

JUDGING SEX

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This Article explores the curious jurisprudence of sexual patterns and how it constructs female sexuality. In modern rape law, the “unchaste character inference” expressly prohibited by the rape shield endures. Though the boundaries that circumscribe appropriate sexual conduct have shifted over time, courts persist in making normative judgments about women’s sexuality. Cloaked in the legitimizing rhetoric of sexual patterns, retrograde notions of deviancy are substituting for rational deliberation on the question of consent. As rape shield law enters its fourth decade, it continues to defy reason, both in application and in theory. The proposed evidentiary approach promises to improve judicial decision making in rape cases, while reorienting the law toward the female sexual subject and the contingency of her consent.

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INTRODUCTION

Over three decades ago, rape law advanced to reflect the general proposition that a woman's past sexual conduct is not evidence that she consented to an alleged rape.¹ In the past, behavior deemed unchaste was thought to suggest a greater likelihood that a rape victim willingly engaged in sex with the defendant.² The enactment of rape shield laws—which generally prohibit the introduction of evidence of a woman's prior sexual history at trial—seemed to represent an emphatic rejection of this logic.³ And yet, the rule of exclusion was never absolute. In consent-defense cases, a little-noticed exception allows a court to admit in evidence a woman's sexual history if it is viewed as “patterned.”⁴ At the time rape shield law was enacted, this exception ensured that the rule of exclusion would only go so far: too much sex, or sex of the wrong kind, lay outside of its scope. Archaic though it may seem, this function endures. The pattern exception permits the otherwise forbidden inference that past consent to intercourse makes consent on a separate occasion more likely. If certain conditions exist, the protection of the rape shield dissipates.

At one time, this exception was a small problem for rape shield law. Cases involving perceived patterns (such as notable sexual histories) were, not coincidentally, cases that prosecutors were unlikely to pursue.⁵ So the exception could rest on the *ipse dixit* logic that “unusual” sexual behaviors were probative, and notions of deviancy silently

¹ See Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 32–39 (1977) (noting the development of varying rape shield laws in different U.S. jurisdictions beginning in the mid-1970s).

² This is commonly referred to as the unchaste character inference. See *infra* note 235 and accompanying text (noting the inference's “invidious” nature).

³ Harriet Galvin has described the impetus for the rape shield law as follows: Pressure for evidentiary reform came from an unusual and uneasy alliance of feminist organizations and law enforcement agencies. These groups persuaded legislators that in-court disclosure of the most intimate details of the rape complainant's personal life acted as a significant deterrent to the reporting and, hence, the prosecution of rape. They further maintained that such “character assassination” in open court, a common defense strategy in forcible rape prosecutions, accounted for the high rate of acquittal in those cases that proceeded to trial. Most important, a growing body of feminist literature questioned the traditional rationale that a woman's unchastity has probative value on the question of whether or not she was raped.

Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 767 (1986) (footnotes omitted).

⁴ See *infra* Part III.

⁵ Dorothy Roberts has cogently observed:

Although rape statutes and cases articulate the tests of force and nonconsent, their meaning has always depended on the identity of the victim and the accused. Courts often appear to be asking the question, “How much force should we allow this type of man to use against this type of woman?” Very little force, if any, was required to convict a Black man of raping a white woman. No amount of force was enough to convict a man of raping his wife or a Black woman or a prostitute.

dictated the judicial categorization of women's sexual conduct. And all of this could go unremarked.

But today, on close examination, the conceptual incoherence of rape shield law has become a more pressing problem. As consciousness about what constitutes rape has evolved, women with eyebrow-raising sexual pasts are still "bad victims,"⁶ but they are also more likely to have their cases reach court.⁷ Their sexual histories now beg the question: rule (exclude) or exception (admit)?

Even more important, the new centrality of consent in rape trials has placed even greater weight on the pattern exception. One can trace this emergence to two striking developments. First, most sexual assaults are committed by a man known to the victim,⁸ and feminist reform efforts have succeeded in bringing about heightened awareness that acquaintance rape is a crime.⁹ Crimes that would not have been pursued or even reported in the past are prosecuted today.¹⁰

Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 363–64 (1993) (footnotes omitted); see also David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1247 (1997) (commenting that contemporary "prosecutors want a witness whom jurors will regard as sexually restrained").

⁶ Consider this prosecutorial perspective on the desirable traits of a rape victim:

A solidly middle-class complainant would not only be more articulate, on average; she might also be more credible to many jurors than a lower-class woman, especially in a consent-defense case. After all, prosecutors want a witness whom jurors will regard as sexually restrained and honest, characteristics that jurors may associate with middle-class status. As an experienced sex-crimes prosecutor puts it:

Good Victims have jobs (like stockbroker or accountant) or impeccable status (like a policeman's wife); are well-educated and articulate, and are, above all, presentable to a jury: attractive—but not too attractive, demure—but not pushovers. They should be upset—but in good taste—not so upset that they become hysterical.

Bryden & Lengnick, *supra* note 5, at 1247 (quoting ALICE VACHSS, *SEX CRIMES* 90 (1993)).

In contrast, a "bad victim" comes to 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) (recounting a conversation with a prosecutor about a particular case). In Susan Estrich's account, this "bad victim" admitted to willingly accompanying her former lover to watch pornographic videos prior to her rape. The rape was not prosecuted.

⁷ But see *infra* note 10 (noting the continuing problem of underenforcement).

⁸ Nearly one in every five women in the United States is raped in her lifetime. MICHELE C. BLACK ET AL., *CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT* 18 (2011). Of the women victimized by rape, half are raped by an intimate partner and forty percent by an acquaintance. *Id.* at 21.

⁹ See Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 626–28 (2005) (arguing that rape law has fundamentally misconceived the crime by employing a dual requirement of assault and rape, which does not capture the typical "all-American rape" that an acquaintance commits).

¹⁰ This is true despite continuing problems of underenforcement. See Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 929 (2001) (asserting that "[b]y unbounding and downgrading crimes involving violence against women, police departments neglect to investigate hundreds, perhaps thousands, of legitimate rape complaints every year"); Bryden

Unsurprisingly, in an allegation of rape involving acquaintances, consent is almost invariably the defense.

Second, as a practical matter, DNA technology necessitates a consent defense in many cases involving strangers. Before the advent of DNA typing, these defendants would most often claim misidentification.¹¹ Now, it is far more difficult to do so. Thus, at least where DNA evidence is available, consent typically becomes the disputed issue. The surfacing of consent as the pivot point for modern rape prosecution has placed tremendous pressure on already existing doctrinal fault lines.

During these same decades, women's sexuality and our sense of its dimensions have continued to evolve. For instance, according to the 2010 National Survey of Sexual Health and Behavior, one of the largest representative studies of human sexuality ever conducted, at least forty percent of women between the ages of twenty and forty-nine have engaged in anal sex, and most women between eighteen

& Lengnick, *supra* note 5, at 1216 (citing studies confirming disparity in prosecutorial treatment of stranger and acquaintance-rape cases); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 *JUR. Q.* 651, 682 (2001) (finding empirical evidence that in cases involving acquaintances, relatives, or intimate partners "prosecutors' anticipation of a consent defense and their downstream orientation toward judges and juries apparently lead them to scrutinize the victim's character and behavior more carefully"); see also Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 *CHI.-KENT L. REV.* 951, 953-70 (2000) (critiquing the lingering existence of both the resistance requirement and marital-rape exemptions).

¹¹ The Federal Rules of Evidence expressly account for this misidentification defense, along with a few delineated others and a constitutional "catchall." In relevant part, Federal Rule of Evidence 412 reads as follows:

- (a) Evidence Generally Inadmissible.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
 - (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
 - (2) Evidence offered to prove any alleged victim's sexual predisposition.
- (b) Exceptions.
 - (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
 - (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
 - (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
 - (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

FED. R. EVID. 412. For a comparison of the federal rape shield to various state-law counterparts, see Galvin, *supra* note 3, at 812-902.

and forty-nine have engaged in oral sex in the past year.¹² Even compared to research from the early 1990s,¹³ these proportions have increased—and in the case of anal sex, increased significantly.¹⁴ Girls frequently become sexually active as adolescents: in one study, nearly thirty percent of sixteen-year-old girls reported giving oral sex and over thirty percent of sixteen-year-old girls reported having vaginal intercourse.¹⁵

Though remarkably incomplete,¹⁶ current empirical evidence depicts a broad range of female sexual practices¹⁷ that is incompatible

¹² See Debby Herbenick et al., *Sexual Behavior in the United States: Results from a National Probability Sample of Men and Women Ages 14–94*, 7 J. SEXUAL MED., Oct. 2010, at 255, 257, 259 (studying a nationally-representative probability sample of 2,936 men and 2,929 women). The practice of oral sex may itself be gendered, as evidenced by the centrality of fellatio to “hook up culture.” See Paula England et al., *Hooking Up and Forming Romantic Relationships on Today’s College Campuses*, in THE GENDERED SOCIETY READER 531, 536, 538 & fig.3 (Michael S. Kimmel & Amy Aronson eds., 3d ed. 2008) (“[W]hen oral sex is not reciprocal, men are on the receiving end three times as often as women. Even when men do give women oral sex, they are either unable to or do not make it a priority to bring the woman to orgasm.”).

¹³ Albert Kinsey’s published 1953 research was the “first large-scale systematic study of female sexual behavior in the United States—and the most comprehensive—although the sample was admittedly limited.” Debby Herbenick et al., *Sexual Behaviors, Relationships, and Perceived Health Status Among Adult Women in the United States: Results from a National Probability Sample*, 7 J. SEXUAL MED., Oct. 2010, at 277, 277–78. Studies of women’s sexuality have not kept pace given widespread “sociocultural changes . . . highly relevant to sexual behavior” that have taken place since Kinsey’s research. *Id.* at 278.

¹⁴ Herbenick et al., *supra* note 12, at 261.

¹⁵ 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., Oct. 2010, at 305, 309–10 tbl.2.

¹⁶ While the latest research is helpful, what we know about our collective sexual practices is dwarfed by what we do not. As former Surgeon General Joycelyn Elders has noted, “[w]e have a sexually dysfunctional society because of our limited views of sexuality and our lack of knowledge and understanding concerning the complexities and joys of humanity.” M. Joycelyn Elders, *Sex for Health and Pleasure Throughout a Lifetime*, 7 J. SEXUAL MED., Oct. 2010, at 248, 248.

¹⁷ Without belaboring the point, recent research also found that, among women between the ages of 25 and 44, 98% had engaged in vaginal intercourse, 88% in oral sex, and 35% in anal sex. WILLIAM D. MOSHER ET AL., CTNS. FOR DISEASE CONTROL & PREVENTION, SEXUAL BEHAVIOR AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15–44 YEARS OF AGE, UNITED STATES, 2002, at 51 tbl.III (2005), available at <http://www.cdc.gov/nchs/data/ad/ad362.pdf>. Among women between the ages of 25 and 44, about one in five had seven to fourteen sexual partners. *Id.* at 29 tbl.11. Among female teenagers between the ages of 15 and 19 years, over half had engaged in vaginal intercourse, over half in oral sex, and about ten percent in anal sex. *Id.* at 51 tbl.III; see sources cited *supra* note 12 (citing research suggesting that the practice of oral sex is gendered).

with traditional understandings¹⁸ common when rape shield laws were adopted and in the early stages of implementation.¹⁹

In the intervening years, one might have expected a repudiation of the notion that a woman's prior sexual conduct can forecast her sexual consent on a different occasion, or at the very least a critical and sustained look at the conceptual foundations of this premise. Neither occurred. Instead, sexual patterns—the term that I will use to encompass evidence that is variously treated as sexual habit, sexual propensity, sexual *modus operandi*, common sexual scheme or plan, sexual proclivity, and other similar notions of judicial creation²⁰—have become entrenched in our law, while serving as a vehicle for importing particular views of women and sex.

This Article explores the curious jurisprudence of sexual patterns and how it constructs female sexuality. Attending to juridical reasoning about sex reveals that notions of deviancy are substituting for rational deliberation on the question of consent. This critique also shows how an evidentiary exception that allows a victim's history to prove that she consented to the alleged rape is conceptually at odds with the rape shield prohibition and its theoretical grounding.²¹ While there may be reasons to allow defendants to introduce this type of evidence, these circumstances have not been properly defined by the extant rape shield law.

Part II describes the evidentiary backdrop against which the sexual pattern exception operates. After demonstrating the inapplicability of traditional rationales for prior-acts evidence, this discussion suggests that judicial ideas about female sexual deviancy are animat-

18 “Under the double standard [of sexuality morality], men were expected to be sexually active before marriage and on occasion to engage in casual extra-marital sex. Women were ordinarily denied such freedom and were subjected to harsh social penalties if they exerted sexual independence.” Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 788–89 (1988).

19 Alongside these developments, the notion that female sexual pleasure is properly the concern of legal theorists has taken hold. See *infra* note 240 and accompanying text (noting the rise of prosex feminism).

20 I further elaborate on these concepts below and explain why they are highly suspect. I omit the quotation marks around the terms, including sexual patterns, only for the sake of readability.

21 Rape shield law's origins reflect the sense that judges and juries overestimated the probative value of a woman's sexual history, as well as concerns for the collateral consequences of its admission into evidence. See Berger, *supra* note 1, at 100 (arguing that altering the treatment of sexual history evidence will help grow “societal respect for women in a setting where deep and primitive emotions have often beclouded rational analysis”); Galvin, *supra* note 3, at 795–96 (noting that when states began implementing rape shield laws, rape was the most underreported serious crime and jurors often misused evidence of victims' past sexual conduct). This Article focuses on the basic evidentiary grounding of rape shield law, as opposed to related policy reasons for its rule of exclusion. In other words, the critique proceeds from principles of relevance and probative value—principles that are integral to our fact-finding process. See *infra* note 35 (citing FED. R. EVID. 401 & 403).

ing the admissibility of sexual patterns. This Part also situates the case law in both a historical and contemporary context in order to observe ways in which the discourse has changed and how its basic structure remains static.

Part III focuses on the modern implementation of the sexual patterns exception. This inquiry reveals that the exception is dependent on a deeply embedded proposition—namely, that boundaries can be located around normal female sexuality.²² If this is not a valid premise, the sexual pattern exception cannot be squared with the rape shield, and judicial inquiry cannot but fail in its quest to divine circumstances under which sexual consent on one occasion is probative of consent on another.

We see these problems in *Gagne v. Booker*, which was recently decided by the Sixth Circuit en banc.²³ *Gagne* illustrates the tensions inherent in judicial efforts to identify sexual patterns in service of ascribing evidentiary significance to them.²⁴ We observe these same tensions when the strange doctrine of sexual patterns is juxtaposed against other areas of rape law.²⁵ In these areas, unlike when patterns are perceived, a woman's choice of sexual partner is afforded duly privileged status. All of this suggests the need to attend to how judges draw lines around female sexuality.

Part IV delves into the reasoning—or failure to reason—that characterizes the jurisprudence of sexual patterns. It focuses on the categories of female sexual behavior that prove especially troubling for judges. This analysis uncovers sexual patterns as artifacts of the traditional view of unchaste women as perpetually consenting. On this deconstructed account, patterned behavior is none other than disapproved sex.

Part V asks whether the sexual pattern exception could be rationalized if unmoored from its moral underpinnings. It offers a taxonomy of sexual variability to suggest why a contingent understanding of consent (i.e., that whether to consent is newly decided on each occasion) is epistemologically sound. Admitting a woman's history to show her willingness to consent to the alleged rape is inconsistent with this understanding; the exception must therefore be abandoned.

As an alternative to the framework now in place, this Part proposes an instrumental approach to the admissibility determination—one that is consistent with both a defendant's constitutional right to a fair trial and a woman's right to sexual autonomy. Regardless of nor-

²² See *infra* note 47 (explaining concept) and note 237 (discussing generally the legal construction of normative sexuality).

²³ 680 F.3d 493 (6th Cir. 2012).

²⁴ See *id.* at 517.

²⁵ See *infra* notes 122–37 and accompanying text.

mative assessments of its worth, sexual history is not probative of consent.²⁶ As the rape shield enters its fourth decade, a reworking is in order.

I

SEXUAL MODUS OPERANDI?

In a rape prosecution in which the disputed issue is consent, when, if ever, is the victim's²⁷ past sexual behavior admissible evidence? If she and the defendant met for the first time at a bar, is it helpful to know that the victim previously met other men at a bar and engaged in consensual intercourse? Does it matter if the bar in question was always the same? Does the answer change if the victim selected as former sexual partners men of a certain background or appearance (shared by the defendant)? What if the men had in common a particular occupation—say, investment banking—or a vocation, such as professional football?²⁸ Or if the woman's sexual partners were consistently members of the same college fraternity as that of the defendant? What if the victim had engaged in past consensual acts of anal intercourse or group sex? Is any of this evidence probative of her willingness to consent to arguably similar conduct with the defendant—conduct that is allegedly rape?

Rape shield rules generally preclude the admission of a victim's past sexual history²⁹ unless the evidence satisfies an exception, which may be either legislatively defined or rooted in a defendant's constitu-

²⁶ I use the term "probative" to refer to a connection between the proffered evidence (here, past sexual conduct) and the fact on which it purportedly bears (consent on the occasion in question) that is appreciably closer than what a mere relevance requirement would necessarily require. Throughout the discussion of sexual history evidence, my focus will remain on its probative value or worth, as opposed to whether it tends to satisfy the minimal relevancy standard. See *infra* note 35.

²⁷ With rare exception, the cases I will discuss involve a finding of guilt at trial. I will therefore tend to refer to the complainant as a victim, rather than an alleged victim.

²⁸ See *infra* note 45 and accompanying text (citing *Hardy v. State*, 285 S.E.2d 547, 549 (Ga. Ct. App. 1981) on victim's "predilection for football players").

²⁹ Unless otherwise noted, my reference to sexual history throughout this Article encompasses sexual activities that occurred prior to trial (and almost always prior to the incident in question) with someone other than the defendant. The discussion is limited to the admissibility of this type of evidence to show that the victim consented (as opposed to supporting a defendant's reasonable mistake as to consent), which is consistent with its most common evidentiary purpose. To be clear, my critique does not encompass cases in which a victim's prior sexual conduct is admitted to show that the defendant was not a source of semen or injury. See FED. R. EVID. 412(b)(1)(A). Nor do I consider situations in which this type of evidence is admitted to show a motive to falsely allege rape. See, e.g., *Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (per curiam) (requiring introduction of evidence that the plaintiff had a motive to lie and falsely allege rape to protect her relationship).

tional right to present a meaningful defense.³⁰ One of these exceptions I will group under the rubric of sexual pattern evidence.³¹

Jurisdiction dictates whether the specific-legislative exception,³² the judicially created exception,³³ or purportedly fact-bound constitutional analysis governs the admissibility of sexual pattern evidence.³⁴ Yet regardless of the specific mechanism for determining admissibility, courts discuss the worth³⁵ of this type of evidence in remarkably similar fashion. When reviewing a trial judge's evidentiary ruling,³⁶ appellate courts tend to evaluate the probative value of past sexual conduct by reference to whether it is sufficiently patterned to mark it as distinctive.

The evidentiary exception for past sexual conduct said to constitute a pattern can be best understood against the backdrop of inferen-

³⁰ These cases are grounded in the rights of due process, confrontation, and compulsory process—collectively, the right to present a meaningful defense. See *Holmes v. South Carolina*, 547 U.S. 319, 321 (2006) (“This case presents the question whether a criminal defendant’s federal constitutional rights are violated by an evidence rule”); *Crane v. Kentucky*, 476 U.S. 683, 684 (1986) (“The question presented is whether this ruling deprived petitioner of his rights under the Sixth and Fourteenth Amendments to the Federal Constitution.”); *Chambers v. Mississippi*, 410 U.S. 284, 298–303 (1973) (discussing generally whether the petitioner had a fair trial under the Due Process Clause of the Fourteenth Amendment); see also *Berger*, *supra* note 1, at 52–55 (examining the effect on accused’s constitutional rights of the new evidence laws); Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1247–50 (1989) (discussing the differences in rape shield laws).

³¹ See *infra* notes 55–68 and accompanying text.

³² See FLA. STAT. ANN. § 794.022 (West 2007); MINN. STAT. ANN. § 609.347 (West 2004); NEB. REV. STAT. ANN. § 28-321 (LexisNexis 2009); N.C. GEN. STAT. ANN. § 8C-1, R. 412 (West 2011) (discussing relevance of sexual activity); TENN. R. EVID. 412.

³³ See, e.g., *United States v. Kelly*, 33 M.J. 878, 882 (A.C.M.R. 1991); *State v. Gonzalez*, 757 P.2d 925, 931–32 (Wash. 1988); *Hardy*, 285 S.E.2d at 549–51 (cited in Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 98 n.247 (2002)).

³⁴ See *supra* note 30 and accompanying text (describing the constitutional rights at issue and leading cases interpreting them).

³⁵ See FED. R. EVID. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”); FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

³⁶ It is worth noting that the case law presents a rather lopsided view of rape shield (as with most evidentiary) determinations. Written appellate opinions, with only rare exception, treat a convicted defendant’s claims of error. Since trial-court rulings allowing the cross examination of a rape victim with prior sexual history evidence are not generally the subject of appeal, a survey of appellate opinions does not fully capture rape shield law in application. See *Anderson*, *supra* note 33, at 95 (discussing the “limited slice of cases [that] forms the basis for a jurisdiction’s jurisprudence on rape shield laws”). Although appellate opinions addressing sexual history evidence are thus a nonrepresentative sample of trial-court rulings (i.e., in tending to underrepresent decisions to admit such evidence), they are still instructive.

tial reasoning that rape shield laws prohibit. The general rule of exclusion embodied by these rules responds to (and rejects) a long sociolegal history of acceptance of the following two propositions: (1) women who are sexually “promiscuous” are generally more likely to consent to sex on any given occasion,³⁷ and (2) women who are sexually “promiscuous” are generally immoral, making it more likely that they will testify untruthfully on the subject of nonconsent (and others).³⁸

After the enactment of rape shield rules, these rationales were formally off limits as bases for admissibility. In their place, of necessity, emerged a new explanation for the probative value of sexual history evidence. Here is the description one state court offered in an early effort to construe its rape shield law:

Factual similarities between prior consensual sex acts and the questioned sex acts claimed by the defendant to be consensual would cause the evidence to meet the minimal relevancy test of [the applicable evidentiary rule]. For instance, if a complaining witness frequently engages in sexual intercourse with men shortly after meeting them in bars, this would have some relevancy if the defendant claims she consented to sexual intercourse with him under similar circumstances. Such a particularized factual showing would demonstrate enough similarity between the past consensual activity and defendant’s claim of consent that it would have the necessary predictive value required by [the applicable evidentiary rule].³⁹

Based on the facts presented, the state supreme court concluded that evidence of prior sexual conduct on the part of the two victims (raped at the same time by the defendants) was properly excluded because it was insufficiently similar to the incident alleged.⁴⁰

But the state supreme court hinted at the level of “similarity” that would lend sufficient probative value to prior history evidence.⁴¹ It suggested:

[N]o testimony was offered showing that the two women had ever engaged in sex with men other than sailors whom they knew or that they had sexual relations with men who had picked them up hitchhiking. Such evidence would have had greater value in aiding the jury to predict whether consent was given in this case [which presented similar facts].⁴²

³⁷ See Abraham P. Ordovery, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 98 (1977).

³⁸ See Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1886–93 (2008).

³⁹ State v. Hudlow, 659 P.2d 514, 520 (Wash. 1983) (en banc).

⁴⁰ *Id.* at 523.

⁴¹ See *id.* at 520.

⁴² *Id.*

Similar judicial expressions of this admissibility rationale and examples of its uneven application abound in early rape shield cases.⁴³ Whether conceptualized as habit,⁴⁴ predilection,⁴⁵ or disposition⁴⁶ to engage in specific sex acts, courts analyzed the admissibility of history evidence by reference to an unmentioned baseline of normative female sexuality.⁴⁷ Most often, by focusing on the frequency of past incidents and whether they were sufficient in number to constitute a pattern, courts proceeded as if sexual behavior could be conceived as the victim's *modus operandi*.⁴⁸

At times, this reasoning was made explicit. For instance, one North Carolina appeals court held that it was reversible error to exclude testimony that “although circumstantial,” suggested “that the prosecuting witness was the initiator, the aggressor, in her sexual encounters.”⁴⁹ The court elaborated as follows:

The evidence excluded suggests that the prosecuting witness's *modus operandi* was to accost men at clubs, parties (public places) and make sexual advances by putting her hands “all over their bodies.” Defendants contend that the prosecuting witness's sexual behavior on [the date in question]—fondling their genitals, trying to get them to engage in an orgy, and telling them where and when to

⁴³ See, e.g., *United States v. Kasto*, 584 F.2d 268, 270 (8th Cir. 1978); *Kaplan v. State*, 451 So. 2d 1386, 1387–88 (Fla. Dist. Ct. App. 1984); *Johnson v. State*, 299 S.E.2d 416, 417 (Ga. Ct. App. 1983); *State v. Vaughn*, 448 So. 2d 1260, 1262 (La. 1983); *People v. Paquette*, 319 N.W.2d 390, 391–92 (Mich. Ct. App. 1982); *State v. Booker*, 348 N.W.2d 753, 754–55 (Minn. 1984); *State v. Hill*, 244 N.W.2d 728 (Minn. 1976); *State v. Mason*, 271 N.W.2d 470, 471–72 (Neb. 1978); *State v. Wilhite*, 294 S.E.2d 396, 399–400 (N.C. Ct. App. 1982); *State v. Wilmoth*, 644 P.2d 1211, 1212 (Wash. Ct. App. 1982).

⁴⁴ See, e.g., *State v. Parker*, 333 S.E.2d 515, 517 (N.C. Ct. App. 1985) (“[N]othing in the record indicates that the prosecutrix was in the habit of drinking with men at Sh-booms and then returning with them to the law office for sex.”).

⁴⁵ See, e.g., *Hardy v. State*, 285 S.E.2d 547, 549 (Ga. Ct. App. 1981) (admitting testimony “that the prosecutrix was known to be sexually active with a predilection for football players”).

⁴⁶ See, e.g., *Kaplan v. State*, 451 So. 2d 1386, 1391 (Fla. Dist. Ct. App. 1984) (Walden, J., dissenting) (evidence “tends to show that the victim was disposed to have consensual sex with others while at odds with her boyfriend” (emphasis omitted)).

⁴⁷ Normative female sexuality encompasses sexual practices considered acceptable for women. See *infra* notes 160–69 and accompanying text (identifying as outside the bounds of normative female sexuality the following: prostitution, group sex, sadomasochism, sex outside of monogamy, sex with perceived frequency, sex on the part of teenagers, and sex deemed woman-initiated).

⁴⁸ See *supra* notes 49–52 and accompanying text.

⁴⁹ *State v. Shoffner*, 302 S.E.2d 830, 832–33 (N.C. Ct. App. 1983). North Carolina's rape shield statute allows the admission of “evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented.” N.C. GEN. STAT. ANN. § 8C-1, R. 412(b)(3) (West 2011).

stop the car—was no different from the prosecuting witness’s pattern of sexual behavior.⁵⁰

Conceding that the prior “pattern of sexual behavior” was factually distinct from the defendants’ version of events,⁵¹ the court nevertheless concluded that the victim’s *modus operandi* had been satisfactorily established and, accordingly, showed consent on the occasion in question.⁵²

One rationale for rulings of this kind is that sexual consent can “los[e] its unique . . . nontransferable character” under certain conditions.⁵³ Of course, it is hardly self-evident that consent should lose its unique, nontransferable character. Instead, as a normative matter, we might view consent as properly subject to perpetual renewal or revocation, depending on circumstance.⁵⁴

Placing this normative proposition to the side, I focus here on the descriptive premise embedded in a *modus operandi* framework, which I take to encompass the distinct but related concepts of habit, predilection, and disposition. Apart from whether it should, *can* sexual behavior be “patterned” in a manner that meaningfully bears on the likelihood of future consent?⁵⁵

⁵⁰ *Shoffner*, 302 S.E.2d at 833.

⁵¹ *Id.* (“We do not believe the Rape Victim Shield Statute requires the prior sexual behavior of a complainant to parallel on all fours a defendant’s version of the prosecuting witness’s sexual behavior at the time in question.”).

⁵² *Id.* at 832–33.

⁵³ Berger, *supra* note 1, at 60 (quoting Note, *Indiana’s Rape Shield Law: Conflict with the Confrontation Clause?*, 9 IND. L. REV. 418, 430 (1976)). Vivian Berger more fully advanced the argument in her influential article on rape shield laws. Berger wrote of the probative value of evidence that a victim “habitually goes to bars on Saturday nights, picks up strangers and takes them home to bed with her.” *Id.* at 59. She posited:

In these situations, where proof of prior sexual conduct pertains narrowly to acts evincing a *pattern* of voluntary encounters characterized by distinctive facts similar to the current charges, one cannot cavalierly assume that a woman’s behavior on one occasion has no relationship at all to her conduct and state of mind on another. On the contrary, her actions tend to “prove that consent to intercourse for her has lost its unique . . . nontransferable character” when these particular conditions obtain. Naturally it would be hard to define exactly what constitutes such a pattern. In determining relevance, “the logical powers employed must be those of *everyday life*, not those of the trained logician or scientist.” The courts have, however, succeeded in administering a somewhat analogous exception to the rule excluding proof of the defendant’s prior crimes. This loophole allows for the use of such acts where the *modus operandi* is quite unique . . .

Id. at 60 (footnotes omitted).

⁵⁴ Anderson, *supra* note 33, at 101. Michelle Anderson has argued that sexual consent “must be uniquely obtained by each individual,” and that to do otherwise “gives insufficient weight to a woman’s sexual autonomy.” *Id.* at 100.

⁵⁵ This Article treats the admissibility of a victim’s past consensual sexual behavior. It does not address evidentiary issues raised by a defendant’s past sexual misconduct, which raises separate issues. Cf. Myrna Raeder, *Excluding Sexual Pattern Evidence of Rape Complainants When the Defense Is Consent*, JOTWELL (Nov. 28, 2011), <http://crim.jotwell.com/2011/11/> (“[S]ome judges who are in jurisdictions where evidence of the defendant’s prior sex-

Because courts consistently neglect to articulate the inferential reasoning underlying the admission of a victim's past sexual behavior, any rational basis for concluding that patterned conduct increases the likelihood of her consent to the alleged rape must be inferred. We can consider a number of evidentiary precedents that might support this foundation.

First is the notion endorsed by some courts that sexual patterns are akin to habits.⁵⁶ To avoid the character inference prohibited by rape shield laws—that “promiscuous” women are more likely to consent to any given sexual act—one might surmise from the exception that women can become so accustomed to engaging in particular behaviors that they begin to do so reflexively, in a virtually automatic manner. Just as one signals before changing lanes or brushes one's teeth upon waking (classic examples of habit evidence), a woman might repeatedly meet different men in the same bar, agree to accompany them home, and there consent to intercourse—all the while engaging in nonpurposive conduct.

But sexual consent is not like descending a particular stairway two steps at a time.⁵⁷ There are a number of reasons why, but for present purposes,⁵⁸ it can be simply noted that consent has a distinctly volitional character, which undermines its invariability and thus its probative value.⁵⁹ On closer inspection, the suggestion that sexual conduct can be indiscriminate to the point where it equates with the habitual is implausible.

Second is the hypothesis that one's sexual choices might be sufficiently peculiar as to remove them altogether from the realm of normal sexual activity. The argument here is not that sexual patterns are sexual habits, but that they are not truly sexual at all—at least in relation to sex that is considered ordinary, conventional, or regular. If sexual conduct is abnormal in the extreme, it may be thought to arise from a deep-seated malfunction, such as a compulsion.⁶⁰

ual acts are widely admitted are more willing to admit pattern evidence of complainants. In other words, they consider it unfair that the complainant and the defendant are treated so differently, although the rationales for rape shields and bad act evidence are completely dissimilar.”).

⁵⁶ See *State v. Parker*, 333 S.E.2d 515, 517 (N.C. Ct. App. 1985).

⁵⁷ See KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 195, at 322 (6th ed. 2006) (citing descending a stairway two steps at a time as a type of habitual behavior).

⁵⁸ For more thorough discussion, see *infra* Part IV.A.

⁵⁹ As the Advisory Committee's Note to FED. R. EVID. 406 (“Habit; Routine Practice”) observes, “the very volitional basis of [an] activity raises serious questions as to its invariable nature, and hence its probative value.” FED. R. EVID. 406 advisory committee's note (quoting *Levin v. United States*, 338 F.2d 265, 272 (1964)).

⁶⁰ See *infra* note 193 (discussing recent empirical work disentangling sexual wanting from sexual consent).

The closest evidentiary analogues (and those expressly advanced by courts⁶¹) are to “common plan”⁶² or *modus operandi*, which allow courts to admit a defendant’s prior bad acts notwithstanding the rule prohibiting the introduction of character evidence.⁶³ Generally, with respect to *modus operandi*, such evidence is thought to bear on the question of identity⁶⁴ if it is sufficiently distinct or peculiar as to constitute a veritable “signature.”⁶⁵ If a defendant committed a bizarre act in the past—such as setting fire to a playground structure by igniting nail polish remover—it is more likely that he is the person who set fire to a playground structure with nail polish remover on this occasion. With respect to criminal behavior, this inference may well be warranted.⁶⁶ But in the domain of sexuality, it seems unlikely. Here, the identity of the victim is not at issue (much less the identity of the defendant), and consensual sex is not antisocial behavior.⁶⁷

Since analogy to familiar evidential reasoning fails, we are back where we started. At times, a sexual act is deemed patterned and thus qualitatively different from the conduct to which rape shield rules squarely address themselves. This classification cannot be understood by reference to traditional evidence rules. Instead, as I argue in the next Part, deviancy is quietly functioning as a justification for diminished legal protection of unapproved sexual behaviors.⁶⁸

Before turning to the modern treatment of sexual patterns, it is worth considering the construct of sexual deviancy that courts employ. In particular, we might wonder if this construct derives from

⁶¹ See cases cited *supra* notes 44–46; see also *State v. Crims*, 540 N.W.2d 860, 867–69 (Minn. Ct. App. 1995) (viewing the determination of admissibility of a victim’s sexual history as a balance between probative value and prejudicial value).

⁶² BROWN ET AL., *supra* note 57, § 190, at 315. To qualify for admission as such, each act “should be an integral part of an overarching plan explicitly conceived and executed by the defendant.” *Id.*

⁶³ See FED. R. EVID. 404(a) (“Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .”).

⁶⁴ See FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .”).

⁶⁵ Evidence may be admitted “[t]o prove other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.” BROWN ET AL., *supra* note 57, § 190, at 315.

⁶⁶ *But see* Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 781–94 (1981) (arguing that inferences based on a criminal defendant’s past criminal acts serve “no useful purpose”).

⁶⁷ This assertion is not inconsistent with the notion that consensual sex can be unwanted by, and thereby harmful to, women. See Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 233–40 (Franklin G. Miller & Alan Wertheimer eds., 2010).

⁶⁸ See *infra* Part II.A.

statistical probabilities or from moral judgment. If the concern is how, as a general proposition, women do or do not behave sexually (statistical deviancy), we would want to know how judges are defining a sexual activity as unusual enough to give rise to patterned consent. The first, rather obvious point is that the relevant data is unknown and judges' personal experience hardly allows for fair extrapolation.⁶⁹ But a second, more subtle and fundamental hitch lies in the assumptions underlying the suggestion that statistical deviancy is probative of patterned consent.⁷⁰ If, as I will show, these assumptions are themselves unwarranted,⁷¹ faulty estimations of the statistical odds are only a secondary pitfall.⁷²

Thus, even if judges could avoid proceeding from idealized female sexuality,⁷³ the available heuristic is hardly of value: guesswork about how female subjects behave in the world. Whether perceptions of moral or statistical deviancy frame judicial decision making, the outcome is much the same. Both processes are irrational; regardless, each tends to result in a similar conclusion and female sexuality is constructed by normative assessments (rather than described).⁷⁴

⁶⁹ See RICHARD A. POSNER, *SEX AND REASON* 1 (1992) (“[J]udges know next to nothing about the subject [of sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary . . .”). Of course, the problem of extrapolation from one’s own sexual experiences is not limited to the judiciary.

⁷⁰ See *infra* notes 192–95 and accompanying text.

⁷¹ See *infra* notes 224–25 and accompanying text (discussing the contingency of consent).

⁷² As a practical matter, the distinction between statistical and moral deviancy may be a false one. In some cases, judges may think they are answering the question of how women generally do or do not behave. But, even so, judicial impressions of how women *ought* to behave sexually (moral deviancy) cannot help but frame the inquiry. Indeed, in many cases, judges come surprisingly close to acknowledging that their ideas about sexual patterns are steeped in morality. For just one recent example, see *Gagne v. Booker*, 606 F.3d 278, 292 (6th Cir. 2010) (Kethledge, J., concurring) (admitting to “not hold[ing] a torch for anyone involved in the underlying events of [the] case”), *rev’d en banc*, *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012). See also *infra* notes 176–78 and accompanying text (characterizing victim’s prior consensual sex as “misconduct”).

⁷³ See *infra* notes 159–69 and accompanying text.

⁷⁴ Legally constructed sexuality has far reaching implications outside the law. This proposition finds support in the academic commentary on social norms. See generally Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 394–95 (1997) (discussing the role of social influence on individuals’ decisions to commit crimes); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1019–25 (1995) (analyzing the role of social meaning in the regulation of dangerous sex); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 427–32 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2033–36, 2050–53 (1996) (describing how laws may be designed to change existing social norms and create new ones). I do not develop the point here, but simply note that this influential body of literature provides theoretical foundations for an assumption that runs throughout these pages—namely, that women’s sexual desires and behaviors, as well as their social meanings, are impacted by the law’s normative expressions. Put simply, the legal construction of female sexuality matters. See Laura A. Rosenbury & Jennifer E. Roth-

In short, intuitions regarding the appropriate bounds of female sexuality influence, and perhaps even dictate, judgments about deviance.⁷⁵ Though these boundaries have shifted considerably since pre-rape shield days,⁷⁶ their very persistence reflects and operationalizes a patriarchal conception of women as decidedly limited sexual agents.⁷⁷ This conception maintains its hold on judicial imaginations⁷⁸ just as it reinscribes control over women's sexuality.⁷⁹

II

SEXUAL PATTERNS IN LIFE AND LAW

We now examine the modern day sexual pattern exception, which reflects and reifies particular understandings of sexual norms and women's departures from them. Critical to this law's functioning is an invisible baseline against which women's sexual conduct is

man, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 813–14 (2010) (challenging the existing legal discourse on the proper arrangement of sexual interactions and relationships).

⁷⁵ A vast literature on social cognition documents distortions in human reasoning processes, including those of judges. See, e.g., Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1378 (2010) (discussing how situational frames prejudice parties who appear before courts); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1253 (2004) (describing the role of schemas in shaping the views of individuals who participate in the legal system); Jon Hanson & David Yosifson, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 51–52 (2004) (explaining the benefits and drawbacks of knowledge structures in helping individuals understand the world around them); Jerry Kang & Kristin Lane, *A Future History of Implicit Social Cognition and the Law* 3–14 (UCLA Sch. of Law, Research Paper No. 09-26, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458678 (summarizing the empirical science underlying social cognition in the legal context); see also Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6, 43 (2007) (proposing an “intuitive-override” model of judicial decision making, which posits that judges usually make intuitive decisions but sometimes override their intuitions with deliberation). Although my orientation here is somewhat more structural, insofar as it emphasizes the effects of patriarchal norms when locating the sources of flawed reasoning processes, it is also consistent with many of the insights of social cognition theory.

⁷⁶ For a helpful historical overview, see Chamallas, *supra* note 18, at 784–90.

⁷⁷ See *id.* at 788–89 (discussing the traditional double standard of sexual morality, which subjected women to “harsh social penalties if they exerted sexual independence”); Mary Joe Frug, Commentary, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1048–66 (1992) (identifying terrorization, maternalization, and sexualization as legal mechanisms for constraining female sexual pleasure); *infra* note 237 and accompanying text.

⁷⁸ See Phoebe C. Ellsworth, *Legal Reasoning*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 685, 690 (Keith J. Holyoak & Robert G. Morrison eds., 2005) (legal realism observes that “the law reflects historical, social, cultural, political, economic, and psychological forces, and the behavior of individual legal decision makers is a product of these forces”).

⁷⁹ As Sylvia Law has noted, “[g]endered assumptions about sexuality have long denied women sexual gratification.” Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 210 (1988). Moreover, “[c]oncepts of sexuality are an important element of the general gender script that destines men for ‘serious’ work in the world and women for essential, but unvalued, lives caring for others.” *Id.*; see *supra* note 77.

judged. Regardless of where this boundary is located (and, as we will see momentarily, this varies), it defines what I will call a presumption of unrapeability⁸⁰: certain sexual histories give rise to an inference that the victim consented on the occasion in question, markedly diminishing the odds of a successful rape prosecution.

In parallel fashion, this concealed baseline establishes categories of sexual conduct in which women may appropriately engage. Given its meaning, then, we should carefully attend to how judges discern where to fix this line. Before returning to this question,⁸¹ I provide a comprehensive view of the applied pattern exception, and its contradictions.

A. Deviancy and the Undoing of the Rape Shield

We first consider the case of *Gagne v. Booker*, just decided by the Sixth Circuit rehearing en banc.⁸² Two defendants were charged with rape, and claimed that the victim consented to the intercourse.⁸³ At trial, the state court excluded evidence that the woman had previously engaged in joint consensual intercourse with one of the defendants—whom she was dating at the time, though no longer when the alleged rape occurred—and another man.⁸⁴

The state appellate court affirmed the exclusion of this evidence, reasoning as follows:

[T]he complainant's willing participation in a threesome with Gagne and [a non-defendant] Bermudez is not probative of whether she consented to a threesome with Gagne and Swathwood [the codefendant] on the night of the alleged offense. Notably, the

⁸⁰ The notion of unrapeability has been employed to describe the aggregate effects of pervasive biases in law and society. For instance, black women, married women, prostitutes, and gay men have been, and to varying extents continue to be, unrapeable. See, e.g., CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 229 (2000); Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1367–68 (2010).

⁸¹ See *infra* Part III.B.

⁸² *Gagne v. Booker*, 606 F.3d 278 (6th Cir. 2010), *rev'd en banc*, *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012).

⁸³ See *id.* at 496–97.

⁸⁴ *People v. Swathwood*, Nos. 235540, 235541, 2003 WL 1880143, at *2 (Mich. Ct. App. Apr. 15, 2003). Michigan's rape shield statute reads in part:

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

threesome involving Bermudez occurred while the complainant and Gagne were still dating. The instant offense occurred after they had ended their relationship, and it involved Swathwood, not Bermudez. In light of the lack of similarity between the Bermudez threesome and the instant offense, we conclude that the trial court did not abuse its discretion in excluding the evidence.⁸⁵

Before rehearing, the Sixth Circuit panel felt this conclusion was not only error; it also reflected an unreasonable application of federal law. Notwithstanding the highly deferential standard of habeas review required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),⁸⁶ the panel majority found that the trial court's exclusion of prior sexual history evidence deprived the defendant of a meaningful opportunity to present a defense.⁸⁷ In short, Gagne was constitutionally entitled to have evidence of the victim's previous consensual threesome admitted.

The court based this conclusion on an unsupported assertion that echoes throughout the case law: "[T]he excluded evidence was not just *relevant* to this case, it was in all likelihood the most relevant evidence regarding the sole contested issue at trial—an issue about which there was not much evidence in the first place.[⁸⁸] We believe

⁸⁵ *Swathwood*, 2003 WL 1880143, at *2.

⁸⁶ Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.). Under the AEDPA, the phrase "unreasonable application" of Supreme Court precedent means that the state court "identifie[d] the correct governing legal principle from [Supreme Court] decisions but unreasonably applie[d] that principle to the facts" of the case. *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Even "a firm conviction that the state court was erroneous" is not enough. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (internal quotation marks omitted). Rather, "the state court's application of clearly established federal law [must be] objectively unreasonable." *Williams*, 529 U.S. at 409.

⁸⁷ *Gagne*, 606 F.3d. at 289.

⁸⁸ *Id.* at 287–88. What the court referred to as "not much evidence in the first place" was an evidentiary record quite common in acquaintance-rape cases: "Other than the two defendants and the complainant, there were no eyewitnesses at all. Nor did the physical evidence tend weigh [sic] in favor of one side or the other." *Id.* The court observed skeptically that, "the question of guilt or innocence turned almost entirely on the credibility of the victim's testimony regarding consent." *Id.* at 289. Again, this is typical of acquaintance-rape prosecutions. As Susan Estrich has noted:

In a rape, corroboration may be impossible to find. In most cases, there are no witnesses . . . There is no contraband—no drugs, no marked money, no stolen goods. Unless the victim actively resists, her clothes may be untorn and her body unmarked. Medical corroboration may establish the fact of penetration, but that only proves that the victim engaged in intercourse—not that it was nonconsensual or that this defendant was the man involved. Moreover, the availability of medical corroboration turns not only on prompt and appropriate treatment by police and medical personnel but, in the first instance, on the victim not doing what interviews find to be the most immediate response of many rape victims: bathing, douching,

it was indispensable to the defense's theory"⁸⁹ The court provided no further explanation.

The concurring judge expressly observed that, because one of the defendants participated in both the prior activities and the alleged rape, the inference that underlay the admission of past consensual sex with the defendant applied.⁹⁰ Yet the concurrence neglected to address the significant factual differences between the two incidents (which the state court emphasized, affirming the exclusion).⁹¹ If these differences did not undermine the probative value of the prior act, what supported the reasoning that equated the two? What negated the reasoning that distinguished them?

Perhaps the answer lies in the judge's opinion of the victim. The evidence admitted at trial that was key, in the judge's view, included the fact that on a prior occasion while she was dating Gagne, the victim had "engaged in oral sex with Swathwood shortly after intercourse with Gagne."⁹² The victim had also "engaged in consensual oral sex with Gagne minutes before the very incident for which he was convicted (and moreover . . . she had drunk a pint of vodka and nine or so beers and smoked crack in the hours before the incident)."⁹³ In a particularly telling passage, the concurring judge concluded with candor: "I entirely agree that Michigan's rape-shield law protects important state interests in the vast majority of cases in which it is implicated. But I submit that, under the circumstances of this trial,

brushing her teeth, gargling. On the surface, at least, rape appears to be a crime for which corroboration may be uniquely absent.

Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1175 (1986).

⁸⁹ *Gagne*, 606 F.3d at 288.

⁹⁰ *Id.* at 290 (Kethledge, J., concurring). The concurrence added: "[Rape shield] laws contain[] an exception for evidence of consensual sex with the defendant. These laws must infer something very important about such evidence; and they do so especially in cases—like this one—where consent itself is the issue. The inference is that, in some (and perhaps most) cases, evidence of past consensual sex with the defendant is highly relevant to the issue of consent in the incident giving rise to the charge." *Id.*

⁹¹ *People v. Gagne*, 673 N.W.2d 755, 755 (Mich. 2003).

⁹² *Gagne*, 606 F.3d at 292 (Kethledge, J., concurring).

⁹³ *Id.* The admissibility of this evidence was not in dispute on Gagne's appeal because the trial judge admitted it, presumably under the Michigan rape shield law exception for "[e]vidence of the victim's past sexual conduct with the actor" where such evidence's probative value outweighs its inflammatory or prejudicial nature. MICH. COMP. LAWS ANN. § 750.520j (West 2004); see *Gagne*, 606 F.3d at 281 (discussing Gagne's motion in-limine pursuant to section 750.520j); see also FED. R. EVID. 412(b)(1)(B) (defining the federal analogue thereof). The court apparently referred to this evidence, not because it was thought to bear on the probative value of the prior evidence of group sex, but because it suggested that the state interest in the rape shield was gutted where other evidence involving such sordid facts had already been admitted. See *infra* notes 112–16 and accompanying text (discussing the connection between the notions of deviancy and the pattern exception in the context of the *Gagne* case).

there was virtually nothing left of those interests to protect.”⁹⁴ In short, “the circumstances of this trial” abrogated the rationale for the rape shield, limiting its scope to cases in which the victim’s past consensual sexual conduct is considered normal.⁹⁵

Charging that the holding “in effect, invalidates all rape shield laws as violative of the Sixth Amendment,”⁹⁶ Chief Judge Alice Batchelder dissented. The practical consequences of the holding were dire, notwithstanding considerable efforts on the part of the majority to proclaim otherwise.⁹⁷ From this perspective, the misguided opinion was especially outrageous because it manifested utter “condemnation of the rape-shield concept.”⁹⁸

Two years after the habeas grant was affirmed, a fractured en banc court reversed the panel. In no less than eight opinions, none of which commanded a majority, the Sixth Circuit judges expressed competing views of the victim’s sexual history. Apart from considerable debate about the proper AEDPA standard of review,⁹⁹ the court was sharply divided in its assessment of the probative value of the excluded threesome evidence.

For the five dissenters, who echoed the reasoning of the panel, the earlier encounter was “[t]he only evidence with which Gagne could realistically defend himself;”¹⁰⁰ it was indeed “indispensable to the defendant’s ability to demonstrate his innocence.”¹⁰¹ From this vantage, the prior threesome was “critical” evidence because it involved “almost identical”¹⁰² or “nearly identical”¹⁰³ sexual conduct, despite the participation of a different man¹⁰⁴ and real factual ambiguities surrounding the use of the word “identical” to describe the acts

⁹⁴ *Gagne*, 606 F.3d at 292. Nevertheless, the concurring judge admitted, “I do not hold a torch for anyone involved in the underlying events of this case.” *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 301 (Batchelder, J., dissenting).

⁹⁷ Responding to the dissent’s dramatic prognostication, the majority took pains to “stress that our holding is fact-bound in the extreme.” *Id.* at 288.

⁹⁸ *Id.* at 293.

⁹⁹ See *supra* note 86 and accompanying text (defining the AEDPA standard of review). The plurality opinion, authored by Chief Judge Batchelder, repeatedly underscored the level of deference required by AEDPA. See, e.g., *Gagne v. Booker*, 680 F.3d 493, 517 (2012) (“It might be that Gagne is correct that, as a matter of his defense, this was the most relevant evidence and the state courts were wrong to exclude it, but whether the trial judge was right or wrong is not the pertinent question under AEDPA. The question is whether the last state court’s decision was objectively unreasonable.” (internal quotation marks omitted) (internal citations omitted)).

¹⁰⁰ *Gagne*, 680 F.3d at 534 (Kethledge, J., dissenting).

¹⁰¹ *Id.* at 536.

¹⁰² *Id.* at 533.

¹⁰³ *Id.*

¹⁰⁴ See *id.* at 502 (plurality opinion) (noting that the defendant’s argument for admissibility “omit[ted] from consideration the identity of any other participant in the group sex and, instead, define[d] ‘group sex’ as just a type of sex or sex act”).

in question.¹⁰⁵ Because of its perceived similarity to the incident in question, the excluded evidence demonstrated “the complainant’s willingness to specifically engage in the kind of facially coercive three-way sex”¹⁰⁶ alleged to be rape in this case.

Several of the five concurring opinions—three of which concurred in the judgment only—expressed skepticism about the significance of the victim’s sexual history: “Gagne’s proffered evidence is not as probative as he submits once it is stripped of the forbidden inference that a woman who consents once to group sex is more likely to consent to it in the future;”¹⁰⁷ “I do not find the excluded evidence so compelling;”¹⁰⁸ “The only bridge to finding evidence of consensual sex between [the victim] and Bermudez material to whether [the victim] had consensual sex with Gagne . . . is to conclude that the kind of women who would say ‘yes’ to someone is the kind of woman who always says ‘yes.’”¹⁰⁹ One judge cautioned, “the logic espoused by the dissent opens the door to prior sexual conduct of the victim being admissible, as a constitutional requirement, whenever the sexual conduct at issue is outside the norm.”¹¹⁰

The plurality chose to ignore this possibility, accepting *arguendo* the potential probative value of sexual patterns evidence. Although it was not “unreasonable to surmise that [] jurors would be more likely to find consent” if they learned about the victim’s repeated participation in consensual group sex, a decision to the contrary was not “beyond any possibility for fair-minded disagreement.”¹¹¹ Because the panel opinion did not afford the requisite deference to the state court, it was reversed. But *Gagne* left intact the sexual patterns excep-

¹⁰⁵ According to the defense proffer, “the events alleged by [Bermudez] is [sic] nearly identical in most regards. There are some exceptions, but the general M.O. if you will, the way that the event took place is almost identical to the way that the events charged in this case took place.” *Id.* at 522 (Moore, J., concurring). Since a factual record was never developed regarding the victim’s “M.O.” and the “exceptions,” judges to whom it mattered were left to speculate as to the meaning of “almost identical.” *Compare id.* at 533 (Kethledge, J., dissenting) (“Non-brutal three-way sex is not ‘almost identical’ or ‘nearly identical’ to brutal three-way sex. And thus it is simply not an accurate reading of the record to say that the Bermudez incident, as described in the proffer, was less brutal than the charged incident.”), *with id.* at 522 (Moore, J., concurring). (“At no point did defense counsel, either in his papers or at the hearing, characterize the Bermudez incident as ‘brutal’ or ‘violent’ in any way, and the defense certainly did not proffer that the Bermudez incident left the victim bleeding and with bruises all over her body.”). In the earlier panel opinion affirming the habeas grant, no mention was made of any violence or brutality possibly associated with the prior threesome. *Gagne v. Booker*, 606 F.3d 278 (6th Cir. 2010), *rev’d en banc*, *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012).

¹⁰⁶ *Gagne*, 680 F.3d at 532 (Kethledge, J., dissenting).

¹⁰⁷ *Id.* at 518 (Sutton, J., concurring).

¹⁰⁸ *Id.* at 522 (Moore, J., concurring).

¹⁰⁹ *Id.* at 524 (Clay, J., concurring).

¹¹⁰ *Id.* at 520 (Griffin, J., concurring).

¹¹¹ *Id.* at 517–18 (plurality opinion).

tion, at least in part because a hard look at its conceptual foundations would have yielded little consensus.

Divergent understandings of import of the victim's prior consensual threesome correspond to deeper disagreements about unconventional female sexuality. For judges inclined to afford the excluded evidence substantial weight, and even for those who see the admissibility question as exceedingly close (and therefore outside the scope of AEDPA review), the sexual conduct at issue is different enough from the norm to somehow alter standard rape shield analysis. The result is a mode of discourse animated not just by notions of promiscuity, but also by an intuitive sense of deviancy.¹¹² While judicial interpretations of the "outlandish sexual encounter"¹¹³ are modernized—in this sense, *Gagne's* threesome may be just the "one night thing"¹¹⁴ of a bygone era—the idea of sexual outlandishness remains, as does its function in establishing the inapplicability of rape shield protection. Though normally past consent is irrelevant, under specified circumstances, consent forecasts more of the same. The law of rape shield thus perpetuates in evolving guises the very assumption that it purports to reject: a woman's sexual past may indeed bear on the likelihood that she would consent to an act she now alleges was rape.

As is generally true of the law of sexual patterns,¹¹⁵ the path of *Gagne* shows how the scope of rape shield protection is defined by reference to unmentioned, imagined benchmarks of acceptable female sexuality. If we look carefully, we see that often judges are not really reasoning about consent at all; rather, they are identifying perceived sexual deviancy,¹¹⁶ then using this designation to advance the evidentiary proposition that connects past consent to present consent. Read together, the en banc opinions capture the paradox at the heart of the sexual pattern exception: cabining its reasoning can be accomplished only if judges are willing to circumscribe female sexuality.

In the modern pattern jurisprudence, judicial perspectives on normative female sexuality are increasingly contested, but—as we have already seen—familiar conceptual tensions recur.¹¹⁷ For instance, compare *Gagne* with the Seventh Circuit's ruling in *Sandoval v.*

¹¹² See *supra* notes 69–79 and accompanying text (elaborating on the idea that judicial notions of deviancy are animated by an intuitive sense of how women ought to behave sexually).

¹¹³ *Gagne*, 606 F.3d at 291 (Kethledge, J., concurring).

¹¹⁴ See *infra* note 156 and accompanying text (discussing *State v. Pancoast*, 596 So. 2d 162, 163 (Fla. Dist. Ct. App. 1992) (per curiam), in which the past sexual encounters characterized as a "one night thing" were deemed admissible).

¹¹⁵ See *supra* notes 43–48 and accompanying text.

¹¹⁶ This deviancy can be statistical or moral. See *supra* notes 69–74 and accompanying text (further explaining the distinction and its importance).

¹¹⁷ See *supra* notes 77–79 and accompanying text.

Acevedo.¹¹⁸ Judge Posner authored the opinion, which concerned the admissibility of evidence of the victim's prior consensual anal intercourse with a third party in a prosecution alleging forcible anal intercourse.

Here, as in *Gagne*, the defense was consent and the case hinged on the victim's credibility.¹¹⁹ But Judge Posner expressly disputed the probative value of the prior history evidence, writing as follows:

The essential insight behind the rape shield statute is that in an age of post-Victorian sexual practice, in which most unmarried young women are sexually active, the fact that a woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she *consented* to engage in this activity with the defendant on the occasion on which she claims that she was raped.

. . . .

The fact that [the victim] had had pleasurable anal intercourse with another man on another occasion would not show that she would have enjoyed having it with Sandoval on an occasion when he was enraged with her and wanted by penetrating her anally to humiliate and, quite possibly, physically hurt her. Indeed, by that logic rape shield laws would be unconstitutional to the core because their central aim is to prevent the drawing of an inference of consent from previous consensual intercourse with other men.¹²⁰

One wonders about a principled basis for distinguishing the divergent treatment of the prior consensual sex acts in *Gagne* and *Sandoval*. Is the difference that anal sex is more common than three-way sex?¹²¹ Or that it is more acceptable? At bottom, Judge Posner confronted the very same dilemma facing the court in *Gagne*—how can some past consensual sexual activities bear on consent, if not all do so; or, conversely, if some past consensual sexual activities with third parties are excluded on the issue of consent, why aren't all excluded? *Sandoval* faced the tension squarely and without apparent commitment to a normative vision of female sexuality. Accordingly, the court deliberately refused to identify consensual conduct, whatever the fla-

¹¹⁸ 996 F.2d 145 (7th Cir. 1993).

¹¹⁹ Compare *id.* at 147–48 (“The only direct evidence of Sandoval’s guilt was the testimony of his victim . . . Sandoval testified that . . . she . . . had initiated anal and oral sex with him.”), with *Gagne v. Booker*, 606 F.3d 278, 287 (6th Cir. 2010), *rev’d en banc*, *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012) (“[T]he entire trial hinged upon consent Other than the two defendants and the complainant, there were no eyewitnesses at all. Nor did the physical evidence tend weigh [sic] in favor of one side or the other.”). See *supra* note 88 and accompanying text (noting the typicality of this fact pattern).

¹²⁰ *Sandoval*, 996 F.2d at 149, 151.

¹²¹ See *supra* notes 12, 17 and accompanying text (citing statistics on frequency of anal intercourse). To my knowledge, no comparable study assessing the frequency of multi-partner sex exists.

vor, as sufficiently deviant to exempt it from rape shield protection. *Gagne*, as we have seen, resolved the question far more equivocally.

In other cases, judicial impressions of normative female sexuality impliedly dictate the admissibility determination (with little to no analysis), creating a conceptual muddle. The confusion derives from the sexual pattern exception itself, rather than its faulty application. One cannot logically square the exception with the rule of exclusion to which it is tethered. To further illustrate this deep tension, I shall juxtapose against the law of sexual patterns examples from two different areas of rape law.

B. Choosing a Particular *Membrum Virile*

The identity of a woman's sexual partner greatly impacts her willingness to consent to sexual activities. This belief animates juridical commitments to both the core rape shield protection and its main exception for past intercourse with the defendant.¹²² The central insight of rape shield law—that consent on one occasion is of limited probative value on the question of subsequent consent—is intricately connected to an understanding of sexual consent as partner specific.¹²³ A woman's choice to engage sexually with a particular individual, as opposed to another, is considered unassailable; the general prohibition on past sexual acts with others to show consent to acts with the defendant codifies this perspective.

Usually the law privileges identity as foundational to the norm of nontransferable consent with little fanfare. One court to expressly insist that identity matters (if only because of the unusual facts presented) is the Court of Military Appeals in *Traylor*.¹²⁴ The facts are recounted as follows:

[Traylor] and Specialist G were assigned to the same squad, which had deployed to Saudi Arabia for Operation Desert Storm. They were acquainted but did not usually work together or socialize. On January 5, 1991, at almost 3:00 a.m., Specialist G was awakened by Specialist Sly, who asked her to meet him outside. They boarded a vacant bus parked nearby, talked for 5–10 minutes in the rear of the bus, and then began engaging in sexual intercourse. After a few minutes, they changed positions so that Specialist G had her knees on the edge of a seat and her head toward the side of the bus, with Specialist Sly behind her engaging in vaginal intercourse from the rear.

¹²² See *supra* note 93 (describing the exception); *infra* notes 217–19 and accompanying text (suggesting conceptual limitations of the exception).

¹²³ For further discussion of the significance of the traits of a sexual partner, see *infra* notes 215–19 and accompanying text (describing the “partner-personal” realm).

¹²⁴ *United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994).

Specialist G testified that Specialist Sly “slipped out but immediately reentered” two-three times. She testified that “he slipped out one more time and I thought it was him reentering but something felt different this time.” She turned her head and saw that appellant had entered her. She testified that she “was shocked . . . mad, upset, and I just—all I said was, ‘Hey, Traylor, what’s going on?’” She testified that she “tried to pull away a little,” but appellant “pulled me back.”¹²⁵

On appeal, the defendant argued that the evidence was insufficient to support a finding of nonconsent because the victim was engaging in consensual intercourse with Sly at the time the defendant entered her. The court disagreed, observing that, “[a]ctual consent’ means consent not only to the act of intercourse, but also consent ‘based on the identity of the prospective partner.’”¹²⁶ To dispel any remaining confusion, the court concluded: “It is not necessary that a woman know the true identity of her sexual partner or know anything about him in order to consent, but she must be agreeable to the penetration of her body by a particular *membrum virile*.”¹²⁷

Putting aside whether this thin conception of identity is sufficient as a normative matter,¹²⁸ *Traylor* is an easy case for the law of rape. The bounds of consent are far more clear and confined than they would be had Specialist Sly shifted from vaginal intercourse to abruptly penetrate Specialist G anally, or failed to withdraw when told to do so.¹²⁹ She chose a “particular ‘*membrum virile*’”; the law affords that choice profound meaning when assessing the probability of consent with another. Unless, as we have seen, the behavior itself is considered outlandish, in which case the significance of identity dissipates.

C. (Un)reasonable Mistakes About Consent

When a rape defendant claims that he mistakenly believed the woman consented to sex, he argues not that she actually consented, but that his belief to the contrary was reasonable.¹³⁰ Though many jurisdictions do not provide for a mistake defense to a rape prosecu-

¹²⁵ *Id.* at 248–49.

¹²⁶ *Id.* at 249 (quoting *United States v. Booker*, 25 M.J. 114, 116 (C.M.A. 1987)).

¹²⁷ *Id.* (internal quotation marks omitted).

¹²⁸ See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 44–47 (1998) (discussing fraudulent conduct in rape); Jane E. Larson, “Women Understand So Little, They Call My Good Nature ‘Deceit’”: A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 417–18 (1993) (discussing a proposed tort of sexual fraud).

¹²⁹ See generally Note, *Acquaintance Rape and Degrees of Consent: “No” Means “No,” but What Does “Yes” Mean?*, 117 HARV. L. REV. 2341, 2341–43 (2004) (exploring how to define affirmative consent).

¹³⁰ See generally Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263, 270–71 (2002) (discussing the defendant’s perceptions of the victim’s consent).

tion,¹³¹ those that do place limits on the type of evidence that the defense allows.

As the Fourth Circuit has described this area of law:

A defendant's reasonable, albeit mistaken, belief that the victim consented may constitute a defense to rape. When consent is the issue, however, [the applicable rule] permits only evidence of the defendant's past experience with the victim. The rule manifests the policy that it is unreasonable for a defendant to base his belief of consent on the victim's past sexual experiences with third persons¹³²

Suppose a defendant asserts that he wrongly believed the alleged rape victim consented to anal sex (or group sex, or any sex act deemed similar to the conduct at issue). Further suppose that the defendant's contention is based solely on his knowledge that, on a number of occasions in the past, the woman willingly engaged in this same act with other men. Most courts, in keeping with the Fourth Circuit's characterization,¹³³ would not find an entitlement to a reasonable mistake of fact instruction under these circumstances.¹³⁴

In part, this may be because judges accurately perceive that an opposite result would run directly counter to essential rape shield norms. But the rejection of a mistake defense under these circumstances can also be understood as affirmation of this proposition; it is not reasonable for a man to assume that a woman would consent to X with him simply because she had on one or more past occasion con-

¹³¹ See *id.* at 280–81. See generally Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact about Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 817–32 (1996) (identifying the development of mistake defenses).

¹³² *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991) (citation omitted).

¹³³ In *Saunders*, the Fourth Circuit held that, to prove his reasonable belief in consent, the defendant was not constitutionally entitled to present evidence of a conversation with a friend in which he learned that the victim “was a ‘skeezer’ and that [the friend] had had sex with [the victim] in exchange for drugs.” *Id.* at 390.

¹³⁴ See, e.g., *United States v. Maksimenko*, No. 05-80187, 2007 WL 522708, at *2 (E.D. Mich. Feb. 14, 2007) (granting government's motion in-limine to prohibit defendant from introducing evidence of victims' sexual behavior, other than that involving defendant, or their profession as exotic dancers, and noting that “it is unreasonable for a defendant to base his belief of consent on the victim's past sexual experiences with third persons”); *United States v. Watt*, 50 M.J. 102, 105 (C.A.A.F. 1999) (noting in dicta that “the defendant's beliefs about the victim's sexual relations, if any, with persons unknown to him, were not relevant to whether the victim was actually consenting with him at that time” (citing *United States v. Greaves*, 40 M.J. 432, 437–38 (C.M.A. 1994))); *United States v. Knox*, 41 M.J. 28, 30 (C.M.A. 1994) (permitting defendant to present evidence of his own experiences with the victim, but not evidence of her reputation as a “bimbo” who was “very easy” and who had reputedly passed a sexually transmitted disease to defendant's coworkers); *Boyd v. State*, 564 N.E.2d 519, 522 (Ind. 1991) (holding that “freewheeling, aggressive behavior” of the victim in a tavern did not warrant a jury instruction on mistake of fact regarding consent).

sented to X with another.¹³⁵ Put differently, sound reasoning does not support such an assumption.¹³⁶

The law provides no explanation of why, in evidentiary determinations involving sexual patterns, this logic is inverted. If anything, we might expect the reasonable mistake defense to allow for more consideration of sexual history than would the actual consent defense.¹³⁷ This contradiction adds to the puzzle of why, when the issue is the latter, certain sexual behaviors lend themselves to a judicial finding of admissibility. Part III pursues this inquiry.

III

THE LEGAL CONSTRUCTION OF FEMALE SEXUALITY

Judicial intuitions surrounding sexual patterns are highly suspect. Absent an analytic framework for sexual history determinations, judges must simply rely on their hunches. This would be problematic regardless of who is doing the reckoning; it is particularly disturbing when we consider the limitations of courts acting in this capacity. As Judge Posner has candidly acknowledged: “[J]udges know next to nothing about the subject [of sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary”¹³⁸

Gagne involved three-way sex.¹³⁹ And indeed group sexual activities constitute one category of evidence that proves particularly vexing for judges. For instance, in a prosecution for rape by three defendants, one Tennessee appeals court found a constitutional right to present evidence that the victim “‘had a threesome’ with two men [neither of whom was a defendant] behind a church.”¹⁴⁰ The Court concluded that the prior sex act was “relevant and crucial evidence as to the alleged victim’s willingness to consent to having sex with more than one partner” for two reasons.¹⁴¹ First, sex with more than one

¹³⁵ With respect to the reasonableness of the defendant’s mistake, the probative value of past consensual acts with the defendant (as opposed to others) may be far greater, depending on context. See *infra* notes 184–230 and accompanying text (asserting primacy of context for sexual consent).

¹³⁶ See *infra* note 184 and accompanying text.

¹³⁷ We might also suppose that judges would demand of themselves a more rigorous analysis than they would demand of rape defendants.

¹³⁸ RICHARD A. POSNER, *SEX AND REASON* 1 (1992). All of this lends the internally conflicted state of the sexual pattern exception—and, as a corollary, the extreme lack of guidance it provides judges—greater urgency. See *infra* notes 183–89 and accompanying text.

¹³⁹ See *supra* notes 82–85 and accompanying text.

¹⁴⁰ *State v. Johnson*, No. M2001-01973-CCA-R9-CD, 2002 WL 992402, at *7 (Tenn. Crim. App. May 15, 2002). In *Johnson*, the state filed an interlocutory appeal of the trial court’s ruling admitting the evidence. *Id.* at *1.

¹⁴¹ *Id.* at *8.

person was “unique behavior.”¹⁴² Second, notwithstanding obvious discrepancies between the facts alleged at trial and the past “three-some . . . behind a church,” the two incidents were similar enough merely by virtue of the fact that both “involved multiple partners.”¹⁴³

In another case raising the issue of consensual group sex, the Arkansas Supreme Court on interlocutory appeal reversed a trial court order admitting evidence of a fifteen-year-old girl’s sexual history in a case of forcible rape by ten defendants.¹⁴⁴ The court focused on the fact that the prior activities in question always involved one young man at a time—though, on occasion, others peered under and through the door while the victim engaged in sexual acts with another.¹⁴⁵ The opinion rested explicitly on the court’s definition of the previous acts involved as “normal, individual sexual relations”— even going so far as to cite a defendant’s own pretrial testimony regarding the past acts (again, which others did not participate in, but may have observed).¹⁴⁶ The court seemed to agree with the defendant on this point: “Nobody’s no pervert.”¹⁴⁷

The dissent would have affirmed the trial court’s admission of the testimony. Whether or not the conduct was “group sex,”¹⁴⁸ because it was watched, it fell outside the bounds of normative sexuality—and was therefore deemed probative.¹⁴⁹ According to the dissent, the conclusion was self-evident: the victim’s sexual history “in circumstances which could be described as less than discrete [sic] and private is relevant to the question whether she consented to the acts charged against these defendants.”¹⁵⁰

Even in cases where the sex act itself is not itself considered “unique behavior,”¹⁵¹ it may still depart from the kind of “discrete [sic] and private” behavior¹⁵² that falls within the sphere of contingent consent. Courts tacitly locate the point at which too much sex or sex with the wrong people becomes sufficiently deviant to render it patterned.¹⁵³

¹⁴² *Id.* The court went on to add that this behavior was unique, “especially for a person the age of the alleged victim,” who at the time “was a high school senior.” *Id.* at *1, *8. *But see supra* note 17 (presenting statistics on sexual conduct in girls between the ages of 15 and 19).

¹⁴³ *Johnson*, 2002 WL 992402, at *7–8.

¹⁴⁴ *See State v. Sheard*, 870 S.W.2d 212, 213–14 (Ark. 1994).

¹⁴⁵ *See id.*

¹⁴⁶ *Id.* at 214.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 216–17 (Newbern, J., dissenting)

¹⁵⁰ *Id.* at 216.

¹⁵¹ *State v. Johnson*, No. M2001-01973-CCA-R9-CD, 2002 WL 992402, at *8 (Tenn. Crim. App. May 15, 2002).

¹⁵² *Sheard*, 870 S.W.2d at 216 (Newbern, J., dissenting).

¹⁵³ *See supra* notes 43–52 and accompanying text.

Here, too, retrograde notions of chastity powerfully influence judicial inquiry. Sex within a monogamous relationship¹⁵⁴ is generally considered irrelevant to later consent with another man.¹⁵⁵ In contrast, sex outside such relationships (however mainstream the acts themselves) may give rise to an inference of patterned behavior, informing the likelihood of later consent—particularly if the victim is considered the initiator of, as one court put it, a “one night thing.”¹⁵⁶

Often these rationales for defining sexual conduct as indiscreet to the point of indiscriminateness merge. In one military review case, for instance, the court found that the victim “was drunk practically every weekend, and behaved in a sexually aggressive manner toward males when drunk”; as such, this evidence demonstrated a “pattern of behavior” and was “relevant, material, and probative.”¹⁵⁷ The court noted that, “evidence that the victim consented to sex freely and indiscriminately would be relevant to prove she acted in conformity with her habit.”¹⁵⁸

¹⁵⁴ While monogamy is still an important benchmark, sex outside of marriage in and of itself is no longer considered as deviant as once it was. See Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 763 (2006) (arguing that the Supreme Court’s decision in *Lawrence v. Texas* “dismantled an isomorphism between marriage/nonmarriage and licit sex/illicit sex”); Ordover, *supra* note 37, at 99 (“[S]ociety that no longer considers nonmarital sexual behavior immoral or even unusual . . .”). This shift evinces the temporally and culturally bound nature of judicial deviancy conceptions.

¹⁵⁵ See, e.g., *State v. Mustafa*, 437 S.E.2d 906, 909–10 (N.C. Ct. App. 1994) (affirming the trial court’s exclusion of evidence regarding the victim’s previous sexual encounter with a man in an ongoing relationship).

¹⁵⁶ *State v. Pancoast*, 596 So. 2d 162, 163 (Fla. Dist. Ct. App. 1992) (per curiam). In *State v. Pancoast*, the trial court entered an order allowing the admission of past-history evidence, holding that the proffered evidence established that, over the course of the past six years, the victim had engaged in a sexual “pattern.” *Id.* The court’s conclusion was based on: (1) the (younger) ages of the three men involved (relative to the victim’s age); (2) the time of day of the encounters (night); (3) the type of sexual activity (which included oral sex); (4) the relationship of the men to the victim’s son (they were the son’s friends), and (5) “the nature of each encounter as a ‘one night thing.’” *Id.* In addition, the three men involved “insinuate[d] that the victim initiated the encounters.” *Id.* at 164. On interlocutory appeal, the appellate court reversed, explaining that, “[w]hile . . . all the prior encounters occurred with men younger than the victim, this alone is insufficient to establish a pattern of conduct warranting the admission of prior consensual sexual activity.” *Id.* The ruling predated widespread attention to sexual relationships between women in their 40s and 50s and younger men. See, e.g., *Are More Older Women With Younger Men?*, ABC NEWS (May 5, 2005), <http://abcnews.go.com/Primetime/Health/story?id=731599> (noting in 2005 the increasing number of women dating younger men).

¹⁵⁷ *United States v. Kelly*, 33 M.J. 878, 882 (A.C.M.R. 1991).

¹⁵⁸ *Id.* (citing *United States v. Holliman*, 16 M.J. 164, 166 (C.M.A. 1983)). The referenced passage reads in full: “Trial defense counsel adverted in his argument to Mil.R.Evid. 406, concerning evidence of ‘habit,’ and contended that ‘[i]f it is the habit of the victim to consent to sex freely and indiscriminately, then this evidence would be relevant to prove her conduct on this occasion was in conformity with this habit.’ While the rationale may be correct, the proffered evidence fell far short of establishing the ‘habit’ to which defense counsel referred.” *Holliman*, 16 M.J. at 166 (alteration in original).

In various ways, then, female sexuality that fails to conform to normative standards¹⁵⁹ sits uneasily with rape shield law.¹⁶⁰ Most discomfiting are acts of prostitution,¹⁶¹ group sex,¹⁶² and sadomasochism.¹⁶³ In a similar manner, sex outside of monogamy,¹⁶⁴ sex with perceived frequency,¹⁶⁵ sex on the part of teenagers,¹⁶⁶ and sex deemed woman initiated¹⁶⁷ are often considered sufficiently deviant to be given patterned treatment.¹⁶⁸ In these cases, the consent requirement is diluted.¹⁶⁹

¹⁵⁹ For a more complete discussion of emotional intimacy as it impacts normative standards of female sexuality, see Rosenbury & Rothman, *supra* note 74, at 825 (arguing that the “new ground for restricting sexual conduct [is] the promotion of emotional intimacy. As such, states may find reason to . . . penalize sexual activities that occur outside of acceptable relationships or are otherwise assumed to play no role in the furtherance of emotional intimacy even within relationships”).

¹⁶⁰ See, e.g., *State v. Brodie*, No. COA04-308, 2005 WL 1431686, at *3 (N.C. Ct. App. June 21, 2005) (declining to decide the admissibility of the victim’s admission to previous intercourse in the presence of her child because the defendant first raised the issue on appeal); *State v. Sheline*, 955 S.W.2d 42, 44, 47 (Tenn. 1997) (after an intermediate court reversed because the excluded evidence “constitute[d] one episode of a distinctive pattern in which the victim met an acquaintance at a bar, was drinking, and eventually had sexual relations with that person,” the state supreme court reinstated the conviction on grounds that “[t]he described acts could hardly be characterized as signature cases”); cf. *State v. Smart*, No. 57129-0-I, 2007 WL 959891, at *6 (Wash. Ct. App. Apr. 2, 2007) (rejecting the defendant’s claim that the court wrongly excluded evidence that “sometimes [the victim] would drink, hit on men she did not know, and then consent to sex,” and that she “had sexual relations with men she met over the Internet or on a camping trip[;]” “[t]he proffered evidence was not similar to [the defendant’s] version of the incident because according to him [the victim] was sober”).

¹⁶¹ See generally Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47 *passim* (1992) (challenging the dichotomy drawn in legal discourse between prostitutes and other women).

¹⁶² See *supra* notes 140–50 and accompanying text.

¹⁶³ See Anderson, *supra* note 33, at 131–37; Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 285–86 (2001). But see *State v. Archibald*, Nos. 2006-L-047, 2006-L-207, 2007 WL 2758600, at *9 (Ohio Ct. App. Sept. 21, 2007). In *Archibald*, the court grappled with the relevance of a victim’s past attendance at a “pure romance party,” which it defined as “apparently parties held by women for their female friends at which they can purchase marital aids.” *Id.* at *7. Though the issue was not preserved on appeal, the court opined: “[W]e fail to see how the victim’s alleged attendance [at] a pure romance party is evidence that the victim had a proclivity for kinky sex. Further, we do not agree that if a person was fond of kinky sex, this affinity would be admissible to support a consent defense” *Id.* at *9 (internal quotation marks omitted).

¹⁶⁴ See *supra* notes 154–56 and accompanying text.

¹⁶⁵ See *infra* notes 176–82 and accompanying text.

¹⁶⁶ See *supra* note 142; see also *State v. Whitehead*, No. W2000-01062-CCA-R3-CD, 2001 WL 1042164, at *6 (Tenn. Crim. App. Sept. 7, 2001) (describing evidentiary record containing evidence of fifteen-year-old girl’s prior sexual history, including consensual acts with “several boys who were approximately her own age”).

¹⁶⁷ See *supra* notes 49–52 and accompanying text.

¹⁶⁸ See *supra* notes 56–72 and accompanying text.

¹⁶⁹ The de facto impossibility of a wife’s nonconsent merits its own treatment. See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 *passim* (2000) (describing the legal landscape surrounding marital rape).

A final case crystallizes the flawed analytic framework underlying the sexual pattern exception. The facts of *Chew v. State*, a Texas appellate decision, are described most fully by the dissenting opinion:

The state's evidence showed that on the night of March 26, 1988, the complainant was walking from a family party to her nearby home when four men, including appellant, approached her in a car. They asked her to go riding, but she declined. Two of them then got out of the car and forced her into the back seat. They then took her to a ranch where cockfights were taking place. There she was raped and otherwise sexually abused in and on the car by a number of men, including appellant. There was testimony that in addition to raping her, appellant held a flashlight on her while others raped her and also forced a beer bottle into her vagina. Appellant and the others who had originally brought the complainant to the ranch left her there and drove away. The complainant was then taken to a second car by other men at the ranch, where the sexual abuse continued.¹⁷⁰

At trial, the defense claimed that the victim consented to the acts in question.¹⁷¹ The jury convicted and the defendant appealed on the basis of the trial judge's exclusion of evidence relating to the victim's sexual conduct.¹⁷² At issue was what the appeals court characterized as

testimony by a number of men describing numerous separate sexual encounters between the complainant and several men at the same time, which took place in the complainant's home, in other homes, and in vehicles These men also testified that the complainant not only participated willingly but at times instigated the sexual encounters, even with men who were *complete strangers*.¹⁷³

The court reversed the conviction for rape and kidnapping, holding that, because the excluded evidence "had the potential to expose facts from which the jurors could have appropriately drawn inferences . . . as to the consent of the complainant," it unconstitutionally deprived the defendant of his right to meaningful confrontation.¹⁷⁴

¹⁷⁰ 804 S.W.2d 633, 640 (Tex. Ct. App. 1991) (en banc) (Peeples, J., dissenting).

¹⁷¹ *Id.* at 634 (majority opinion).

¹⁷² *Id.* Somewhat unusual is that the proffered evidence pertained to acts occurring after the alleged incident; accordingly, the state rape shield law—which governs "previous sexual conduct" and "past sexual behavior"—was deemed inapplicable. *Id.* at 641 n.2 (Peeples, J., dissenting). Notwithstanding this oddity (and the dissent's observation that "the tendered evidence certainly comes within the spirit of rule 412"), the admissibility of evidence was analyzed on constitutional grounds (and ultimately found to be constitutionally required); hence, the relevant chronology is not significant for our purposes. *Id.*; *id.* at 638 (majority opinion).

¹⁷³ *Id.* at 634 (emphasis added).

¹⁷⁴ *Id.* at 637–38 ("The appellant was prevented from presenting the only defense he had. Thus, this error alone requires that the case be reversed and remanded.").

The court also found error in the trial judge's decision to curtail the defendant's examination of Dr. Lawrence Taylor, "a qualified psychiatrist with expertise in sexual disorders."¹⁷⁵ The testimony was admitted as follows:

Dr. Taylor described the illness of "nymphomania" as a condition occasionally found in females, consisting of an unmanageable sexual desire which results in dramatic frequency of sexual contact with a partner as well as indiscriminate sexual contact with groups. Dr. Taylor testified that it was not uncommon for females afflicted with this illness to attempt to hide their condition from the general public as well as from their own family, and further, that those afflicted very seldom seek medical attention on their own.¹⁷⁶

The evidence wrongly excluded, per the appellate court, included the following offer of proof:

In the court's chambers, outside the hearing of the jury, Dr. Taylor was posed a hypothetical question . . . about the complainant's alleged consensual *sexual misconduct* subsequent to the occasion in question. He responded that the facts were "in keeping with a diagnosis of nymphomania." The doctor further testified that when females afflicted with this illness are caught or confronted, they have a tendency "to cover up you might say but that would not stop them usually." He testified that he meant that such a person, even after being caught or confronted, would usually "continue on with the sexual promiscuity and the amount and number of people."¹⁷⁷

The victim's sexual conduct, or "misconduct," was not just evidence of propensity, but of such extreme deviancy as to constitute a "medical affliction," one that had "a direct connection with the defense of consent."¹⁷⁸ Her sexuality was fully pathologized as "nympho-

¹⁷⁵ *Id.* at 634.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (emphasis added). By "sexual misconduct," the court was apparently referring to the proffered evidence of "separate sexual encounters between the complainant and several men at the same time, which took place in the complainant's home, in other homes, and in vehicles." *Id.* What is remarkable about the characterization of these acts as "misconduct" is that it lays bare the moral judgment that, in more typical cases, remains just beneath the surface.

¹⁷⁸ *Id.* at 638.

mania,"¹⁷⁹ a condition defined by "unmanageable sexual desire."¹⁸⁰ Here we see the unrapeability presumption¹⁸¹ in its most naked form: "[A] female so afflicted could possibly be raped but . . . it was not probable."¹⁸²

Though typically less visible, this presumption lurks throughout the jurisprudence of sexual patterns.

IV

THE CONTINGENCY OF CONSENT

We have seen that judges divide the sexual universe into the consensual, the nonconsensual, and what I shall term the aconsensual. With aconsensual sex, consent is imputed from prior consensual sex acts of a like nature.¹⁸³ Judges implicitly set the boundaries of this kind of sex, not through a process of reasoning, but by making thinly disguised judgments about sexual normativity.¹⁸⁴ This casts in doubt the law of sexual patterns.

Thus far, the critique has exposed fundamental problems with the implementation of rape shield law. Given the futility of excising normative judgments from judicial decision making around women's

¹⁷⁹ *Id.* at 634. To be clear, Dr. Taylor never examined the victim in the case. Rather, the in-court "nymphomania" diagnosis of which the court approves was based solely on facts contained in a "hypothetical question . . . about the complainant's alleged consensual sexual misconduct subsequent to the occasion in question." *Id.*; see also *supra* note 177 (discussing court's use of "misconduct" to summarize the acts in question). It is also worth noting that nymphomania is not a recognized diagnosis according to the American Psychiatric Association's official guide to mental illness, the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV; nor, more to the point, was nymphomania recognized by the DSM-III-R, the reference manual current when the court decided *Chew*. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (4th ed. 1994); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R (3d ed., rev. 1987).

¹⁸⁰ *Chew*, 804 S.W.2d at 634.

¹⁸¹ See *supra* note 80 and accompanying text.

¹⁸² *Chew*, 804 S.W.2d at 634.

¹⁸³ In this sphere, belief in the contingent functioning of consent is suspended.

¹⁸⁴ See *supra* note 75 and accompanying text. This observation is also consistent with the more general proposition that "relevance . . . depends on a decisionmaker's particular worldview, itself deeply embedded in a social context." Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 974 (2004); see also Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 627 (1994) ("Evidence is not a set of things, as the conventional theory would have it; it is instead the process by which fact finders come to conclusions about the past."); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 131 (1996) ("[I]t is not logic but cultural beliefs that determine that the prior sexual history of a woman who alleges she has been raped is relevant to the question of whether she 'in fact' consented on the occasion in issue."); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 430-34 (1991) (arguing that the evidentiary relevance rules discriminate against women by virtue of the fact that "relevance is . . . in the eye of the beholder" and trial judges tend to "solidif[y] a white male perspective").

sexuality,¹⁸⁵ this failure might be reason enough to abandon the pattern exception.

But the problems of the pattern evidence exception lie not just in application; rather, the exception is conceptually flawed. Efforts to discern probative value in previous sexual consent cannot be rationalized.¹⁸⁶ To test the proposition, let us pursue the following abstract inquiry: Is a morally neutral stance on female sexuality consistent with the notion that sexual consent on one occasion may be probative of consent on another and that these circumstances can be divined through a process of reason? This framework highlights the only justification for admitting sexual history evidence to show consent (i.e., its probative value with regard to whether the woman actually consented to the alleged rape).¹⁸⁷

What we know about sexuality¹⁸⁸ suggests, as a descriptive matter,¹⁸⁹ that consent is contingent—meaning that consent on one occasion is not probative of consent on another. Though this does not mean that a court should never admit a woman’s sexual past at trial,¹⁹⁰ it does indicate the need for a dramatic analytic shift in the treatment of sexual history evidence. Before explaining this approach,¹⁹¹ I first elaborate on the idea of contingent consent by offering a taxonomic description of sexual variability.

A. A Taxonomy of Sexual Variability

Along multiple dimensions,¹⁹² women and men confront variables potentially relevant to a willingness to engage in sexual conduct.¹⁹³ As a starting point for discussion, I identify these overlapping

¹⁸⁵ This assessment would find considerable support in the many ways that rape law has been used over time to constrain women’s sexual autonomy. See Roberts, *supra* note 5, at 368–88.

¹⁸⁶ See *infra* notes 220–25 and accompanying text.

¹⁸⁷ The question might be more precisely framed as follows: Does sexual consent on past occasions where rape was not alleged bear on subsequent consent where rape was alleged? But since this inquiry substantially departs from existing evidentiary approaches, I do not pursue it here.

¹⁸⁸ I do not rule out the possibility that this knowledge will evolve, though the adaptation of future social science research to the criminal justice setting is a separate question.

¹⁸⁹ For the normative argument, see Anderson, *supra* note 10, at 924–27.

¹⁹⁰ See *infra* Part IV.B.

¹⁹¹ See *id.*

¹⁹² The suggested taxonomy encapsulates a more nuanced way of thinking about patterns. It does not purport to capture the full range of human sexuality or to provide an explanatory model of sexual behavior. Efforts in this direction may well be doomed to fail.

¹⁹³ Recent empirical work on women’s sexual experiences suggests even more complicated realities than are generally perceived. For instance, researchers have suggested the need to disentangle the concepts of sexual wanting and sexual consent. See Zoë D. Peterson & Charlene L. Muehlenhard, *Conceptualizing the “Wantedness” of Women’s Consensual and Nonconsensual Sexual Experiences: Implications for How Women Label Their Experiences with Rape*, 44 J. SEX RES. 72, 73–74 (2007). Subjects’ reasons for wanting and reasons for not wanting

and possibly underinclusive realms: spatial, temporal, behavioral,¹⁹⁴ and—what for many may be the most influential factor—the partner personal.¹⁹⁵ In the course of describing these realms, I observe that each has been inadequately accounted for within the law. And yet, the collective existence of these realms—and the fact that women afford varying degrees of significance to each—hinders the possibility of forecasting consent. This dynamic is exacerbated by the prospect of intersectional effects between apparently separate domains.

1. *Spatial*

The spatial realm implicates the choice of where to participate in sexual activities. There are countless ways of geographically dividing the world of sex, which reaches far beyond the marriage bed. In the rape shield context,¹⁹⁶ however, this world tends to be simplistically divided into public and private space.¹⁹⁷ Conduct deemed public has been assumed to bear on the likelihood of further consensual activities of a putatively nonprivate nature.¹⁹⁸

Judges do not always observe the spatial components of their analysis. For instance, in a case involving the rape of a high school girl by three fellow students in a park, the court affirmed the inadmissibility of evidence of the victim's "earlier consensual sexual intercourse with another student in an alley behind a movie theater," but only because there was "no showing of the appellants' knowledge of that promiscuous behavior."¹⁹⁹ The court did not draw an explicit connec-

sex illustrate the complexities involved in women's sexual decision making. *See id.* at 78. The data suggests the coexistence of reason and desire in influencing consent, and raises interesting possibilities for further research that can inform the law of rape.

¹⁹⁴ Here I do not differentiate between behaviors that take place before the sexual act and those intrinsic to the act itself. *See infra* notes 204–13 and accompanying text.

¹⁹⁵ The partner-personal category includes all considerations related to the sexual partner's identity. *See infra* notes 214–19 and accompanying text.

¹⁹⁶ Even outside this context, sexual conduct in the public domain is of concern. Consider *Lawrence v. Texas*, 539 U.S. 558 (2003). In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and striking down a statute criminalizing "deviate sexual intercourse," the U.S. Supreme Court described the case as "involv[ing] liberty of the person both in its spatial and in its more transcendent dimensions." *Lawrence*, 539 U.S. at 562–63. This transcendence was qualified, however: the Court expressly noted that the case did "not involve public conduct." *Id.* at 578. For a critique of the Court's *Lawrence* decision and its perpetuation of gendered sexual roles, see Rosenbury & Rothman, *supra* note 74, at 825–42.

¹⁹⁷ *See, e.g., State v. Shoffner*, 302 S.E.2d 830, 832–33 (N.C. Ct. App. 1983) ("The evidence excluded suggests that the prosecuting witness's *modus operandi* was to accost men at clubs, parties (public places) and make sexual advances by putting her hands 'all over their bodies.');" *supra* notes 144–50 and accompanying text (discussing *State v. Sheard*, 870 S.W.2d 212 (Ark. 1994)).

¹⁹⁸ *But see* *People v. Wilhelm*, 476 N.W.2d 753, 759 (Mich. Ct. App. 1991) (upholding exclusion of evidence that victim exposed her breasts to two male bar companions, stating, "we fail to see how a woman's consensual sexual conduct with another in public indicates to third parties that the woman would engage in similar behavior with them").

¹⁹⁹ *In the Interest of J.F.F.*, 341 S.E.2d 465, 467 (Ga. Ct. App. 1986).

tion between the location of the prior conduct and its designation as promiscuous.

At other times, the reliance on the public/private distinction is made explicit. In one such case, the New Hampshire Supreme Court, per Justice Souter, reversed the conviction of a defendant on the basis that he was entitled to introduce evidence that the victim had “directed sexually provocative attention toward several men” in a bar before eventually leaving for the defendant’s trailer, where the two engaged in intercourse.²⁰⁰ On the disputed issue of consent, the court expressed the probative value of the excluded evidence as follows: “[T]he jury could have taken evidence of the complainant’s *openly* sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group.”²⁰¹ The public nature of the bar was critical to the analysis:

As soon as we address this process of assigning relative weight to prejudicial and probative force, it becomes apparent that the public character of the complainant’s behavior is significant [E]vidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners.²⁰²

Notwithstanding a judicial focus on space that is insufficiently private, whether and, if so, how spatial geographic concerns impact women’s sexual choices remains unknown.

2. *Temporal*

A woman may consent to sexual conduct at different times (per the clock or calendar, or even in relation to particular events) on different days. Conversely, she may choose only to engage in sex at a given time. Rarely does the question of timing explicitly appear in discussions of sexual patterns.²⁰³

3. *Behavioral*

Falling along this axis are pre-sex act behaviors²⁰⁴ as well those behaviors intrinsic to the act, including type of intercourse and num-

²⁰⁰ State v. Colbath, 540 A.2d 1212, 1212 (N.H. 1988).

²⁰¹ *Id.* at 1217 (emphasis added).

²⁰² *Id.* at 1216.

²⁰³ See *supra* note 53 and accompanying text (describing Vivian Berger’s hypothetical involving Saturday nights); cf. *Colbath*, 540 A.2d at 1216 (relating a woman’s “contemporaneous receptiveness to sexual advances”). But see State v. Pancoast, 596 So. 2d 162, 163 (Fla. Dist. Ct. App. 1992) (per curiam) (noting relevance of “the time of day of the encounters”).

²⁰⁴ See, e.g., State v. Hudlow, 659 P.2d 514, 520 (Wash. 1983) (en banc) (“For instance, if a complaining witness frequently engages in sexual intercourse with men shortly after

ber of partners (which we have already seen, tend to preoccupy the judiciary).²⁰⁵ None of this, as far as we know, has probative value without regard to the other domains, particularly the partner personal.²⁰⁶

Yet a notable asymmetry undermines the law's treatment of sexual behaviors. Engaging in anal sex is thought to suggest a propensity for the same; engaging in vaginal intercourse does not. Participation in three-way sex is deemed probative of future three-way sex; the same is not true of sex with a single partner.

We see similar tensions in the question of whether sexual activity—of any kind, with any partner—bears on further sexual activity—of any kind, with any partner. The core rape shield rule roundly and rightly affirms the notion that, as a general proposition, consent to intercourse is incident bound.²⁰⁷ A willingness to engage in sexual activities does not imply consent in perpetuity. Accordingly, a woman cannot be cross-examined on her nonvirginal status to show consent;²⁰⁸ here, the law's directive is clear.

But courts have struggled with a converse inquiry, which asks whether virginity is probative of nonconsent.²⁰⁹ Put differently, are there shared characteristics of a nonsexual existence²¹⁰ that mark *it* as distinctive? The issue typically arises when the state seeks to introduce evidence of a rape victim's virginity to show the greater unlikelihood that she would have consented to intercourse with the defendant. With little discussion, appellate courts have at times found error in the admission of this type of evidence,²¹¹ and in other cases affirmed it.²¹²

meeting them in bars, this would have some relevancy if the defendant claims she consented to sexual intercourse with him under similar circumstances.”).

²⁰⁵ See, e.g., *supra* notes 163–82 and accompanying text.

²⁰⁶ See *infra* notes 214–19 and accompanying text.

²⁰⁷ See FED. R. EVID. 412.

²⁰⁸ See *id.* But see *supra* note 11 (noting FED. R. EVID. 412's exception for evidence of prior sexual conduct offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence).

²⁰⁹ See *People v. Vargas*, No. H020097, 2002 WL 244982, at *8 (Cal. Ct. App. Feb. 20, 2002) (“Given the lack of evidence of virginity, the introduction of evidence that Jane was not a virgin could have led the jury to infer a likelihood that she did give consent. We note, however, that the notion that an ‘unchaste’ woman is more likely to consent than her virtuous counterpart is ‘archaic and discredited.’”).

²¹⁰ For present purposes, this formulation does not encompass solo activities.

²¹¹ See, e.g., *People v. Bone*, 584 N.W.2d 760, 761 (Mich. Ct. App. 1998) (precluding “evidence of a victim's virginity as circumstantial proof of the victim's current unwillingness to consent to a particular sexual act” (footnotes omitted)); cf. *Commonwealth v. Francis*, No. 99-P-1256, 2001 WL 958756, at *3 (Mass. App. Ct. Aug. 22, 2001) (“Assuming without deciding that [the victim] should not have been allowed to state that she was a virgin at the time here in issue . . .”).

²¹² See, e.g., *State v. Bradley*, 230 P.2d 216, 219 (Ariz. 1951) (evidence of prior virginity made it highly unlikely that victim had consented to intercourse with a stranger in a pre-rape shield case); *State v. Preston*, 427 A.2d 32, 33–34 (N.H. 1981) (per curiam) (rape shield rule does not prohibit introduction of evidence of victim's virginity to show nonconsent to alleged rape); cf. *People v. Prentiss*, 172 P.3d 917, 923 (Colo. App. 2006) (rape

That courts reach opposite conclusions in the face of functionally similar facts is hardly news. What is striking here, however, is the failure to squarely confront whether there is a meaningful distinction between entering the realm of the sexual and not entering this realm at all.²¹³

4. *Partner Personal*

Last, and often most importantly, is the realm of partner characteristics, which I take to include the full spectrum of individual traits. Over time, a woman's sexual partners might share any number of attributes related to personality, interests, vocation, religion, age, race, class, ethnicity, culture, appearance, educational background, marital status (including in relation to the woman), gender,²¹⁴ sexual identity, and surely others. Courts rarely mention these similarities.²¹⁵ Even on those rare occasions where they do,²¹⁶ left unsaid is why these similarities are or are not significant.

The recognition that sexual consent depends on partner selection may help to explain the admissibility of prior consensual acts with the defendant.²¹⁷ Now the rule of exclusion is inverted to dictate the following proposition: though a woman's consensual conduct with A does not bear on her willingness to engage in sex with B, it is highly probative of subsequent consent to sex with A.

But this construction is not inevitable, and need not flow from the precept that sexual consent is partner specific. Canadian law actually codifies the very opposite supposition (i.e., consensual sex with A

shield rule does not preclude inquiry into prior sexual history of thirteen-year-old victim with hymenal injury).

²¹³ The most explicit mention of this issue may be found in a 1973 case, where the Massachusetts Supreme Judicial Court found a "rational basis for distinguishing between admitting evidence that the victim was a virgin and excluding evidence of specific prior events of intercourse in which the victim participated." *Commonwealth v. McKay*, 294 N.E.2d 213, 218 (Mass. 1973). While noting the time and distraction involved in proving prior intercourse, the court noted without elaborating on the relative proof value of the two categories of evidence:

The victim's lack of virginity . . . has little probative value on the issue of consent because the victim's consent to intercourse with one man does not imply her consent in the case of another. On the other hand, the status of the victim as a virgin at the time of the alleged crime has far more probative value on the issue of consent.

Id. (internal citations omitted).

²¹⁴ See Peter Nicolas, "*They Say He's Gay*": *The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 824-25 (2003) (discussing cases involving evidence that the victim was a lesbian where such evidence was offered by the prosecution to rebut a consent defense).

²¹⁵ But see *supra* note 28 and accompanying text (raising victim's predilection for football players, *Hardy v. State*, 285 S.E.2d 547, 551 (Ga. Ct. App. 1981)).

²¹⁶ See *United States v. Kelly*, 33, M.J. 878, 882 (A.C.M.R. 1991); *supra* note 39 and accompanying text.

²¹⁷ See *supra* note 93 and accompanying text (citing FED. R. EVID. 412(b)(1)(B)).

is not evidence of consent with A under differing circumstances).²¹⁸ Perhaps we too should be less sanguine about assuming this type of sexual path dependence.²¹⁹

Putting this suggestion to the side, notice that despite the basic insight of rape shield law, the identity of one's sexual partner is not always respected as paramount. Rather, at times, particular sexual *behaviors* are afforded a greater descriptive power. On these occasions, a woman's conduct becomes the thread that weaves together a perceived pattern; her partner's identity is less important than *what* she is doing with *whomever* he might be. This discrepancy demands a rationale—one that has not been articulated. In the face of this void, we ought to be wary of legal judgments about female sexuality.

B. An Instrumental Approach to Sexual History Evidence

Imagine a sexual encounter that shares particular characteristics with another. Now ponder how you conjured up this constellation of traits, and decide whether it is purely descriptive or whether it tends to foretell consent on a later occasion, at a different time, with a different person. What informs your reasoning?

As we have seen, the rape shield law does not undertake this inquiry. Rather, it proceeds from the premise that, given the facts described above, a woman's consent to engage in sex is more likely than would otherwise be the case; not always, but provided the conduct at issue is viewed as sharing the common traits of past behaviors. But support for this supposition is hard to come by. Why women consent

²¹⁸ In Canada, evidence of a woman's prior consensual conduct with an accused is "not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief." Canada Criminal Code, R.S.C. 1985, c. C-46, s. 276. For a thorough discussion of Canada's approach, see generally Susan M. Chapman, *Section 276 of the Criminal Code and the Admissibility of "Sexual Activity" Evidence*, 25 QUEEN'S L.J. 121, 124–27 (1999) (exploring Canada's approach to sexual activity evidence). See also *People v. Buchanan*, No. 258575, 2006 WL 1115968, at *2 (Mich. Ct. App. Apr. 27, 2006) (affirming exclusion of evidence of wife's "propensity to engage in 'rough' consensual sex" with her husband); Hart Schwartz, *Sex with the Accused on other Occasions: The Evisceration of Rape Shield Protection*, 31 CRIM. REPS. 232, 234 (1994) ("[P]ersons involved in an ongoing relationship do not, by that fact alone, provide some kind of tacit, or inferred, consent that they are willing to engage in sexual activity. 'Actual consent' is a decision made by each of the parties at the particular time and in the particular circumstances in question.").

²¹⁹ To be clear, evidence of prior consensual sex with the defendant does not preclude a finding of later nonconsent. But while the rape shield exception is formally compatible with still recent recognition that marital rape is a crime, evidence law may well reflect vestiges of the ideology that sanctioned rape within marriage. See generally Hasday, *supra* note 169, at 1486–91 (exploring modern defense of marital rape exception).

to sex under some circumstances but not others is not known—even, or perhaps especially, by judges.²²⁰

A theory of probative value might be grounded in an understanding of sexual behavior as bypassing the reasoning process altogether. From this perspective, consent is given in unthinking fashion.²²¹ Female sexual desire is the antithesis of rationality, and the female body is merely subject to lust.²²² But this vision fails for a number of reasons that should by now be evident.²²³ First, it does not readily lend itself to the line drawing required to distinguish between inadmissible sexual history evidence (the rule) and admissible sexual history evidence (the exception). Second, it is at odds with the requirement of willed consent that lies at the heart of rape law. Lastly, it does not comport with what we know about human sexual behavior.²²⁴

The alternate theory of sexual consent that I advance rests on its contingency. A contingent view of consent is contextual, defining a willingness to engage in sexual activities as circumscribed by the particularities of the moment. This is the conception embraced, albeit sporadically, by the law of rape. Moreover, reflecting the multiplicity of dimensions along which sexual encounters vary, the account is epistemologically sound.

If indeed consent is contingent, it gives the lie to claims that a woman's willingness to engage in sexual acts on one occasion makes her more likely to consent under different circumstances. This contingent view of consent, which is essentially codified by the rape shield rule, is inconsistent with an exception for particular sexual histories. A qualified rape shield rule sees sexual consent as context dependent, except when context disappears from judicial view. Even in the abstract, faulty application aside, the sexual pattern exception fails the test of reason.

To reject the proposition that sexual history is probative of consent is not to say that a defendant's right to present a meaningful de-

²²⁰ I presume that judges have no special insights about sex that enable them to reach sound conclusions by virtue of their judicial status. See source cited *supra* note 69.

²²¹ See *supra* notes 56–57 and accompanying text (discussing the legal treatment of habit evidence).

²²² See *supra* notes 170–82 and accompanying text (discussing *Chew v. State*, 804 S.W.2d 633 (Tex. Ct. App. 1991) (en banc)); see also Roberts, *supra* note 5, at 365 (“[M]yths of the licentious Black woman and brutish Black man were deliberately perpetuated after slavery ended and persist in contemporary American culture.”).

²²³ See *supra* notes 56–67 and accompanying text (rejecting analogies to habit and *modus operandi*).

²²⁴ See *supra* notes 57, 123 and accompanying text; *supra* notes 192–95 and accompanying text (noting that consent to engage in sexual behavior is both distinctly volitional and partner specific).

fense²²⁵ never requires the admission of sexual history evidence. As a matter of fairness to the defendant, there may indeed be times when a court should allow this evidence. But, unlike the law's treatment to date, a consent defense does not itself trigger this need. Put differently, one cannot justify a rule that makes an *ex ante* determination in favor of admissibility (i.e., patterned sexual history evidence becomes admissible when a defendant raises a consent defense).

The proper default, in a rape prosecution in which consent is disputed, is that a victim's sexual history is inadmissible.²²⁶ A court should only admit this evidence if the prosecutor's case-in-chief has somehow enhanced its probative value, infusing it with significance beyond the prohibited inference that consent begets consent.

This alternative approach to admissibility is instrumental, meaning that it takes account of the prosecutor's theory of guilt.²²⁷ In other words, a court should only allow sexual history evidence when the prosecutor's case-in-chief has opened the door to its use.²²⁸ To be clear, the door does not open simply because a defendant claims that the victim consented, as the status quo permits. Instead, the trial

²²⁵ See *supra* note 30 and accompanying text (describing constitutional grounding for this right).

²²⁶ The rules of evidence generally require judges to balance the probative value of evidence against the danger that the evidence will confuse the jury or unfairly prejudice the jury by its admission. See, e.g., FED. R. EVID. 403. This may result in the exclusion of evidence that satisfies the minimal test of relevancy. But unless the excluded evidence is "critical," its exclusion does not violate the defendant's constitutional rights. See *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973); see also *Ex parte Dennis*, 730 So. 2d 138, 140–41 (Ala. 1999) (collecting cases affirming the exclusion of evidence).

²²⁷ Technical implementation of this approach would depend on the current formulation of rape shield law in the particular jurisdiction. See *supra* notes 32–34 and accompanying text (providing overview of various rape shield law regimes). In some jurisdictions, this effort would require statutory elimination of the existing exception for pattern evidence. In other jurisdictions, like the federal courts, statutory amendment might codify the following proposition:

Sexual behavior with persons other than the accused is not admissible to prove consent, regardless of perceived similarity to the charged offense. It may only be offered to rebut evidence or argument tending to deny the occurrence of other sexual behavior.

While legislative change of this sort cannot dictate the constitutional analysis, it can substantially frame it. Of course, judges are the final arbiters of the question.

²²⁸ "Door opening" is a familiar evidentiary concept:

In essence, parties may lose the right to exclude evidence by their "affirmative strategies." . . . [Door-opening] involves the use of "counterproof" and encompasses both situations in which the invited evidence is admissible (e.g., character of the defendant) and inadmissible (no objection was raised to the initial evidence). Door-opening, then, strongly smacks of a "tit-for-tat rule" that is fully justified by the adversarial ethos: "[t]he real concern . . . is that evidence that might affect outcome should not be immune from rebuttal."

Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 22–23 (2006) (footnotes omitted) (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.4, at 11–12 (3d ed. 2003)).

court must assess the evidential worth of the victim's prior sexual conduct solely in relation to the state's theory of guilt.²²⁹ In short, the probative value of a woman's sexual history must be evaluated—as with any other evidence—with regard to the entire evidentiary record.²³⁰

The approach that I advocate acknowledges that the prosecution's presentation of particular arguments and testimony may, under rare instances,²³¹ create the conditions under which it would be unfair to exclude sexual history evidence. It allows defendants to offer this evidence when it is directly responsive to specific testimony or comment. But it does not allow the inference that prior consent predicts later consent. In short, the proposed approach maintains fidelity to the core prohibition of rape shield law.

For a few illustrations of the circumstances I have in mind: If a prosecutor argues that the jury should infer nonconsent from what is referred to as the "bizarre" nature of the sexual conduct at issue, a judge might allow evidence that the victim previously engaged in this type of conduct. If a victim testifies that she would never willingly participate in a particular sexual behavior, a judge might allow evidence of such prior consensual activities.

These rulings would fully accord with the accepted judicial practice of allowing a defendant to introduce evidence of a woman's prior sexual conduct only if she has testified to her virginal status.²³² Absent this testimony, such evidence is prohibited—and it is not persuasive for a defendant to argue that his consent defense makes it otherwise. But if the prosecution's proof alters the evidentiary significance of the victim's prior sexual history, the categorical rule of exclusion is suspended, and a fact-specific ruling demanded. This practice

²²⁹ See Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439, 440 (1994) ("[A] determination of the conditional probative value of a given piece of evidence is much like the ordinary determination of probative value—except that the determination must be made twice, once with a prescribed evidentiary condition satisfied and once without.").

²³⁰ I recognize that this solution leaves room for the continuing influence of judicial-deviancy conceptions. Although the proposal does not definitively resolve the problems I identify—as would an absolute rule of exclusion—it does place meaningful limits on any role for normative assessments of female sexuality.

²³¹ In most cases, the victim's prior sexual history and arguments that imply or derive from it are not particularly probative of a fact in dispute. It may also be true that never having engaged in a particular sexual activity with a specific individual is more suggestive of nonconsent to that activity with the individual than is the converse.

²³² See, e.g., *In re K.W.*, 666 S.E.2d 490, 494 (N.C. Ct. App. 2008) (rape shield law does not prohibit the admission of prior sexual conduct to impeach a victim's testimony that she was a virgin prior to rape); cf. *People v. Vargas*, No. H020097, 2002 WL 244982, at *8 (Cal. Ct. App. Feb. 20, 2002) (rejecting a defendant's claim that the trial court erred in excluding evidence that the victim was not a virgin "[g]iven the lack of evidence of virginity," and noting that "[d]efendant does not explain, and we cannot conceive, how the evidence would do so except by supporting the impermissible inference").

is the appropriate response to sexual history evidence, whether or not it is called patterned.

Courts should treat sexual history evidence consistently, by limiting its admissibility to a rebuttal function.²³³ Constraining the use of prior sexual conduct in this manner rationalizes the rape shield, re-orienting the law to a vision of consent unmediated by juridical conceptions of proper female sexuality, and untarnished by an insistence that this boundary must exist.²³⁴

CONCLUSION

As rape shield law entered its second decade, Professor Harriet Galvin proposed amending the rules to absolutely prohibit the “invidious unchaste-character inference.”²³⁵ Twenty-five years after this seminal treatment of the subject, sexual history exceptions endure as a relic of the very same inference that Galvin sought to eliminate. Cloaked in the legitimizing rhetoric of patterns, the exception allows precisely what the rape shield purports to reject.²³⁶ All the while, the law of patterns continues to inscribe a constricted view of female sexuality.²³⁷

²³³ The meaning of “rebuttal” that I am intending here has been described as follows: “[T]he defendant’s evidence in opposition very frequently also rebuts (i.e. tends to explain, repel, counteract, or disprove) the evidence offered by the prosecution.” Michael H. Graham, *Error on Appeal: Wavier of Right, Invited Error, Rebuttal, and “Door Opening,”* 41 CRIM. L. BULL. 641, 644 (2005).

²³⁴ See *supra* text accompanying note 114 (observing that “the idea of sexual outlandishness remains”).

²³⁵ Galvin, *supra* note 3, at 809.

²³⁶ One may situate this observation within a larger feminist critique of rape law. As Susan Estrich writes:

Sexism in the law of rape is no matter of mere historical interest; it endures, even where some of the most blatant testaments to that sexism have disappeared. Corroboration requirements unique to rape may have been repealed, but they continue to be enforced as a matter of practice in many jurisdictions. The victim of rape may not be required to resist to the utmost as a matter of statutory law in any jurisdiction, but the definitions accorded to force and consent may render “reasonable” resistance both a practical and a legal necessity. In the law of rape, supposedly dead horses continue to run.

Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986); see also Nourse, *supra* note 10, at 961–70 (discussing how, while courts have overturned laws exempting spousal rape, “the ideas that shape the marital exemption have not died”).

²³⁷ Laura Rosenbury and Jennifer Rothman have persuasively argued that “legal scholars should care about challenging the current construction of sex, both within the law and outside of it.” Rosenbury & Rothman, *supra* note 74, at 813. As Rosenbury and Rothman observe:

[T]he construction, and laws that contribute to it, benefit some individuals while harming others, thus conflicting with norms of equality and individual liberty. The vision of acceptable sexual activity furthered by the current construction of sex is primarily modeled on heterosexual, monogamous couples, thus channeling sex into a domesticated and gendered form. Indi-

The dominant rape trial paradigm is now acquaintance rape,²³⁸ elevating the theoretical and doctrinal prominence of consent,²³⁹ along with the evidence that attends its proof. For this next era of rape prosecution, a framework for deciding the admissibility of sexual history evidence must contemplate the full spectrum of female sexual practices²⁴⁰ just as it affirms the contingency of consent.²⁴¹

I argue that sexual history evidence²⁴² is not generally probative of consent. This is true regardless of the normative judgment that attends the behavior in question. It holds true whether the conduct is considered mainstream or outlandish, common or unusual, quotidian or kinky, normal or deviant. The proposed approach to admitting history evidence incorporates these insights.

Here, negative and positive sexual freedoms converge:²⁴³ the law protects women's freedom from sexual violation, just as it protects the freedom to engage in all manner of consensual sexual practices. Affirming the contingency of consent allows for better views of its presence, its absence, and its ambiguities.²⁴⁴ We become more able to distinguish sex that is blameworthy from sex that is not.

viduals who do not adhere to this vision are stigmatized as being hypersexual, asexual, criminal, or otherwise deviant.

Id. (footnote omitted).

²³⁸ See *supra* notes 9–10 and accompanying text.

²³⁹ The centrality of consent to the law of rape has been subject to legitimate critique. See Chamallas, *supra* note 18, at 797–800; see also Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1414–21 (2005) (arguing that, in light of the shortcomings of the consent requirement, it should be replaced with a negotiation requirement). For a recent defense of the position that consent should continue to mark the boundary between criminal and noncriminal sex, see West, *supra* note 67, at 221–50.

²⁴⁰ See Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 280, 282 (2008) (describing the “newer generation” of sex-positive feminism as advancing the insight that, “while sex might in some cases be a source of danger for women, it is also a potentially important site of pleasure, fulfillment, and even power”); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 199–200, 202 (2001).

²⁴¹ See *supra* notes 224–25 and accompanying text.

²⁴² Again, the sexual pattern exception is separate from the law's treatment of prior sex between the victim and the defendant. See *supra* notes 122–23 and accompanying text (noting the distinction). Though this Article focuses on the former, many of its claims have relevance to the latter exception as well. See *supra* note 218 and accompanying text (describing Canadian rape shield law, which excludes this type of evidence). Further analysis of this question is beyond the scope of this work, though it is due.

²⁴³ See Franke, *supra* note 240, at 182 (“Curiously, since the end of the so-called ‘sex wars’ in the 1980s, it seems that legal feminists have ceded to queer theorists the job of imagining the female body [sic] as a site of pleasure, intimacy, and erotic possibility. While we devote our considerable energies to addressing sexuality understood in terms of freedom from oppressive practices, feminists in other disciplines continue to simultaneously approach questions of sexuality in both negative (freedom from) and positive (freedom to) terms.”).

²⁴⁴ See West, *supra* note 67, at 246 (“Consent may well be a good marker for the divide between the criminal and noncriminal in sex as elsewhere; I believe it is. It's not a good proxy for well-being. We should not treat it as such.”).