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# The Seductive Power of Patriarchal Stories

AVIVA ORENSTEIN\*

In his book, *Rape and the Culture of the Courtroom*,<sup>1</sup> the late Professor Andrew Taslitz (hereinafter lovingly referred to as Taz) analyzed the patriarchal stories that permit lawyers, judges, and juries to rely on sexist stereotypes and rape myths to discount victims' accounts of rape.<sup>2</sup> To honor Taz's scholarship, this Essay applies his brilliant scholarship and passionate insights to recent case law involving rape shield and the interpretation of rape shield statutes.

This Essay will focus on cases in which the accused argues that rape shield's policy of excluding certain evidence about the rape victim violates his constitutional rights, and it will question the exception for prior sex with the accused. It examines the degree to which judges rely on patriarchal stories to determine whether evidence about the victim's sexual past or propensities is essential to a fair defense. It also analyzes the extent to which such constitutional objections function as a vehicle for circumventing the social policy and law reform for which rape shield was promulgated.

This Essay will begin by reviewing Taz's thesis about the role of patriarchal stories in shaping rape trials and the impediments such stories present for victims trying to tell their stories in a way that judges,

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1. ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* (1999). The name of this Essay, *The Seductive Power of Patriarchal Stories*, is intended as a tribute to the power of Taz's scholarship, which explained the nature of patriarchal stories and their role in shaping the culture of rape trials. Additionally, it acknowledges the continuing, powerful draw of such stories on our collective imaginations, and discusses how these stories influence our understanding and treatment of rape victims fifteen years after Taz's masterwork was published.

2. See generally Andrew E. Taslitz, *Patriarchal Stories: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387 (1996) (basing the book in part on his article).

juries, and the public can understand. It then briefly presents the federal rape shield statute. It analyzes the operation of recent constitutional attacks on rape shield in recent rape cases, focusing on an en banc decision from the Sixth Circuit.<sup>3</sup> The critique of the recent constitutional cases will lead to a broader analysis of the role of propensity and a deeper examination of what information about the victim the jury needs to know. Finally, this Essay will discuss the role of propensity in rape shield exceptions.

A review of recent cases validates the persistent power of patriarchal stories. The open-ended constitutional exception invites sexist thinking and subversion of rape shield principles. Sometimes, the accused's constitutional claims indicate a resistance to the entire enterprise of rape shield—the accused is merely attempting to trigger the exception to legitimate the patriarchal stories he sees as essential to his defense.<sup>4</sup> In other cases, truly difficult questions arise about the fairness of excluding evidence that negates a presumption about the victim or conveys significant information about the victim's motive.

## I. PATRIARCHAL STORIES AND THE CULTURE OF RAPE TRIALS

Taz observed how cultural tropes, the adversary system, and the language of courtroom discourse serve to subvert the victim's ability to tell her story and be heard. He noted how gender stereotypes and rape myths can play into sexist and racist attitudes that harm the victim and render her less likely to be believed. Rape myths are empirically untrue but firmly held notions about the incidence and nature of rape.<sup>5</sup> These prejudicial false beliefs about rape, rape victims, and rape perpetrators rely on and perpetuate gender stereotypes. As Taz explained, “jurors judge the credibility of courtroom stories by comparing how they square with standard cultural ones.”<sup>6</sup>

Taz recounted the various and sometimes contradictory cultural tale of rape. He observed our culture's “dual message: only vixens get raped, and when it happens it really is not rape anyway because they

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3. See *infra* Part II D.

4. As did Taz, I refer to the accused rapists as men and the alleged victims as women because this reflects the overwhelming gender dynamics of rape accusations outside of prison. See TAsLITZ, *supra* note 1, at xi.

5. See generally Eliana Suarez & Tahany M. Gadalia, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 J. INTERPERSONAL VIOLENCE 2010 (2010) (examining rape-myths acceptance in published studies).

6. TAsLITZ, *supra* note 1, at 17.

really want and deserve it.”<sup>7</sup> Such patriarchal stories “portray women as hypersexual, selfish liars.”<sup>8</sup> This focus on the lying victim is pronounced in rape cases, and is associated with either female delusion or vengeance.<sup>9</sup> As Taz observed, “[r]arely is the robbery victim portrayed as deranged or a liar.”<sup>10</sup> He therefore concluded that “[t]reating rape like other crimes fails to contend with the unique power of these narratives.”<sup>11</sup>

The patriarchal story concerning a “real” rape victim<sup>12</sup> recounts the tale of a virtuous woman who behaves modestly and cautiously but nevertheless is brutally attacked by a deviant stranger. When the facts of a rape story diverge from this cultural paradigm—such as when the victim is perceived to be sexually promiscuous, incautious, or drunk, she is seen as untrustworthy, partly culpable, or simply not worth bothering about.<sup>13</sup>

## II. FEDERAL RAPE SHIELD LAW

Historically, the law treated a woman claiming to be a rape victim with great suspicion,<sup>14</sup> subjecting her to intense cross-examination regarding her dress, sexual history, and proclivities. Any prior sexual activity on her part outside of marriage undermined the veracity of the victim’s claim. First, defense attorneys argued, such sexual activity indicated that she did not value her chastity or her marriage vows, a

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7. TASLITZ, *supra* note 1, at 8.

8. TASLITZ, *supra* note 1, at 8.

9. TASLITZ, *supra* note 1, at 18.

10. TASLITZ, *supra* note 1, at 6.

11. TASLITZ, *supra* note 1, at 154.

12. SUSAN ESTRICH, *REAL RAPE* 1 (1987).

13. Psychologists tell us that victims are blamed for sexual or incautious behavior such as flirting, taking a man to her room, or drinking. See, e.g., Dominic Abrams et al., *Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity*, 84 J. PERSONALITY & SOC. PSYCHOL. 111 (2003) (“Researchers have reported that both legal practitioners and laypersons attribute blame to rape victims on the basis of extralegal factors such as clothing.”) (citations omitted); Amy Grubb & Julie Harrower, *Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim*, 13 AGGRESSION AND VIOLENT BEHAVIOR 396, 397 (2008).

14. This suspicion can be traced back to the Bible, in which rape accusations that occurred in the city, where screams could be heard, were disbelieved. See *Deuteronomy* 22:24–25. As Taz explained:

[F]ear of female lies led judges to caution jurors about Hale’s concerns. Again, for no other crime were jurors told to distrust the victim. ‘Hell hath no fury like a woman scorned,’ the ‘sense of shame after consenting to illicit intercourse’, and similar motives to lie were said to explain why rape had to be treated differently. Notably, to avoid false cries of rape by women feeling guilty about their consensual sexual exploits, the law required women to resist to the utmost.

TASLITZ, *supra* note 1, at 152.

fact which made her a promiscuous character who was more likely to consent to sex with the accused. Second, any pre-marital sexual activity was deemed a character flaw that generally undermined her truthfulness.<sup>15</sup> Third, although it was never openly expressed as such, a woman who was sexually active outside of marriage was already “damaged goods”; her dignity and personal integrity were thereby deemed less valuable, and as a realistic matter, would not be vindicated in court.<sup>16</sup>

In response to the humiliating treatment of rape victims at trial and concerns that such victims were being discouraged from testifying, a nationwide movement arose in the 1970s and 1980s to amend both the substantive and procedural law concerning rape.<sup>17</sup> Although the statutes vary considerably, rape shield is designed to restrict information about the victim’s sexual history, behavior, and preferences in order to limit irrelevant inquiries that may embarrass or harass the victim.<sup>18</sup> According to the Supreme Court, rape shield law “represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.”<sup>19</sup>

Jurisdictions employ various approaches to the construction and reach of rape shield statutes.<sup>20</sup> One approach, exemplified by Federal

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15. See TAsLITZ, *supra* note 1, at 152 (“The victim’s prior sexual conduct was relevant, both to impeach her credibility (tramps lie) and to make her consent more likely.”); Heather D. Flowe et al., *Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women’s Sexual History on Rape Allegations*, 31 LAW & HUM. BEHAV. 159, 160 (2007) (“[E]vidence of promiscuity was routinely admitted at trial to undermine the credibility of a complainant and to demonstrate to the jury that in all likelihood she consented on the occasion in question.”) (citations omitted).

16. As Taz noted:

Rape trial practices also reinforce oppressive social norms. Among the gendered norms are that a woman should not go out at night without a male protector, should dress modestly in public, and should not openly express sexual interest in a man. Women are taught that violating these norms risks rape. Correspondingly, to violate these norms risks being labeled a “slut”, for whom any assault is nonrape. When the rape victim is treated as a slut at trial and her assailant is found not guilty, the citizenry publicly expresses approval of these norms. Yet, these norms limit women’s freedom of movement and expression. They contribute to a gendered caste system.

TAsLITZ, *supra* note 1 at 113.

17. See generally Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 469–70 (2005) (discussing the first wave of rape reform 1970–2000).

18. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 80–81 (2002) (dividing rape shield statutes into four categories, distinguished by the manner and degree to which they admit evidence of a woman’s sexual history).

19. *Michigan v. Lucas*, 500 U.S. 145, 149–50 (1991).

20. See Helim Kathleen Chun & Lindsey Love, *Rape Sexual Assault and Evidentiary Matters*, 14 GEO. J. GENDER & L. 585, 591–93 (2013) (distinguishing legislative, federal, judicial

Rule of Evidence 412, is a blanket ban on propensity evidence concerning the victim, only allowing for limited exceptions. Rule 412 provides exceptions for: (A) evidence of other sources of the cause of the victim's injury; (B) evidence of a prior relationship between the victim and the accused, where defense is consent; and (C) cases when "exclusion would violate the defendant's constitutional rights."<sup>21</sup> The last, broad and amorphous exception contrasts markedly with the much more specific and narrow exceptions in the same rule.

Rule 412 serves as a template for many states.<sup>22</sup> Some jurisdictions that follow the Rule 412 approach to rape shield provide additional exceptions, excluding evidence that:

- demonstrates prior untruthful rape allegations,<sup>23</sup>
- impeaches the victim where she made her prior sexual behavior an issue,<sup>24</sup>
- illustrates a distinctive pattern of sexual behavior that closely resembles the crime charged<sup>25</sup> and, remarkably,
- provides the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.<sup>26</sup>

Other jurisdictions do not follow the federal approach and instead employ some sort of balancing test, weighing the probative value of the evidence against its unfair prejudice to the victim.<sup>27</sup> All versions provide for the possibility of having a nonpublic hearing outside the hearing of the jury to protect the victim's privacy and shield her from humiliation when issues of her prior sexual behavior or propensities are first raised.

Whatever the organization, rape shield gives the trial judge discretion. As Taz observed, historically "police, prosecutors, judges, and

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hybrid and evidentiary purpose approaches); see also Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 773 (1986) (documenting four distinct approaches). See generally NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, *Rape Shield Statutes* (2011).

21. FED. R. EVID. 412(b).

22. See VA. CODE ANN. § 18.2-67.7(A)(1)–(3) (West 2010); UTAH R. EVID. 412(b).

23. WIS. STAT. ANN. § 972.11(2)(b)(3) (West 2012).

24. W. VA. CODE ANN. § 61-8B-11(B) (West 2014).

25. N.C. GEN. STAT. § 8C-1, Rule 412(b)(3) (West 2014); TENN. R. EVID. 412(c)(4)(iii).

26. N.C. GEN. STAT. § 8C-1, Rule 412 (b)(4) (West 2014).

27. See, e.g., S.C. CODE ANN. § 16-3-659.1(1) (2015); WASH. REV. CODE ANN. § 9A.44.020(3)(d) (West 2013); WYO. STAT. ANN. § 6-2-312(a)(iv) (2010); TEX. R. EVID. 412(b)(3).

defense counsel have used their discretion to circumvent these reforms.”<sup>28</sup>

### III. WHEN DOES THE ACCUSED’S DESIRE TO INTRODUCE EVIDENCE BARRED BY RAPE SHIELD RISE TO A CONSTITUTIONAL RIGHT?

#### A. Potential Constitutional Rights Involved

When criminal defendants raise a constitutional objection to the exclusion of evidence because of rape shield, they cite the Sixth-Amendment right to meaningfully confront witnesses and the right to present a complete defense: “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”<sup>29</sup> “Highly relevant” or “indispensable” evidence may be constitutionally mandated, even if it runs afoul of established evidence rules.<sup>30</sup>

The right to present a complete defense, however, is not unlimited. As the Supreme Court explained in *Michigan v. Lucas*,<sup>31</sup> that right “‘may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.’”<sup>32</sup> Accordingly, the Supreme Court has found that some evidence, even if it is prohibited by rape shield, must be admitted for the trial to be fair. In *Olden v. Kentucky*, the Court held that an accused was permitted to introduce evidence that the white rape victim was living with a black man with whom she was having an extramarital affair.<sup>33</sup> The defense in the case was consent and the accused wished to show the victim had a motive

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28. Taslitz, *supra* note 1, at 7.

29. *Holmes v. South Carolina*, 547 U.S. 319 (2006) (quotations omitted).

30. *Crane v. Kentucky*, 476 U.S. 683, 683 (1986) (holding that the accused had a right to present the conditions under which his confession was made); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding that hearsay statements regarding a confession to the crime by someone other than the accused and the inability of the accused to confront that person violated Chambers’ due-process right to present a defense).

31. *Michigan v. Lucas*, 500 U.S. 145, 152 (1991). See generally *United States v. Elbert*, 561 F.3d 771, 776 (8th Cir. 2009) (quoting *Lucas*).

32. *Lucas*, 500 U.S. at 149 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)); see *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (noting that the trial court has “wide latitude” to impose “reasonable limits” to avoid “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”).

33. *Olden v. Kentucky*, 488 U.S. 227, 233 (1988).

to lie about having been raped because her lover saw her disembark from the accused's car.<sup>34</sup>

## B. Procedural Posture of Federal Cases

Constitutional questions regarding rape shield exclusion of evidence arise in federal court in two ways. First, the accused can directly challenge the exclusion of the victim's sexual reputation, history, or proclivity at trial or on appeal. In such direct appeals, the accused argues that the final exception of Rule 412 has been triggered and that certain evidence is so essential to a fair trial that the "exclusion would violate the defendant's constitutional rights."<sup>35</sup> Because rape is generally not a federal offense, there are not many such cases in the federal system outside the military and Indian Country, where federal courts have jurisdiction over the crime of rape.<sup>36</sup>

Alternatively, such cases arise in habeas corpus collateral attacks on state convictions. The standard of review is highly deferential. On habeas, a federal court will reverse a state's determination only if it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts."<sup>37</sup>

## C. An Overview of Recent Rape Shield Cases with Constitutional Challenges

Many of the so-called constitutional objections to exclusion of evidence about the victim are nothing more than resistance to the regular function and underlying policy of rape shield.<sup>38</sup> For instance, in *U.S. v. Ambrose*, the court rejected the appellant's argument that he was denied his constitutional right to present a defense and to cross-

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34. *Id.* at 230.

35. FED. R. EVID. 412(b)(1)(C).

36. See generally, Aviva Orenstein, *Propensity or Stereotype?: A Bad Evidence Experiment in Indian Country*, 19 CORNELL J.L. & PUB. POL'Y 173 (2010) (noting the jurisdictional anomalies of federal rape cases).

37. Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d) (2015).

38. See also *United States v. Papakee*, 573 F.3d 569, 573 (8th Cir. 2009) (holding that evidence that the victim propositioned an investigating deputy soon after the incident was rightfully excluded under rape shield); *Collins v. State*, 223 P.3d 1014, 1019 (Okla. Crim. App. 2009) (holding that trial court rightfully excluded victim's history of prostitution despite accused's argument "that this ruling impaired his ability to impeach [the victim] with her past crimes of 'moral turpitude' . . . because the convictions and past acts of prostitution were relevant to prove [the victim's] motive or propensity to lie and to supported Collins' defense of consent").

examine witnesses, because evidence of the victim's consensual sexual intercourse with one of the appellant's co-conspirators would have made it "more likely that she had consensual sex with the appellant."<sup>39</sup>

Cases that involve a serious constitutional challenge to rape shield's exclusion of evidence seem to fall into five distinct categories: (1) the victim's past sexual conduct is offered to explain a child-victim's knowledge about sex;<sup>40</sup> (2) the victim's prior sexual activity reflects on the victim's motive to lie (for instance, the victim might lie about consent to placate a jealous husband or boyfriend,<sup>41</sup> to protect a married paramour,<sup>42</sup> to avoid her parents' wrath if they discover she willingly participated in premarital sex,<sup>43</sup> or to prevent the accused from exposing something private about her sex life);<sup>44</sup> (3) the victim's prior history of prostitution or exotic dancing is offered to show consent to the sex act;<sup>45</sup> (4) the victim's prior, allegedly false rape reports

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39. *United States v. Ambrose*, No. NMCM 9900167, 2001 WL 1488485, at \*6 (N.M. Ct. Crim. App. Nov. 16, 2001).

40. *See generally* *United States v. Seibel*, 712 F.3d 1229, 1234–35 (8th Cir. 2013); *Merritt v. Roper*, No. 4:09CV01068 AGF, 2012 WL 3541901, at \*2 (E.D. Mo. Aug. 15, 2012); *State v. Mack*, No. 100695, 2014 WL 5500021, (Ohio Oct. 30, 2014).

41. *See* *United States v. Sizemore*, ARMY 20051235, 2008 WL 8087965, at \*6 (A. Ct. Crim. App. Apr. 29, 2008).

42. *See* *United States v. Pumpkin Seed*, 572 F.3d 552, 561–62 (8th Cir. 2014) (rejecting the theory that victim lied about rape to protect her married lover because she was unable to become pregnant and her contracting a sexually transmitted disease would not have exposed the fact that she was in a relationship).

43. *See* *United States v. Gaddis*, 70 M.J. 248, 256–57 (C.A.A.F. 2011) (discussing the extent to which the accused had a constitutional right to present evidence that the victim had a motive to fabricate the rape allegation to hide the victim's other sexual activity from her mother).

44. *See* *Martin v. McKee*, No. 2:11-CV-15034, 2013 WL 3224174, at \*18 (E.D. Mich. June 25, 2013) (crediting "[p]etitioner's theory of defense . . . that the complainant had a motive to falsely accuse him of rape because she was trying to protect her adult-aged boyfriend from going to jail for having sex with a minor," but finding that the issue was improperly raised on habeas). *Compare* *Cecil v. Commonwealth*, 297 S.W.3d 12, 17 (Ky. 2009) (rejecting accused's argument that evidence of victim's sexual behavior and prostitution while a runaway was relevant to her motive for inventing a rape claim against him because she feared discovery of her activity by her family, possible pregnancy, or a sexually transmitted disease), *with* *State v. Stephen F.*, 188 P.3d 84, 90–91 (N.M. 2008) (trial court infringed on juvenile's Sixth-Amendment right to effective cross examination by forbidding accused to establish a motive to fabricate by questioning the victim about a prior sexual encounter, and the consequent punishment she received from her parents). In yet another variation, an accused wanted to claim that the allegedly false rape accusation was made because the accused had threatened to reveal that the victim had undergone an abortion. *Valentine v. United States*, No. 3:11-CV-361-S, 2014 WL 2766076, at \*1 (W.D. Ky. Mar. 28, 2014).

45. *See* *United States v. Mack*, No. 1:13CR278, 2014 WL 356502, at \*3 (N.D. Ohio, Jan. 31, 2014). The fact of prostitution becomes more convincing if the accused uses it to explain that the conflict arose because of accused's failure to pay for a consensual sexual transaction. *See* *Chun & Love*, *supra* note 20, at 587.

are used to impeach the victim's credibility;<sup>46</sup> and (5) the victim's prior sexual practices, which are deemed unusual and unlikely to have been consented to, such as a propensity for rough or sadomasochistic sex,<sup>47</sup> use of sex toys or other objects,<sup>48</sup> interracial sex, or sex with multiple partners<sup>49</sup> are offered to negate the assumption that the victim was unlikely to have consented. It is this last category that is explored in *Gagne v. Booker*, below.

D. *Gagne v. Booker* – A Recent Case Considering the Constitutionality of Excluding Evidence under Rape Shield

*Gagne v. Booker*,<sup>50</sup> which was heard en banc by the Sixth Circuit in 2012, presents a fascinating case study of the tension between rape shield protections and concerns for the accused's right to present a full defense. It is particularly interesting because the accused's concerns about deprivation of vital evidence rely squarely on rape myths and assumptions about women's sexuality.

The underlying facts of *Gagne* involved what all parties acknowledged began as consensual sex between the accused, Gagne, and his

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46. See *United States v. Crow Eagle*, 705 F.3d 325, 329 (8th Cir. 2013); *Mathis v. Berghuis*, 90 F. App'x 101, 107 (6th Cir. 2004) (affirming district court's admission of prior false rape claim); *Burke v. Pallito*, No. 2:12 CV 197, 2013 WL 6145810, at \*11 (D. Vt. Nov. 20 2013). Often, courts that reject the proffered testimony do so because they find that the accused has failed to show that the prior claim was false. See *Crow Eagle*, 705 F.3d at 329 (8th Cir. 2013) (rejecting impeachment of victim with allegedly false prior rape charges where accused offered no evidence that the prior charges were false); *Bouie v. Mendoza-Powers*, No. CV07-111-JVS, 2009 WL 5220726, at \*8 (C.D. Cal. Dec. 31, 2009) (finding that false claims "of molestation would be admissible under California law as relevant to the victim's credibility, but that accused was "speculating at best that R.'s comments involved a false claim of molestation."); *United States v. Hohenstein*, No. ACM 37965, 2013 WL 3971576, at \*2 (A.F. Ct. Crim. App. July 1, 2013); cf. *Piscopo v. Michigan*, 479 F. App'x. 698, 704 (6th Cir. 2012) (rejecting accused's wish to introduce evidence of victim's claims that she was abused by her father, who, like the accused was a pastor, to show that her perception was skewed in the present case). See *TASLITZ*, *supra* note 1, at 587–88.

47. See *Buchanan v. Harry*, No. 5:07-CV-11630, 2014 WL 1999047, at \*5 (E.D. Mich., May 15, 2014); see generally, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 131–37 (2002).

48. See *United States v. Ramone*, 218 F.3d 1229, 1238 (10th Cir. 2000) (excluding the victim's statement that she previously used objects as part of sex with the accused, finding that evidence was not probative of whether victim consented after brutal beating by the accused).

49. See *Haidl v. Cate*, No. SACV 11-133 GW (AJW), 2014 WL 102341, at \*19 (C.D. Cal. Jan. 7, 2014) (rejecting the accused's argument that evidence of the victim's willingness to engage in sexual act with multiple partners in front of others and that she derived pleasure from insertion of inanimate objects was crucial to their consent defense even though it was arguably impeachment in part because victim was incapacitated and issue of whether she might have consented if not inebriated was relevant).

50. *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012) [*hereinafter* *Gagne* II].

ex-girlfriend, Clark.<sup>51</sup> At some point, another accused, Swathwood, joined the sexual encounter and both men engaged in oral, vaginal and anal sex with Clark.<sup>52</sup> The sexual activity became rough and involved spanking, whipping, and insertion of various objects into Clark's vagina and anus, which caused her to bleed and bruise. All parties were drinking and using drugs. After the sexual encounter, Gagne and Swathwood took Clark's ATM card to buy more crack cocaine, but did not return to Clark's home and instead smoked it by themselves. The parties agreed to these facts but did not agree on whether Clark consented to the inclusion of Swathwood and the subsequent sexual activity among the three of them.<sup>53</sup> Clark claimed she had been forcibly raped. Gagne and Swathwood claimed that Clark consented and was falsely charging rape because she was a woman scorned (Gagne, her ex-boyfriend, was leaving for California) or because Clark was angry about not getting to partake of the drugs that were bought with her money.<sup>54</sup>

The Michigan trial court admitted some, but not all, of the evidence the defendants wanted to introduce about Clark's prior sexual behavior and propensities. The Michigan trial court admitted testimony about a previous consensual sexual encounter between Clark and the two defendants, Gagne and Swathwood. Clark did not fully remember the prior incident (because of alcohol) but she did not deny that it occurred.<sup>55</sup> This prior incident with Gagne and Swathwood included some other women but did not involve Clark having sex with both men simultaneously. Additionally, Gagne was permitted to introduce evidence that he and Clark had engaged in consensual sex play

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51. The facts are portrayed in both *Gagne II*, and the prior panel opinion, *Gagne v. Booker*, 606 F.3d 278, 280–81 (6th Cir. 2010) [*hereinafter* *Gagne I*]. Although the victim is referred to as P.C. in the en banc opinion, *see Gagne II*, 680 F.3d at 496 (calling her “Gagne’s former girlfriend, P.C.”), she is named in the panel opinion, *see Gagne I*, 606 F.3d at 279 (referring to her as “Gagne’s ex-girlfriend, Pamela Clark.”). Various arguments can be made about the utility, wisdom, and fairness of withholding the alleged victim’s name. *See Aviva Orenstein, Special Issues in Rape Trials*, 76 *FORDHAM. L. REV.* 1585, 1593–97 (2007).

52. *Gagne I*, 606 F.3d at 280. Both Gagne and Swathwood were convicted for “forcibly and simultaneously engaging in sexual activities with Clark.” *Id.* at 279.

53. *See id.* at 281 (The accused’s “description of the sexual activities differed only in that Clark consented to them.”). Clark also claimed that her ATM card was taken without her permission. *Gagne II*, 680 F.3d at 497.

54. *Gagne II*, 680 F.3d at 497. Because of a procedural failure to appeal in time to the Michigan Court of Appeals, Swathwood lost his right to bring a habeas action. *See Gagne I*, 606 F.3d at 283 n.3.

55. *Gagne I*, 606 F.3d at 282. The consensual nature of that encounter could be questioned given that Clark was so drunk she claimed to remember none of it, although she did not dispute that it could have happened. *See id.*

involving rough sex, including the use of a whip and the insertion of various foreign objects into Clark's vagina and anus.<sup>56</sup> This evidence fell under Michigan's exception to rape shield, which permits "[e]vidence of the victim's past sexual conduct with the actor."<sup>57</sup>

The key evidentiary dispute and potential constitutional questions concerned the Michigan trial court's exclusion of evidence of that: (1) Clark had a three-way sexual encounter with Gagne and a different man, Bermudez, a month before the alleged rape, when Gagne and Clark were still dating (hereinafter "the Bermudez evidence"); and, (2) Clark had offered to have sex with Gagne and his father simultaneously. Gagne argued that the trial unfairly excluded both pieces of evidence in violation of his constitutional rights.

The Michigan trial court excluded both pieces of evidence because it determined that their admission would have violated Michigan's rape shield law.<sup>58</sup> The Michigan Court of Appeals affirmed Gagne's conviction and the Michigan Supreme Court refused to hear the case.<sup>59</sup>

Gagne brought a pro se habeas petition to the Federal District Court for the Eastern District of Michigan, which granted habeas relief.<sup>60</sup> The district court concluded that the Michigan Court of Appeals violated Gagne's Sixth-Amendment right to a fair trial, to confront the witnesses against him, and to present a complete defense by excluding the Bermudez evidence and Clark's alleged offer to have sex

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56. *See Gagne II*, 680 F.3d at 533 (Kethledge, J., dissenting). Clark agreed about the whip, but denied any past sex play with a wine bottle. *See id.* at 522 n. 2 (Moore, J., concurring).

57. MICH. COMP. LAWS §750.520j(1)(a) (quoted in *Gagne I*, 606 F.3d at 281 n.2).

58. *Gagne I*, 606 F.3d at 281. Although there was serious disagreement about the credibility of the two contested pieces of evidence, they were excluded because of rape shield, not because the evidence was deemed baseless. Some of the judges expressed skepticism of the notion that the other events occurred at all. *See id.* at 299 (Batchelder, J., dissenting) (portraying the allegations as "self-serving and unverifiable" and noting that "Clark was prepared to refute these accusations, had Gagne been allowed to raise them."). Also, to the extent they did occur, at least one judge on the en banc panel questioned the factual similarities between the Bermudez incident and the rape charged. *See Gagne II*, 680 F.3d at 522 (Moore, J., concurring in the judgment only) (disputing the dissent's characterization of the Bermudez proffer as brutal or violent and noting that "the defense certainly did not proffer that the Bermudez incident left the victim bleeding and with bruises all over her body").

59. *People v. Swathwood*, Nos. 235540 and 235541, 2003 WL 1880143, at \*1-2 (Mich. Ct. App. Apr. 15, 2003) (concluding that the evidence of the three-way sexual activity with Bermudez and the alleged invitation to Gagne's father were irrelevant because they involved third parties, not Gagne's co-defendant Swathwood, and noting that the jury heard at length about another encounter between the victim and the two accused). The Michigan Supreme Court denied certification, *People v. Gagne*, 673 N.W.2d 755 (2003) (unpublished table decision).

60. *Gagne v. Booker*, No. 04-60283, 2007 WL 1975035, at \*1 (E.D. Mich. July 2, 2007).

with Gagne and his father simultaneously.<sup>61</sup> A divided panel of the Court of Appeals for the Sixth Circuit affirmed the grant of habeas.<sup>62</sup> The panel's majority opinion held that "[i]n our view, the court of appeals underestimated the vital nature of the disputed material, which we believe to be highly relevant, primarily as substantive evidence on the issue of whether Clark consented to the sexual activity."<sup>63</sup> The majority concluded that where "the question of guilt or innocence turned almost entirely on the credibility of the victim's testimony regarding consent, the exclusion was an unreasonable application of the principles set forth by the Supreme Court."<sup>64</sup>

A fractured en banc Court reversed the grant of habeas. In eight separate opinions the judges disagreed on:

- the source and specificity of the constitutional protections involved,<sup>65</sup>
- whether, even if a constitutional problem might exist with the exclusion of the evidence, the habeas standard was met,<sup>66</sup>
- whether the excluded evidence fell within the rape shield exception relating to the victim's prior sexual relationship with the accused,<sup>67</sup>

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61. *Id.* at \*5–9. See *Gagne II*, 680 F.3d at 497.

62. *Gagne I*, 606 F.3d at 279. Judge Norris wrote the panel opinion, in which Judge Kethledge concurred and to which Judge Batchelder dissented. See generally *id.*

63. *Id.* at 286.

64. *Id.* at 288–89.

65. *Gagne II*, 680 F.3d at 493. The judges disagreed about the reach of *Crane v. Kentucky*, 476 U.S. 683 (1986) (holding that due process required the admission of the circumstances surrounding a sixteen-year-old's confession to murder, even though the court had found the confession voluntary) and *Chambers v. Mississippi*, 410 U.S. 284 (1973) (holding that the hearsay rule could not serve to bar a crucial confession by another person to the murder with which Chambers was charged, and that Chambers had a constitutional right to confront the party who allegedly made and repeated the confession). The dissent read both cases broadly to require admission of highly relevant, non-cumulative, and indispensable evidence, where credibility was central to the dispute. The dissenters also read *Chambers* to stand for the principle that evidentiary rules must give way to basic fairness. The plurality read both cases more narrowly, confining them to their facts. The plurality also noted that in *Crane* there was no strong governmental policy favoring exclusion of the evidence as there was with rape shield. *Gagne II* at 493, 523.

66. *Gagne II*, 680 F.3d at 521–27. Some of those concurring in the judgment to reverse the grant of habeas relied on this very high standard, finding that even if constitutionally debatable, Michigan's decision to exclude the evidence could not be said to violate a clear determination of constitutional law as established by the United State Supreme Court. See, e.g., *id.* at 521–22 (Moore, J., concurring) ("Gagne is not entitled to habeas relief because the Michigan Court of Appeals did not unreasonably apply the clearly established constitutional principles."); *id.* at 526–27 ("Although I find the dissent's interpretation of the record reasonable, I do not think it is compelled.")

67. *Id.* at 519, 524–28. For the dissent, the two pieces of excluded evidence clearly fell squarely within the exception to rape shield involving prior sex with accused. See *id.* at 528 (Kethledge, J., dissenting). For the plurality, the importance of the excluded evidence and the prejudice that its exclusion engendered was not that Clark had sex with Gagne before — there

- the extent to which the court had discretion to exclude sexual behavior even if it fell within that exception,<sup>68</sup>
- the extent to which Clark's other sexual behavior admitted at trial (her prior threesome with Swathwood and Gagne, and her prior sexual activity with Gagne) mitigated the harm of excluding the allegations about Bermudez and Gagne's father, and finally,<sup>69</sup>
- whether, even if Michigan's rape shield law were properly applied, the basic fairness of the trial was jeopardized by the exclusion of the evidence.

On this last point, the en banc debate revealed the persistent draw of patriarchal stories. Essentially, the dissenters believed that past sexual behavior was so probative of consent on this occasion that to exclude it violated Gagne's constitutional rights. Writing for the dissenters, Judge Kethledge, who concurred in the original panel opinion, believed that "evidence that the complainant had consented to the same kind of conduct with the defendant, only a handful of weeks before, is indispensable to his defense."<sup>70</sup> Admission was not only constitutionally necessary but required "by any measure of fairness and common sense."<sup>71</sup> Judge Kethledge continued: "The only evidence with which Gagne could realistically defend himself—evidence, I might add, that suggests a substantial possibility that he is innocent—was the evidence that the trial court excluded. . . . What was left was an empty husk of a trial—at whose conclusion came a prison sentence of up to 45 years."<sup>72</sup>

According to the dissenters, a jury could not possibly imagine that a woman would consent to the group sex, rough sex, or insertion of foreign objects into her orifices that Clark experienced in the al-

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was much admitted evidence as to that point — but that a third-party was involved. As Judge Clay explained: "It is clear that the purpose of the Bermudez evidence would not have been to demonstrate prior consent between Clark and Gagne, but prior consent between Clark and Bermudez. What is not clear is how evidence of consensual sex between Clark and Bermudez would be material to the material factual issue of whether Clark consented to sex with Gagne on [the date in question]." *Id.* at 524 (Clay, J., concurring); *id.* at 519 (Griffin, J., concurring) ("Contrary to the dissent's conclusion, evidence regarding consensual group sex does not fit into an exception to Michigan's Rape Shield Statute.").

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

69. According to the dissenters, the admitted evidence concerning a prior sexual encounter among Clark, Gagne, and Swathwood was insufficient to make this point with the jury because the events concerning the prior sex act that were admitted were distinct, particularly because Clark did not engage in sex with both men simultaneously. *Id.* at 532.

70. *Id.* at 527 (Kethledge, J., dissenting).

71. *Id.*

72. *Id.* at 534 (Kethledge, J., dissenting).

leged rape. Although the jury did hear evidence about such prior behavior, the excluded evidence was vital to counteract the jurors' notion that consent would have been unlikely under the circumstances.<sup>73</sup> Therefore, the jury simply had to hear the excluded evidence, which indicated that Clark had engaged in such behavior before.<sup>74</sup>

The dissent in the en banc opinion rests on the sexist notion that unless forced, respectable women (“good girls”) do not engage in the deviant sexual behavior described in this case. The dissenters feared that exclusion of evidence about Clark’s past sexual behavior would leave the jury with the misimpression that Clark was a “normal” woman with normal appetites, and therefore could not possibly have consented to the sexual encounter at issue.<sup>75</sup> Judge Griffin criticized this approach in his concurrence, noting that “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.”<sup>76</sup>

Another indication of the dissenters’ adoption of patriarchal stories concerns the frequent mention of the victim’s consumption of drugs and alcohol—though it had no relevance to the question of consent or the contested evidentiary issues. In fact, the dissenters seem positively hostile to the victim because of her drinking, drug use, and past sexual behavior. In his concurring panel opinion, Judge Kethledge noted that Clark engaged “in consensual oral sex with Gagne minutes before the very incident for which he was convicted (and moreover that she had drunk a pint of vodka and nine or so

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73. *Gagne I*, 606 F.3d at 282. According to Judge Norris, the prosecutor remarked upon the unlikelihood of the defendants’ version of the story. In closing argument, the prosecutor stated that the event was “more consistent with a pornographic movie than real life.” *Id.*

74. *Gagne II*, 680 F.3d at 532 (Kethledge, J., dissenting). As Judge Norris stated in the panel’s majority decision: “The idea that someone could have consented to this sort of thing seems incredible absent proof that the person had consented to it before.” *Gagne I*, 606 F.3d at 288. Similarly, the district court stated: “[e]vidence of prior group sex involving Petitioner and Bermudez and evidence of the complainant’s invitation to Petitioner’s father was an indication that it was not unusual or implausible for the complainant to engage in a ‘threesome.’” *Gagne Booker*, No. 04-60283, 2007 WL 1975035, at \*8 (E.D. Mich. July 2, 2007) (cited in *Gagne II*, 680 F.3d at 525) (Clay, J., concurring).

75. As a doctrinal matter, for Judges Norris and Kethledge on the panel, the case presented an easy application of Michigan’s exception for prior sexual activity with the actor because Gagne was involved in both and according to the dissenters “these prior incidents have significant relevance not only because Gagne and Clark were involved in them, but also because they are both remarkably similar to the events that occurred the night [in question].” *Gagne I*, 606 F.3d at 286.

76. *Gagne II*, 680 F.3d at 520 (Griffin, J., concurring).

beers and smoked crack in the hours before the incident).<sup>77</sup> This parenthetical aside is not only irrelevant, but also breezily disdainful in tone.

In a chilling, if revealing statement, Judge Kethledge wrote: “In this trial, I respectfully submit, there was virtually nothing left for the rape shield statute to protect.”<sup>78</sup> Judge Kethledge means that Clark’s interests in privacy and in preventing potential shame and embarrassment “such as they were in this case, given the evidence of sexual activity (albeit non-brutal) and drug use that was admitted at trial” were already forfeited.<sup>79</sup> Judge Kethledge expressed doubt that admitting the Bermudez evidence<sup>80</sup> and the alleged offer regarding Gagne’s father “would have diminished those interests any further.”<sup>81</sup> Apparently, according to the dissenters, there are behaviors that put a victim beyond the core policies and protections of rape shield.<sup>82</sup>

In arguing that a trial without the excluded evidence was so unfair as to be unconstitutional, the dissenters insinuated that somehow concern for rape shield (and sexual politics or perhaps political correctness) had trumped basic fairness.<sup>83</sup> Judge Kethledge criticized the notion “that certain statutory values are so important as to trump constitutional ones. . . . There is no rape-defendant exception to the Constitution.”<sup>84</sup>

The implication from and effect of the opinions of the dissenters en banc (as well as from the district court and the two judges on the panel who voted to grant habeas) is that rape shield exists to protect

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

78. *Gagne II*, 680 F.3d at 535 (Kethledge, J., dissenting). Part of the reason for this astounding statement lies in Judge Kethledge’s belief that the facts of this case fall squarely within the exception for sex with the accused; see also *Gagne I*, 606 F.3d at 292 (Kethledge, J., concurring) (“I submit that, under the circumstances of this trial, there was virtually nothing left of those interests to protect.”); see generally *Olden v. Kentucky*, 488 U.S. 227 (1988)

79. *Gagne II*, 680 F.3d at 535 (Kethledge, J., dissenting).

80. *See id.* at 534–35.

81. *Id.* at 535.

82. *See generally id.* at 535. The admitted evidence stripped Clark of any rape shield protection. Ironically, however, this other evidence was, according to the dissent, insufficient to render harmless any error in excluding the Bermudez and father allegations, but was not sufficient to educate the jury about the proclivities of the accused. *See generally id.*

83. *Cf. Giles v. California*, 544 U.S. 353, 376 (2008) (“[W]e are puzzled by the dissent’s decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and Crawford described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women?”).

84. *Gagne II*, 680 F.3d at 528 (Kethledge, J., dissenting). Similarly, Judge Martin, who concurred in dissent, expressed his “disappoint[ment] in the majority’s decision to frame this evidentiary issue as a protection of Michigan’s rape shield statute.” *Id.* at 527 (Martin, J., dissenting).

the temperate, tee-totaling, sexually tame, decorous, missionary-position type of victim. Clark was portrayed as none of these and hence undeserving of (and indeed beyond) protection. Besides, according to the dissenters, given the evidence that had already been admitted, Clark had no reputational or privacy interest to salvage anyway. On the other hand (and here there is a slight tension given the first point), the dissenters believed that the accused will suffer because the jury may not realize how abnormal the victim is: the evidence of her past behavior was vital to show a pattern of abnormal sexual appetites and promiscuity that make the accused's consent defense plausible.

#### IV. THE DRAW OF PATRIARCHAL STORIES

##### A. Critiquing the Dissent in *Gagne*

By arguing that Clark's past sexual behavior was not only relevant, but constitutionally mandated by clear Supreme Court precedent, the dissenters reveal a deep and abiding belief in the truth of patriarchal stories. The dissenters say that they accept rape shield law,<sup>85</sup> and they more or less seem to credit the instrumental aspects of rape shield—encouraging victims to report and testify.<sup>86</sup> They are willing to prohibit inquiry into a victim's sexual history where such evidence is merely meant to harass and is not “indispensable.”<sup>87</sup> They are all too eager, however, to adopt the retrograde view that the victim's past sexual practices and proclivities indicate a great likelihood of future consent.<sup>88</sup> Context, including the surroundings, the relationship with the partner, or even the identity of the partner,<sup>89</sup> does not seem

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85. *Id.* at 528–29 (Kethledge, J., concurring.) (“[O]ur concern for a defendant's constitutional rights does not amount to a lack of concern for the interests served by the rape-shield laws.”).

86. There is no reason to suppose the dissenters are consciously misogynistic or affirmatively mean-spirited. Aside, of course, from his remarks about having nothing left to protect, which are misogynistic and frankly horrifying, even Judge Kethledge asserts that he approves of rape shield. *Gagne I*, 606 F.3d at 292 (Kethledge, J., concurring).

87. *Gagne II*, 680 F.3d at 527 (Kethledge, J., dissenting).

88. In fact, this is precisely what *Gagne* argued:

The idea that a woman would have sex with two or more men at the same time strikes most people as bizarre and a jury, therefore, [would] be inclined to view a consent defense in a case like this one with inherent disbelief. The evidence of past consensual group sexual activity is relevant to show that the charged incident in question occurred consensually, as [the defendant] testified it did, rather than as [P.C.] stated.”

*Gagne II*, 680 F.3d at 503.

89. Professor Deborah Tuerkheimer discusses *Gagne* in her article, *Judging Sex*, where she uses it to illustrate how courts “persist in making normative judgments about women's sexuality.” Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1461 (2012). She specifically notes what should be, but apparently is not, obvious: “The identity of a woman's sexual partner greatly impacts her willingness to consent to sexual activities.” *Id.* at 1484.

to affect the relevance of the propensity argument. What matters only is that the victim is the type of woman who would do such a thing.<sup>90</sup>

Taz's scholarship is clearly essential reading about and for those who share the dissenters' mindset. Despite protestations to the contrary,<sup>91</sup> the dissenters ultimately resist rape shield in theory and practice.<sup>92</sup> Rape shield does not make sense to the dissenters because it subverts their worldview of how women should and do behave. The dissenters' deep conviction that the propensity evidence of past sexual behavior is "vital" and "indispensable," explains why we have rape shield in the first place.<sup>93</sup>

Judge Kethledge's newly minted rape shield exception, "nothing left to protect," is truly shocking.<sup>94</sup> Judge Kethledge does not see any distinction between engaging in consensual sexual acts in private and being questioned about them in a hostile and deriding manner in public. Apparently after an alleged rape victim engages in certain sexual behavior that Judge Kethledge finds distasteful or even just unusual, the victim forfeits rape shield protection entirely. This focus on women's propensities and prior sexual activity functions to control women's behavior. The social message is that sexual behavior too far outside the norm exposes women to attack and humiliation. The law will not come to the aid of a rape victim if in the past she has been incautious, sexually adventurous, or deviant.<sup>95</sup>

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90. Tuerkheimer notes that "female sexuality that fails to conform to normative standards sits uneasily with rape shield law." *Id.* at 1490 (footnote omitted). Instead, "retrograde notions of deviancy are substituting for rational deliberation on the question of consent." *Id.* at 1461. Tuerkheimer argues that *Gagne* "shows how the scope of rape shield protection is defined by reference to unmentioned, imagined benchmarks of acceptable female sexuality." *Id.* at 1482.

91. *Gagne II*, 680 F.3d at 528 (Kethledge, J., dissenting) ("[O]ur concern for a defendant's constitutional rights does not amount to a lack of concern for the interests served by the rape-shield laws.").

92. Chief Judge Batchelder, who wrote the en banc plurality opinion and dissented in the original three-judge panel, aptly observed that the dissenters' desired outcome "invalidates all rape shield laws as violative of the Sixth Amendment." *Gagne I*, 606 F.3d at 301 (Batchelder, C.J., dissenting).

93. *See generally* *Jardine v. Dittmann*, 658 F.3d 772, 778 (7th Cir. 2011) ("But evidence that a sexual-assault complainant often consented to sex with other men is archetypally prejudicial and not highly probative of consent in a particular case; precisely that concern underlies rape shield statutes.").

94. Judge Sutton wrote a brief concurrence in part to emphasize that "the State's interests in its rape shield laws remain strong even after a trial court admits some evidence of the victim's past sexual practices." *Gagne II*, 680 F.3d at 518 (Sutton, J., concurring).

95. *See* TAsLITZ, *supra* note 1.

Finally the dissenters can be fairly criticized for minimizing the state interest at stake in applying rape shield.<sup>96</sup> When a piece of evidence fits within the exception to rape shield, it nevertheless must be otherwise admissible and pass a Rule 403 balancing test whereby the evidence may be excluded if the unfair prejudice substantially outweighs its probative value.<sup>97</sup> Even assuming that the relevance of the two pieces of evidence in *Gagne* was high, there is still the problem of unfair prejudice. The danger of such evidence is that the trier of fact will believe that Clark has consented so often that she will (and did) consent to anything.

Even more pernicious than overvaluing the relevance of prior sexual behavior is the likelihood that the trier of fact might be less inclined to care about the victim's welfare or might believe that she "had it coming to her." This type of thinking taps into rape myths about fallen, ruined women. If Clark consented to a three-way sexual encounter, she crossed a line of propriety where rape shield no longer serves to protect her. Finally, no one seemed to raise the issue of the extreme prejudice of Clark's alleged proposal of an incestuous threesome among Gagne, his father, and herself. Even if a jury would forgive adventurous sex, incest might cross a line that would lead a jury to detest Clark and refuse to vindicate her rape.

The idea that some people cling to sexist assumptions, believe in rape myths, and adopt worldviews that have the effect of circumscribing women's acceptable sexual expression cannot be news. As Taz explained in *Rape Trials and the Culture of the Courtroom*, it would be ridiculous to imagine that our society has outgrown its fondness for patriarchal stories.<sup>98</sup> It is therefore more interesting, and in some respects depressing, to analyze the role of patriarchal stories in the plurality and concurring opinions in *Gagne*. If we shift the focus to the judges who voted to reverse the habeas grant, then we can spot the residual power of rape myths and patriarchal stories that undergird those opinions and influence the understanding of rape shield.

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96. *Gagne II*, 680 F.3d at 536 (Kethledge, J., dissenting) ("the State's interests in excluding the evidence were minimal.").

97. See *United States v. Mack*, No: 1:13CR278, 2014 WL 356502, at \*2 (N.D. Ohio Jan. 31 2014); see also *United States v. Anderson*, 467 Fed. 474, 477 (6th Cir. 2012) ("Although the language of Rule 412(b)(1)(B) is unqualified, it is well accepted that the admissibility of prior sexual acts between the accused and the alleged victim in order to prove consent is not absolute.").

98. See generally TAsLITZ, *supra* note 1.

Chief Judge Batchelder, who wrote the dissenting opinion on the original panel and the plurality for the en banc, displays some tentativeness and contradiction in her two opinions. She seems to vacillate between (1) arguing that the evidence is not relevant at all (or barely so) and (2) conceding that it is indeed extremely relevant but nevertheless prejudicial, and that the determination of the Michigan court should be respected, particularly because the state has an interest in encouraging prosecution and avoiding victim trauma.

In Judge Batchelder's original panel dissent, there is no equivocation. She wrote:

Some 35 years ago, the Michigan state legislature determined that a criminal defendant accused of rape may not introduce evidence about the victim's past sexual behavior, because the victim's past willingness is not relevant to the question of present consent. The majority here disagrees with that legislative determination and concludes that evidence of the victim's promiscuity or previous willingness to engage in somewhat similar sex acts was not only relevant but was "indispensable" and "the most relevant evidence."<sup>99</sup>

In her en banc opinion, there is a thread of ambiguity and uncertainty. In the en banc plurality opinion, Batchelder focuses primarily on the habeas standard and the fact that the Michigan Court of Appeals was not objectively unreasonable.

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."<sup>100</sup>

Part of Judge Batchelder's ambivalence stems from trying to meet the various arguments of the dissenters that the evidence was constitutionally mandated. As noted above, the judges who dissented en banc argued that the evidence of the other two alleged incidents were "the most relevant evidence" and "indispensable,"<sup>101</sup> so part of the response by Judge Batchelder is clearly an argument in the alternative even if the disputed evidence is credible and highly relevant,<sup>102</sup> it is

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99. *Gagne I*, 606 F.3d at 292–93 (Batchelder, J., dissenting).

100. *Gagne II*, 680 F.3d at 517.

101. *Id.* at 527 (Kethledge, J., dissenting).

102. To be sure, jurors might find this behavior outlandish, aberrant, abnormal, bizarre, disgusting, or even deviant and, therefore, find it incredible or inherently unbelievable that P.C. would have consented to it. And it is not unreasonable to surmise that those

still inadmissible. But nevertheless, her commitment to the notion that the evidence was not relevant at all seemed to waiver.

Past consent to a sexually adventurous escapade with the accused and another man simultaneously does not indicate that the woman would consent to engage in similar sex acts with the same men on another occasion (the evidence that was admitted by the Michigan trial court) or with the accused and a different man (the contested Bermudez evidence). Behavior that is consensual in one circumstance could be forced in another. In his concurrence, Judge Clay wrote “separately to clarify the limitations required under the Michigan rape shield law and to further respond to the dissent’s argument in favor of admitting ‘pattern of conduct’ evidence.”<sup>103</sup> He lucidly and forcefully explained:

The only bridge to finding evidence of consensual sex between Clark and Bermudez material to whether Clark had consensual sex with Gagne on July 3, 2000, is to conclude that the kind of woman who would say “yes” to someone is the kind of woman who always says “yes.” But this is the kind of assumption that the Michigan legislature attempted to circumvent by enacting its rape shield law, and to rule otherwise would undermine the obvious intent of the legislature.<sup>104</sup>

Judge Clay concluded that: “Such superfluous details of Clark’s sexual activity with Bermudez would serve no purpose but to embarrass or humiliate Clark; and furthermore, they fail the materiality test, and should be excluded.”<sup>105</sup> Similarly, in his concurrence, Judge Griffin critically observed that “the dissent embraces the inference that because the victim did it before, she likely did it again.”<sup>106</sup>

In contrast, the dissenters’ argued that in some cases the accused really needs to show the victim’s propensity because it (she?) is weirder than the jury would otherwise dare to guess. Judges Clay and

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jurors would be more likely to find consent if they were told that she had engaged in — and offered to engage in — group sex at least two other times in the past.

*Gagne II*, 680 F.3d at 517.

103. *Gagne II*, 680 F.3d at 524 (Clay, J., concurring in the judgment only).

104. *Id.* Judge Clay’s observations are mirrored by the Michigan Court of Appeals, which explained that “the complainant’s willing participation in a threesome with Gagne and Bermudez is not probative of whether she consented to a threesome with Gagne and Swathwood on the night of the alleged offense.” *People v. Swathwood*, Nos. 235540 and 235541, 2003 WL 1880143, at \*2–3 (Mich. Ct. App. Apr. 15, 2003) (finding the alleged events involving Bermudez to be distinguishable and noting that other evidence that “the complainant was not averse to group sexual activity” was admitted in the description of a prior, consensual three-way sexual encounter among Gagne, Swathwood, and Clark).

105. *Gagne II*, 680 F.3d at 524 (Clay, J., concurring in the judgment only).

106. *Gagne II*, 680 F.3d at 520 (Griffin, J., concurring in the judgment).

Griffin fully understood and rejected the dissenters' argument, seeing it for what it was: a camouflaged propensity rationale serving to nullify rape shield's policy and intellectual underpinnings.

*Gagne v. Booker* should have been an easy case, particularly because of the almost insurmountable standard on habeas. And yet, five judges on the Court of Appeals for the Sixth Circuit could not resist the draw of propensity evidence about the sexual conduct and proclivities of the victim. Even some of the judges who voted to reverse the grant of habeas did so with reluctance, finding the two pieces of excluded evidence important to fairness, despite the fact their admission was not clearly commanded by Supreme Court precedent. And Judge Batchelder wavered on the relevance of the excluded evidence sufficiently enough to inspire Judges Clay and Griffin to write separately.

#### V. RETHINKING THE APPLICATION OF THE RAPE SHIELD EXCEPTION FOR PRIOR SEX WITH THE ACCUSED

The *Gagne* case raises deep questions about the legitimate role of propensity arguments in applying rape shield exceptions. In dissent, Judge Kethledge emphasized that every rape shield statute “contains an exception for evidence of consensual sex with the defendant.”<sup>107</sup> The judges disagreed about whether this exception applied at all to the facts of *Gagne*, and whether the rights protected therein are constitutionally mandated. But it is worth examining *why* prior sex with the accused is an exception in the first place. Although limiting the evidence of prior sexual behavior to sex with the accused does undermine the broader retrograde notion that once a victim consents to one man, she is in general a “consenter” to all, it is still problematic. The exception can create mischief because it taps into the “intimacy discount” by which crimes against intimates are less likely to be perceived as criminal activities or will be punished more leniently.<sup>108</sup>

Judge Kethledge reads the exception for prior sex with the accused as merely a permitted version use of propensity evidence—the victim agreed to sleep with this guy once, so it is more likely that she agreed on another occasion. This is not a necessary or wise interpreta-

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107. *Gagne II*, 680 F.3d at 529 (Kethledge, J., dissenting); see Anderson, *supra* note 18, at 118.

108. See Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 701–06 (2006).

tion. He ignores the insight of Professor Tuerkheimer that “consent is contingent—meaning that consent on one occasion is not probative of consent on another.”<sup>109</sup> The special exception for prior sex with the accused relies on “the equally invidious common law inference that a woman’s consent to sexual intercourse has no temporal constraints.”<sup>110</sup> Reading the exception as admitting the victim’s propensity to have sex with the accused subverts the policies of rape shield and taps into the rape myth surrounding date-rape and rape in marriage; that once a woman says yes to a particular man, she consents for all time.

It is possible, however, to understand the exception for sex with the accused in ways that give the exception meaning without undermining the practical benefits and policies of rape shield. There are at least three legitimate ways to read the exception without resorting to a propensity argument. First, the information about the prior relationship can help establish the victim’s bias or motive. Although it may also tap into a negative stereotype concerning the lying, vengeful woman, evidence about motive is often highly relevant. The accused has a right to say that he and the victim had a bad break up and that the false accusation against him was made out of malice.<sup>111</sup>

Second, when the substantive rape law turns on the accused’s subjective understanding of consent, the prior relationship between the victim and the accused will sometimes be highly relevant. A wordless sexual encounter between people who have a sexual history might account for the accused’s belief that he received glances of encouragement and assent during the encounter.

Finally, without information that the accused and the victim knew each other, the jury will be confused about why certain events took place. For instance, in *Gagne*, the jury required some explanation of why Gagne stopped by Clark’s house and why she was willing to have sex with him, at least at first. So, information about a prior sexual relationship may be necessary to explain context.<sup>112</sup>

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109. Tuerkheimer, *supra* note 89, at 1494.

110. See Anderson, *supra* note 18, at 121.

111. In a similar manner, evidence about a sexual relationship with a third party else may be relevant to show why the woman is lying about rape. See *Olden v. Kentucky*, 488 U.S. 227, 230 (1988); FED. R. EVID. 412(b)(1)(C); Orenstein, *supra* note 36 and accompanying text; see also Anderson, *supra* note 18 at 152–53.

112. See Anderson, *supra* note 18 at 130 (“For the sake of background and perspective, it is appropriate to allow the defendant to discuss general information about the nature of the parties’ relationship, such as the fact that the parties were married or lived together, or dated previously.”).

None of the above reasons is grounded on a propensity to have sex with the accused. In fact, propensity evidence is not as relevant as those who are swayed by patriarchal stories think. Such propensity evidence certainly does not rise to a constitutional mandate for admission. All evidence of prior sex with the accused should be screened by the trial judge for relevance and subject to Rule 403 balancing.

## VI. THE PROBLEMATIC CONFLUENCE OF RACE AND RAPE

The dissenters in *Gagne* argued that something peculiar and unexpected about the victim's sexual behavior and propensity constituted essential information for the jury. As Professor Deborah Tuerkheimer has persuasively argued, this type of thinking represents a constrained notion of female sexuality where "retrograde notion of chastity powerfully influence judicial inquiry."<sup>113</sup> It is interesting to speculate on what other circumstances besides the group-sex and the victim's prior sex with the accused (both present in *Gagne*) might be deemed highly relevant to counteract suppositions about "normal" women, their sexual behavior, and the likelihood of consent. One problematic but very revealing scenario involves interracial sex.

In an older case, *People v. Williams*, the defendants challenged New York's rape shield law on statutory and constitutional grounds, arguing that the trial judge should have admitted evidence that the white teen-aged victim had previously engaged in group sex with different black men.<sup>114</sup> On appeal, the accused presented a theory of relevance very similar to that of the dissenters in *Gagne*, arguing "that the prohibited evidence was needed to counter a possible inference by the jury that no woman would voluntarily have sexual relations with three men she had met just hours before on the street."<sup>115</sup> Although unstated, the opinion very clearly implied that no young *white* woman from the suburbs would voluntarily have sex with three *black* men she met just hour before on the streets of New York. The court affirmed the exclusion of the evidence in part because the prosecution did not dwell on the unusual nature of the encounter in making his case.<sup>116</sup>

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113. Tuerkheimer, *supra* note 89, at 1489.

114. *People v. Williams*, 614 N.E.2d 730, 733 (N.Y. 1993).

115. *Id.* at 735. At trial, the accused were pretty muddled in their reasoning, arguing that "evidence of the victim's prior group sex with black males would show her motivation for testifying against defendants." *Id.*

116. *Id.*

In another older case, *People v. Hackett*, the accused, a black man, sought to introduce evidence that the victim, a white man, engaged in previous homosexual acts with different black men, including three days before the alleged rape.<sup>117</sup> The accused claimed that the evidence was necessary “to circumvent the inference that it would be improbable that a white male prisoner would consent to sodomy by a black male prisoner.”<sup>118</sup> The Michigan Supreme Court affirmed the exclusion of the evidence, explaining that “a close[ ] question is presented where such evidence was sought to dispel the assumption that most jurors would believe such an act, especially given the interracial element, is not likely to occur voluntarily.”<sup>119</sup> The Court nevertheless held that the accused was not denied his constitutional right to confrontation in part because some other evidence of homosexual conduct with a black prisoner was introduced.<sup>120</sup>

Both cases involved interracial sex and another potential taboo (in *Williams*, group sex, in *Hackett*, gay sex).<sup>121</sup> The confounding factor of race however, might alter the calculus. Certainly, if the prosecutor were to argue that the victim would *never* consent to sex with a black man, the probative value of such impeachment evidence increases tremendously and may rise to a constitutional imperative. But what do we do with the unspoken racist assumption that a white person would not generally consent to sex with a black man?

Taz noted how the patriarchal stories about rape alter when the accused is a black man and the victim is white (usually, but as *Hackett* indicates, not always a woman).<sup>122</sup> Our historic skepticism of victims softens a bit when the perpetrator is a black man. As Taz wrote concerning the troubling history of false rape accusations against black men in American history: “A black defendant/white victim combination alone entitled a jury in some courts to draw the inference beyond a reasonable doubt that the defendant intended rape.”<sup>123</sup> He traced

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117. *People v. Hackett*, 265 N.W.2d 120, 126–27 (Mich. 1984).

118. See generally Mark A. Whately & Ronald E. Riggio, *Gender Difference in Attributions of Blame for Male Rape Victims*, 8 J. INTERPERSONAL VIOLENCE 502 (1993) (analyzing victim blaming based on gender).

119. *Hackett*, 365 N.W.2d at 127.

120. *Id.*

121. In a psychological experiment more responsibility, more pleasure and less trauma was attributed to male rape victims who were homosexual than those who were heterosexual. See Damon Mitchell et al., *Attributions of Victim Responsibility, Pleasure and Trauma in Male Rape*, 36 J. SEX RESEARCH 369, 369 (1999).

122. Male victims of rape also suffer from rape myths, particular from the myth that if the victim did not actively and physically fight back, then the victim desired the unconsented-to sex.

123. TAZLITZ, *supra* note 1, at 29.

the history of racism in rape charges from the Scottsboro boys to the central park jogger case.<sup>124</sup> Taz noted: “The usual presumption is that a suspect is *not* a bully but, rather, a victim of a Lying Woman. But this presumption is turned on its head when there is a black defendant and a white victim.”<sup>125</sup> As Professor I. Bennett Capers recently observed, in addition to suspicion of victims, “there is another history of distrust that is equally important: the distrust of testimony by black men.”<sup>126</sup>

Unlike the propensities of victims that are perceived as unusual (group sex, anal sex, and sadomasochism), which often serve to shame the victim, the issue of race seems more legitimate. It is not simply something about the victim, but it is inextricably intertwined with the identity of the accused. It is troubling to rely on the propensity of the victim to have sex with black men; it is equally disturbing to let the jury’s racist attitudes serve to make consent less likely than it would have been had the perpetrator been white. Information that the victim had sex with black men in the past may be held against her; but silence on that point may tap into historic racist notions that infect the basic fairness of the trial.

## VII. SEARCHING FOR THE BALANCE BETWEEN THE RIGHTS OF THE RAPE VICTIM AND THE ACCUSED

The constitutional exception to rape shield reflects tensions in evidence law between protecting victims and assuring a fair defense, two sometimes competing values, both cherished by our late colleague, Taz. It also highlights difficult related questions about our continuing reliance on propensity evidence, challenges notions of acceptable sexuality, and reminds us that our history and attitudes towards rape are linked to issues of race.

Certainly, occasions exist when evidence that discloses a victim’s sexual propensities and history must, out of basic fairness, be admissible.<sup>127</sup> Issues of motive or evidence that directly contradicts the victim’s assertions may indeed be vital to the defense. For instance, in *Lewis v. Wilkinson*, the Court of Appeals for the Sixth Circuit appro-

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124. TAZLITZ, *supra* note 1, at 30.

125. TAZLITZ, *supra* note 1, at 31.

126. See I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1377 (2010).

127. As Judge Moore wrote, “[w]hen a state court mechanically applies a rape shield statute to exclude indispensable evidence of a victim’s sexual history, habeas relief may be warranted. That situation, however, is not before us today.” *Gagne II*, 680 F.3d at 523. (Moore, J., concurring in the judgment only).

privately held that the trial court had unconstitutionally excluded entries from the victim's diary.<sup>128</sup> Even though the entries referred to the victim's past sexual conduct and proclivities, her statements were essential because they cast doubt on her motives and indeed raised questions as to whether a rape had occurred at all.<sup>129</sup>

However, there is no constitutional right to allow the victim's proclivity and sexual history to be introduced as propensity. The mistake many judges continue to make concerns the belief that propensity in itself is "highly relevant" and "indispensable" to the defense. The attempt to wedge sexual propensity into neutral pattern evidence should always be rejected. It is barely relevant and always extremely unfairly prejudicial to admit evidence that the victim tends to consent to a particular form of sexual activity, or even that the victim tends to consent to a particular person. Even an exception as deeply entrenched as the one for prior sex with the accused must be applied carefully, so that it does not become a free pass for the accused because of the victim's propensity to have sex with the accused.

Of all the tough problems Taz examined, the confluence of rape myths and negative stereotypes about black men were the most intellectually difficult and personally painful for our beloved lost colleague, whose intellect and heart merged to produce great scholarship. We are indebted to him for raising such questions in his scholarship and for his personal example of how to wrestle with competing concerns with integrity and compassion.

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128. *Lewis v. Wilkinson*, 307 F.3d 413, 422–23 (6th Cir. 2002) (granting habeas for exclusion of victim's diary).

129. *Id.* at 417–18. The victim wrote: "I think I pounced on [the accused] because he was the last straw. That, and because I've always seemed to need some drama in my life . . . I'm sick of myself for giving in to them . . . I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends." *Id.* at 417. The court observed that the victim's statements could "reasonably be said to form a particularized attack on the witnesses credibility directed toward revealing possible ulterior motives, as well as implying her consent." *Id.* at 422. The Court believed that the diary entries could be read as indicating that pursuing rape charges was the victim's "way of taking a stand against all the men who previously took advantage of her" and that no rape had occurred but rather the victim was angry at the accused's sexually caddish behavior as a "player." *Id.* at 421.