THE PERSISTENCE OF RAPE MYTHOLOGY

Ramona C. Albin[†]

[†] Associate Professor of Law, Cumberland School of Law, Samford University. The author presented a draft of this Article at a faculty workshop at the Cumberland School of Law and appreciates feedback received from the Cumberland faculty. The author would also like to thank Lajuana Davis and Lane Woodke for their comments. Finally, the author would like to thank the law students who provided research assistance: Stephanie Lynge, Riley Kate Lancaster, and Henry Sheils.

ABSTRACT

In the 1970s, rape shield laws—laws that limit the admissibility of past sexual behavior evidence of rape victims—were first introduced to encourage reporting, protect victims during the adjudicative process, and ensure just verdicts. Legislative bodies enacted these laws intending to address culturally embedded stereotypes about women and rape, focusing on the so-called twin myths: (1) women who are sexually active more likely consented to sex in the charged event and (2) sexually active women are less credible and should not be believed. By addressing these rape myths through evidentiary rules, the theory was that it would increase reporting, increase conviction rates, and lessen victim trauma during trial. Nearly 50 years later, rape is still prevalent, with low reporting and conviction rates, and sexual behavior evidence, in certain circumstances, may still be admitted at trial. Some courts have even admitted sexual pattern evidence—evidence that establishes a pattern of prior conduct by the victim sufficiently similar to the accused's version of the alleged rape.

This Article argues that rape mythology underlies the admission of sexual pattern evidence in three common law jurisdictions: the United States, Canada, and England and Wales, and its admission is contrary to the purpose of extant rape shield laws. It interrogates the history of rape shield laws in each jurisdiction, traces the development of those laws, analyzes cases admitting sexual pattern evidence, and examines legislative and judicial responses to the recognition of the prevalence of rape myths impacting admission of sexual behavior evidence. Each jurisdiction has taken a different approach to addressing the resilience and prevalence of these myths. Based on this comparative analysis, the Article proposes amending Fed. R. Evid. 412 to include more robust procedural mechanisms to explicitly address mythology that may infect the fact-finding process.

INTRODUCTION

1. She asked for it;
2. It wasn't really rape;
3. He didn't mean to;
4. She wanted it;
5. She lied;
6. Rape is a trivial event;
7. Rape is a deviant event.[1]

Rape myths. They are false beliefs and attitudes rooted in societal stereotypes about sexual assault/rape, rape victims, and often result in victim-blaming and excuses for the perpetrator.[2] Such myths are the "engine of rape culture."[3] The rise of the women's movement in the 1960s and 1970s spurred changes in rape law in many countries, and many of those changes focused on addressing these rape myths. For example, before the 1970s, evidence of a victim's prior sexual history/sexual behavior was routinely admitted in rape cases in the United States, United Kingdom, and Canada as evidence of victim consent to the charged rape.[4] As a result, rape convictions were rare.[5]

---

1. KATE HARDING, ASKING FOR IT: THE ALARMING RISE OF RAPE CULTURE – AND WHAT WE CAN DO ABOUT IT 22 (2015) (quoting Diana Payne, Kimberly Lonsway, & Louise Fitzgerald, *Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale*, 33 J. OF RSCH. IN PERSONALITY 27, 37 (1999)).

2. Martha Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY AND SOC. PSYCH. 217 (1980); *see also* Kristen McCowan, Henry Fradella & Tess McDonald, *A Rape Myth in Court: The Impact of Victim-Defendant Relationship on Sexual Assault Case Outcomes*, 26 BERKELEY J. CRIM. L. 155, 156 (2021).

3. HARDING, *supra* note 1, at 23.

4. *See* Lisa Dufraimont, *Contesting Criminal Law: Honouring the Work of Professor Don Stuart: Myth, Inference and Evidence in Sexual Assault Trials*, 44 QUEEN'S L.J. 316, 334 (2019); *see also* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 15–16 (1977) (explaining that courts considered the "victim's character for chastity" as being "pertinent to whether or not she consented to the act that led to the charge of rape" and to "the woman's credibility"); Jennifer Temkin, *Regulating Sexual History Evidence—The Limits of Discretionary Legislation*, 33 INT'L COMPAR. L.Q. 942, 943 (1984); Clare McGlynn, *Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*, 81(5) J. CRIM. L. 367, 368–69 (2017).

5. *See Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Crim. Just. of the H. Comm. on the Judiciary*, 94th Cong. 1, 23 (1976) [hereinafter *Hearings*] (statement of Judge Sylvia Bacon, Chairperson Criminal Justice Section, Committee on Women and Criminal Justice, on behalf of the American Bar Association) (citing data during testimony to Congress on the proposed federal rape shield law that less than 1% of those charged were convicted of rape).

In the 1970s, rape shield laws—laws that limit the admissibility of past sexual behavior evidence of rape victims—were first introduced in these common law jurisdictions and were intended to encourage reporting rape, protect victims during the adjudicative process, and ensure just verdicts.[6] Legislative bodies enacted these laws intending to address culturally embedded stereotypes about women and rape.[7] And they focused on the so-called twin myths: (1) women who are sexually active more likely consented to sex in the charged event and (2) sexually active women are less credible and should not be believed.[8] By addressing these rape myths through evidentiary rules, the theory was that it would increase reporting, increase conviction rates, and lessen victim trauma during trial.[9]

Nearly fifty years after enactment of the first rape shield laws, rape is still prevalent, with low reporting and conviction rates, and sexual behavior evidence continues to be admitted at trial. And such evidence continues to be admitted, even in cases involving sexual pattern evidence (also called similarity evidence)—evidence that establishes a pattern of prior conduct by the victim sufficiently similar to the defendant's version of the alleged rape.[10] This Article focuses on the admission of such evidence in three common law jurisdictions, because on its face it is clearly the type of evidence that should be excluded by rape shield laws, as it draws on the prohibited inference that if a woman consents to sex in one way or with one person, it evidences her consent in other contexts. The construct that because a woman had

---

6. *See infra* Part II.

7. *See* Dufraimont, *supra* note 4; *see also Hearings, supra* note 5, at 2 (statement of Rep. Elizabeth Holtzman); *see also* R v. A, [2001] UKHL 25, [2002] 1 AC (HL) 45 (appeal taken from Eng.).

8. *See id.* For a fulsome discussion of rape mythology, *see also* HARDING, *supra* note 1, at 11–25; JOANNA BOURKE, RAPE: A HISTORY FROM 1860 TO THE PRESENT 21–49 (2007).

9. *Hearings*, *supra* note 5, at 3–4, 8 (statement of Roger A. Pauley, Deputy Chief, Legis. and Special Projects Section, Crim. Div.); *see also* FED. R. EVID. 412 advisory committee's note to 1994 amendment.

10. *See* North Carolina (N.C. GEN. STAT. § 8C-1, R. 412), Tennessee (Tenn. R. Evid. 412(c)(4)(iii)), and Florida ((FLA. STAT. § 794.022(2)), that allow the admission of sexual pattern or similarity evidence in certain circumstances when the defendant claims consent. For example, in the North Carolina statute, the rule provides for the admissibility of pattern evidence and defines it as follows: "Is 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." § 8C-1, R. 412. *See also* Deborah Turkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1476–87 (2012) (for a general discussion of sexual pattern evidence and Rule 412).

sex in a certain way once, twice, or five times means she consented to sex in that way with another individual is solely based on stereotypes of female sexuality and rape. It is straight up propensity evidence generally excluded by the rules and is the type of evidence rape shield laws were enacted to guard against. And, if sexual pattern evidence is being admitted because of rape myths, it is likely other sexual behavior evidence that falls within the confines of the rule is also being admitted.

Given that the admission of sexual pattern evidence conflicts with the purpose of rape shield laws, its admission in any case is startling and indicative of the power of these myths. In the United States, sexual pattern or similarity evidence is potentially admissible under several state rape shield statutes and has been admitted in rape trials.[11] The United Kingdom's (specifically, England and Wales's)[12] rape shield law includes an explicit exception for certain types of "similarity" (in other words, sexual pattern) evidence, and such evidence has also been admitted in various Canadian cases. The admission of such evidence underscores the persistence of rape myths and the need for rape shield laws to directly address their continued presence.

This Article argues that rape mythology underlies the admission of sexual pattern evidence in three common law jurisdictions: the United States, Canada, and England and Wales, and such admission is contrary to the purpose of extant rape shield laws. It interrogates the history of rape shield laws in each jurisdiction, traces the development of those laws, analyzes cases admitting sexual pattern evidence, and examines legislative and judicial responses to the recognition of the prevalence of rape myths impacting admission of sexual behavior evidence. Each jurisdiction has taken a different approach to addressing the resilience and prevalence of these myths. A comparative analysis of these approaches offers mechanisms to concretely and explicitly

11. *See* Tenn. R. Evid. 412(c)(4)(iii); North Carolina (N.C. GEN. STAT. § 8C-1, R. 412); Florida (FLA. STAT. § 794.022); Turkheimer, *supra* note 10.

12. The United Kingdom has three separate criminal justice systems (CJS): England and Wales, Scotland, and Northern Island. *See The justice system and the constitution*, COURTS AND TRIBUNALS JUDICIARY, http://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/justice-sys-and-constitution/ (on file with Syracuse Law Review) (last visited Feb. 25, 2026) [hereinafter *The justice system and the constitution*]. The CJS for England and Wales is reserved and under the control of Parliament. *Id.* The CJS for Scotland and Northern Ireland are devolved and under the control of the Scottish Parliament and the Northern Ireland Assembly, respectively. *See id.* The Article will specifically address rape shield laws in England and Wales and for that reason will reference those jurisdictions specifically. Various studies discussed in the Article reference the United Kingdom generally and, in that circumstance, the Article will reference the United Kingdom.

address biases to fully implement the purpose of rape shield laws. The Article then proposes amendments to Federal Rule of Evidence 412, based on the comparative analysis, to more effectively address rape myths.

Part I generally addresses rape prevalence, rape mythology, and the impact of the current system on sexual assault victims. Part II provides a brief history of rape shield laws in the United States and then discusses case law where sexual pattern evidence has been admitted at trial. Part II also lays out the extant federal rape shield law with its substantive and procedural provisions. Part III follows a similar structure, but applied to England and Wales, and Part IV, to Canada. During the discussion of each jurisdiction's rape shield law, the Article examines the differences between the various statutory regimes. Part V provides recommendations to improve the United States' federal rape shield law, Federal Rule of Evidence 412, based on this comparative analysis, including more robust procedural mechanisms to explicitly address mythology that may infect the fact-finding process. Finally, the reader is advised that in its discussion of case law from the United States, United Kingdom, and Canada, located in Parts II, III, and IV, this Article includes explicit descriptions of sexual crimes.

I. RAPE, RAPE MYTHOLOGY, AND SECONDARY VICTIMIZATION

A. Prevalence of Rape

Rape remains a highly prevalent, violent crime. In the United States, rape and sexual assault accounted for approximately 7.6% of all reported violent victimizations in 2023.[13] The majority of rapes/sexual assaults are not even reported. In the 2022 Bureau of Justice Statistics ("BJS") National Crime Victimization Survey, BJS estimates that approximately 75% of rapes and sexual assaults go unreported, making it one of the most underreported violent crimes.[14] Stunningly, the 2016/2017 Center for Disease Control and Prevention National Intimate Partner Survey (reported in 2022 and the most

13. *See* U.S. DEP'T OF JUST., NATIONAL CRIMINAL VICTIMIZATION SURVEY 2–3 (2023). The report provides that in 2023, "the rate of violent victimization was 22.5 per 1,000 persons" over 12. *Id.* at 1. The rate of rape and sexual assault was 1.7 per 1000 persons. *See id.* at 3. Thus, rape and sexual assault constitute 7.6% of non-simple violent victimizations (1.7 divided by 22.5).

14. *See* U.S. DEP'T OF JUST., NATIONAL CRIMINAL VICTIMIZATION SURVEY 8 (2022). Rape/Sexual Assault reported to police as .4 per 1000 persons and Rape/Sexual Assault not reported equaled 1.5 per 1,000 persons–meaning approximately 75% of rape/sexual assault goes unreported. *Id.* at 8.

recent survey to date) reports that one in four women and one in nine men in the United States have been a victim of a completed or an attempted rape.[15]

Rape is similarly prevalent and unreported in England and Wales and Canada. According to the 2018 Crime Survey for England and Wales, one in five women experienced an attempted or completed sexual assault.[16] In Canada, approximately 30% of women have been subjected to sexual assault or attempted sexual assault,[17] and, according to the 2018 Canadian General Social Survey on Victimization, only 5% of sexual assaults were reported to police.[18] In England and Wales, it is estimated that fewer than one in six cases of rape or sexual assault are reported.[19]

Even when reported, the likelihood of a charge post-complaint is unlikely. In England and Wales, only one in 70 reports resulted in a case being charged.[20] In Canada, one in three reported rape/sexual assault led to a charge,[21] and of those that are charged, less than 43% resulted in a finding of guilt.[22] In the United States, it is estimated that

---

15. *See* KATHLEEN C. BASILE ET AL., CDC, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON SEXUAL VIOLENCE 3 (2022).

16. *See Violence against Women and Girls and Male Position Factsheets*, HOME OFF. UK (Mar. 7, 2019), https://homeofficemedia.blog.gov.uk/2019/03/07/violence-against-women-and-girls-and-male-position-factsheets/#:~:text=Facts%20&%20statistics,695%2C000%20of%20these%20being%20male (on file with Syracuse Law Review); *see also* OFF. NAT'L STAT., CRIME IN ENGLAND AND WALES: APPENDIX TABLES App. A1, tbl. 1 (July 19, 2018).

17. *See* STAT. CAN., GENDER-BASED VIOLENCE AND UNWANTED SEXUAL BEHAVIOUR IN CANADA, 2018: INITIAL FINDINGS FROM THE SURVEY OF SAFETY IN PUBLIC AND PRIVATE SPACES 1, 2, tbl. 1 (2019).

18. *See* GOV'T OF CANADA, SEXUAL ASSAULT 1 (2019), https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/apr01.html (on file with Syracuse Law Review) [hereinafter GOV'T OF CANADA].

19. *See* OFFICE FOR NAT'L STAT., NATURE OF SEXUAL ASSAULT BY RAPE OR PENETRATION, ENG. AND WALES: YEAR ENDING 2020: UNDERSTANDING SEXUAL ASSAULT (2020), https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/natureofsexualassaultbyrapeorpenetrationenglandandwales/yearendingmarch2020#understanding-sexual-assault (on file with Syracuse Law Review).

20. *See* CTR. FOR WOMEN'S JUST., THE END OF VIOLENCE COALITION, IMKAAN, AND RAPE CRISIS ENG. AND WALES, THE DECRIMINALISATION OF RAPE: WHY THE JUST. SYS. IS FAILING RAPE SURVIVORS AND WHAT NEEDS TO CHANGE, 1 (Nov. 2020).

21. *See* GOV'T OF CANADA, *supra* note 18, at 1.

22. *See id.*; *see also* STATISTICS CANADA, *Adult criminal courts, guilty cases by most serious sentence,* CANSIM (Oct. 3, 2024), www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510003101(on file with Syracuse Law Review); STATISTICS CANADA, *Adult criminal courts, number of cases and*

for every 1000 sexual assaults, 310 are reported, 50 reports lead to an arrest, and 28 to a felony conviction.[23]

B. Revictimization and Lack of Victim Protection

For those cases where victims report, rape survivors express that formal systems do little to protect them and contribute to further trauma. In Canada, the overwhelming majority of sexual assault victims surveyed in 2013 reported little confidence in law enforcement, the trial process, or the criminal justice system.[24] Victims reported that they are not believed and are treated unfairly in the process.[25] In an attrition study conducted in the United Kingdom, researchers found that 34% of victims who made an initial report withdrew from the process.[26] The researchers concluded that "so many lose confidence so quickly, clearly not believing that the criminal justice system ("CJS") is capable of either recognizing their needs and concerns or delivering justice, is surely an indication that there are serious gaps in how reported rape and sexual assault is currently responded to."[27]

Similarly, in a 2019 study in the United States, in the jurisdictions studied researchers reported, "only 19 percent of cases ever led to an arrest, six percent of reports resulted in a guilty finding primarily as a result of a plea bargain, and less than two percent ever went to trial."[28] Addressing the significant attrition, one of the principal investigators explained that several factors were involved in the decision to prosecute including the seriousness of the offense, the amount of victim cooperation, and prosecutorial evaluation of victim "credibility" and

---

charges by type of decision, CANSIM (Oct. 3, 2024), www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002701 (on file with Syracuse Law Review).

23. *See The Criminal Justice System: Statistics*, RAPE, ABUSE, AND INCEST NATIONAL NETWORK https://rainn.org/statistics/criminal-justice-system (last accessed July 11, 2025) (on file with Syracuse Law Review).

24. Melissa Northcott, *A Survey of Survivors of Sexual Violence*, VICTIMS OF CRIME RESEARCH DIGEST, at 12–19, http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd6-rr6/p3.html#ftn1_[hereinafter Northcott] (last accessed Aug. 13, 2025) (on file with Syracuse Law Review); *see also* GOV'T OF CANADA, *supra* note 18, at 1.

25. Northcott, *supra* note 24, at 12–19.

26. *See* LIZ KELLY, JO LOVETT & LINDA REGAN, A GAP OR A CHASM: ATTRITION IN REPORTED RAPE CASES 59 (2005).

27. *Id.* at 68.

28. Melissa S. Marabito, Linda M. Williams & April Pattavina, *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.*, OFF. OF JUST. PROGRAMS' NAT. CRIM. JUST. REFERENCE SERV., https://www.govinfo.gov/content/pkg/GOVPUB-J28-PURL-GPO121074/PDF/GOVPUB-J28-PURL-gpo121074.pdf (on file with Syracuse Law Review) (last visited Feb. 25, 2026).

behavior before the rape.[29] The application of myths are present throughout the process, including in the prosecution's charging decisions.

Victims not only feel unprotected by the legal system, but they report being harmed by participating in it. In a recent qualitative study of sexual assault survivors' post-assault legal system experiences in the United States, survivors reported experiencing a lack of legal protection resulting in revictimization or secondary victimization.[30] This revictimization ranged from light sentences for the perpetrator, to victim-blaming by the court, to intimidation by the prosecutor and defense counsel.[31]

C. Rape Myths and Rape Shield Laws

Unsurprisingly, the prevalence and persistence of rape mythology is likely responsible for extremely low conviction rates in rape cases.[32] Two of the most common rape myths are: (1) sexually active women are more likely to consent to sex and therefore if a rape victim consented to sex in the past she consented to sex in the case at bar; and (2) women who are sexually active, are less trustworthy and lie about being raped either because they "wanted to be raped and changed their minds" or because "unchaste" women are inherently untrustworthy.[33] In other words, sexually active women are not worthy of legal protection.[34]

These rape myths cut across geographical boundaries and are deeply embedded in cultural attitudes.[35] The introduction of sexual history evidence during trial animates rape myths for judges and jurors. Varied studies in different jurisdictions support this conclusion

---

29. *See* WELLESLEY CENTERS FOR WOMEN, *Concerning Rates of Attrition for Sexual Assault Cases: New Report*, https://www.wcwonline.org/2019/concerning-rates-of-attrition-for-sexual-assault-cases-new-study (on file with Syracuse Law Review) (last visited Feb. 25, 2026) (statement of co-principal investigator Dr. Linda Williams).

30. *See generally* Katherine Lorenz, Anne Kirkner & Sarah Ullman, *Qualitative Study of Sexual Assault Survivors' Post-Assault Legal System Experiences*, 20 J. TRAUMA DISSOCIATION 5 (2019).

31. *See id.*

32. *See* Meagan Hildebrand & Cythia Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Cases*, 78 ALB. L. REV. 1059, 1060 (2015).

33. HARDING, *supra* note 1, at 22–23; BOURKE, *supra* note 8, at 24–41. *See also* Hildebrand & Najdowski, *supra* note 32, at 1060.

34. *See* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 53 (2002).

35. *See* Hildebrand & Najdowski*, supra* note 32, at 1081.

and identify the distortion caused by the introduction of sexual history evidence, making acquittals "more likely as jurors consider complainants less credible and more likely to have consented."[36] Studies show that "the more jurors endorse rape myths, the more likely they are to blame the woman for being victimized."[37] Like jurors, judges bring their own biases regarding rape and sexuality into the courtroom, impacting the treatment of complainants during trial and the outcome of trials. For example, in a Canadian case in 2014 where the judge acquitted the defendant of sexual assault, the trial judge asked the complainant: "why couldn't you just keep your knees together" and commented that "the accused [had not explained] why she allowed the sex to happen if she didn't want it" and commented on the complainant's morality during trial stating that "her morality left a lot to be desired."[38]

Rape shield laws were enacted to address many of the issues victims identify as barriers to pursuing protection through the criminal justice system. As discussed more fully below, they were enacted to prohibit the admission of sexual behavior/sexual predisposition evidence to protect victim privacy, encourage reporting, and increase just verdicts. At bottom, they were enacted to address rape myths and blunt propensity reasoning regarding a victim's prior sexual history. But, because of the persistence of rape mythology, rape shield laws are not currently accomplishing their intended purpose.

Notwithstanding rape shield laws, sexual history evidence is still being admitted at trial. A 2006 comprehensive study showed sexual history evidence is routinely admitted in England, Wales, and Scotland, and is admitted outside the rule's established evidentiary procedures.[39] Recent studies from the United Kingdom support those findings, showing that sexual history evidence was admitted to explain the victim's background, used to highlight similarities between prior sexual behavior and case at bar, and once admitted, defense counsel may use it to attack the victim's credibility.[40] In her book, Putting Trials on

36. Clare McGlynn, *Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*, 81 J. CRIM. L. 367, 372 (2017).

37. Hildebrand & Najdowski*, supra* note 32, at 1078.

38. R v. Wagar, [2015] ABCA 327, paras. 59, 61, 66 (Can.).

39. *See* LIZ KELLY, JENNIFER TEMKIN & SUE GRIFFITHS, SECTION 41: AN EVALUATION OF NEW LEGISLATION LIMITING SEXUAL HISTORY EVIDENCE IN RAPE TRIALS, 70–72 (2006); *see also* McGlynn, *supra* note 36, at 373–74; *see also* JOANNE CONAGHAN & YVETTE RUSSELL, SEXUAL HISTORY EVIDENCE AND THE RAPE TRIAL 120–21 (Bristol Univ. Press 2023).

40. *See* CONAGHAN & RUSSELL, *supra* note 39, at 120–21.

Trial, Elaine Craig identifies specific egregious instances where trial judges in Canada failed to properly implement the Canadian rape shield law because of stereotyped thinking.[41] In the United States, the expansive consent exception in Federal Rule Evidence 412 grants the trial court broad discretion regarding admission of sexual behavior evidence in certain circumstances. It is difficult to assess how often such evidence is admitted in state and federal courts in the United States because there are no comprehensive studies addressing this topic. And, if the evidence was admitted and the defendant was acquitted, unless there are very unusual circumstances, that case typically would not be subject to appellate review and not reported. Nonetheless, as described below, sexual pattern is admitted in trial courts in the United States.

II. THE FEDERAL RAPE SHIELD LAW: BROAD JUDICIAL DISCRETION IN THE CONSENT CONTEXT

A. History of the Rape Shield Law[42]

Before the 1970's, state and federal courts in the United States routinely admitted victims' sexual history and sexual behavior evidence at trial. Such evidence was considered "relevant" to victim credibility and consent.[43] As to consent, the stated justification was that sexually active women, or "unchaste" women, were more likely to consent to sex.[44] Even if a woman said no, it actually meant yes. In

41. *See* ELAINE CRAIG, PUTTING TRIALS ON TRIAL: SEXUAL ASSAULT AND THE FAILURE OF THE LEGAL PROFESSION 168–74 (McGill Queens Univ. Press 2018).

42. The following discussion on the history of FED. R. EVID. 412 draws, in part, on a discussion from two previous articles on this Rule. *See generally* Ramona C. Albin, *Appropriating Women's Thoughts: The Admissibility of Sexual Fantasies and Dreams Under the Consent Exception to Rape Shield Laws*, 68 U. KAN. L. REV. 617 (2020) [hereinafter Albin, *Appropriating Women's Thoughts*]; Ramona C. Albin, *Stereotyping Evidence: The Civil Exception to the Federal Rape Shield Law and Its Embedded Sexual Stereotypes*, 30 AM. U.J. GENDER SOC. POL'Y & LAW 1 (2022) [hereinafter Albin, *Stereotyping Evidence*].

43. *See* Berger, *supra* note 4, at 15–16 (explaining that courts considered the "victim's character for chastity" as being "pertinent to whether or not she consented to the act that led to the charge of rape" and to "the woman's credibility"); *see also* Anderson, *supra* note 34, at 52–53 ("The law traditionally insisted that the sexual history of a woman who alleged that she was raped was relevant to the truth of her allegation.").

44. *See* Reva B. Siegel, *A Short History of Sexual Harassment*, Directions in Sexual Harassment Law, 4 (Catharine A. McKinnon & Reva B. Siegel eds., 2004); *see also* State v. Muhammad, 162 N.W.2d 567, 571 (Wis. 1968) (where the court, quoting Kacmarzyk v. State, 280 N.W. 362 (1938), stated: "'The law recognizes a woman of previous unchaste characters is more likely to consent to an act of sexual

other words, if a woman had sex before, she had a propensity to consent to sex with others. At bottom, prior sexual history evidence was allowed to be used for propensity purposes regarding consent. Such evidence was also considered relevant to victim credibility. According to these same omnipresent social stereotypes, women wanted to be raped (an oxymoron), and after sexual intercourse, women may have changed their minds and then lied about the allegedly consensual sex.[45] Legal commentators from the 1960s even ascribed to this outrageous construct; in an article published in the Stanford Law Review, Professor Roger Dworkin stated:

> The problem becomes even greater when one recognizes the existence of the so-called "riddance mechanism." This is a phenomenon whereby a woman who fears rape unconsciously sets up the rape to rid herself of the fear and to "get it over with." The consent standard makes no provision for moralistic denial of willingness, for ambivalence, or for unconscious complicity.[46]

States were at the forefront of recognizing the need for evidentiary rules prohibiting the admission of this type of evidence. In 1974, Michigan passed the first rape shield law[47] and by 1976, 24 states had passed rape shield laws.[48] When Congress enacted the Federal Rules of Evidence in 1975,[49] it did not include a rape shield provision and therefore sexual behavior and sexual predisposition evidence were still admissible in federal court in rape and sexual assault cases. Although Federal Rule of Evidence 404(a)(1) generally prohibited the admission of character evidence, Federal Rule of Evidence 404(a)(2) allowed the introduction of "evidence of a pertinent trait of character of the victim of the crime offered by the accused."[50] In fact, the Advisory Committee Notes to Rule 404(a)(2) specifically stated that, "an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of . . . consent in a case of rape."[51] Such evidence was

---

intercourse than is a woman who is strictly virtuous.'"); *see also* Albin, *Appropriating Women's Thoughts*, *supra* note 42, at 617–18.

45. *See* Hildebrand & Najdowski*, supra* note 32, at 1063.

46. Roger B. Dworkin, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 682 (1966).

47. *See* MICH. COMP. LAWS ANN. § 750.520j (West 2025).

48. *Hearings*, *supra* note 5, at 2 (statement of Rep. Elizabeth Holtzman).

49. Pub. L. No. 93–595, 88 Stat. 1926 (1975).

50. *Hearings*, *supra* note 5, at 1 (statement of Rep. William L. Hungate, Chair, Subcomm. on Crim. Just.); *see also* Albin, *Appropriating Women's Thoughts*, *supra* note 42, at 625.

51. *Hearings*, *supra* note 5, at 1.

not only admissible, but some federal courts found reversible error to exclude it.[52]

In 1976, Congress recognized the need to limit evidence about the victim's past sexual conduct in rape cases. Representative Elizabeth Holtzman introduced legislation to create Rule 412 to safeguard the privacy rights of rape victims.[53] During hearings on the proposed rule, witnesses described the stereotypes underlying the admissibility of the victim's sexual behavior that the new rule would address. For example, Roger Pauley, a deputy chief of the Criminal Division, explained:

> The present admissibility of this evidence is bottomed on the premise that reputation for unchastity is probative of a lack of truthfulness because indicative of a generally poor moral character or that a person of unchaste reputation more probably indulged in consensual sex, now claimed as rape, than would be the case with respect to a person with a reputation for chastity. We are unaware of any basis in experience to support the first premise concerning the credibility generally of "unchaste" as opposed to chaste individuals. As to the second premise supporting the existing rule—that reputation for chastity has a bearing on the issue of consent—it seems clear that whatever marginal relevance such evidence may possess to show the likelihood of the complainant's consent to a subsequent act of sex is considerably outweighed by the public interests in preventing unfair prejudice at trial so as to endanger the chances of obtaining a rational verdict based on the totality of the evidence, as well as protecting the privacy of the victim and combatting the well documented reluctance of victims of forcible sex offenses to report such incidents because of fear that their reputation and private lives will be unduly exposed to the "unfeeling scrutiny of the courtroom."[54]

Pauley's testimony summarizes the myths underlying admissibility and provides the rationale for a rule prohibiting such evidence. His

52. *See id.* at 4 (statement of Roger A. Pauley, Deputy Chief, Legis. and Special Projects Section, Crim. Div.); *see also* Packineau v. United States, 202 F.2d 681, 687 (8th Cir. 1953), *overruled by* United States v. Kasto, 584 F.2d 268 (8th Cir. 1978); Albin, *Appropriating Women's Thoughts*, *supra* note 42 at 625.

53. *See Hearings, supra* note 5, at 1–2 (statement of Rep. Elizabeth Holtzman).

54. *Id.* at 4 (statement of Roger A. Pauley, Deputy Chief, Legis. and Special Projects Section, Crim. Div.).

testimony recognized the danger of such evidence to victims, jurors, and the fairness of the trial process. Along the same lines, Judge Sylvia Bacon, speaking on behalf of the American Bar Association, noted the impact of sexual behavior evidence on rape reporting and convictions by citing data showing that only 20% of victims reported the crime and less than 1% of those charged were convicted.[55]

In 1978, Congress passed legislation amending the Federal Rules of Evidence to enact Federal Rule of Evidence 412, providing some protection for victims of rape.[56] The new rule only applied to rape and assault to commit rape cases. The rule generally prohibited "reputation or opinion evidence of the past sexual behavior of an alleged victim" unless the evidence fell into one of three exceptions: (1) constitutionally required to be admitted; (2) past sexual behavior with the accused where the accused claimed consent; (3) past sexual behavior with someone other than the accused offered to show that another person was the source of semen or injury.[57] By including the general prohibition language, even with the substantial exceptions embedded in the rule, Congress recognized the necessity of reducing judicial discretion in the admission of such evidence. As stated at the Congressional hearings on the proposed rule, judges admitted sexual history evidence finding it relevant to consent or credibility and the admission was responsible for low rates of rape reporting and low conviction rates.[58]

---

55. *See id.* at 23 (statement of Judge Sylvia Bacon, Chairperson Crim. Just. Section, Comm. on Women and Crim. Just., on behalf of the Am. Bar Ass'n).

56. *See* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 [hereinafter *Protection of Rape Victims Act*].

57. *Id.* § 2(a). The Rule provided:

"(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

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

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

Id.

58. *See Hearings*, *supra* note 5, at 37 (statement of Mary Ann Largen).

Mary Ann Largen, Former National Organization of Women ("N.O.W.") National Rape Task Force Coordinator, explained that judges, like jurors, have grown up within the same societal influences and may share the same biases and misconceptions about rape that are common in the broader community.[59] Judicial discretion, therefore, needed limits because the trial was not to be a referendum on the victim's morality.[60] Nonetheless, because of the broad exceptions to the rule, judges maintain extensive discretion regarding admissibility of sexual behavior evidence.

1. The Current Rule: Federal Rule of Evidence 412

In 1994, Congress amended Rule 412, expanding the types of evidence covered by the general prohibition (sexual behavior and sexual predisposition evidence) and the scope of the rule by applying it to all criminal and civil cases involving sexual misconduct.[61] As with the rule enacted in 1978, the 1994 amendment and the current iteration contain broad exceptions to the general prohibition, particularly, the exception countenancing the introduction of the victim's sexual behavior with the defendant if the defendant claims consent.[62] Because consent is a common defense, this exception often applies, and admissibility is subject to broad judicial discretion.[63] The current rule is substantively the same as that passed in the 1994 legislation. The current rule provides:

> Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
>
> (a) PROHIBITED USES. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
>
> (1) evidence offered to prove that a victim engaged in other sexual behavior; or
>
> (2) evidence offered to prove a victim's sexual predisposition.

59. *See id.* at 34; *see also* Albin, *Stereotyping Evidence*, *supra* note 42, at 16.

60. *See* Albin, *Stereotyping Evidence*, *supra* note 42, at 16.

61. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1799, 1918–19. For an extensive discussion of the legislative history of Fed. R. Evid. 412, *see* Albin, *Appropriating Women's Thoughts*, *supra* note 42, at 626–35; Albin, *Stereotyping Evidence*, *supra* note 42, at 1.

62. *See* FED. R. EVID. 412(b)(1)(B).

63. *See* Eric R. Carpenter, *Normative Words and the Fundamental Limits of Rape Law Reform*, 74 S.C. L. Rev. 351, 365 (2022); Albin, *Appropriating Women's Thoughts, supra* note 42, at 617; Anderson, *supra* note 34, at 81–86.

> (b) Exceptions.
>
> (1) *CRIMINAL CASES.* The court may admit the following evidence in a criminal case:
>
> (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
>
> (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
>
> (C) evidence whose exclusion would violate the defendant's constitutional rights.
>
> (2) *CIVIL CASES.* In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.[64]

The Rule generally bars the use of evidence related to a victim's sexual behavior or sexual predisposition in civil and criminal cases. Congress enacted the Rule to "safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process,"[65] or, in other words, to address rape myths. Under the criminal consent exception, judges have expansive discretion to admit sexual behavior evidence. And, under the civil exception, the general prohibition does not effectively apply because the court may admit sexual behavior evidence subject to a balancing test. Significant judicial discretion regarding sexual history evidence continues.

Rule 412's current procedural requirements are straightforward and limited. The procedural component of the Rule provides:

> (c) PROCEDURE TO DETERMINE ADMISSIBILITY.
>
> (1) *MOTION.* If a party intends to offer evidence under Rule 412(b), the party must:

64. FED. R. EVID. 412(a)–(b).

65. FED. R. EVID. 412 advisory committee's note to 1994 amendment; *see also* Albin, *Appropriating Women's Thoughts*, *supra* note 42, at 621–22; Albin, *Stereotyping Evidence*, *supra* note 42, at 10.

> (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
>
> (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
>
> (C) serve the motion on all parties; and
>
> (D) notify the victim or, when appropriate, the victim's guardian or representative.
>
> (2) *HEARING.* Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.[66]

The Rule requires any party seeking to admit sexual behavior evidence to file a motion specifically describing the sexual behavior evidence it seeks to admit and the purpose of the evidence at least 14 days before trial, serve the motion on the parties, and notify the victim or the victim's representative. Under this subsection, the court must conduct a hearing before admitting the evidence and give the victim the right to attend and be heard. Other than those requirements, the Rule does not provide guidance to the trial court on the appropriate factors to consider regarding the admissibility of such evidence.

A. Sexual Pattern Evidence and Its Propensity Purpose

Although the Rule generally prohibits the admission of sexual behavior evidence, such evidence may still be admitted, even in cases involving third parties or cases involving sexual pattern evidence. Under the plain language of Rule 412, when a defendant claims consent, there is no exception for evidence of sexual behavior between a victim and third parties. For that exception, only evidence of sexual behavior between the defendant and the victim is potentially admissible.

Federal Rule of Evidence 412, unlike some state statutes, does not contain an exception for sexual pattern evidence. Sexual pattern evidence, which has been defined as "a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the

66. FED. R. EVID. 412(c). The 1994 amendment to the rule slightly modified some of the procedural requirements in the original bill. Although some of the language in the procedural requirement section has changed since 1994 as part of restyling of the evidence rules, the procedural requirements remain the same.

alleged encounter with the victim,"[67] is precisely the type of evidence that should fall within the Rule's general prohibition because the evidence is admitted to show a pattern of conduct to be used for propensity purposes. In 1976, at the Congressional Hearings on establishing Rule 412, Representative Holtzman, the sponsor of Rule 412, addressed this issue stated, "[t]here is no logical reason for me to claim that because a woman has had sexual relations in the past she will automatically say yes to every person. In fact my bill takes the position that whether or not a woman has ever said in the past is absolutely irrelevant to whether she would have said yes at the present time to the present defendant."[68]

It is difficult to determine how often this type of evidence is admitted. Many federal and state courts exclude sexual pattern evidence in sexual assault cases, but some courts still admit it. The following cases showcase the stereotyped rationale justifying admission.

1. Gagne v. Booker I: Countenancing Sexual Behavior Evidence for Propensity Purposes

Lewis Gagne and his co-defendant, Donald Swathwood, were charged with three counts of first-degree criminal sexual conduct for forcibly engaging in sexual acts with Gagne's former girlfriend, Pamela Clark, on July 3, 2000.[69] The defendants alleged that the complainant, Gagne's ex-girlfriend, consented to the sexual conduct; therefore, consent was the central issue at trial.[70] Gagne was convicted of two counts (but acquitted on the forced fellatio count) and Swathwood of all three counts.[71]

The background facts were not disputed at trial.[72] Gagne and Clark dated from January 2000 until early June 2000.[73] They moved in together in late January or early February until they broke up in June.[74] Throughout the relationship, Clark worked but Gagne was unemployed and he often used her ATM card without permission.[75] On

67. TENN. R. EVID. 412(c)(4)(iii); *see also* State v. Sheline, 955 S.W.2d 42, 46 (Tenn. 1997).

68. *Hearings*, *supra* note 5 at 45 (Statement of Rep. Elizabeth Holtzman).

69. *See* Gagne v. Booker, 606 F.3d 278, 279 (6th Cir. 2010).

70. *See id.*

71. *See id.*

72. *See id.* at 280.

73. *See id.*

74. *See Gagne*, 606 F.3d at 280.

75. *See id*.

July 3, 2000, Clark spent her day working in her yard.[76] During that time, she also drank nearly a pint of vodka.[77] Gagne came to her house uninvited around 10:45 pm.[78] He told her that he and Swathwood, who she knew, were moving to California.[79] Soon after that conversation, Swathwood and another friend of Gagne's (named Stout) arrived at Gagne's house.[80] They all started drinking and some smoked marijuana.[81] Clark drank about 9–10 beers.[82]

The parties disputed the facts surrounding the subsequent sexual conduct. According to the government, around midnight, Clark and Gagne showered together and then Clark, who thought the others had left, engaged in oral sex with Gagne in the living room.[83] Then, Swathwood came into the living room and had sexual intercourse with Clark, without her consent, while Gagne "forcibly held her head down."[84] Shortly after that, Gagne let Clark go, they went into the bedroom, and Clark told Gagne "she did not want to have sex with Swathwood."[85] In the bedroom, Clark then performed oral sex on Gagne.[86] Once again, Swathwood entered the room and had sexual intercourse with Clark without her consent.[87] Gagne and Swathwood held her down, had oral sex and sexual intercourse with her, slapping her buttocks and using sex toys on her.[88] Around 5:00 a.m., the men finally stopped these activities and left the bedroom.[89] Clark then went into the bathroom, threw up, and slept until the following day.[90] When she woke up, she learned that at 5:28 a.m. someone withdrew $300 using her ATM card and tried to withdraw more.[91] Two days later Clark reported her rape to the police and her adult son, and sought medical care.[92] She had bruising, but, according to the doctor's notes, no "trauma to her

76. *See id.*
77. *See id.*
78. *See id.*
79. *See Gagne*, 606 F.3d at 280.
80. *See id.*
81. *See id.*
82. *See id.*
83. *See id.*
84. *Gagne*, 606 F.3d at 280.
85. *Id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *See Gagne*, 606 F.3d at 280.
90. *See id.*
91. *See id.*
92. *See id.* at 281.

wrists or shoulders."[93] The Court also noted that the doctors did not find internal or external tearing of her vagina or rectum.[94]

At trial, the defense argued that the sexual activities were consensual, and Clark actually suggested the group sexual activities.[95] The defendants did not dispute that the sexual activities Clark described occurred, but argued that Clark consented to them. In addition to the sexual contact, the defense alleged that the group used cocaine.[96] According to the defense, at 5:00 a.m., Clark and Gagne agreed that Gagne should buy more crack using Clark's ATM card.[97] The men left in Clark's car, withdrew the $300 using Clark's ATM card, and then purchased crack with it.[98] They argued that the men did not go back to Clark's house at that time because they saw a police car in the neighborhood so they smoked the crack at a nearby cemetery.[99] Then they returned to Clark's house, returned her ATM card, and left because Clark was angry.[100]

Relevant here, at trial, Gagne sought to introduce evidence regarding Clark's past sexual history.[101] Specifically, the defense sought admission of the following evidence:

1. One Allegation of group sex sometime in June 2000 between Clark, Gagne and Swathwood, and two women they met at "Tony's Lounge";
2. One allegation, again sometime in June 2000, that Clark and Gagne engaged in group sex with an individual by the name of Ruben Bermudez;
3. Allegations that Clark and Gagne used sex toys during their relationship;
4. An allegation that Clark was the one who actually invited Stout (who was not charged) to have group sex on the night of the sexual assault;

93. *Id.*
94. *See Gagne*, 606 F.3d at 281.
95. *See id.*
96. *See id.* at 280.
97. *See id.* at 281.
98. *See id.*
99. *See Gagne,* 606 F.3d at 281.
100. *See id*.
101. *See id*.

5. An allegation that on another date, although unidentified, Clark had invited Gagne's father to have sex with her and Gagne.[102]

According to the defense, this evidence was probative of consent.[103] The government objected.[104] Specifically related to the group sex with Bermudez and the invitation to Gagne's father, the government argued that this evidence was propensity character evidence prohibited by Rule 404 and the Michigan rape shield statute because "it had nothing to do with the sexual activity between these two gentlemen."[105] The defense responded that excluding the evidence violated Gagne's constitutional right to confront the witnesses against him and to present a viable consent defense.[106]

The trial court partially granted Gagne's motion and allowed admission of evidence as to the "Tony's Lounge Incident" and the use of sex toys between the victim because their probative value outweighed any prejudicial effect.[107] The trial court excluded Gagne's alleged group sex with the victim and Bermudez and the alleged offer of group sex to Gagne's father as not falling within the dictates of the rape shield law because it involved a third party, not just the actor(s).[108]

Regarding the Tony's Lounge Incident, evidence that was presented to the jury, sometime in the spring of 2000, Gagne, Clark, and Swathwood went to Tony's Lounge, drank, and met two women there.[109] At some point, they all left the bar and went to one of the women's houses.[110] Clark and Gagne had sex in the living room and then moved to the bedroom while Swathwood had sex with the two women in the living room and later in the bedroom.[111] Clark and Gagne started arguing in the bedroom and Clark then left.[112] It was uncontroverted that Clark was drunk.[113] Gagne claimed Clark had oral

102. Gagne v. Booker, 680 F.3d 493, 499 (6th Cir. 2012). The facts related to the evidentiary issue are clearly outlined in the en banc opinion and that is the reason the subsequent en banc opinion is cited here. *See Gagne*, 606 F.3d at 281.

103. *See Gagne*, 606 F.3d at 281.

104. *See id.*

105. *Gagne,* 680 F.3d at 499–500.

106. *See id.* at 500.

107. *See id.* at 501.

108. *See id.*

109. *See Gagne*, 606 F.3d at 281.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.* at 280.

sex with Swathwood that night.[114] Swathwood testified that he and Clark had oral sex that night in front of Gagne and the two other women and further, answered yes when asked by defense counsel whether it was a "[f]air assessment to say this was kind of a group-sex, orgy-type situation[.]"[115] Clark testified that she did not have sex with Swathwood in the living room.[116] That evidence was highlighted at trial.[117] The panel opinion notes that in closing argument, the Government repeatedly highlighted the implausibility of the defendant's version of the event at issue.[118] In response, the defense argued at closing that Clark was not credible and emphasized the Tony's Lounge facts to show evidence of her consenting to this type of activity before.[119] On rebuttal, the Government asserted that even if the jury believed that the Tony's Lounge Incident involved consensual sex, the circumstances were factually different because the Tony's Lounge Incident "'did not involve…two men.'"[120]

Gagne was convicted of two counts of first-degree criminal sexual conduct.[121] Gagne raised several issues on direct appeal—relevant here was his claim "that the trial court violated his due process right to present a defense when it excluded the evidence regarding the group sexual activity with Bermudez, and Clark's solicitation of Gagne's father to participate in group sex with her and Gagne."[122] The Michigan Court of Appeals affirmed.[123] The Michigan Court of Appeals explained that the alleged group sexual activity and the invitation to Gagne's father was of no relevance because third parties were involved.[124] Finally, the Michigan Court of Appeals noted that Gagne's defense was not limited because he presented evidence of group sexual activity via the Tony's Lounge evidence.[125] Gagne sought an appeal to the Michigan Supreme Court, which "denied [his] leave to appeal."[126]

---

114. *See Gagne*, 606 F.3d at 282.
115. *Id.* at 282.
116. *See id.* at 281.
117. *See id.*
118. *See id.* at 282.
119. *See Gagne*, 606 F.3d at 282.
120. *Id.*
121. *See id.* at 279.
122. *Id.* at 282.
123. *See id.*
124. *See Gagne*, 606 F.3d at 282.
125. *See id.*
126. *Id.* at 282–83.

After affirmance on direct appeal, Gagne pursued habeas relief in federal court primarily based on the trial court's exclusion of the past sexual history evidence and its impact on mounting a complete and meaningful defense.[127] The federal district court granted the petition conditionally because the "evidence was highly relevant since it involved occurrences remarkable in their similarity to the events on the night of July 3" and the case was a "credibility contest."[128] The Government appealed.[129]

The Sixth Circuit panel affirmed.[130] Before turning to the case at bar, the Sixth Circuit outlined the appropriate balancing test to be applied. The Sixth Circuit explained that in *Crane v. Kentucky*, involving the events related to the defendant's confession, the Supreme Court attempted to balance the defendant's right to present a meaningful defense against the government's interest in exclusion of the evidence.[131] In that case, according to the majority opinion, the Supreme Court specified that the inquiry must include an evaluation of the relevance of the evidence and its centrality to the defense theory of the case.[132] The Sixth Circuit also relied on the Supreme Court's opinion in *Michigan v. Lucas*, where it recognized similar interests involved.[133] In *Lucas*, the Supreme Court held that the Michigan Court of Appeals erred by adopting a per se rule that exclusion of evidence of a rape victim's prior sexual behavior with the defendant because of the defendant's failure to comply with the rape shield laws' notice requirement was unconstitutional.[134] The Supreme Court stated that Michigan's rape shield law's requirements were a "valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."[135] But, the Court reversed and remanded for the Michigan courts to balance the interests of the government in exclusion under the rape shield law versus Lucas's rights under the Sixth Amendment.[136] Finally, the Sixth Circuit noted under 28 U.S.C. § 2254(d), the petition may only be granted if the state court's decision was "contrary to, or involved an

127. *See id.* at 278, 281, 283.
128. *Id.* at 283.
129. *See* Gagne, 606 F.3d at 279, 283.
130. *See id.* at 279.
131. *See id.* at 284 (citing Crane v. Kentucky, 476 U.S. 683, 690–91 (1986)).
132. *See id.* at 284.
133. *See id.*; *see also* Michigan v. Lucas, 500 U.S. 145, 149, 152 (1991).
134. *See Lucas*, 500 U.S. at 149, 152.
135. *Id.* at 150.
136. *See Gagne*, 606 F.3d at 285 (citing *Lucas*, 500 U.S. at 153).

unreasonable application of, clearly established Federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented."[137]

Applying these standards to Gagne's appeal, the Sixth Circuit panel found that the Michigan Court of Appeals' discussion of federal law and the appropriate balancing test was not inconsistent with the standards expressed in *Crane* and *Lucas*.[138] Nonetheless, according to the panel, the state appellate court unreasonably applied the law, and on that basis, affirmed the federal district court.[139] According to the Sixth Circuit, the state court "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 the night of July 3, 2000."[140] The opinion found this evidence "'indispensable'" and "so 'highly relevant'" to the jury considering defendant's consent claim.[141] In other words, because Clark allegedly consented to group sex with individuals other than the defendants (i.e. Bermudez), that is evidence she consented to group sex on July 3. This inference is precisely the inference rape shield laws were meant to address. The rationale the court applied here is the same rationale that would allow prior sexual behavior of the victim, with individuals other than the defendant, to be considered relevant and admissible. She had sex when she was drunk on a prior occasion, or she had sex using a certain sexual position on a prior occasion, or she had sex with multiple partners on a prior occasion and therefore she consented here. The majority opinion stated: "[i]n this case, these prior incidents have significance relevance not only because Gagne and Clark were involved in them, but also because they are both remarkably similarly to the events that occurred the night of July 3."[142]

In terms of the state's interest as a component of the balancing test, the Sixth Circuit minimized or even ignored the purpose of Michigan's rape shield law. The majority viewed sexuality outside the mainstream as unworthy of legal protection. The majority opinion stated:

> This is not a case involving sex a decade before the subject incident. And what made the evidence even

137. 28 U.S.C. § 2254(d); *see also Gagne*, 606 F.3d at 283, 285.
138. *Gagne*, 606 F.3d at 285–86.
139. *See id.* at 286.
140. *Id.* at 286.
141. *Id.* at 287, 289 (citing *Crane*, 476 U.S. at 691).
142. *See id.* at 286.

> more central to petitioner's defense was the extraordinary nature of the events giving rise to the charge. The idea that someone could have consented to this sort of thing seems incredible absent proof that the person *had* consented to it before.[143]

In other words, if a woman's sexual practice is outside the mainstream, sexual behavior that would otherwise not be relevant becomes relevant, whether that conduct is solely with the defendant or not. The panel attempted to limit the holding to the facts of this case, but the panel effectively held that consensual three-way sex between the defendant, victim, and an individual not involved in the case at bar, was relevant to consent.

Chief Judge Alice Batchelder dissented.[144] She stated that the panel overrode the legislatively adopted rape shield law and decided 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.'"[145] At bottom, the Chief Judge explained, the holding condemned the entire rape shield rationale and construct.[146] As the Chief Judge noted, the majority subscribed to the view that in rape cases perpetrator testimony of the victim's sexual promiscuity or sexual proclivities is "indispensable" evidence.[147] And that view is in direct conflict with the purpose and structure of rape shield laws. It is an example of the persistence of rape mythology.

2. Gagne v. Booker II: Reversed Gagne I, but Forbidden Inferences Remain

The State of Michigan sought rehearing en banc, and the Sixth Circuit vacated and reversed.[148] The plurality opinion first outlined the district court's rationale for its grant of habeas relief. According to the plurality opinion, the district court found that by excluding the two instances of alleged group sex, the Michigan Court of Appeals violated the defendant's constitutional right to a fair trial, confronting the witnesses against him, and presenting a fulsome defense.[149] But, again according to the plurality, a federal district court "may not grant a writ

143. *Gagne*, 606 F.3d at 288.
144. *See id.* at 292 (Batchelder, CJ., dissenting).
145. *Id.* at 293 (Batchelder, CJ., dissenting).
146. *See id.*
147. *Id.* at 299.
148. *Gagne*, 680 F.3d at 496.
149. *See id.* at 509.

unless the state court's decision 'was contrary to, or involved in an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "'was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding.'"[150] The opinion further explained that habeas review is extremely deferential to state courts.[151] And, determining the unreasonableness of a rule requires the district court to consider the rule's specificity.[152] A general rule will likely lead to "reasoned disagreement."[153] Gagne claimed that the Michigan Court of Appeals unreasonably applied the principles in *Luca*s and *Crane*.[154] But, as the plurality opinion outlined, the district court did not define the "'clearly established federal law'" at play here and did not explain precisely how the Michigan Court of Appeals "unreasonably applied it."[155] The plurality found that even if the district court disagreed with the "reasons given" by the Michigan Court of Appeals for exclusion of the evidence, they were still "legitimate reasons" and not objectively unreasonable.[156] The issue was not whether the evidence was the "'most relevant evidence'" or whether Clark's participation in prior group sex made it more likely that Clark consented to sex with Gagne in this case.[157] Because Gagne could not show that the Michigan Court of Appeals decision was objectively unreasonable, the Sixth Circuit reversed and denied the petition.[158]

In concurrences, several judges posited additional reasons to reject the petition and to highlight disagreement with dissenting opinions, specifically addressing the improper inferences the majority panel opinion and the dissenting en banc opinions relied upon. Judge Sutton pointed out that the probative value of the evidence at issue was founded on the "forbidden inference that a woman who consents once to group sex is more likely to consent to it in the future."[159] In Judge Griffin's concurrence, the judge noted that "the evidence at issue was not offered to demonstrate the victim's willingness to consent to

150. *Id.*
151. *See id.* at 513–14.
152. *See id.* at 514.
153. *Gagne*, 680 F.3d at 514.
154. *See id.* at 512.
155. *Id.* at 509.
156. *Id.* at 517.
157. *Id.*
158. *See id.* at 518.
159. *Gagne*, 680 F.3d at 518 (Sutton, J., concurring).

sexual relations with Gagne."[160] The judge explained that the jury knew they were in a relationship.[161] In reality, the evidence was sexual behavior evidence offered for the purpose of showing that the complainant had certain sexual tendencies and therefore, because she consented before, she likely consented again—straight up propensity evidence.[162] Dangerously, as Judge Griffin explains, this rationale would compel the admission of prior sexual behavior evidence when the complainant had sexual tendencies that were not traditional.[163]

At bottom, several dissents argued that a complainant's pattern of sexual conduct should be admissible as evidence of consent. Judge Kethledge argued that because the victim "consented to virtually identical conduct" (with the not insignificant difference of involving different parties) four weeks earlier and had proposed group sex on another occasion, that evidenced her consent in the instant case.[164] Judge Martin also dissented, making a similar argument.[165] That dissent stated: "In a rape case, adult individuals should be allowed to introduce evidence of past relevant behavior going towards whether the sexual act in question was consensual. The language of Michigan's rape-shield statute does not bar the admission of Lewis Gagne's proposed evidence of past similar consensual conduct . . ."[166] Relevant evidence in Judge Martin's view is past similar consensual conduct involving the defendant, complainant, and a random third party, because such conduct evidences the complainant's consent.

3. State v. Perez: Prior Sexual Behavior Is Relevant to Victim Credibility

In *State v. Perez*, the Court of Appeals of Kansas found the prior sexual conduct of the complainant with individuals other than the defendant relevant to the defendant's consent defense.[167] In *Perez*, the complainant, a 16-year-old girl, attended a party where she had sex with two men.[168] Defendant Perez witnessed her having sex with them.[169] She later left the party with Perez and another man and while

160. *Id.* at 520 (Griffin, J., concurring).
161. *See id.* (Griffin, J., concurring).
162. *See id.*
163. *See id.* (Griffin, J., concurring).
164. *Gagne*, 680 F.3d at 527. (Kethledge, J., dissenting).
165. *See id.* (Martin, J., dissenting).
166. *Id.*
167. *See* State v. Perez, 995 P.2d 372, 377 (Kan. Ct. App. 1999).
168. *See id.* at 375.
169. *See id.*

the three were in the car, the complainant claimed Perez raped her.[170] The State charged Perez with one count of rape and one count of aggravated kidnapping.[171] Perez claimed they did not have sexual intercourse but engaged in consensual fondling.[172]

At trial, Perez sought to introduce affidavits from the two men who had sex with the complainant at the party because, according to the defense, it was relevant to consent and victim credibility.[173] In addition, Perez sought to introduce testimony of the complainant where she admitted to sex with the two men at the party (that testimony came from a pre-trial motions hearing).[174] The trial court found this evidence irrelevant and inadmissible under the Kansas rape shield law.[175]

Perez was convicted of one count of rape.[176] He appealed, arguing the trial court erred in excluding the evidence of the victim's sexual behavior that evening at the party before she was raped.[177]

The Kansas Court of Appeals expressed an extremely broad view of the relevance of prior sexual conduct regarding consent, notwithstanding the Kansas rape shield law. According to the Court of Appeals, the relevance inquiry involves an evaluation of whether the prior sexual behavior "makes it more probable or less probable that the victim consented to sexual activity on this occasion."[178] The Court went further and explained that "a complaining witness' prior sexual behavior is relevant to credibility when the witness' past sexual

170. *See id.*

171. *See id.* at 376.

172. *See Perez*, 995 P.2d at 375.

173. *See id.* at 376.

174. *See id.*

175. *Id.*; *see also* KAN. STAT. ANN. § 21-3525(b) (2005) (repealed 2010) (current version at KAN. STAT. ANN. 21-5502 (b) (2017)). The statute was amended in 2005 and 2010. In 2005, the Kansas statute provided: "[I]n any prosecution to which this section applies, evidence of the complaining witness' previous sexual conduct with any person including the defendant shall not be admissible, and no reference shall be made thereto in any proceeding before the court except under the following conditions: [describes motions offer of proof and motions process] . . . . The court shall conduct a hearing on the motion in camera. At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the previous sexual conduct of the complaining witness is relevant and is not otherwise inadmissible as evidence, the court may make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted. The defendant may then offer evidence and question witnesses in accordance with the order of the court." *Id.*

176. *See Perez*, 995 P.2d at 376.

177. *See id.*

178. *Id.*

activities are so factually similar to the defendant's version of the incident in question to diminish his or her credibility."[179]

The opinion sets out the factors to determine relevance:

> (1) evidence of prior sexual conduct by complainant with defendant; (2) to rebut medical evidence on proof of origin of semen, venereal disease or pregnancy; (3) distinctive sexual patterns so closely resembling defendant's version of the alleged encounter as to tend to prove consent on the questioned occasion; (4) evidence of prior sexual conduct by complainant with others, known to the defendant, tending to prove he believed the complainant was consenting to his sexual advances; (5) evidence of sexual conduct tending to prove complainant's motive to fabricate the charge; (6) evidence tending to rebut proof by the prosecution regarding the complainant's past sexual conduct; and (7) evidence of sexual conduct offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the acts charged.[180]

The Court of Appeals also added that proximity in time between prior sexual conduct and the charged act should also be considered.[181] Embedded in much of this list and its broad construction of relevance are sexual stereotypes the rape shield law is meant to address, *i.e.*, that if a woman consented to sex with an individual, then surely she consented to sex with other men two hours later. That if the defendant knows of the complainant consenting to sex with someone else; that is evidence to show that she consented to sex with the perpetrator.

In *Perez,* the Court of Appeals explained that the proximity factor was satisfied because it was only an hour or two between the complainant's sexual intercourse at the party and the events in the car with the defendant.[182] The Court attempted to argue that the result did not offend the rape shield law because the sexual history evidence was not offered to humiliate the complainant, rather, it was offered to show that the complainant's version of events was not credible.[183] In other words, if an individual chooses to have sex and then an hour later gets into a car with two other men, then she clearly consented to sex in the car and she is not credible if she alleges rape. Her prior sexual activity

179. *Id.*
180. *Id.* at 377.
181. *See Perez*, 995 P.2d at 377.
182. *See id.* at 781.
183. *See id.* at 782.

with two individuals other than the defendant means she consented to sex with the defendant. This is clearly the type of propensity evidence that the rape shield law intended to exclude.

The Court of Appeals then tried to further justify this result by arguing that the evidence was actually sexual pattern evidence, admissible under the rule.[184] According to the court, the victim had sexual intercourse with two different men at the party while other people were watching, and then she had sexual intercourse, in a car, with the defendant, while someone else was driving.[185] According to the court, these two things are "strikingly similar and support[ed] Perez's consent defense."[186] Finally, the Court of Appeals stated the quiet part out loud, that "[h]ad the trial court not precluded evidence of [the complainant's] sexual activities at the party, the jury could have more accurately assessed [the complainant's] credibility."[187] The Kansas Court of Appeals explicitly found that the prior sexual activities of the victim are indicative of victim credibility.[188] On this basis, the Court of Appeals reversed.[189]

4. State v Jones: A Sex Party Equals Consent

In *State v. Jones*, the defendant, the uncle of the complainant, was convicted of second-degree rape with the aggravating circumstance of the use of a position of trust to facilitate the crime.[190] According to the complainant, the defendant "put his hands around her neck," said he would kill her, and then raped her.[191] According to Jones, the complainant consented to sex during an "all-night, drug-induced sex party."[192] Jones sought to testify to the following: the complainant and Jones went to a truck stop, the complainant used cocaine and alcohol, danced for money, and had consensual sex with two other men that

184. *See id.*

185. *See id.*

186. *Perez*, 995 P.2d at 782.

187. *Id.* at 378.

188. *See id.* at 376.

189. *See id.* at 378.

190. *See* State v. Jones, 230 P.3d 576, 579 (Wash. 2010). Defendant was initially charged with first degree rape and found not guilty, but the jury did not reach a verdict on the lesser included charge of second-degree rape. *See id.* The state amended the charge to that of second-degree rape with aggravating circumstances and was tried again and convicted in the case discussed above. *See id.* The recitation of the facts references evidence from the second trial. *See id.*

191. *Id.* at 579.

192. *Id.* at 580.

night.[193] The trial court excluded the "sex party" evidence finding that it fell directly within the confines of the Washington State rape shield law because the purpose of the evidence was to attack the complainant's credibility.[194] The defendant objected, arguing that the exclusion violated his Confrontation Clause rights and right to a meaningful defense.[195] At trial, Jones did not call any members of the "sex party" as witnesses, and, importantly, "only Jones's semen was found on [the victim]."[196] After his conviction, Jones appealed and the Court of Appeals affirmed.[197] He then appealed to the Washington Supreme Court, which reversed.[198] On appeal, Jones argued the trial court violated his Sixth Amendment rights by excluding evidence of the "sex party" through his testimony.[199]

The Washington Supreme Court held that the rape shield law did not apply to this case.[200] To justify the holding, the Court distinguished between past sexual behavior covered by the statute and behavior that occurred at the same time or in proximity to the sexual conduct at issue.[201] Foreshadowing the Court's view of female sexuality and its impact on consent, the Washington Supreme Court agreed with the Court of Appeals questioning whether "flirtatious behavior on the evening of a rape counted as past sexual conduct" and found that such behavior was not barred by the rape shield statute."[202] The Washington Supreme Court then explained that even if the rape shield statute applied, the result would be the same because "it cannot be used to bar evidence of extremely high probative value per the Sixth Amendment."[203] According to the Court, evidence such as "meeting men in bars before consenting to sex or other distinctive sexual patterns, could be relevant if it demonstrates 'enough similarity between the past consensual activity and defendant's claim of consent.'"[204] Under this rationale, meeting men in bars establishes a pattern sufficient to be considered evidence of consent. The sex party evidence, according to the

193. *See id.* at 579.
194. *See id.*
195. *See Jones*, 230 P.3d at 579.
196. *Id.* at 582.
197. *See id.* at 579.
198. *See id.* at 582.
199. *See id.* at 579.
200. *See Jones*, 230 P.3d at 581.
201. *See id.*
202. *Id.*
203. *Id.*
204. *Id.* (citing State v. Hudlow, 659 P.2d 514, 520 (Wash. 1983)).

Court, if believed, "would prove consent."[205] The long-standing tropes regarding women and consent are front and center in this opinion. This case is an analog to *Gagne I* and exhibits the same rationale and the same application of stereotypes.

5. State of Utah v. Richardson: Sexual Behavior Evidence Provides Important Context

Similarly, in *State of Utah v. Richardson*, the Supreme Court of Utah countenanced the use of sexual behavior evidence because "[i]f a person is more likely to consent to sex with a past sexual partner, she is also more likely to consent to the kind of sexual relations she has had with a partner in the past."[206] In *Richardson*, the parties agreed that they had a heated argument the evening of the rape. The defendant lived with the complainant and her two children.[207] The complainant testified that the defendant became physical during the argument, assaulted her, and forced oral, vaginal, and anal sex upon her.[208] According to the complainant, while in their bedroom, the defendant demanded she have anal sex with him and threatened her that if she did not comply, he would "call Child Protective Services and have her children taken away."[209] She tried to escape the bedroom, but he pushed her on the bed. She admitted she hit him at this point and then he hit her several times.[210] He choked her and then penetrated her vaginally and anally.[211] He told her to call the man she was seeing to come pick her up.[212] She called that man's number and spoke to that man's mother, who then called the police.[213] The defendant claimed that the sex was consensual "make-up sex."[214]

Defendant was charged with aggravated kidnapping (later dropped), two counts of forcible sodomy, rape, aggravated assault, and two counts of domestic violence in the presence of a child.[215] At trial, defendant sought to introduce evidence that he and the complainant had previously engaged in sex while the victim was menstruating and

205. *Jones*, 230 P.3d at 580.
206. State of Utah v. Richardson, 308 P.3d 526, 532 (Utah 2013).
207. *See id.* at 528.
208. *See id.*
209. *Id.*
210. *See id.*
211. *See Richardson*, 308 P.3d at 528.
212. *See id.*
213. *See id.*
214. *Id.* at 529.
215. *See id.*

anal sex to "establish a pattern of consensual anal sex between the parties."[216] The trial court admitted general evidence of the parties' sexual relationship, but excluded evidence of anal sex during menstruation because there was no evidence the complainant was menstruating during the offense in question and the court questioned the probative value of admitting evidence of prior consensual anal intercourse.[217] The trial court ruled that unless the government opened the door by presenting that the couple never engaged in anal sex, the evidence would not be admissible under Utah Rule of Evidence 412.[218] The jury convicted the defendant of vaginal rape and forcible anal sodomy.[219]

On appeal, the defendant argued that the trial court improperly excluded the sexual history evidence under Rule 412.[220] The Utah Supreme Court agreed and reversed.[221] What is interesting about this case is the broad view of relevance of prior sexual history, particularly related to evidence of "unconventional" sexual conduct, such as anal sex. The Court found that the evidence fit squarely within the Rule 412 consent exception, which stated that "'evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct, if offered . . . by the accused to prove consent' is admissible if it 'is otherwise admissible' under our evidentiary rules."[222] The trial court excluded the evidence at issue under this exception because it was not relevant.[223] The Utah Supreme Court, however, disagreed, finding that sexual behavior evidence between the parties "contextualizes" the sexual relationship and establishes a pattern of sexual conduct; therefore general sexual behavior evidence and specific instances of sexual behavior were admissible.[224] Here, the court found that because anal intercourse is of "an unconventional nature," it would lead to unfair prejudice to the defendant to exclude this evidence.[225]

This broad view of relevance in the sexual assault/rape context means most sexual behavior evidence between the parties would be

216. *Richardson*, 308 P.3d at 529.
217. *See id.* at 530.
218. *See id.*
219. *See id.*
220. *See id.*
221. *See Richardson*, 308 P.3d at 531, 535.
222. *Id.* at 531.
223. *See id.*
224. *Id.*
225. *Id.* at 533.

relevant and admissible under the Rule, contrary to the purpose of rape shield laws.

III. THE RAPE SHIELD LAW IN ENGLAND AND WALES: EXPANSIVE JUDICIAL DISCRETION

Like the United States, rape mythology was the foundation for the admissibility of sexual history evidence under English common law. Such evidence was admissible and considered relevant to (1) witness credibility, i.e., sexually active complainants were considered less trustworthy, and (2) consent, i.e., women who engaged in sexual activity were more likely to have consented.[226] And, like the United States, in the 1970s and 1990s, the United Kingdom (England and Wales) enacted iterations of rape shield laws to limit sexual behavior evidence.[227] There are some significant differences between the United States and England and Wales's laws. Unlike Federal Rule of Evidence 412, the rape shield law in England and Wales explicitly countenances the admission of sexual pattern evidence in certain circumstances.[228]

A. The Heilbron Committee, the Sexual Offenses (Amendment) Act 1976, and Limiting the Admission of Sexual Behavior Evidence

In 1975, activated by public outrage over the House of Lords holding in *D.P.P. v. Morgan*, that an unreasonable belief in consent could potentially negate mens rea in a case involving the victim's husband and three of his Royal Air Force colleagues who gang-raped her, the Home Secretary convened an advisory group, subsequently called the Heilbron Committee, "to consider whether early changes in the law of rape were necessary."[229] This Committee concluded that evidence relating to the relationship between defendant and complainant would be admissible but sexual behavior evidence with other men "ought not to be introduced."[230] Regarding sexual history evidence of the complainant with "men other than the accused," the Committee recommended that such evidence should be inadmissible "except with

226. *See* Temkin, *supra* note 4, at 943; McGlynn, *supra* note 4, at 369.

227. *See infra* Part III (A).

228. *See infra* Part III (C).

229. HOME OFFICE ADVISORY GROUP, REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, 1975, Cm. 6352 ¶¶ 4–7 (Introduction) (UK); *see also* D.P.P. v. Morgan [1975] AC 182 (HL).

230. HOME OFFICE ADVISORY GROUP, *supra* note 229 ¶ 134 (Evidence in Rape Cases).

the leave of the trial judge."[231] According to the Committee, such evidence would be admissible if it "relates to behaviour on the part of the complainant which was strikingly similar to her alleged behaviour or following, the alleged offense" and such evidence has such a degree of relevance so "that it would be unfair to the accused to exclude it."[232]

B. Sexual Offenses (Amendment) Act 1976

In 1976, soon after publication of the Heilbron Committee Report, Parliament passed the Sexual Offenses Act.[233] Although the Act generally prohibited the admission of sexual history evidence with individuals other than the defendant, it also allowed the admission of such evidence if the trial judge was satisfied that it would be unfair to the defendant to exclude it.[234] In other words, the Act allowed the trial court discretion to determine admissibility of sexual history evidence with individuals other than the defendant. The Act did not address sexual history evidence of the defendant and complainant. That evidence, admissible under common law, survived untouched.[235]

C. Sections 41 and 43 of the Youth Justice and Criminal Evidence Act 1999

As in the United States in the 1990s, there was international and regional recognition in the United Kingdom of the prevalence of violence against women and the insufficiency of extant rape shield legislation.[236] The Sexual Offences Act did not serve as much of a deterrent to the admissibility of sexual behavior evidence. In fact, a study from the 1980s revealed that sexual history evidence was present in nearly

---

231. *Id.* at ¶ 3 (Summary of Recommendations).

232. *Id.* at ¶ 137 (Evidence in Rape Cases).

233. *See* Sexual Offences (Amendment) Act 1976, c. 82, § 2 (UK).

234. *See id.* The Act provided:(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.
(2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.
Id.

235. *See* Temkin, *supra* note 4, at 961.

236. *See* LIZ KELLY, ROUTES TO (IN)JUSTICE: A RESEARCH REVIEW ON THE REPORTING, INVESTIGATION AND PROSECUTION OF RAPE CASES 33–34 (2001); *see also* McGlynn, *supra* note 4, at 375.

two-thirds of trials and a study in Scotland from the 1990s showed that 85% of applications to introduce such evidence were granted.[237]

In response, England and Wales adopted the Youth Justice and Criminal Evidence Act of 1999, where Parliament supposedly removed the broad discretionary powers of the trial court regarding admissibility of the complainant's sexual history.[238] In the Act, Parliament intended to address the twin myths and limit the admissibility of prior sexual behavior of the complainant.[239] Section 41 of the Act, which established limitations on the admissibility of such evidence, is predominantly the same as when enacted in 1999.[240]

Section 41 of the Act currently provides:

> (1) If at trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> a. No evidence may be adduced, and
>
> b. No question may be asked in cross-examination,
>
> By or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
>
> (2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accessed, and may not give such leave unless it is satisfied—
>
> a. That subsection (3) or (5) applies, and
>
> b. That a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.
>
> (3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—
>
> a. That issue is not an issue of consent; or
>
> b. It is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about

237. *See* KELLY, *supra* note 236, at 34; *see also* McGlynn, *supra* note 4, at 373–74.

238. *See* Youth Justice and Criminal Evidence Act 1999, c. 23, § 41 (UK); *see also* McGlynn, *supra* note 4, at 368.

239. *See* Regina v. A, [2001] UKHL 25, [36], [2002] 1 AC (HL) 45 (appeal taken from Eng.).

240. *Compare* Courts Act 2003, c. 39, § 109(1), sch. 8, ¶ 384(g) (amending section 43(3) under section 41); *with* Youth Justice and Criminal Evidence Act 1999, c. 23, § 41 (UK).

the same time as the event which is the subject matter of the charge against the accused; or

c. It is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

i. To any sexual behaviour of the complainant which (according to the evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

ii. To any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subjection applies if the evidence or question—

a. Relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

b. In the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance of (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).[241]

241. Youth Justice and Criminal Evidence Act 1999, c. 23, § 41 (1)–(6) (UK).

Even though Section 41 contains a general prohibition, there is broad discretion for the trial court to admit sexual behavior evidence. In comparison to Federal Rule of Evidence 412, Section 41 allows even more discretion on the part of the trial judge to admit it and it also countenances the admission of similarity evidence. Under Section 41(3), regarding a consent defense, the rule states that leave may be given to admit sexual history evidence where: (1) the defendant claims consent and the specific instances of sexual behavior have taken place about the same time as the case at issue; or (2) the defendant claims consent and the evidence is so similar to any sexual behavior of the complainant which took place at or about the same as the conduct at issue; or (3) the defendant claims consent and the evidence is so similar to any other sexual behavior of the complainant which took place at or about the same time as the conduct at issue "that the similarity cannot reasonably be explained as a coincidence."[242] There is no limitation that the complainant's sexual behavior must be with the accused to be admissible. The rule on its face makes no such limitation and as will be discussed below in Parts III (D) and (E), courts have admitted sexual behavior evidence with third parties under this provision. Section 41 explicitly allows "similarity" evidence (akin to sexual pattern evidence) and the statute itself provides that the evidence may be used for propensity purposes, *i.e.,* evidence that is so similar "that the similarity cannot reasonably be explained as a coincidence."[243]

Importantly, the admission of sexual behavior evidence under Section 41(3) is not limited to sexual conduct close in time to the event.[244] And, other than the required procedural mechanisms described below, there is little guidance for the court in making the admissibility decision other than the dictates of Section 41(6), *i.e.,* "the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate)."[245]

Section 43 of the Youth Justice and Criminal Evidence Act outlines the procedural requirements to admit sexual behavior evidence. That section requires that the application must be heard in private in absence of the complainant, the court must state in open court the

242. *Id.* at § 41(3) (UK).
243. *See id.* at § 41(3)(c) (UK).
244. *See infra* Part (III)(E)(1).
245. Youth Justice and Criminal Evidence Act 1999, c. 23, § 41 (6) (UK).

reasons for giving or refusing leave and limitations, if any, on that permission.[246] Section 43 also provides that the criminal procedure rules will dictate application requirements.[247] Under Rule 22.4 of the Criminal Procedure Rules, the defendant must serve the written application on the court and all parties as soon as practicable but no later than 10 days before trial; identify the grounds for admission under Section 41; specify the evidence and the exact questions the defendant intends to ask; and give the name and date of birth of any witness whose evidence the defendant wants to introduce.[248] Procedurally, Sections 41, 43, and the corresponding Rules of Criminal Procedure, require more specificity than that outlined in Federal Rule of Evidence 412. Under Federal Rule of Evidence 412, the motion to admit sexual behavior evidence must specifically identify the evidence to be offered and its purpose.[249] Beyond that, Federal Rule of Evidence 412 does not require additional information.

D. R v. A and Its Impact on the Scope and Application of Section 41

In 2001, *R v. A* cemented the continuing breadth of judicial discretion in implementing Section 41. Under the statute, certain sexual behavior evidence is admissible with the "leave of the court."[250] The *R v. A* holding established that courts must only consider whether evidence of sexual behavior between the complainant and the defendant is relevant to consent in applying Section 41.[251] In this context, relevance is a social construct, and admissibility is once again dictated by judicial discretion.

In *R v. A*, the indictment charged the defendant with rape.[252] According to the Crown, the complainant first met the defendant, accompanied by complainant's friend, on or about May 26, 2000.[253] The complainant's friend began a sexual relationship with the defendant.[254] On June 13, 2000, the complainant visited the defendant and her friend at the apartment they were sharing and the complainant and her friend had sexual intercourse when the defendant was not there.[255]

246. *See id.* at § 43(1)–(2).
247. *See id.* at § 41(1)–(2).
248. *See* The Criminal Procedure Rules 2020, SI 2020/759, pt. 22, r. 22.4 (Eng.).
249. *See* FED. R. EVID. 412(c).
250. Youth Justice and Criminal Evidence Act, c. 23, § 41(1) (UK).
251. *See R v. A*, [2001] UKHL at ¶ 17.
252. *See id.*
253. *See id.* at ¶ 18.
254. *See id.*
255. *See id.*

The defendant returned to the apartment, they all went out for a picnic near the Thames River and the defendant and the friend drank alcohol.[256] They all returned to the apartment where the complainant's friend collapsed and was taken by ambulance to the hospital.[257] Early the next morning, on June 14, 2000, the defendant and complainant left the apartment to go visit the complainant's friend in the hospital.[258] The defendant led the way and chose a route near the river.[259] As they walked on the path, the defendant fell down.[260] The complainant stated that she tried to help the defendant to his feet but he pulled her down and raped her.[261] Later that same day the complainant reported the sexual assault to the police.[262] The defendant claimed that the June 14, 2000, sexual encounter was consensual, that there was an ongoing sexual relationship that began around May 26, 2000, that they had consensual sex for approximately three weeks, and had consensual sex at the apartment several times between May 26, and June 14.[263]

Before trial, consistent with procedural requirements, the defendant's counsel sought leave from the trial court to cross-examine the complainant about her prior sexual relationship with the defendant.[264] The trial court, under Section 41, ruled:

> 1. The act of consensual sexual intercourse with the friend could be put to the complainant in cross-examination;
> 2. The complainant could not be cross-examined, nor could evidence be led, about her alleged sexual relationship with the defendant;
> 3. The prepared statement of the defendant, alleging that he had a sexual relationship with the complainant for approximately three weeks, could not be put in evidence.[265]

The judge further found that this result violated "the right to a fair trial under art[icle] 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights

256. *See R v. A*, [2001] UKHL at ¶ 18.
257. *See id.*
258. *See id.*
259. *See id.*
260. *See id.*
261. *See R v. A*, [2001] UKHL at ¶ 18.
262. *See id.*
263. *See id.*
264. *See id.*
265. *Id.* at ¶ 20.

Act 1998."[266] Under the United Kingdom Human Rights Act 1998, "primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights."[267] Article 6 of the European Convention on Human Rights provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[268] Article 6 also provides that the accused is entitled to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[269] The trial court granted leave to appeal.[270]

The Court of Appeal held that the trial court correctly found cross-examination of the complainant about her prior sexual relationship with the accused was inadmissible under Section 41(3)(b), paragraph 34.[271] The appeal was allowed to the House of Lords, however, "on the ground that the judge was wrong" to make such a finding because such evidence was relevant to consent and a fair trial may not be possible without such evidence.[272] The Court of Appeal found that if the accused were convicted with such an instruction, the trial may be deemed unfair under Article 6 of the European Convention on Human Rights and could result in a declaration of incompatibility between Section 41(3)(b) and Article 6.[273] On that basis, the Court of Appeal granted leave to appeal to the House of Lords the following question:

> May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?[274]

---

266. *See R v. A*, [2001] UKHL at ¶¶ 21.

267. Human Rights Act 1998, c. 42, § 3 (UK).

268. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221; *see also* Human Rights Act, c. 42.

269. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.

270. *R v. A*, [2001] UKHL at ¶ 21.

271. *See id.* at ¶ 64.

272. *Id.*

273. *See id.* at ¶¶ 23–24.

274. *Id.* at ¶ 24; *see also id.* at ¶ 6.

The House of Lords[275] did not declare Section 41 and Article 6 incompatible. The judgment found that "the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the convention. If this test is satisfied the evidence should not be excluded."[276] On this basis, the House of Lords dismissed the Crown's appeal, instructing the trial court to rule on admissibility under the broader interpretation adopted in the House of Lord's judgment to remain consistent with the 1998 Human Rights Act.[277] After this holding, the only limiting principle regarding admissibility would be the trial court's relevance determination.

The House of Lords expressly limited the judgment to a prior sexual relationship between the accused and the complainant and did not address the complainant's sexual behavior with other individuals. In fact, Lord Steyn, and others, stated that issue was not before the House of Lords and, in addition, that the 1999 Act appropriately and fairly addressed such behavior and that evidence would be "almost always irrelevant."[278] As will be discussed in Part E (2) below, the rationale applied in *R v. A* has been relied on to further expand the admissibility of sexual behavior evidence to third parties and highlights the need for guardrails on judicial discretion in this arena.[279]

Each judge's opinion notes the importance of excluding sexual history evidence because, as Lord Slynn states, the jury may believe "consensual sex once means that any future sex was with the women's consent."[280]Although the House of Lords' judgment and separate opinions recognized the twin myths relating to the relevance of sexual behavior evidence, the judges advance and rely on these myths in their opinions. The premise underlying the relevance of sexual behavior

275. Before 2009, the highest appellate court for criminal cases in England, Wales, and Northern Ireland was the House of Lords. *The justice system and the constitution*, *supra* note 12. The House of Lords had jurisdiction to declare legislation inconsistent with the European Convention on Human Rights. Richard Benwell & Oonagh Gay, *The Separation of Powers*, HOUSE OF COMMONS (Aug. 16, 2011), https://commonslibrary.parliament.uk/research-briefings/sn06053/ (on file with Syracuse Law Review). In 2005, the Constitutional Reform Act created a Supreme Court for the United Kingdom, effective in 2009. *The justice system and the constitution*, *supra* note 12.

276. *R v. A*, [2001] UKHL at ¶¶ 15, 46, 110, 140.

277. *See id.* at ¶ 47.

278. *Id.* at ¶ 30; *see also id.* at ¶¶ 125–26.

279. *See infra* Part III (E)(2).

280. *R v. A*, [2001] UKHL at ¶¶ 4, 27, 55, 76, 123–24, 144–45.

evidence between the complainant and the defendant is the assumption that prior consent predicts future consent.

For example, although Lord Slynn explains the dangers of admission of prior sexual behavior evidence between the complainant and the accused, *i.e.,* "[i]t may lead the jury to accept that consensual sex once means that any future sex was with the woman's consent," he opines that evidence should be admissible "which relates to a relevant issue in the case" and assumes that prior sexual behavior with the accused would be relevant.[281] Along the same lines, although Lord Steyn acknowledged the "twin myths," he also stated, "[a]s a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent."[282] Lord Steyn goes on to say, "[i]t is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not usually blot out all memories. What one has been engaged on in the past may influence what choice one makes on a future occasion."[283]

These same assumptions are present in Lord Hutton's opinion. When discussing the relevance of sexual behavior evidence between the complainant and the defendant, citing Professor Harriet Galvin's article titled "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn. L. Rev. 763, 786 (1986), Lord Hutton states:

> Where there has been a recent close and affectionate relationship between the complainant and the defendant it is probable that the evidence will be relevant, not to advance the bare assertion that because she consented in the past she consented on the occasion in question, but for the reason given by Professor Galvin, which is that evidence of such a relationship will show the complainant's specific mindset toward the defendant, namely her affection for him. In relation to this point Professor Galvin, at p 786, cites the opinion of Dean Wigmore that such evidence shows: 'an emotion towards the particular defendant tending to allow him to repeat the liberty.'[284]

Contrary to Lord Hutton's belief that the evidence is not being introduced to show that she consented before and more likely

281. *Id.* at ¶¶ 4, 13.
282. *Id.* at ¶¶ 27, 31.
283. *Id.*
284. *Id.* at ¶ 152.

consented on another occasion, this is obviously the reason such evidence is considered relevant, *i.e.,* allowing him to repeat the liberty. And Lord Hutton adopts the trope that rape is not a crime of violence but rather an issue of whether the woman wanted it or was affectionate toward the accused.

Lord Hope arrived at a similar conclusion with a similar rationale. Lord Hope stated that Section 41 does not distinguish between evidence of the complainants sexual behavior with third parties or the accused and "the extent to which these two situations ought to be approached differently is left to the determination of the trial judge."[285] And, Lord Hope further states that even though evidence relating to the complainant's sexual behavior with third parties is harder to justify as relevant, Section 41 appropriately does not distinguish between these two types of evidence because the exclusion of either type of evidence could impact the defendant's right to a fair trial.[286] Even though these opinions reference and acknowledge the twin myths underlying sexual behavior evidence, they still find such evidence potentially relevant, even in circumstances involving third parties.

E. The Admissibility of Sexual Pattern Evidence Under Section 41: Rape Myths Abound

1. R v. T: No Temporal Limitation on Similarity Evidence

In *R v. Tahed* ("*R v. T*"), the defendant was charged with rape, two counts of indecent assault, and false imprisonment.[287] He was convicted on all counts.[288] Defendant and complainant had a sexual relationship for approximately two and a half years before the charged conduct.[289] It was undisputed that on July 18, 2002, while on a children's climbing structure in a park, "acts of sexual intercourse, oral sex and digital penetration took place."[290] During some of the sex acts, the complainant faced away from the victim.[291] The complainant stated that she did not consent to the sexual acts and two witnesses who observed the incident supported the complainant's allegations.[292]

---

285. *R v. A*, [2001] UKHL at ¶ 77.
286. *See id.*
287. *See* R v. Abdul Tahed, [2004] EWCA Crim 1220 [1] (appeal taken from Eng.).
288. *See id.*
289. *See id.* at ¶ 2.
290. *Id.* at ¶ 4.
291. *See id.* at ¶ 5.
292. *Tahed*, [2004] EWCA Crim at ¶ 4.

The defendant asserted that the sexual intercourse was consensual.[293] The defendant sought leave to cross-examine the complainant about the following prior sexual behavior and interactions with the defendant: (1) in public parks and on a bus, (2) on the same climbing frame three to four weeks prior, (3) by a lake three days prior, (4) oral sex with the defendant, (5) adopting the same physical positions (facing away from the defendant) in other sexual interactions, and establishing her relationship with another individual (named S) when complainant and defendant had split up and that she told defendant after intercourse on July 18 that she had slept with S.[294] Defendant sought leave to introduce that evidence under Section 41(3)(b) and 41(3)(c)(ii). The trial court found that Section 41 excluded cross-examining the complainant about prior sex in public parks, sexual intercourse 3-4 weeks prior on the climbing frame, prior oral sex, and prior sex using the same physical position, finding that Section 41 includes a temporal requirement that was not met in the case at bar.[295] The Court of Appeal, however, found otherwise.[296]

The Court of Appeal agreed that Section 41(3)(b) included a temporal limitation, but, focusing on Paragraph 46 of Lord Steyn's opinion in *R v. A*, the Court of Appeal found that under 41(3)(c), such a temporal limitation would not apply to evidence similar to "'any sexual behaviour of the complaint which, (according to evidence adduced or adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused.'"[297] According to the Court of Appeal, the House of Lord's opinion in *R v. A* established that there is no temporal restriction under 41(3)(c)(i).[298] In other words, the Court of Appeal interpreted the *R v. A* opinion to remove the temporal limitation for similar sexual activity "where that similarity cannot reasonably be explained as a coincidence whenever that similar sexual activity took place."[299] On that basis, the Court of Appeal found that the evidence of prior sexual activity on the climbing frame was admissible even though it was three to four weeks earlier, evidence of prior oral sexual activity was admissible, regardless of the time frame, and evidence of use of the same physical position during sex was admissible, again regardless of time frame,

293. *See id.*
294. *See id.* at ¶ 5.
295. *See id.* at ¶¶ 13–14.
296. *See id.* at ¶ 16.
297. *Tahed*, [2004] EWCA Crim at ¶¶ 9–11.
298. *See id.*
299. *Id.* at ¶ 12.

because it would all be considered similar under Section 41(3)(c)(i).[300] The Court of Appeal quashed the conviction because of these evidentiary errors.[301]

The power of rape mythology is plain to see in the Court of Appeal decision. First, the Court of Appeal, citing Lord Steyn, explains that the standard for admissibility under Section 41(3)(c) is whether the evidence "is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Art. 6 of the Convention."[302] The conclusion that evidence of sexual behavior, such as prior instances of oral sex or similar sexual positions months before, is relevant—let alone its exclusion could endanger the fairness of the trial—is rooted in not only a fundamental misunderstanding of the etiology of rape, but also stereotypes involving female sexuality, i.e. that the fact the complainant had oral sex with the defendant before is somehow relevant to whether she consented on this occasion. Second, along the same lines, the Court of Appeal interprets Lord Steyn's opinion to mean that Section 41(3)(c)(i) and (ii) include no temporal requirement and further interprets Section 41(3)(c)(i) to mean that if there is any prior sexual behavior that is the same or similar to conduct that took place as part of the event at issue, then it is relevant and potentially admissible.[303]

2. R. v. Evans: Sexual Behavior with Third Parties Evidences Consent

In *R v. Evans*, the Court of Appeal further limited the reach of Section 41, again relying on longstanding misperceptions and stereotypes of female sexuality to do so. In *R v. Evans*, the accused, Evans, was a professional soccer player.[304] On May 29, 2011, Evans and his friend, McDonald, had sex with the complainant in a hotel room.[305] Evans booked a room at the Premier Inn on the afternoon of the sexual assault in McDonald's name.[306] McDonald and Evans went out separately for part of the evening.[307] McDonald, Evans, and the complainant had been drinking that night, and around 4:00 a.m. McDonald and the complainant met up and "within seconds" got into a taxi and went

300. *See id.* at ¶¶ 14–15.
301. *See Tahed*, [2004] EWCA Crim at ¶ 16.
302. *Id.* at ¶ 7.
303. *See id.* at ¶ 11–12.
304. *See* R v. Evans, [2016] EWCA Crim 452 [1] (appeal taken from Eng.).
305. *See id.*
306. *See id.* at ¶ 5.
307. *See id.*

to the Premier Inn.[308] During the taxi ride, McDonald either texted or called Evans and told him that he "got a girl."[309] McDonald and the complainant entered the hotel around 4:15 a.m. and the night porter described the complainant as "extremely drunk."[310] The night porter heard the complainant say to McDonald, "[y]ou're not going to leave me are you?" and McDonald did not reply.[311] McDonald and the complainant entered the hotel room.[312]

About ten to fifteen minutes later, Evans and two other men arrived at the hotel and Evans convinced the night porter to give him a key to the room, saying he had booked it.[313] The night porter gave him a key and Evans went to the room.[314] Around the same time, the two men Evans arrived with looked through that room's window and filmed what was happening.[315] The hotel porter went to check on what was happening in the room and concluded that the occupants were having sex.[316] About 30 minutes later, McDonald left the hotel.[317] Upon leaving, he asked the night porter in the reception area to look in on the complainant because she was sick.[318] Evans left the hotel by the emergency exit and met up with his friends, and they drove back to Evans's house.[319] The complainant awoke around 11:00 a.m., naked and afraid.[320] She did not remember arriving at the hotel and did not know what had happened there.[321] A few hours later she contacted the police.[322] The complainant did not regain her memories as to the events in the room.[323] Evans and McDonald admitted to law enforcement that they had sex with the complainant.[324] According to Evans, when he entered the hotel room, McDonald was having sex with the

308. *See id.*
309. *Evans*, [2016] EWCA Crim at ¶ 5.
310. *Id.* at ¶ 6.
311. *Id.*
312. *See id.*
313. *See id.* at ¶ 7.
314. *See Evans*, [2016] EWCA Crim at ¶ 7.
315. *See id.* at ¶ 8.
316. *See id.* at ¶ 8.
317. *See id.* at ¶ 9.
318. *See id.*
319. *See Evans*, [2016] EWCA Crim at ¶ 9.
320. *Id.* at ¶ 10.
321. *Id.*
322. *See id.*
323. *See id.*
324. *See Evans*, [2016] EWCA Crim at ¶ 11.

complainant and McDonald invited Evans to join.[325] Evans further stated that he performed oral sex on the complainant, they had sexual intercourse where the complainant was on all fours and she used the words (F*** me harder).[326]

At trial, Evans claimed consent.[327] Evans claimed that the complainant was "enthusiastic and awake," capable of consenting even though the defense conceded "she may have been under the influence of something."[328] The jury convicted Evans but acquitted McDonald.[329] In 2012, Evans was not granted leave to appeal (first appeal).[330] He then appealed his conviction (second appeal) based on new evidence relating to the complainant's prior sexual behavior.[331] In 2016, the Court of Appeal allowed the appeal and, as discussed below, the second appeal succeeded.[332]

Additional facts were considered during the second appeal. After the jury returned their verdict, a man by the name of Tristan Owens contacted the police, and the call note stated: "Caller states that two weeks after alleged incident of rape in Rhuddlan he saw female concerned (X). He slept with her and he can't understand why she would sleep with someone so soon after a rape."[333] Many of Evans's friends were "outraged" by the charge and one of Evans's friends, who also knew Owens, asked if he would talk to Evans's attorneys.[334] Owens then told one of Evans's attorneys, Mr. Ripley, that on three separate occasions when he and the complainant had spent the night together, the next morning she asked if anything sexual had occurred.[335] He also told Ripley there was a fourth occasion when they had sex.[336] Ripley drafted a witness statement, dated May 16, 2012, where the witness stated that "he knew X [complainant] because she lived in the same street as his mother," and in the months before May 2011, when the Evans rape occurred, he met the complainant at a bar and at least three times after both he and the complainant were drunk she propositioned

325. *See id.* at ¶ 12.
326. *See id.*
327. *See id.* at ¶ 13.
328. *Id.*
329. *See Evans*, [2016] EWCA Crim at ¶ 16.
330. *See id.* at ¶ 2.
331. *Id.* at ¶ 2–3.
332. *See id.* at ¶ 74.
333. *Id.* at ¶ 16.
334. *See Evans*, [2016] EWCA Crim at ¶ 17.
335. *See id.* at ¶ 18.
336. *See id.*

him saying she would give him a "good time."[337] On those three occasions, complainant went home with Owens, they did not have sex, but on each occasion she said she could not remember if sexual intercourse occurred.[338] Evans's friend was the point of contact between the attorney and Owens.[339]

That statement was not used for Evans' first appeal.[340] After the first appeal, however, Evans asked the Court of Appeal to receive evidence from Owens, and two other witnesses in his second appeal.[341] In 2013, Owens gave another statement to the investigators.[342] In the second statement, Owens stated that he had known Evans for about seven to eight years and the complainant for about 13 years.[343] He stated that on three occasions before May 2011, the complainant approached him at closing time at a bar, after they had both been drinking, and asked him to go home with her.[344] According to the second statement, they went to his house, but did not have sex, and when the complainant woke up in the morning she asked him what happened the night before.[345] He also described a fourth occasion, which was not mentioned in the first statement, which occurred two weeks after the incident with Evans and the complainant, where Owens said the complainant was drunk again and approached Owens.[346] The complainant allegedly said if he'd take her home she'd show him a good time, they then went to his home and as they were having sex, the complainant said "f*** me, f*** me harder," she asked Owens to penetrate her from behind and she got on all fours to do this and continued to shout those words.[347] The complainant woke up the next morning and went home.[348] Owens stated that the next morning, after complainant left, he learned from his mother that the complainant had made a rape allegation against Evans, and Owens was surprised she would have sex soon after the rape.[349] Owens stated that he called the police after the conviction because he thought that Evans was wrongly convicted and

337. *Id.* at ¶ 19.
338. *See id.*
339. *See Evans*, [2016] EWCA Crim at ¶ 17.
340. *See id.* at ¶ 20.
341. *See id.* at ¶¶ 28-31.
342. *See id.* at ¶ 23.
343. *See id.*
344. *See Evans*, [2016] EWCA Crim at ¶ 23.
345. *See id.*
346. *See id.* at ¶ 24.
347. *Id.*
348. *See id.* at ¶ 25.
349. *See Evans*, [2016] EWCA Crim at ¶ 25.

because he thought the complainant having sex with him so soon after the rape was inconsistent with her rape allegation.[350] Owens's mother gave a statement on August 18, 2015, where she confirmed that she told Owens that the complainant made a rape allegation against Evans, and that Owens' actions could "cause trouble."[351]

On September 14, 2011, Steven Hughes made a statement to Mr. Ripley, Evans's attorney.[352] Hughes stated that he met the complainant on Facebook in March or April 2011.[353] They met at a restaurant where the complainant worked, went back to Hughes's home, and did not have sexual intercourse that night, but had sex the next day, including oral sex, and then had sex five-six more times.[354] Hughes also stated that on May 27, 2011, the complainant texted Hughes and they arranged to meet and have sex.[355] On December 3, 2015, Hughes gave another statement to Evans's attorneys.[356] In this statement, Hughes specifically referenced the May 27, 2011, event. In that statement he said the complainant telephoned him from a club, he picked her up and she was very drunk, she instigated the sexual intercourse that evening, they had vaginal and oral sex, including having sex with her from behind while she was on all fours, and at the time she said "go harder, go harder."[357]

In the second appeal, the Court of Appeal focused on whether the evidence of Owens, Owens's mother, and Hughes, was relevant to consent and whether it was "so similar" that it could not be explained as a coincidence, and if that evidence were received at trial, if it might affect Evans's conviction.[358] Because the evidence concerned the sexual behavior of the complainant, admissibility would be dependent on whether it fell within an exception under Section 41.

Even though the evidence concerned sexual behavior with individuals other than the accused, the Court of Appeal found that this sexual behavior would be admissible under Section 41(3)(c)(i)

350. *See id.* at ¶ 26.
351. *Id.* at ¶ 30.
352. *See id.* at ¶ 31.
353. *See id.* at ¶ 32.
354. *See Evans*, [2016] EWCA Crim at ¶¶ 32–33 (2016).
355. *See id.* at ¶ 33.
356. *See id.* at ¶ 35.
357. *Id.*
358. *Id.* at ¶ 39.

because it was "sufficiently similar" sexual behavior.[359] On that basis, the court granted the appeal and permitted a retrial of the case.[360] The Court of Appeal found that prior sexual behavior does not have to be unusual to be admissible under this provision, as long as it is "sufficiently similar that it cannot be explained reasonably as a coincidence."[361] Even though the Court of Appeal stated that it "reached this conclusion with a considerable degree of hesitation" and confirmed it understood "the importance of offering complainants in sexual offences protection from intrusive and unnecessary questioning about their sexual history," the opinion conflicts with that understanding.[362] This interpretation essentially allows prior sexual behavior evidence to be admissible, without temporal restrictions and without limiting such evidence to prior sexual behavior with the defendant.

The Court of Appeal relied on the House of Lords' opinion in *R v. A*, even though that holding was limited to conduct between the complainant and the defendant. Nonetheless, the Court of Appeal expanded the *R v. A* holding to apply to the complainant's sexual behavior with individuals other than the defendant. The Court of Appeal opinion cited Lord Clyde's rationale from *R v. A*, that "only a similarity that is required" and "that does not necessitate that the similarity has to be in some rare or bizarre conduct."[363] The Court also cited the Court of Appeal holding in *R v. T*, where the Court found that adopting the same respective sexual position is sufficiently similar under Section 41 (even though that case concerned the complainant and the accused).[364] Under this logic, there is little prior sexual behavior of the complainant's that would not be admissible as long as some prior sexual behavior occurred.

The Crown argued that the complainant's sexual activity with other men was not relevant to the instant case and only showed "that a sexually active woman enjoys sexual activity in a way with other men that is far from unusual" and, further, the language she used were common place words.[365] The Court of Appeal rejected this argument and adopted the defense claim, that the language the complainant used

359. *See Evans*, [2016] EWCA Crim at ¶ 72 (stating the Court of Appeal also found that the evidence may have been relevant and admissible under Section 41(3)(a) to show the accused's reasonable belief in consent.).

360. *Id.* at ¶¶ 74–75.

361. *Id.* at ¶ 73.

362. *Id.* at ¶ 74.

363. *Id.* at ¶ 51.

364. *See Evans*, [2016] EWCA Crim at ¶ 53.

365. *Id.* at ¶ 56.

satisfied the similarity test under Section 41 and as interpreted in *R v. T*, suggested that when the complainant was engaged in sexual intercourse she was not a passive observer, she instigated sexual activity, and directed her sexual partners to certain positions and to have sex in certain ways.[366] In other words, the Court adopted the myth that Section 41 was meant to address, that if she consented to certain types of sex before, she did so now.

In 2016, the jury acquitted Evans at his retrial after less than three hours deliberation.[367] In 2017, MP Liz Saville Roberts introduced legislation to prohibit cross-examination of a complainant's prior sexual behavior with individuals other than the defendant.[368] Also, in 2017, MP Harriet Harman, introduced an amendment to another bill so that Section 41 prohibited any evidence about the prior sexual behavior of the accused.[369] Neither bill was enacted.[370]

The England and Wales statute, on its face, is broader than Federal Rule of Evidence 412 and, as will be discussed below, the Canadian statute. The statute has few limits on admission of sexual behavior evidence and allows the court broad discretion. Additionally, the inclusion of similarity evidence as an exception to any general prohibition language allows the admission of sexual behavior evidence based on sexual stereotypes.

IV. THE CANADIAN RAPE SHIELD LAW AND ACKNOWLEDGEMENT OF THE TWIN MYTHS

Canada's rape shield law has undergone repeated legislative and judicial modifications. Although the development of the law generally follows that in the United States and United Kingdom, the current iteration of the Canadian statute contains robust procedural requirements unlike those in the other jurisdictions, providing significant guidance for judges in admissibility determinations. These

366. *See id.* at ¶ 58.

367. *See* Steven Morris & Alexandra Topping, *Ched Evans: footballer found not guilty of rape in retrial*, THE GUARDIAN (Oct. 14, 2016, at 18:21ET), https://www.theguardian.com/football/2016/oct/14/footballer-ched-evans-cleared-of-in-retrial (on file with Syracuse Law Review).

368. *See* Eva Niculiu & Ali Naseem Bajwa, *The Post-Ched Evans debate on sexual history evidence*, COUNSEL (June 1, 2018), https://www.counselmagazine.co.uk/articles/the-post-ched-evans-debate-sexual-history-evidence (on file with Syracuse Law Review).

369. *See id.*

370. *See id.*

requirements provide a structure to address admissibility centered on the purpose of these laws and explicitly addressing pervasive rape myths.

A. Canadian Common Law and the Underpinnings of a Rape Shield Law

Before the 1970s, Canadian common law, consistent with the legal traditions of the United States and England and Wales, permitted the admission of evidence about a complainant's prior sexual history for two purposes: to impeach the complainant's credibility and to establish consent.[371] This common law rule was codified in Canadian Criminal Code Section 142.[372] In 1976, the Canadian Parliament amended Section 142 to add limited protections for the complainant.[373] That amended section provided:

> 142. [N]o question shall be asked by or on behalf of the accused as to the sexual conduct of the complainant with a person other than the accused unless
>
> (a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to ask such question together with particulars of the evidence sought to be adduced by such question and a copy of such notice has been filed with the clerk of the court; and
>
> (b) the judge, magistrate or justice, after holding a hearing *in camera* in the absence of the jury, if any, is satisfied that the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant.[374]

Although not effectively limiting the admission of sexual behavior evidence, the amended statute required written notice of the evidence sought to be introduced and an *in camera* hearing on its relevance.[375]

---

371. *See* Mary A. Wagner, *Canadian Rape Shield Statutes*, 16 HASTINGS INT'L & COMP. L. REV. 637, 640 (1993).

372. *See id.*; *see also* Criminal Code, R.S.C. 1970, c. C-34, s. 142 (1974) (Can.). Section 142 provided that if the complainant's testimony was not corroborated, the jury should be instructed that the "it is not safe to find the accused guilty in the absence of such corroboration." *Id.*

373. *See* Criminal Code, R.S.C. 1970, c. C-34, s. 142 (1976) (Can.).

374. *Id.*

375. *See id.*

B. Canada's Criminal Code First Addresses Rape Mythology

In 1980, the Supreme Court of Canada, in *Forsythe v. The Queen*, held that Section 142 allowed the accused to compel testimony of the complainant at the *in camera* hearing, a circumstance unavailable to the accused under common law where the court would judge the credibility of the complainant's testimony.[376] In response to concern over this opinion, in 1982, Parliament repealed section 142 and enacted a new rape shield statute, Criminal Code Sections 246.6 and 246.7, "renumbered in 1985 as sections 276 and 277."[377]

Criminal Code Section 276 generally prohibited the admission of complainant's sexual activity with individuals other than the accused with three exceptions: (1) evidence that "rebuts evidence of the complainants sexual activity or absence thereof that was previously adduced by the prosecution": (2) "evidence of specific instances of the complainants sexual activity tending to establish the identity of the person who had sexual contract with the complainant on the occasion set out in the charge;" or (3) "evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence relates to the consent that the accused alleges he believes was given by the complainant."[378] Subsection (3) only prohibited sexual behavior evidence with individuals other than the accused and therefore did not restrict sexual activity evidence involving the accused. Section 276 also required reasonable notice by the accused to the prosecutor that the accused intends to admit such evidence and that the judge hold an *in camera* hearing, where the complainant is not compellable, before such evidence may be admitted.[379]

Section 277 overtly addressed one of the twin myths, *i.e.*, that sexual reputation evidence, "whether general or specific, is not admissible for the purpose of supporting the credibility of the complainant."[380] Although s. 277 addressed a component of rape mythology head-on, s. 276 had few limits on the admissibility of sexual behavior evidence. First, s. 276 only applied to sexual activities with individuals other than the accused. The admissibility of this type of evidence

376. *See* Wagner, *supra* note 371, at 641–42; Forsythe v. The Queen, [1980] 2 S.C.R. 268, 269 (Can.).

377. Wagner, *supra* note 371, at 642; Criminal Code, R.S.C. 1970, c. C-34, s. 246.6, 246.7 (1982) (Can.).

378. Criminal Code, R.S.C. 1985, c. C-46, s. 276 (Can.).

379. *See id.*

380. *Id.* at s. 277.

would be within the discretion of the trial court, and broad judicial discretion is one of the drivers underlying the need for rape shield laws. Second, trial courts could still admit evidence of the complainant's sexual activity if it fell within one of the three exceptions, and, again, those exceptions, as evidenced by the *Evans* case, could be interpreted broadly by the trial or appellate courts.

C. R v. Seaboyer: The Rape Shield Law Was Found Unconstitutional Because of the Exclusion of Judicial Discretion

In 1991, the Supreme Court of Canada in *R v. Seaboyer* found Section 276 unconstitutional as violative of sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms,[381] holding that while the purpose of s. 276 was laudable, "its effect goes beyond what is required or justified by that purpose."[382] The Supreme Court of Canada consolidated two cases that raised the constitutionality of ss. 276 and 277: *R v. Seaboyer* and *R v. Gayme*. In these cases, each defendant was charged with sexual assault.[383] Seaboyer was charged for sexually assaulting a women he had been drinking with and Gayme was charged for sexually assaulting a 15-year-old (Gayme was 18 at that time).[384] Seaboyer sought to cross-examine the complainant about her sexual activity which may have caused bruising and Gayme sought to cross-examine the complainant about her prior and subsequent sexual activity to show that the complainant was the sexual aggressor.[385] At the preliminary inquiry, the trial courts refused to allow that cross-examination under ss. 276 and 277, refused to hear argument as to whether those sections were unconstitutional under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms, and committed the accused

---

381. The relevant sections of the Canadian Charter of Rights and Freedoms provided:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
> 11. Any person charged with an offence has the right . . .
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Canadian Charter of Rights and Freedoms, ss. 7, 11(d), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

382. R. v. Seaboyer, [1991] 2 S.C.R. 557, 582, 598 (Can.).

383. *See id.* at 578–79.

384. *See id.*

385. *See id.*

for trial.[386] The cases ultimately arrived at the Supreme Court of Canada to address the constitutionality of ss. 276 and 277 of the Canadian Criminal Code.[387]

The majority opinion explained that "the real issue under s. 7 was whether the potential deprivation of liberty flowing from ss. 276 and 277 takes place in a manner that conforms to the principles of fundamental justice."[388] The majority opinion outlined the range of arguments regarding the statute.[389] The majority explained the purpose of the legislation—to abolish common law rules and remove inferences based on rape mythology.[390] The majority stated:

> The main purpose of the legislation is to abolish old common law rules, which permitted evidence of the complainant's sexual conduct which was of little probative value and calculated to mislead the jury. The common law permitted questioning on the prior sexual conduct of the complainant without proof of relevance to a specific issue at trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. There inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief.[391]

Additionally, the majority outlined three other purposes of the statute: (1) preserving the integrity of the trial by eliminating highly prejudicial evidence with low probative value; (2) encouraging reporting of sexual assault; and (3) protecting complainants' privacy.[392] The Supreme Court pointed out that these purposes were consistent with conceptions of fundamental fairness.[393] At the end of the day, according to the majority, the issue was not simply the legitimacy of the legislation's purpose, but also its effect, and the Court concluded that the effect of the legislation conflicted with the Charter.

---

386. *See id.* at 578–79.
387. *See id.* at 579–80.
388. *Seaboyer*, [1991] 2 S.C.R. at 602–03.
389. *See id.* at 604.
390. *See id.*
391. *Id.*
392. *See id.* at 605.
393. *See Seaboyer*, [1991] 2 S.C.R. at 606.

The majority emphasized appellant's argument that ss. 276 and 277 infringed on the accused's right to a fair trial, violating s. 11(d) and ultimately s. 7 of the Charter.[394] The appellants maintained that this rape shield provision "goes too far and eliminates relevant evidence."[395] To determine whether or not these sections were unconstitutional, the majority evaluated whether ss. 276 and 277 "exclude evidence the probative value of which is not substantially outweighed by its potential prejudice."[396] Turning to s. 277, the majority found that evidence of sexual reputation admitted to challenge or support credibility served no legitimate purpose at trial and therefore did not violate the Constitution.[397]

On the other hand, the majority found that s. 276 constituted a blanket exclusion subject to three exceptions, and this evidence, according to the court, may be relevant and should be admissible in the interest of a fair trial.[398] Important to the discussion here, the court explicitly discussed the potential relevance of sexual pattern evidence. The majority explained that even though such evidence draws on the inference "that prior conduct infers similar subsequent conduct" and must be carefully scrutinized, the court concluded that it would be unfair to exclude evidence of "critical relevance."[399] At bottom, the court objected to the categorical exclusion of s. 276, which removed discretion from the trial court to conduct a balancing test—whether the prejudicial effect of the evidence outweighed its probative value.[400] Although the majority recognized the "twin myths" and stated that they have "no place in a rational and just system of law," by advocating for judicial discretion in evaluating sexual pattern evidence, the majority conveniently ignored that the relevance and probative value of evidence is in the eye of the beholder. And, when rape mythology is so deeply embedded in societal structures, the balancing test advocated by the court for this type of evidence, specifically sexual pattern evidence, the result is the admission of evidence that relies on prohibited inferences for relevance.

394. *See id.* at 606–07.
395. *Id.* at 608.
396. *Id.* at 612.
397. *See id.* at 612–13.
398. *See id.* at 613.
399. *Seaboyer*, [1991] 2 S.C.R. at 615–16.
400. *See id.* at 617.

D. Parliament Amends s. 276 and Explicitly Addresses the Twin Myths

In 1992, responding to the court's holding in *Seaboyer*, the Canadian Parliament amended s. 276, codifying the *Seaboyer* principles and explicitly addressing rape mythology in the statute.[401] As seen in the text of the statute, Canada, unlike England and Wales, in response to a constitutionality challenge, addressed the constitutional claims but also gave significant guidance to trial courts in making admissibility decisions by explicitly recognizing the potential power of the "twin myths" in judicial decision-making and requiring courts to consider various factors in deciding admissibility.[402]

The current iteration of the statute is similar to that enacted in 1992. The most recent significant amendment to the rule occurred in 2018.[403] Parliament modified the rule in several respects and, most importantly, moved the procedural requirements out of s. 276 and into ss. 278.93 and 278.94 and changed some verbiage strengthening its protections.[404]

---

401. *See* Criminal Code, R.S.C. 1992, c. C-46, s. 276 (Can.) As written, the 1992 rule states: INCLUDE THE RULE AS WRITTEN in 1992. *Id.*

402. *See id.*; *see also supra* Part III (C).

403. *See* Act to Amend the Criminal Code, S.C. 2018, c. 29, s. 21 (Can.).

404. A comparison of the pre and post-2018 s. 276 reflects the following changes:

1. Added label—"Conditions for admissibility"—beneath 276(1).
2. Substituted stronger wording in 276(2):
   a. Pre-2018: "In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced . . . ."
   b. Post-2018: "In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced . . . ."
3. Moved procedural rules to other sections
   a. Pre-2018: 276.1 and 276.2
   b. Post-2018: 278.93 and 278.94
4. Additional requirement added to 276(2)
   a. Pre-2018:
      i. 276(2)(a) is of specific instances of sexual activity;
      ii. 276(2)(b) is relevant to an issue at trial; and
      iii. 276(2)(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
   b. Post-2018:
      i. 276(2)(a) is not being adduced for the purpose of supporting an inference described in section (1);
      ii. 276(2)(b) is relevant to an issue at trial; and
      iii. 276(2)(c) is of specific instances of sexual activity; and
      iv. 276(2)(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
5. Added an "Interpretation" section (276(4)) that broadens application of Section 276:

Section 276 currently provides:

> (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, 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.
>
> CONDITIONS FOR ADMISSIBILITY
>
> (2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence
>
> (a) is not being adduced for the purpose of supporting an inference described in subsection (1);
>
> (b) is relevant to an issue at trial; and
>
> (c) is of specific instances of sexual activity; and
>
> (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> FACTORS THAT JUDGE MUST CONSIDER
>
> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (a) the interests of justice, including the right of the accused to make a full answer and defence;

---

a. Pre-2018:
   i. No longer in Section 276.
b. Post-2018:
   i. For the purpose of this section, sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature.

> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (h) any other factor that the judge, provincial court judge or justice considers relevant.
>
> INTERPRETATION
>
> (4) For the purpose of this section, *sexual activity* includes any communication made for a sexual purpose or whose content is of a sexual nature.[405]

Unlike Federal Rule of Evidence 412 and Section 41, in s. 276(1), the Canadian statute specifically references the twin myths and explicitly states that sexual history evidence may not be admitted for propensity purposes. In s. 276(2), the statute requires compliance with certain procedural requirements (discussed below) and, in addition to not being adduced for prohibited inferences, the evidence must have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice."[406] In s. 276(3), the statute specifically outlines the factors the court must consider in the admissibility determination, factors that address achieving the purpose of the rule, to protect victims, facilitate just outcomes, and encourage reporting.

In terms of procedural requirements, under s. 276.93, the defendant must make an application in writing detailing the evidence sought to be admitted.[407] If the court finds that the notice requirement was

405. Criminal Code, R.S.C. 1985, c. C-46, s. 276 (Can.) (emphasis added).

406. *Id.* at s. 276(2).

407. *See* Criminal Code, R.S.C. 1985, c. C-46, s. 278.93 (Can.). That section provides:

properly fulfilled and such evidence may be admissible under s. 276(2), then the Court will grant the application and will hold a hearing under s. 276(2) to determine admissibility.[408] The initial consideration of the application is a facial one, and applications are only dismissed without a hearing if it the evidence is clearly incapable of being admitted under the statute.[409] If a hearing occurs, the jury and public are excluded from it.[410] The complainant may attend, has a right to

---

(1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).
Form and content of application
(2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.
Jury and public excluded
(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.
Judge may decide to hold hearing
(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2). R.S.C. 1985, c. C-46, s. 278.93 (Can.).
Id.

408. *See id.*; *see also* R. v. W.J.A et al., 2010 YKTC 108, ¶¶ 12–16 (Can.) (describing procedures required by s. 276).

409. *See W.J.A et al.*, 2010 YKTC at ¶ 15.

410. *See* Criminal Code, R.S.C. 1985, c. C-46, s. 278.94 (Can.). s. 278.94 provides:
(1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).
Complainant not compellable
(2) The complainant is not a compellable witness at the hearing but may appear and make submissions.
Right to counsel
(3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.
Judge's determination and reasons
(4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and
(a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
(b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and

counsel, and may make a submission, but cannot be compelled to attend.[411] The procedural rule provides, in s. 278.94(4)-(5), that at the end of the hearing the court must decide what evidence is admissible, provide specific reasons, including which s. 276(3) factors shaped the decision, explain how the evidence is relevant to issues at trial, and either orally explain the rationale on the record or provide reasons in writing.[412]

E. Applying s. 276 to Cases Involving Sexual Pattern Evidence

1. R v. A: Sexual Pattern Evidence Admitted for a Prohibited Purpose

Co-defendants, P.A. and W.A. were charged with sexual assault and unlawful confinement.[413] Defendants claimed the sexual activity was consensual.[414] Under s. 276, defendants sought to admit evidence of sexual activity between themselves and the complainant and sexual activity of the complainant and third parties to show a pattern of consensual conduct.[415] The defense sought to introduce a list written by the complainant where she identifies the individuals she had sexual intercourse with and the type of intercourse between 2003-2005.[416] There was no live evidence; the ruling was based on submitted affidavit evidence.[417]

The trial court allowed the defense to introduce evidence or cross-examine the complainant about prior consensual sexual activity with the complainant and any three-way sexual activity with the two defendants but excluded any sexual activity evidence with individuals other than the defendant.[418] The trial court found that evidence of sexual activity between the complainant and individuals other than the

---

(c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.
Record of reasons
(5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.
Id.

411. *See id.* at s. 278.94(2), (3).
412. *See id.* at s. 278.94(4), (5).
413. *See W.J.A et. al.*, 2010 YKTC at ¶ 1.
414. *See id.* at ¶ 7.
415. *See id.* at ¶¶ 2–3, 6.
416. *See id.* at ¶ 5.
417. *See id.* at ¶ 8.
418. *W.J.A et al.*, 2010 YKTC at ¶ 8.

defendant inadmissible.[419] In regard to the letter, the trial court found it unrelated to the accused and "not capable of being admitted without offending s. 276(1)" and not worthy of further consideration.[420]

In determining the admissibility of the sexual activity between the complainant and defendants, the trial court applied the criteria in s. 276(2) and the s. 276(3) factors.[421] According to the trial court, the evidence should be admitted because it is "logically relevant to the issue of consent" and because it is more likely someone would have consensual sex with someone with whom they have an existing sexual relationship and for this reason does not offend s. 276.[422] But this use of sexual history evidence does offend s. 276 because the evidence is used to show precisely what s. 276(1) prohibits—that the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge. According to the court, this evidence provides "context," meaning this evidence allows jurors to consider that the victim had sex with the defendant(s) before and therefore she may have consented here.[423] Even though this fact pattern differs from *R v. Evans* and *State v. Perez* because it did not involve third parties, the trial court admitted sexual pattern evidence for a prohibited purpose.

2. R v. Goldfinch: Sexual Behavior Evidence as a Disguised Myth

In *Goldfinch*, the defendant and complainant dated and then lived together for less than a year when the complainant terminated the relationship.[424] When the formal relationship ended, they continued contact and became "friends with benefits."[425] On May 18, 2014, the complainant called Goldfinch and they went to his place.[426] Upon arrival, they had some drinks and watched TV.[427] Goldfinch had a roommate so while watching TV he mouthed to the complainant words to the effect that he was going to have sex with her.[428] According to Goldfinch, she responded with a smile.[429] Then, he invited her downstairs

419. *See id.* at ¶ 12.
420. *Id.* at ¶ 20.
421. *See id.* at ¶ 26.
422. *See id.* at ¶ 34.
423. *W.J.A et al.*, 2010 YKTC at ¶ 32.
424. R. v. Goldfinch, [2019] SCC 38, ¶ 6 (Can.).
425. *Id.*
426. *See id.* at ¶ 7.
427. *See id.* at ¶ 8.
428. *See id.*
429. *See Goldfinch*, [2019] SCC at ¶ 8.

to his bedroom.[430] According to the complainant, she told him that they were not going to have sex.[431] They sat on a couch, kissed, and then Goldfinch proposed that they go to bed.[432] At this point, the defendant and the complainant present different versions of what happened that evening. The defendant alleged that the complainant then agreed to go into his bedroom where they removed their clothes and had consensual sexual intercourse and fell asleep.[433] Complainant later woke him up because she claimed he hit her in his sleep.[434] He told her to leave and called her a cab using her phone.[435]

The complainant testified that after Goldfinch's invitation for sex, she told him she did not want to have sex but he then dragged her into the bedroom.[436] She then removed her clothes upon his demand, he pushed her onto the bed, hit her in the face, and pushed her shoulder so hard she thought it was broken.[437] After he sexually assaulted her, she called a taxi from her cell phone and called the police when she returned to her own home.[438]

Goldfinch moved to admit evidence of their relationship status as "friends with benefits" (which the court defined as friends who occasionally met to have sex) under s. 276. As required by the statute, Goldfinch asserted he was not relying on "twin myth inferences," rather, he sought admission for context, but did not identify any other inferences from its use.[439] The Crown agreed to the following: evidence that the parties knew each other for four-to-five years, lived together for seven to eight months until that relationship ended, the two remained friends, and complainant occasionally spent the night at Goldfinch's house.[440] The trial judge agreed to admit the "friends with benefits evidence" because it was "relatively benign" evidence and without it, Goldfinch's defense would be harmed.[441]

At trial, the judge anticipated that the "contextual information" would have been adduced via an agreed statement of facts and because

430. *See id.* at ¶ 9.
431. *See id.*
432. *See id.* at ¶ 10.
433. *See id.* at ¶ 12.
434. *See Goldfinch*, [2019] SCC at ¶ 12.
435. *See id.*
436. *See id.* at ¶ 13.
437. *See id.*
438. *See id.*
439. *Goldfinch*, [2019] SCC at ¶ 14.
440. *See id.*
441. *Id.* at ¶ 15.

that was not the case, questioning regarding "friends with benefits" would be limited to the context and the nature of the relationship.[442] Nonetheless, the court agreed to admit said evidence within very narrow circumstances and solely addressing the context of the relationship.[443]

During the direct examination of the complainant, she first denied any relationship with the defendant beyond friendship after they broke up but then admitted she had sex with the defendant on "various dates" for "quite awhile" after the relationship ended.[444] Before cross-examination, the defense argued that the prosecution opened the door to questions about how often the defendant and complainant had sex.[445] The court allowed that cross-examination and the complainant ultimately testified that they had sex 15 times since the break-up.[446] After that testimony, the trial judge gave a limiting instruction to the jury advising them that the evidence of the past sexual relationship could not be used to infer that because they had sex before, the complainant more likely consented in the case before them.[447] The jury acquitted the defendant.[448]

The Crown appealed under s. 276.5 of the Criminal Code which provided that an admissibility determination involving sexual behavior evidence is appealable as a question of law.[449] The Alberta Court of Appeal reversed, finding that the evidence at issue was not permissible and invoked the twin myths squarely addressed in the statute.[450] The majority noted that the evidence the Government agreed to allow was sufficient to establish that the complainant and defendant were not strangers.[451] The dissent disagreed and argued that the evidence did not support the twin myths and provided important context about the relationship.[452]

The defendant appealed.[453] The Supreme Court of Canada framed the issue on appeal as follows: "[t]his case asks whether evidence of a

442. *Id.* at ¶ 17.
443. *See id.*
444. *Goldfinch*, [2019] SCC at ¶ 18.
445. *See id.* at ¶ 19.
446. *See id.*
447. *See id.* at ¶ 20.
448. *See id.* at ¶ 23.
449. *See Goldfinch*, [2019] SCC at ¶ 24.
450. *See id.* at ¶ 24–25.
451. *See id.* at ¶ 25.
452. *See id.* at ¶ 26.
453. *See id.* at ¶ 1.

relationship with an implicit sexual component engages s. 276 of the Criminal Code and, if so, when such evidence may be admitted."[454]

At the outset, the Supreme Court admitted that "[t]he mischief Parliament sought to address in enacting s. 276 remains with us today."[455] The Supreme Court recognized the social prejudices affecting the fairness of sexual assault trials, the impact of sexual assault on survivors, and stating that the costs associated with sexual assault "are not relics of a bygone Victorian era."[456] It is in this context that the majority interpreted Canada's rape shield law.

The court addressed the relevance of the relationship evidence through the lens of prohibited twin myth evidence. First, the Supreme Court of Canada addressed the myth that a complainant's prior sexual behavior supports a consent inference.[457] The court stated: "[t]oday, an accused may no longer argue that consent was implied by a relationship: contemporaneous, affirmatively communicated consent must be given for each and every act…Today, not only does no mean no, but only yes means yes."[458] Moving to the second myth, that prior sexual behavior means a complainant is less credible, the court explained that even though there is less stigma to being sexually active than in the past, "complainants continue to be treated as less deserving of belief based on their previous sexual conduct. The notion that some complainants 'invite' assault and, by inference, do not deserve protection persists both inside and outside the courtroom."[459]

The Supreme Court then outlined the requirements for admissibility. Under s. 276, prior sexual behavior evidence is presumptively prohibited.[460] The complainant's prior sexual activity may be admissible under s. 276(2) if the accused right to a full and fair defense requires admission. But to do so, under the statute, the defendant must show that the evidence is: (1) relevant, (2) involves specific instances of sexual behavior, and (3) the probative value substantially outweighs the danger of prejudice.[461]

The court found that the proffered evidence did not satisfy the relevance requirement.[462] The court explained that the relevance

454. *Goldfinch*, [2019] SCC at ¶ 27.
455. *Id.* at ¶ 37.
456. *Id.*
457. *See id.* at ¶ 44.
458. *Id.*
459. *Goldfinch*, [2019] SCC at ¶ 45.
460. *See id.* at ¶ 48.
461. *See id.* at ¶ 49.
462. *Id.* at ¶¶ 59–65.

arguments must be carefully examined so that context is not actually "a disguised myth."[463] The court explained that the evidence was not relevant to an issue at trial because the "context" the evidence provided was meant to show that "because the complainant had typically consented to sex with Goldfinch in the past, she was more likely to have done so on this 'routine' occasion."[464] On this basis, the Supreme Court dismissed the defendant's appeal.[465] The court stated: "[a]dmitting that evidence was a reversible error of law which might reasonably be thought to have had a material bearing on the acquittal."[466]

Justices Moldaver and Rowe concurred. They presented two additional procedural safeguards that should be used in sexual assault cases where relationship evidence is admitted ensuring just outcomes: first, the concurrence countenances a concise, agreed-upon statement of facts submitted before trial outlining the proffered relationship evidence.[467] This allows the trial court to ensure that the parties do not go beyond those parameters.[468] Second, a limiting instruction given immediately after the admission of sexual activity evidence explaining "permissible and impermissible uses of the evidence."[469]

Although the basic requirements for admissibility under the Canadian statute are very similar to those under Federal Rule of Evidence 412, the procedural requirements are very different from those in the United States, England and Wales. Under the Canadian statute, courts must explicitly address the twin myths and ensure that the rationale for admission is not actually based on a disguised myth. The Canadian statute addresses rape myths head-on, recognizing their strength and their impact on judicial decision-making. The Canadian procedural requirements outlined in the statute and the additional requirements suggested in *Goldfinch* provide a roadmap to improve Federal Rule of Evidence 412.

---

463. *Id.* at ¶ 56.

464. *Goldfinch*, [2019] SCC at ¶ 72. The Court noted that if Goldfinch sought to admit the evidence to establish a distinctive pattern of behavior, the evidence did not support admissibility under this exception. *Id.* at ¶ 64.

465. *See id.* at ¶¶ 72, 75–76.

466. *Id.* at ¶ 72.

467. *See id.* at ¶ 98.

468. *See id.*

469. *Id.* at ¶ 99.

V. PROPOSAL TO AMEND FED. R. EVID. 412 TO ACKNOWLEDGE THE TWIN MYTHS AND PROVIDE ADDITIONAL GUIDANCE TO JUDGES

The comparative analysis conducted here reveals the ongoing impact of rape myths in rape cases. There are lessons to be learned from this analysis to improve Federal Rule of Evidence 412. First and foremost, given the prevalence and strength of these myths, the Judicial Conference should consider amending Rule 412 to include explicit language laying out the prohibited inferences—specifically, the twin myths. Canada's approach where the statute clearly explains the prohibited inferences in the body of the statute is a powerful reminder to judges, who have broad discretion regarding admissibility of evidence, as to the statute's purpose. Second, explicitly requiring judges to reflect on rape myths and outline their rationale by considering specified factors addressing these myths and the purpose of rape shield laws focuses judicial decision-making on permissible considerations as opposed to relying on improper stereotypes. As shown above, the application of the Canadian rape shield law does not result in the elimination of bias, but it may be an effective tool to address these myths.

Third, United States courts should consider implementing some of the other procedural recommendations outlined in *Goldfinch*. For example, as discussed in *Goldfinch*, where sexual history evidence is deemed admissible, an agreed-upon statement of facts submitted to the court that outlines the relationship evidence is preferable. That statement allows the trial court to ensure the parties stay within those parameters and cause less damage to the victim and the process itself. Fourth, the Judicial Conference should consider amending Rule 412 to include additional victim access to motions hearings, like the Canadian rule, and additional protections for victims in these hearings. The rule should explicitly state that: (1) the complainant is not compellable at the hearing; and (2) the complainant has a right to counsel. The rule should also provide a requirement for written or recorded reasons regarding admissibility and the factors the court relied on in reaching that decision. Finally, in the advisory committee notes to the amended rule, the Judicial Conference should explain that similarity evidence, such as that in the Tennessee, North Carolina, and Florida statutes, is contrary to the purpose of the rule because it furthers prohibited myths.

CONCLUSION

Nearly 50 years ago, during the Congressional hearings on establishing Federal Rule of Evidence 412, Mary Ann Largen, Former National Organization of Women's National Rape Task Force Coordinator, testified that the proposed rule reflected a "policy decision that the courts must finally put aside their fantasies and myths about rape and do something to effectively protect the women of this nation."[470] That policy goal is unrealized. Unfortunately, as shown in this Article, the endurance of rape mythology infects the trial process in each of the jurisdictions evaluated here. To protect victims of rape and sexual assault and move toward achieving the goal of these statutes, rape shield laws must directly address the driver of rape culture, rape myths. Not only should these statutes prohibit sexual pattern evidence; they must include robust procedural mechanisms that explicitly address embedded cultural attitudes to safeguard the integrity of the trial process.

470. *See Hearings*, *supra* note 5, at 34 (statement of Mary Ann Largen).