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Girls Gone Wild and Rape Law: Revising the Contractual Concept of Consent & (and) Ensuring an Unbiased Application of Reasonable Doubt When the Victim is Non-Traditional

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"GIRLS GONE WILD"* AND RAPE LAW: REVISING THE CONTRACTUAL CONCEPT OF CONSENT & ENSURING AN UNBIASED APPLICATION OF "REASONABLE DOUBT" WHEN THE VICTIM IS NON-TRADITIONAL

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* The term "Girls Gone Wild" is used here to illustrate the manner in which society categorizes as "wild" all women whose behavior does not fit society's view of acceptable behavior for women. The recent use of "Girls Gone Wild" references videos of young women on spring break which codifies this pre-existing classification. In this Article, the author contends that society implicitly associates the pejorative title of "Girls Gone Wild" not only to the young women of spring break, but to any woman whose sexual behavior departs from society's idea of acceptable behavior for women.

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"It's a lot of real G's doing time 'cause a groupie bit the truth and told a lie."[1]

> *In the United States most rapes are never reported. Most reported rapes are not prosecuted. Most prosecuted rapes do not result in convictions. The vast majority of rapists are never held to account for their actions in any way. Many victims of rape anticipate, with reason, that they will not be believed by the authorities or will lose in court—perhaps because they are not believed or perhaps because the triers of fact value the rapists over them, blame the woman for the rape, or do not care that they were raped, thinking the harm trivial or the law against rape repressive. Many African American women dread both the legal system's racism against Black men and its racist devaluation of their rape.*[2]

1. TUPAC, I GET AROUND (Jive Records 1993) (encapsulating the tension present in rape law: balancing the desire to avoid gender bias and to protect the interest of the victim against the interest in protecting potentially innocent accused individuals).

2. CATHERINE A. MACKINNON, SEX EQUALITY 748, 751-52 (Foundation Press 2d ed. 2007) [hereinafter MACKINNON, SEX EQUALITY] (examining connections between sexuality and rape, and noting that even with rape law reform in the United States there has been little improvement in reporting and conviction rates); *see also* Jennifer Wriggins, *Rape, Racism and the Law*, 6 HARV. WOMEN'S L.J. 103, 122 (1983) (describing instances where police have taken Black women's rape claims less seriously, and noting that this is concerning because "Black women are much more likely to be victims of rape than are white women"); Gail E. Wyatt, *The Sociocultural Context of African American and White American Women's Rape*, 48 J. SOC. ISSUES 77, 78 (1992) (explaining that African American women may still be cautious about coming forward because of their perceptions of society).

I. INTRODUCTION

The above statements encapsulate two principal fears that rape cases often elicit: (1) that innocent defendants will be unjustly imprisoned as a result of false accusations by women, and (2) that a rape victim's trauma[3] will be trivialized.[4] False rape claims by White women against Black men as well as the United States' violent racial history of lynching have strengthened the first fear.[5] The reality for many women of color has been that, along with being raped and treated as a commodity, women of color historically have lived in fear of losing their fathers and husbands to the slaughter that traditionally followed accusations of rape issued by White women against Black men during slavery and the Jim Crow era.[6] Scholars delving into the rape law area should particularly be conscious of this painful history and cognizant of the need to maintain a balance between providing a fair trial for the defendant and protecting the rights of the victim.[7] Achieving this balance is especially crucial considering that, concurrent with our jurisprudential history of false prosecution, our judicial system has historically accorded less credibility to non-traditional victims.[8] "Non-traditional victims" in this article refers to women who do not fit the profile of the stereotypical rape victim. This Article will explore the relevant issues for two types of non-traditional rape cases; rape cases where the victim is a prostitute and multi-partner rape cases. The choice of those

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3. *See* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1378 (1997) (noting that a large number of acquaintance rape victims do not take legal action against their rapist because of their "fears of a hostile or overly skeptical criminal justice system").

4. *See* Tamara Larsen, Comment, *Sexual Violence Is Unique: Why Evidence of Other Crimes Should Be Admissible in Sexual Assault and Child Molestation Cases*, 29 HAMLINE L. REV. 177, 200 (2006) ("[L]aws have historically been premised on the fear of women making false allegations of rape.").

5. *See* Lisa M. Calderon, *Rape, Racism, and Victim Advocacy*, THE BLACK COMMENTATOR, July 8, 2004, *available at* http://www.blackcommentator.com/98/98_calderon_rape_racism_pf.html ("Women are often blamed for their own victimization by either making 'poor choices' or not getting out of the situation sooner. However, the analysis of who is a 'good' or sympathetic victim, who is the 'bad' stereotypical perpetrator, and what is the appropriate community or legal response, is not so simply defined. Add to the mix an alleged victim who is White, the accused who is Black, and the criminal offense of sexual assault. Here is where the concept of justice is at a crossroads, and the issues of rape and racism collide.").

6. *See Riots and Massacres in the Jim Crow South*, CHICKEN BONES: A JOURNAL FOR LITERARY AND ARTISTIC AFRICAN-AMERICAN THEMES (2007) http://www.nathanielturner.com/jimcrowriots.htm (detailing riots and mass murders of Black Americans in the wake of rape accusations by White women).

7. *See* Calderon, *supra* note 5 (asserting a critical analysis of standards rape victims face that create a victimhood paradigm).

8. *See* Bryden & Lengnick, *supra* note 3, at 1247-50, 1254 (discussing the characteristics of a rape victim that juries generally find sympathetic, particularly the victim's appearance and apparent intelligence, which jurors often associate with middle class and credibility).

two types of cases does not, however, exclude the application of this Article's analysis for all types of non-traditional rape victims.

During slavery and the Jim Crow era, the two types of non-traditional rape victims least likely to find justice in courts were women of color raped by slave owners and married women raped by their husbands.[9] While the treatment of women as property is the dominant link between those two groups, true solidarity was impeded by the fact that, despite their vulnerable status, in court White women's words carried more credibility[10] than those of Black men[11] and Black women.[12] It has been reported that 80% of the 453 men executed for rape in the United States between 1930 and 1989 were African American.[13] Black women are least likely to be believed in courts, but are among those more likely to be the victims of sexual assault.[14] Black women "are generally considered to be subjected to a higher incidence of rape than white women in the American population . . . but African American women who are raped, like all

9. James W. Fox, Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 160 (2006) (noting that in the Jim Crow South "rape was a crime only when the victim was a white woman"); *see also* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 64-65, 65 n.69 (2002) ("Under slavery, white slave owners expected their female slaves to be available to them sexually . . . . Under this reign of white male patriarchy during slavery, Black women could not seek legal recourse for any such acts of sexual violence perpetrated against them by any man.").

10. MACKINNON, SEX EQUALITY, *supra* note 2, at 751 ("The exception to substantial impunity for rape in America occurs in the least frequent [cases]: the rape of white women by African American men. As philosophy professor Angela Y. Davis analyzes this reality, '[w]hile rapists have seldom been brought to justice, the rape charge has been indiscriminately aimed at black men, the guilty and innocent alike.'" (quoting ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS (Random House, Inc., 1st ed. 1983)). *See generally* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (Rev. ed. La. State Univ. Press 2007) (1969) (detailing the controversial Scottsboro trial that convicted nine young Black men of raping two White girls despite questionable facts).

11. *See* Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse and Reparations*, 14 UCLA WOMEN'S L.J. 89, 132-33 (2005) ("However, some of these prosecutions helped maintain other aspects of social control. For example, the Mann Act was used against a black man who took his fiancée, a white woman, across state lines. Many historians and commentators believe that this aspect became the Act's primary application."); *see also* Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. 529, 545-47 (1999) (discussing the bias that boxer Jack Johnson faced in the criminal justice system because of his past associations with White women).

12. *See* Andrew Elliot Carpenter, Chambers v. Mississippi*: The Hearsay Rule and Racial Evaluations of Credibility*, 8 WASH. & LEE RACE & ETHNIC ANC. L.J. 15, 20-21 (2002) (examining the influence that Black witness stereotypes had on the credibility of their testimony in rape cases).

13. *See* GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 141 (1989) (noting that before the Civil War, rape laws in the United States "treated black and white offenders differently").

14. *Cf.* MACKINNON, SEX EQUALITY, *supra* note 2, at 752 (theorizing that because of racist reasons, African American women receive little protection from the American judicial system).

women, seldom report it."[15] The existence of this encoded racial hierarchy, both in legal and social practice, has polarized drastically the two groups.[16]

It is because of this painful history that we must consistently interrogate and scrutinize our jurisprudence to make sure that all vestiges of commodification of women are eradicated.[17] It is also incumbent upon us to develop standards that carry out these goals with no prejudice to potential defendants.[18] Reality shows that rape law has, thus far, been unable to address the societal biases of judges, juries, prosecutors, and other members of the justice system.[19] The fact is that "the United States has yet to judicially recognize that systematic gender bias in state rape laws, facially and in their ineffective enforcement, discriminate against women victims of violence."[20] Until the complete eradication of gender

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15. *See id.* (explaining that some of the sexual violations that are least likely to occur are the most likely to be forcefully prosecuted).

16. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1438 (1991) (describing the devaluation of Black women as women and as mothers).

> Slave owners forced women to lie face down in a depression in the ground while they were whipped. This procedure allowed the [slave owner] to protect the fetus while abusing the mother. It serves as a powerful metaphor for the evils of a fetal protection policy that denies the humanity of the mother. It is also a forceful symbol of the convergent oppressions inflicted on slave women: they were subjugated at once both as Blacks and as females.

Id.

17. *See* Michèle Alexandre, *Dance Halls, Masquerades, Body Protest and the Law: The Female Body as a Redemptive Tool Against Trinidad's Gender-Biased Laws*, 13 DUKE J. GENDER L. & POL'Y 177, 180 (2006) ("Vestiges of these repressive views of women's bodies still remain not only in men's and women's psyches but also in societal norms and in legal concepts. For example, the United States, which purports to have achieved the greatest strides in the struggle for women's rights, still grapples with the idea of an autonomous female body.").

18. This Article limits the discussion of rape law and non-traditional rape victims to heterosexual rape. There are, however, additional issues affecting other types of non-traditional victims as well as issues involving same-sex sexual assault.

19. *See* TIMOTHY C. HART & CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: REPORTING CRIME TO THE POLICE, 1992-2000, at 1 (Mar. 2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rcp00.pdf (citing that only 31% of rapes were reported between the years of 1992 and 2000); s*ee also* Tom Linninger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1585 (2008) (noting the judicial tendency to misconceive the rape victim as "vindictive, greedy, or mentally unstable"); Andrea Giampetro-Meyer & Amy Fiordalisi, *Toward Gender Equality: the Promise of Paradoxes of Gender to Promote Structural Change*, 1 WM. & MARY J. WOMEN & L. 131, 140 (1994) (book review) (explaining that "although rape is probably one of the single most devastating crimes a woman could experience, rape victims often are treated with disdain and insensitivity in the courtroom").

20. *See* MACKINNON, SEX EQUALITY, *supra* note 2, at 742 ("[W]omen have historically been excluded from the authoritative processes through which community rules are made, interpreted, and enforced . . . . Historically, even when civil claims for so-called seduction were recognized, the legally injured party was the young woman's father . . . ."); *see also* Jane E. Larson, *Women Understand So Little, They Call My Good Nature "Deceit": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 401-03 (1993) (detailing the history of seduction in the common law and intentional misrepresentation laws in various states, and asserting that both types of law

bias[21] from rape laws is made an expressed goal by the legislature and judicial bodies, women, particularly non-traditional women, will continue to suffer from implied and express gender biases in the implementation of rape laws.[22]

This Article argues that the standard for consent applied in rape cases is erroneous and particularly harmful to non-traditional rape victims. This Article therefore proposes a change from the current, implicit, contractual idea of consent to a continuum-based idea of consent. The continuum-based idea of consent directly contradicts the idea that consent is finite in time and cannot be withdrawn once given. Instead, it considers that the withdrawal of consent can occur at any time during sexual interaction(s). Courts' treatment of non-traditional rape victims when applying the current consent standard perpetuates gender biases[23] in ways that nullify the very purpose of the rape shield laws.[24] In addition, the purported "reasonable" standard is often misleading.[25] In fact, these decisions are full of sexist assumptions and inferences about the victim's sexual behavior, which courts use to justify their decisions to allow evidence of the victim's past sexual conduct.[26] This type of evidence unfailingly permeates the jury's decision as to whether or not the victim's behavior and past acts are worthy of protection.[27] In light of this trend, it is imperative not only to reform the Rape Shield Statute so as to prevent biased applications, but it is also crucial that judges and juries undergo strict gender deconstruction and bias eradication training.[28] Gender deconstruction for judges and juries is crucial because, despite the existence of formal rules to protect victims,

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discriminate against women in rape cases).

21. *See* Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 472 (2005) ("[R]ape is the least reported, least indicted, and least convicted non-property felony in America.").

22. A. Thomas Morris, Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call For Legislative Reform*, 1988 DUKE L.J. 154, 165 (1988) (recognizing additional race-based judicial bias of rape victims).

23. *See* Seidman & Vickers, *supra* note 21, at 485 (asserting that the law should require affirmative consent as opposed to assuming that a women's silence is a result of coyness).

24. *See* Anderson, *supra* note 9, at 55-56 (arguing that promiscuous women who were raped were treated unfairly by courts).

25. *Cf.* Note, *Patriarchy is such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1976-77 (1995) (discussing the changing perceptions of what is objective or reasonable behavior for the female gender in general).

26. *See* Kathryn M. Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 347 (2001) (describing past statements by politicians and judges that indicate gender bias).

27. *See* Anderson, *supra* note 9, at 56 (explaining that many of the norms behind past chastity requirements continue to determine whether courts find past sexual behavior relevant).

28. *See* Bryden & Lengnick, *supra* note 3, at 1259 (discussing the effects that gender bias has on the decisions of juries in rape cases).

societal norms regarding sex and women are such that popular notions of appropriate behavior for women become the tacit backdrop of these cases.[29]

This Article further analyzes the implementation of rape shield statutes in cases of non-traditional rape victims. In doing so, this Article explores a sample of rape cases where the victims are prostitutes. Courts' gender biased application of the rape shield statutes in cases where the victim is a prostitute, for example, illustrates the shortcomings of rape shield statutes.[30] The task, consequently, is to determine what reforms would best work to prevent the introduction of gender bias while not undermining the rights of the accused pursuant to the Sixth Amendment. These proposed changes, however, could not be considered without taking into account the complex and varied nature of rape victims.[31] Any attempts at reforming the rape shield statutes must include *a priori* rules designed to protect individuals who do not fit society's stereotypes of a rape victim.

This Article is divided into the following: Part II investigates the continuum-based idea of consent in rape cases; Part III describes the provisions of the Rape Shield Statute and its application; Part IV provides specific instances of gender bias in the application of rape shield statutes in rape cases involving victims who are prostitutes; Part V proposes amendments and alternative standards to rape shield statutes and considers these proposals' import in the application of rape shield laws to the multi-party rape context; finally, Part VI considers policy reasons for the proposed changes and how they would help advance our rape jurisprudence.

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29. *See* Christina E. Wells & Erin Elliot Motley, *Reinforcing The Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U.L. REV. 127, 146-49 (2001) (explaining that courts relied on negative connotations about women to put the rape victim on trial instead of the perpetrator).

30. *See* Karin S. Portlock, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1407 (2007) (noting that admission of evidence linking the victim claimant to prostitution defies the purpose of the rape shield legislation and that admission of such evidence "disproportionately discourages the rape claims of prostitutes of color. States' various prostitution exceptions compromise the protections of the shield at the expense of these women, a group that is particularly vulnerable to frequent sexual attack.").

31. Heather C. Brunelli, Note, *The Double Bind: Unequal Treatment for Homosexuals within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201, 230 (2000) (noting the importance of examining how "rape shield statutes will affect *all* people," non-traditional rape victims included).

II. CRITICISM OF THE CURRENT CONTRACTUAL STANDARD AND EXPLORATION OF A CONTINUUM-BASED STANDARD OF CONSENT

A. The Detrimental Influence of the Contractual Standard of Consent

While the traditional contractual idea of consent is a good framework for regulating goods and services, it is detrimental when applied to rape law. This, however, seems to be the de facto standard for consent that has been used where courts attempt to decipher whether consent has occurred in cases of rape.[32] Under the Restatement (Second) of Contracts § 22:

> (1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.
> (2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.[33]

The idea that consent is finite in time underlies this definition of mutual assent. Once proven by assent or by conduct, courts often seek to ratify the terms of the contracts. This view is illustrated further in Restatement (Second) of Contracts § 18, which states that "[m]anifestation of mutual assent to an exchange requires that each party either make a promise or begin . . . performance."[34] This understanding of consent is tacitly present in the treatment of consent in rape cases. Under this norm,

> affirmative consent standards and limitations on the defense of mistaken belief operate as inducements for revealing preferences and for ensuring that others' preferences be respected. Stringent *mens rea* requirements mean that the negative externalities of individual transactions must be taken into account, thereby reducing the inefficiencies of coercive heterosexuality. [R]eformulated legal standards for sexual consent might be seen as an active reconfiguration of sexual interactions in a manner

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32. *See* Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neo Liberal Subjects and Risky Women*, 41 AKRON L. REV. 865, 887 (2008) (arguing that courts' decisions in rape cases still involve an economic framework).

33. RESTATEMENT (SECOND) OF CONTRACTS § 22 (1981).

34. See RESTATEMENT (SECOND) OF CONTRACTS § 18 cmt. b (1981), which states:

> [W]here a bargain has been fully performed on one side, there is commonly no need to determine the moment of making of the contract or whether the performing party made a promise before he performed. Those issues ordinarily become important only when a dispute arises at an earlier stage. In the typical case such a dispute involves an exchange of promises before any performance takes place; there is an offer containing a promise and made binding by an acceptance containing a return promise. Section 50. The beginning or tender of performance may operate as such a return promise under § 63. In less common cases, acceptance may be made by a performance under § 54, and the beginning of performance may have an intermediate effect of making the offer irrevocable under § 45.

> that infuses normative sexuality with an entrepreneurial logic.[35]

This standard of consent operatively converts victims into perpetuators. Similarly, the Uniform Commercial Code (U.C.C.), which regulates the sale of goods, defines consent or acceptance as a finite process capable of being garnered by lack of an express statement. Under § 2-606 of the U.C.C.:

> (1) Acceptance of goods occurs when the buyer
>
> > (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
> >
> > (b) fails to make an effective rejection . . . but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
> >
> > (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.
>
> (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.[36]

The above contractual ideas of consent/acceptance have been transposed in the drafting and implementation of rape law's definition of consent without regard to the fact that a woman's body is not analogous to goods or services.[37] Our jurisprudence's initial view of women as property and its failure to directly address the inherent gender biases in laws affecting women explain the perpetuation of these inadequate laws. The subjugation of women's bodies and the law's treatment of women's bodies as commodities and goods, rather than as women's exclusive domain, have been the subject of many scholarly works.[38] Still, gender bias has been so pervasive that legislative and judicial bodies have not directly addressed how these destructive views undermine the laws that were initially created to protect women.

This neglect has taken place with the tacit approval of society, which also has a vested interest in promoting these subversive views of women's bodies.[39] While the eradication of gender bias from society is a centuries-

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35. *See* Gotell, *supra* note 32, at 874 (explaining that when viewed through the lens of mutual assent, sexual interaction becomes like a market transaction).

36. U.C.C. § 2-606 (2004).

37. *See* Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1449-52 (1993) (devaluating the theory that we should view sex as a commodity and apply contract theory to rape law).

38. *See, e.g.*, Gotell, *supra* note 32, at 872-73 (discussing the effects that the comparison of rape to economics has had on rape cases).

39. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 21-22 (1977) (surveying critical analysis of rape victims that historically has presented concerns of "deliberate lies," "female psychic diseases," social and religious pressures, and other fears of false claims).

old task, scholars, judges, and legislators can begin the task by directly addressing the inherent bias in rape laws.[40] One of the means to accomplish this is to redefine the notion of consent to reflect the idea that a woman's body should be within her exclusive control at all times, and that access to her body has to be obtained by periodic and expressed verification of consent.[41] When exploring a defendant's contention that an alleged rape was in fact consensual intercourse, courts plough through the circumstances surrounding the rape to determine whether evidence of consent by the victim can be pinpointed.[42] In doing so, old contractual concepts, like the implied consent cited in the comment to Restatement (Second) of Contracts § 18,[43] have become one of the accepted methods of determining the existence or non-existence of mutual consent.[44] The application of a contractual view of assent to rape cases is one of the means through which rape shield statutes have been circumvented.[45]

The contractual ideas of acquiescence, reliance, and estoppel are tacitly employed in the evaluation of these circumstances where even a woman's silence out of fear during a rape can still be used against her as evidence of consent.[46] In cases involving a woman too fearful to speak up during her rape,[47] courts evaluate the circumstances from the rapist's perspective and

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40. *See* Gotell, *supra* note 32, at 872 (observing that the Canadian consent standard is changing as judges place more emphasis on sexual autonomy and the burden of acquisition of clear consent on those initiating sexual contact).

41. *See id.* at 886 (describing the shift toward a positive and specific consent standard by Canadian courts and the necessity to give expressed verification of consent).

42. *Cf.* Anderson, *supra* note 9, at 57 (addressing the New Jersey Supreme Court's definition of consent as specific and directed toward the specific act of penetration, and arguing that consent to sexual intercourse is not freely transferrable from person to person).

43. *See* RESTATEMENT (SECOND) OF CONTRACTS § 18 cmt. a (1981) (acknowledging that assent to the formation of a contract must be manifested, but that assent can occur through conduct other than words).

44. *See Annotated Legal Bibliography on Gender*, 12 CARDOZO J.L. & GENDER 471, 512 (2005) (contending that implied consent as a defense to rape should be eliminated and replaced with a requirement of verbal consent).

45. *See* James T. McHugh, *Interpreting the "Sexual Contract" in Pennsylvania: The Motivations and Legacy of* Commonwealth of Pennsylvania v. Robert Berkowitz, 60 ALB. L. REV. 1677, 1680 (1997) (discussing a case where a rape conviction was overturned because the court focused on a contractual interpretation of the incident without considering other factors such as the victim's fear).

46. *See* Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 506-07 (1991) (citing a study that found jurors routinely considered the rape victim's nonverbal behavior, including body language, to determine whether the victim consented).

47. *See* GENDER VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 173 (Laura L. O'Toole & Jessica R. Schiffman eds., 1997) [hereinafter GENDER VIOLENCE] ("Overwhelming evidence supports the contention that rape and coercive [sexual behavior exists] . . . for women in our culture. One sample of 930 randomly selected women, taken from a probability survey of households in San Francisco, found that 44 percent of those who completed the in-person interview had experienced rape or attempted rape. Of these, 50 percent had been raped more than once.").

erroneously apply contractual notions of equity.[48] The idea is that the victim's silence led the rapist to believe that consent existed, that he had grounds to rely on such perceived consent, and that, because of her silence, she is now estopped from holding him accountable.[49] In other words, silence equals acquiescence. The contrary view—that the alleged rapist *must* secure verbal unequivocal consent at each step of the transaction—has generally not been imposed on defendants.[50] This failure is rooted in the gender-biased perception that a woman's silence during sex is often a form of consent.[51] According to pre-set gender roles, men are viewed to actively chase and hunt women until the women eventually give in, even after demonstrating substantial resistance.[52] Her very resistance is viewed as a favorable form of foreplay in which she says "no" and is perceived as really meaning "yes."[53] If her express "no" can be so easily ignored, her silence is as effortlessly and commonly interpreted as acquiescence.[54]

Consider California's statute defining consent.

> In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.
>
> A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289.[55]

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48. *See* McHugh, *supra* note 45, at 1682 (noting that the appellate courts considered the victim and defendant's previous social interactions to determine it was reasonable that the defendant believed the victim wanted to engage in sexual intercourse with him).

49. *See* JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 207-09 (2005) (refuting the argument that because a large amount of communication is nonverbal, men should not be required to obtain verbal consent, with the argument that it is categorically unreasonable to infer consent from silence).

50. *See id.* at 114 (arguing that requiring consent at each stage of the sexual encounter helps both parties because it is a display of equality and respect for bodily autonomy).

51. *See id.* at 209 (pointing to data indicating that women who do not want to participate in sex sometimes rely on nonverbal refusals, but noting that the lack of verbal consent should not be construed as consent).

52. *See* GENDER VIOLENCE, *supra* note 47, at 176 (citing early psychoanalytic rape theories that held rape was the result of a woman's unconscious desire to be seduced).

53. *See id.* (explaining the traditional view of rape: it is a result of men's uncontrollable sexual appetites coupled with women's flaunted sexuality, and that ultimately, rape happens because women want sexual intercourse).

54. *See* McHugh, *supra* note 45, at 1678 (discussing a rape case where the victim and defendant acknowledged that the victim said "no," but the appellate court held that it was reasonable for the defendant to believe that her "no" was not a revocation of consent).

55. *See* CAL. PENAL CODE § 261.6 (West 2008) (stating that the statutory definition of consent shall not affect the burden of proof or the admissibility of evidence related

Comparatively, a Massachusetts rape statute states:

> Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury and if either such sexual intercourse or unnatural sexual intercourse results in or is committed with acts resulting in serious bodily injury . . . shall be punished by imprisonment in the state prison for life or for any term of years.[56]

Alabama, on the other hand, defines consent generally in criminal behavior as:

> (a) *In general.* The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives a required element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.
> (b) *Consent to bodily harm.* When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense only if:
>
> > (1) The bodily harm consented to or threatened by the conduct consented to is not serious; or
> > (2) The conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport; or
> > (3) The consent establishes a justification for the conduct under Article 2 of Chapter 3 of this title.
>
> (c) *Ineffective consent.* Unless otherwise provided by this Criminal Code or by the law defining the offense, assent does not constitute consent if:
>
> > (1) It is given by a person who is legally incompetent to authorize the conduct; or
> > (2) It is given by a person who by reason of immaturity, mental disease or defect, or intoxication is manifestly unable and known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct; or
> > (3) It is given by a person whose consent is sought to be prevented by the law defining the offense; or
> > (4) It is induced by force, duress or deception.[57]

Alabama's statute absolutely prevents the use of consent as a justification where the law strictly protects a class of individuals, such as in the case of statutory rape.[58] It is significant that the statute allows consent

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to consent).

56. MASS. ANN. LAWS ch. 265, § 22(a) (LexisNexis 2008).

57. ALA. CODE § 13A-2-7 (1975).

58. See ALA. CODE § 13A-2-7 cmt. (1975), which states

> [Section] (3) covers situations involving certain types of sexual misconduct, or "statutory rape," or sodomy where the penal statute defining the offense clearly ignores, or rejects, the actual consent of the particular victim in order to protect

as a defense in cases involving "non-serious bodily injury" and in cases where the transaction is mutually entered into (such as athletic events), but not for serious bodily injuries.[59] The fact that consent is allowed in rape cases (except statutory rape), analogizes rape to a benign bodily injury or an athletic interaction.[60] The commentary following the statute explains that

> [t]raditionally the courts have recognized, or applied, the principle that consent may be a defense to criminal liability in cases of insignificant injury where there is no public policy to the contrary, but in cases of more serious injury only where there is public acceptance of the type of transaction and consent to the risk involved. Thus, there is no liability for simple assault and battery resulting from mutual "horse play" type of jostling of swimmers at an outing, although some kind of minor bodily harm was foreseeable.[61]

Both of these analogies are problematic and demonstrate the law's failure to understand the deep trauma and injury that is rape. These analogies also demonstrate the failure of the legislature and judiciary to recognize their own gender-bias in minimizing the effect of rape.

Victims of rape suffer lifelong psychological and sometimes biological effects of the physical violations.[62] In fact, some rape victims may never completely recover from those effects.[63] For many, "rape can destroy one's sense of safety, feelings of integrity and worth . . . . Dread and terror of rape and anticipation of its possibility can set limits to women's freedom of action and access to a full life."[64] Rape, of course, is not only limited to women—other marginalized members of society have also been the victims of these hateful crimes.[65]

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the entire class of which he or she happens to be a member.

59. *See id.* (noting that the availability of consent as a defense can be a result of public policy concerns: where there is public acceptance of behavior, consent is often a viable defense).

60. *See id.* (indicating some of the acts that cannot be consented to include such things as fist fighting and dueling).

61. *Id.*

62. *See* Gina M. Wingood & Ralph DiClemente, *Rape Among African American Women: Sexual, Psychological and Social Correlates Predisposing Survivors to Risk of STD/HIV*, 7 J. WOMEN'S HEALTH 77, 78 (1998) (asserting that rape victims suffer from myriad long-term health effects including chronic anxiety, alcoholism, and psychological distress, and that rape victims engage in high-risk sexual behaviors more often than women who have not been raped).

63. *Cf.* Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 13 AM. J. PSYCHIATRY 981, 982-84 (1974) (explaining that after a rape victim has moved through the first or acute stage of trauma that occurs immediately after attack, he or she will enter a second, long-term stage that can affect motor activity, sleep, and general psychological health).

64. MACKINNON, SEX EQUALITY, *supra* note 2, at 755.

65. *See* MCGREGOR, *supra* note 49, at 4 (citing a study that found one in four female college students had been the victim of rape or attempted rape).

Arizona's statute, in contrast to Alabama, defines consent in the following manner:

> "Without consent" includes any of the following:
> (a) The victim is coerced by the immediate use or threatened use of force against a person or property.
> (b) The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For purposes of this subdivision, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.
> (c) The victim is intentionally deceived as to the nature of the act.
> (d) The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.[66]

The California definition that consent can be interpreted in an "attitude pursuant to an exercise of free will" is the type of vague definition that perpetuates the idea that the slightest bit of non-negation, if deemed to be the result of "free will," could mean consent.[67] Under this analysis, the act of being passive might still be problematic. Defining what constitutes "free will" and understanding the subjective fear that a woman might experience mandates that the burden of obtaining consent be viewed more strictly. For instance, Arizona's definition of lack of consent as the product of clear coercion, incapacity, or intentional deception does not add any categorical burden to secure open and express consent, even in the absence of these extreme circumstances.[68] The reasoning underlying the Arizona statute seems to be that "but for" any circumstances that do not fit into those categories even a lack of express consent could be considered consensual.[69] Thus, the de facto effect is to shift the burden of proof to the victim to prove that the sexual interaction occurred without consent rather than placing the burden on the defendant to prove that it happened with express consent.[70] This problem can be solved by a legislative mandate that

66. ARIZ. REV. STAT. ANN. § 13-1401 (2008).

67. CAL. PENAL CODE § 261.6 (West 2008).

68. *See* ARIZ. REV. STAT. ANN. § 13-1401 (defining "without consent" but remaining silent on what constitutes consent).

69. *But see* State v. Witwer, 856 P.2d 1183, 1185 (Ariz. Ct. App. 1993) (noting that the meaning of "without consent" is not limited to the situations described by the statute).

70. Justice for rape victims remains a major problem. *See* Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effect of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 555-59, 573 (1993) (indicating that victim's rights groups fought for rape law reform because of the tendency to blame the victim; although a number of jurisdictions have changed the consent standard to bring the focus back on the accused, the results have been mixed). *See* MACKINNON, SEX EQUALITY, *supra* note 2, at 751 ("Although social attitudes toward rape victims may have improved slightly beginning in the 1970's . . . rape law

consent be obtained expressly and at every step of the sexual interaction, and that consent be defined as capable of taking place on a continuum.

B. The Continuum-Based Consent Standard Defined

The disconnect between overwhelming evidence of culpability in many rape cases and jury verdicts of acquittal has been described as "the divide between elite and popular opinion about sexual mores and gender roles."[71] One of the reasons for this divide lies in our problematic view of consent.[72] Many rape statutes allow "consent" as a defense to rape even when force is involved.[73] In these cases, consent has been interpreted implicitly from the most passive of actions of the victims. Despite the fact that rape is inherently a violent crime that generates fear, it has traditionally been overlooked judicially that "consent in this world of fear is so passive that the woman consenting could be dead and sometimes is."[74] Thus, consent is assumed not from the presence of a verbal "yes" at each step of the sexual transaction, but by the mere absence of a loud "no," often needing to be accompanied by physical evidence of non-consent.

The divide between societal perceptions of women and the reality of women's lives can be mended. To do so, we must redefine our standard of consent. A new standard should include a paradigm of consent that defines consent as taking place on a continuum. Unlike the traditional view of consent, the new paradigm for consent understands that the granting of consent in rape cases is not rigid. In fact, in these cases, the granting of consent should be viewed as fluid, not finite in time, thereby capable of being withdrawn at any time. The proposed standard requires that, in cases where a defendant alleges consent, a defendant must first prove that express and present consent was explicitly obtained at the time of the actual sexual interaction, not before or after; express consent entails verbal or written assent that leaves no doubt as to the victim's agreement to the

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reform efforts in the United States in the 1970's and 1980's, largely inspired by women's critiques, produced little to no detectable improvements in reporting, arrest, or convictions rates . . . .").

71. Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 957-58, 966 (2008) ("Elite opinion values sexual autonomy and suspects, when it does not despise, sexual aggression. Popular opinion supposes that sexual autonomy may be forfeited by female promiscuity or flirtation, and views male sexual aggression as natural if not indeed admirable.").

72. *See* Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 4-5 (1998) (noting that whereas men are stereotypically "strong and assertive," women are stereotypically "weak and acquiescent" and therefore naturally unable to protect themselves against the primal sexual desire of men).

73. *See, e.g.*, ALA. CODE § 13A-2-7 (1975) (allowing consent to bodily harm as a defense to rape).

74. *See* Catherine A. MacKinnon, *Reflections of Sex Equality Under Law*, 100 YALE L.J. 1281, 1299 n.91 (1991) (quoting ANDREA DWORKIN, INTERCOURSE 129 (1987)).

sexual interaction. Second, if the defendant is able to establish express, present, and uncontroverted consent to the sexual interaction at issue, the burden will shift to the prosecution to demonstrate withdrawal of consent; withdrawal of consent can happen at any time during the sexual interaction. Third and finally, a defendant's subjective state of mind is never a defense. This continuum-based definition of consent in rape cases is the most efficient and equitable approach to solving the consent conundrum in these cases.

Thus, in this proposed standard, the burden is initially placed on the defendant claiming consensual sex to prove express consent within the parameters of the case at bar, precluding him from using any evidence of past sexual behavior or any circumstantial evidence of consent. Evidence of a victim's manner of clothing or conduct during circumstances unrelated to the sexual interaction would also not be admissible to prove consent. The ease with which our rape shield statutes are minimized[75] evidences a deep failure to truly comprehend how consent operates.

The idea of consent as an all or nothing grant or denial of access seems to be rooted in a contractual view of sexual consent.[76] Under this contract-based paradigm, we think of a sexual interaction as happening at a finite time, we envision that consent is given or inferred from past behavior, and from that point on, performance, in essence, begins for the parties involved.[77] Consequently, indications of a woman's attempt to withdraw consent at some point later in the interaction are often disregarded. The ease with which withdrawal of consent is disregarded stem from the traditional contract-based view that the defendant relied upon the consent given and would be prejudiced if consent was subsequently withdrawn.[78] This idea protects in part the contractual expectations of the defendant and is inspired by the contractual concept of part-performance.[79] In other

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75. *See* Anderson, *supra* note 9, at 55 (arguing that although facially most rape shield laws appear to protect rape victims, exceptions to the laws effectively destroy their protections).

76. *See* Sakthi Murthy, Comment, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 CAL. L. REV. 541, 566 (1991) (addressing the stereotype underlying the idea of a contractual view of sexual consent, which is that the male sex drive is inherently distinguishable from the female sex drive).

77. *See id.* (noting that a contractual view of sexual encounters leads to the premise that men are justified in their sexual expectations because of the unrelenting nature of male sexuality).

78. *See* Matthew R. Lyon, Comment, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 280-81 (2004) (observing that the common law disallows rape prosecutions if a woman withdraws consent after intercourse has begun).

79. *See* McHugh, *supra* note 45, at 1684 (expressing the majority rule that because the lack of consent at the time of penetration is the determinative factor to analyze whether a rape has occurred, a rape has not occurred if consent is withdrawn after penetration).

words, from circumstantial evidence,[80] we interpret the contract as only capable of having been made at the inception of the sexual interaction. Accordingly, once the contract is made, all steps subsequently taken by the defendant are in reliance on the original terms of the contract. If, consequently, a contract is identified and a defendant is deemed to have relied on these contractual terms, courts often implicitly conclude that negating the existence of the contract would cause too great of an injustice to the defendant.[81] Thus, even if the facts overwhelmingly point to a victim's attempt to withdraw consent, empathy for the defendant's perceived reliance on the would-be contract often leads to an acquittal.[82] This normative view of consent is faulty and founded on the historical view of a woman's body as a commodity and, therefore, akin to goods capable of being transacted.[83]

Multi-partner rape cases, as well as other rape cases involving non-traditional rape victims, would benefit from redefining consent as existing on a continuum where it can be granted and/or withdrawn at any time, without any allegations of a breach.[84] This continuum-based idea of consent would not only support the many decades of feminist scholarship advocating for society to recognize a woman's right to control her body without external interferences and restrictions, it would also provide us with a paradigmatic counter to the traditional contractual standard which can help better frame our legal discussions and decisions.[85]

The continuum-based idea of consent moves away from traditional contractual ideas of consent. Consequently, it also rejects contract law's notion that one who cancels a contract without any cause is entitled to a remedy.[86] Section 2-106 of the U.C.C. governs the cancellation of contracts for the sales of goods and states that a cancellation "occurs when either party puts an end to the contract for breach by the other and its effect

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80. *See* People v. Barnes, 721 P.2d 110, 119 (Cal. 1986) (recognizing possible reactions of rape victims and noting that some rape victims "become helpless from panic and numbing fear") (citation omitted).

81. *See* McHugh, *supra* note 45, at 1682 (citing the Supreme Court of Pennsylvania's willingness to find contractual reliance based on prior social interactions, including sexual innuendo, and repeated phone calls and visits).

82. *See id.* at 1687 ("This abstraction of sexual relationships has made it easier for men to assert and maintain coercive power and then defend their actions through a sympathetic legal system.").

83. *See id.* at 1688-90 (providing examples of the historical view that women's bodies are commodities, similar to the traditional understanding that a woman is her husband's property).

84. *See id.* at 1692-93 (explaining that courts often find a permanent explicit contractual agreement in the cases of married women and prostitutes—married women have essentially consented to sex with their husbands for eternity and prostitutes cannot deny one man while offering her services to another).

85. *See* Lyon, *supra* note 78, at 280 (suggesting that a requirement of consent both pre- and post-penetration is necessary to adequately protect victim's rights).

86. *See* U.C.C. § 2-106(4) (2004).

is the same as that of 'termination' except that the canceling party also retains any [right to a] remedy for breach of the whole contract or any unperformed balance."[87] This notion explains the sympathy that juries and judges seem to feel for defendants in rape cases where the defendant and the victim had prior consensual sexual interactions.[88] Since women's bodies are viewed as goods, the underlying assumption has often prevailed that consent to access once should signify consent to access forever.[89] This is so even with the enactment of rape shield statutes that preclude the introduction of the victim's sexual past.[90] Despite that preclusion, a victim's sexual history with a defendant has often been found to be probative. Under that pretext, the defendant is often acquitted despite overwhelming evidence that the defendant did in fact rape the victim.[91]

The proposed continuum-based approach to consent has not been recognized by courts, as is evidenced by the way courts' decisions perpetuate misconceptions about perceived flexibility in the appropriation of women's bodies.[92] Despite the formal equality that legal rules, such as rape shield statutes, originally strived to provide, the actual implementation of these rules has been quite limited and has influenced gender-biased reprobation of the choices and lifestyles of non-traditional rape victims.[93] Legislation must render the eradication of gender bias a mandatory goal in

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87. *See* U.C.C. § 2-106 n.3 (stating that the purpose of subsection (4) is to make the distinction between termination and cancellation clear).

88. John H. Biebel, Note, *I Thought She Said Yes: Sexual Assault in England and America*, 19 SUFFOLK TRANSNAT'L L. REV. 153, 163-64 (1996) (noting the tendency of juries to assume that the victim consented based on evidence of a past relationship between the rapist and the victim).

89. *See, e.g.*, Ivey v. State, 590 S.E.2d 781, 784 (Ga. Ct. App. 2003) (finding that because the victim worked as a prostitute and had engaged in sexual relations with the defendant previously, the jury could have reasonably believed that the sex was consensual).

90. *See* Murthy, *supra* note 76, at 542-43 (noting that even the federal rape shield statute has been circumvented in order to allow evidence of mistaken belief of consent when the victim is "promiscuous").

91. *See* State v. Sanchez-Lahora, 616 N.W.2d 810, 814, 817 (Neb. Ct. App. 2000) (overturning a rape conviction because the lower court impermissibly excluded evidence of a prior sexual relationship between the victim and the defendant, despite the fact that a jury had found the defendant guilty of sexual assault and "terroristic threats").

92. *See* Lyon, *supra* note 78, at 292-93 (citing a description by the North Carolina Supreme Court that found withdrawal of consent cannot effectively occur during a sexual act, it can only occur before or between sexual acts).

93. *See* Rosemary C. Hunter, *Gender In Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 132 (1996) ("Judgments about prejudice are also culturally embedded. For example, common stereotypes about African American women, 'promiscuous' women, and prostitutes ensure that any probative value their prior sexual history might conceivably have in a rape case would inevitably be outweighed by its prejudicial effect. Thus prior sexual history evidence in these cases should be excluded. Research for this article uncovered little discussion and few examples of the possibility that a rape complainant's sexual history might be excluded on the ground that it was more prejudicial than probative.").

judges' construction of jury instructions.[94] While some have proposed the eradication of juries as a means of preventing bias, that solution might not be as far-reaching as a redefinition of the consent standard, considering that gender bias permeates all aspects of the adjudication of rape cases.[95]

III. THE RAPE SHIELD STATUTE

The current contractual view of consent has undermined the application and construction of rape shield statutes. Consequently, these statutes also need to be reformed to reflect an express commitment to the eradication of gender bias in rape cases. Rape shield statutes are designed to prevent the introduction of biased evidence of past sexual conduct in rape cases.[96] Despite this mandate, evidence of past sexual conduct is routinely admitted in rape cases via the use of exceptions in rape shield laws.[97] Consequently, the Rape Shield Statute,[98] which was designed to prevent the introduction of bias in rape cases, is now inadequate to carry out that purpose.[99] This problem is especially present in cases involving non-traditional rape victims.[100] In rape law, the prototype of a sympathetic rape victim is that of a woman considered chaste by society and whose sexual assault takes place with extreme force of violence, leaving her near death.[101] Rape victims with an active sexual history, particularly a past sexual history with the defendant, are less sympathetic as victims.[102]

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94. *See* Bryden & Lengnick, *supra* note 3, at 1196 (arguing that rapists go unpunished in large part because of rules created by male judges, including the use of the "cautionary instruction" that warns the jury about false rape accusations).

95. *See id.* at 1197-98 (suggesting the use of the term "rape" itself leads to gender bias because it implies the crime is sexually motivated instead of violent).

96. *See* WASH. REV. CODE ANN. § 9A.44.020(3) (2008) (stating that evidence introduced for the purpose of attacking the character of the victim is barred except for certain specific exceptions); *see also* N.Y. CRIM. PROC. LAW § 60.42 (Consol. 2008) (barring evidence of the victim's past sexual conduct except for delineated exceptions).

97. *See*, *e.g.*, N.Y. CRIM. PROC. LAW § 60.42 (Consol. 2008); WASH. REV. CODE. ANN. § 9A.44.020 (2008).

98. FED. R. EVID. 412.

99. Joel E. Smith, Annotation, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R.4th 283, § 2 (1980) (noting a case where the court held that the rape shield statute prohibited the defendant from presenting a defense because evidence of the victim's past sexual conduct was barred pursuant to the statute).

100. *See* Anderson, *supra* note 9, at 113 (stating that a "number of rape shield statutes allow for the introduction of a victim's prior criminal convictions when they involve moral turpitude, which would likely include prior convictions for prostitution." (citing N.Y. CRIM. PROC. LAW § 60.42 (Consol. 2008))).

101. *See* Bryden & Lengnick, *supra* note 3, at 1199 (noting that despite legislative changes to rape laws, there has been little impact on the outcome of rape cases, and arguing that more drastic reforms, such as requiring affirmative consent before a sexual act, might resolve the problem).

102. *See* Carney, *supra* note 26, at 346-47 (citing examples illustrating the negative perception of non-traditional rape victims).

The Rape Shield Statute was created to prevent the introduction of prejudicial evidence to the detriment of rape victims.[103] Evidence of the victim's sexual history was readily introduced in rape cases prior to the enactment of federal and state rape shield statutes.[104] States have adopted versions of the Rape Shield Statute since the 1970s to prevent the introduction of evidence capable of harming the character of rape victims.[105] Despite this intent, rape shield statutes have been unsuccessful in preventing the introduction of gender-biased evidence that often leads juries to be prejudiced against rape victims.[106] Furthermore, in the absence of carefully crafted, gender-bias free jury instructions by judges and deliberate application of bias-free standards of review for motions *in limine*, the interpretation given to those types of evidence is limited to narratives of society's view of appropriate conduct for women engaging in sexual negotiation.[107] The Virginia rape shield statute, for example, provides, in pertinent parts:

> (A) In prosecutions under this article, general reputation or opinion evidence of the complaining witness's unchaste character or prior sexual conduct shall not be admitted. Unless the complaining witness voluntarily agrees otherwise, evidence of specific instances of his or her prior sexual conduct shall be admitted only if it is relevant and is:
>
> > (1) Evidence offered to provide an alternative explanation for physical evidence of the offense charged which is introduced by the prosecution, limited to evidence designed to explain the presence of semen, pregnancy, disease, or physical injury to the complaining witness's intimate parts; or
> >
> > (2) Evidence of sexual conduct between the complaining witnesses

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103. See Joseph A. Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 FORDHAM L. REV. 1641, 1659 (2007), which explains that

> while rape-shield rules vary by jurisdiction, the statutes or rules generally prohibit the use of a victim's character propensity evidence involving sexual conduct in litigation, including the sexual history of the alleged victim of a rape or other sexual assault. These rules exist in the federal system and across the states to protect victims of rape or other sexual offenses from the humiliation of having their sexual history presented in a public forum.

104. *See* Knox v. State, 365 So. 2d 349, 350 (Ala. Crim. App. 1978) (permitting evidence of the victim's previous sexual intercourse with the accused).

105. *See* Jamie Goss Dempsey, Fells v. State*: Good Decision on Procedural Grounds, Dangerous Precedent for Future Application of Arkansas's Rape Shield Statute*, 59 ARK. L. REV. 943, 951-52 (2007) (describing the legal movement toward rape shield statutes, from Arkansas's allowance of evidence of the victim's "unchastity" at common law to contemporary adoption by all states of some form of statutory rape protection).

106. *See* Friedland, *supra* note 46, at 487, 519 (1991) (concluding that "[b]ecause evidentiary rules, rape shield statutes and jury instructions all have failed to address specifically the impact of the culture of acceptance on nonverbal conduct, jurors continue to perpetuate latent gender stereotypes and biases").

107. *See id.* at 518 (explaining that rape shield laws do not protect rape victims from the culture of acceptance of gender biases).

> and the accused offered to support a contention that the alleged offense was not accomplished by force, threat or intimidation or through the use of the complaining witness's mental incapacity or physical helplessness, provided that the sexual conduct occurred within a period of time reasonably proximate to the offense charged under the circumstances of this case; or
>
> (3) Evidence offered to rebut evidence of the complaining witness's prior sexual conduct introduced by the prosecution.
>
> (B) Nothing contained in this section shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused. If such evidence relates to the past sexual conduct of the complaining witness with a person other than the accused, it shall not be admitted and may not be referred to at any preliminary hearing or trial unless the party offering same files a written notice generally describing the evidence prior to the introduction of any evidence, or the opening statement of either counsel, whichever first occurs, at the preliminary hearing or trial at which the admission of the evidence may be sought.[108]

Section (B) is a common section of rape shield statutes that allows defendants to circumvent the rape shield law and introduce evidence of past sexual conduct. Once jurors are given an opportunity to hear about the sexual history of the accused, the likelihood is increased that the information will create bias in the mind of the jury.[109] Generally, it is sufficient for the court to determine that the information in question is "relevant."[110] When weighing the probative value of the information against its potential bias in cases, courts should anticipate that, in cases involving non-traditional victims, gender bias will almost always outweigh the probative value of the evidence.[111] Consequently, this balancing test, measuring bias versus probative value, is illusory at best and, most of the time, extremely detrimental to the victim.[112] In states with a "reasonable inference of consent" standard, individuals involved in multi-partner sexual activities, for example, would most likely not be able to overcome the inference of consent to all partners once evidence is introduced that the victim gave consent to at least one partner.[113]

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108. VA. CODE ANN. § 18.2–67.7 (2008); Cairns v. Commonwealth, 579 S.E.2d 340, 345-46 (Va. Ct. App. 2003).

109. *See* Friedland, *supra* note 46, at 517-18.

110. *See* Josh Maggard, *Courting Disaster: Re-Evaluating Rape Shields in Light of* People v. Bryant, 66 OHIO ST. L.J. 1341, 1357-58 (2005) (stating that since relevance of evidence is a low standard to meet, courts may accept sexual history as relevant to the case).

111. *See id.*

112. *See id.*

113. *See* J.B. Glen, Annotation, *Admissibility in Rape Cases of Evidence of Previous Unchastity, or Reputation for Unchastity, of Prosecutrix*, 140 A.L.R. 364, § 3 (1942); *see also* Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1391 (2005).

IV. DETRIMENTAL INFLUENCE OF THE CONTRACTUAL STANDARD IN NON-TRADITIONAL RAPE CASES

A. The Prostitution Cases

The Rape Shield law has often been circumvented, particularly in cases where the accused has made non-traditional sexual choices.[114] This is exemplified in rape cases where evidence introduced at trial showed that the victim engaged in prostitution.[115] In these cases, the non-traditional choices of the victims often become central to the determination of the case. [116] The issue of credibility, then, turns less on whether the alleged victim's story is credible and/or whether the weight of the evidence weighs against the defendant, but rather on how her sexual history and prior choices affect her credibility.[117] For example, Georgia's version of the Rape Shield Statute[118] requires that if

> In any prosecution for a violation of . . . Code Section 16-6-22.2, relating to aggravated sexual battery, evidence relating to the past sexual behavior of the complaining witness may be introduced if the court,

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114. *See* Lininger, *supra* note 113, at 1390-91 (criticizing exceptions to rape shield laws, such as the exceptions listed in Federal Rules of Evidence 412, because they spur "gamesmanship by the defense," whereby evidence of other sexual partners may be used to inject doubt as to the veracity of the victim's claims).

115. *See* Ann Althouse, *The Lying Woman, The Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 963 (1994) ("[P]rostitutes are frequent targets of rape whose complaints are almost never taken seriously . . . the problem seems also to create the opportunity for someone to tap the old joke—sometimes presented as a serious argument in criminal law classes—that with a prostitute, nonconsensual sex is never rape, only theft.").

116. *See* Andrea A. Curcio, *The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws*, 20 GA. ST. U. L. REV. 565, 610 (2004) (noting that "many jurors believe that a prostitute cannot be raped or that the only 'real' rape is stranger rape.").

117. *See* Dana Vetterhoffer, *No Means No: Weakening Sexism in Rape Law by Legitimizing Post-Penetration Rape*, 49 ST. LOUIS U. L.J. 1229, 1253 (2005) (noting that the credibility of rape victims is often evaluated based on the victim's prior sexual behavior).

118. Part (a) of GA. CODE ANN. § 24-2-3 (2008) is consistent with the goal of the rape shield law. It states that

> [i]n any prosecution for a violation of Code Section 16-6-1, relating to rape; Code Section 16-6-2, relating to aggravated sodomy; Code Section 16-6-4, relating to aggravated child molestation; or Code Section 16-6-22.2, relating to aggravated sexual battery, evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, non-chastity, or sexual mores contrary to the community standards.

Id. § 24-2-3(a). *But see* GA. CODE ANN. § 24-2-3(b) (undermining the purpose of the rape shield law by allowing the "subjective" inference of the defendant to be determinative).

> following the procedure described in subsection (c) of this Code section, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.[119]

This standard compromises any chances the Georgia rape shield statute might have of protecting non-traditional victims.[120] Unfortunately, gender-biased notions of acceptable behaviors by women are such that any behavior that deviates from what is considered acceptable will be interpreted as supporting "an inference that the accused could have reasonably believed"[121] that consent was given. The fact that the perspective from which consent is determined is that of the accused is additionally harmful to rape victims.[122] This subjective standard is another example of the use of the contractual standard of consent in an attempt to provide remedies for perceived harm to the accused, even if the perception of consent is false. The continuum-based standard would require that the onus be placed on the accused to ensure that consent was obtained expressly with clear words of assent from the other party at every step of the interaction.

This contractual standard proved to be detrimental to the accuser in *Ivey v. State*.[123] In *Ivey*, the defendant succeeded in circumventing the Georgia rape shield statute by claiming "that the trial court erred by granting the State's motion *in limine*, premised on Georgia's Rape Shield Statute, to exclude all evidence of his sexual history with the victim . . . ."[124] The defendant in *Ivey* was convicted of aggravated sodomy. On trial the evidence presented revealed that "[a]fter the incident, police took S.R. [the victim,] to a medical center where a rape examination revealed anal

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119. GA. CODE ANN. § 24-2-3(b).

120. Susan Hanley Kosse, *Race, Riches, and Reporters: Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 251 (2007) ("Overdetermined by class and race, the black-woman-as-whore appears nearly as often as black women are to be found in representations of American culture.").

> The figure of the oversexed-black Jezebel has had amazing longevity. She is to be found in movies made in the 1980s and 1990s—*She's Gotta Have It*, *Jungle Fever*, *City of Hope*—in which black female characters are still likely to be shown unclothed, in bed, and in the midst of coitus. Mammy, welfare cheat, Jezebel, period.

Id. at 252.

121. GA. CODE ANN. § 24-2-3(b).

122. *See* Vetterhoffer, *supra* note 117, at 1230 ("How a female victim of rape would realistically respond to such an assault [is] deemed irrelevant . . . . Although women are the gender most often raped, men are the ones tinkering with exactly what that term means. The male perspective has and continues to dominate.").

123. Ivey v. State, 590 S.E.2d 781, 782 (Ga. Ct. App. 2003).

124. *Id.*

bleeding and tears."[125] The record also showed that,

> at around 3:00 a.m. on April 22, 2001, Officer Jonathan Williams was on motorcycle patrol when Ivey's car passed him at a high rate of speed. As Officer Williams activated his emergency lights to stop Ivey for speeding, S.R. burst out of the passenger door, fell on her knees, and yelled that she had been raped. After accelerating his car and attempting to elude the officer, Ivey stopped the car, and he was later forcefully removed from his vehicle and handcuffed after resisting arrest. At trial, S.R. testified that Ivey drove her to a remote area and forced her to engage in both [sic] oral, vaginal, and anal sex.[126]

Despite all this evidence, the appeals court determined that the victim's past sexual history as a prostitute should have been introduced and could have been determinative. At the motion *in limine* hearing, both defendant and complaining witness "testified that they had an ongoing relationship for a period of at least five years, during which time Ivey paid S.R., an active prostitute, for sex on at least five occasions."[127] The defendant argued that sexual intercourse the night of the alleged rape was the result of a sexual transaction. He claimed that he went to the alleged victim's house that night to solicit sex. The appeals court distinguished *Ivey* from *Davis v. State*, a prior case, where the court excluded evidence of the victim's past history as a prostitute by stating:

> In *Davis*, there is no indication that the complaining witness *admitted* a prior sexual relationship with the defendant. In the case now before us, on the other hand, S.R. has admitted that she and Ivey had a sexual relationship spanning a five-year period . . . . Furthermore, the injuries suffered by the complaining witness in *Davis* were far greater than those suffered by the complaining witness in this case. In *Davis*, the complaining witness was savagely beaten, thereby supporting the trial court's conclusion that the defendant could not have reasonably believed that the sexual act on the date in question was consensual. In contrast, the injuries suffered by the complaining witness in this case, though regrettable, are not indicative of the type of brutal assault in *Davis*.[128]

This reasoning perpetuates the idea that the ideal rape victim, especially non-traditional victims, at the very least must suffer extreme, near-death injuries in order to be credible. In *Ivey*, the victim suffered substantial injuries. However, the victim's profession caused the court to raise the threshold for credibility even higher than the already steep threshold accorded to rape victims.[129] Finally, the court makes the fact that the

125. *Id.* at 787 (Phipps, J., dissenting).

126. *Id.* at 782 (majority opinion).

127. *Id.*

128. *Id.* at 784.

129. *Cf.* Davis v. State**,** 509 S.E.2d 655, 657 (Ga. Ct. App. 1998) (affirming the trial court's rejection of evidence of the victim's past sexual history with Davis when she volunteered sex with him for money or drugs).

victim had a prior relationship with the accused determinative, a decision that inevitably highly prejudices victims of rape.[130]

The fact that the *Ivey* court concluded that the jury could have reasonably inferred consent in this instance[131] demonstrates the precarious and vulnerable situations in which non-traditional rape victims, such as prostitutes, are placed. Any past sexual activity with the victim is interpreted as probative and as implying consent.[132] Considering that a great number of cases of violence against women involve cases where the victim was familiar or intimate with the perpetrator, these cases make it easier for rapists to escape justice.[133]

The gender-bias inherent in courts' treatment of non-traditional victims is illustrated further in *Jackson v. State*, a precedent-setting case in Georgia.[134] In *Jackson*, the defendant alleged that the brutal interaction between the victim and him was the result of sex in exchange for cocaine. The court noted:

> a cohort, Larry Brown, confronted a woman on the street who they believed had failed to pay for cocaine received from Jackson. Despite her protests, Jackson grabbed her arm and forced her down some steps into an isolated area. When the woman denied receiving the cocaine and denied having money to pay, Brown threatened to kill her and Jackson pointed a knife at her within a foot of her face. While Jackson emptied her purse, Brown removed her clothes and fondled her breasts, vagina, and anus to search for the cocaine. Finding no cocaine and no money, Jackson demanded oral sex from the woman, who vigorously protested. Holding the knife, Jackson forced her into an outdoor-bricked area of the local community center and with the assistance of Brown forced her mouth onto Jackson's penis. Over the next two hours, the protesting woman was subjected to a series of brutal and often simultaneous sexual assaults, ranging from anal and vaginal intercourse to fellatio to belt-whippings on her buttocks and fire near her vagina, and involving Jackson, Brown, McGinty, and other men. A crowd including children gathered to watch the assaults, which eventually ended when the battered woman fainted and a neighbor came to her rescue.[135]

Despite these egregious acts, the *Jackson* court, pursuant to a motion *in*

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130. *See id.* (discussing the Rape Shield Statute as not barring evidence of the victim's past sexual behavior if it directly involves the accused, thereby supporting an inference that the accused reasonably believed the victim consented, but only if the evidence will substantially support this conclusion).

131. *See Ivey*, 590 S.E.2d at 784.

132. *See id.* (reviewing the victim and defendant's ongoing sexual relationship for pay for at least five years).

133. *See* Friedland, *supra* note 46, at 488-89 (arguing that because society has a more permissive attitude toward acquaintance rape, there is a low incidence of reported acquaintance rape and few successfully prosecuted acquaintance rape cases).

134. Jackson v. State, 562 S.E.2d 847, 848-49 (Ga. Ct. App. 2002).

135. *Id.*

limine, allowed some evidence of the victim's past relationship with the accused, mainly from the accused himself.[136] On appeal, Jackson argued that the trial court improperly limited the evidence he could introduce during the *in limine* hearing. A review of the proceeding at trial revealed, however, that this contention was far from true. In fact, Jackson was given multiple chances to introduce additional evidence of the victim's past sexual history and failed to do so.[137] Despite his tardiness, Jackson was still able to introduce his own testimony of the victim's sexual history.[138] Were it not for Jackson's own delay in providing further evidence, as the court encouraged him[139] to do, he might not have been convicted by the jury.

Similarly, in *People v. Slovinsky*,[140] the Rape Shield Statute was easily circumvented.[141] In response to defendant's argument that evidence of the complainant's profession as a prostitute should have been allowed, the court relied on cases from various jurisdictions that "indicate[d] a willingness on the part of some jurisdictions to allow evidence that a victim is a prostitute when the defense is consent and a proper showing thereof has been made."[142] The court reasoned further that "[i]n our case, we conclude that evidence of the victim's prior sexual activity is absolutely critical in ensuring defendant a fair trial and in preserving his confrontation right. Without this evidence, defendant would be precluded from presenting his defense of consent."[143] The fact that evidence of prostitution can be

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136. *Id.* at 849-50.

137. *Id.* at 850.

> Jackson proffered only his testimony at the in-camera hearing. Not only did he not proffer testimony from others, but when the State observed that Jackson had no independent witnesses to the sexual relationship, Jackson agreed, testifying that no one else knew about his sexual relationship with the victim. Based on Jackson's proffer, the court ruled his testimony was admissible. The court expressly left open the door to allow any party during the trial to request another in-camera hearing to elicit additional testimony if that party wanted to have anyone else testify to prior sexual conduct of the victim. During the trial, the court twice more reminded the parties of this opportunity. Although Jackson stated during trial that he had other witnesses to testify that the victim gave sex for drugs, Jackson never requested another in-camera hearing nor proffered the testimony of these witnesses, and he never showed that these witnesses could testify about his personal sexual relationship with the victim.

Id.

138. *Id.*

139. *Id.* at 848-49.

140. 420 N.W.2d 145 (Mich. Ct. App. 1988).

141. *See id.* at 153 (determining that it was appropriate to introduce evidence of the victim's past sexual experience as a prostitute since the defendant claimed the victim had consented to an act of prostitution and consent was a fact at issue).

142. *See id.* at 155 (citing cases from Arizona, California, and Indiana as support).

143. *See id.* (finding that unless the defendant was allowed to introduce the victim's sexual history as a prostitute, it would effectively preclude the defendant from presenting his defense that the victim consented to the acts; the court did not recognize

determinative in establishing consent undermines the very foundation of the Rape Shield Statute.[144] The *Slovinsky* court also deemed admissible evidence of the victim's behavior whenever it can show bias on the part of the victim.[145]

In Massachusetts, like in many other states, the trial judge has the discretion to allow impeachment of a sexual assault complainant by prior conviction of a sexual offense, such as prostitution, despite the Massachusetts rape shield law.[146] The Massachusetts statute does not allow the victim's sexual history to be an issue unless: (1) the victim's sexual conduct is with the defendant, or (2) there is evidence of recent conduct of the victim that is alleged to be the cause of a physical feature, characteristic, or condition of the victim.[147] In these instances, the judge is required to hold a hearing on the motion to hear the defendant's offer of proof and determine whether the impeachment value of the evidence outweighs any prejudicial effect to the victim and whether it is relevant to the victim's bias or motive to fabricate.[148] It is hard to imagine how any evidence of the victim's past sexual conduct with the accused could ever be probative enough to explain the perpetration of such violence on the victim, as seen in the prostitute rape cases discussed above. Nonetheless, the *Ivey* court held that "[f]rom these facts, the jury could certainly draw a reasonable inference, based on reason and common sense, that Ivey might have believed that the sexual acts were consensual."[149] This reasonable belief standard, however, will always be problematic because it is mainly based on what a reasonable man in the defendant's situation would have believed. Limiting the evaluation of the victim's credibility to the actual

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that such evidence is the type the rape shield law intended to make inadmissible).

144. *See id.* at 153 ("We conclude that this evidence is admissible on the issues of consent and right of confrontation.").

145. *See id.* at 177-80 (reiterating that evidence, even concerning consent in a rape case, should be permitted so long as it tends to make a fact at issue more probable and is not substantially outweighed by prejudice).

146. *See* Commonwealth v. Harris, 825 N.E.2d 58, 64 (Mass. 2005) (asserting that evidence that may cause prejudice can be ameliorated by giving a limiting instruction to the jury).

147. *See* MASS. ANN. LAWS. ch. 233, § 21B (LexisNexis 2008) (explaining that admitting evidence of the victim's sexual history is appropriate because it is relevant to show the victim's bias and involves a balancing between the victim's interest in privacy and the defendant's right to confront witnesses against him).

148. *See* Commonwealth v. McGeoghean, 593 N.E.2d 229, 231 (Mass. 1992) (holding that it was appropriate to introduce testimony of a mother burning her child with cigarettes because the evidence was relevant to the defendant's malicious state of mind and its probative value outweighed the possible prejudice); Commonwealth v. Velasquez, 718 N.E.2d 398 (Mass. App. Ct. 1999) (finding that admitting evidence about prior convictions was appropriate because it tended to prove the defendant's state of mind rather than a propensity to commit the crime with which the defendant was charged). *See* Anderson, *supra* note 9, at 84-90 (discussing the purpose of rape shield laws and their effect in the courtroom); Berger, *supra* note 39.

149. *See* Ivey v. State, 590 S.E.2d 781, 783 (Ga. Ct. App. 2003).

case being litigated would still be consistent with concerns for the defendant's Sixth Amendment rights. Rather than allowing a victim's credibility to be measured according to prior or contemporaneous sexual relationships, a deep investigation of the facts involved in the case, the introduction of psychological evaluations, the absence or presence of causal links to the defendant and the establishment of both parties' credibility based on detailed dissection of both parties' consistent narrations of the events at hand, are all alternative tools for attempting to unveil the truth. These suggestions are in no way meant to undermine the complexity of rape cases. The fact is, however, that the difficulties inherent in litigating rape cases should never serve as excuses for allowing gender-biased resolutions of these cases.

B. Multi-Partner Rape Cases

Other types of non-traditional rape victims involved victims who are labeled by society as promiscuous because of a history of adultery or evidence of more than one sexual partner.[150] *State v. Sanchez-Lahora* involved a victim with whom the defendant alleged a secret relationship while she had a boyfriend.[151] During the *in limine* hearing, the defendant

> testified that he had met the victim several months before November 6, 1998. He stated that they developed a friendship, which eventually evolved into a secret sexual relationship. The defendant estimated that they had sexual intercourse 11 to 14 times in various locations . . . he and the victim concealed this relationship from the victim's boyfriend. The defendant admitted to having sexual intercourse with the victim on November 6, but he asserted that she participated voluntarily.[152]

In *Sanchez-Lahora*, the Nebraska court made it clear that a judge is only to determine the relevance of evidence, while the issue of credibility is left entirely to the jury.[153] Based on that standard, the appellate court concluded that the lower court had erred by excluding evidence that the defendant engaged in sexual relations with the victim several times before the incident.[154]

Nebraska's rape shield law demonstrates bias against non-traditional

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150. *See* Amanda O. Davis, Comment, *Clarifying the Issue of Consent: The Evolution of Post-Penetration Rape Law*, 34 STETSON L. REV. 729, 751 (2005) (recognizing the popular notion that women viewed as promiscuous will be less affected by rape than their virginal counterparts).

151. *See* 616 N.W.2d 810, 814 (Neb. Ct. App. 2000).

152. *See id.*

153. *See id.* at 820 (reasoning that the language "tends to prove" demonstrates that the reliability of prior sexual conduct evidence goes to the credibility of the evidence, which is for the jury to decide, rather than admissibility of the evidence).

154. *See id.* (finding evidence of prior sexual conduct between the victim and the defendant as tending to establish a pattern of conduct relevant to consent, a fact at issue, and therefore admissible).

sexual choices even further. On the issue of admissibility of past sexual behavior, the statute states:

> Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, to determine the relevance of evidence of the victim's or the defendant's past sexual behavior. Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: (a) Evidence of past sexual behavior with persons other than the defendant . . . or (b) *evidence of past sexual behavior with the defendant* when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged *if it is first established* to the court *that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.*[155]

The court admitted in its opinion that the Nebraska statute was more stringent than the federal rule of evidence after which it was modeled. The court emphasized that an assessment of credibility depended on whether the evidence established a pattern on the part of the victim relevant to the issue of consent.[156] That very language exemplifies the types of sexual profiling women and non-traditional victims face in the adjudication of rape cases. Furthermore, with such a strict standard, the rape shield statute is completely eroded.

The pretext given for making this kind of evidence relevant to consent is that the alleged victim has a motive to lie to the male witness about her sexual encounter when she is conducting a sexual relationship with someone else.[157] The allowance of such arguments does not only defy the spirit of the Rape Shield Statute, but it also perpetuates sexist notions about women and sexuality. Such evidence should be inadmissible on its face. In essence, by allowing the defendant's evidence of past sexual experiences with the victim, the court sanctioned the notion that a woman is estopped from withholding consent when she has consented at least once to sexual interaction.

In multi-partner rape cases, the traditional view of consent leads to further inequities.[158] The term "multi-party rape cases" refers to incidents

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155. *See* NEB. REV. STAT. ANN. § 28-321 (LexisNexis 2008) (emphasis added).

156. *See Sanchez-Lahora*, 616 N.W.2d at 818 (proclaiming that establishing consent is the sole factor in determining the admissibility of prior sexual conduct with the defendant).

157. *See* Anderson, *supra* note 9, at 52-53 (revealing that historically a woman's rape claim was only believed when she was chaste and it was otherwise assumed that the woman consented to the sexual advances and subsequently lied about the encounter).

158. *See* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence*

where rape occurs in the context of group sex.[159] Allegations of rape that originate from group sex have become more prevalent among young people, particularly on college campuses and during spring break trips.[160] In these contexts, the tendency to look for implicit indications of consent by simply looking at the women's behavior is a great impediment to finding lack of consent.[161] Society's view of sex and appropriate behavior by women is such that multi-party sex shocks the conscience of traditional jurors and triers of fact.[162] Consequently, when parties allege rape in those contexts, the victim has to surmount the assumption that consent to multi-party sexual activity necessarily equals consent to anything that happens during that interaction.[163] At the very least, this view is based on the tort theory assumption of risk, which is often applied to behaviors defined as "risky" for women. The "inverse opposite of the rape-preventing subject is the risky woman . . . who avoids personal responsibility for sexual safety," and who "chooses" to engage in a "high-risk lifestyle."[164]

Consider the case of Airwoman 1st Class Cassandra M. Hernandez, an Air Force officer who, after withdrawing her complaint subsequent to alleging gang rape, was herself prosecuted.

> Hernandez said she was gang-raped at a party on May 13, 2006. The Air Force charged Airman Russell J. Basile in the incident. Later, however, Hernandez said she felt pressured by the Air Force judicial process and intimidated by Basile's defense attorney, an Air Force lawyer, who she

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Relating to a Sex Offense Complainant's Past Sexual Behavior, 44 CATH. U. L. REV. 709, 747 (1995) (stating that multi-partner sex "strikes most people as bizarre, disgusting, and unlikely" and thus concluding that "a jury may be inclined to view a consent defense with inherent disbelief").

159. *See* Kimberly M. Trebon, *There Is No "I" in Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 65, 66-67 (2007) (describing gang rape, where multiple members of a gang have sexual intercourse with a victim to show camaraderie with other members of the gang).

160. *See, e.g.*, Jennifer Gaffney, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J.L. & POL'Y 247, 274-75 (1997) (listing allegations of multi-partner rape by athletes at colleges and universities, such as a case where three basketball players at Southwestern Michigan University were charged with raping an eighteen-year-old woman, which they video-taped).

161. *See* Trebon, *supra* note 159, at 94 (explaining that a jury may choose to believe that the victim fabricated the rape rather than concede that a talented young athlete would commit such an offense).

162. *See id.* (noting that often times the jury does not want to believe that the rape occurred for social and personal reasons).

163. *See* Linda Robayo, Note, *The Glen Ridge Trial: New Jersey's Cue to Amend its Rape Shield Statute*, 19 SETON HALL LEGIS. J. 272, 273-77 (1994) (detailing a young girl's struggle to explain that she did not consent to giving oral sex or being penetrated by foreign objects even though she went willingly to the place the sexual assault occurred and stayed after the assault ended).

164. *See* Gotell, *supra* note 32, at 882-84 (finding that fact finders mistake women's alternative lifestyle, such as living on the street, as an implicit choice that these women want to engage in risky behaviors).

> said interviewed her without her victim's advocate present. "I just wanted to go to work and not have this hanging over my head. I just wanted to be normal," Hernandez said Wednesday.[165]

In a strange twist of events the Air Force charged her with indecent behavior for having sex with more than one man. The commander of "her unit signed papers charging Hernandez with committing an indecent act by having sexual relations with Airman 1st Class Jerrell W. Apache while Basile and Airman Rotez J. Butler watched."[166] Airwoman Hernandez was tried even before her rape case received adjudication. The papers filed by the defendants played into obvious stereotypes by describing her as promiscuous and indecent. For example, "[i]n written statements to her attorneys, the three accused airmen call the sex consensual. One said Hernandez wore 'skin tight' clothes, danced in a 'promiscuous way' and later stripped naked."[167] It is unthinkable that a victim would be charged and prosecuted because of her decision not to testify in the court martial proceedings adjudicating her rape claim. The trauma experienced by women during rape trials is well documented.[168] In addition, it is reported that Airwoman Hernandez experienced specific pressure from the Air Force personnel handling her case.[169] This case is a specific representation of our society's tendency to condemn the victim in rape cases. Gang rape cases where the victim knew at least one of the accused are particularly challenging because the defense tends to attack the credibility of the victim[170] and infer consent from unrelated sexual activities.[171] Any mention that a rape victim might have flirted or socialized with the defendants on the night of the rape is sometimes enough to shatter the

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165. *See* Kelcey Carlson, *Air Force Charges Turn Woman from Rape Victim to Defendant*, W.R.A.L., Aug. 6, 2007, *available at* http://www.wral.com/news/local/story/1674488/ (depicting how a woman who engaged in "risky" behavior, such as drinking alcohol while under the age of twenty-one, was charged with committing indecent acts with three men, even though she had previously accused one of the men of raping her).

166. *See id.* (detailing how the Air Force turned the tables and punished the victim for engaging in behaviors that were deemed risky and promiscuous).

167. *See id.*

168. *See*, *e.g.*, *id.* (acknowledging in a letter to the Texas Governor that she decided not to testify because she felt that the pressure of the judicial system was difficult to endure and that it was not in her best interest).

169. *See id.* ("Capts. Christopher Eason and Omar Ashmawy, who are representing Hernandez, say the Air Force failed to follow its own procedures and is persecuting her.").

170. *See* Robayo, *supra* note 163, at 276 (noting that although the defendants were on trial for the brutal rape of their incompetent peer "[d]uring the judicial proceedings, Ann, [the victim] was actually on trial").

171. *See id.* at 282-83 (recognizing that fact finders often do not consider a sexual encounter rape when the victim knows the offender because stereotypes of male aggression and female passivity lead the fact finder to conclude that a woman is merely an object to take sex from).

victim's credibility.[172] This type of evidence of the victim's "behavior" is often found probative enough to disregard a rape shield law's mandate against prejudicing the victim.[173]

The rigid contractual notions of consent in the adjudication of rape cases are particularly harmful to non-traditional rape victims. The prejudicial effect of this passive idea of consent is heightened in circumstances where women engaged in behaviors that incurred societal disapproval.[174] The publicized hypersexual behavior of students on spring break is an example of such behaviors.[175] Most of us are, by now, quite familiar with the numerous narratives describing the heightened sexual activity that takes place during college spring break trips.[176] The American Medical Association reported in March 2006 that:

> [s]izable numbers [of college women] reported getting sick from drinking, and blacking out and engaging in unprotected sex or sex with more than one partner . . . . About thirty percent of women surveyed said spring break trips with sun and alcohol are an essential part of college life . . . . About forty percent said they regretted passing out or not remembering what they did . . . . Ten percent said they regretted engaging in public or group sexual activity.[177]

These types of activities sometimes involve women who are raped on the same night that they consented to sexual intercourse with multiple partners.[178] For the most part, we think of the concept of rape as an all or nothing grant or denial of consent.[179] How, then, should we legally make

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172. *See* Alexandre, *supra* note 17, at 185-86 (asserting that the credibility of the victim is undermined if the victim engages in these types of behaviors because fact finders have determined that the victim is estopped from refusing access to her body).

173. *See id.* at 186 (concluding that evidence which the rape shield law is intended to exclude is often admitted when trying to prove whether a victim acted like an individual who was raped).

174. *See* Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1588 (2007) ("Although to modern ears the requirement of chastity seems obsolete, the tendency to blame victims for 'asking for it' (by flirting, taking a man to her room, or drinking), or to believe that the victim was lying to cover an indiscretion or to gain revenge, still rings true. We do not mind if a rape victim has had some reasonable sexual experience, but if she is too promiscuous, she will fall into the category of 'asking for it.'").

175. *See* Marco R. della Cava, *Spring Break Gone Wild*, USA TODAY, Mar. 30, 2005, *available at* http://www.usatoday.com/life/lifestyle/2005-03-30-spring-break_x.htm (describing the sex and alcohol focused environment of spring break trips taken by contemporary youth).

176. *Id.*

177. *See Girls Warned About Spring Break Dangers: Risky Behavior Common Among Young Women, According to AMA Survey*, ASSOCIATED PRESS, Mar. 17, 2006, *available at* http://www.msnbc.com/id/11726292.

178. *See* Alexandre, *supra* note 17, at 186, n.43, 197 (asserting that the problem with determining consent subjectively is that a woman may decide to withdraw her consent once it has been given which can lead to an improper assessment of consent).

179. *See* MCGREGOR, *supra* note 49, at 120 ("Consent is all or nothing, that is, either a person consents to something or not . . . .").

sense of situations involving women who, while engaged in multi-partner sexual activities, give consent to touching by some partners but not to others? How should we measure consent in these contexts? And above all, how do we prevent society's biases and stereotypes from influencing the outcome of these types of cases?

Underlying all these cases is the notion that where a woman grants access to her body in these non-traditional contexts, access means "unlimited access" and she is estopped from withdrawing her grant of access.[180] The proposed continuum-based idea of consent would be particularly instrumental in these contexts. Under this proposed view of consent, when a woman engages in a multi-party sexual transaction, consent would not be imputed to everything that happens in the course of that interaction. Thus, if she withdraws consent at any time, the withdrawal of consent would be effective at the time of the withdrawal, regardless of what happened before. Under this method of viewing consent, "no" would only mean "no," but "yes" would not be an absolute "yes." A woman's "yes" at one moment would not be forced on her for the rest of her interaction(s) with the defendant(s). Instead, "yes" will always be attached with a caveat that the "yes" can be withdrawn by the woman and the transaction(s) terminated at any time. This continuum-based view of consent would help take us away from the mainstream perception of sexual negotiations as equivalent to transactions for the sale of goods or services.[181]

V. PROPOSAL FOR ERADICATING GENDER BIAS FROM RAPE SHIELD STATUTES WITHOUT PREJUDICING INNOCENT DEFENDANTS

As discussed above, the contractual view of consent has contributed to limit the implementation of the Rape Shield Statute.[182] To reverse the damage caused by this rigid view of consent, I propose a complete revision of the biased reasonableness standards and implicit contractual idea of consent often used by courts in rape cases. I propose that we revise the

180. *See* Alexandre, *supra* note 17, at 185-86 (asserting that the credibility of the victim is undermined if the victim engages in these types of behaviors because fact finders have determined that the victim can no longer refuse access to her body).

181. *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 22 (1981) (allowing manifestation of mutual assent to be found even though "neither offer nor acceptance can be identified and even though the moment of formation cannot be determined"), *and* U.C.C. § 2-606 (2004) (defining acceptance as a failure to make an effective rejection), *with* CAL. PENAL CODE § 261.6 (West 2008) (defining consent as "positive cooperation in act or attitude pursuant to an exercise of free will").

182. *See* McHugh, *supra* note 45, at 1685-87, 1691 (reasoning that a special contractual definition of consent similar to duress has been used in rape cases; it requires the victim to prove that she did not consent to the intercourse and that the alleged perpetrator used force).

standard of review for consent from a subjective standard of what a reasonable man in the defendant's situation would have done to what a reasonable person with a completely bias-free understanding of sexual relations between men and women would do. This understanding would have to include an understanding that a woman may choose to have sex with as many partners as she wishes, contemporaneously and otherwise, and be entitled to say no at any point.

Furthermore, a new Rape Shield Statute must also require that the absence of force not be computed in the calculation of whether consent occurred. The determination of consent should be an objective standard, which considers consent to the whole transaction and during the whole time of the sexual interaction. These ideas are encapsulated in the proposed continuum-based standard of consent.[183]

In addition, the interests of non-traditional victims should be a foremost priority in any reforms to rape shield law. This should be the case because non-traditional victims are the most likely to be prejudiced in the rape context. In order to resolve these multi-partner cases without problems, evidence of contemporaneous sexual behavior should only be admissible if there is direct and concrete evidence that the victim consented to sex with the defendant. The type of evidence in question cannot be evidence of past experiences or evidence gathered as a result of an inference from the victim's behavior. In order for such evidence to be admissible, it must be actual and concrete evidence.

Finally, the litigation of these cases must include judge and jury instructions that require juries to consciously disregard any gender bias. Adding a requirement that the trier of fact explain in a concrete way the reason it reached a bias-free decision should further test the mandatory bias-free process. This new requirement would necessitate that judges and juries receive specific training designed to bring the issues of gender construction to the forefront.[184] By bringing an awareness of the role that gender construction and normative views play regarding acceptable uses of the female body, we can begin the process of eradicating the effect of gender bias in decision-making. Furthermore, judges should be required to provide clear and bias-free support for decisions regarding the denial or grant of motions *in limine*. The construction of jury instructions is crucial to the outcome of cases, particularly rape cases.[185] Juries look to guidance

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183. *See supra* p. 55-56.

184. *See* Bryden & Lengnick, *supra* note 3, at 1377 (concluding that bias is particularly strong in acquaintance rape).

185. *See* Abbe Smith, *"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORHAM L. REV. 523, 559-60 (1998) (noting that "empirical studies demonstrate that women jurors are more likely to convict rape defendants than their male counterparts . . . [and are] less influenced by a rape complainant's virginity or social status . . . [whereas] men tend to identify more with the defendant and find the

from judges to help them determine what factors they should take into account in reaching their decisions. Consequently, it is crucial to mandate that judges draft deliberate and carefully worded jury instructions with an express mandate that juries exclude from deliberation facts that lead to sexist conclusions and interpretations about a particular victim's behavior.

The above proposal serves three goals. First, it provides a system for considering consent in rape cases that helps eliminate the influence of gender bias in the deliberation of these cases. Second, it provides an efficient alternative to the de facto contract-based view of consent that courts have applied. Third, it ensures a fairer adjudication of rape cases with no encroachments on defendants' Sixth Amendment rights. Because it requires hard concrete evidence of consent, defendants have the opportunity to provide such evidence and confront their accusers. Due to the particular nature of rape, which is an unlawful, unwanted, violent invasion of a woman's body, the assumption should be that all consent to sex with a woman must be proved concretely.

VI. POLICY REASONS SUPPORTING THE PROPOSAL FOR A CONTINUUM-BASED CONSENT

The proposed continuum-based standard of consent is more efficient because it does not delve into the quagmire of inferring consent based on implicit or potentially relevant past behavior.[186] It simply looks at whether consent was expressly granted at any time and whether it was withdrawn at any time during the interaction(s) between defendant and victim and views any moment where consent is withdrawn as a cancellation of any prior consent. This model thus prevents the pitfall of treating "yes" as irrevocable consent for all subsequent interactions between defendant and victim. Even for states that are contemplating the "no means no" approach, the progress can be curtailed if a rigid "yes" as irrevocable consent is also imposed. Although an affirmative consent standard would seem to tangentially draw inferences about women's sexual agency, it is far too

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defendant's testimony more credible than do women jurors").

186. *See* Richardson v. State, 581 S.E.2d 528, 531 (Ga. 2003) (Benham, J., dissenting).

> [T]he Sixth Amendment to the United States Constitution, as incorporated in the Fourteenth Amendment, guarantees a person accused of a crime the right to confront the witnesses against him. However, the Confrontation Clause does not prohibit the imposition of limits on cross-examination. In *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), the U.S. Supreme Court made it clear that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."

Id.

flawed to be used as the determinative standard in rape cases.[187] Courts must question the legal acceptance of "yes" as irrevocable consent "in relation to broader shifts in governance and the new privileged forms of citizenship they produce."[188] If this rigid contractual view of consent is not revised, our perceived gains in eradicating biased gender construction in the application of the law are in actuality very limited.[189] The contractual view of consent will continue to facilitate violence against women.

Violence against women is still a systemic and ongoing problem around the world. In the United States, the Violence Against Women Act[190] was an attempt at codifying a formal commitment towards the eradication of gender biases in sexual assault laws.[191] The act created a federal right of action classifying gender-based violence as sex-based discrimination.[192] Unfortunately, the VAWA's "civil provision . . . making actionable crimes of violence 'committed because of gender or on the basis of gender,' 42 U.S.C.S. 13981(d)(1), was found unconstitutional for exceeding the federal legislative power."[193] The Supreme Court found that the sexual violence did not implicate interstate commerce and that, consequently, it should be the purview of states to regulate it.[194]

Despite this particular domestic setback, local and international organizations have been working tirelessly in the past decades to reverse patriarchal perceptions of women's bodies being of less value. International bodies such as the Organization of American States (OAS)

187. *See* Gotell, *supra* note 32.

188. *See id.* at 867-68 (distinguishing consent from forced submission and adding an element to the defense of mistaken consent to require that the defendant took reasonable steps to obtain consent, which moves the consent standard closer to an affirmative consent standard).

189. *See Richardson*, 581 S.E.2d at 529 ("Evidence merely that the victim has or had a romantic relationship with another man does not reflect on her character for sexual behavior. Therefore, so long as Richardson confined his questioning to the non-sexual nature of the victim's former relationships, the statute would not be a basis for curtailing his cross-examination of her."); Banks v. State, 366 S.E.2d 228, 230 (Ga. Ct. App. 1988) (holding the state's introduction of testimony that the victim was dating someone at the time of the offense was not an invitation by the defense to introduce evidence of the victim's past sexual experience).

190. Violence Against Women Act, 42 U.S.C.S. § 13981 (LexisNexis 2008).

191. Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 FAM. L.Q. 157, 160 (2005) (stating that the purpose of the VAWA civil rights remedy was to "connect violence against women with the longstanding manifestations of sex inequality that perpetuate women's second-class citizenship").

192. 42 U.S.C.S. § 13981.

193. *See* MACKINNON, SEX EQUALITY, *supra* note 2, at 744 (explaining that the civil remedy position was found unconstitutional because it did not affect interstate commerce).

194. United States v. Morrison, 529 U.S. 598, 621-22 (2000) (reasoning that the Court must be careful to protect the balance of power between the federal and state governments created by the Fourteenth Amendment).

recognized in a convention the pivotal role of gender bias in sexual violence.[195] The OAS stated that "violence against women is an offense against human dignity and a manifestation of the historical unequal power relations between women and men . . . ."[196] This concern should be made a primordial consideration in the adjudication of all rape and sexual assault cases, particularly in cases involving non-traditional rape victims who often suffer the brunt of society's biased definitions and expectations of appropriate behavior for women. Today, non-traditional rape victims occupy all racial and social echelons.[197] Still, the more vulnerable groups and the ones least likely to be believed are women of color and women of lower economic echelons.[198] Further, society's tacit view of a woman's body as property often leads it to judge, with a patriarchal slant, what constitutes appropriate behavior and proper sexual choices for women in the context of sexual interactions.[199]

VII. CONCLUSION

As long as the de facto contractual standards are implemented, the inherent message is that gender autonomy and agency will be recognized only as long as women are willing to pay the price. Such a view, in essence, creates a structure that recognizes only diminished autonomy and agency. If not revised, this limited grant of autonomy will continue to create problems of inequity, which will remain unaddressed by our legal system.

The proposed continuum-based idea of consent honors women's autonomy: an autonomy that should be assumed in all sexual endeavors, while at the same time protecting women from predators. Unlike the current consent standard, this proposed standard is intent on preventing the risk that women will be punished for their sexual choices. The non-

195. *See* Organization of American States, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, *entered into force* March 5, 1995 [hereinafter IAC] (discussing the importance of quelling gender violence).

196. *See* MACKINNON, SEX EQUALITY, *supra* note 2, at 743 (arguing that the United States lags behind the OAS's recognition of the systemic bias within their own system of laws (quoting the IAC Preamble)).

197. *See* Lynda Olsen-Fulero & Solomon M. Fulero, *Commonsense Rape Judgments: An Empathy-Complexity Theory of Rape Juror Story Making*, 3 PSYCHOL. PUB. POL'Y & L. 402, 404 (1997) (noting that there are common misconceptions regarding social class and rape, especially regarding the "character and sexual history" of the alleged rape victim).

198. *See* Theresa M. Beiner, *Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases?*, 14 DUKE J. GENDER L. & POL'Y 125, 146 (2007) ("Studies have shown that the rape victim is more likely to be a single, white or black young female, from a lower social working class.").

199. *Cf. Patriarchy is such a Drag*, *supra* note 25, at 1994 (explaining that married women were often viewed as the property of their male spouse).

traditional rape victims, prostitutes, and women engaged in multi-partner sexual activities used as examples in this Article are but a few examples of the myriad of women who are indelibly disadvantaged by the judgments judges and juries make about their sexual choices in the adjudication of rape cases. The continuum-based idea of consent also moves away from the pattern of treating sexual encounters as business transactions in which a purported contract cannot be breached by a woman without penalty. While it is abundantly clear that tackling the judicial system alone will not solve this problem, the judicial system, nonetheless, serves as an important site of reform. Along with the reformation of the judicial system into a gender bias-free system, there is, of course, an immense need to implement educational programs regarding the importance of respecting women's autonomy and choices in all aspects of our society.