

# RAPE, TRUTH, AND HEARSAY

BENNETT CAPERS†

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## INTRODUCTION

Though known among Evidence scholars, *Stephens v. Miller* is not a ground-breaking case.<sup>1</sup> In applying a rape shield law to the “she said, he said” facts before it—*she* said her acquaintance attempted to rape her, *he* said they had consensual sex—and in wrestling with whether the application of the rape shield deprived the defendant of his constitutional right to present a defense, the Seventh Circuit en banc opinion forged no new law. Instead, the plurality engaged in a rather straightforward, even predictable, analysis. The opinion’s references to “doggy fashion”<sup>2</sup> sex may give the case some singularity. But as far as cases go, *Stephens v. Miller* is not canonical. One could even say the case is non-exceptional, at least insofar as any sexual assault case can be described as non-exceptional.

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†Stanley A. August Professor of Law, Brooklyn Law School. BA Princeton University; JD Columbia Law School. Assistant U.S. Attorney, Southern District of New York, 1995-2004. E-mail: bennett.capers@brooklaw.edu. This Article benefited from presentation at the “Rape” panel at the Association of American Law Schools’ 2016 Annual Meeting, and from presentation at a faculty workshop at Drexel Law School. This article also benefited from conversations and feedback from numerous individuals: Michelle Anderson, Anne Coughlin, George Fisher, Lisa Kern Griffin, Aya Gruber, Craig Konnoth, Julia Simon-Kerr, Alice Ristroph, and Deborah Tuerkheimer. To them, I am indebted as well. Finally, an extra special thanks to my research librarian Kathleen Darvil.

<sup>1</sup> *Stephens v. Miller*, 13 F.3d 998 (7th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 57 (1994). The case does appear in a few Evidence law casebooks. *See, e.g.*, GEORGE FISHER, EVIDENCE 347–53 (3rd ed. 2014). The case has also been the subject of a few law review articles and notes. *See, e.g.*, John Lausch, Note, *Stephens v. Miller: The Need to Shield Rape Victims, Defend Accused Offenders, and Define a Workable Constitutional Standard*, 90 Nw. U. L. REV. 346 (1995); Richard W. Miller III, Note, *Stephens v. Miller: Placing Rape Shield Statutes Between a Rock and a Hard Place*, 27 U. Tol. L. Rev. 217 (1995).

<sup>2</sup> *Stephens*, 13 F.3d at 1000.

It is its very non-exceptionalism, however, that makes *Stephens v. Miller* an interesting case and ultimately a curious one. Allow me to begin with interesting. Part of what draws me to *Stephens v. Miller* is my interest in storytelling and the law, specifically the stories we tell with respect to rape. We are still, for the most part, stuck at “he said, she said” for the typical acquaintance rape,<sup>3</sup> or “he said, he said” for the less typical ones.<sup>4</sup> We listen to stories, usually competing stories, and try to ascertain truth beyond a reasonable doubt.<sup>5</sup> This observation alone is not new. Competing narratives in rape trials is well-trodden ground.<sup>6</sup> *Stephens v. Miller*, with its multiple judicial opinions, illustrates a different aspect of storytelling in rape trials that is worthy of closer scrutiny: the stories courts tell. It poses a new question: if court opinions are “never innocent,”<sup>7</sup> if courts are not above shading the truth, then how can we expect more of complainants and defendants? Separate and apart from the role courts play in the stories we tell, *Stephens v. Miller* serves as a sobering reminder not only of what Robert Cover called law’s violence<sup>8</sup>—the law, let us not forget, sentences Stephens to twenty years’ imprisonment—but also of law’s impotence. Notwithstanding numerous rape reforms liberalizing rape law,<sup>9</sup> when it comes to rape judgments and ascertaining, with epistemic comfort, whether a rape oc-

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<sup>3</sup> There are rarely third-party witnesses to sexual assault offenses. A recent study found that third-party witnesses exist in fewer than 22% of rape cases. See JOSEPH PETERSON ET AL., *THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS* 92 (2010).

<sup>4</sup> This Article focuses primarily on female victim rape because most of the cases applying rape shields involve male defendants and female victims. This is not because male-on-male rape does not happen. As I have demonstrated elsewhere, once we include prison populations, the frequency of male victim rape rivals female victim rape. See I. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1266–77 (2011).

<sup>5</sup> This of course assumes that the goal of criminal trials is truth, a goal which the Supreme Court has repeatedly emphasized. See, e.g., *United States v. Havens*, 446 U.S. 620, 626 (1980) (stressing the importance of “arriving at the truth in criminal trials”); *Tehan v. United States*, 382 U.S. 406, 416 (1966) (“The basic purpose of a trial is the determination of truth.”). However, given that courts routinely exclude truth-aiding information in order to serve some other goal—for example, protection from involuntary confessions—it may be more accurate to speak in terms of “legal truth.” For a cogent argument that we are not interested in even legal truth, but rather the appearance of legal truth, see Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 261–62 (1920).

<sup>6</sup> See, e.g., ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 37–41 (1999); see also Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 437–41 (2006); Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757, 767–72 (1992).

<sup>7</sup> Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 16,16 (Peter Brooks & Paul Gewirtz eds., 1996).

<sup>8</sup> Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“Legal interpretive acts signal and occasion the imposition of violence upon others.”).

<sup>9</sup> For an overview of such reforms, see Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981 (2008) (arguing that recent reforms in rape law have weakened accused rapists’ due process rights).

curred, we are often no better off than we were before such reforms were enacted.<sup>10</sup> Again, we are stuck at stories.

This is only part of what makes *Stephens v. Miller* interesting. I mentioned that the plurality engaged in a rather straightforward application of the rape shield rule. Faced with a choice between the law *is* and the law *ought*, the plurality chose the former. But the law *ought* was not completely silenced. There is a reason why the en banc opinion includes a total of seven opinions—four judges in the plurality, two concurring opinions, and five judges issuing four dissenting opinions. The tension between the law *is* and the law *ought* is particularly evident with rape shields. Nearly five decades after the widespread adoption of rape shield rules—every state now has some version of a rape shield barring from trial evidence of the sexual history of the complainant<sup>11</sup>—the application of rape shield rules continues to be problematic, unsatisfying, fraught, and out of touch with what many would consider to be the right judgments.<sup>12</sup> *Stephens v. Miller*, with its multiple en banc opinions, to say nothing of its multiple lower court opinions, illustrates just how problematic rape shields continue to be. The opinion should also prompt us to take note of an odd state of affairs: notwithstanding nearly perennial reforms to the substance of rape law—including recent reforms to criminalize non-forcible rape, to cover rape by fraud and exploitation, to require affirmative consent—the evidentiary rules around rape have remained oddly stagnant. We are still relying on rape shield rules that were drafted in the 1970s, that predate even the societal awareness of acquaintance rape,<sup>13</sup> that have little to do with evolving cultural norms around sex.<sup>14</sup>

All of this makes *Stephens v. Miller* interesting. Ultimately, however, what makes *Stephens v. Miller* especially interesting to me is what the decision could have done. For me, *Stephens v. Miller* signals a missed opportunity, one that could have addressed two of the most intractable problems with rape shields: the sense that they are often over-inclusive and our intuitive sense that sometimes they get in the way of the right rape judgment. To be clear, by “right judgment,” I am not necessarily referring to a particular verdict. Rather, I mean a judgment—whether guilty or not guilty—that restores to juries the right to decide crucial facts and gives us comfort that the fact-finders’ decision was based on the necessary evidence. Just underneath the surface of *Stephens v. Miller* is a solution to both of these problems. Indeed, the solution is one that the evidentiary issue in *Stephens v. Miller*—the admissibility of a question and a statement, mere words: “Don’t you like

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<sup>10</sup> Indeed, with the recognition of acquaintance rape and non-forcible rape, we face additional hurdles in getting at the truth, since now there may be little tangible evidence of whether a rape in fact took place.

<sup>11</sup> For a list of state statutes, see 1 WHARTON’S CRIMINAL EVIDENCE § 4.41 n.39 (15th ed. 2015).

<sup>12</sup> See *infra* notes 152–204 and accompanying text.

<sup>13</sup> See *infra* notes 208–11 and accompanying text.

<sup>14</sup> For a discussion of some of these evolving norms, see I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 876–79 (2013).

it like this? . . . Tim Hall said you did”—seemed to invite, and yet it went unnoticed by the plurality.<sup>15</sup> The solution involves borrowing from another branch of evidence law: hearsay. The solution involves re-conceptualizing rape shield laws to consider whether sexual history evidence is being offered for its truth, or for some non-truth purpose. As I shall demonstrate, this solution is remarkably simple. The significance of the solution is not its simplicity, however. The mark of the solution is that it can result in better rape judgments not only in cases like *Stephens v. Miller* but in an array of other rape cases as well, including a particularly challenging category of cases—cases in which the defendant claims that he made an honest but reasonable mistake as to whether consent existed.<sup>16</sup>

This Article begins proper, in Part I, by examining the facts, both elicited and not elicited, during the trial of Lonnie Stephens and the resulting Seventh Circuit en banc decision. After exploring the role narrative plays for jurors and other decision-makers, Part II then calls “the story” of *Stephens v. Miller* into question by showing that there is not just one story, but several, including those that various courts participated in constructing. Of course, it is the plurality’s official story that informs the plurality’s rape shield analysis. Part III accordingly turns to this analysis and to the many problems with rape shield rules in general. Rape shield rules, progressive as they were in the late 1970s when they were first introduced, are in need of reform. Looking beneath the surface of *Stephens v. Miller* to reveal a simple solution, Part IV begins the process of doing just that.

## I. THE CASE

### A. *The Trial*

On the night of March 17, 1987, the woman in this case—let’s call her “the woman”<sup>17</sup>—was in the front room of her trailer sleeping.<sup>18</sup> She hadn’t

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<sup>15</sup> *Stephens v. Miller*, 13 F.3d 998, 1010 (7th Cir. 1994) (en banc).

<sup>16</sup> Although jurisdictions vary on the mens rea required for rape or sexual assault—or use mens rea as a way to grade sexual assault offenses—the general rule has been that a person is not guilty of rape if he honestly and reasonably believed that consent to sexual intercourse was present. Reasonable mistake is not an affirmative defense per se, but rather an element-negating defense, since the defendant is claiming that he lacked the requisite mens rea to be guilty of the charged offense. For more on reasonable mistakes and sexual assault, see Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 431 (1998); Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 817–42 (1996).

<sup>17</sup> Calling her “the woman” deserves explanation. Historically, of course, we shied away from naming rape accusers and victims—calling them instead the complainant, the accuser, the prosecutrix, indeed anything but their real names. Whether withheld as a matter of courtesy, or law, or court orders, this has been and continues to be the norm. See generally, Deborah W. Denno, *Perspectives on Disclosing Rape Victims’ Names*, 61 FORDHAM L. REV. 1113, 1113 (1993) (noting that the “great majority” of news organiza-

locked the front door and awoke to find Lonnie Stephens standing near her.<sup>19</sup> She knew Lonnie Stephens; they were casual acquaintances, so to speak.<sup>20</sup> He sat down next to her on the couch and attempted to kiss her.<sup>21</sup> She told Stephens that her sister and brother-in-law were asleep in the bedroom, which was true.<sup>22</sup> Her son and nephew were also in the trailer someplace.<sup>23</sup> She yelled for her sister, and Stephens stopped for a bit but then persisted with his advances.<sup>24</sup> The woman again called for her sister; again her sister failed to respond.<sup>25</sup> At this point, Stephens got up and went to the bathroom, leaving the woman alone.<sup>26</sup> When Stephens returned, he angrily accused the woman of lying about her sister and brother-in-law being in the trailer.<sup>27</sup> Stephens threw the woman on the couch and covered her mouth to keep her from screaming, then pressed his body against her, unfastened her bra, and reached down to undo his pants.<sup>28</sup> It was as he was undoing his pants that the woman pushed him away and ran into the bedroom shouting.<sup>29</sup> Perhaps realizing that there were in fact other people in the trailer, Stephens fled.<sup>30</sup>

But already, this telling is incomplete, since Stephens's version of events, as is often the case in the "he said, she said" narrative of rape cases, is decidedly different. According to Stephens, earlier that evening, he had gone out for drinks with his friend David Stone.<sup>31</sup> Afterwards, he asked Stone to drop him off at the woman's trailer.<sup>32</sup> The woman's son was sleeping on the couch. Stephens moved him to a bedroom, where, as the woman explained, her sister, brother-in-law, and their child were also sleeping.<sup>33</sup> With the living room to themselves, Stephens and the woman talked. The

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tions today do not disclose the names of rape victims). But as is typical when it comes to rape and sexual assault, every decision comes at a cost. Although withholding names may encourage victims to come forward and report rape, it also perpetuates our unfortunate history of equating a woman's value with her chastity and viewing rape victims as damaged goods. While all of this weighed in my thinking, ultimately my decision to call her "the woman" has a more strategic explanation. By calling her "the woman," I hope to convey that she could be any woman. Given that one in five women have been victimized by rape and that all women are at risk of rape, "the woman" in this case really could be any woman. MICHELLE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2011 SUMMARY REPORT (2011), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_executive\\_summary-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf) [http://perma.cc/F4TS-QEJ6].

<sup>18</sup> Stephens, 13 F.3d at 1000.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Stephens v. Miller, 989 F.2d 264, 266 (7th Cir. 1993).

<sup>33</sup> Stephens v. Miller, 13 F.3d 998, 1000 (7th Cir. 1993) (en banc).

woman gave Stephens permission to kiss her,<sup>34</sup> they engaged in foreplay,<sup>35</sup> and, well, “one thing led to another,” with the two of them on the floor “doing it doggy fashion.”<sup>36</sup> It was as they were “doing it doggy fashion” that Stephens said to the woman, “[D]on’t you like it like this? . . . Tim Hall said you did.”<sup>37</sup> Stephens also suggested perhaps “switching partners” at some future time, since he had heard from Tim Hall that she enjoyed partner switching.<sup>38</sup> According to Stephens, his statements resulted in coitus interruptus, though he did not use that term.<sup>39</sup> The woman angrily told him to stop and leave.<sup>40</sup> Stephens did as he was told.<sup>41</sup> In short, per Stephens, everything was going fine until he spoke about Tim Hall and switching partners.<sup>42</sup> It was this that angered the woman and led her to fabricate the attempted rape charge.

Of some import too are the events that followed. After Stephens left the woman’s home, he went to his friends’ home nearby and told them he had just come from the local Pic a Pac Store.<sup>43</sup> When questioned by the police about the alleged attempted sexual assault, he stuck with his story about the Pic a Pac store.<sup>44</sup> As further cover, Stephens asked his friend David Stone to tell the police that after the two of them had gone drinking, Stone had dropped him off at the store.<sup>45</sup> Stone agreed, and even testified at trial that he had driven Stephens to the Pic a Pac.<sup>46</sup> On cross-examination, however, Stone admitted that he had told the Pic a Pac story due to instructions from Stephens.<sup>47</sup>

<sup>34</sup> *Id.*

<sup>35</sup> *Stephens*, 989 F.2d at 266.

<sup>36</sup> *Stephens*, 13 F.3d 998 at 1000.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* Apparently, this was in reference to his conversations with Tim Hall, from which Stephens understood that the woman had engaged in partner switching before with Tim and his wife. See *Stephens v. State*, 544 N.E.2d 137, 138–39 (Ind. 1989).

<sup>39</sup> See 13 F.3d at 1000.

<sup>40</sup> *Id.* at 1001.

<sup>41</sup> *Id.*

<sup>42</sup> In fact, on a list of ten things not to say as “dirty talk” during sex, Stephens’s comments evoked at least two enumerated don’ts. See Maggie Parker, *Ten Dirty Talk Dos and Don’ts*, MENSFITNESS.COM, <http://www.mensfitness.com/women/sex-tips/10-dirty-talking-dos-and-donts> [<http://perma.cc/7Q5D-JJAY>] (listing as number one using derogatory terms like “slut” and listing as number seven “don’t be demeaning”). As evidence of how complicated sexual relations can be, the same list encourages men to be dominating. *Id.* Another site notes that some women are turned on by terms like “slut” and “whore” during sex, even though they would find the terms offensive outside of sex. See Lizette Borelli, *The Science of Dirty Talk and Why it Increases Sexual Pleasure*, MEDICALDAILY.COM (Apr. 27, 2015, 8:00 AM), <http://www.medicaldaily.com/science-dirty-talk-and-why-it-increases-sexual-pleasure-349854> [<https://perma.cc/72GC-C6DB>].

<sup>43</sup> *Stephens v. Miller*, 13 F.3d at 1000.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* Stephens also gave four different versions of the event to his live-in girlfriend, but claimed he did so because he was afraid she would leave him and take their children. *Stephens v. Morris*, 756 F. Supp. 1137, 1141 (N.D. Ind. 1991).

The jury that sat on Stephens's attempted rape trial heard most of the foregoing evidence, but not all. In this case of "she said, he said," the jury only heard part of what Stephens said. Pursuant to Indiana's Rape Shield Statute,<sup>48</sup> which, like most rape shield laws, generally excludes evidence of a complainant's prior sexual history or conduct, the trial court ruled that the defendant's proffered testimony about what he said to the woman during sex—"[D]on't you like it like this? . . . Tim Hall said you did."—was inadmissible since his statements referenced the woman's sexual history.<sup>49</sup> For the same reason, the trial court also precluded Stephens from repeating his comments about "doing it doggy fashion" or "switching partners."<sup>50</sup> In response to Stephens's contention that he was being denied his constitutional right to testify in his own defense and to support his theory of the case—that Stephens's words sufficiently angered the woman enough to prompt her to falsely claim rape—the trial offered a take it or leave it alternative. The trial court allowed Stephens to testify that he had said "something" to the woman that angered her and led her to fabricate an attempted rape charge.<sup>51</sup> With his options so circumscribed, Stephens testified that he made unspecified statements that angered the woman, and she ordered him to stop and leave, which he did.<sup>52</sup>

Given this limitation, this snipping of Stephens's testimony, it is perhaps not surprising that the jury found him to be the less credible party and returned a verdict of guilty,<sup>53</sup> as a result of which the trial court sentenced Stephens to twenty years' incarceration. We tend to associate specificity and details with credibility,<sup>54</sup> and lack of details with deceit.<sup>55</sup> As such, Stephens's vague statement that he said "something" likely rendered his entire testimony suspect in the minds of the jurors. It was certainly at odds with the

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<sup>48</sup> IND. CODE § 35-37-4-4 (2016). The Indiana Rape Shield Statute bars evidence of a victim's past sexual conduct. However, such evidence may be admitted if such evidence: (1) shows the witness' past sexual conduct with the defendant; (2) shows a specific instance of sexual activity which would show some person other than the defendant committed the act in question; or (3) shows that the victim's pregnancy at the time of trial was not caused by the defendant. *Id.* § 35-37-4-4(b).

<sup>49</sup> Stephens v. Miller, 13 F.3d at 1000.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1001.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Steven Lubet, *Persuasion at Trial*, 21 AM. J. TRIAL ADVOC. 325, 341 (1997) ("In many recent psychological studies, two traits stand out as well-accepted indicators of believability. All things being equal, a factfinder is more likely to believe a witness who exhibits certainty and mastery of detail."). It is no coincidence that courts demand specificity in the Fourth Amendment context of ascertaining probable cause. *See, e.g.,* Illinois v. Gates, 462 U.S. 213, 233-34 (1983) (discussing how a "detailed description" can tip the scales).

<sup>55</sup> Cynthia R. Cohen et al., *Demeanor, Deception and Credibility in Witnesses*, Presentation Paper at American Bar Association Section of Litigation Annual Conference 13, (Apr. 24-26, 2013), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac\\_2013/33\\_demeanor\\_deception.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/33_demeanor_deception.authcheckdam.pdf) [https://perma.cc/8V2M-M9QD] ("Liars are not always vivid with details.").

importance of telling a story “with descriptive richness,” and the “persuasive power of the concrete and particular,” that the Court espoused in perhaps the most famous Supreme Court evidence case, *Old Chief v. United States*.<sup>56</sup>

It was the trial court’s decision to exclude Stephens’s actual statements that became the focus of Stephens’s appeal, first in Indiana state courts, and then in federal court pursuant to his habeas petitions.

### B. *The Appeals*

Although there were a range of appeals—directly to the Indiana Supreme Court,<sup>57</sup> then to a federal district court on habeas,<sup>58</sup> and then to the Seventh Circuit Court of Appeals twice<sup>59</sup>—it is the Seventh Circuit plurality opinion upon rehearing en banc that is the most interesting, both for what it says and what it does not.

Stephens’s argument before the en banc court was simple: the trial court’s application of Indiana’s Rape Shield Statute in effect deprived him of his constitutional right to testify in his own defense.<sup>60</sup> In addition, Stephens argued that the excluded evidence should have been admissible because it was part of the *res gestae* of the offense.<sup>61</sup> In a 6-5 decision, the Seventh Circuit affirmed Stephens’s conviction. The plurality decision acknowledged that the Supreme Court has long interpreted the Sixth Amendment as guaranteeing a criminal defendant a right to testify in his or her own defense but noted that this right “is not unlimited and may bow to accommodate other legitimate interests in the criminal process.”<sup>62</sup> For example, although a defendant has the right to testify, he does not have the right to commit perjury,<sup>63</sup> and procedural and evidentiary rules may “control the presentation of

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<sup>56</sup> *Old Chief v. United States*, 519 U.S. 172, 187–188 (1997). As the Court emphasized in *Old Chief*, the “persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.” *Id.* at 187. The Court added, “A party seemingly responsible for cloaking something has reason for apprehension.” *Id.* at 189. Stephen Saltzburg makes a similar point: “If [jurors’] expectations are not satisfied, triers of fact may penalize the party who disappointed them by drawing a negative inference against that party.” Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011, 1019 (1978).

<sup>57</sup> *Stephens v. State*, 544 N.E.2d 137 (Ind. 1989).

<sup>58</sup> *Stephens v. Morris*, 756 F. Supp. 1137 (N.D. Ind. 1991) (denying habeas petition).

<sup>59</sup> *Stephens v. Miller*, 989 F.2d 264 (7th Cir. 1994) and *Stephens v. Miller*, 13 F.3d 998 (7th Cir. 1994) (en banc).

<sup>60</sup> *Stephens v. Miller*, 13 F.3d at 1001.

<sup>61</sup> *Id.* at 1003. At common law, *res gestae*, quite literally the “things done,” allowed parties to introduce evidence of matters inextricably linked to the main fact, and was occasionally invoked to permit the introduction of statements that were trustworthy. At the time *Stephens v. Miller* was decided, Indiana law specifically permitted *res gestae* evidence of events “happening near in time and place which complete the story of the crime.” *Id.*

<sup>62</sup> *Id.* at 1002 (quoting *Michigan v. Lucas*, 500 U.S. 145 (1991)).

<sup>63</sup> *Id.* at 1002 (citing *United States v. Dunnigan*, 507 U.S. 87, 96 (1993)).

evidence” without “offend[ing] a criminal defendant’s right to testify.”<sup>64</sup> Rape shield rules fall into this category, the majority held.

Rape shield statutes . . . represent the valid legislative determination that victims of rape and, as here, attempted rape deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. These statutes also protect against surprise to the prosecution. Restrictions imposed by rape shield statutes, especially as they relate to a criminal defendant’s right to testify, may not, however, be arbitrary or disproportionate to the purposes they are designed to serve. Rather, the state is required to evaluate whether the interests served by the rule justify the limitation imposed on the criminal defendant’s right to testify.<sup>65</sup>

Categorizing the trial court’s decision to circumscribe Stephens’s version of events as a “very minor imposition on Stephens’ right to testify,” the plurality concluded that this minor limitation was easily justified.<sup>66</sup> The trial court “properly balanced Stephens’ right to testify with Indiana’s interests because it allowed him to testify about what happened and that he said something that upset [the complainant].”<sup>67</sup>

The plurality also quickly rejected Stephens’s *res gestae* claim, finding that permitting all evidence of “the thing done” did not rise to the level of a constitutional requirement.<sup>68</sup> The plurality noted a practical, Pandora’s box problem with Stephens’s *res gestae* claim: to permit it would essentially render rape shields a dead letter, since a criminal defendant could always claim they heard or said something near in time and place to the alleged sexual assault to invoke *res gestae* and sidestep rape shield laws.<sup>69</sup>

Four separate dissents were filed. The thrust, however, was similar. While the dissenters conceded that the interests served by rape shield statutes are substantial, they emphasized that those interests must occasionally yield in certain cases to the accused’s right to present a defense. Such was the case here, where the plausibility of Stephens’s defense “turned in substantial part on whether the jury could be persuaded that something Stephens had said to the complainant could have so enraged her that she would have responded” by fabricating an attempted rape.<sup>70</sup>

Central to Stephens’ case then are the words he claims to have said that night, words the jury never heard. . . . Stephens instead was permitted only to testify without elaboration that he had said *some-*

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<sup>64</sup> *Id.* (citing *Rock v. Arkansas*, 483 U.S. 44, 55 n.11 (1987) and *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1003.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1010 (Cummings, J., dissenting).

*thing* that angered the complainant. The judge required Stephens to convince the jury of the truth of his story without allowing him to reveal the fragments on which its plausibility turned. He was asked to counter the detailed and vivid depiction offered by the prosecution with a version whose essential elements had been expunged.<sup>71</sup>

In short, the dissent argued that this was a unique case where a defendant's specific statements were "central to his defense," and therefore should have been admitted. The dissent concluded, "Sending the innocent to jail, or depriving the guilty of due process, is not a price our Constitution allows us to pay for the legitimate and worthy ambition to protect those already victimized from additional suffering."<sup>72</sup>

## II. THE STORIES WE TELL

In recent years, scholars have increasingly called attention to the critical role narrative plays for jurors and other decision-makers.<sup>73</sup> While it has long been the general view that such factfinders base their decisions on deductive reasoning and probabilistic assessments,<sup>74</sup> this view is grounded more in aspiration than reality. Experiential research makes clear that factfinders only partially weigh probabilities when deciding cases.<sup>75</sup> Even more critical to factfinders is whether the provided evidence "can be assembled into a plausible, teleological narrative."<sup>76</sup> Andrew Taslitz, in his discussion of narrative, makes a similar observation:

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281 (2013) (discussing the relationship between storytelling and factual accuracy in trials); I. Bennett Capers, *Real Woman, Real Rape*, 60 UCLA L. REV. 826 (2013) (criticizing rape shield laws for perpetuating traditional narratives of chastity and rape); Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (arguing that narrative is a tool for outsiders to understand legal truths); see also Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) (discussing jurors' cognitive strategies and the critical role that story-telling plays in analyzing a legal issue).

<sup>74</sup> See, e.g., 5 JEREMY BENTHAM, *RAISONALE OF JUDICIAL EVIDENCE* 17 (1827) ("If there be one business that belongs to a jury . . . , it is, one should think, the judging of the probability of evidence . . . ."); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978) (discussing rationality as a basis of decision-making); George F. James, *Relevancy, Probability, and the Law*, 29 CALIF. L. REV. 689, 694-705 (1941).

<sup>75</sup> Griffin, *supra* note 73, at 294. See also Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513 (2004) ("[T]here are deep incompatibilities between actual legal decision making and the primarily Rationalist assumptions on which trials are designed.")

<sup>76</sup> Capers, *Real Women, Real Rape*, *supra* note 14, at 860. See also Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES* 2, 8-9 (Peter Brooks & Paul Gewirtz eds., 1996).

[J]ury reasoning is story-based. Juries convert evidence into familiar stories, filling in gaps in the evidence where needed to craft a coherent tale. Whom jurors believe turns on the consistency of each witness's testimony with the plausible stories that juries create based upon their preexisting stock. These stock stories come from experience and culture, tales learned from the Bible, children's tales, television, radio, books, magazines, and movies. Stories create our world of meaning; they are the lens through which we view of all life's events.<sup>77</sup>

This is particularly true in rape cases, where often the only direct witnesses are the accuser and the accused. As Kalen & Zeisel noted nearly a half-century ago in *The American Jury*,<sup>78</sup> when confronted with ambiguous evidence, jurors are more likely to feel "liberated" in assessing the truth.<sup>79</sup> Studies show that jurors turn to preconceived "rape scripts" to assess what "really happened."<sup>80</sup> They turn too to assumptions, including patriarchal assumptions, "about the sexes' similarities and differences, motivations and needs, strengths and weaknesses."<sup>81</sup> The jurors, in short, converge "on whatever stereotypic-consistent imagery and information is available to them."<sup>82</sup> Using this information, jurors construct an ending/verdict that accords with narrative expectations of restoring balance.<sup>83</sup>

This is not to suggest that jurors have free rein in story selection. Evidentiary rules play a significant role in shaping, editing, and culling the stories they hear.<sup>84</sup> The Rules of Evidence are, to a large extent, rules about which stories matter (relevancy), which stories are unreliable (hearsay and authentication), and which stories are private (privileged). In short, which stories get told and heard.<sup>85</sup> Even here, though, the interplay between narrative theory and evidentiary rules is more complex, since evidentiary rules are themselves dependent on norms and *topoi* (or stock conventions) of storytelling. That the husband accused of killing his wife was having an extramarital affair is only relevant because of our assumptions about stories and

<sup>77</sup> TASLITZ, *supra* note 6, at 7–8.

<sup>78</sup> See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 249–55 (1966).

<sup>79</sup> *Id.* at 165.

<sup>80</sup> See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 204 (1986) (finding that jurors incorporate assumptions—including false assumptions—in rape cases).

<sup>81</sup> TASLITZ, *supra* note 6, at 8.

<sup>82</sup> Douglas D. Koski, *Jury Decisionmaking in Rape Trials: A Review & Empirical Assessment*, 38 CRIM. L. BULL. 21, 128 (2002).

<sup>83</sup> *Id.*

<sup>84</sup> This is not to suggest that evidentiary rules are the only constraints on courtroom stories. Constitutional and statutory rules also play a role. For example, a criminal case may exclude the story of a defendant's confession because her *Miranda* rights were violated or include only a redacted confession to preserve a co-defendant's confrontation clause rights.

<sup>85</sup> Peter Brooks makes a similar point: "All of the rules of evidence, including the much-debated exclusionary rule, touch on the issue of rule-governed storytelling." Brooks, *supra* note 7, at 19–20.

because of our urge to complete stories. We imagine he wanted his freedom, that there were disadvantages to a divorce. In short, the Rules of Evidence—both Rule 401 and, more precisely, Rule 104(b)—by recognizing and relying on “common sense inferences,” implicitly incorporate storytelling and narrative assumptions and permit decision-makers to participate in the creation of stories as a way of ascertaining “truth.”<sup>86</sup> Without assumptions learned from storytelling, the Rules of Evidence would lack meaning. Indeed, Paul Gewirtz has described “the entire law of evidence” as “really a law of narrative—a law of narrative transactions.”<sup>87</sup>

This interplay between narrative theory and evidentiary rules has particular salience in rape trials. That jurors continue to acquit<sup>88</sup> in cases where they find insufficient evidence of resistance (notwithstanding the relaxation and even elimination of the resistance requirement in many states)<sup>89</sup> or when the complainant did not make prompt complaint<sup>90</sup> or when the accuser’s behavior post-rape otherwise fails to comport with their expectations about how a rape victim should act<sup>91</sup> points to the continued power of story-based ideas and assumptions.<sup>92</sup> Nor is this just true in cases where jurors acquit. Narratives and rape scripts also play a determinative role in cases where jurors reach a verdict of guilty.

Of course, it is impossible to know with certainty what factors played a role in the jury’s decision to return a guilty verdict against Stephens, or what weight was accorded each factor.<sup>93</sup> It seems probable that jurors weighed

<sup>86</sup> See Fed. R. Evid. 104(b), 401.

<sup>87</sup> Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in *LAW’S STORIES* 135, 136 (Peter Brooks & Paul Gewirtz eds., 1996).

<sup>88</sup> Of course, story-based ideas play a role in every decision stage of the proceeding, including the decision to file charges and prosecute. A prosecutor, in weighing the strength of a case, will almost invariably wonder how the case will appear to potential jurors. Will the complainant’s version comport with the juror’s assumptions about how women are and should be, and how men are and should be?

<sup>89</sup> For a discussion of the role resistance continues to play in rape cases, see Victoria Nourse, *The “Normal” Successes and Failures of Feminism and the Criminal Law*, 75 *CHI.-KENT L. REV.* 951, 956–57 (2000).

<sup>90</sup> Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 *VILL. L. REV.* 907, 937 (2001).

<sup>91</sup> Capers, *Real Women, Real Rape*, *supra* note 14, at 863.

<sup>92</sup> *Id.* There is also the separate issue of the mode of storytelling in court, which may disadvantage women in general. See Kim Lane Scheppele, *Just the Facts Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 *N.Y.L. SCH. L. REV.* 123, 138–39 (1992) (arguing that many sexual assault victims are initially silent about their victimization, and then “try to smooth out social relations by minimizing the harm of the abuse, engaging in self-blame, telling stories that offer alternative explanations of events so that the full consequences of the abuse do not have to be dealt with at the time, and disguising the brutality through descriptive distortions of events,” all of which is used against them to undermine their credibility); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 *MICH. L. REV.* 2073, 2083–84 (1989) (arguing that the law tends to privilege the stories of those who are white and male, and cast aside the stories of those who are not).

<sup>93</sup> Part of the difficulty in knowing what happened in the jury room is attributable directly to the Rules of Evidence. Because Rule 606 and state cognates limit the use of juror testimony to impeach a verdict, in effect barring any testimony concerning “any

Stephens's several false statements and his suborning perjury as reflecting his consciousness of guilt. It also seems probable that preconceived rape scripts and assumptions about gender and sex played a role in the jury's verdict. After all, Stephens's claim was that he knew the woman casually and that she had essentially given him a standing invitation to visit her in her trailer.<sup>94</sup> For jurors, and perhaps especially for these jurors in rural Indiana,<sup>95</sup> this claim alone may have cast Stephens's credibility into doubt, conflicting perhaps with their assumptions about how women are: *She gave him a standing invitation to come to see her? Women don't do that.* Stephens's claim that the woman was willing to engage in sex with him on the floor of her living room even though her sister, brother-in-law, son, and nephew were asleep in the adjacent room may have also struck jurors as inconsistent with their normative assumptions. In fact, the district court intimated as much, stating that "the jury would have been hard pressed to believe this whirlwind courtship took place in a matter of fifteen minutes."<sup>96</sup> At the same time, the woman's version of events—that Stephens entered her home uninvited, that he forced himself upon her, and that she resisted to the utmost and indeed managed to escape his clutches—likely accorded with received scripts about "good girls,"<sup>97</sup> about vulnerable girls, and about how a good girl would respond.<sup>98</sup> Indeed, the woman's version, which downplayed her acquaintance with Stephens, in several ways fit the paradigmatic rape: the intruding stranger.<sup>99</sup> Perhaps most importantly, Stephens's speculation about why the woman had alleged rape after first consenting to sex—specifically,

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matter or statement occurring during the course of the jury's deliberations," attorneys rarely have the incentive to draw back the curtain on jury deliberations. See FED. R. EVID. 606(b).

<sup>94</sup> Stephens v. Miller, 989 F.2d 264, 260 (7th Cir. 1993).

<sup>95</sup> For a discussion of how the cultural background and assumptions of jurors have a stronger effect than legal definitions in rape cases, see generally Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010).

<sup>96</sup> Stephens v. Morris, 756 F. Supp. 1137, 1143 (N.D. Ind. 1991).

<sup>97</sup> The use of the diminutive "girl" here is deliberate. For a discussion of "good girls" and rape shields, see Capers, *Real Women, Real Rape*, *supra* note 14, at 853–57.

<sup>98</sup> The assumption, in fact and in the law, has long been that "good girls" should resist to the utmost. As one court put it, "[I]f a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant." *People v. Dohring*, 59 N.Y. 374, 384 (1874). Judge Cole made a similar point in *State v. Rusk*, insisting that a good woman should "follow the natural instinct of every proud female" and resist. *State v. Rusk*, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting). Or as Anne Coughlin commented, early rape law allowed men something akin to a "woman's failure of actus reus defense." Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 36 (1998). Such a defense was justifiable on the notion that rape is a fate worse than death. See generally Corey Rayburn, *Better Dead than Ra(p)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119 (2004) (explaining that courts have recently upheld the traditional standard that physical signs of resistance must be shown to prove rape).

<sup>99</sup> On the paradigmatic rape, see I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1386 (2010); Capers, *Real Women, Real Rape*, *supra* note 14, at 860–65.

his judicially redacted assertion that he said “something” to offend her—likely struck the jurors as vague and implausible given received rape scripts. *Women, after all, don’t allege rape for no reason or just because somebody said “something.”* In this sense, the application of the rape shield in excluding the specifics of his version—his statement “You like it like that, don’t you? Tim Hall said you did.”—also shaped how jurors completed the story of what happened. All of this—as well as class and race assumptions<sup>100</sup>—likely factored into the jury’s guilty verdict. In this regard, the role narrative and rape scripts play in jury decision-making is a crucial one.

But *Stephens v. Miller* also reveals another aspect of storytelling in rape trials that, for the most part, remains under-theorized and under-examined: the stories courts tell. Instead of being above the fray, courts too engage in storytelling.<sup>101</sup> Like other actors in the legal process, courts construct narratives with a goal of persuading official decision-makers, though, in their case, the official decision-makers are appellate courts. In this sense, legal opinions, like Janus, look in two directions at once: towards the historical “facts” and towards the decision’s afterlife. As Drucilla Cornell puts it, “Legal interpretation demands that we remember the future.”<sup>102</sup> And appellate courts are not the only audience. Lower courts are also concerned about a more general audience comprised of lawyers, litigants, victims, and the community at large, and about presenting a narrative marked “by a rhetoric of certainty and inevitability, a rhetoric that denies the complexity of the problem before the court and drives with a tone of self-assurance to its conclusion.”<sup>103</sup>

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<sup>100</sup> Both Stephens and the woman were white. This case therefore does not involve the rape script that most favored white accusers, that of interracial rape. Historically, allegations of interracial rape were treated differently as a matter of law, subjecting black defendants to higher penalties, including capital punishment. Post Reconstruction Amendments, allegations of interracial rape continued to be treated differently, though now a type of unwritten law governed the disparate treatment. However, the fact that this case involved an intra-racial allegation does not render race irrelevant. That the woman was white likely enhanced her credibility, and supported a rape script that cast her as a “good girl,” or at least a “decent woman.” At the same time, Stephens’s class—there are repeated references to suggest he was working class—likely factored against him insofar as it supported a script that cast him as a never-do-good. For more on the interplay of race and class in rape scripts, see Capers, *The Unintentional Rapist*, *supra* note 99, at 1371–81; Capers, *Real Women, Real Rape*, *supra* note 14, at 860–65.

<sup>101</sup> Consider the opening line of a recent Confrontation Clause case, *Ohio v. Clark*, 135 S. Ct. 2173 (2015). Justice Alito begins the opinion by stating, “Darius Clark sent his girlfriend hundreds of miles away to engage in prostitution and agreed to care for her two young children while she was out of town.” *Id.* at 2177. This sentence alone tells the reader that the Court is likely to rule against Clark, especially since little in this sentence is relevant to the issue at hand, whether Clark was entitled to confront L.P. at trial.

<sup>102</sup> Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, 11 CARDOZO L. REV. 1690, 1709 (1990).

<sup>103</sup> Gewirtz, *supra* note 76, at 11. Gewirtz adds: “[T]he rhetoric of certainty seems to result from the perceived need of judges to preserve the institutional authority of the court. Acknowledging the complexity and ambivalence, on this account, threatens the legitimacy of a decision backed by state power.” *Id.* See also Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L.J. 1023, 1042 (1996). Other scholars have made similar

Perhaps even more importantly, courts deploy narrative to naturalize the coercive force of the state, especially in criminal cases. As Paul Gewirtz has observed, court opinions usually end with the words “It is so ordered” to emphasize the court’s coercive force.<sup>104</sup> The words themselves function as a speech act.<sup>105</sup> But the justification for the power is always in the body of the opinion that precedes those words and in, again, its rhetoric of certainty and inevitability. As Robert Cover famously observed, “Legal interpretation takes place in a field of pain and death.”<sup>106</sup>

These narrative strategies are particularly evident in the case against Stephens, which generated a total of four published decisions, some of which contain various concurring and dissenting opinions. Each of these decisions begins with the “facts,” though the “facts” differ in important ways in each opinion. What is included, what is omitted, how events are sequenced, and the tone vary. Even the decision of how to identify the complainant—by name, as “the complainant,” as the “victim,” as the “prosecutrix”—differs depending on the opinion. An opinion read in isolation may seem certain and inevitable. The opinions read sequentially reveal each choice to be encumbered and even political. The multiple opinions remind the reader that there is never one univocal story and that even the “official story” depends on the teller.<sup>107</sup> As Paul Gewirtz observes, “the existence of multiple opinions defeats the ability of any single opinion to enshrine any particular version of reality as the undoubted truth.”<sup>108</sup> In this respect, each “text announces the elements of its own indeterminacy.”<sup>109</sup>

That the courts in *Stephens v. Miller* were engaged in “strategies of discourse”<sup>110</sup> and “appeals to pathos”<sup>111</sup> becomes apparent in ways both small and large, in ways both subtle and less so. Allow me to return to the decision about how to describe the woman. For the Indiana Supreme Court,

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observations. See Robert Ferguson, *The Judicial Opinion as a Literary Genre*, 2 *YALE J. L. & HUMAN.* 201, 206–07 (1990) (“The one thing a judge never admits in the moment of decision is freedom of choice. [The opinion] must instead appear as if forced to its inevitable conclusion.”); David Luban, *Difference Made Legal: The Court and Dr. King*, 87 *MICH. L. REV.* 2152, 2153 (1989) (court “narratives must dovetail in an improbable mutual correspondence that legitimizes both the favored conclusion and the political narrative that embeds it.”).

<sup>104</sup> Gewirtz, *supra* note 76, at 10. Even this coercive force is disembodied and made to seem inevitable. Most opinions do not end, “The Court so orders.” Most opinions end, “It is so ordered.”

<sup>105</sup> In other words, the words themselves accomplish something and therefore amount to an act. On speech acts generally, and declarative speech acts in particular, see JOHN SEARLE, *SPEECH ACTS* (1969).

<sup>106</sup> Cover, *supra* note 8.

<sup>107</sup> Gewirtz, *supra* note 76, at 11.

<sup>108</sup> *Id.* at 11.

<sup>109</sup> *Id.* at 12 (emphasis added).

<sup>110</sup> This term comes for the literary theorist Homi Bhabha. See Homi K. Bhabha, *The Commitment to Theory*, 5 *NEW FORMATIONS* 5, 19 (1988).

<sup>111</sup> On the merits of pathetic arguments generally, see Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 *COLUM. L. REV.* 1389, 1390–91 (2013).

she is “the victim;”<sup>112</sup> for the federal district court, she is “the prosecutrix.”<sup>113</sup> It is the three-judge Seventh Circuit decision—the one decision to side with Stephens and grant his writ of habeas—that is the first to refer to her by name, Melissa Wilburn.<sup>114</sup>

The attributes assigned to Lonnie Stephens also vary depending on the court. The first Seventh Circuit decision includes the following: “Stephens and his friend, David Stone (‘Stone’), did automotive work together during the day and later went out drinking.”<sup>115</sup> By contrast, as described by the district court, Lonnie Stephens comes across as a complete lay-about: unemployed and drunk. The district court tells the reader Stephens went to the woman’s house “[a]fter almost a full day of drinking beer.”<sup>116</sup> Indeed, another aspect becomes apparent upon closer inspection: that notwithstanding evidence law’s ban on character evidence, such evidence permeates cases and permeates judicial opinions. What else are we to think when we are told about Stephens’s almost “full day of drinking beer,” if not his character?<sup>117</sup>

The first Seventh Circuit decision is also more generous in including Stephens’s version of events and in doing so fills in the details that seem glaringly missing from the en banc decision. Whereas the en banc decision tells us that Stephens knew the woman as a “casual acquaintance,” the first Seventh Circuit decision tells us what that means. Stephens had previously talked with the woman, “who told him that she was separated from her husband and had moved.”<sup>118</sup> She had “invited Stephens to visit her sometime.”<sup>119</sup>

Reading the en banc decision, one is also struck by other gaps and omissions. Consider, for example, how the en banc court begins its description of Stephens’s version of events:

Stephens testified at trial and painted a quite different picture of the evening’s events. He claimed that [the woman] invited him into her trailer after [his friend David Stone] dropped him off. Stephens stated that when he entered the trailer, [the woman’s]

<sup>112</sup> Stephens v. State, 544 N.E.2d 137, 138 (Ind. 1989).

<sup>113</sup> Stephens v. Morris, 756 F. Supp. 1137, 1139 (N.D. Ind. 1991).

<sup>114</sup> Stephens v. Miller, 989 F.2d 264, 266 (7th Cir. 1993).

<sup>115</sup> *Id.* at 265.

<sup>116</sup> Stephens v. Morris, 756 F. Supp. at 1140.

<sup>117</sup> Richard Polenberg makes a similar observation about Justice Cardozo’s opinion in *People v. Zackowitz*, a case which stands for the principle that character evidence is inadmissible. 254 N.Y. 192 (N.Y. 1930). But even in explaining why such evidence is inadmissible, Justice Cardozo relies on the character of the defendant. Ironically, Cardozo’s decision was “based largely on his assessment of the defendant’s character.” Richard Polenberg, *Law and Character: The “Saintly” Cardozo: Character and the Criminal Law*, 71 U. COLO. L. REV. 1311, 1311 (2000). To be sure, it is possible to imagine a non-character purpose for this evidence—perhaps his drinking was referenced to show that alcohol may have made him less inhibited or more sexually aggressive. However, one senses the opinions mean to convey more.

<sup>118</sup> Stephens v. Miller, 989 F.2d at 266.

<sup>119</sup> *Id.*

son was asleep on the couch. Stephens carried him to one of the bedrooms . . . .<sup>120</sup>

Elisions abound. For example, the en banc decision tells the reader nothing about how Stephens claimed he gained entry into the trailer. With this and other omissions, questions begin to insist themselves, and one begins to see that such omissions may serve strategic purposes and divert the reader from evidence that may undermine the certainty and inevitability of the law's violence. For example, since the en banc opinion merely describes Stephens and the woman as casual acquaintances, how is it that he comes to carry her son to one of the bedrooms? Did she ask him to? Did he do so unprompted? Did she protest or acquiesce? By contrast, the earlier, more generous Seventh Circuit decision fills in much of this detail, making a more complete and complicated picture. "When Stone dropped Stephens off at the trailer, Stephens knocked on the door and [the woman] let him in. [The woman] told Stephens she could take him home, so Stephens told Stone to leave."<sup>121</sup> Inside, the woman's son was asleep on the couch, so Stephens carried him into one of the bedrooms.<sup>122</sup>

Other differences are subtler yet equally significant. Consider the description of how the woman eventually fends off Stephens's advances. The opinions are relatively uniform in describing the actions of Stephens, at least from the woman's point of view, with respect to his actions in throwing her on the couch, undoing her bra, and tearing a button from her shirt. But note the difference in language the various opinions use to describe the woman's resistance—again, a crucial point for decision-makers notwithstanding reforms relaxing the *legal* requirement of resistance. Per the Seventh Circuit en banc plurality decision, the woman "pushed Stephens off of her."<sup>123</sup> The three-judge Seventh Circuit panel uses similar language: the woman "struggled and eventually pushed Stephens off, and he fell to the floor."<sup>124</sup> Both of these descriptions accord with received rape scripts and gender expectations about how good girls should resist to the utmost. Now compare these descriptions to the language from the district court and the Indiana Supreme Court. Per the district court, "the prosecutrix was able to shift her body weight which caused the petitioner to lose his balance and fall to the

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<sup>120</sup> Stephens v. Miller, 13 F.3d 998, 1000 (7th Cir. 1994) (en banc).

<sup>121</sup> Stephens v. Miller, 989 F.2d at 266.

<sup>122</sup> *Id.* Perhaps not surprisingly, the attorneys representing Stephens and Indiana also shaded the "facts" to advance their goals. Consider the opening of the State's brief in opposition to the petition before the Seventh Circuit: "On March 17, at around 10:00—uninvited and drunk—Petitioner entered the trailer" of the woman, an acquaintance of his. Brief for Respondents in Opposition at 1, Stephens v. Miller, 13 F.3d 998 (7th Cir. 1994) (No. 93-1734). It continues: "Petitioner made three unwanted, and increasingly aggressive, sexual advances toward her, each of which she rebuffed." *Id.* Eventually, "Petitioner violently attacked" the woman and attempted to rape her. *Id.* at 2.

<sup>123</sup> Stephens v. Miller, 13 F.3d at 1000.

<sup>124</sup> Stephens v. Miller, 989 F.2d at 266.

floor,”<sup>125</sup> a description that seems to attribute the woman’s escape to happenstance rather than a deliberate act of resistance. The Indiana Supreme Court takes the opposite tack. In that decision, as Stephens “reached down to undo his trousers, the victim flipped him off of her,”<sup>126</sup> a show of resistance that is stronger but which potentially cuts against the victim, since such strength may be inconsistent with jurors’ assumptions about femininity and vulnerability.

Perhaps the most revealing narrative choice is that concerning subsequent “facts.” I mentioned earlier that Stephens’s demonstrably false statements—he lied to the police and encouraged his friend Stone to lie at trial—probably played a significant role in the jury’s decision to credit the woman and find Stephens guilty of attempted rape. Not surprisingly, Stephens’s false statements are given prominent space in the Seventh Circuit en banc plurality opinion. But there were other subsequent events that seem equally important and yet are withheld in the opinion. Perhaps most glaring is the plurality’s decision to withhold information which may have added complexity to the woman’s motives for going to the police. For this, one would have to comb through dissents or read the district court decision.

This is what we know from the district court opinion: Later on the evening of March 17, 1987, the woman’s estranged husband called her, and the woman told him that Stephens had tried to rape her. Her husband responded by going to Stephens’s residence and then going to the woman’s trailer sometime between 1:00 a.m. and 1:30 a.m.<sup>127</sup>

When her husband arrived, he was in an agitated state and made enough noise to wake the prosecutrix’s sister and brother-in-law. Her brother-in-law and husband became involved in a verbal and physical altercation which caused the prosecutrix’s sister to call the police. By the time the police arrived the situation between the two men had calmed down. While the police were present, neither the prosecutrix nor any other person told the police about the alleged attempted rape by Stephens. In fact, there was no report made to any law enforcement agency about Stephens until after the prosecutrix was confronted by her landlady.

The following evening the prosecutrix was in an automobile with her brother-in-law when she was stopped by the landlady, Pat Bosworth, who complained about the police being called for the disturbance in her trailer. The landlady told the prosecutrix that she would not have any problems in her trailer park. Even though the

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<sup>125</sup> Stephens v. Morris, 756 F. Supp. 1137, 1139 (N.D. Ind. 1991).

<sup>126</sup> Stephens v. State, 544 N.E.2d 137, 138 (Ind. 1989).

<sup>127</sup> See Stephens v. Morris, 756 F. Supp. at 1139. According to Stephens, the woman’s husband showed up at Stephens’s trailer sometime between 12:30 a.m. and 1:00 a.m. and demanded to know what Stephens was doing “trying to screw his old lady.” *Id.* at 1141.

landlady was talking about the police being called in response to the fight between her husband and brother-in-law, the prosecutrix indicated to the landlady that the police were called because Stephens was an intruder in her trailer. The landlady suggested that the prosecutrix go to the police to get a restraining order. The prosecutrix and her brother-in-law went to the Blackford County Jail where the prosecutrix stated that she needed to report an attempted rape. She was referred to the Hartford City Police Department, where she made the report.<sup>128</sup>

These events were entirely omitted from the plurality opinion. One senses that the majority knew these subsequent events would unsettle and muddle the teleology of the narrative, that they would cut against accepted “rape scripts,” that these events would undermine the “always-already”<sup>129</sup> present goal of certainty and inevitability. Peter Brooks’s observation that storytelling “is never innocent”<sup>130</sup> becomes equally applicable to courts.

What all of this suggests may seem intuitive: that every telling—even a retelling based on a transcript and told by a supposedly “neutral” commentator—is suspect. Even my telling is suspect. Why write, as I did in one of the preceding paragraphs, that “the woman was willing to engage in sex with him on the floor of her living room” instead of writing “on the floor of her trailer”? Even my calling her “the woman” is strategic, as I acknowledge in a footnote.<sup>131</sup>

Catherine MacKinnon has written, “[I]n postmodernity, where no one actually lives, interpretations are infinite.”<sup>132</sup> While we do not exist in a state of postmodernity, and thus do not have the possibility of infinite interpretations, we do have the reality of multiple interpretations which exponentially grow with each retelling, and this reality applies to court opinions as well. Courts too engage in shaping and controlling the narrative and “constitutive rhetoric.”<sup>133</sup> Indeed, the process of interpretation antedates the telling and begins with the reading. After all, every criminal court opinion begins with a reading: a reading of the transcript,<sup>134</sup> a reading of memoranda and briefs, a

<sup>128</sup> *Stephens v. Morris*, 756 F. Supp. at 1139–40.

<sup>129</sup> For a discussion of what “always-already” constituted, see Louis Althusser, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 85, 119 (1971) (“Ideology has always-already interpolated individuals as subjects . . . . Hence individuals are ‘abstract’ with respect to the subjects which they always-already are.”).

<sup>130</sup> Brooks, *supra* note 7, at 16.

<sup>131</sup> See *infra* note 17.

<sup>132</sup> Catherine A. MacKinnon, *Law’s Stories as Reality*, in *LAW’S STORIES* 232, 234 (Peter Brooks & Paul Gewirtz eds., 1996).

<sup>133</sup> James Boyd White, *Law as Rhetoric, Rhetoric as the Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 690 (1985).

<sup>134</sup> Transcripts of course are incomplete. As Elaine Craig notes, transcripts “omit some oral communication (such as sighing, groaning, or weeping) and fail to capture most nonverbal content (such as tone of voice, facial expression, body language, and affect).” See Elaine Craig, *The Inhospitable Court*, 66 U. TORONTO L.J. 197, 201 (2015);

reading of other opinions and statutes, and, for the trial court at least, a “reading” of the witnesses involved. Except for the part about witnesses, the same is true of appellate courts. All of this prompts a question: if judges reading a transcript necessarily engage in interpretation<sup>135</sup> and, in the retelling, shade the facts through a process of inclusion and exclusion, what “truth” should we expect of the witnesses themselves?

James Boyd White once argued that a verdict does not necessarily end the narrative of a crime.<sup>136</sup> Although a jury may hear certain competing stories and select one to serve as the authoritative version on which to base their verdict, the verdict will ultimately depend on “community acceptance” and validation.<sup>137</sup> White observed:

[A legal] judgment is always incomplete, for it always depends upon what happens in the other world of ordinary narrative and private life in which it must work and which it cannot control . . . . It is not that the legal judgment has no authority, but that its authority is not absolute.<sup>138</sup>

White is correct, to be sure. But thinking about *Stephens v. Miller* reveals the friction even between the verdict and community acceptance. What does it mean for community acceptance when differing opinions reveal how laden and subjective “what really happened” remains, even after a verdict? What is the community to make of judicial narratives that overlap but never quite fit together? Or of each court’s role in silencing the stories that disrupt the court’s conception of the truth?<sup>139</sup> And what does it mean, for court opinions in particular and for criminal justice more broadly, when judicial storytelling reveals itself to be tainted, to be impure? What does it mean to recognize that a court opinion, like any other story, is never “morally neutral”?<sup>140</sup> In rape cases in particular, what does it mean to throw back at courts the very

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see also Austin Sarat, *Rhetoric and Remembrance: Trials, Transcription, and the Politics of Critical Reading*, 23 LEGAL STUD. F. 355, 361 (1999).

<sup>135</sup> See Sarat, *supra* note 134, at 361 (“[T]he trial transcript offers itself up for interpretation. While it may ‘freeze’ the record, the transcript cannot govern its own interpretation.”).

<sup>136</sup> JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* 185–86 (1985).

<sup>137</sup> *Id.* at 185.

<sup>138</sup> *Id.* at 191.

<sup>139</sup> Feminist theorists in particular have called attention to the way law functions as a system of power, deciding what can be said, and what must be silenced, in a way that harms women. See, e.g., Kathleen Lahey, *On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory*, in CANADIAN PERSPECTIVES ON LEGAL THEORY 319, 319 (Richard F. Devlin ed., 1991); Linda Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 892–95 (1989). With the rise of what Janet Halley calls “Governance Feminism,” Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 340–42 (2006), other voices are now being silenced as well, as was the case in *Stephens v. Miller*.

<sup>140</sup> Brooks, *supra* note 7, at 16.

words they have used to describe complainants: “practiced,”<sup>141</sup> “unchaste,” and “impure”? And what does it mean for rape law if, after decades of reform, we are still stuck at stories and still no closer to the right judgments, by which I mean judgments, whether guilty or no, that give us epistemic comfort that the jurors’ decision was based on all necessary evidence? Certainly these are questions worth asking and pondering, and certainly these questions should inform the weight and authority we give opinions.

### III. RAPE SHIELDS

There is another reason that *Stephens v. Miller* is interesting. Nearly forty years after feminists secured passage of the federal rape shield rule and a host of state cognates, rape shield laws continue to be problematic, flawed, and—most troubling of all—unpredictable, especially when it comes to the exception that allows evidence of a complainant’s sexual history where doing so is necessary to protect the defendant’s constitutional rights.<sup>142</sup> The en banc decision in *Stephens v. Miller*, perhaps more than any other case, places these flaws in sharp relief. It speaks volumes that eleven judges of the Seventh Circuit issued seven opinions: four judges joined the plurality decision, two judges wrote concurring opinions, and four judges wrote dissenting opinions.

To make sense of the difficulties that inhere in applying rape shield rules to a case like *Stephens v. Miller*—indeed, to innumerable rape cases—it pays to begin not with *Stephens v. Miller* but with Rule 412 itself, which was signed into law on October 28, 1978, as the centerpiece of the Privacy Protection for Rape Victims Act.<sup>143</sup> The bill’s principal sponsor, Representative Elizabeth Holtzman, made clear the goal was to close evidentiary doors that put rape victims themselves on trial and made rape prosecutions so difficult to prosecute:

Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim’s morality, not trials of the defendant’s innocence or guilt, it is not surprising that it is the least reported crime. . . [I]t is permissible still to subject rape victims to brutal cross-examination about their past sexual histories. H.R. 4727 would rectify this problem in Federal courts and I hope, also serve as a model to suggest to the remaining states that reform of

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<sup>141</sup> *People v. Abbott*, 19 Wend. 192, 195 (N.Y. Sup. Ct. 1838) (“Will you not more readily infer assent in the practiced Messalina. . .?”).

<sup>142</sup> See *infra* notes 159 through 171 and accompanying text.

<sup>143</sup> Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046.

existing rape laws is important to the equity of our criminal justice system.<sup>144</sup>

Then-Senator Joe Biden also spoke in support of passage:

The enactment of this legislation will eliminate the traditional defense strategy. . . of placing the victim and her reputation on trial in lieu of the defendant [and] end the practice . . . wherein rape victims are bullied and cross-examined about their prior sexual experience[, making] the trial almost as degrading as the rape itself.<sup>145</sup>

President Jimmy Carter also spoke when signing Rule 412 into law, describing the rule as intended “to end the public degradation of rape victims and, by protecting victims from humiliation, to encourage the reporting of rape.”<sup>146</sup>

The result was Rule 412 of the Federal Rule of Evidence, which declared inadmissible, in any criminal proceeding<sup>147</sup> involving alleged sexual misconduct, any evidence of the alleged victim’s past sexual behavior or sexual predisposition whether offered as substantive evidence or for impeachment.<sup>148</sup> Rule 412 permits only three exceptions to this ban. One, such evidence may be admitted when offered “to prove that someone other than the defendant was the source of semen, injury, or other physical evidence.”<sup>149</sup> Two, such evidence may be admitted if it constitutes “sexual be-

<sup>144</sup> 124 CONG. REC. 24, 913 (1978) (statement of Rep. Holtzman).

<sup>145</sup> *Id.* at 36, 256 (statement of Sen. Biden).

<sup>146</sup> 14 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1902 (Oct. 30, 1978).

<sup>147</sup> Rule 412 was later amended to apply to civil cases as well.

<sup>148</sup> FED. R. EVID. 412(a). For example, the rape shield rule has resulted in the exclusion of the following evidence at trial: 1) the alleged victim’s “general reputation in around the Army post”; 2) the victim’s “habit of calling out to the barracks to speak to various and sundry soldiers”; 3) the victim’s “habit of coming to the post to meet people and of her habit for being at the barracks at the snack bar”; 4) evidence from the alleged victim’s former landlord regarding his experience with her promiscuity; and 5) a social worker’s opinion of the alleged victim. *Doe v. United States*, 666 F.2d 43, 47 (4th Cir. 1981).

<sup>149</sup> FED. R. EVID. 412(b)(1)(A). For example, in a rape trial in which the prosecution sought to introduce evidence that a rape kit examination following the alleged incident revealed the presence of semen, the defense would be permitted to introduce evidence that the semen originated from another person. This exception is sometimes referred to as the “Scottsboro rebuttal,” based on the case in which nine black youths were accused of raping two white women on a freight train. 23 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5388 (1980). In its case in chief, the prosecution offered medical testimony to establish the presence of semen. In response, the defense was eventually allowed to introduce evidence that the women, who were both prostitutes, had had intercourse with two other men the night before, and medical testimony that the small amount of semen found was inconsistent with the gang rape allegation, and that the semen was non-motile, indicating it had been present at least twelve hours prior to the women boarding the train. DAN. T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 81–84, 213, 229–30 (1969) Notwithstanding the paucity of the evidence and the fact that one of the women recanted and testified for the defense, the nine youths were repeatedly convicted. JAMES GOODMAN, STORIES OF SCOTTSBORO 393–95, 414 (1994).

havior [by the alleged victim] with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor.”<sup>150</sup> Three, such evidence is admissible if “exclusion would violate the defendant’s constitutional rights.”<sup>151</sup>

Perhaps not surprisingly, Rule 412 and similar state rules have been controversial since their inception. For victim advocates, rape shield rules have not protected rape victims as hoped.<sup>152</sup> Indeed, for many proponents, the exceptions—particularly the constitutional catch-all exception—have swallowed the rule, rendering the shield a sieve.<sup>153</sup> Rape shields certainly have not leveled the playing field for victims of rape. Rapes remain underreported,<sup>154</sup> conviction rates remain low,<sup>155</sup> and victims who come forward continue to face demeaning and victim-blaming cross-examination in the courtroom amounting to a “second victimization.”<sup>156</sup> On the other side,

<sup>150</sup> FED. R. EVID. 412(b)(1)(B). Thus, where the defense is consent, the rape shield rule would not prohibit the defendant from introducing evidence, through cross-examination or otherwise, that he had previously engaged in consensual sexual activity with his accuser. For example, in *People v. Jovanovic*, 700 N.Y.S.2d 156 (App. Div. 1999), the court ruled that emails in which the accuser described herself as enjoying sadomasochistic sex and enjoying being a “slave” were admissible as conduct with the accused. *Id.* at 169–70. It should be noted that this exception, rather than changing the common law, is consistent with the common law.

<sup>151</sup> FED. R. EVID. 412(b)(1)(C). This exception has been described as a “catch-basin” because it allows courts wide discretion in determining when a state’s interest in excluding sexual history must give way to a defendant’s right to confront witnesses or present a defense. See Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 775 (1986). This exception has been read as allowing the admission of sexual history evidence to show bias, *Olden v. Kentucky*, 488 U.S. 227, 231–32 (1988); to show evidence of prior sexual knowledge, *LaJoie v. Thompson*, 217 F.3d 663, 671–73 (9th Cir. 2000); and to show prior false accusations, *Redmond v. Kingston*, 240 F.3d 590, 592 (7th Cir. 2001).

<sup>152</sup> CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 155 (1992) (finding modest benefits of rape law reform, with those benefits accruing largely to victims in stranger-rape cases); Nancy E. Snow, *Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims*, in *A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE* 245, 245 (Keith Burgess-Jackson ed., 1999) (noting that “[r]ecent studies of the impact of rape shield legislation conclude that its value has been largely ‘symbolic’”).

<sup>153</sup> Rape shield laws have been applied haphazardly and incoherently. As Michelle Anderson observed almost a decade ago, “Cases managed to slip past rape shields when they involved women previously intimate with the defendant, women who frequented bars to attract new sexual partners, prostitutes, or other women deemed similarly promiscuous.” Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 55 (2002).

<sup>154</sup> Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 986 (2004); Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 518–19 (2014).

<sup>155</sup> David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997) (concluding that rape law reforms have “generally had little or no effect on the outcomes of rape cases”); Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CALIF. L. REV. 1631, 1657–60 (2012).

<sup>156</sup> LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM* 29–36 (1991); GREGORY M. MATOESIAN, *REPRODUCING RAPE:*

many defense attorneys have been critical as well, but for entirely different reasons. For these critics, rape shields exclude relevant evidence that would aid in trial's truth-seeking function. These critics also complain that rape shield rules unfairly curtail a defendant's Sixth Amendment right to confront witnesses and to present evidence in his own defense.<sup>157</sup>

*Stephens v. Miller*<sup>158</sup> reflects this dissatisfaction. While rape shield's exceptions are straightforward and easily applied, at least most of the time, the constitutional catch-all exception seems amorphous, malleable, and subjective. When will the exclusion of sexual behavior evidence "violate the defendant's constitutional rights"? In *Stephens v. Miller*, the defendant hinged his argument on his constitutional right to testify in his own defense. But already, this "right" needs clarification since it is nowhere included in the Bill of Rights and rather is an implied right. But what other rights are implied? For example, the Court has also inferred, via the Sixth Amendment's right to confront witnesses, an implied right "to show a prototypical form of bias on the part of the witness."<sup>159</sup> Even more amorphous, if every defendant has a general Due Process right to a "fair" trial, how do we determine when *that* right is violated? In *Chambers v. Mississippi*<sup>160</sup> the Court held that where testimony is critical to a criminal defendant, is supported by "persuasive assurances of trustworthiness,"<sup>161</sup> and directly affects the ascertainment of guilt, the Rules of Evidence may not be applied "mechanistically to defeat the ends of justice,"<sup>162</sup> but the reach of the holding remains unclear. Nor did the Court add much clarity in *Holmes v. South Carolina*,<sup>163</sup> in which it read the Due Process Clause as guaranteeing criminal defendants "'a meaningful opportunity to present a complete defense.'"<sup>164</sup> But what exactly is a meaningful opportunity to present a complete defense?

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DOMINATION THROUGH TALK IN THE COURTROOM 91–107 (1993); TASLITZ, *supra* note 6, at 81–99; cf. Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1059 (1991) (observing that in "many rape prosecutions, the victim, for all practical purposes, becomes a pseudo-defendant"); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12 (1977) (noting that rape cases often put the "victim on trial").

<sup>157</sup> See, e.g., David S. Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1, 14–46 (1976); Alexander Tanford & Anthony Boachio, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 556–60 (1980); Frederick Eisenbud, Note, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403, 419–25 (1975).

<sup>158</sup> 13 F.3d 998 (7th Cir. 1994) (en banc).

<sup>159</sup> *Olden v. Kentucky*, 488 U.S. 227, 231 (1988); see also *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Of course, what constitutes a "prototypical" form of bias remains a point of contention.

<sup>160</sup> 410 U.S. 284 (1973).

<sup>161</sup> *Id.* at 302.

<sup>162</sup> *Id.*

<sup>163</sup> 547 U.S. 319 (2006).

<sup>164</sup> *Id.* at 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683 (1986)).

To further complicate matters, even if the defendant has a constitutional right at issue to trigger an exception under Rule 412, the admissibility of evidence relating to a complainant's sexual history can still be curtailed. For example, while a defendant has a constitutional right to testify, that right is not absolute and may be circumscribed to accommodate other legitimate interests in the trial process.<sup>165</sup> As the en banc court in *Stephens v. Miller* observed by analogy, a defendant may have a right to testify, but there is no "constitutional right to commit perjury," and "numerous procedural and state evidentiary rules control the presentation of evidence and do not offend a criminal defendant's right to testify."<sup>166</sup> But how should one balance the state interests against a defendant's constitutional right? And as Stephens asked in his petition for certiorari to the Supreme Court, what role, if any, should the court's assessment of the credibility of the evidence play?<sup>167</sup> What standard should a court apply in judging the importance of the evidence to the defense?<sup>168</sup> In whose favor should any doubt be resolved?<sup>169</sup> Rather than addressing these issues, the plurality opinion in *Stephens v. Miller* skirted them<sup>170</sup> and held simply that the trial court:

properly balanced Stephens's right to testify with Indiana's interest because it allowed him to testify about what happened and that he said something that upset the complainant. . . . The interests served by the Indiana Rape Shield Statute justify this very minor imposition on Stephens's right to testify.<sup>171</sup>

Given this vague balancing test, it was easy for the dissenting judges to apply the same test and reach the opposite conclusion, that Stephens was deprived of his constitutional right to testify.

But these are only some of the difficulties presented by Rule 412 and state cognates. As I have explored elsewhere, the main argument in favor of rape shield rules—that sexual history is irrelevant<sup>172</sup>—upon close inspection

<sup>165</sup> See *Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987).

<sup>166</sup> *Stephens v. Miller*, 13 F.3d 998, 1002 (7th Cir. 1994) (en banc).

<sup>167</sup> Petition for Writ of Certiorari at 17, *Stephens v. Miller*, 13 F.3d 998 (1994) (No. 93-1734).

<sup>168</sup> *Id.* at 18.

<sup>169</sup> *Id.* at 16.

<sup>170</sup> *Stephens*, 13 F.3d at 1012 (Cuhady, J., dissenting) (describing the majority's treatment of the balancing test as "cursory").

<sup>171</sup> *Id.* at 1002.

<sup>172</sup> See, e.g., Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1467–68 (2012) ("Regardless of normative assessments of its worth, sexual history is not probative of consent."); Galvin, *Shielding Rape*, *supra* note 151, at 799 ("[T]he mere fact that the complainant has previously engaged in consensual sexual activity affords no basis for inferring consent on a later occasion."); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 131 (1996) ("The notion that any woman who has consented once to sex is likely to consent always, if it was ever acceptable, cannot now be sustained.").

reveals itself to be remarkably weak.<sup>173</sup> It certainly cannot be squared with the very liberal approach normally accorded relevancy. Rule 401, after all, defines as “relevant” evidence that has “any tendency to make a fact more or less probable than it would be without the evidence.”<sup>174</sup> The scale is not just tipped towards admissibility. It is weighted such that George Fisher has observed it “would be hard to devise a more lenient test of probativeness than Rule 401’s ‘any tendency’ standard.”<sup>175</sup> While prior consent is not probative of consent always, it is slightly probative of consent in the future, which is all Rule 401’s “any tendency” standard requires. Indeed, if sexual history had no bearing on consent, one would conclude that whether or not a complainant was an avowed virgin or a lesbian would be irrelevant to countering a consent defense. In fact, courts have admitted such evidence.<sup>176</sup> The claim that “sexual history is irrelevant” is also difficult to square with more mundane evidence that it is routinely admitted in sexual assault cases, including background evidence.<sup>177</sup> Consider *People v. Jovanovic*,<sup>178</sup> a rape case in which the jury learned that the complainant was a “Barnard undergraduate” from “Salamanca, a small town in upstate New York,” and that the defendant was a fan of the photographer Joel-Peter Witkin.<sup>179</sup> If such mundane information has probative value, then excluding sexual history evidence solely on the ground that it lacks *any* probative value does not make sense.

There is also the problem of internal inconsistency. For example, if sexual history is irrelevant and is not probative of consent, then the exception allowing evidence of “sexual behavior with respect to the person ac-

<sup>173</sup> Capers, *Real Women, Real Rape*, *supra* note 14, at 847–49.

<sup>174</sup> FED. R. EVID. 401.

<sup>175</sup> GEORGE FISHER, EVIDENCE 23 (3d ed. 2013); *see also* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 588 (1993) (noting that the Federal Rules of Evidence in general have a “liberal thrust”).

<sup>176</sup> Capers, *Real Women, Real Rape*, *supra* note 14, at 850–51; *see, e.g.*, *People v. Prentiss*, 172 P.3d 917, 923–24 (Colo. App. 2006) (permitting defendant to offer evidence of victim’s alleged non-virginity as evidence he did not cause her hymenal injury); *State v. Preston*, 427 A.2d 32, 33–34 (N.H. 1981) (permitting victim’s testimony about her virginity as evidence of lack of consent); *State v. Gavigan*, 330 N.W.2d 571, 575–78 (Wis. 1983) (permitting victim to repeat her conversation with defendant, during which she identified herself as a virgin and Christian); *see also* *Commonwealth v. McKay*, 294 N.E.2d 213, 224–25 (Mass. 1973) (concluding that virginity has probative value on the issue of consent, but that lack of virginity does not). A court has also permitted an alleged victim to introduce evidence that she is a lesbian to refute any claim that she consented to sex with the male defendant. *Meaders v. United States*, 519 A.2d 1248, 1256–57 (D.C. 1986) (Gallagher, J., concurring in part and dissenting in part) (“It is almost too obvious to mention that—where consent is the issue (as here)—if the complaining witness offers on direct examination, among other things, that she is a lesbian, this may seriously impair a defense of consent to the charged rape.”).

<sup>177</sup> Capers, *Real Women, Real Rape*, *supra* note 14, at 850–51. This is not to say that rape shield laws cannot be justified on policy grounds—that they protect complainants from embarrassment and may encourage more victims to come forward. Rather, this is to say that oft-articulated rationale, relevancy, is on closer inspection insufficient.

<sup>178</sup> 700 N.Y.S.2d 156 (N.Y. App. Div. 1999).

<sup>179</sup> *Id.* at 159–60.

cused”<sup>180</sup>—a standard exception in rape shields—is deeply problematic. Put differently, if we accept that one always has the right to refuse consent, whether the person seeking consent is the person’s husband,<sup>181</sup> boyfriend,<sup>182</sup> or a stranger, then permitting an exception for husbands and boyfriends to introduce the complainant’s sexual history with them *on the ground that prior consent is relevant in these cases* is difficult to justify.

Going beyond the surface of rape shield laws, there is also the problem related to the expressive message communicated by rape shield laws: on a certain level, they reinscribe the chastity requirement that feminists hoped to abolish. Allow me to elaborate. By concealing evidence of sexuality, rape shields in effect encourage jurors to assume that the victim is chaste, or at least a “good girl.”<sup>183</sup> Rather than communicating that everyone is entitled to sexual autonomy and agency, rape shields in effect communicate the normative message that sexuality is something to be “concealed, corseted, and locked away.”<sup>184</sup> In short, rather than fostering a space for greater sexual liberty or disrupting history’s chastity requirement, rape shields have the effect of entrenching such requirements further. They communicate that jurors should assume the alleged complainant is without a sexual past, that she is *de facto* chaste, or at least not sexually active, and thus deserving of the law’s protection. The effect is decidedly retrograde.

Beyond this, the effect of Rule 412 is likely racially inflected. As the discussion of narrative and rape scripts in Part II should make clear, it is a fallacy to assume that when jurors are told nothing, they assume nothing. Rather, jurors fall back on default assumptions and stereotypes to assess what “really happened.”<sup>185</sup> While white women who are presented<sup>186</sup> as demure may fit the script of a “good girl” and thus benefit from rape shield’s protections, women who do not fit this script, and men,<sup>187</sup> may not. Jurors may assume an Asian woman is “exotically sexual [and] willingly submis-

<sup>180</sup> FED. R. EVID. 412(b)(1)(B).

<sup>181</sup> For a discussion of the demise of marital immunity for rape, see Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

<sup>182</sup> For example, in the case *State v. Alston*, 312 S.E.2d 470 (N.C. 1984), where the evidence showed that the boyfriend beat his girlfriend, threatened to “fix her face,” *id.* at 472, and then raped her, it should strike us as strange that the rape shield would provide no bar to the defendant offering evidence that the victim had engaged in sexual activities with him in the past. For more on this case, see Camille A. Nelson, *Consistently Revealing the Inconsistencies: The Construction of Fear in Criminal Law*, 48 ST. LOUIS U. L.J. 1261, 1277–79 (2004).

<sup>183</sup> Capers, *Real Women, Real Rape*, *supra* note 14, at 854–59.

<sup>184</sup> *Id.* at 856.

<sup>185</sup> See *supra* note 80 and accompanying text.

<sup>186</sup> Even here, a victim’s agency is often compromised, since it is the prosecutor who will determine how she is “presented” to the jury. See Capers, *Real Women, Real Rape*, *supra* note 14, at 864 n.197; Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 459–65 (2006).

<sup>187</sup> On the difficulty of imagining adult men as rape victims, see Capers, *Real Rape Too*, *supra* note 14, at 1260–78.

sive,”<sup>188</sup> or a Hispanic woman is hot blooded, “wanton and promiscuous.”<sup>189</sup> As I have written previously, rape shields are likely particularly ineffective in cases involving black women, given the long history of associating black women with sexual accessibility and with being “unrapeable.”<sup>190</sup> In short, while rape shield rules may benefit some white women because jurors, told nothing, will presume them to be “good girls,” other victims are unlikely to enjoy the same presumption.<sup>191</sup>

While I have discussed several of these problems in earlier work, there is yet another problem that to date has not been attended to: rape shield rules, in application, have created the odd result of courts adopting a “male gaze”<sup>192</sup> and casting women as sexual objects rather than recognizing them as subjects. This becomes particularly apparent when one considers the application of rape shield rules to modes of dress. The Advisory Committee Notes make clear that Rule 412 is intended to extend to matters which “may have a sexual connotation for the factfinder.”<sup>193</sup> Courts have accordingly excluded evidence of the complainant’s mode of dress at the time of the incident.<sup>194</sup> The intent behind excluding evidence of how the complainant

<sup>188</sup> Lisa C. Ikemoto, *Male Fraud*, 3 J. GENDER RACE & JUST. 511, 519–20 (2000).

<sup>189</sup> Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-racist Politics*, 47 BUFF. L. REV. 1, 89 (1999).

<sup>190</sup> Capers, *The Unintentional Rapist*, *supra* note 99, at 1368; Capers, *Real Women, Real Rape*, *supra* note 14, at 865–71; *see also* Darci E. Burrell, *Recent Developments: Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN’S L.J. 87, 89 (1993); Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 874 n.9 (1996).

<sup>191</sup> It should be noted that for years, black women were largely invisible in media discussions about rape, even though evidence suggests black women face higher victimization rates than white women. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2010, NCJ 235508 (Sept. 2011). The attention the media paid to the white victim in the Central Park jogger case, for example, is telling. In fact, there were 3,254 other reported rapes in New York that year, “including one the following week involving the near decapitation of a black woman in Fort Tryon Park and one two weeks later involving a black woman in Brooklyn who was robbed, raped, sodomized, and thrown down an airshaft of a four-story building.” JOAN DIDION, *AFTER HENRY* 255 (1992). These rapes of women of color, however, remained invisible to the media. As I wrote several years ago, it is relatively easy to summon the images of white female victims. I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 855–56 (2008). Meanwhile, the only “black females who come to mind are Tawana Brawley and the accuser in the Duke Lacrosse team rape case, both famously discredited as non-victims.” *Id.* at 856 n.115. Now, the accuser in the Dominique Strauss-Kahn case would be added to that list. *See* Capers, *Real Woman, Real Rape*, *supra* note 14, at 879–82.

<sup>192</sup> Although the concept of a “male gaze” originated in film theory, *see* Laura Mulvey, *Visual Pleasure and Narrative Cinema*, ART AFTER MODERNISM: RETHINKING REPRESENTATION 361, 366 (B. Wallis ed., 1988), the concept has crossed into feminist theory more broadly to describe not only the pleasure male spectators receive in observing women, but also the notion that “the ‘ideal’ spectator is always assumed to be male and the image of the woman is designed to flatter him.” JOHN BERGER, *WAYS OF SEEING* 64 (1972).

<sup>193</sup> FED. R. EVID. 412 advisory committee’s note to 1994 amendment.

<sup>194</sup> “Consequently . . . evidence such as that relating to the alleged victim’s mode of dress, speech or life-style will not be admissible.” *Id.*

was dressed is certainly laudable—it puts to rest one of the most notorious passages in the history of rape law, Judge Cowen’s assertion in *People v. Abbot*<sup>195</sup> that we “more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia[.]”<sup>196</sup> However, it is also troubling insofar as it reinscribes the notion that dress, regardless of the wearer’s intention, signals sexuality, indeed sexual availability.<sup>197</sup> It protects complainants, but at a cost. In protecting complainants—paradigmatically perceived to be *women* in need of protection—Rule 412 adopts a perspective reminiscent of the male gaze and, in doing so, re-objectifies women.<sup>198</sup> It denies women self-determination.<sup>199</sup> It tells women, *Although you may think you are dressing for yourself, or for comfort, or for fashion, you are in fact engaged in “sexual behavior,” so we are excluding evidence of how you dress.*

Allow me to elaborate on this last point. It is now familiar to hear women assert that they should be able to dress in ways that are sexual without risking assault and without being accused of “asking for it.” There is even a SlutWalk movement. As Deborah Tuerkheimer has written, the SlutWalk movement takes “aim at rape while expressly promoting the virtues of female sexuality,” and in doing so “situates itself where anti-rape and pro-sex norms converge.”<sup>200</sup> Tuerkheimer argues that incorporating sex-positivity

<sup>195</sup> 19 Wend.192 (N.Y. Sup. Ct. 1838).

<sup>196</sup> *Id.* at 195.

<sup>197</sup> To be sure, dress is a signal. As one commentator has observed in her discussion of the semiotic system of dress, “dress makes a sign that describes the wearer, and the wearer uses dress to make a sign.” Alinor C. Sterling, *Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women’s Clothing in Rape Trials*, 7 YALE J.L. & FEMINISM 87, 91 (1995). Roland Barthes has described dress as a kind of writing. See ROLAND BARTHES, *The Disease of Costume*, CRITICAL ESSAYS 41, 49 (Richard Howards trans., 1972). Or, as I have written, dress “is communication” with “its own syntax and grammar.” I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 6 (2008). The point here is not about the wearer using dress as a signal—for example, one of the erotic female autonomy that Duncan Kennedy famously explored. See DUNCAN KENNEDY, *SEXY DRESSING* (1993). Rather, the point here is about the spectator seeing the dress as a signal, even where no such signal is intended, or where a signal is intended for a different audience. The concern, as such, is about misreadings and usurped readings.

<sup>198</sup> Catherine MacKinnon’s observation bears repeating: “Woman through male eyes is [a] sex object, that by which man knows himself at once as [a] man and as [a] subject.” CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 122 (1989).

<sup>199</sup> This is not the only place where Rule 412 allows judges to unilaterally categorize something as “sexual behavior” which, to the victim, may not be sexual at all. The most extreme example is evidence that the complainant was a prior victim of rape, which courts have categorized as “prior sexual behavior” and thus covered by Rule 412. See *United States v. Nez*, 661 F.2d 1203, 1205–06 (10th Cir. 1981) (holding that evidence that complainant had been raped twice before falls under Rule 412’s prohibition); *State v. Muyingo*, 15 P.3d 83, 87 (Or. Ct. App. 2000) (holding that prior sexual victimization is prior sexual behavior for purposes of rape shield rule). A more prudent decision would have been to exclude such evidence under Rule 401.

<sup>200</sup> See Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1455–56 (2014).

into rape law can lead to better rape laws and greater sexual agency.<sup>201</sup> My concern also focuses on greater sexual agency, but from a different direction. My concern is not just with women who want to dress in a manner that may be sexual but also with those women who dress in ways that they think are not sexual at all. Consider a woman who wears a skirt to work—assume she works at a law firm where skirts are “business professional” attire for associates. Assume too that, working late one evening, she is sexually assaulted by a co-worker. At trial, the judge bars all reference to the woman’s skirt, make-up, and heels for fear that the jurors will consider her dress sexual behavior. While this might remove dress from jurors’ minds—again, class and race assumptions will likely impact what style of dress jurors imagine when they are told nothing—it will do so in a way that is anything but cost-free. The woman, after all, will likely not be asked whether references to her clothing should be excluded. Usually, at the request of the prosecutor, they simply are. This state of affairs may be particularly troubling for women who believed they were only dressing for themselves. If the expressive message is, *No, you were engaged in sexy dressing*, then the expressive message must also be, *To a certain extent, you participated in your own sexual objectification by dressing as you did*. Imagine how a complainant might internalize this.<sup>202</sup> Do we really want complainants thinking, *I guess I shouldn’t have worn a skirt, or heels, or lipstick?*

To be clear, I am not suggesting that this always happens. Nor am I suggesting that the benefits to excluding evidence of dress do not outweigh the costs. What I am suggesting is that we should not blind ourselves to the costs of judicially re-dressing women and of communicating to women whose agency has been denied once that their agency is being denied again, this time by a judge. We should consider ways to minimize the costs. For example, rather than judges—still mostly male<sup>203</sup>—banning all evidence of every complainant’s dress on the ground that it might be deemed sexual behavior, imagine a judge instead delivering an instruction to the jury. Imagine a judge instructing jurors: “In a society predicated on freedom, everyone enjoys freedom of dress. The law protects every person from unwanted sex and does so equally, whether that person is wearing a skirt or a business suit, heels or flats, lipstick or nothing at all.”

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<sup>201</sup> See *id.* at 1458.

<sup>202</sup> As Anne Coughlin has argued, we should pay more attention to how prosecutorial tactics and expressive messages may conflict with female agency and feminist goals. Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1605 (2009). Coughlin focuses on scripts used to interrogate and secure confessions from suspected rapists—scripts which seductively but problematically encourage suspects to blame the victim. *Id.* Something similar is at stake with Rule 412 when the state “protects” the victim by re-objectifying and re-sexualizing her.

<sup>203</sup> See Malia Reddick et al., *Racial and Gender Diversity on State Courts*, 48 JUDGES’ J. 28, 30 tbl.1 (2009) (finding percentage of female judges ranges from 33.5% in Florida to 5.6% in West Virginia).

Imagine, too, how agency-enhancing it would be if the decision regarding the admissibility of how the complainant was dressed rested not unilaterally with the judge or the prosecutor, but also took into consideration the wishes of the complainant.

As the foregoing should make clear, if we are truly concerned about retiring retrograde notions of demure women in need of protection, then rape shields, which paradigmatically assume a female victim, have much to answer for. Rape shields—and again, there is some good in them—bear troubling similarities with Victorian notions that there are certain things that a woman does not discuss. That there are things that should not be said in polite (read female) company. That just as a woman should never be asked her age, she should certainly never be asked about her sexual history. In other words, it is true that rape shield laws, at least when they are strictly applied, function as shields, but we must also acknowledge another truth: that they simultaneously function as corsets and chastity belts. Certainly there is something paternalistic, or, as I have more recently argued, maternalistic,<sup>204</sup> about this approach.

I have largely been arguing that rape shield rules are problematic because, in excluding sexual history evidence, they in fact communicate that sexual history *does* matter. They communicate that jurors should assume the complainant is chaste, is a “good girl,” is someone deserving of the law’s protection. Rape shields do not subvert the common law’s chastity requirement; instead, they reinscribe it in a different form. However, this does not have to be the case. This troubling expressive message could be countered with a different instruction. I have suggested in earlier work that courts should instruct jurors as follows:

Everyone deserves to have the criminal law vindicate them when they have been raped, regardless of their sexual history. Engaging in sexual behavior, whether it be once or innumerable times, does not render a person outside of the law’s protection. Everyone is entitled to sexual autonomy, and no one, by merely engaging in sex, assumes the risk of subsequent rape. Put differently, before the law, it does not matter whether a complainant is a virgin or sexually active. Before the law, everyone is entitled to legal respect, regardless of his or her sexual past.<sup>205</sup> Accordingly, [although you may hear evidence of the complainant’s sexual history in this case,] bear in mind that in this case and in all rape cases, all rape victims are entitled to the law’s protection.<sup>206</sup>

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<sup>204</sup> I. Bennett Capers, *On “Violence Against Women,”* 13 OHIO ST. J. CRIM. L. 347, 356 (2016).

<sup>205</sup> This instruction borrows heavily from Michelle Anderson’s normative vision of rape law. See Anderson, *supra* note 153, at 55.

<sup>206</sup> Capers, *Real Women, Real Rape*, *supra* note 14, at 872.

Such an instruction has the potential to counter rape shield's troubling expressive message that jurors should assume the complainant is chaste and good. Such an instruction decouples protection from sexual history, making it clear that everyone is entitled to sexual agency without judgment.<sup>207</sup> To the extent rape shields are sex-negative, such an instruction is the very opposite: sex-positive.

There is another point to be made about the two instructions I have now offered, and that is this: these instructions can play a role in changing the culture. If, as Alexis de Tocqueville argued, serving on a jury is an education and one way we learn about good citizenship, then we should use that opportunity to teach citizens that everyone is entitled to equal respect and equal protection and everyone has the right to sexual agency.

I would be remiss if I did not at least note one other problem with rape shields. Rape shield rules seem outdated when applied to the cases that matter most now. Rape shield rules were enacted at a time when it was especially difficult to secure a conviction even in stranger rape cases, and the pressing issue was proving that a defendant engaged in sexual intercourse without consent and by force, the standard definition of rape. Due in part to the reforms urged by feminists—eliminating the corroboration requirement, abolishing or at least limiting the resistance requirement, and repealing the marital immunity rule, to name a few—we are now in another era. Just consider: the terms “date rape” and “acquaintance rape,” now part of the popular lexicon, entered the conversation in the early 1980s,<sup>208</sup> *after* rape shield rules were enacted. It was only in the 1980s that society began to acknowledge that sexual assault by intimates was also “real rape,” to borrow from Susan Estrich’s phrasing.<sup>209</sup> Now, “it is acquaintance rape that is in the zeitgeist” and that has become the most pervasive danger,<sup>210</sup> and with this change has come a different legal issue in rendering rape judgments. Now, at a time when force is no longer required for many rape prosecutions, there is often the issue of whether the defendant was mistaken—in short, whether the defendant honestly and reasonably believed there was consent. Rule 412 and its state cognates largely predate this change<sup>211</sup> and they have proved an odd fit indeed.

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<sup>207</sup> As Julia Simon-Kerr has noted, there is a long history of associating a woman’s worth and goodness, including her honesty, with her chastity. See generally Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854 (2008); Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. (forthcoming 2016).

<sup>208</sup> The entry of the term “date rape” in English-language books can be seen in a Google ngram using the search term “date rape.” See Ngram Viewer, GOOGLE BOOKS, <https://books.google.com/ngrams> (graph the words “date rape”).

<sup>209</sup> SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* 3 (1987).

<sup>210</sup> Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 2 (2015).

<sup>211</sup> Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 431 (1998) (“Before rape law reform, the issue of *mens rea* rarely arose in rape trials.”).

Using *Stephens v. Miller* to re-conceptualize rape shield rules cannot address all of these issues, but it can address some.

#### IV. RETHINKING RAPE SHIELDS

As the foregoing should make clear, rape shields remain deeply problematic. They are imperfect and send messages that, upon close inspection, reveal themselves to be retrograde rather than progressive, sex negative rather than sex positive. While they may benefit some women—women who because of race or class can easily fit the script of ideal, “good” victims—it is unlikely that this benefit extends to other individuals who do not fit the ideal victim script. For these victims, jurors who are told nothing likely turn to pre-conceived stereotypes that may be diametrically at odds with rape shields’ intended message.

Given these problems and the often opposing goals of victim advocates and defense lawyers, it may very well be impossible to fashion a rape shield rule that satisfies everyone. That said, they can certainly be improved, and they can be applied so that they restore to juries the power to decide crucial facts, especially in cases where the probative value of evidence is strong and the risk of unfair prejudice has been minimized. *Stephens v. Miller* can point the way out of two of the major, recurring problems with rape shield laws: their sometimes overbreadth and their inconsistency with our intuitions about the right judgments.<sup>212</sup> My argument is radical in its simplicity. Radical, because rape shields have governed rape trials for some forty-five years, excluding evidence in literally tens of thousands of rape trials, without such an intervention. Simple, because the solution does not require a major reworking of rape shield rules. In theory, the language of the Federal Rape Shield, Rule 412, need not be changed at all, though I do recommend a change for the sake of clarity. The solution does not “go far to seek disquietude.”<sup>213</sup> Instead, the solution, which gets us closer to the law *ought*, comes from another part of the Rules of Evidence. The solution comes from the part governing hearsay.

Recall the effect of the rape shield in *Stephens v. Miller*. At bottom, the evidence Stephens sought to introduce, and which the en banc court held was properly excluded under Indiana’s rape shield provision, constituted nothing more than words. Because Stephens’ words seemed to reference the complainant’s past sexual behavior and sexual predisposition—“[d]on’t you like it like this . . . Tim Hall said you did” and that she enjoyed “switching

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<sup>212</sup> Again, by “right judgment,” I am not referring to a particular verdict, guilty or not guilty. Rather, I am referring to a judgment that gives us the sense that crucial evidence was decided by a jury and that the jury considered all relevant and non-prejudicial evidence. It is this type of “right judgment” that is consistent with the role of the jury, legitimacy, and community acceptance.

<sup>213</sup> WILLIAM WORDSWORTH, *PRELUDE*, Book Five, v.51–52 (1805).

partners”<sup>214</sup>—the en banc court deemed his words as falling within the scope of Indiana’s rape shield rule. Nor was the plurality decision alone in concluding that Stephens’s proffered evidence was sexual predisposition evidence within the meaning of Indiana’s rape shield rule; every court that considered Stephens’s case assumed that the evidence Stephens sought to introduce—again, his words—amounted to sexual history evidence and thus was presumptively barred under the rape shield rule. Faced with the first such ruling, from the judge who presided over Stephens’s trial, Stephens was compelled to turn to the only option the trial judge provided: Stephens testified that he said “something” to the woman.<sup>215</sup> Stephens testified that this “something” angered the woman, leading her to retroactively withdraw her consent and claim that she had been raped.<sup>216</sup> This claim, predicated on Stephens’s vague “I said something,” certainly did not persuade the jury, and likely hurt his defense for the reasons I have already articulated.<sup>217</sup> They returned a verdict of guilty, and the judge imposed a sentence of twenty years.

However, something curious emerges if we bracket the rape shield rule for a moment and return to Stephens’s original words: Freed from the shadow of the rape shield rule, the evidentiary significance of Stephens’s out-of-court statements would turn on their relevancy and their reliability. In short, the question would no longer be, “Do these out-of-court statements violate the rape shield rule?” Rather, the evidentiary question would be, “Are the statements relevant and would admission of the statements, since they were made out of court, violate the ban against hearsay?”

As to the first question, the statements clearly added support to Stephens’s defense theory that the complainant fabricated the rape charge after consensual sex because she was angered that others had been talking about her sexual history. As the dissenting judges pointed out in the en banc opinion, the statements were “a cornerstone of Stephens’ case.”<sup>218</sup> The dissenting judges added:

The plausibility of Stephens’ defense turned in substantial part on whether the jury could be persuaded that something Stephens had said to the complainant could have so enraged her that she would have responded in the manner he alleged. Central to Stephens’ case then are the words he claims to have said that night, words the jury never heard.<sup>219</sup>

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<sup>214</sup> Stephens v. Miller, 13 F.3d 998, 1000 (7th Cir. 1994) (en banc).

<sup>215</sup> *Id.* at 1001.

<sup>216</sup> *Id.*

<sup>217</sup> See *supra* note 54 and accompanying text.

<sup>218</sup> Stephens v. Miller, 13 F.3d at 1009 (Cummings, J., dissenting).

<sup>219</sup> *Id.* at 1010.

It seems beyond dispute that the statements were clearly relevant to the defense, given relevancy's "any tendency" standard and the lenient test of probativeness.<sup>220</sup>

Now consider the second question: are Stephens's statements reliable? Or to put this in evidentiary terms, should we be concerned that his statements contain hearsay, which is defined as an out of court statement offered "in evidence to prove the truth of the matter asserted in the statement"?<sup>221</sup> Clearly all of Stephens's statements were "out of court." He offered to repeat what he said the night of March 17, 1987, and even a trial witness's own statements are included in the hearsay ban.<sup>222</sup> Stephens's statements, or at least a portion of them, seem to also satisfy the second definitional requirement of hearsay:<sup>223</sup> they include a communicative assertion. Stephens was arguably communicating something to the woman.<sup>224</sup> "Don't you like it like this? . . . Tim Hall said you did."<sup>225</sup> Indeed, upon closer inspection, Stephens's statement that the woman liked sex a particular way and enjoyed switching partners, according to Tim Hall, involved two levels of potential hearsay. Stephens's proposed testimony at trial would have included not only Stephens quoting himself, but also quoting Tim Hall. In short, Stephens wanted to testify at trial words to the effect, "I told the woman, 'You like it like that, don't you.' I also told the woman, 'Tim Hall told me you like it this way and that you enjoy switching partners.'" What renders Stephens's statements non-hearsay is their failure to satisfy the third requirement: hearsay only applies to statements that are offered for the truth of the matter the declarant intended to assert.<sup>226</sup> Here, Stephens's statements were not offered at trial for their truth. Instead, he offered them for another purpose entirely.

An illustration may be useful. Consider an example in which a husband comes home to find his wife despondent. She calmly tells him, "My ex-boyfriend showed up here and hit me." The statement would be inadmissible at trial to prove that the woman's ex-boyfriend did in fact show up and hit her. However, assume the husband responds to the news by tracking down the ex-boyfriend and shooting him, and that the husband himself now faces

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<sup>220</sup> FED. R. EVID. 401(a); *see also id.* advisory committee's note to 1972 rules ("The standard of probability under the rule is 'more probable than it would be without the evidence.'")

<sup>221</sup> FED. R. EVID. 801(c).

<sup>222</sup> FED. R. EVID. 801 advisory committee's notes on proposed rules (observing that its decision to include a witness's own past statements within the ambit of hearsay was "one more of experience than of logic.")

<sup>223</sup> One could argue that the first part of Stephens's statement, "You like it like this," is not communicative at all since presumably the woman already knew how she enjoyed sex. However, a fairer reading would be that Stephens is essentially saying, "I know you like it like this." That information would be communicative.

<sup>224</sup> Of course, even if Stephens's statements were non-assertive, the end result would remain the same: the statements would be non-hearsay, and thus not barred by the rule against hearsay.

<sup>225</sup> *Stephens v. Miller*, 13 F.3d 998, 1000 (7th Cir. 1994) (en banc).

<sup>226</sup> FED. R. EVID. 801(c)(2).

homicide charges. Now, the statement is admissible, although still not for its truth. Rather, it is admissible for the non-truth purpose to show the *effect* the words had on him, and thus support a provocation defense.

Viewed as a hearsay issue, it becomes apparent that Stephens was not offering his out of court statement, or the statement he repeated from Tim Hall, to prove that the woman liked sex in a particular position or enjoyed switching partners. For starters, it is hard to imagine such information being relevant to the issue of consent. Nor was Stephens offering the statements to prove that *he* believed the woman liked sex in a particular position or switching partners. It is hard to imagine this being relevant either. The crux of Stephens's defense in no way turned on the substantive truth of what he was saying. This becomes clear by engaging in an evidentiary thought exercise. If Tim Hall later told Stephens, "I was just joshing you, I was only joking," Stephens would still want to repeat his statements in court. He would want to repeat them not because he is offering them for their truth—he might even be willing to stipulate that he later learned his friend was joking—but to contextualize and explain his claim of why she responded as she did. Quite simply, Stephens was not offering these statements for their truth, but in classic non-hearsay fashion, to show the effect on the listener and to explain why the woman may have been motivated to react in anger, terminate her consent, order him to leave, and falsely accuse him of rape.<sup>227</sup> The ban against hearsay would present no bar to its admissibility.<sup>228</sup> The jurors could still dismiss Stephens's testimony as not-credible, but the jurors would at least hear his testimony. They would base their decision on more evidence, rather than less, and on specific, concrete statements rather than the vague and difficult-to-credit "something" pressed upon Stephens by the trial judge.

Focusing on the non-hearsay nature of the contested evidence and the issue of what the evidence is being offered for—that Stephens was not offering his statements for their truth—suggests a way out of a recurring problem in applying rape shield rules. Each court that considered Stephens's case deemed his statements as falling within the scope of Indiana's rape shield cognate to Rule 412 of the Federal Rules of Evidence because of a sequential error. Rather than first asking whether Stephens's proffered testimony

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<sup>227</sup> To be sure, Stephens's defense would be enhanced if his assertions were true. Were they false, the woman might have been more likely to react in confusion. If true, however, the woman might be indignant that her sex life had been made public—perhaps indignant enough to want to retaliate by withdrawing consent and accusing Stephens of rape. (Credit is due to George Fisher for urging me to consider this possibility). But while the truth of Stephens's statement would buttress his defense, the truth is not necessary to it. Again, the judge can instruct jurors to not consider the statement as true. The judge might even require Stephens to so stipulate.

<sup>228</sup> The sole remaining issue would be to balance its probative value against the risk of undue prejudice, but here, too, it would likely survive admission. The probative value is high, and any risk that jurors would misuse the evidence say, for its truth, can be tempered the usual way, with a limiting instruction from the court pursuant to FED. R. EVID. 105.

was relevant and trustworthy (since they consisted of out of court statements), the courts immediately turned to whether the statements violated the rape shield rule as “evidence of the victim’s past sexual conduct.”<sup>229</sup> Because of this sequential error, the courts assumed that Stephens was in fact offering the evidence to prove the “victim’s past sexual conduct.” Had the courts first asked the relevancy and trustworthiness questions, or at least asked them at some point, the courts might have realized that the trustworthiness/hearsay analysis provides a way to apply rape shield rules in a way that seems fairer, more consistent with a defendant’s constitutional right to present a defense, and more consistent with allowing jurors to decide issues of fact to reach the right judgment, whether that be a judgment of guilty or not guilty.<sup>230</sup> Put differently, the distinction between evidence offered for its truth and evidence offered for some other reason—the same test for distinguishing hearsay from non-hearsay—could have presented the trial judge in *Stephens v. Miller*, and judges in numerous other sexual assault cases, a way to rethink rape shield rules and avoid overbreadth. It makes some sense that rape shields would bar evidence of a victim’s past sexual conduct if offered for its truth. It makes less sense that rape shields should also bar evidence not offered for its truth at all, but for some other non-truth reason. This is the approach taken by Rule 412 in another context, that of prior false accusations of rape. Courts treat such prior accusations as outside of Rule 412’s prohibition of sexual history evidence in part because false accusations are not “sexual conduct,” but also in part because they are not offered for their truth, but instead for their very falsity to consider in judging the credibility of the complainant.<sup>231</sup>

This is what I mean when I suggest *Stephens v. Miller* presented a missed opportunity. Had the courts proceeded in a different sequence, or at least thought seriously at some point about whether Stephens was offering evidence for its truth, the plurality could have reached a very different decision that would have served as a model for other courts to rethink the applicability of rape shield rules. More specifically, the plurality could have ruled that since such evidence was not being offered for its truth, the rape shield rule had no applicability at all. Such non-truth evidence certainly avoids the risk of embarrassment or invading the victim’s privacy that in part motivated the widespread passage of rape shield laws. Thus, the question would simply be one of weighing the relevancy against the risk of unfair prejudice. The plurality could have suggested a limiting instruction that sexual evidence

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<sup>229</sup> IND. CODE § 35-37-4-4 (2016).

<sup>230</sup> This is not the only route by which the defense may have been able to admit Stephens’s statements. The defense could also have argued that admission was warranted under *Olden v. Kentucky*, which held that it is a violation of a defendant’s Sixth Amendment right to confront witnesses to prohibit him from cross-examining his accuser to show “a prototypical form of bias.” 488 U.S. 227, 231 (1988).

<sup>231</sup> See, e.g., *State v. Smith*, 743 So.2d 199, 202–23 (La. 1999); see also FED. R. EVID. 412 advisory committee’s note to 1994 amendment (“Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412.”).

would be admissible where it is relevant and used for non-truth purposes. In short, the plurality could have pointed the way to a better application of rape shield rules.

Thus far, I have been suggesting that improving rape shields to minimize two of their most pressing problems—overbreadth and the sense that they are often out of step with the our sense of who should be deciding crucial facts—could have been accomplished had the en banc court simply interpreted the rape shield’s application as limited to sexual history evidence offered for its truth. The language of Indiana’s rape shield rule,<sup>232</sup> and even more so the federal rape shield rule,<sup>233</sup> already lends itself to such a reading. Such a ruling could have inspired other courts to similarly apply rape shields in a more judicious fashion. That said, to further clarify how and when rape shields should be applied, one could imagine a simple amendment to the rule. For example, the federal rape shield rule could be amended, in relevant part, as follows:

The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

- (a) Evidence offered to prove a claim that a victim in fact engaged in other sexual behavior; or
- (b) Evidence offered to prove a claim that a victim in fact had a sexual predisposition.<sup>234</sup>

<sup>232</sup> In relevant part, Indiana’s rape shield provides:

Sec. 4. (a) In a prosecution for a sex crime as defined in IC 35-42-4:

- (1) evidence of the victim’s past sexual conduct;
- (2) evidence of the past sexual conduct of a witness other than the accused;
- (3) opinion evidence of the victim’s past sexual conduct;
- (4) opinion evidence of the past sexual conduct of a witness other than the accused;
- (5) reputation evidence of the victim’s past sexual conduct; and
- (6) reputation evidence of the past sexual conduct of a witness other than the accused;

may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

IND. CODE § 35-37-4-4 (2016).

<sup>233</sup> In relevant part, the federal rape shield rule applies to “evidence offered to prove that a victim engaged in other sexual behavior; or . . . to prove a victim’s sexual predisposition.” FED. R. EVID. 412(a).

<sup>234</sup> It could be argued that such an amendment should be unnecessary for the federal rape shield rule because it already specifies that it bars evidence “offered to prove” that a victim engaged in other sexual conduct or a victim’s sexual predisposition. FED. R. EVID. 412. Indeed, one of the dissenters in *Stephens v. Miller* made this argument. 13 F.3d 998, 1012 (7th Cir. 1994) (en banc) (Cudahy, J., dissenting) (“The testimony that Stephens sought to offer, however, neither sought to prove the victim’s character nor was intended to address the question of consent. Rather than attempting to prove the truth of any matter about Wilburn’s character, Stephens ostensibly wanted to offer his story to show its effect on the listener.”). At least one other court, albeit in dicta, made a similar distinction. See *People v. Jovanovic*, 700 N.Y.S.2d 156, 166 (Sup. Ct. App. Div. 1999) (noting that “a statement may be relevant as proof of the speaker’s, or the listener’s, state of mind” rather

Thus, in situations where a defendant is offering evidence of a sexual nature, the court would analyze the evidentiary issue sequentially, first turning to relevancy and trustworthiness under the traditional hearsay rules before turning to the rape shield. If the trial court determines that the party is not offering the evidence for its truth but for some other, non-truth reason, Rule 412 itself would not bar its admission. Rather, the trial court would engage in the normal probative value versus unfair prejudice balancing test that applies to all evidence. Where, after conducting a balancing test, a court admits sexual evidence relating to a complainant for a non-truth purpose, the court, pursuant to Rule 105, can instruct the jury how such evidence can be used in order to minimize any risk of unfair prejudice.<sup>235</sup> For example, in *Stephens v. Miller*, the *en banc* court could have recommended an instruction along the following lines:

You have heard evidence that the defendant made a statement to the complainant to the effect that he had heard she liked sex a particular way. This statement was certainly not offered to show consent. It has no bearing on that issue at all, and as such you may not consider it on the issue of consent. Nor was it offered for its truth, i.e., that she liked sex a particular way. Indeed, you may even assume the substance of the statement to be false. Rather, I allowed the statement for a limited purpose: so that you, as finders of fact, can decide whether the defendant in fact made the statement, and if so, whether such a statement, regardless of its truth or

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than to prove the truth of the matter). However, the Advisory Committee Notes suggest that the rule was not intended to be so limited. The Advisory Committee Notes provide simply that Rule 412 bars

evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs the possible harm to the victim.

FED. R. EVID. 412 advisory committee's notes to 1994 amendment. Treatises take a similar view. *See, e.g.*, MEULLER & KIRKPATRICK, EVIDENCE, § 4.32 (5th ed. 2012) ("FRE 412(a) imposes a general prohibition against evidence of an alleged victim's 'other sexual behavior' or 'sexual predisposition.'"). Nor have most courts interpreted the rule as so limited. *See, e.g.*, *United States v. Knox*, No. ACM 28628, 1992 WL 97157 (A.F.C.M.R. Apr. 20, 1992) (interpreting M.L.R.EVID. 412 as extending its prohibition to evidence offered not for its truth, but to show the belief of the defendant); *United States v. Torres*, 937 F.2d 1469, 1471-72 (9th Cir. 1991); *United States v. Duran*, 886 F.2d 167, 168 n.3 (8th Cir. 1989). The one federal appellate decision to read Rule 412 as not barring evidence to show the defendant's reasonable belief—*Doe v. United States*, 666 F.2d 43 (4th Cir. 1981)—was roundly criticized on the ground that the court was reading a non-existing exception into Rule 412's flat prohibition. *See, e.g.*, Robert G. Spector & Teree E. Foster, *Rule 412 and the Doe Case: The Fourth Circuit Turns Back the Clock*, 35 OKLA. L. REV. 87, 96-97 (1982). The Fourth Circuit later retreated from its decision. *See United States v. Saunders*, 943 F.2d 388 (4th Cir. 1991) (interpreting Rule 412 to cover evidence offered not for its truth, but to show the belief of the defendant).

<sup>235</sup> *See* FED. R. EVID. 105 ("[T]he court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

falsity, might have so angered the complainant that it motivated her to falsely accuse the defendant of attempted rape.

My suggestion of a yet another jury instruction—this is the third so far—is sure to give some critics pause, but it should not. Although the Court has repeatedly insisted that jurors are presumed to follow instructions,<sup>236</sup> scholars have been skeptical.<sup>237</sup> However, growing evidence suggests that instructions do work under the right conditions, especially when those instructions are explained and repeated throughout the trial.<sup>238</sup> Add to this the following: to the extent the parties are concerned that some jurors will be unable to follow instructions, these jurors can be removed during *voir dire* for cause. Lastly, turning back to the trial itself, the trial court has the authority to condition the admissibility of non-truth evidence on the defendant conceding, in front of the jury, that the substance of the evidence is or may be false.<sup>239</sup>

Ideally, this proposed modification to rape shield rules would have broad application beyond the singular facts of *Stephens v. Miller*. For starters, the proposed modification would simplify cases like *United States v. Pumpkin Seed*.<sup>240</sup> In *Pumpkin Seed*, the defendant claimed that he was in the process of engaging in consensual sex with the complainant when they were spied by several neighborhood boys. The defendant told the boys to go away because he was “trying to get some” from a “minor bunner,” a derogatory term for a promiscuous woman.<sup>241</sup> According to the defendant, the complainant responded to his characterization of her by cursing the defendant and claiming rape.<sup>242</sup> Assuming the defendant sought to offer his characterization of her as a “minor bunner” not for its truth, but rather to show its effect on the complainant and thus explain her possible motivation for claiming rape, his statements would not be barred by the proposed, modified rape shield rule. Rather, the judge would conduct a probative value versus unfair prejudice balancing test to determine its admissibility, could condition admissibility on the defendant explaining to the jury that he had no basis for

<sup>236</sup> See, e.g., *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

<sup>237</sup> See, e.g., David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 409–10 (2013).

<sup>238</sup> *Id.*; see also Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 681 (2000) (arguing “that jury instructions should be given whenever they would facilitate the sound administration of the jury or would assist the jury in carrying out its twin duties of finding the facts and applying the relevant legal principles to those facts.”).

<sup>239</sup> See FED. R. EVID. 102 (directing courts to construe rules to secure the fair administration of justice); *United States v. Jackson*, 405 F. Supp. 938, 943 (E.D.N.Y. 1975) (reading Rule 102 as permitting courts to “interpret the Rules creatively so as to promote growth and development in the law of evidence in the interests of justice and reliable fact-finding”).

<sup>240</sup> 572 F.3d 552 (8th Cir. 2009).

<sup>241</sup> More specifically, the term describes a woman who “has a proclivity for engaging in sexual activities with adolescent males.” *Id.* at 555 n.2.

<sup>242</sup> *Id.* at 555.

his characterization of the woman, and would instruct the jury that the defendant's own statements were not being offered for their truth but merely to explain why the complainant may have responded as the defendant claims. Two points are worth emphasizing. First, to the extent the defendant in fact cares about the truth, these conditions may very well serve as a clearing device and prompt him to withdraw his proffer since the jury will be unable to use the evidence as he had hoped. Second, and more importantly, should the defendant agree to offer this evidence on these conditions, there is nothing in this proposal that requires the jurors to credit the defendant. The prosecution would be free, through its direct examination of the complainant and cross-examination of the defendant, to establish that such statement was never made, or that if it was made, it did not have the "fabricating" influence the defendant claims. The ultimate decision of whether to credit the defendant or not, and whether to accept his theory of the case or not, would be with the jurors. This is what justice looks like. This is what I mean by the right judgment.

Perhaps most significantly, this proposal would also apply to a category of sexual assault cases that are far more typical, such as acquaintance rape cases in which a defendant claims reasonable mistake of fact, specifically that he mistakenly but reasonably believed the complainant had consented.<sup>243</sup> A hypothetical reasonable mistake-of-fact case, as an illustration, may be helpful: Imagine a boy and girl meet on Tinder. Boy and girl engage in sexually flirtatious texts before meeting in person at a Hurrah for the Riff Raff concert. Afterwards, he invites her to his apartment to "Netflix and chill." In the apartment, when he begins kissing her, she kisses back, and when he begins undressing her, she does not protest. He proceeds to engage in sexual intercourse. In this hypothetical, which may bring to mind cases that are staples in criminal law casebooks such as *People v. Jovanovic*<sup>244</sup> and *State v. Rusk*,<sup>245</sup> the possibility of reasonable mistake lies just beneath the surface.<sup>246</sup> It is possible that from his perspective, knowing that "Netflix and

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<sup>243</sup> Importantly, consent can be expressed verbally or non-verbally. For example, the pending draft of the revised Model Penal Code criminalizes penetration without consent, but permits that "consent may be expressed or it may be inferred from behavior" such as "words and conduct—both action and inaction—in the context of all the circumstances." See MODEL PENAL CODE § 213.0(3) (AM. LAW. INST., Tentative Draft No. 2, 2016).

<sup>244</sup> 700 N.Y.S.2d 156, 164–75 (N.Y. App. Div. 1999) (involving college students who met online and joked about S&M online, with the complainant describing herself as a masochist and "pushy bottom," before meeting in person; the defendant, after inviting her back to his room, tied her up and over the course of twenty hours dropped hot candle wax on her skin and molested her with a baton.).

<sup>245</sup> 289 Md. 230, 234 (1981) (involving a complainant who met a guy at a bar, agreed to give him a lift home, and became afraid when he began badgering her to come up to his apartment, where he removed her clothes; afraid, in part because of "the look in his eyes," she did not physically resist when he engaged in sexual activity).

<sup>246</sup> Because of the difficulty of proving sexual assault, some scholars have argued that we should disallow the reasonable mistake defense in sexual assault cases. See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1102 (1986) ("My view is that such a 'negligent rapist should be punished, albeit—as in murder—less severely than the man who acts

chill” is slang for a sexual hookup,<sup>247</sup> her subsequent behavior was consistent with consent. But it is also entirely possible that from her perspective, thinking that “Netflix and chill” literally meant watching Netflix and relaxing, and then experiencing frozen fright, this was non-consensual sex. The law, in many jurisdictions, will allow the defendant to make the element-negating claim that he lacked the requisite *mens rea* to be guilty of sexual assault, because he honestly and reasonably believed that consent had been expressed.

The rule modification I am proposing would assist triers of fact in those situations in which a defendant seeks to offer out-of-court statements to explain the basis for his mistaken belief that he had received consent. Let me say up front that the point of this proposal is not to help defendants avoid justice. Far from it. Rather, the goal is to assist jurors in reaching a just result to the best of their ability, whether their verdict is one of guilty or not guilty. Consider a few possibilities, but for now try to withhold judgment. I am not asking the reader to like these defendants. But I am asking the reader to keep an open mind about whether these defendants are deserving of the law’s violence.<sup>248</sup> First, consider a variation of the case *Commonwealth v. Berkowitz*.<sup>249</sup> The defendant and complainant, both college students, had attended the same “‘Does ‘no’ sometimes means ‘yes’?” school seminar two weeks earlier, and after the seminar the complainant told a group of friends, in Berkowitz’s presence, what she liked in penis size. The complainant later showed up at his dorm room stating that she was looking for her boyfriend, agreed to hang out for a bit when she realized her boyfriend was not there, and did not physically resist when Berkowitz kissed her, fondled her, and straddled her on the bed. Assume she later accuses Berkowitz of rape. Recalling her earlier statement about what she liked in penis size, Berkowitz, invoking a mistake of fact defense, might argue that he reasonably believed the totality of her actions constituted consent.

Or consider the facts of *United States v. Sanchez*,<sup>250</sup> in which the defendant, who had previously heard that the complainant would often invite ser-

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with purpose or knowledge, or even knowledge of the risk.”). However, as long as the defense exists, one can imagine the defendant invoking the defense here. Certainly the proposed amendments to the Model Penal Code provisions on sexual assault contemplate that defendants will be entitled to make the defense. *See, e.g.,* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Discussion Draft No. 2, 2015) (maintaining the requirement that the defendant at least be reckless to be guilty of forcible rape (Section 213.1) or sexual penetration against her will or without consent (Section 213.2)).

<sup>247</sup> See Kevin Roose, “Netflix and Chill”: The Complete History of a Viral Sex Catchphrase, FUSION.NET (Aug. 27, 2015, 6:46 PM), <http://fusion.net/story/190020/netflix-and-chill/> [<https://perma.cc/6PPB-32HV>]; see also *Netflix and Chill*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=netflix%20and%20chill> [<https://perma.cc/G8MK-QAHE>] (“It means that you are going to go over to your partners [sic] house and fuck with Netflix in the background”).

<sup>248</sup> See Cover, *supra* note 8, at 1607.

<sup>249</sup> 609 A.2d 1338 (Pa. Super. Ct. 1992).

<sup>250</sup> 44 M.J. 174 (C.A.A.F. 1996).

vicemen she met at the military base's Non-Commissioned Officers Club (the "NCO Club") back to her apartment for sex, took the woman on a date at the NCO Club, then escorted her back to her room and assumed, given the circumstances and statements he had heard about the woman, that she had non-verbally communicated her consent. Let us assume he too is arrested and claims that he mistakenly, but reasonably, thought consent existed.

Lastly, consider a variation of *United States v. Knox*,<sup>251</sup> which involved both verbal and non-verbal communication. The defendant Knox was drinking with his close friend Sergeant Castonguay and Castonguay's girlfriend when the three decided to return to Knox's room, where the girlfriend sat on Castonguay's lap while Knox occasionally made attempts to run his hands along her leg.<sup>252</sup> Later, Knox stepped out of the room, and when he returned, he saw that Castonguay had carried his girlfriend to the bed and initiated sex.<sup>253</sup> Knox had previously heard that the girlfriend "liked to party," was sexually adventurous, had once taken her top off at a downtown bar, and had engaged in various sex acts in the presence of others at a beach party.<sup>254</sup> Suppose Sergeant Castonguay motioned to Knox to join in, that his girlfriend was open to a threesome. Given the totality of the circumstances and what he had heard, Knox at trial claims that he (like Berkowitz and Sanchez) assumed he had consent, especially since the girlfriend seemed to enjoy the sex.

Not one of these examples is an easy case. Not one of these cases presents a defendant who would ever be categorized as a Boy Scout or chivalrous knight in shining armor. But whether these defendants should be found guilty beyond a reasonable doubt is a separate matter. In the real world, rape cases are rarely simple, rarely black and white. There are rarely third-party witnesses in rape prosecutions to testify about the alleged sexual assault itself. In sexual assault cases that do not involve "extra" violence, there is rarely forensic evidence to compel a finding of guilty or not guilty. Rather, at the crucial moments, jurors are quite literally left with "she said, he said." This difficulty is compounded in the category of cases described above, mistake of fact cases, where we, as a society, recognize that there is sometimes a rape without a culpable rapist.<sup>255</sup> These mistake of fact cases do not involve a stranger jumping out of the bushes with a knife, but rather an acquaintance who, instead of brandishing a weapon, has been privy to conversations with and about the complainant. Indeed, consistent with evidence that men and women may "read" the same signals differ-

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<sup>251</sup> *United States v. Knox*, No. ACM 28628, 1992 WL 97157 (A.F.C.M.R. Apr. 20, 1992).

<sup>252</sup> *Id.* at \*1.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at \*5.

<sup>255</sup> See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 654 (1983) (recognizing that there may be situations where a "woman is raped but not by a rapist").

ently,<sup>256</sup> these mistake of fact cases may even involve crossed signals and crossed messages. The community to which someone belongs may even impact how one interprets a signal.<sup>257</sup> A complainant, following a date, alleges that she never consented to sex. The accused claims that, given the signals, he honestly and reasonably believed that the sexual contact was consensual. Against this backdrop, jurors must now make findings based on their assessments of the demeanor of the defendant and complainant and, as discussed in Part II, how well their stories fit in with preconceived “rape scripts.” The jurors will look for narratives that make sense, so much so that “what happened” may become indistinguishable from “what must have happened.”

Here is the rub. Further compounding the difficulty in these cases is the way courts cull the evidence. For many courts, the defendant in each of these cases described above would be prohibited from repeating at trial the statements he heard, notwithstanding the fact that these statements would be offered not for the truth, but to support a reasonable mistake of fact defense. The jury would never learn that Berkowitz based his understanding in part on what he heard the complainant say about what she liked in penis size. The jury would never learn that Sanchez based his understanding on what he heard about the complainant inviting men she met at the NCO Club to escort her home to signal she was interested in sex. The jury would never learn that Knox based his understanding in part on what he’d heard about the complainant being sexually adventurous and open to threesomes. In short, the courts would deem the statements as touching on the complainant’s sexual history or predisposition and thus presumptively barred under rape shield rule. Instead of hearing a story “with descriptive richness,” and the “persuasive power of the concrete and particular,”<sup>258</sup> the jury would be left with a story with troubling gaps and elisions. Allow me to make this point differently. Excluding these out of court statements may protect real victims from embarrassment and shame, but it does so at a cost. These same rules, as currently applied, frustrate jurors’ ability to tell whether the defendant is, in

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<sup>256</sup> David Dryden Henningsen, *Flirting with Meaning: An Examination of Miscommunication in Flirting Interactions*, 50 *SEX ROLES* 481, 487–88 (2004); Antonia Abbey & Christian Melby, *The Effects of Nonverbal Cues on Gender Differences in Perceptions of Sexual Intent*, 15 *SEX ROLES* 283, 295–96 (1986); Michelle Anderson, *Negotiating Sex*, 78 *S. CALIF. L. REV.* 1401, 1417 (2005).

<sup>257</sup> Consider a woman who can’t find the key to her apartment one evening and asks a male neighbor if she can sleep on his couch until the morning. For the male neighbor who grew up in a more progressive, sex-equality based community, that the woman asked to sleep on his couch may mean simply that. By contrast, for the male neighbor who grew up in a more traditional community, the woman’s suggestion may come across as a coded invitation, especially if he’s wondering why she didn’t ask any of the female neighbors in the building. Although Dan Kahan has focused on the cultural background of jurors in rape cases, his analysis seems applicable here. See Kahan, *supra* note 95, at 793–97. On reception theory, see generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980) (exploring how the communities to which one belongs and interacts can affect how one interprets a text).

<sup>258</sup> See *supra* note 56.

fact, a real rapist. He may be a cad, a dog, an idiot, even a complete dick. But the law should require something more before we label someone a convicted rapist. For those of us who care about justice for real victims *and* care about punishment for real rapists, the current rules are too protective and maternalistic in situations where a complainant's sexual predisposition or history is not really at issue.

What I am suggesting is something better, and that trusts jurors' ability to decide the facts of the case.<sup>259</sup> Recall again the cases described above, loosely based on the facts of *Commonwealth v. Berkowitz*, *United States v. Sanchez*, and *United States v. Knox*. In each of these cases, we can imagine the defendant seeking to offer at trial an out of court statement that he heard in order to explain why he thought, however mistakenly, that consent existed. In each of these cases, the proffered statements would clearly be relevant—indeed, they would be crucial to each defendant's theory of the case. In each of these cases, the true import of the proffered statements would lie not in their truth, the test for inadmissible hearsay, but in their effect on the defendant. Thus, relevancy rules and hearsay rules would favor admissibility. Since such evidence would not be offered “to prove a claim” that a complainant engaged in sexual behavior or had a sexual predisposition, my proposed rape shield rule would not bar their admission. Rather, the question of their admissibility would turn on weighing their probative value against the risk of unfair prejudice. In some cases, the prejudice might be too great, and trial courts would bar admission. In other cases, however, balancing might compel admission in light of a court's other gatekeeping tools, especially since in truly non-truth cases, there is little risk of embarrassment or the harassment that rape shield rules were designed to avoid. Again, one could imagine a trial court conditioning admission of these statements on a concession from the defendant about his having no basis for their truth. One can imagine jury instructions that make it patently clear that jurors must not consider the substance of the statements as true.

Applying this modified rape shield rule so that it only bars sexual history or predisposition evidence offered for the truth will not solve every problem I've identified with rape shields. But it will get us closer to epistemic comfort with the judgments jurors reach, whether they be judgments of guilt or not guilt. We might still disagree with certain outcomes, but it would not be because jurors were blindfolded. Rather, we would at least know that the jurors heard necessary evidence where the probative value was not outweighed by a substantial risk of unfair prejudice, and in doing so had the

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<sup>259</sup> Part of my trust in jurors is attributable to how different society is from when rape shields were enacted in the late 1970s. As I have written previously, “we have come a long way.” Capers, *Real Women, Real Rape*, *supra* note 14, at 876. As just one example, in 1977, 73% of surveyed Americans believed that extramarital sex was always wrong, and another 13.6% believed it was almost always wrong. Norval D. Glenn & Charles N. Weaver, *Attitudes Toward Premarital, Extramarital, and Homosexual Relations in the U.S. in the 1970s*, 15 J. SEX RES. 108, 113 (1979). We have come a long way indeed.

ability to reach a verdict crucial to “community acceptance” and validation.<sup>260</sup>

Indeed, let me take this a step further: such a rule would give us additional comfort in those cases in which a jury reaches a verdict of guilty. After all, a jury hearing the omitted out-of-court statements in *Stephens v. Miller* could easily conclude that Stephens, who suborned perjury,<sup>261</sup> is a liar and a rapist, and return a verdict of guilty. A jury hearing Berkowitz’s claim that the complainant talked about her preferred penis size in his presence could conclude that Berkowitz was credible, but determine that what he heard could not possibly lead him to reasonably believe she was consenting to sex with him, and find him guilty. Similarly, a jury, after hearing Knox’s defense that he heard his best friend’s girlfriend “liked to party” and was sexually adventurous, could easily conclude that it still was not reasonable for him to think what he heard from third parties amounted to consent from her. This, too, is what I mean about better rape judgments.

#### CONCLUSION

The goal of this Article has been to address a recurring problem with rape shields and move us closer to what the law *ought*. In time, I hope that even this fix may be unnecessary. A decade ago, when I first started thinking about rape law, it was the culture of rape that seemed most problematic. But if there is a rape culture, it is certainly not static. We have certainly come a long way. Thankfully, these days, when a norm of needing affirmative consent is gaining traction, the idea of reasonable mistake—based on what someone else said, how the complainant was dressed, how the complainant danced (was she twerking?), whether the complainant was drinking, whether the complainant supposedly said it “with a song,”<sup>262</sup> or whether the complainant occasionally liked S&M<sup>263</sup> or had a copy of *50 Shades of Grey*—may seem a relic of the past. One can only hope. Until then, some intervention is appropriate. Hopefully, my intervention is a welcome start.

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<sup>260</sup> WHITE, *supra* note 136, at 185.

<sup>261</sup> *Stephens v. Miller*, 13 F.3d 998, 1002 (7th Cir. 1994) (en banc).

<sup>262</sup> This is a reference to an ad on Spotify, which encourages people to communicate “with a song.” Interestingly, the tone of the advertisement suggests that a song can communicate interest in engaging in sex. See Spotify, *Can’t Find the Words?*, YOUTUBE (Apr. 10, 2014), <https://www.youtube.com/watch?v=YnNhFVf2ULo> [<https://perma.cc/HZM5-K6ED>].

<sup>263</sup> In *People v. Jovanovic*, the defendant apparently thought he had consent when the complainant described herself as someone who enjoyed sadomasochistic sex and being a “slave.” 700 N.Y.S.2d 156, 169 (N.Y. App. Div. 1999).