Excluding Sexual Pattern Evidence of Rape Complainants When the Defense is Consent

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Deborah Tuerkheimer, *Judging Sex,* 97 Cornell Law Review (forthcoming 2012), available on SSRN**.**

Professor's Tuerkheimer's article, *Judging Sex* is a valuable addition to the debate about where the line should be drawn when balancing the privacy of complainants in rape cases against the evidentiary and constitutional dimensions implicit in the right to present a criminal defense. She approaches the long-standing controversy with fresh eyes, arguing that any probative value imputed to sexual pattern evidence of complaining witnesses in an earlier era is clearly inapplicable in light of current sexual mores, thereby exposing the only basis for permitting such evidence as an inappropriate reliance on views of morality and sexual deviancy that no longer ring true. As a result, she presents a strictly evidentiary analysis of probative value (Rule 401) and prejudice (Rule 403), rather than falling back on the policy justifications for rape shields, which encourage rape reporting by protecting complainants from being subjected to detailed, embarrassing and often humiliating questions about their sexual histories.

Admittedly, rape shields also assume that the probative value of sexual history is low, and therefore make a categorical determination that the probative value of the evidence is substantially outweighed by considerations of complainant privacy and prejudice to the state when jurors refuse to convict because "she asked for it." However, even today some rape shields permit sexual pattern evidence of the "alleged victim," and interpretation of the Federal Rape Shield's "exception" for constitutionally required evidence occasionally reaches the same result on the grounds that promiscuity, whether by numbers or types of sexual encounters, tells us something about consent in the current incident. By debunking the probative value of sexual pattern evidence, Tuerkheimer demonstrates that in the modern sexual environment, pattern evidence should only be admitted rarely when employing the probative value/prejudice (401/403) analysis. This conclusion also suggests that the Confrontation Clause would rarely require the admission of such evidence.

She points out that this analysis is particularly significant now because the consent defense in rape cases has become ever more popular given that the presence of the defendant's DNA defeats any claim that he did not engage in sex, a staple of pre-DNA argument. As a result, consent is the only viable defense, even in some stranger rape cases. Moreover, prosecutors are now more willing to try acquaintance rape cases. However, in today's world it is not uncommon for complainants to have a number of consensual sexual partners, with whom they may have engaged in anal, oral and even group sex, besides more traditional intercourse. Thus, even if prosecutors are more willing to try these cases, are they winnable if the judge lets jurors hear such pattern evidence?

The porous nature of rape shields is a topic I previously lamented about in *Litigating Sex Crimes: Has the Last Decade Made Any Difference*, 6 International Commentary on Evidence Art. 6, at 16-17 (2009):

> Undoubtedly, the largest category of potentially rape proof women whose privacy is not guaranteed by shields is composed of young independent females, whether students or workers, who assume that drinking, partying, and freely engaging in consensual sex is not an invitation to

be sexually assaulted, and view promiscuity as a feature of modern society.

In other words, they are caught up in the double standard that encourages sexual freedom for females, but then blames them for engaging in such behavior as inviting unwanted sex when they contend an act was not consensual. This disconnect is not surprising given that the judges and even jurors who assess these young women's behavior are older, and often reflect social mores that are unforgiving of females who openly proclaim their sexuality. My suggestion was to deny admissibility unless the probative value of the specific pattern evidence could be demonstrated by clear and convincing evidence as a way of making its introduction more difficult. In contrast, Tuerkheimer asserts that even under current evidentiary standards sexual pattern evidence does not logically support a finding of consent. While I think this is a stretch in an "any tendency" FRE relevancy regime, I agree that the recent surveys she cites concerning sexual practices should overwhelmingly support exclusion under a 403 rationale, and as she suggests the only likely time that such evidence would be constitutionally required is when the prosecution has somehow opened the door to its use through overstatement or presentation of misleading evidence.

The recent attention-getting evidence she cites about changing sexual behavior comes from the 2010 National Survey of Sexual Health and Behavior, which finds that at least forty percent of women between the ages of 20 and 49 have engaged in anal sex, and most have engaged in oral sex. She also notes that a different national survey in 2005 found that among women over 25, about one in five had 7 to 14 sexual partners, and half of teenage girls engaged in vaginal sex. While one can always question precise estimates on the basis of faulty research methodology, undoubtedly applying outdated concepts of chastity to the "hook-up" generation results in inappropriate inferences about any link between sexual patterns and consent.

Tuerkheimer explains that rape shields rejected the view that sexually promiscuous women were more likely to consent to sex on any given occasion and that promiscuity indicated immorality that would render them untruthful. As a result, theories of admission shifted to "similarity" of past sexual encounters to the charged crime. She debunks treating sexual patterns like habits as ignoring the volitional character of sex. Similarly, she argues that sexual patterns cannot be considered abnormal, and they do not rest on statistical views of deviancy, but are in essence a judgment about the "appropriate bounds of female sexuality." She discusses *Gagne v. Booker*, 606 F.3d 278 (6th Cir. 2010), which has been vacated and is awaiting an en banc decision by the Sixth Circuit. *Gagne* involved sex with two men, which the defendants claimed was consensual. The trial court excluded evidence of previous three way sex involving the complainant and one of the defendants who at the time of the earlier encounter was her boyfriend, as well as a different third man. Professor Tuerkheimer analyzes the varied opinions by the panel that reversed the conviction, finding that the majority's opinion was animated by its view that the complainant's behavior was deviant, that having sex with more than one partner was unique, and that the complainant's excessive drinking vitiated the rationale of rape shield protection. She rejects these views as ignoring that the identity and relationship of the sexual partners matter, and that consent depends on the type of sexual activity with the particular person at the particular time in question. Therefore, she calls consent "contingent" and concludes that consent on one occasion is "not probative of consent on another." She also reasons that the asymmetry between views that engaging in vaginal intercourse does not suggest propensity, but anal sex or three-way sex does, demonstrates this distinction is based on morality not probativity. Ultimately, she observes it is context that makes any prior sexual incident admissible, not simply the fact that the defense is consent.

While I might have wished a bit more attention to sexual patterns when the complainant is a prostitute or has a mental disability, and a discussion of the admissibility of expert rebuttal if such evidence is permitted, the article poses an important challenge to the status quo and suggests that judges as well

as the rest of us need to put aside outdated assumptions when evaluating sexual pattern evidence. However, as I have discussed elsewhere, I think that some judges who are in jurisdictions where evidence of the defendant's prior sexual acts are widely admitted are more willing to admit pattern evidence of complainants. In other words, they consider it unfair that the complainant and the defendant are treated so differently, although the rationales for rape shields and bad act evidence are completely dissimilar. Personally, I am no fan of propensity reasoning as it affects either the complainant or the defendant.

Moreover, I think judges and jurors distinguish between different types of defendants. A college student whose conviction will brand him as a sexual predator, and subject him to lifelong registration as a sex offender after he serves what may be a lengthy sentence benefits from the sentiment that Susan Estrich once described by saying "it is far easier to condemn date rape than it is to condemn the date rapist." Until attitudes about sex, drinking, and victim blaming change, rape shields are likely to continue to be inconsistently interpreted. This raises the question of how to change public attitudes to overcome moralistic reasoning that is unduly sympathetic to defendants charged with acquaintance rape. Cultural shifts do occur. For example, there has been a sea change in attitudes about drunk drivers stemming from MADD's campaign that drinkers should appoint designated drivers. Realistically I think cultural shifts require more than a good analytical argument, but Professor Tuerkheimer's article provides support for such a change.

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