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She Acts Guilty: Sexually Charged Consciousness of Guilt Evidence Should Be Excluded Because It Is Biased against Women.

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ARTICLES

SHE ACTS GUILTY: SEXUALLY CHARGED CONSCIOUSNESS OF GUILT EVIDENCE SHOULD BE EXCLUDED BECAUSE IT IS BIASED AGAINST WOMEN

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I. INTRODUCTION

Sexually charged evidence—admitted under a consciousness of guilt theory—is utilized to convict women based on their character and not for their alleged crimes in criminal cases across the nation. This form of evidence is biased because it exploits common gender stereotypes in an ef-

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fort to obtain criminal convictions. This Article begins by giving a brief background illustrating this type of consciousness of guilt evidence and then discusses the evidentiary theory under which it is admitted. Next, it will explain why this sexually charged evidence is biased against women. The Article will conclude by arguing that this type of evidence should be excluded.

II. BACKGROUND

Two recent cause célèbres[1] illustrate the use of this evidence. In both cases, the prosecution used the defendants' supposedly inappropriate sexual behavior after the alleged crime as evidence of their consciousness of guilt.[2] By using the sexually charged evidence, the prosecution exploited gender stereotypes.

In a Florida case, the female defendant faced sexually charged evidence presented by the prosecutors that suggested she went out partying after she allegedly killed her daughter.[3] Prosecutors presented to the jury photos depicting the defendant entering a "hot body" contest and showing her dressed in a tight blue dress and boots.[4] Witnesses testified that after the alleged murder, when the defendant's daughter was purported

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1. *See* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/cause%20célèbre (last visited Feb. 24, 2013) (defining "cause célèbres" as "a legal case that excites widespread interest.").

2. *See generally* Melanie Michael, *Party Pictures Show Casey Anthony Grinding on the Dance Floor*, WTSP NEWS (May 26, 2011), http://www.wtsp.com/news/local/story.aspx?storyid=194015 (describing the prosecution's perspective on the infamous Casey Anthony case, arguing that Casey had a motive for killing her daughter: to live the life she really wanted); Josh Mankiewicz, *Cindy Sommer's Long Vindication*, NBC NEWS (Apr. 25, 2008, 2:06 PM), http://insidedateline.nbcnews.com/_news/2008/04/25/4374269-cindy-sommers-long-vindication?lite (evidencing how Sommer's suspicious behavior was used to demonstrate consciousness of guilt in the case against her for killing her Marine husband).

3. *See* Michael, *supra* note 2 (presenting the prosecution's argument that the defendant could now "live the life she wanted without Caylee [defendant's missing daughter] in the picture."); *see also* Ashleigh Banfield & Jessica Hopper, *Casey Anthony Trial: Former Boyfriend Describes Casey Anthony Romance*, ABC NEWS (May 25, 2011), http://abcnews.go.com/US/casey-anthony-trial-tony-lazzaro-describes-romance-caylee/story?id=13682814 (characterizing the prosecution's evidence as "a veritable scrapbook of Anthony's clubbing during the month her daughter was missing.").

4. *See* Michael, *supra* note 2 ("The pictures show Casey Anthony partying in a short, tight-fitting blue dress. She is seen also wearing thigh-high black boots and grinding on the dance floor at an Orlando club called Fusion."); *see also* Stephen Loiaconi, *Prosecutor: "Whose Life Was Better Without Caylee?"*, HLN (March 7, 2012, 9:12 PM), http://www.hlntv.com/article/2011/07/04/prosecutor-whose-life-was-better-without-caylee (describing a "split-screen with a photo of Casey partying at a night club on one side and[,] a close-up of the 'Bella Vita' tattoo that she got weeks after Caylee died on the other" shown to the jury during the prosecution's case in chief).

to be missing, the defendant did not appear to be worried or scared.[5] Witnesses further testified the defendant was living with a man.[6] The prosecution used this testimony as evidence of defendant's consciousness of guilt,[7] by repeatedly referencing how "indifferently"[8] the defendant acted during their closing statement—including showing a picture of the defendant partying.[9] The prosecution also stated that the defendant was not a good mother.[10]

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5. *See Casey Anthony Trial: Suspect Called a 'Fun Party Girl' During Second Day of Testimony*, HUFFINGTON POST (Jan. 19, 2012, 10:23 AM), http://www.huffingtonpost.com/2011/05/25/casey-anthony-trial-fun-party-girl_n_867189.html ("Lezniewicz testified that he never saw Anthony upset or depressed and he mentioned a trip to a nightclub on June 20, 2008, at which Anthony participated in a "hot body contest" during a nightclub promotion."); *see also Testimony: Casey Anthony Partied While Girl Was Missing*, USA TODAY (May 25, 2011, 3:34 PM), http://usatoday30.usatoday.com/news/nation/2011-05-25-casey-anthony-trial_n.htm (according to witness testimony, Anthony "never appeared worried, depressed[,] or angry" during the time her toddler-aged daughter was missing).

6. Michael, *supra* note 2; *see also Testimony: Casey Anthony Partied While Girl Was Missing*, USA TODAY (May 25, 2011, 3:34 PM), http://usatoday30.usatoday.com/news/nation/2011-05-25-casey-anthony-trial_n.htm ("In late May of 2008, Anthony met Tony Lazaro during a party. They soon became romantically involved and she moved into an apartment he was sharing with four other people.").

7. *See* Stephen Loiaconi, *Prosecutor: "Whose Life Was Better Without Caylee?,"* HLN (March 7, 2012, 9:12 PM), http://www.hlntv.com/article/2011/07/04/prosecutor-whose-life-was-better-without-caylee ("While Baez [Anthony's defense attorney] had dismissed testimony about Casey's behavior during the [thirty-one] days between when her daughter Caylee was last seen and when she was reported missing as 'irrelevant,' Burdick [the prosecutor] said her actions suggested a consciousness of guilt, not grieving.").

8. *See id.* (noting that thirty-one days had passed between Caylee's disappearance and when Casey reported the disappearance); *see also* Gage Lester, *Thomas v. State: Evidence of a Defendant's Refusal to Provide a Blood Sample is Inadmissible to Show Consciousness of Guilt*, 33 U. BALT. L.F. 37, 37 (2003) (defining consciousness of guilt as "a person's post-crime behavior."). *Compare* State v. Pepshi, 745 A.2d 494, 496 (N.J. 1999) (disagreeing with the idea that acceptance of draconian conduct or indifference to arrest indicate consciousness of guilt) *with* State v. Pindale, 592 A.2d 300, 310 (N.J. Super. Ct. App. Div. 1991) (claiming that unexplained flight, switching clothes before a lineup, and an unusual showing of remorse for the victim are intrinsically indicative of consciousness of guilt).

9. *See* Loiaconi, *supra* note 7 (showing a up close photo of Casey's tattoo reading "Bella Vita" she got shortly after Caylee's death); *see also* Ashleigh Banfield & Jessica Hopper, *Casey Anthony Trial: Former Boyfriend Describes Casey Anthony Romance*, ABC NEWS (May 25, 2011), http://abcnews.go.com/US/casey-anthony-trial-tony-lazzaro-describes-romance-caylee/story?id=13682814 (stating that prosecutors entered into evidence several pictures of Casey at nightclubs during the month her daughter was missing).

10. *See* Marisol Bello & William M. Welch, *How the Casey Anthony Case Came Apart*, USA TODAY (July 7, 2011, 10:57 AM), http://usatoday30.usatoday.com/news/nation/2011-07-05-Casey-Anthony-Caylee-Anthony-acquittal-murder-case-Florida_n.htm (claiming that the Anthony case was the "social media" trial of the century and the public was wondering what kind of mother parties while her daughter is missing).

Another recent case from California shows the use of such evidence against women. Although admitted because of defense attorney error, the prosecution used the evidence to show consciousness of guilt.[11] In the case, Cynthia Sommer, was accused of murdering her husband, Marine Sgt. Todd.[12] As part of its argument, the prosecution told the jury of her visits to Tijuana, Mexico.[13] They highlighted her participation in a wet t-shirt contest where she flashed the crowd,[14] her sexual encounters with other men after her husband's death,[15] and her breast augmentation.[16] In sum, the prosecution used the evidence specifically to show that the defendant was behaving inappropriately after her husband's death,[17] arguing that she was celebrating rather than grieving.[18]

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11. *See* Josh Mankiewicz, *Cindy Sommer's Long Vindication*, NBC NEWS (Apr. 25, 2008, 2:06 PM), http://insidedateline.nbcnews.com/_news/2008/04/25/4374269-cindy-sommers-long-vindication?lite (using evidence of purchasing breast implants, sleeping around with other Marines, and participating in a wet t-shirt contest in Tijuana, Mexico to demonstrate consciousness of guilt).

12. *See* Dana Littlefield, *Wife's Grief Central Issue at Trial's End*, SAN DIEGO UNION-TRIB., Jan. 26, 2007, http://www.utsandiego.com/uniontrib/20070126/news_7m26sommer.html (accusing her of murder by poison, and of murder for financial gain).

13. *Id.* Of course, the prosecutors made sure to inform the jury that she had visited a dance club while in Mexico. *Id.*

14. *Id. See also* Josh Mankiewicz, *Marine Widow's Long Legal Odyssey*, NBC NEWS (Apr. 25, 2008, 8:35 PM), http://www.nbcnews.com/id/24318534/ (detailing the events that led to the woman being convicted for poisoning her husband). Her participation in a thong contest was added to the list of conduct unseemly for a good woman, let alone a widow. *Id.* The prosecution also called the decedent's mother to the stand where she expressed her displeasure and lack of understanding for her daughter-in-law's behavior. *Id.*

15. Littlefield, *supra* note 12. The prosecution used the fact that the woman had several sexual partners within the first two months of her husband's death to show the jury "her true colors[.]" Josh Mankiewicz, *Marine Widow's Long Legal Odyssey*, NBC NEWS (Apr. 25, 2008, 8:35 PM), http://www.nbcnews.com/id/24318534/. At least two Marines were called to testify before the jury that they had been sexually involved with the defendant shortly after her husband's death. *Id.*

16. *Woman Accused of Killing Husband for Implants*, ABC NEWS (Jan. 6, 2007), http://abcnews.go.com/GMA/LegalCenter/story?id=2775274&page=1. The breast augmentation surgery proved to be especially damning evidence in the eyes of the jury. *See* Josh Mankiewicz, *Marine Widow's Long Legal Odyssey*, NBC NEWS (Apr. 25, 2008, 8:35 PM), http://www.nbcnews.com/id/24318534/ (pointing out that the defendant was consulting a cosmetic surgeon on the same day her husband was showing signs of serious illness). The prosecution went so far as to suggest that she was planning on using the proceeds from his life insurance to pay for the breast augmentation. *Id.*

17. Littlefield, *supra* note 12. *See also* Josh Mankiewicz, *Marine Widow's Long Legal Odyssey*, NBC NEWS (Apr. 25, 2008, 8:35 PM), http://www.nbcnews.com/id/24318534/ (pointing out that none of these "sordid detail[s]" should have been used to incriminate the defendant). "In a vacuum, that conduct wouldn't have merited more than some eye-rolling and disdain. Against the backdrop of arsenic poisoning, it looked sinister . . . ." *Id.*

18. Littlefield, *supra* note 12. *See* Tony Perry, *Release of Widow Ends Bizarre Case*, L.A. TIMES, Apr. 19, 2008, http://articles.latimes.com/2008/apr/19/local/me-poison19 (char-

In both cases, the evidence was obviously sexually charged.[19] However, the evidence did not directly show the defendants' guilt, but instead invited the jury only to infer guilt. The inference the jury was encouraged to draw was not that either defendant was guilty because they acted guilty—as the consciousness of guilt theory of admission discussed later would suggest—but rather, it was that they are women who violated gender norms, and, therefore, committed the crime.

III. THEORY OF ADMISSION

Consciousness of guilt evidence is admitted under the Federal Rules of Evidence or the equivalent state or common law rules.[20] Federal Rule of Evidence 401 states that all relevant evidence is admissible, while Rule of Evidence 403 creates exceptions to the admissibility of that relevant evidence due to overriding factors leading to the evidence's prejudicial danger outweighing its probative value.[21] However, because the Rules of Evidence concerning relevancy are so broad, they do not directly address the case-by-case determination of the admissibility of consciousness of guilt evidence, instead leaving that decision largely to the common law.[22]

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acterizing the prosecution's case against Sommer as "tabloid-style," referring to the State's theory that the wife killed her younger husband and then underwent breast augmentation surgery).

19. *See* Littlefield, *supra* note 12 (listing the various evidence put before the jury including a breast augmentation Cynthia Sommer underwent as well as a "wet t-shirt" contest she entered into while in Tijuana, exposing her bare chest to a crowded bar); *see also Roommates, Friends: Casey Anthony Partied While Girl Was Missing*, FOX NEWS (May 25, 2011), http://www.foxnews.com/us/2011/05/25/casey-anthonys-murder-trial-enters-second-day/ (explaining how sexual evidence was introduced at Casey Anthony's trial, including her partying in tight clothing, and entering into a swimsuit contest around the time her toddler-aged daughter disappeared).

20. *See* FED. R. EVID. 401, 403 (citing to the rules of evidence that cover relevancy and exclusion of otherwise relevant evidence for prejudice, waste of time, confusion, or other reasons); *see also* People v. Bennett, 79 N.Y.2d 464, 469–70 (1992) (expressing that the admissibility of consciousness of guilt evidence is determined based on whether it is relevant, "meaning that it has a tendency to establish the fact sought to be proved—that defendant was aware of guilt.").

21. *See* FED. R. EVID. 401, 403 (summarizing the rules of evidence which allow admission of any relevant evidence but exclude that evidence which is more likely to mislead or confuse the jury than be helpful). The Court may exclude evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. *Id.*

22. *See id.* (explaining that because all relevant evidence is considered admissible, the category is quite encompassing); United States v. Perez, 387 F.3d 201, 209 (2d Cir. 2004) (referencing how—if reasonable inferences can be drawn—consciousness of guilt evidence can be relevant).

This evidence is relevant because the jury can use the defendant's demeanor to determine guilt.[23] Actions that constitute consciousness of guilt evidence are in the words of one Court "impossible to limit," thereby creating an endless list of activities the prosecution can argue to show guilt.[24] Such actions include: flight,[25] false alibis,[26] attempted suicide,[27] failure to undergo a superstitious test,[28] turning pale when arrested,[29] joining the military after committing a crime,[30] and changing

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Such evidence is admissible if the court[:] (1) determines that the evidence is offered for a purpose other than the prove the defendant's bad character or criminal propensity, (2) decides that the evidence is relevant and satisfies Rule 403, and (3) provides an appropriate instruction to the jury as to the limited purposes for which the evidence is introduced, if a limiting instruction is requested.

Id. at 209 (citing United States v. Mickens, 926 F.3d 1323, 1328–29 (2d Cir. 1991)).

23. McAdory v. State, 62 Ala. 154, 154–58 (1878); *see* People v. O'Neill, 112 N.Y. 355, 362–63 (1889) (looking to factors such as conduct and demeanor, taken with other circumstances, tending to indicate and aid the jury in finding guilt). "[The relevancy of consciousness of guilt evidence] is largely a question of fact, rather than a question of law, for the determination of the jury, whether particular conduct, or particular expressions of the accused, refer to a criminal offense, and spring from his consciousness of guilt." *McAdory*, 62 Ala. at 158.

24. *See* Johnson v. State, 234 S.W.3d 43, 55 (Tex. App.—El Paso 2007, no pet.) (citing Lee v. State, 866 S.W.2d 298, 302 (Tex. App.—Fort Worth 1993, pet. ref'd); Torres v. State, 794 S.W.2d 596, 598 (Tex. App.—Austin 1990, no pet.)) (emphasizing consciousness of guilt evidence to be one of the strongest indicators of guilt); *McAdory*, 62 Ala. at 158.

25. *See* United States v. Wallace, 461 F.3d 15, 26 (1st Cir. 2006) (recognizing that flight evidence is only somewhat probative of guilt, the court found the defendant's flight "relevant consciousness-of-guilt evidence as to both the robbery and the murder charges.").

26. *See* People v. Moses, 63 N.Y.2d 299, 308 (1984) (categorizing false alibis as evidence "indicative of consciousness of guilt and thus of guilt itself," while acknowledging that even innocent persons who fear wrongful convictions may provide false alibis as well).

27. People v. Duncan, 261 Ill. 339, 352–53 (1913) (noting the difference between an attempt at suicide and an attempt to escape custody, but nonetheless asserting that both actions seek to accomplish an escape from punishment and may be considered by a jury as evidence of guilt).

28. WILLIAM RICHARDSON, RICHARDSON ON EVIDENCE § 159 (Jerome Prince ed., 7th ed. 1948) ("The police or interested persons often employ superstitious tests as a means of obtaining a clue to guilt, and a refusal to undergo such a test would properly be evidential of consciousness of guilt.").

29. Lindsay v. People, 63 N.Y. 143, 155 (1875) (stating that while the defendant's act of turning pale was little evidence of guilt, the question of whether it "was merely the disturbance of the physical system" was for the jury to decide).

30. *See* People v. Mentola, 268 N.E.2d 8, 10 (1971) (citing People v. Rossini, 185 N.E.2d 831 (1962) and People v. Lobb, 161 N.E.2d 325 (1959)) (indicating that joining the military after the alleged commission of a crime is admissible as evidence of flight which tends to show guilt). *Cf.* Jarrell v. Commonwealth, 110 S.E. 430, 436 (Va. 1922) (upholding jury instructions that the defendant's joining the army was a "purpose formed before the [crime]" and therefore could not be considered as evidence of flight tending to show guilt).

appearance before trial,[31] among others.[32]

When arguing for a conviction based on the indifference or the lack of grieving shown by the two defendants above, prosecutors were not treading new ground. Lack of emotion—usually failing to exhibit grief—after an alleged crime, is used to show consciousness of guilt.[33] In *Greenfield v. People*,[34] evidence showing the defendant did not shed tears after his wife's death was admitted.[35] It was also shown that when an acquaintance mentioned the murder, the defendant replied, "Yes, I had a load of oats stolen."[36] Similarly, in *Allanson v. State*,[37] testimony that a defendant also did not shed tears after his parents' deaths was heard.[38] While

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31. *See e.g.*, United States v. Carr, 373 F.3d 1350, 1353 (D.C. Cir. 2004) (approving jury instructions that allowed the jury to consider change of appearance evidence in determining consciousness of guilt); United States v. Foppe, 993 F.2d 1444, 1450 (9th Cir. 1993) (deciding the government's statements that the defendant had changed his appearance to avoid apprehension were not unduly prejudicial); Jackson v. State, 17 P.3d 998, 1000 (Nev. 2001) (allowing jury instruction regarding change of appearance over defendant's objections that his changes in appearance happened too far after the alleged crime, and that he did not know he was going to be in a line-up before he changed his appearance).

32. *See* People v. Bennett, 593 N.E.2d 279, 283 (N.Y. 1992) (citations omitted) ("Other conduct that has been recognized as revealing a guilty mind includes false statements or alibis, coercion or harassment of witnesses, and abandonment or concealment of evidence."). *See also* WILLIAM RICHARDSON, *supra* note 28 § 158 (indicating that the jury is permitted to use the following conduct in determining an inference of guilt: reluctance to have one's shoes measured, readiness to present allegedly stolen goods on request, proposing marriage to one's alleged rape victim). *See generally* 29 AM. JUR. 2D EVIDENCE § 318 (2008) (discussing behavior that may be used to indicate a guilty mind).

33. See 41 C.J.S. HOMICIDE § 369 (2006) ("[E]vidence regarding the defendant's lack of emotional response to the victim's death has been admitted as probative of the defendant's consciousness of guilt.").

34. 85 N.Y. 75 (1881).

35. *See* Greenfield v. People, 85 N.Y. 75, 85 (1881) (noting that a number of witnesses testified that they had not seen the defendant cry the morning after his wife's murder). *See also* People v. Samuels, 113 P.3d 1125, 1149 (Cal. 2005) (upholding no prosecutorial misconduct for referring to defendant's lack of remorse after her husband's death); Smith v. State, 721 S.E.2d 892, 896 (Ga. 2012) (approving introduction of evidence regarding defendant's lack of emotion through testimony of an assistant medical examiner and through the prosecutor's reference to the defendant's lack of emotion during the display of her child's autopsy records in his closing argument); Flores v. State, 120 P.3d 1170, 1171, 1173, 1181 (Nev. 2005) (deciding that evidence of the defendant's lack of remorse after the death of her young stepdaughter, for which she was present, "was probative to her consciousness of guilt.").

36. *Greenfield*, 85 N.Y. at 85.

37. 221 S.E.2d 3 (1975).

38. Allanson v. State, 221 S.E.2d 3, 6 (1975). *See also* Dan E. Stigall, *Prosecuting Raskolnikov: A Literary and Legal Look at "Consciousness of Guilt" Evidence*, ARMY LAW. 54, 56 (2005) (describing actions and reactions that may be considered as evidence of consciousness of guilt).

in *Beckworth v. State*,[39] the defendant's failure to make funeral arrangements for his wife was offered as consciousness of guilt evidence.[40]

The use of defendants' alleged celebrations is not without precedent either. Celebrating after a crime has been used to show consciousness of guilt as well. In *People v. Olanson*,[41] the defendant killed a mail carrier who was a member of rival tribe.[42] The following evening the defendant engaged in a ritual celebration to commemorate the killing.[43] The Court allowed this as evidence of guilt under a consciousness of guilt theory.[44] More recently, in *Berryhill v. State*,[45] the Georgia Supreme Court confronted similar issues.[46] It allowed testimony that after the death of his son, the defendant went out "partying" while friends and relatives came to give their condolences.[47] Testimony that the defendant laughed and played with a ball outside during the wake was also presented.[48]

Celebrating or failure to grieve, to show consciousness of guilt is used to justify the admission of sexually charged evidence. In the Florida and California cases referenced above, the prosecution introduced the defendants' celebrations and failure to grieve—such as photos of the women at nightclubs—to demonstrate their guilt. Clearly this evidence is problematic because it can be used in a biased fashion against women in particular.

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39. 190 S.E. 184 (1937).

40. Beckworth v. State, 190 S.E. 184, 185 (1937). *See also* Dan E. Stigall, *Prosecuting Raskolnikov: A Literary and Legal Look at "Consciousness of Guilt" Evidence*, ARMY LAW. 54, 56 (2005) (describing actions and reactions that may be considered as evidence of consciousness of guilt).

41. 49 Phil. Rep. 146 (1927).

42. *Id. See also* John E. Hartsell, *Litigating with the Law: An Introduction to the "False Exculpatory Statements" Instruction*, 29 THE REP. 3, 5 (2002) (describing the Supreme Court's rational for consciousness of guilt).

43. *Olanson*, 49 Phil. Rep. 146. *See also* John E. Hartsell, *Litigating with the Law: An Introduction to the "False Exculpatory Statements" Instruction*, 29 THE REP. 3, 5 (2002) (describing that while there are a number of ways to show incriminatory evidence, consciousness of guilt is "incredibly powerful evidence").

44. *Olanson*, 49 Phil. Rep. 146.

45. 285 Ga. 198 (2009).

46. *Id.* at 200; *see also* 40A AM. JUR. 2D HOMICIDE § 453 (noting the suspect's actions at the funeral).

47. *Berryhill*, 285 Ga. at 200; *see also* 6 WHARTON'S CRIMINAL EVIDENCE § 69:2 (15th ed.) (noting the application of the "excited utterance" rule in consciousness of guilt findings).

48. *Berryhill*, 285 Ga. at 200; *see also* Dan E. Stigall, *Prosecuting Raskolnikov: A Literary and Legal Look at "Consciousness of Guilt" Evidence*, ARMY LAW. 54 (2005) (illustrating the history of consciousness of guilt evidence in American jurisprudence).

IV. WHY CONSCIOUSNESS OF GUILT EVIDENCE IS DISCRIMINATORY TOWARDS WOMEN

Sexually charged evidence is particularly problematic when used against women because there is a strong potential for bias. Essentially, this type of evidence exploits gender stereotypes in order to obtain a conviction. This Article will now discuss how the evidence reinforces those stereotypes and why it is biased against women.

Women, by mere virtue of their sex, are already viewed as deviating from male norms.[49] They are defined not as individuals, but defined based on stereotypes.[50] Women are often devalued because of their gender.[51] This devaluation based on gender is similar to the devaluation of an individual who commits an immoral act.[52] Ultimately, "femaleness" is considered a threat to male norms.[53]

Traditional society holds a negative view of women who engage in sexual activity.[54] Put simply, promiscuity is considered a deviant behavior

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49. EDWIN M. SCHUR, LABELING WOMEN DEVIANT: GENDER, STIGMA, AND SOCIAL CONTROL 23–24 (1983); *see also* J. Cindy Eson, *In Praise of Macho Women: Price Waterhouse v. Hopkins*, 46 U. MIAMI LAW REV. 835, 845 (1992) (highlighting further the incompatibility of male and female norms in society).

50. *See* WINNIE HAZOU, THE SOCIAL AND LEGAL STATUS OF WOMEN 101 (1990) (explaining the need for social redefinition of women); Mary E. Kite et al., *Gender Stereotypes*, *in* PSYCHOLOGY OF WOMEN: A HANDBOOK OF ISSUES AND THEORIES 205–09 (Florence L. Denmark & Michelle A. Paludi eds., 2d ed. 2007) (discussing the impact of gender stereotypes).

51. *See* SCHUR, *supra* note 49, at 22–24 (discussing the stigmatization of sexuality).

52. *Id.* at 23.

53. *See id.* at 111 (examining the impact a male dominated society has on defining gender norms); Zenobia V. Harris, *Breaking the Dress Code: Protecting Transgender Students, Their Identities, and Their Rights*, 13 SCHOLAR 149, 152 (2010) (discussing society's judgment of those who do not conform to traditional gender norms).

54. *See, e.g.*, LEORA TANENBAUM, SLUT! 111 (1999) (writing about the realities and ramifications of being branded as promiscuous at a young age); Tineke M. Willemsen & Els C. M. van Schie, *Sex Stereotypes and Responses to Juvenile Delinquency*, 20 SEX ROLES 623, 624–626, 636–637 (1989) (finding in part that girls receive different punishments than boys for their delinquent behavior depending on whether the behavior is considered masculine or indecent). This negative view of women who engage in sexual activity is outrageously illustrated in a description of a teenage girl's involuntary manslaughter charge for the death of her newborn:

> Interestingly, the state's preparation for trial involved neither of these lines of evidence. Instead, subpoenas were issued to a large number of the girl's male eighth grade classmates, who were prepared to testify to the girl's promiscuity. Regardless of the testimony's admissibility, this line of inquiry reveals much about the state's attorney's perception of societal values regarding sexuality. The boys could testify to having had sex with her without fear of retribution (even if their stories incriminated them for statutory rape and were reminiscent of a gang rape). Yet the same testimony, applied to the girl, might help to convince the judge that she should be incarcerated.

for women.[55] While women's sexual activity remains stigmatized in a number of critical ways,[56] men's sexual activity is celebrated.[57] Typically, women are defined by society as either a "slut" or a "saint."[58] For instance the term "slut" is often used generically to refer to a "bad girl."[59] That is, one who does not conform to socially acceptable behavior norms.[60] Women who do not conform to gender norms are often also

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Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femaleness*, 7 BERKELEY WOMEN'S L.J. 1, 4 (1992).

55. SCHUR, *supra* note 49, at 5.

56. *See* Stephen A. Diamond, *What Motivates Sexual Promiscuity?*, PSYCHOL. TODAY (Nov. 17, 2011, 4:24pm), http://www.psychologytoday.com/blog/evil-deeds/201111/what-motivates-sexual-promiscuity (discussing the possible motivations behind sexual promiscuity). *See also* Barry W. McCarthy & L. Elizabeth Bodnar, *The Equity Model of Sexuality: Navigating and Negotiating the Similarities and Differences Between Men and Women in Sexual Behaviour, Roles and Values*, 20 SEXUAL & RELATIONSHIP THERAPY 225 (2005) (observing that traditionally male and female sexual behavior has been evaluated as fundamentally different, paradigms that have been reinforced by the popular media, but in fact both genders have similar sexual needs). *Cf.* SCHUR, *supra* note 49, at 5 (observing that the label, "deviant," is a social construct indicating society's response to a particular behavior rather than any quality of the behavior itself). *But see* Michael J. Marks, *Evaluations of Sexually Active Men and Women Under Divided Attention: A Social Cognitive Approach to the Sexual Double Standard*, 30 BASIC & APPLIED SOC. PSYCHOL. 84 (2008) (hypothesizing that the sexual double standard may not be empirically born out when tested in research studies that more accurately mimic real-life gender interactions); Derek A. Kreager & Jeremy Staff, *The Sexual Double Standard and Adolescent Peer Acceptance*, 72 SOC. PSYCHOL. Q. 143 (2009) (finding that empirical data supporting a sexual double standard is inconclusive and often not based on actual sexual behavior).

57. TANENBAUM, *supra* note 54, at 23–24. *But see* Michael J. Marks & R. Chris Fraley, *Confirmation Bias and the Sexual Double Standard*, 54 SEX ROLES 19 (2006) (suggesting that confirmation bias accounts for the pervasive belief in a sexual double standard).

58. HAZOU, *supra* note 50. The pop star, Madonna, has seemingly transcended this dichotomy by turning the sexual double standard on its ear. Madonna's name itself invokes the imagery of the Virgin Mary and Madonna has frequently used religious imagery in her music and videos, but Madonna also embraces an aggressive sexuality most often associated with males. Madonna has turned these formerly mutually exclusive images into a provocative rock star persona that has generated millions in revenue. Carla Freccero, *Our Lady of MTV: Madonna's "Like a Prayer,"*, 19 FEMINISM & POSTMODERNISM 163 (1992). Madonna also does not seem to have suffered in the press for her overt sexuality when she herself became a mother. Elaine Stuart, *Madonna on Motherhood*, PARENTS, http://www.parents.com/parenting/celebrity-parents/madonna-on-motherhood/ (last visited Mar. 1, 2013). However, this is likely due to the fact that she has a substantial independent income and a cadre of public relations advisors with which she can insulate herself from much criticism. *Id.*

59. TANENBAUM, *supra* note 54; Elizabeth Black, *Good Girls, Bad Girls: The Kinkiness of Slut-Shaming*, ON THE ISSUES MAG. (Feb 10, 2013, 11:50 PM), http://www.onthe issuesmagazine.com/2010summer/2010summer_Black.php.

60. TANENBAUM, *supra* note 54.

called prostitutes and are the subject of reproach.[61] Indeed, sexual activity, partying, and certain dress styles are considered signs of an unfit mother.[62]

Interestingly, the stigmas of promiscuity and of being an unfit mother are closely related. Being a good mother is a sign of normality for women.[63] An unwed mother is considered, in many segments of society, to be a bad person.[64] Stereotypes label her as promiscuous, and therefore unable to take care of herself or her child.[65] Promiscuous behavior violates society's good mother norm.[66]

Once an individual has been characterized as violative of social norms like promiscuity or motherhood, that person is reassessed in a process called retrospective interpretation.[67] Their character, as well as their past and present behaviors, are reinterpreted.[68] Women who violate the promiscuity norm are considered "bad."[69] For example, women who are accused of criminal activity are often also accused of violating the promiscuity norm in some form, with such labels as prostitute, witch, or lesbian.[70]

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61. SARA DELAMONT, THE SOCIOLOGY OF WOMEN 122 (W. M. Williams ed., 1980).

62. SCHUR, *supra* note 49, at 89; Germaine Greer, *These 'Slut Walk' Women Are Simply Fighting for Their Right to Be Dirty*, THE TELEGRAPH (May 12, 2011, 8:33pm), http://www.telegraph.co.uk/health/women_shealth/8510743/These-slut-walk-women-are-simply-fighting-for-their-right-to-be-dirty.html.

63. SCHUR, *supra* note 49, at 81; Eike Adams & Pippa Dell, *Being a 'Good Mother': A Discourse Analysis in Women's Experiences of Breast Cancer and Motherhood*, 10 THE PSYCHOL. OF WOMEN SEC. REV. 3 (2008).

64. SCHUR, *supra* note 49, at 84; Jen Roesch, *The Single Mother Myth*, SOCIALIST WORKER (July 23, 2012), http://socialistworker.org/2012/07/23/single-mother-myth.

65. SCHUR, *supra* note 49, at 84; Jen Roesch, *The Single Mother Myth*, SOCIALIST WORKER (July 23, 2012), http://socialistworker.org/2012/07/23/single-mother-myth.

66. SCHUR, *supra* note 49, at 83; Boykin v. Boykin, 296 S.C. 100, 102, 370 S.E.2d 884, 886 (Ct. App. 1988).

67. SCHUR, *supra* note 49, at 29.

68. *Id.*

69. "Bad" is a relative term that expresses when a girl "steps out of line." TANENBAUM, *supra* note 54, at 110–12. The term changes with each community and has developed over time. *Id.* Today, being "bad" or a "slut" is when a girl appears too open or carefree about her sexuality. *Id. See generally* Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401 (2004) (discussing the chastity narrative throughout time).

70. "The history of the English language shows that nearly all insulting words used about women began with, or acquired, the meaning of prostitute." DELAMONT, *supra* note 61, at 122 (W. M. Williams ed., 1980). *See also* Brian Donovan & Tori Barnes-Brus, *Narratives of Sexual Consent and Coercion: Forced Prostitution Trials in Progressive-Era New York City*, 36 LAW & SOC. INQUIRY 597 (2011) (portraying the stories of women who were arrested for "chastity" offenses and charged with other "criminal offenses"); Elizabeth Kaigh, *Whores and Other Sex Slaves: Why the Equation of Prostitution With Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimina-*

Sexually charged consciousness of guilt evidence is used to show female defendants violated norms. The two recent examples, cited above, demonstrate how prosecutors accused female defendants of violating the promiscuity and motherhood norms. In the Florida case concerning Casey Anthony, the prosecution asserted that the defendant's claim of being a good mother was false.[71] The prosecution displayed pictures of the defendant partying at a nightclub during their closing statement.[72] They used photos to scrutinize the defendant's tattoo.[73] In their final rebuttal argument the prosecution asserted: "That makes her a good mother? No, that makes her a mother. Maybe an adequate mother [sic]." Similarly, the prosecution in the California case also introduced evidence of the defendant partying several weeks after the alleged crime.[74] In both cases the defendant's sex life was used as evidence.[75] Critically, in each instance consciousness of guilt evidence was used not to show guilt, but to show norm violation.

Using women's post-crime conduct as evidence is problematic. Hearing the evidence could lead the fact-finder to reevaluate a woman's earlier actions through a prejudiced lens. While some reactions may, in fact, be indicative of guilt, others may just not fit into society's box of "appropriate responses." The real risk is the fact-finder will convict women of crimes simply because they violated gender norms or because they are women—not because the evidence demonstrates their guilt. Convictions

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tion,, 12 SCHOLAR 139, 158 (2009) (discussing laws that limited the legal definition of prostitute to women).

71. Linda Drane-Burdick stated that Casey Anthony was at best an "adequate mother" for allowing her parents to provide Caylee with necessaries. Loiaconi, *supra* note 7.

72. Defense claims this was used to demonstrate Ms. Anthony's lack of grieving from the death of her daughter. *See* Lizette Alvarez, *Casey Anthony Not Guilty in Slaying of Daughter*, N.Y. TIMES, July 5, 2011, http://www.nytimes.com/2011/07/06/us/06casey.html?pagewanted=all&_r=0 (announcing the not guilty verdict returned against Casey Anthony).

73. Defense used Ms. Anthony's tattoo, "Bella vita/Beautiful life," that was obtained shortly after Caylee's death to again show a lack of remorse. Loiaconi, *supra* note 7. *See also* Alvarez, *supra* note 72 (announcing the not guilty verdict returned against Casey Anthony).

74. Littlefield, *supra* note 12; Bob Considine, *Wife Cleared of Murder 'Overwhelmed With Emotion'*, USA TODAY, Apr. 22, 2011, http://www.nbcnews.com/id/24254002/site/todayshow/ns/today-today_news/t/wife-cleared-murder-overwhelmed-emotion/#.URh32qVpfyA.

75. Littlefield, *supra* note 12; Michael, *supra* note 2. *See also* Saul Relative, *Casey Anthony Case: Can Casey Anthony's Odd Behavior Just Be "Ugly Coping"?*, YAHOO! VOICES (May 4, 2009), http://voices.yahoo.com/casey-anthony-case-casey-anthonys-odd-behavior-3249303.html?cat=62 (discussing a possible theory of "ugly coping" present in both Anthony's and Sommer's behavior).

should not be based on character or gender, but on the actual commission of the crime.

V. EXCLUDING THEORIES

There are two main theories that should be used to exclude sexually charged consciousness of guilt evidence: (1) the evidence is more prejudicial than probative, and (2) the evidence violates a female defendant's constitutional rights. First, this Article will argue why such evidence should be excluded under the more-prejudicial-than-probative analysis. Next, this Article will than explain why such evidence should be excluded on constitutional grounds.

A. *More-Prejudicial-than-Probative and Consciousness of Guilt Evidence*

In turning to the application of the more-prejudicial-than-probative standard to consciousness of guilt evidence, the Federal Rules of Evidence are instructive. The more-prejudicial-than-probative standard originates at common law and is elucidated in Federal Rule of Evidence 403.[76] The common law allows courts to exclude evidence on these grounds as well.[77]

Among other reasons, the Federal Rule allows a court to exclude evidence if: (1) its probative value is outweighed by the danger of unfair prejudice, or if (2) the evidence is likely to confuse the jury.[78] The Su-

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76. FED R. EVID 403 (2011); *see* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 595 (1993) (restating the spirit of Federal Rule of Evidence 403 in dicta).

77. People v. Scarola, 71 N.Y.2d 769, 777 (1988) (citing People v. Acevedo, 40 N.Y.2d 701, 704 (1976) and Uss v. Oyster Bay, 37 N.Y.2d 639, 641 (1976)). In *Scarola*, the New York Court of Appeals recognized that,

> [n]ot all relevant evidence is admissible as of right, however. Even where technically relevant evidence is admissible, it may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury.

Id. Similarly, the New York Court of Appeals addressed, in *Oyster Bay*, the appropriate standard of review for evidentiary rulings. *Oyster Bay*, 37 N.Y.2d at 641. The Court's analysis in *Oyster Bay* shows how a particular trial court had the ability to make contradictory decisions regarding admissibility without abusing its discretion. *See id.* ("[W]e cannot say as a matter of law that there was an abuse of discretion by the trial court . . . . The court here might have been justified in forbidding a demonstration . . . . On the other hand it was not error as a matter of law for the court . . . to determine that plaintiffs' legitimate interests could be sufficiently protected . . . .").

78. FED R. EVID. 403. According to the Advisory Committee's notes, there is "ample support in the authorities" for the application of the exclusionary rule in four specific areas: [1] unfair prejudice, [2] confusion of issues, [3] misleading the jury, and [4] wasting time. *Id.* As an example of a ruling based on unfair prejudice one should consider *United*

preme Court has said that this type of evidence would "lure the fact[-]finder into declaring guilt on a ground different from the proof specific to the crime charged."[79] Often times this would refer to a decision made on emotional grounds.[80] In a case decided before enactment of the Federal Rules of Evidence, Judge Hand excluded evidence of a defendant's prior rapes.[81] This was to prevent the jury from convicting him simply because he was "loathsome."[82] He did not want the jury to convict the

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States v. Rutland, 372 F.3d 543, 543 (3rd Cir. 2004). In this case, the defendant-appellant claimed that the trail court abused its discretion by admitting certain evidence. *Id.* The Third Circuit determined, however, that no abuse of discretion occurred, recognizing, from the Advisory Committed Notes, how an "improper basis" is not necessarily one based on emotion. *Id.* In this case, the appellate court addressed an issue that focused on the apparently impressive credentials of the state's handwriting expert. *Id.* The court determined that "[j]urors may properly take an expert's impressive experience and credentials into account when determining the weight of the expert's testimony." *Id.*

79. Old Chief v. United States, 519 U.S. 172, 180 (1997). Also, at least one commentator has noted how "Rule 403 is highly discretionary." Aviva Orenstein, *Propensity or Stereotype?: A Misguided Evidence Experiment in Indian* Country, 19 CORNELL J.L. & PUB. POL'Y 173, 179–80 (2009). While discussing Rule 403 within the context of Rule 413 and Rule 414, this commentator further noted that "[c]ourts have forsaken the traditional, discretionary gate-keeping role of Rule 403 and substituted a presumption of admissibility." *Id.* (citing United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997) (internal quotation marks omitted)).

80. *Old Chief*, 519 U.S. at 180. While this analysis developed around the Federal Rules of Evidence and within our federal court system, it has influenced state courts as well. *See, e.g.*, State v. Collins, 727 S.E.2d 751, 757 (S.C. Ct. App. 2012). In *Collins*, the South Carolina Court of Appeals stated that "[t]his definition of unfair prejudice was taken originally from the Advisory Committee Notes to the formerly identical federal rule 403." *Id.* (citing State v. Alexander, 401 S.E.2d 146, 149 (S.C. 1991)).

81. United States v. Krulewitch, 145 F.2d 76, 80 (2d Cir. 1944). In *Krulewitch*, Judge Hand seemingly anticipated Rule 403 stating, for instance,

> As has been said over and over again, the question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and the expense it will involve, and by the chance that it will divert the jury from the facts which should control their verdict."

Id. Within the Second Circuit, at least, the authority of the *Krulewitch* decision continues to influence court decisions. *See* United States v. Colombo, 808 F.2d 711, (2d Cir. 1990) (relying on *Krulewitch* in a Rule 403 analysis). In relevant part, the Second Circuit stated that in *Krulewitch* "we observed that its prejudicial effects outweighed its probative value because it tends to muddle the jury, and to lead them to convict the accused because he was in general so loathsome." *Id.* (citing and quoting *Krulewitch*, 145 F.2d at 80) (internal quotation marks omitted).

82. *Krulewitch*, 145 F.2d at 80; *see also* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(B)*, 78 TEMP. L. REV. 201, 243 (2005) (analyzing the different ways consciousness of guilt evidence is deemed admissible in court: "Judge Werner's version of the rule presumes the inadmissibility of uncharged misconduct and allows only well-recognized exceptions to the general prohibition. Judge Parker's rule presumes the admissibility uncharged misconduct, except when offered solely for the reason of proving the accused's bad character.").

defendant simply because he was bad person; rather, he wanted to ensure a conviction based on the crime the defendant allegedly committed.[83] The probative value of evidence is contended to be synonymous with relevancy.[84] In 1963, the New York Court of Appeals expanded upon this contention, asserting in *People v. Yazum*[85] that evidence is relevant if it would "tend to convince that the fact sought to be established is so."[86]

1. Application to Consciousness of Guilt Evidence

Consciousness of guilt evidence, like any other evidence, is subject to the more-prejudicial-than-probative analysis.[87] In conducting this analysis, the court weighs the probative value of the evidence—including the prosecution's need for the evidence—against its prejudicial effect.[88] The probative value of consciousness of guilt evidence and the prejudicial effect of consciousness of guilt evidence have an especially unique prejudi-

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83. *Krulewitch*, 145 F.2d at 80; *see also* Michelson v. United States, 335 U.S. 469, 476 (1948) (stating that prior criminal acts tend to "overpersuade" the jury and deny the accused "a fair opportunity to defend against a particular charge."); Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1 (1994) (discussing "legitimate advocacy" that can lead to using biases in order to kept information from reaching the jury.).

84. 5 ROBERT BARKER & VINCENT ALEXANDER, WEST'S NEW YORK PRACTICE SERIES 110 (1996); *see* Dan E. Stigall, *Prosecuting Raskolnikov: A Literary and Legal Look at "Consciousness of Guilt" Evidence*, ARMY LAW. 54, 56 (2005) (stating that actions, even banal acts, may be admissible if they "may be indicative of a criminal's consciousness of guilt.").

85. 196 N.E.2d 263 (N.Y. 1963).

86. *Id.* at 264; *see* Robert A. Baker, *Evidence*, 44 SYRACUSE L. REV. 329, 353 (1993) (noting that evidence which is "held to constitute consciousness of guilt" is viewed as weak).

87. United States v. Perez, 387 F.3d 201, 209 (2nd Cir. 2004); *see also* People v. Feldman, 296 N.Y. 127, 138–39 (1947) ("the evidence of defendant's refusal to permit an autopsy upon the body of his wife . . . was not only of doubtful probative value as proof of the defendant's consciousness of guilt but was prejudicial to the defendant's rights before the jury."); Michael Avery, *Prejudice vs. Probative Value, Philadelphia Style*, 50 ST. LOUIS U. L.J. 1147, 1153 (2006) (noting that the question of how a judge measures probative value and prejudice are "discretionary judgments"); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 425, 462 (2010) (stating that in order to avoid unfair prejudice judges must use their "discretionary authority to exclude evidence."); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(B)*, 78 TEMP. L. REV. 201, 243 (2005) ("[M]ost modern judges believe that evidence of predisposition to criminal acts is somehow very unfair to the accused.").

88. *See* FED. R. EVID. 403 (excluding relevant evidence if the probative value of the evidence is substantially outweighed by unfair prejudice); *see also* United States v. Stout, 509 F.3d 796, 796 (6th Cir. 2007) (holding that "even if evidence of defendant's prior bad act was subjectively critical, those circumstances did not make the bad act evidence objectively more probative . . . .").

cial effects on female defendants; these types of evidence are subjected to specific standards, as discussed below.

a. Probative Value of the Evidence

Courts have held that consciousness of guilt evidence has probative value.[89] The fact-finder is allowed to draw the inference that defendant's consciousness of guilt caused him or her to act guilty and therefore they must be guilty.[90] For example, a fact-finder is allowed to draw the inference that if a defendant fled after a crime, they were fleeing because they knew they were guilty.[91]

Even though consciousness of guilt evidence is generally accepted as probative, some courts have argued against this concept.[92] In *People v. Troche*,[93] the New York Court of Appeals asserted that "[n]aturally enough, the courts have consistently acknowledged the weakness of this type of evidence, reflecting a consciousness of guilt . . . ."[94] This weakness is qualified by the varying ways individuals may react in the aftermath of a crime.[95]

Chief Judge Shaw of the Massachusetts Supreme Judicial Court gave a paradigmatic example addressing consciousness of guilt evidence and how people can react in different and unexpected ways after crime.[96] To illustrate his contention, Shaw referred to an incident where a man stood

89. *See* People v. Bennett, 79 N.Y.2d 464, 470 (App. Div. 1992) (stating evidence of consciousness of guilt may be admissible if relevant).

90. *See* United States v. Johnson, 624 F.3d 815, 820–21 (7th Cir. 2010) (indicating that jurors could use recorded conversations of defendant to find consciousness of guilt even though defendant did not explicitly threaten informant).

91. *See* United States v. Obi, 239 F.3d 662, 665 (4th Cir. 2001) (holding that "the jury's consideration of evidence of flight requires that it be able—from the evidence—to link such flight to consciousness of guilt of the crime for which the defendant is charged.").

92. *See* Charges to Jury & Requests to Charge in Crim. Case § 4:38 N.Y. (2012) (reasoning that "an innocent person may attempt to extricate himself from a situation by denying incriminating evidence even though he knows it can be truthfully explained or by fleeing from an accuser because of fear of wrongful conviction.").

93. 221 N.Y.S.2d 228, 231 (App. Div. 1961).

94. *Id.* at 231.

95. State v. Beckner, 198 N.W. 643, 646 (Iowa 1924); *see also* Greenfield v. People, 85 N.Y. 75, 86 (1881) (discussing the different reactions that could be displayed by both guilty and innocent people after a crime); Andrew Palmer, *Guilty and the Consciousness of Guilt: The Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and Prosecution of Crime*, 21 MELB. U. L. REV. 95, 119 (1997) (pointing out that an array of different emotions plague both the innocent and guilty after a crime).

96. *See* Commonwealth v. Webster, 59 Mass. 295, 316–17 (1850) (explaining how crimes can be proven based on the varying "feelings, passions, and propensities under which parties act . . . .").

accused of the murder of his niece.[97] He disappeared and returned with a woman deceptively posing as his niece.[98] The allegedly murdered niece later turned up alive.[99] He had not killed her, despite the fact he had acted as many assume a guilty man would act.[100] This anecdote demonstrates how a person's actions can be qualified with consciousness of guilt.[101]

Consciousness of guilt evidence's low probative value means the prosecution's need for evidence is not a major factor. Therefore, if the prosecution needs the evidence to convict, they do not have a case strong enough for conviction.[102] Indeed, some jurisdictions will not allow a conviction based on consciousness of guilt evidence alone because its probative value is too low.[103] For instance, mere flight cannot sustain a conviction.[104] The New York Court of Appeals' ruling in *People v.*

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97. *Id.* at 317.

98. *Id.*; *see* People v. Moses, 63 N.Y.2d 299, 309 (1984) (explaining that flight may result in a presumption of consciousness of guilt. The court states, "[w]here an accomplice's testimony is bolstered only by consciousness of guilt, this court has been reluctant to find the necessary corroboration[,]" and "[t]he bare evidence of consciousness of guilt . . . [is] so inherently weak that it [does] not satisfy the corroboration requirement of CPL 60.22[,]" which speaks further to the lack of probative value held by consciousness of guilt evidence).

99. Commonwealth v. Webster, 59 Mass. 295, 316 (1850).

100. *See id.* at 317 (showing how the accused's actions reflected that of one attempting to conceal criminal behavior).

101. *See id.* at 316.

102. *See* People v. Ellis, 65 Cal.2d 529, 537–38 (1966) (asserting that "[b]y acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind."); People v. May, 290 N.Y. 369, 375 (1943) (noting how the court ordered a new trial because the defendant's alleged consciousness of guilt was not probative.); *see also* United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977) (consciousness of guilt's probative value as circumstantial evidence depends upon the degree of confidence from which inferences could be drawn. The Court details facts for inferences related to flight.); Herring v. State, 501 So.2d 19, 20 (Fla. 1986) ("A defendant's behavior is circumstantial evidence probative of his consciousness of guilt, and ultimately guilt itself, only when it can be said that behavior is 'susceptible of no prima facie explanation except consciousness of guilt.'").

103. *See* People v. May, 49 N.E.2d 486, 488 (N.Y. 1943) (explaining how the court believed that the evidence of consciousness of guilt was regarded "as a whole of doubtful legal sufficiency . . . ."); *see also* Commonwealth v. Matos, 394 Mass. 563, 565–66 (1985) (instructing jury that they "could not convict the defendant solely on evidence of flight as consciousness of guilt.").

104. *See* United States v. Obi, 239 F.3d 662, 665 (4th Cir. 2001) (stating that the jury must consider all evidence to connect flight with consciousness of guilt); Justice v. State, 530 N.E.2d 295, 297 (Ind. 1988) ("[E]vidence of flight [is] not probative unless tied to some other evidence which is strongly corroborative of the actor's intent."), People v. Kidd, 102 N.E.2d 141, 144 (Ill. 1951) ("[T]he fact that he fled when approached by police officers, raises no legal presumption that he is guilty of the particular crime charged in the indictment.").

Reddy[105] for example, asserted that flight is not probative enough to corroborate a co-conspirator's inculpatory statements, which New York requires for a conviction.[106] In *People v. Kidd*,[107] the Illinois Supreme Court also argued that flight, coupled with other vague evidence, was not enough to sustain a conviction.[108]

b. Prejudicial Effects of Consciousness of Guilt Evidence

Consciousness of guilt evidence can have great influence on a fact-finder.[109] Courts have recognized that this influence may be "pushed too far"[110] when it leads a jury to convict a defendant based on their character and not the facts.[111] This risk has prompted some courts to exclude consciousness of guilt evidence as more-prejudicial-than-probative.[112]

The New York Court of Appeals is one court that has excluded consciousness of guilt evidence for being more-prejudicial-than-probative.[113] In *People v. Feldman*,[114] the defendant was accused of murdering his wife with poison[115] and refusing to permit an autopsy.[116] The court held that

105. 261 N.Y. 479 (1933).

106. *Id.* (stating that flight is evidence of "slight value").

107. 102 N.E.2d 141 (Ill. 1951).

108. *Id.* at 144.

109. *See* People v. May, 290 N.Y. 369, 373–74 (1943) (discussing how the jury "may well have been influenced" by "consciousness of guilt" evidence).

110. People v. Troche, 221 N.Y.S. 2d 228, 231 (App. Div.1961) (citing People v. Leyra, 1 N.Y.2d 199, 209 (1956) (stating that evidence reflecting a consciousness of guilt "may easily be pushed too far.")) (holding that where there is "insufficien[t] [ ] probative evidence to sustain the conviction" and considering consciousness of guilt evidence alone may have led to the possibility of prejudice); *see also* People v. Nowakowski, 221 A.D. 521, 523 (N.Y. 1927) (showing that courts have long recognized that consciousness of guilt evidence "may easily be pushed too far . . . .").

111. *See* United States. v. Robinson, 560 F.2d 507, 514 (2nd Cir. 1977) (citing United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975) (holding that evidence, such as consciousness of guilt, that elicits "a strong emotional or inflammatory impact" and lacks probative value "may pose a risk of unfair prejudice because it 'tends to distract' the jury from the issues in the case and 'permits the trier of fact to reward the good man and punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.'").

112. *Id.* at 527 n.1 (explaining the standard to which relevant evidence can be excluded); *see* FED. R. CIV. P. 403 (outlining that evidence may be excluded "if its probative value is [ ] outweighed by the danger of unfair prejudice . . . .").

113. *See* People v. Feldman, 296 N.Y. 127, 139 (1947) (holding that "[the] defendant's refusal to permit an autopsy upon the body of his wife" lacked probative value of evidence of his consciousness of guilt and was found to be prejudicial); *see also* People v. Cheek, 503 N.Y.S.2d 876 (App. Div. 1986) (explaining that evidence of guilt could be admitted because it had no prejudicial effect).

114. 296 N.Y. 127 (1947).

115. *Id.* at 130.

116. *Id.* at 137.

this refusal should have been excluded.[117] The court explained, "[i]n any event, the danger of undue emphasis being attached to the testimony outbalances any legitimate probative force it could have had."[118] The court ordered a new trial.[119]

Under the Federal Rules of Evidence federal courts engage in a more-prejudicial-than probative analysis.[120] The Second Circuit's ruling in *United States v. Perez*[121] expressed that a lower court did not abuse its discretion in finding that consciousness of guilt evidence—that the defendant coerced a witness—was not more prejudicial than probative.[122] Though, the court did engage in the analysis.[123]

c. Prejudicial Effects Against Female Defendants

There is little case law concerning evidence that is specifically prejudicial against women. Even so, courts have examined gender when conducting a more-prejudicial-than-probative analysis, utilizing gender as a reason for excluding such evidence. For example, in *People v. Martin*,[124] the California Court of Appeals held that obscene letters and writings in possession of a female defendant should be excluded because they had nothing to do with the crime charged, and were therefore, prejudicial.[125] She was on trial for bombing the home of a superior court judge.[126] In making reference to the gender of the defendant, the court went on to discount the evidence as being nothing more than a "tende[ncy] to show [defendant] to be a most depraved and vicious woman."[127] The court left unsaid what was obscene in those letters and writings; however, the use of the terms "obscene" and "depraved" seem to indicate it was of a sexual nature.[128] The jury would have been unable to try her only for the crime

117. *Id.* at 130, 139.
118. *Id.* at 127, 137.
119. *Id.* at 127, 140.
120. United States v. Perez, 387 F.3d 201, 209–10 (2nd Cir. 2004).
121. *Id.*
122. *Id.* at 210.
123. *Id.*
124. 108 P. 1034 (Cal. Ct. App. 1910).
125. *See id.* at 1038 (noting that irrelevant matters are prohibited from being heard by a jury).
126. *Id.* at 1034-35.
127. *Id.* at 1038.
128. *See id.* (stating that the letters presented at the trial were obscene and conveyed the perception that the defendant, Isabella Martin, was a depraved and vicious woman); *see also* AM. HERITAGE DICTIONARY (5th ed. 2011), *available at* http://www.ahdictionary.com/word/search.html?q=obscene (defining "obscene" as "offensive to accepted standards of decency . . . of or relating to materials that can be regulated or criminalized because their depiction of nudity, sex, or excretion is patently offensive . . . ." Defining "depraved"

charged after reading the letters.[129] For this reason, and others, the verdict was overturned.[130]

More recently in a civil case for negligence, the Eighth Circuit directly confronted the issue of sexually charged evidence with regard to female defendants. In *Littleton v. McNeely*,[131] a lawsuit over a boat collision,[132] evidence capturing the behavior of the defendant was held to be more prejudicial than probative.[133] Photographs taken of defendant socializing with third parties on the boat at a location known as "Party Cove" were at issue[134] The photographs offered as evidence did not clearly illustrate whether the defendant and third parties were drinking alcoholic beverages.[135] Nor were the photographs marked in a way to determine the date or time when they were taken.[136] The photographs also showed the defendant and several other women topless.[137] The court said jurors

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as "morally corrupt or perverted."). Note the sexual connotations of both the words "obscene" and "depraved."

129. *See Martin*, 108 P. at 1038 (noting that the inclusion of the letters as evidence in Isabella Martin's trial created prejudice against her and made it virtually impossible for her to receive a fair trial); *see also* SCHUR, *supra* note 49, at 1–2 (noting that women are profoundly affected by the prevailing descriptions of deviance in our society). The author states that the definition of deviance in our culture can make women feel a sense of shame, harm their reputation, and ultimately reinforce the disparity between the sexes. *Id.* at 1–2.

130. *See Martin*, 108 P. at 1038 (ruling that due to the wrongful admission of the letters and the resulting prejudice against Isabella Martin, the verdict of the lower court should be overturned). *See generally* FED. R. CIV. P. 403 (mandating that even if evidence has some relevance, it should be excluded if its probative value is outweighed by the possibility of unfair prejudice).

131. 562 F.3d 880 (8th Cir. 2009).

132. *See id.* at 883 (affirming the origins of the lawsuit, and stating the lawsuit stemmed from a collision between two boats on the Lake of the Ozarks in Missouri in 2005).

133. *See id.* at 888–89 (stating that the court saw no probative value to the photographs of women that were displayed at trial and noting that they were, in fact, potentially prejudicial). The photographs in question showed women drinking alcohol and showed them without their bathing suit tops on. *Id.*; *see also* Lee v. Bennett, 927 F. Supp. 97, 101 (S.D.N.Y. 1996) (stating that prejudicial evidence should not be entered into court proceedings, including prosecutor's summations, because it inhibits the jury's ability to fairly determine someone's guilt or innocence).

134. *McNeely*, 562 F.3d at 888-89. The photos in question were salvaged from a camera that was in a boat belonging to Robert Smedley. *Id.* at 888.

135. *Id.* "The photos do not reveal whether the bottles contain alcoholic or non-alcoholic beverages. Even if the photos did show Gerri Littleton drinking alcohol, we fail to see how that fact would have had any significant impact on the verdict." *Id.*

136. *Id.* at 888-89. "[T]here is no date stamp on the photos, and McNeely offered no evidence to establish whether the photos were taken on the day of the collision or another day that weekend." *Id.* at 888.

137. *See id.* at 888-89 (clarifying that the photos of Gerri Littleton and Lisa Smedley provide a "potentially prejudicial depiction").

might find the photos "lewd, offensive, or immoral"[138] and displaying them would prejudice the jury against the parties.[139] The court held that the district court was right to exclude the photos.[140]

2. When Excluding Theories Should be Used

Courts should exclude sexually charged consciousness of guilt evidence,[141] because the probative value of this evidence is low while the potential for prejudice is high.[142] As the court argued in *Webster*, people react differently to tragedy, thus qualifying the probative value of evidence of their reaction as rather low.[143] As a result, some courts will not uphold a conviction based on that type of evidence alone.[144] On the other hand, the potential for prejudice against accused women when considering sexually charged consciousness of guilt evidence is very high. As

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138. *Id.* The court reasoned that if the photos had any probative value at all, the district court "certainly did not abuse its discretion by determining any minor probative value was far outweighed by the potential for prejudice resulting from the jury's disapproval of the photos." *Id.* at 889.

139. *Id.* at 888. The court noted that even if the pictures clearly depicted the women drinking alcohol, it would not have a significant impact on the jury. *Id.*

140. *See id.* at 888-89 (asserting the admittance of the photographs into evidence was potentially prejudicial as the actions could be considered lewd, offensive, or immoral and had no probative value).

141. *See generally* Dan E. Stigall, *Prosecuting Raskolnikov: A Literary and Legal Look at "Consciousness Of Guilt" Evidence*, ARMY LAW. 54 (2005) (discussing the use of disposing of the evidence, giving false exculpatory statements, fleeing the scene, and displaying an unusually nervous demeanor, as four deeply rooted examples of consciousness of guilt evidence which is widely accepted in U.S. criminal law).

142. *See* United States v. Copeland, 321 F.3d 582, 598 (6th Cir. 2003) ("The slight probative value of these statements [threats against the prosecutor] notwithstanding, a court must still consider whether that probative value substantially outweighs any resulting prejudicial effect."). The Sixth Circuit went on to weigh the value of the statements as evidence of the accused consciousness of guilt determining that because he was not charged with obstruction of justice, the threats had no relation to his charged conduct and the effects outweighed their probative value. *Id.* at 598-99.

143. *See* Commonwealth v. Webster, 59 Mass. 295, 316-17 (1850) (overruled on other grounds).

> To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion, without just cause, on other persons: all or any of which tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused. But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs.

Id.

144. *See* People v. Kidd, 102 N.E.2d 141, 144 (Ill. 1951) (overturning Kidd's conviction because evidence of flight, which tends to prove guilt, was not enough when considering all evidence).

discussed in *Littleton*, the court specifically excluded sexually charged evidence because of the potential for prejudice.[145] Once a woman has been shown violating social norms, the fact-finder is likely to reevaluate all of her actions based on that violation, including actions in the past and in the present.[146] Including this type of evidence effectively encourages fact-finders to punish women for deviating from social standards.[147] By allowing gendered expectations to cloud their reasoning, the jury is likely to convict female defendants for being a "bad" person—a notion which *Kruelwich* and *Martin* prohibit.[148]

Therefore, because of the low probative value and the high prejudicial effect, courts should exclude sexually charged consciousness of guilt evidence when used against women. This, however, is not the only ground for exclusion; several constitutional constraints exist that also warrant exclusion of this evidence.

B. *Constitutional Constraints*

It is well established that the use of race, ethnicity, and religion to convict a defendant violates his or her constitutional rights.[149] Courts have declared these abuses as violative of due process rights, equal protection, and the Fifth Amendment right to a fair trial.[150] Although they have used different methods of reasoning, courts have consistently held that the improper injection of race, ethnicity, or religion into a trial is unconstitutional. However, case law regarding the improper use of gender is less common, and the case law that does exist suggests the use of gender to obtain a conviction also violates a defendant's rights.[151]

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145. Littleton v. McNeely, 562 F.3d 880, 888-89 (8th Cir. 2009).

146. *See* SCHUR, *supra* note 49, at 29 ("Once an individual has been identified as a deviant (of whatever sort), observers tend to reassess the person's overall character and specific behaviors—past and present—in light of that new, devaluing identity.").

147. *Id.*

148. *See* Old Chief v. United States, 519 U.S. 172, 180 (1997) (explaining that when examining a defendant's illicit behavior, individuals tend to generalize that behavior "into bad character and taking that as raising the odds that he did the later bad act [ ] charged.").

149. United States v. Nobari, 574 F.3d 1065, 1072-73 (9th Cir. 2009) (discussing evidence of ethnicity); *see also* United States v. Steele, 298 F.3d 906, 910 (9th Cir. 2002) (explaining that "when the defendant objects to alleged prosecutorial misconduct, the standard of review is abuse of discretion.").

150. United States v. Cabrera, 222 F.3d 590, 594 (9th Cir. 2000); *see* Bains v. Cambra, 205 F.3d 964, 974 (9th Cir. (2000) (talking about the use of religious affiliation as evidence); *see also Nobari*, 574 F.3d at 1072-73 (elaborating on the use of religion as evidence).

151. *See* Lee v. Bennett, 927 F. Supp. 97, 105 (S.D.N.Y. 1996) (discussing the use of gender bias with the jury); *see also* E. LeFevre, Annotation, *Prejudicial Effect of Counsel's Addressing Individually or by Name Particular Juror During Argument*, 55 A.L.R.2d 1198

In *United States v. Nobari*,[152] the Ninth Circuit held that a trial court cannot hear evidence concerning the ethnicity of the defendants.[153] The trial court heard evidence of the role different ethnic groups—such as Mexicans and Middle Easterners—play in drug trafficking.[154] In *United States v. Cabrera*,[155] another Ninth Circuit case, the conviction was reversed because of appeals to ethnic prejudice.[156] A witness' references to Cubans and the techniques Cuban drug dealers used were held to be improper.[157] In *United States v. Doe*,[158] the D.C. Circuit overturned a conviction based on racial evidence.[159] The prosecution elicited evidence concerning Jamaican drug dealers during the trial.[160] The prosecutor specifically referred to that evidence in his summation.[161]

There is little case law concerning whether the prohibition against racial, ethnic and religious evidence also extends to evidence concerning gender. However, in *Lee v. Bennett*,[162] a habeas corpus case, a federal district court considered how a specific appeal to the "ladies of the jury" might have affected the outcome of the case.[163] In the same case, a male defendant was convicted of rape in a second trial, after his first trial en-

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(1957) (discussing other forms of singling out jurors, in particular, by name or otherwise individually).

152. 574 F.3d 1065 (9th Cir. 2009).

153. *Id.* at 1076.

154. *See id.* at 1071-73 (referencing the testimony of the informant who described the role Mexicans and Middle Easterners play in drug trafficking). The informant gave detailed information on what the Mexicans' role allegedly was in drug trafficking, stating that Mexicans were the "cookers"—the ones who turned the pseudoephedrine into methamphetamine. *Id.* at 1072. The informant also stated that the role of the Middle Easterners was allegedly to get the pseudoephedrine into the United States and into the hands of the Mexicans. *Id.*

155. 222 F.3d 590 (9th Cir. 2000).

156. *Id.* at 591. Because the lead detective interjected prejudicial material that had little to no probative value, the appellate court reversed the district court's decision on unfair prejudice under Rule 403 of the Federal Rules of Evidence. *Id.*; FED. R. EVID. 403.

157. *Cabrera*, 222 F.3d at 596-97. "[R]eferences to racial, ethnic, or religious groups are not only improper and prejudicial but are reversible error." *Id.* at 594.

158. 903 F.2d 16 (D.C. Cir. 1990).

159. *Id.* at 29. Because the prosecutor's remarks kindled racial predilections, these types of statements "'can violently affect a juror's impartiality.'" *Id.* at 28.

160. *Id.* at 17–18. The prosecutor called several witnesses who testified about drugs associated with a Jamaican and Jamaican drug dealers. *Id.* One of these witness, a detective, described how the Jamaican drug dealers operated and how they "have had a phenomen[al] impact on the drug trade in the District of Columbia." *Id.* at 18.

161. *Id.* at 23–24.

162. 927 F. Supp. 97 (S.D.N.Y. 1996).

163. *Id.* at 106 ("[T]he prosecutor was allowed by the trial court by this and other remarks, to create an unwholesome atmosphere in which it could hardly be expected that the jury deliberations would concentrate on the facts.").

ded in a mistrial.[164] Accusations of gender bias were made against the prosecutor.[165] The court believed that the prosecutor was attempting to appeal to the gender bias of female jurors because, in the first trial, the female jurors had voted to acquit the defendant.[166] The court criticized the prosecutor for using the word "insensitive,"[167] and said it was "a current buzz word used on TV talk shows and soap operas to describe masculine reactions to complaints by women.[168] This statement was an appeal to gender bias among the jurors.[169] The prosecutor also made specific appeals to the "the women who constituted a majority of the jurors" during closing arguments.[170] The court overturned the conviction based on the prosecutor's appeals to female jurors.[171]

When the prosecution introduces sexually charged consciousness of guilt evidence against women it is appealing to gender prejudice. They call the defendant's sex to attention because women are already devalued in a way similar to those who commit bad acts.[172] The prosecutor in the ubiquitous Casey Anthony trial tried to appeal to the prejudice that bad mothers are bad people, when he argued that the Casey Anthony was not a good mother.[173] When prosecutors show pictures of a defendant in a

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164. *Id.* at 100.

165. *See id.* at 104 ("It is clear to this court, upon consideration of the People's entire summation, that the intent of the prosecutor was to specifically concentrate of [sic] the women of the jury and to focus them on matters having little to do with the evidence of the case.").

166. *See id.* at 100 ("In some fashion the participants ascertained that the first trial jury, which consisted of seven women and five men had deadlocked six to six with six women voting to acquit.").

167. *Id.* at 105.

168. *Id.*

169. *Id.* at 105 n.3. The court defined the term "insensitive" with regard to the testimony of "J's" former employer who stated that "J" seemed cheerful and unaffected following the attack. The prosecutor used the term in order to emphasize why so many women go without reporting rape. *Id.*

170. *Id.* at 105. The court also sustained an objection to the aforementioned statement as well as the statement that the subject matter before the jury was "'even more difficult for female jurors than for male jurors.'" *Id.*

171. *See id.* at 106 ("This misconduct having so infected the search for truth, this Court concludes as a matter of law that the conviction in the second trial justifies no confidence in its reliability.").

172. *See* SCHUR, *supra* note 49 (quoting feminist writer Mary Daly on the society's stigma of women as deviants, "[t]o be female is to be deviant by definition on the prevailing culture;" as well as social psychologist Judith Long Laws who stated, "[m]ales as a group constitute the dominant class and females are the deviant class . . . . In our society male is normal (not merely different) and female is deviant, or Other.").

173. Loiaconi, *supra* note 7 (stating that the defendant could not be considered a good mother merely because she provided basic necessities—food, clothing, and shelter—for her daughter).

revealing dress[174] or tell of her participation in a wet t-shirt contest,[175] they are bringing the defendant's sexuality to attention. The prosecution is essentially arguing that the female defendant should be convicted solely because she is a woman. The prosecutors in in *Nobari*[176] and *Doe*[177] made a similar appeal to convict the defendant because of his ethnicity. In *Lee*, the court specifically held that injecting gender issues into a case violates a defendant's rights.[178] A court could exclude this evidence under the Fourth Amendment's Due Process Clause, the Fifth Amendment's right to a fair trial, or whichever other constitutional grounds it choses.

VI. Conclusion

Sexually charged consciousness of guilt evidence should be excluded when used against women. This type of evidence encourages fact-finders to find the accused guilty, not because they believe she committed the crime charged, but because of her "deviance" from socialized gendered expectations.

Unlike the evidence in *Berryhill* and *Olanson*, sexually charged evidence presents special problems with regards to women. As the court recognized in *Littleton*, once sexually charged evidence is introduced fact-finders will have trouble deciding only the case at bar and may punish women for other reasons. Furthermore, In *Lee*, the court recognized that it violated a defendant's rights to interject gender into a trial.

For these reasons, courts should exclude this evidence under a more-prejudicial-than-probative analysis. This type of evidence has little probative value as it encourages fact-finders to decide guilt on impermissible grounds, namely the violation of gender norms. It should also be excluded on constitutional grounds since it is impermissible to argue for conviction based on a defendant's sex. Yet, sexually charged evidence often results in convictions based on the defendant's sexual departures from socialized gender norms. Courts should exclude this evidence and ensure that convictions are based on facts, not on social stereotypes.

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174. Michael, *supra* note 2; Loiaconi, *supra* note 7.

175. Littlefield, *supra* note 12.

176. *See* United States v. Nobari, 574 F.3d 1065, 1076 (9th Cir. 2009) (explaining the court's holding that the "[t]he district court abused its discretion by admitting the testimony and allowing the closing argument concerned with ethnic generalizations . . . .").

177. *See* United States v. Doe, 903 F.2d 16, 29 (D.C. Cir. 1990) (proposing how racially charged statements can influence the impartiality of a fact-finder).

178. *See* Lee v. Bennett, 927 F. Supp. 97, 106 (S.D.N.Y. 1996) (noting that the prosecutor's actions to appeal to the female members of the jury was held as a violation of the defendant's due process rights).