

# Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity

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# ADMISSIBILITY OF PATTERNS OF SIMILAR SEXUAL CONDUCT: THE UNLAMENTED DEATH OF CHARACTER FOR CHASTITY

*Abraham P. Ordovert*†

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The following materials are cited in this Article as indicated below, without cross-reference:

MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE (1976) [hereinafter cited as WEINSTEIN].

J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW [hereinafter cited as WIGMORE] [individual volumes cited include 1, 2, 7 WIGMORE (3d ed. 1940); 3A WIGMORE (Chadbourn rev. 1970)].

## INTRODUCTION

In adopting Federal Rule of Evidence 404(a)(2),<sup>1</sup> Congress accepted a traditional exception to the general rule that evidence of character is inadmissible to show that a person acted in a particular way on a specific occasion.<sup>2</sup> According to the traditional view, women who consent to nonmarital sexual intercourse possess a "character for unchastity."<sup>3</sup> Under the common law and the Federal Rules, an accused rapist may therefore introduce reputation evidence of the complainant's unchaste character to prove inferentially that she consented to intercourse with the defendant on the occasion in issue.<sup>4</sup>

Within a few months of the effective date of the Federal Rules, however, the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee reported a bill that would have limited admissibility to situations in which specific prior acts form "part of a pattern of sexual conduct by the victim that under the circumstances is relevant to the issue of consent."<sup>5</sup> This formula-

<sup>1</sup> FED. R. EVID. 404(a)(2) provides:

(a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

...

(2) *Character of victim.*—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor . . . .

<sup>2</sup> See 2 WEINSTEIN ¶ 404[06]. See generally MCCORMICK § 188.

<sup>3</sup> See 1 WIGMORE § 62; Annot., 140 A.L.R. 364, 380 (1942).

<sup>4</sup> See FED. R. EVID. 404(a)(2), 405(a); 2 WEINSTEIN ¶ 404[06]; 1 WIGMORE §§ 62, 200.

<sup>5</sup> S. 1, 94th Cong., 1st Sess. § 1646(b)(2)(B) (1975). As finally reported by the Subcommittee this proposal would have also admitted evidence of prior sexual acts with the defendant:

(b) PROOF.—Under sections 1641 through 1645 [defining certain sex offenses]:

...

(2) evidence relating to the victim's prior sexual conduct is not admissible as evidence except on the issue of consent, and is not admissible on the issue of consent unless such conduct:

(A) involved the participation of the defendant; or

(B) was part of a pattern of sexual conduct by the victim that under the circumstances is relevant to the issue of consent.

Congress failed to take action on S. 1. Although most of the bill's provisions were reintroduced in S. 1437, 95th Cong., 1st Sess. (1977), § 1646(b)(2) of the new bill differs significantly from its predecessor:

(b) PROOF.—In a prosecution under section [sic] 1641 through 1645:

...

(2) except as otherwise required by the Constitution, evidence relating to the victim's prior or subsequent sexual behavior is not admissible.

tion excludes evidence of reputation, and thus departs dramatically from the common-law doctrine embodied in the Federal Rules and followed in most states. Such an approach is long overdue. Both longstanding principles of evidentiary law and modern conceptions of sexual morality unequivocally point to the need for reform.

The Senate bill not only drew attention to this problem; it also provided a sensible replacement for the traditional rule. Although several states have enacted legislation that limits the common-law rule in a variety of ways,<sup>6</sup> for presumably similar policy

The Senate has not yet taken action on this measure.

A different approach appears in a separate bill introduced in the House, which would add a new Federal Rule of Evidence 412. *See* H.R. 408, 95th Cong., 1st Sess. (1977). The new Rule would provide in part:

(a) Notwithstanding any other provision of law, reputation or opinion evidence of a person's past sexual behavior is not admissible in any trial if an issue in such trial is whether such person was raped or assaulted with intent to commit rape.

(b) Notwithstanding any other provision of law, evidence of specific instances of a person's past sexual behavior is not admissible in any trial if an issue in such trial is whether such person was raped or assaulted with intent to commit rape, except that otherwise admissible evidence of specific instances of such conduct is admissible in such trial—

(1) if such evidence—

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

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

*Id.* To date, no action has been taken on this proposal.

<sup>6</sup> *See, e.g.*, CAL. EVID. CODE §§ 782, 1103(2) (West Supp. 1977); IND. CODE ANN. §§ 35-1-32.5-1 to 4 (Burns Supp. 1976); N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1976); OHIO REV. CODE ANN. § 2907.02(D) (Page Supp. 1976); TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1976). Nevertheless, only two of the recently enacted statutes—those of Florida and Minnesota—adopt the pattern-of-similar-behavior formulation proposed under § 1646 of S. 1 (*see* note 5 and accompanying text *supra*) and advocated in this Article. Florida's statute provides that

when consent by the victim is at issue, . . . evidence [of specific instances of prior consensual sexual activity between the victim and any person other than the defendant] may be admitted if it is first established to the court outside the presence of the jury that such activity shows such a relation to the conduct involved in the case that it tends to establish a pattern of conduct or behavior on the part of the victim which is relevant to the issue of consent.

FLA. STAT. ANN. § 794.022(2) (West 1976). Similarly, when the defendant raises consent or fabrication as a defense, Minnesota's statute allows evidence of prior acts "tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the

reasons,<sup>7</sup> the Senate proposal stands almost alone in defining relevance in terms of specific patterns of behavior.<sup>8</sup>

This standard reflects reality. Given the wide variety of possible sexual relationships in contemporary society, the nature of the complainant's prior sexual activity, rather than its mere existence, provides the only reliable indicator of present consent.<sup>9</sup> Thus, courts should evaluate the relevance of sexual history evidence by measuring the degree of similarity between the prior acts and the

case at issue on the part of the complainant, relevant and material to the issue of consent or fabrication," but such evidence is admissible only if the conduct took place within one year before the alleged offense and only to the extent that the court finds that "its inflammatory or prejudicial nature does not outweigh its probative value." MINN. STAT. ANN. § 609.347(3) (West Supp. 1976). Several other statutes also provide for a balancing of probative value against prejudice, but do not necessarily exclude reputation or opinion evidence of the victim's chastity. *See, e.g.*, OHIO REV. CODE ANN. § 2907.02(D) (Page Supp. 1976); TEX. PENAL CODE ANN. tit. 5, § 21.13(a) (Vernon Supp. 1976). Under a catch-all provision, New York apparently allows the defense to introduce opinion and reputation evidence if the court deems it "relevant and admissible in the interests of justice." N.Y. CRIM. PROC. LAW § 60.42(5) (McKinney Supp. 1976).

In marked contrast to S. 1, California bars all reputation evidence, opinion evidence, and proof of specific acts (except when the evidence relates to sexual conduct with the defendant), while allowing the use of such evidence, subject to certain procedural safeguards, to impeach the victim's credibility. *See* CAL. EVID. CODE §§ 782, 1103(2) (West Supp. 1977). Although S. 1 would have limited the admissibility of prior sexual relations with the defendant to the issue of consent, the various state statutes almost uniformly allow the use of such evidence to impeach credibility as well. *See, e.g.*, CAL. EVID. CODE § 1103(2)(b), (d) (West Supp. 1977); FLA. STAT. ANN. § 794.022(2) (West 1976); IND. CODE ANN. § 35-1-32.5-2(a) (Burns Supp. 1976); MINN. STAT. ANN. § 609.347(3)(c) (West Supp. 1976); N.Y. CRIM. PROC. LAW § 60.42(1) (McKinney Supp. 1976). Moreover, unlike S. 1, many of the statutes also provide explicitly for the admissibility of the complainant's prior sexual conduct to show the source of semen, pregnancy, or disease. *See, e.g.*, MINN. STAT. ANN. § 609.347(3)(b) (West Supp. 1976); N.Y. CRIM. PROC. LAW § 60.42(4) (McKinney Supp. 1976).

For a comprehensive discussion of the state statutes with regard to both their substantive and procedural provisions, see Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 32-39 (1977).

<sup>7</sup> Policies underlying reform include encouraging the victim to report the crime, protecting the victim's privacy, preventing undue harassment and humiliation, and shifting the focus away from the victim's character—a collateral issue at best—to the commission of the crime. *See, e.g.*, Bellacosa, Practice Commentary to N.Y. CRIM. PROC. LAW § 60.42, at 100 (McKinney Supp. 1976); Berger, *supra* note 6, at 54; Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L.J. 1551, 1554 (1975).

<sup>8</sup> Only the Florida and Minnesota statutes take a similar approach. *See* note 6 *supra*.

<sup>9</sup> *See generally* People v. Blackburn, 56 Cal. App. 3d 685, 690-91, 128 Cal. Rptr. 864, 866-67 (1976); Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974); Commonwealth v. McKay, 363 Mass. 220, 227, 294 N.E.2d 213, 218 (1973); 3 H. UNDERHILL, CRIMINAL EVIDENCE § 766, at 1766-67 (5th ed. 1957); Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?*, 9 IND. L. REV. 418, 429-30 (1976); Note, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U.L. REV. 127, 138 (1975) [hereinafter cited as *Fallacy*].

conduct alleged on the occasion in issue.<sup>10</sup> This Article develops an analytical framework for making this evaluation.

The suggested analysis allows the trier of fact to draw an inference of consent from prior patterns of behavior clearly similar to the conduct immediately in issue. The pattern of conduct would be admissible only if there is a strong showing based on evidence of specific acts (1) that the victim engaged in the alleged prior acts; (2) that the pattern of conduct shares common characteristics, especially as to participants, with the incident involved in the present case; (3) that the prior conduct is not too remote in time; (4) that the proof is necessary to the proper presentation of the defendant's case; and (5) that the probative value of the evidence outweighs its potential prejudicial effect. This inductive approach follows generally accepted evidentiary principles regarding the relevance of prior similar occurrences,<sup>11</sup> and would exclude much of the sexual history evidence still admitted under the traditional rule.

In addition to allowing the defense to present reputation evidence of the complainant's unchastity to prove consent, the Federal Rules and many states admit such evidence to impeach the complainant's credibility.<sup>12</sup> Wigmore, the leading proponent of the traditional doctrine, bases this rule on the assumption that unchaste women habitually make false accusations.<sup>13</sup> In contrast, the Senate bill would have totally excluded evidence of sexual history—in whatever form—when offered for purposes of impeachment.<sup>14</sup> In rejecting Wigmore's position, however, the proposal went too far. Evidence of specific prior acts, when shown to be relevant under closely circumscribed standards of similarity, should be admissible to impeach credibility as well as to show consent.

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<sup>10</sup> See *Huffman v. State*, 301 So. 2d 815, 817 (Fla. Dist. Ct. App. 1974); *State v. Hill*, 244 N.W.2d 728, 731 (Minn. 1976), *cert. denied*, 429 U.S. 1065 (1977).

<sup>11</sup> See generally McCORMICK § 200 (evidence of previous accidents and injuries in negligence and products liability cases). See also *id.* § 195 (evidence of habit and custom). In discussing the admissibility of evidence of other crimes to prove criminal intent, two commentators have advocated a similar approach:

As an additional factor, it must be shown that the prior acts are similar, at least sufficiently so to allow for some probative value. Establishing requirements for similarity will no doubt leave considerable room for difference of opinion, and much will be left to the discretion of the individual trial judge.

Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 328 (1956) (footnotes omitted).

<sup>12</sup> See 3A WIGMORE § 924a; notes 199-206 and accompanying text *infra*.

<sup>13</sup> See 3A WIGMORE § 924a, at 736-37; 1 WIGMORE § 62, at 466-67.

<sup>14</sup> See note 5 and accompanying text *supra*.

## I

UNCHASTE CHARACTER AS PROOF OF CONSENT—AN  
ATTACK ON THE TRADITIONAL RULE

Since lack of consent is a necessary element of the crime of rape,<sup>15</sup> the defense must be permitted to offer evidence that the victim consented to the act.<sup>16</sup> It thus becomes necessary to determine what types of evidence are admissible to prove consent. The defendant's testimony that the complaining witness consented would be clearly relevant and admissible. The testimony of other witnesses relating to the woman's conduct on the occasion in question and her immediate relationship with the defendant would also be unobjectionable. But when the defense seeks to show consent by offering evidence of the complainant's general reputation, significant questions of relevance and prejudice become apparent.<sup>17</sup>

Acknowledging the shortcomings of character evidence, courts have normally excluded it.<sup>18</sup> Apparently, however, men of previous generations were so unnerved by women's accusations of sexual abuse that in rape cases they departed from this general rule to protect the accused against the wild charges of "errant young girls and women."<sup>19</sup> Thus, even when the circumstances of the alleged crime differed completely from the woman's reputed sexual activity, her reputation, viewed as evidence of character, provided a

<sup>15</sup> *E.g.*, *Williams v. United States*, 327 U.S. 711 (1954); *Commonwealth v. Shrodes*, 354 Pa. 70, 46 A.2d 438 (1946); 2 WEINSTEIN ¶ 404[06], at 404-35; 1 WIGMORE § 62, at 464.

<sup>16</sup> The defendant's due process rights to a fair trial and to confrontation of the witnesses against him guarantee this opportunity. *See* U.S. CONST. amends. VI, XIV; *People v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976); *People v. Conyers*, 86 Misc. 2d 754, 382 N.Y.S.2d 437 (Sup. Ct. 1976); *Berger*, *supra* note 6, at 52-53; Comment, *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) [hereinafter cited as *Limitations*]. Respectively, *Blackburn* and *Conyers* rejected constitutional challenges to the California and New York statutes limiting a rape defendant's opportunity to introduce evidence of the complainant's prior sexual conduct. *See* CAL. EVID. CODE §§ 782, 1103(2) (West Supp. 1977); N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1976); note 6 *supra*. In *Conyers*, the court concluded that "the statute would have serious problems of constitutionality" if it did not, in a final catch-all provision, allow the trial judge broad discretion to admit "in the interests of justice" evidence that the statute would otherwise exclude. 86 Misc. 2d at 763, 382 N.Y.S.2d at 444. *See generally* Note, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity*, 7 LOY. CHI. L.J. 118, 129-34 (1976) (constitutional implications of proposal limiting content of rape defense) [hereinafter cited as *Indicia*].

<sup>17</sup> *See* notes 64-76 and accompanying text *infra*.

<sup>18</sup> *See, e.g.*, McCORMICK § 188.

<sup>19</sup> 3A WIGMORE § 924a, at 736.

sufficient basis for the inference of present consent.<sup>20</sup>

This approach maximized the scope and effect of sexual history evidence in rape cases. The trier of fact was not permitted to draw the inference of consent directly from specific acts forming the complainant's sexual history, since a significant dissimilarity between past and present circumstances would have exploded the inference.<sup>21</sup> The traditional doctrine avoided this obstacle by recasting sexual history into a character trait.<sup>22</sup> This approach comported with a basic evidentiary principle: inferences may be drawn from character, but generally not from specific prior acts.<sup>23</sup> Thus, the traditional doctrine allowed the factfinder to draw an inference of unchaste character from a reputation for prior sexual activity,<sup>24</sup> and then permitted an inference of present consent from the character thus established.<sup>25</sup> Under the traditional view, the character of the complainant in a rape case is not directly in issue, as it might be in a seduction case.<sup>26</sup> The concept of character takes on significance only as a vital step in the inferential process leading to proof of consent.

Proponents of the traditional view assume that all nonmarital intercourse is abnormal, immoral, and reprehensible.<sup>27</sup> If this assumption is false, the doctrine must fall. Research conducted over the past thirty years indicates that most young women now engage in premarital sexual relationships.<sup>28</sup> Contemporary society generally considers such behavior normal.<sup>29</sup> With this change in prevailing behavior and attitudes, the mere presence of nonmarital sexual

<sup>20</sup> See notes 33-40 and accompanying text *infra*.

<sup>21</sup> See notes 88-95 and accompanying text *infra*.

<sup>22</sup> See 1 WIGMORE § 62.

<sup>23</sup> See *id.* at 467.

<sup>24</sup> See FED. R. EVID. 404(a)(2), 405(b) & Advisory Committee's Note; 2 WEINSTEIN ¶¶ 404[06], 405[04]; 1 WIGMORE §§ 62, 200; Annot., 140 A.L.R. 364, 380-90 (1942).

<sup>25</sup> See generally 1 WIGMORE § 192.

<sup>26</sup> *E.g.*, *Burrow v. State*, 166 Ark. 138, 265 S.W. 642 (1924); *State v. Wilcoxon*, 200 Iowa 1250, 206 N.W. 260 (1925). See Advisory Committee's Note to FED. R. EVID. 404; 1 WIGMORE §§ 79, 205.

<sup>27</sup> See, *e.g.*, *State v. Wood*, 59 Ariz. 48, 122 P.2d 416 (1942); *People v. Abbot*, 19 Wend. 192 (N.Y. 1838); *Lee v. State*, 132 Tenn. 655, 179 S.W. 145 (1915). See generally Note, *supra* note 7, at 1551 n.3; *Fallacy*, *supra* note 9, at 150-51.

<sup>28</sup> See notes 41-55 and accompanying text *infra*. One recent study showed that 65% of the sample of unmarried college women were nonvirgins. See Oswald, *Sexual and Contraceptive Behavior of College Females*, 22 AM. C. HEALTH A.J. 392 (1974). See also R. SORENSON, *ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA* 121-22 (1973) (45% of females aged 13-19 had experienced intercourse). See generally *Limitations*, *supra* note 16, at 413-14; *Fallacy*, *supra* note 9, at 141-43.

<sup>29</sup> See, *e.g.*, M. HUNT, *SEXUAL BEHAVIOR IN THE 1970's* 116 (1974).

experience provides no basis for inferring a specific character "trait" predictive of present consent. In short, sexual history is "character-neutral."

In addition to its failure to reflect this change in social norms, the traditional doctrine ignores basic principles of relevance long recognized in other contexts. Instead of admitting only the particularized proof normally required to connect general assumptions of probability with the specific event in question,<sup>30</sup> the traditional rule allows juries to speculate about consent on the basis of a tortured series of inferences grounded on unreliable reputation evidence.<sup>31</sup> Furthermore, the traditional doctrine fails to take into account the unfair prejudice and confusion likely to result from admission of sexual history evidence. These dangers will often far outweigh the probative value of such evidence.<sup>32</sup>

In short, the traditional rule is wrong. It proceeds from a faulty premise and contravenes principles and policies long embodied in the law of evidence.

#### A. *The Foundation of the Traditional Rule Crumbles*

Traditionalists argue that evidence of the complainant's unchastity is always relevant when the defendant raises the issue of consent.<sup>33</sup> Wigmore states that "the character of the woman as to chastity is of considerable probative value in judging the likelihood of [her] consent."<sup>34</sup> The traditionalists reach this conclusion through a specious form of deductive reasoning: moral judgments as to character give rise to a universal premise from which a conclusion is drawn in each particular case.<sup>35</sup> In operation, the logic

<sup>30</sup> See generally *People v. Collins*, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (en banc); *Smith v. Rapid Transit, Inc.*, 317 Mass. 469, 58 N.E.2d 754 (1945); Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 812-13 (1961); James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 697-700 (1941); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1346 (1971). Cf. *United States v. Cavazos*, 530 F.2d 4 (5th Cir. 1976) (rejecting use of probability statistics in sentencing).

<sup>31</sup> See, e.g., *State v. Wulff*, 194 Minn. 271, 260 N.W. 515 (1935). See generally 1 WIGMORE §§ 62, 200.

<sup>32</sup> See *Fallacy*, *supra* note 9, at 149-61; notes 64-76, 97-107 and accompanying text *infra*. See generally FED. R. EVID. 403.

<sup>33</sup> See, e.g., 2 WEINSTEIN ¶ 404[06]; 1 WIGMORE § 62.

<sup>34</sup> 1 WIGMORE § 62, at 464. See Advisory Committee's Note to FED. R. EVID. 404; 2 WEINSTEIN ¶ 404[06].

<sup>35</sup> In contrast, the analysis proposed in this Article relies on an inductive approach. This involves reasoning from evidence of specific prior acts to a conclusion regarding the

proceeds as follows:

Major Premise: Women who possess the character trait of unchastity consent more readily than chaste women to sexual intercourse.

Minor Premise: The complainant's reputation establishes that she possesses the character trait of unchastity.

Conclusion: The complainant's character trait of unchastity makes her consent more likely than if she lacked this trait.<sup>36</sup>

This conclusion seems to accord with a basic evidentiary rule: evidence is relevant if it has any tendency to make the existence of a material fact more or less probable.<sup>37</sup> The conclusion is invalid, however, because it proceeds from a faulty major premise. This premise springs from the moral judgment that women who engage in nonmarital intercourse are "immoral," and that such immoral women are more likely to consent to nonmarital intercourse on any given occasion. Once the woman's immorality is established, albeit by character evidence, the factfinder may infer consent not from her specific pattern of behavior, but rather from her membership in the class of women with a reputation for unchastity.<sup>38</sup>

That the traditional reasoning employs a concept of character heavily laden with moral bias<sup>39</sup> is hardly surprising, for character evidence by its nature reflects moral predilections. Each person

probability of a similar occurrence in the present case. See notes 134-37 and accompanying text *infra*.

<sup>36</sup> See, e.g., *People v. Johnson*, 106 Cal. 289, 39 P. 622 (1895); *People v. Collins*, 25 Ill. 2d 605, 186 N.E.2d 30 (1962).

The following is a typical jury instruction employing this deductive analysis:

Evidence was received for the purpose of showing that the female person named in the information was a woman of unchaste character.

A woman of unchaste character can be the victim of a forcible rape but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again.

Such evidence may be considered by you only for such bearing as it may have on the question of whether or not she gave her consent to the alleged sexual act and in judging her credibility.

CALIFORNIA JURY INSTRUCTIONS CRIMINAL 10.06 (3d ed. 1970). For a discussion of the traditional rape instruction and its historical antecedents, see *People v. Rincon-Pineda*, 14 Cal. 3d 864, 873-77, 538 P.2d 247, 254-56, 123 Cal. Rptr. 119, 126-28 (1975); Berger, *supra* note 6, at 10, 96-97. An increasing number of jurisdictions are abandoning the special charge in rape cases, through either legislative reform or judicial decision. See *id.* at 11 & n.75.

<sup>37</sup> FED. R. EVID. 401; MCCORMICK § 185, at 437. See notes 78-87 and accompanying text *infra*.

<sup>38</sup> See *Limitations*, *supra* note 16, at 414-16.

<sup>39</sup> See Note, *supra* note 7, at 1551 n.3; *Limitations*, *supra* note 16, at 403 n.3, 407. See generally Advisory Committee's Note to FED. R. EVID. 405.

exhibits some character traits society applauds and others it condemns. Character is measured by the degree of conformity to the prevailing customs or standards of the culture. Thus, character analysis begins with a general formulation of the traits society favors, proceeds to determine whether some individual is reputed to possess those traits, and then infers particular action on a particular occasion from the "character" previously "proved." This process relies on both a moral presumption and a complex series of inferences. The immorality of the complainant in a rape case was deemed relevant because it was viewed as the functional equivalent of character. The moral beliefs of individual judges thus became the standard for determining the admissibility of the complainant's sexual history.

Under the traditional doctrine, these moral judgments were purportedly applied not in any religious or ethical sense, but purely as a basis for logical inference; prior immoral acts established a disposition or propensity to engage in further immoral acts.<sup>40</sup> If these moral notions are removed, however, the specific acts previously forced into the background take on the significance they should have had all along. The question then becomes whether the prior acts have probative value in determining the likelihood that the later acts occurred.

In a society that no longer considers nonmarital sexual behavior immoral or even unusual, there can be no immoral character trait of unchastity; thus, there can be no character-based presumption that unchaste women consent more readily than chaste women to a given sexual act. Common acceptance of nonmarital sexual activity undermines the foundation of the traditional rule. Unchastity is no longer "immoral"; it is character-neutral.

A less theoretical explanation of the traditional rule lies in the antipathy of previous generations toward those perceived as "immoral." In a society that favored and professed to practice chastity, women who engaged in sexual activity outside the conjugal bed were deemed unworthy of either protection or belief. Present perceptions of sexual morality obviously undermine this "justification" for the traditional rule.

Longstanding beliefs about the sexual attitudes and practices of American women began to crumble with the publication of the famous Kinsey Report in 1953.<sup>41</sup> The Report showed that nearly

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<sup>40</sup> See 1 WIGMORE §§ 62, 192, 200; 3A WIGMORE § 924a.

<sup>41</sup> A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, *SEXUAL BEHAVIOR IN THE*

50% of the women interviewed who had married by age 20 had engaged in premarital intercourse.<sup>42</sup> The same percentage held for women married between the ages of 21 and 25.<sup>43</sup> Among women married between the ages of 26 and 30, between 40% and 66% had experienced premarital sex.<sup>44</sup> Of the married women who had engaged in premarital relations, 77% saw no reason to regret the experience.<sup>45</sup> Of the unmarried women, 69% expressed a similar attitude.<sup>46</sup>

More recent research indicates that female sexual attitudes and practices are substantially more liberal today than a mere generation ago.<sup>47</sup> Moreover, the research also demonstrates that male attitudes toward female sexual behavior do not accord with the common-law view that most men scorn the "unchaste" woman.<sup>48</sup> A recent study, published by Morton Hunt in 1974,<sup>49</sup> showed that by age 24, 70% of the unmarried women in the sample had experienced intercourse, and 80% of the married women had engaged in premarital relations.<sup>50</sup> The study also showed that 68% of all the women interviewed condoned premarital sex for women and 73% condoned it for men.<sup>51</sup> Of the men, a remarkable 81% accepted

HUMAN FEMALE (1953) [hereinafter cited as KINSEY]. See also A. KINSEY, W. POMEROY, & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

Kinsey based his findings on a sample of 5,940 white females whose case histories were completed prior to 1950. KINSEY, *supra*, at 22, 43. The case histories were supplemented by substantial additional data. *Id.* at 3, 22; P. ROBINSON, *THE MODERNIZATION OF SEX* 99-100 (1976).

For a historical overview of sexual research from the Victorian era to the present, with particular emphasis on the work of Havelock Ellis, Alfred Kinsey, and William Masters and Virginia Johnson, see P. ROBINSON, *supra*. For a compilation of statistical materials resulting from this research, see V. PACKARD, *THE SEXUAL WILDERNESS* 491-511 (1968).

<sup>42</sup> KINSEY, *supra* note 41, at 287.

<sup>43</sup> *Id.*

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

<sup>45</sup> *Id.* at 316. The study also showed that by age 40, some 26% of the married women had engaged in extramarital relationships. *Id.* at 416.

<sup>46</sup> *Id.* at 316. One historian of sexual research has described the importance of Kinsey's work in the following terms:

One can . . . sense Kinsey's influence in the increasing tolerance with which the sexual activities of the young, especially the unmarried young, are contemplated. . . . [T]his liberalizing influence has stemmed in part from a simple empirical discovery, namely that a great deal of sexual activity, among young and old alike, occurs outside marriage.

P. ROBINSON, *supra* note 41, at 117.

<sup>47</sup> See, e.g., M. HUNT, *supra* note 29, at 20, 149-55; V. PACKARD, *supra* note 41, *passim*.

<sup>48</sup> See M. HUNT, *supra* note 29, at 114-20.

<sup>49</sup> M. HUNT, *supra* note 29.

<sup>50</sup> *Id.* at 150.

<sup>51</sup> *Id.* at 116, Table 13. These figures represent women's views on premarital sex for

premarital sex for women, and 84% accepted it for men.<sup>52</sup>

Statistical studies of the sexual activities and attitudes of American men and women date back to the time of World War I.<sup>53</sup> They consistently demonstrate that substantial and growing majorities of the adult population have engaged in and condoned sexual relationships that the common-law doctrine would condemn as immoral.<sup>54</sup> If these studies are accurate, the majority of American

"engaged" couples. For couples described as "in love," 61% of the female sample condoned premarital sex for women, 68% for men. *Id.*

<sup>52</sup> *Id.* These figures reflect men's views on premarital sex for "engaged" couples. For couples described as "in love," 77% of the male sample condoned premarital sex for women, 82% for men. *Id.*

Sexual attitudes were also explored in a recent poll of 530 Long Island boys and girls between the ages of 13 and 18. *See* *Newsday*, Mar. 30, 1976, at 3A. Some 64% believed that cohabitation before marriage was acceptable behavior, and 55% approved of sexual relations among high-school teenagers. *Id.*

<sup>53</sup> *See* V. PACKARD, *supra* note 41, at 492-503.

<sup>54</sup> *See id.* at 135-46, 492-503.

The studies conducted before 1920 showed a marked disagreement on the sexual experience of American women. One researcher concluded that as early as 1919, 26% of the women sampled between the ages of 20 and 29 had engaged in premarital sex. L. TERMAN, *PSYCHOLOGICAL FACTORS IN MARITAL HAPPINESS* 321, Table 113 (1938). Other data from the same period, however, indicated that only 7% to 14% of the women sampled had experienced premarital relations. K. DAVIS, *FACTORS IN THE SEX LIFE OF TWENTY-TWO HUNDRED WOMEN* 20 (1929); KINSEY, *supra* note 41, at 339, Table 83.

During the 1920's, researchers generally found a marked increase in sexual behavior. Their calculations of the incidence of premarital relations among women who had reached the age of 25 ranged between 36% and 49%. *See* G. HAMILTON, *RESEARCH IN MARRIAGE* 384 (1929); KINSEY, *supra* note 41, at 339, Table 83; L. TERMAN, *supra*, at 321, Table 113.

Although the studies in the 1930's again showed divergent results, they revealed a definite upward trend in premarital sexual activity. *See* D. BROMLEY & F. BRITTON, *YOUTH AND SEX* 289, Table 7 (1938); *PUBLIC OPINION 1935-1946*, at 481-82 (H. Cantril ed. 1951); KINSEY, *supra* note 41, at 339, Table 83; L. TERMAN, *supra*, at 321, Table 113. Research for this period showed that at least 39% of the women sampled had experienced premarital relations. KINSEY, *supra* note 41, at 339, Table 83. In one study, a sample of 666 married couples showed that 47% of the women and 68% of the men had had premarital sexual experience. E. BURGESS & P. WALLIN, *ENGAGEMENT AND MARRIAGE* 330, Table 28 (1950). The Terman study, typically yielding the highest percentages in this regard, found that 68% of the women and 86% of the men sampled had engaged in premarital sex by age 20. L. TERMAN, *supra*, at 321, Table 113.

Research conducted abroad during these periods also demonstrated significant and increasing levels of premarital sexual activity. V. PACKARD, *supra* note 41, at 495-500. In England, for example, the percentage of women who have had premarital relations by age 20 has ranged from 19% in the period before 1904 to 43% in 1954. E. CHESSEY, *SEXUAL, MARITAL AND FAMILY RELATIONSHIPS OF ENGLISH WOMEN* 311, Table 276 (1956). A study in West Germany revealed that about 70% of the women and 89% of the men interviewed had experienced premarital sex. W. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* 36 (1963). Research conducted in East Germany in 1967 showed that by age 20, 78% of the women and 83.5% of the men had engaged in premarital relations. V. PACKARD, *supra* note 41, at 496. A study in Sweden revealed that by age 18, 46% of the girls and 57% of

adults possess the character trait of unchastity.<sup>55</sup> Thus, even if this concept remains useful for religious or ethical purposes, sexual activity outside of marriage is so widespread that it provides no basis for inferring sexual conduct in a specific instance. For purposes of the law of evidence, the concept of character for unchastity no longer has a moral foundation.

### B. *Shortcomings of the Character Concept*

Evidence of a person's character is generally inadmissible to prove that he or she acted in a specific way on a particular occasion.<sup>56</sup> At least three sound reasons support this rule. First, as suggested above, character evidence necessarily reflects moral judgments.<sup>57</sup> Second, such evidence may simply allow the jury to give vent to their prejudices and hostilities.<sup>58</sup> Third, character evidence can easily distract the jury from the true issues in the case. The drafters of the Federal Rules clearly recognized these dangers:

Character evidence . . . tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.<sup>59</sup>

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the boys had engaged in nonmarital sex. B. LINNÉR, *SEX AND SOCIETY IN SWEDEN 19-20* (1967). Another study of students aged 17-24 showed an increase in those experiencing intercourse from 72% in 1960 to 81% in 1965; the rise among women was especially dramatic—from 40% to 65%—during this period. *Id.* at 19. Yet another Swedish study showed that among a sample of married women between the ages of 16 and 50, 80% had engaged in premarital sex. *Id.* at 18-19. In Denmark, one study found that 97% of the women had experienced sex before marriage. V. PACKARD, *supra* note 41, at 496.

<sup>55</sup> It should be noted that Kinsey's samples were limited to the white population of the United States. KINSEY, *supra* note 41, at 4, 27, 35. Later research includes all racial groups, and is consistent with Kinsey's earlier findings. See, e.g., M. HUNT, *supra* note 29, at 16-17, 146-52.

Although it might be said that a majority of American *adults* possess the "character trait" of unchastity, this concept appears to be totally inappropriate when applied to adolescents. One commentator has noted:

. . . [E]ven if one could hypothesize a unitary trait for chastity that determines behavior in particular cases, one might be slow to apply the concept to young persons, whose "characters" are still fluid. Studies have shown that victims of rape are by and large extremely youthful; more than half are under twenty; three-quarters under twenty-six.

Berger, *supra* note 6, at 21.

<sup>56</sup> See MCCORMICK § 188.

<sup>57</sup> See notes 39-40 and accompanying text *supra*.

<sup>58</sup> See MCCORMICK §§ 186, 188.

<sup>59</sup> Advisory Committee's Note to FED. R. EVID. 404 (quoting CAL. LAW REVISION

Thus, admission of character evidence subtly undermines the adversary system. The system's purpose is to settle discrete disputes between litigants by discovering the facts of the incident in question and applying legal principles to those facts. It does not examine the parties' lives in an effort to reward the morally worthy and to scorn the unworthy.

Despite these drawbacks, the Federal Rules of Evidence admit evidence of character to prove consent. Rule 404(a) states the general proposition that evidence of a person's character is not admissible to prove that he or she acted "in conformity therewith" on any particular occasion.<sup>60</sup> Rule 404(a)(2), however, recognizes the common-law exception with respect to the character of the victim.<sup>61</sup> The Advisory Committee's Note to Rule 404 indicates that the question of consent does not put the complainant's character directly in issue.<sup>62</sup> Rather, proof of character on the question of consent is inferential and is permissible only by reputation or opinion evidence under Rule 405(a), rather than by evidence of specific acts under Rule 405(b).<sup>63</sup>

### C. *Shortcomings of Reputation Evidence*

The creation of the "class" of unchaste women is disingenuous. Even worse is the type of evidence the common law and the Federal Rules admit to establish membership in that class. Since character evidence has been viewed with suspicion,<sup>64</sup> restrictions on its introduction abound.<sup>65</sup> These restrictions result from the recognition that proof of character involves inherent dangers of re-

COMM'N, REP., REC. & STUDIES, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 615 (1964)). See also Berger, *supra* note 6, at 19-20.

<sup>60</sup> FED. R. EVID. 404(a), set out in relevant part in note 1 *supra*.

<sup>61</sup> See FED. R. EVID. 404(a)(2), set out in note 1 *supra*; 2 WEINSTEIN ¶ 404[06].

<sup>62</sup> Advisory Committee's Note to FED. R. EVID. 404.

<sup>63</sup> FED. R. EVID. 405 provides:

(a) *Reputation or opinion.*—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.*—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

<sup>64</sup> See, e.g., *Michelson v. United States*, 335 U.S. 469, 477-80 (1948); Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 585 (1956).

<sup>65</sup> See FED. R. EVID. 405 & Advisory Committee's Note; McCORMICK § 186. See generally 2 WEINSTEIN ¶¶ 405[01]-[04].

moteness, prejudice, and confusion.<sup>66</sup>

Thus, different rules have evolved as to the manner of proof, depending on the evidentiary purpose of the offer. If it is an ultimate issue in the case, character may be shown by evidence of specific acts, and, in some jurisdictions, by opinion and reputation evidence.<sup>67</sup> When character is only circumstantially significant, however, courts in nonrape cases frequently reject the offer of proof altogether.<sup>68</sup> When permitted, presentation is usually limited to evidence of reputation.<sup>69</sup>

This approach may lessen the dangers of jury confusion and prejudice, but the price paid in terms of reliability is high indeed.<sup>70</sup> Under the traditional method of introducing reputation evidence, the lawyer asks the witness about his connection with the community and whether he has spoken to others about the subject's reputation for the specific trait in question. The lawyer then elicits the witness's statement concerning the subject's reputation.<sup>71</sup> At best, this evidence proves what the community allegedly believes, not what the person is.<sup>72</sup> At worst, such proof is vague and composed only of rumor and hearsay.<sup>73</sup> Thus, the United States Supreme Court has criticized rules allowing use of reputation evidence to establish character as "illogical, unscientific, and anomalous, explainable only as archaic survivals of compurgation," opening a "veritable Pandora's box of irresponsible gossip, innuendo and smear."<sup>74</sup>

Reputation evidence is particularly unreliable when it relates to sexual matters. Sex lends itself to sensationalism and exaggeration. Moreover, since sexual activity is usually private, one's sexual reputation generally reflects little more than speculation.<sup>75</sup> Most

<sup>66</sup> See FED. R. EVID. 403 & Advisory Committee's Note; MCCORMICK §§ 185, 188.

<sup>67</sup> MCCORMICK § 187. See FED. R. EVID. 405 & Advisory Committee's Note.

<sup>68</sup> See MCCORMICK § 188.

<sup>69</sup> *Id.* § 186. See Advisory Committee's Note to FED. R. EVID. 405.

<sup>70</sup> See *Michelson v. United States*, 335 U.S. 469, 477-80 (1948).

<sup>71</sup> See *id.* at 477-78; MCCORMICK § 44, at 90; Berger, *supra* note 6, at 59 n.347.

<sup>72</sup> "The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood." *Michelson v. United States*, 335 U.S. 469, 477 (1948).

<sup>73</sup> See *id.*

<sup>74</sup> *Id.* at 475 n.5 (quoting 32 C.J.S. *Evidence* § 433 (1964)), 480.

<sup>75</sup> See generally Advisory Committee's Note to FED. R. EVID. 405; 7 WIGMORE §1986. "Moreover, '[i]n a mobile, sexually active society,' there may sometimes be 'no such thing as a "reputation for unchastity"'. The only knowledge of the victim's life will be held by her and a few other people, not by some hypothetical 'community.'" Berger, *supra* note 6, at 63 (footnote omitted) (quoting B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *SEX*

important, normal social processes tending to ensure that "the truth will out" are ineffective to offset such exaggeration and speculation. Because people value privacy, it is unlikely that a woman who is rumored to be promiscuous will seek to correct the record by detailing the true facts of her sex life. Moreover, providing the complainant with an opportunity to do so at trial fails to solve the problem. In effect, this puts the victim on trial, thus obscuring ultimate issues, and inviting a verdict based on the jurors' personal notions of morality.<sup>76</sup>

#### D. *Relevance and Prejudice*

Because Federal Rule 404(a) embraces the traditional rule, the offer of sexual reputation evidence necessitates a twofold inquiry. Rule 401 defines relevant evidence as evidence having any tendency to make a material fact more or less probable. Rule 403 allows the judge to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."<sup>77</sup> These Rules pose two essential questions: Is the evidence of the complainant's unchastity relevant to the question of consent in this case? If so, does the possibility of prejudice or confusion substantially outweigh the probative value of the evidence?

##### 1. *Relevance*

Relevancy lies in the logical nexus between the proffered evidence and the material fact it is offered to prove.<sup>78</sup> This relationship cannot be derived by applying mechanical tests set out in evidence codes or constructed by the common law.<sup>79</sup> The "any tendency" criterion of Rule 401 serves as only a general guideline

DISCRIMINATION AND THE LAW 839-40 (1975)). See *Limitations*, *supra* note 16, at 411-12.

<sup>76</sup> See *McLean v. United States*, 377 A.2d 74 (D.C. 1977).

We deem a woman's reputation for unchastity to be of very slight probative value since it is neither relevant to her credibility as a witness, nor material on the issue whether on the occasion of the alleged crime she consented or was forced to submit to an act of sexual intercourse. . . . The reputation of a woman for unchastity raises unnecessary collateral issues which are nearly impossible to rebut, it diverts the jury's attention from the principal issues at trial and it results in prejudice to the complaining witness which greatly outweighs its extremely limited probative value.

*Id.* at 79 (footnote omitted).

<sup>77</sup> FED. R. EVID. 403.

<sup>78</sup> See Advisory Committee's Note to FED. R. EVID. 401; MCCORMICK § 185; 1 WEINSTEIN ¶ 401[01]; James, *supra* note 30, at 690.

<sup>79</sup> 1 WEINSTEIN ¶ 401[01], at 401-7. See MCCORMICK § 185, at 438.

rather than a strict standard.<sup>80</sup> Its inclusion in Rule 401 indicates that the Federal Rules adopted the concept of "logical relevance" rather than "legal relevance."<sup>81</sup> The former concept simply requires the trial judge to use his practical experience and understanding of human affairs to determine if proof of fact A makes material fact B more or less probable than it would be without the proof.<sup>82</sup> "Legal relevance," on the other hand, requires more for purposes of admissibility than "any tendency" or mere probability.<sup>83</sup> This standard requires "a generally higher degree of probative value . . . than would be asked in ordinary reasoning."<sup>84</sup> The inference to be drawn from the evidence must be "highly probable"<sup>85</sup> or must "rest upon reasonable certainty or preponderating probability."<sup>86</sup> The legal relevance standard is undesirable because it confuses sufficiency of the evidence, a concept related to the overall burden of proof, with probative value, a concept related to threshold admissibility.<sup>87</sup> Logical relevance provides the appropriate test. It cannot, however, be applied in a vacuum. The proffered evidence and the inference it supports must be logically related within a particular factual context.

If a defendant seeks to prove present consent (fact B) based upon prior similar relations between the victim and defendant (fact A), a direct logical relationship exists between facts A and B. The identity of persons and similarity of conduct, although not conclusive of present consent, meet the standard of logical relevance. Evidence of prior sexual activity between the defendant and the victim under *dissimilar* circumstances also has logical relevance, although the sufficiency of this evidence is more questionable.<sup>88</sup> When both identity of persons and similarity of circumstances are removed, however, probative value all but disappears. Prior consent to relations with another man under different circumstances is so tenuously related to present consent with the defendant that evidence of the prior consent should be excluded as irrelevant.

Courts have nevertheless admitted proof of prior consent

<sup>80</sup> See 1 WEINSTEIN ¶ 401[01].

<sup>81</sup> *Id.* ¶ 401[06]. See McCORMICK §§ 184, 185.

<sup>82</sup> See McCORMICK § 185, at 438; 1 WEINSTEIN ¶ 401[06].

<sup>83</sup> See McCORMICK § 185; 1 WIGMORE § 28.

<sup>84</sup> 1 WIGMORE § 28, at 409 (emphasis omitted).

<sup>85</sup> *People v. Nitzberg*, 287 N.Y. 183, 187, 38 N.E.2d 490, 493 (1941).

<sup>86</sup> *Engel v. United Traction Co.*, 203 N.Y. 321, 323, 96 N.E. 731, 732 (1911).

<sup>87</sup> 1 WEINSTEIN ¶ 401[06]. See McCORMICK § 185, at 437.

<sup>88</sup> See notes 162-64 and accompanying text *infra*. Conversely, where the prior conduct involves similar circumstances but different persons, evidence of a pattern of behavior may be relevant. See notes 166-67 and accompanying text *infra*.

without regard either to identity of persons or to similarity of circumstances. In nonrape cases, many courts would exclude such evidence on the theory that it requires the factfinder to pile inference upon inference without direct support for any of these inferences, much less the conclusion to which they supposedly lead.<sup>89</sup> The evidence is simply too remote.

Probability evidence always raises the question of remoteness.<sup>90</sup> Evidence regarding a class of objects or behavior should be admissible only when it is possible to reason logically from the class to the individual case.<sup>91</sup> Probability evidence, absent individualized proof adequately connecting it with the instant case, is inadmissible because it invites speculation by the jury.<sup>92</sup>

In rape cases, the traditional reasoning "calculates" the probability of consent with respect to the entire class of unchaste women.<sup>93</sup> This class is composed of wholly unrelated members, except for their single common characteristic of having consented to nonmarital intercourse. To find any relationship among members of the class, consent must be viewed as fungible—consent is consent is consent. From the generalized fact of prior consent at various times under a variety of circumstances, this view permits the inference that a class member is more likely than a nonclass member to consent to a particular act on a particular occasion. This view of probabilities, the traditionalists argue, makes evidence of unchastity "relevant" under the technical definition of that term.<sup>94</sup>

Human behavior is too complex and variable to permit such simple-minded generalization. The class designation underlying the traditional doctrine fails to consider the infinite variety of circumstances involved in consent to sexual intercourse. Absent the notion that consents are fungible, the traditional analysis collapses.<sup>95</sup>

Moreover, if modern sexual research is to be credited, the class of the unchaste includes a majority of American females.<sup>96</sup> Since

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<sup>89</sup> See, e.g., *Shutt v. State*, 233 Ind. 169, 117 N.E.2d 892 (1954); *People v. Rzezicz*, 206 N.Y. 249, 99 N.E. 557 (1912); Annot., 95 A.L.R. 162 (1935). *But see* I WIGMORE § 41.

<sup>90</sup> See authorities cited in note 30 *supra*.

<sup>91</sup> See *James*, *supra* note 30, at 697-700.

<sup>92</sup> See, e.g., *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir.) (economic data offered to prove antitrust damages excluded as susceptible to exaggeration through "prejudice and hasty reasoning") (quoting I WIGMORE § 28, at 409), *cert. denied*, 369 U.S. 865 (1962).

<sup>93</sup> See notes 33-38 and accompanying text *supra*.

<sup>94</sup> See *Limitations*, *supra* note 16, at 412-17; *Indicia*, *supra* note 16, at 123-25.

<sup>95</sup> See Note, *supra* note 9, at 430.

<sup>96</sup> See notes 41-55 and accompanying text *supra*.

it is impossible to infer that any specific member of this class is more likely to consent under the particular circumstances of the case, it is also impossible to conclude that the complainant is more likely to have consented. Individualized proof of probability is lacking.

## 2. *Prejudice and Confusion*

As pointed out above, proof of character traits based on reputation evidence is fraught with dangers of confusion and prejudice. Such proof centers on collateral issues imbued with moral overtones.<sup>97</sup> Moreover, the dangers of prejudice and confusion are particularly acute when chastity is at issue.<sup>98</sup>

Since the victim is not the defendant, however, courts until recently have refused to consider the prejudice that admission of sexual history evidence may arouse.<sup>99</sup> Yet inquiries into prejudice should be similar regardless of who submits the challenged evidence.<sup>100</sup> Federal Rule 403 draws no distinctions among witnesses or parties in allowing exclusion of prejudicial evidence.<sup>101</sup> If its probative value is marginal, there is good reason to exclude "[e]vidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action."<sup>102</sup> Evidence of prior sexual activity might well satisfy all of these descriptions.

Evidence of a criminal defendant's general propensity to commit crime is uniformly inadmissible on grounds of prejudice, confusion, and lack of probative value.<sup>103</sup> Yet the rape victim is "tried" on similar general propensity evidence relating to her

<sup>97</sup> See notes 64-74 and accompanying text *supra*.

<sup>98</sup> See notes 75-76 and accompanying text *supra*.

<sup>99</sup> See, e.g., 3A WIGMORE § 921, at 724. For a discussion of recent cases recognizing the dangers of prejudice and confusion, see notes 168-74 and accompanying text *infra*. For recent statutory developments, see note 6 *supra*.

<sup>100</sup> See *McLean v. United States*, 377 A.2d 74 (D.C. 1977), quoted in note 76 *supra*. Cf. *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (evidence of robbery victim's homosexuality offered to prove bias rejected as ambiguous and prejudicial).

<sup>101</sup> One basis for distinguishing between offers made by the prosecution and those made by the defense is the need for protecting the defendant's constitutional right to a full and fair presentation of his case. See note 16 and accompanying text *supra*. However, this should certainly not foreclose courts entirely from excluding evidence offered by the defendant.

<sup>102</sup> 1 WEINSTEIN ¶ 403[03], at 403-15 to 16 (footnotes omitted).

<sup>103</sup> See FED. R. EVID. 404(b) & Advisory Committee's Note; MCCORMICK § 190; 1 WIGMORE § 57.

unchastity.<sup>104</sup> Indeed, some theorists view character for unchastity in terms of propensity.<sup>105</sup> While failing to note the diversity of the "class" of the unchaste, they argue that women who engage in nonmarital intercourse have a propensity for doing so, and that this propensity has predictive value.<sup>106</sup> This theory merely substitutes propensity for unchastity. The fatal lack of connection from the class to the individual remains. Moreover, the theory disregards the well-established rule that propensity evidence is generally inadmissible.<sup>107</sup>

### E. *A Hypothetical Example*

Emotional reactions and moral judgments pervade the traditional analysis of sexual history evidence. A comparison with the analysis applied to analogous evidence offered in a nonrape case may therefore provide a useful method of evaluating the traditional rule. An examination of how character evidence is treated in other contexts also serves to reveal the intellectual hypocrisy of Wigmore and his fellow traditionalists. Most important, it provides a useful summary of the arguments already raised in this Article.

Consider the following hypothetical. *X* has been indicted for perjury in answering questions propounded by a Senate committee investigating subversion. At the hearing *X* was asked if he voted for *Z*, the Fascist Party candidate in the presidential election of 1968. He replied that he did not. The prosecution wishes to offer evidence that in 1960, *X* was reputed to be a member of the Fascist Party. The prosecution's theory is that *X*'s reputed membership tends to make his vote for *Z* in 1968 more likely than it would be without the evidence.

Several problems are involved in this offer of proof. First, the evidence of *X*'s party membership eight years prior to the event is unreliable. Second, even if the reputation of membership accords with fact, the fact itself is remote in time. Third, there is no individualized proof that party membership relates to voting choice in 1960, let alone 1968. Fourth, there is no connection between the candidates for office in 1960 and 1968. Fifth, there is no evidence of *X*'s voting conduct at any time. Sixth, the evidence may motivate the jury to decide the case on the ground of hostility alone.

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<sup>104</sup> See generally Berger, *supra* note 6, at 12-15.

<sup>105</sup> See, e.g., *Limitations*, *supra* note 16, at 409 & n.28.

<sup>106</sup> See *id.* at 409-10, 416-17.

<sup>107</sup> See generally FED. R. EVID. 404; McCORMICK § 190.

On these facts, Wigmore and other authorities would likely exclude the evidence of party membership on grounds of both relevance and prejudice. Yet where analogous evidence is offered to prove consent in a rape case, most authorities would admit it.<sup>108</sup> These authorities would permit the inference of consent from the generalized notion of character without connection of the alleged prior consent to the instant facts.<sup>109</sup> Thus, the lack of relation between the prior alleged consent and the present case is no bar to its admissibility,<sup>110</sup> nor is the inherent prejudice to the victim.<sup>111</sup>

If a general "class" of activities is to provide the basis for inferring consent, the generalized data should be the victim's own sexual history. This reasoning would involve but one inferential step. Reasoning from the actions of "unchaste" women generally, however, stands several steps away from the ultimate issue in the case. The traditional doctrine not only indulges in such reasoning, but also bars judgments based on specific past acts of the complainant.<sup>112</sup>

## II

### PATTERNS OF CONDUCT AS PROOF OF CONSENT— REFORM OF THE TRADITIONAL RULE

The rape defendant has the right to introduce relevant evidence on the question of consent. If, as suggested above, reputation evidence of unchastity should be excluded as irrelevant, unreliable, and prejudicial, a key question remains: What, if any, sexual history evidence should be admitted to prove consent? Extending standard evidentiary rules regarding prior similar acts and occurrences<sup>113</sup> to rape cases would permit admission of the complainant's prior sexual activities if they formed a pattern of behavior similar to the facts of the incident in issue.<sup>114</sup> Although at first glance this test might appear to expand the scope of admissibility, it is in fact a limitation. The well-established doctrine permitting

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<sup>108</sup> See notes 33-38 and accompanying text *supra*.

<sup>109</sup> See notes 30-31 and accompanying text *supra*.

<sup>110</sup> See, e.g., *Packineau v. United States*, 202 F.2d 681 (8th Cir. 1953).

<sup>111</sup> See generally *Berger*, *supra* note 6, at 12-15, 41-52.

<sup>112</sup> See FED. R. EVID. 405 & Advisory Committee's Note; MCCORMICK § 186; 1 WIGMORE § 200.

<sup>113</sup> See generally MCCORMICK §§ 195, 200.

<sup>114</sup> In essence, the proposal in S. 1 and two state statutes adopt this formulation. See notes 5 & 6 and accompanying text *supra*.

proof of prior similar conduct is closely circumscribed.<sup>115</sup> Properly applied, the doctrine requires clear and convincing proof that the previous acts occurred;<sup>116</sup> a careful comparison of the prior acts with present circumstances, especially with regard to factors of similarity and remoteness;<sup>117</sup> a clear showing of relevance to a material issue;<sup>118</sup> a showing of necessity;<sup>119</sup> and a weighing of prejudice against probative value.<sup>120</sup>

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<sup>115</sup> See McCORMICK §§ 186-188, 190; 1 WIGMORE §§ 192-194.

<sup>116</sup> See *United States v. Beechum*, 555 F.2d 487, 492-98 (5th Cir. 1977); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977); *United States v. Jordan*, 552 F.2d 216, 218-19 (8th Cir.), *cert. denied*, 97 S. Ct. 2982 (1977); *United States v. Davis*, 551 F.2d 233, 234-35 (8th Cir.), *cert. denied*, 97 S. Ct. 2197 (1977); *United States v. Adderly*, 592 F.2d 1178, 1180 (5th Cir. 1976); *United States v. Arteaga-Limones*, 529 F.2d 1183, 1197 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976); *United States v. Cavallino*, 498 F.2d 1200, 1206 (5th Cir. 1974).

<sup>117</sup> See *United States v. Beechum*, 555 F.2d 487, 495-96 (5th Cir. 1977) (evidence of prior crime to show intent); *United States v. Myers*, 550 F.2d 1036, 1045-48 (5th Cir. 1977) (evidence of subsequent crime to show identity); *United States v. Nolan*, 551 F.2d 266, 271 (10th Cir. 1977) (evidence of prior conviction to show intent and knowledge); *United States v. Jordan*, 552 F.2d 216, 218-19 (8th Cir.) (evidence of prior crime to show intent), *cert. denied*, 97 S. Ct. 2982 (1977); *United States v. Davis*, 551 F.2d 233, 234 (8th Cir.) (evidence of prior crimes to show *modus operandi* and identity), *cert. denied*, 97 S. Ct. 2197 (1977); *United States v. Maestas*, 546 F.2d 1177, 1181 (5th Cir. 1977) (evidence of prior crimes to show identity); *United States v. Largent*, 545 F.2d 1039, 1043 (6th Cir. 1976) (evidence of prior crimes to show intent), *cert. denied*, 97 S. Ct. 1117 (1977); *United States v. Adderly*, 529 F.2d 1178, 1180 (5th Cir. 1976) (evidence of prior conviction to show intent); *United States v. Arteaga-Limones*, 529 F.2d 1183, 1197 (5th Cir.) (evidence of prior conviction to show intent), *cert. denied*, 429 U.S. 920 (1976); *United States v. Cavallino*, 498 F.2d 1200, 1206-07 (5th Cir. 1974) (evidence of prior crimes to show *modus operandi* and identity); *United States v. Woods*, 484 F.2d 127, 133-36 (4th Cir. 1973) (evidence of prior crimes to show *modus operandi*, identity, and *corpus delicti*), *cert. denied*, 415 U.S. 979 (1974); *United States v. Broadway*, 477 F.2d 991, 994 (5th Cir. 1973) (statement of general rule).

<sup>118</sup> See *United States v. Biggins*, 551 F.2d 64, 68 (5th Cir. 1977) (defendant raised entrapment defense against charges of possession and distribution of heroin; evidence that defendant had previously distributed cocaine held relevant to show predisposition and intent); *United States v. McFadyen-Snyder*, 552 F.2d 1178, 1182-84 (6th Cir. 1977) (evidence of defendant's prostitution and passing of bad checks unrelated to charges of mail fraud and false statements); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977); *United States v. Jordan*, 552 F.2d 216, 218-19 (8th Cir.), *cert. denied*, 97 S. Ct. 2982 (1977); *United States v. Adderly*, 529 F.2d 1178, 1180 (5th Cir. 1976); *United States v. Arteaga-Limones*, 529 F.2d 1183, 1197 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976).

<sup>119</sup> See *United States v. Rice*, 550 F.2d 1364, 1372 (5th Cir. 1977); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977); *United States v. Arteaga-Limones*, 529 F.2d 1183, 1197 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976).

<sup>120</sup> See *United States v. Beechum*, 555 F.2d 487, 493 (5th Cir. 1977); *United States v. McFadyen-Snyder*, 552 F.2d 1178, 1182-84 (6th Cir. 1977); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977); *United States v. James*, 555 F.2d 992, 998-1001 (D.C. Cir. 1977); *United States v. Nolan*, 551 F.2d 266, 271 (10th Cir. 1977); *United States v. Jordan*, 552 F.2d 216, 218-19 (8th Cir.), *cert. denied*, 97 S. Ct. 2982 (1977); *United States v. Adderly*, 529 F.2d 1178, 1180 (5th Cir. 1976); *United States v. Arteaga-Limones*, 529 F.2d 1183, 1197

### A. *Permissible Inferences*

This Article suggests that the jury may properly draw an inference of consent directly from the victim's specific prior acts. Wigmore insists that prior similar behavior by itself is irrelevant and confusing when offered as direct proof of an ultimate issue; prior acts, if admissible at all, are relevant only to show the witness's character or disposition, from which an inference as to present behavior may be drawn. Reasoning that human action is infinitely variable, Wigmore concludes that a past act is not probative of whether the act was done on the occasion in question.<sup>121</sup>

Wigmore's exaggerated fear that women falsely accuse men of sexual abuse led him to disregard his own notions of relevance.<sup>122</sup> In rape cases, he would admit evidence of dissimilar prior acts as well as reputation through the medium of the character-disposition concept.<sup>123</sup> In effect he thus ignored his own reasoning that an act done once will not necessarily be repeated. Wigmore not only manipulated the character concept, he carried it to an extreme. Courts had found the victim's character only circumstantially relevant on the question of consent,<sup>124</sup> and wholly irrelevant when consent was not an issue.<sup>125</sup> Yet Wigmore insisted that character evidence was admissible against the complainant even in cases of attempted rape and indecent assault, where consent is not an issue.<sup>126</sup>

Wigmore's interposition of character between behavior and consent ignores many instances in which prior similar conduct or occurrences may legitimately provide a basis for inferring an ultimate or necessary fact.<sup>127</sup> To be sure, similar behavior in and of itself has no probative value without a specific showing of relevance.<sup>128</sup> Evidence of prior acts may be relevant to questions of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, *modus operandi*, existence of defect, duty to repair, ownership, agency, business practice, or habit.<sup>129</sup> If

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(5th Cir.), *cert. denied*, 429 U.S. 920 (1976); *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

<sup>121</sup> See 1 WIGMORE § 192.

<sup>122</sup> See *id.* § 62. See also 3A WIGMORE § 924a.

<sup>123</sup> See 1 WIGMORE §§ 62, 200.

<sup>124</sup> See *id.*; McCORMICK §§ 186, 188; Advisory Committee's Note to FED. R. EVID. 404.

<sup>125</sup> See 1 WIGMORE § 200.

<sup>126</sup> See *id.* § 62, at 466-67.

<sup>127</sup> See McCORMICK §§ 189-190, 195, 200; Slough & Knightly, *supra* note 11, at 326-36.

<sup>128</sup> See Advisory Committee's Note to FED. R. EVID. 401.

<sup>129</sup> See FED. R. EVID. 404(b); McCORMICK §§ 190, 195, 200, 201; 1 WIGMORE § 217; Slough & Knightly, *supra* note 11, at 328-33. See generally cases cited in notes 116-20 *supra*.

one of these is a material question in the case, proof of prior similar acts or occurrences may be admissible without regard to character at all.<sup>130</sup> Moreover, a strict limitation on the admissibility of similar-act evidence to these specific purposes has been criticized as spurious.<sup>131</sup>

The approach suggested here will limit admissibility to evidence demonstrably related to the conduct presently under investigation—*i.e.*, past conduct occurring under circumstances substantially similar to those of the alleged rape. This view comports with longstanding evidentiary principles. For example, if the prosecution seeks to prove that robbery defendant *X* is the same person who robbed others under similar circumstances, the prior acts may be offered to show a *modus operandi* pointing to identity.<sup>132</sup> Evidence of the prior robberies should be admissible only if there is clear and convincing proof that *X* committed the robberies and that the method was nearly identical to the circumstances of the present case.<sup>133</sup> This reasoning allows the factfinder to draw an inference of present conduct directly from past acts.

When the prosecution seeks to introduce evidence of a defendant's prior acts under Federal Rule 404(b), courts generally apply a five-pronged test; the evidence is admitted only if (1) there is a clear showing that the defendant committed the prior acts; (2) the circumstances of the prior acts closely resemble those of the present case; (3) the prior acts are clearly relevant to a material issue, such as identity or intent; (4) the evidence is necessary to the prosecution's case; and (5) the probative value of the evidence outweighs its prejudicial effects.<sup>134</sup>

As applied to rape cases, the requirement that convincing proof link the complainant with the prior acts would eliminate the use of reputation evidence, since reputation proves nothing about

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<sup>130</sup> The language of Rule 404(b) makes clear that the concepts involved are not character-based. See FED. R. EVID. 404(b) & Advisory Committee's Note.

<sup>131</sup> See *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974); McCORMICK § 190, at 448, 453; Slough & Knightly, *supra* note 11, at 326-27; Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

<sup>132</sup> See *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977); *United States v. Davis*, 551 F.2d 233, 234 (8th Cir.), *cert. denied*, 97 S. Ct. 2197 (1977); *United States v. Cavallino*, 498 F.2d 1200, 1207 (5th Cir. 1974).

<sup>133</sup> See *United States v. Myers*, 550 F.2d 1036, 1044-48 (5th Cir. 1977); *United States v. Davis*, 551 F.2d 233, 234-35 (8th Cir.), *cert. denied*, 97 S. Ct. 2197 (1977); *United States v. Cavallino*, 498 F.2d 1200, 1206-07 (5th Cir. 1974).

<sup>134</sup> See cases cited in notes 116-20 *supra*.

the details of prior conduct.<sup>135</sup> The second and third requirements—by admitting only clearly related conduct relevant to the issue of consent—would exclude confusing and prejudicial evidence of prior dissimilar conduct; under these requirements, the rejection of prior acts that are too remote would insure that evidence of prior conduct is both reliable and relevant to the recent events in issue. The necessity test would force the court to consider the merits of the consent defense itself, and would end the practice of judges who abuse their discretion by admitting sexual history evidence even when the use of overwhelming force has been clearly demonstrated.<sup>136</sup> Finally, the requirement that probative value outweigh prejudice would eliminate questioning designed primarily to harass the complainant or to arouse the jury's sentiments against her.

A sixth requirement should be added, however, which derives at least in part from Wigmore's logic: A single past act is not probative of present acts; only related patterns of behavior should be admissible.<sup>137</sup> This requirement provides added assurance of relia-

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<sup>135</sup> See notes 70-76 and accompanying text *supra*.

<sup>136</sup> See, e.g., *Packineau v. United States*, 202 F.2d 681 (8th Cir. 1953) (exclusion of evidence of complainant's prior cohabitation with man other than defendant held prejudicial error despite proof of physical injury resulting from attack); *Teague v. State*, 208 Ga. 459, 67 S.E.2d 467 (1951) (evidence of complainant's reputation for lewdness admitted despite evidence of physical injury); *People v. Crego*, 70 Mich. 319, 38 N.W. 281 (1888) (jury instructed to consider woman's prior sexual conduct despite testimony that defendant struck her to make her lie still); *State v. Satchell*, 17 N.C. App. 312, 194 S.E.2d 51 (1973) (questioning of complainant on "whether she had ever had intercourse with another male" held permissible, despite proof of complainant's injuries and obvious signs of violence at scene of alleged rape); *Guy v. State*, 443 S.W.2d 520 (Tenn. Crim. App. 1969) (defendant allowed to question victim on specific relations with other men, despite evidence that defendant knocked her down and forced her to submit to defendant and four other men). For a better decision, see *State v. Warford*, 293 Minn. 339, 200 N.W.2d 301, *cert. denied*, 410 U.S. 935 (1972). In *Warford*, the court held that "when consent is not a serious issue, the corroborating evidence is strong, and the victim's chastity is not raised as part of the prosecution's case," cross-examination of the victim regarding her prior unrelated sexual conduct is improper. 293 Minn. at 341-42, 200 N.W.2d at 303. Although it did not decide the question, the court noted that under these circumstances the evidence might also be inadmissible as part of the defendant's case-in-chief. *Id.* at 342 n.2, 200 N.W.2d at 303 n.2.

Even when the use of force is conceded, the defense may raise the issue of consent to introduce evidence of the victim's chastity, hoping that the jury will try the victim rather than the defendant. See *Berger*, *supra* note 6, at 30-31; *Fallacy*, *supra* note 9, at 160. Kalven and Zeisel found that in 12% of the cases sampled involving charges of "aggravated rape" (defined as rape in which there was evidence of violence or multiple assailants, or in which defendant and victim were complete strangers), the jury acquitted when the judge would have convicted. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 252-53 (1971).

<sup>137</sup> See text accompanying note 121 *supra*. Cf. *United States v. Woods*, 484 F.2d 127, 133 (4th Cir. 1973) (evidence of repeated "accidents" especially relevant to prove infanticide), *cert. denied*, 415 U.S. 979 (1974).

bility, and strengthens the permissible inference that prior consent was repeated on the present occasion.

Other rules of evidence recognize the importance of establishing similarity between past and present acts. Although propensity evidence is generally inadmissible when offered to show a defendant's predisposition to commit a crime,<sup>138</sup> in one class of cases propensity is relevant in and of itself. Where entrapment is a defense, the prosecution may rebut by showing that the defendant was predisposed to commit the crime.<sup>139</sup> Nonetheless, evidence of *general* criminal propensity is inadmissible even in entrapment cases.<sup>140</sup> The evidence of prior acts must show the defendant's readiness to commit the specific type of crime with which he is charged.<sup>141</sup>

In rape cases, under Wigmore's rule, the complainant does not receive similar consideration. A single act of nonmarital intercourse, even if unrelated to the present charge, could suffice to establish a disposition for unchastity. It would thus be admissible to prove consent.

### B. *Similarity of Circumstance*

General evidentiary doctrine admits evidence of prior acts only if the circumstances of the prior acts closely resemble the event in issue.<sup>142</sup> Although evidence of the *defendant's* sexual history may be excluded in rape cases because of its potential prejudicial effect,<sup>143</sup> when it relates to the defendant's prior similar and unusual relations with the victim, some courts have admitted the evidence because its high probative value outweighs the possibility of prejudice.<sup>144</sup> Such proof may be described as showing a special disposition toward the present victim,<sup>145</sup> a character concept. However,

<sup>138</sup> See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977); FED. R. EVID. 404(b); MCCORMICK § 190; 1 WIGMORE § 194; *Slough & Knightly*, *supra* note 11, at 326, 332 & n.38.

<sup>139</sup> See *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958).

<sup>140</sup> See *United States v. Ambrose*, 483 F.2d 742 (6th Cir. 1973).

<sup>141</sup> See *United States v. Brown*, 453 F.2d 101 (8th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

<sup>142</sup> See cases cited in note 117 *supra*.

<sup>143</sup> See, e.g., *People v. Greer*, 49 App. Div. 2d 297, 303-04, 374 N.Y.S.2d 224, 230-31 (4th Dep't 1975).

<sup>144</sup> See 2 WIGMORE § 402; *Slough & Knightly*, *supra* note 11, at 333-34.

<sup>145</sup> See 2 WIGMORE § 402, at 370; *Slough & Knightly*, *supra* note 11, at 334. See generally *Commonwealth v. Kline*, 361 Pa. 434, 443, 65 A.2d 348, 351-52 (1949).

this evidence resembles more closely proof of *modus operandi* and the like, concepts unrelated to character.<sup>146</sup>

Another analogy can be found in habit cases. Evidence of a regular practice, routine, or "habit" is admissible to show that the particular act in issue occurred under similar circumstances.<sup>147</sup> The requirement of invariable regularity severely limits admissibility.<sup>148</sup> Only evidence of a pattern of conduct, rather than isolated instances of prior action, will satisfy the standard.<sup>149</sup>

In civil actions, courts usually exclude evidence of prior conduct to show present negligence.<sup>150</sup> However, when the prior conduct took place under circumstances closely related to the present situation, the evidence may be admissible on questions of knowledge, duty to repair, foreseeability, objective condition of danger, and even proximate cause.<sup>151</sup>

Admitting evidence of prior acts or occurrences carries substantial risks of jury prejudice and confusion.<sup>152</sup> Thus, courts must first weigh its probative value against its prejudicial effect.<sup>153</sup> Such balancing is necessary when the evidence is offered to impeach credibility;<sup>154</sup> similar principles should also apply when the evidence is offered as part of the case-in-chief.<sup>155</sup> Federal Rules 608 and 609 contain the balancing principles applicable to impeachment. The Rules encourage defendants or other witnesses to testify by reducing the risk of undue harassment and humiliation from cross-examination based upon prior conduct unrelated to the witness's present credibility.<sup>156</sup>

The same policy underlies recent state legislation that severely restricts the admissibility of evidence of sexual history,<sup>157</sup> thereby

<sup>146</sup> See notes 129-30 and accompanying text *supra*.

<sup>147</sup> See FED. R. EVID. 406; McCORMICK § 195; 1 WIGMORE § 92.

<sup>148</sup> See, e.g., *Baldrige v. Matthews*, 378 Pa. 566, 570, 106 A.2d 809, 811 (1954); 1 WIGMORE § 92.

<sup>149</sup> See *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1158 (2d Cir. 1968); McCORMICK § 195; 1 WIGMORE § 92.

<sup>150</sup> McCORMICK § 189, at 446; 1 WIGMORE § 199, at 678.

<sup>151</sup> See McCORMICK § 200.

<sup>152</sup> See Advisory Committee's Note to FED. R. EVID. 405; 1 WIGMORE § 29a.

<sup>153</sup> See FED. R. EVID. 403; McCORMICK § 190, at 453-54.

<sup>154</sup> See *People v. Sandoval*, 34 N.Y.2d 371, 375, 314 N.E.2d 413, 414-15, 357 N.Y.S.2d 849, 853-54 (1974); FED. R. EVID. 608, 609. See generally McCORMICK §§ 41-44.

<sup>155</sup> See notes 99-101 and accompanying text *supra*.

<sup>156</sup> See *People v. Sandoval*, 34 N.Y.2d 371, 375, 314 N.E.2d 413, 414-15, 357 N.Y.S.2d 849, 853-54 (1974); Advisory Committee's Note to FED. R. EVID. 608. See also FED. R. EVID. 611(a).

<sup>157</sup> See note 6 *supra*.

encouraging rape victims to come forward and testify.<sup>158</sup> Indeed, the commentary to the New York statute<sup>159</sup> specifies that the law is to be interpreted in light of the balancing principles announced by the Court of Appeals in *People v. Sandoval*,<sup>160</sup> although language in *Sandoval* limits its scope to attacks on the credibility of a defendant.<sup>161</sup>

What patterns of conduct are admissible on the issue of consent? The new statutes uniformly admit evidence of the complainant's prior sexual relations with the defendant.<sup>162</sup> Although this evidence would probably pass the pattern-of-behavior test in most cases,<sup>163</sup> its admissibility is also justifiable on other grounds. A past relationship between the victim and defendant may support an inference of consent, even if the past conduct is dissimilar to that at issue in the case.<sup>164</sup> Nevertheless, a marked disparity in circumstances might render the evidence inadmissible—particularly in cases of proven force.

Admissibility of prior conduct should be determined by inductive rather than deductive reasoning. This process would require the trial court to weigh the victim's pattern of specific prior acts against the circumstances of the present case. If there is a high degree of similarity, the evidence would have substantial probative value outweighing the risk to the victim of undue harassment or humiliation. If the pattern of previous behavior is dissimilar, it would lack probative value.

Thus, if the rape involved the use of physical force or multiple attackers,<sup>165</sup> and the victim's pattern of conduct showed con-

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<sup>158</sup> See note 7 *supra*.

<sup>159</sup> Bellacosa, Practice Commentary to N.Y. CRIM. PROC. LAW § 60.42, at 101 (McKinney Supp. 1976).

<sup>160</sup> 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974).

<sup>161</sup> See *id.* at 373 & n.1, 314 N.E.2d at 415 & n.1, 357 N.Y.S.2d at 852 & n.1.

<sup>162</sup> See, e.g., CAL. EVID. CODE § 1103(2)(b) (West Supp. 1977); FLA. STAT. ANN. § 794.022(2) (West 1976); IND. CODE ANN. § 35-1-32.5-2 (Burns Supp. 1976); MINN. STAT. ANN. § 609.347(3)(c) (West Supp. 1976); N.Y. CRIM. PROC. LAW § 60.42(1) (McKinney Supp. 1976); OHIO REV. CODE ANN. § 2907.02(D) (Page Supp. 1976); TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1976); Berger, *supra* note 6, at 33.

<sup>163</sup> See notes 134-37 and accompanying text *supra*.

<sup>164</sup> See generally Berger, *supra* note 6, at 58-59. Cf. *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977) (complete identity of circumstances between defendant's prior crimes and present charge not required for admissibility); *Bradley v. United States*, 433 F.2d 1113, 1121 (D.C. Cir. 1969) (prior crimes offered to show defendant's identity need not "possess factual sameness in every detail").

<sup>165</sup> See cases cited in note 136 *supra*.

sent only with intimate friends, evidence of this prior conduct would be irrelevant. Moreover, even if the pattern of conduct showed consent with men other than close friends, but under circumstances substantially different from the incident in question, probative value would still be minimal. On the other hand, if the present case represented merely one more episode in a long history of promiscuity, evidence of this history would be admissible,<sup>166</sup> as would a peculiar pattern of behavior that shares the special or distinguishing characteristics of the alleged rape.<sup>167</sup>

### C. *A Case-by-Case Approach*

In determining the admissibility of past-act evidence, a fixed standard is neither necessary nor desirable. Human conduct defies rigid compartmentalization. Courts should fix the requisite degree of similarity between past and present circumstances on a case-by-case basis.

Several recent decisions under the new state statutes may prove helpful in charting these waters. In *Huffman v. State*,<sup>168</sup> the rape defendant alleged consent. The defendant conceded that he broke into the victim's house at night with intent to commit grand larceny. To prove consent, and apparently to impeach the victim's credibility, the defendant sought to inquire on cross-examination into the victim's prior acts of intercourse with other men. Affirming the trial court's exclusion of this evidence, the appellate court noted that, at most, it would permit evidence of "illicit relationships

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<sup>166</sup> See, e.g., *People v. Bastian*, 330 Mich. 456, 47 N.W.2d 692 (1951) (allowing both cross-examination of complainant and expert testimony concerning complainant's nymphomania and "sexual psychopathic" personality); *Lee v. State*, 132 Tenn. 655, 179 S.W. 145 (1915) (evidence of complainant's intercourse with others, constituting recent habitual behavior, admissible on both consent and credibility).

Perhaps the classic illustration of a course of conduct constituting "promiscuity" appears in *Giles v. Maryland*, 386 U.S. 66 (1967), in which one of the defendants testified that, prior to the alleged rape, the 16-year-old complainant had told the defendants that "she had had relations with 16 or 17 boys that week and two or three more wouldn't make any difference." *Id.* at 69. There was also evidence—allegedly suppressed by the prosecution at trial—that the complainant had told a police officer that in the previous two years she had engaged in sexual relations with "numerous boys and men, some of whom she did not know." *Id.* at 71.

<sup>167</sup> For example, if the victim regularly consented to sado-masochistic sex, which on the present occasion allegedly resulted in rape, the pattern of prior sexual activity would seem relevant to the issue of consent.

<sup>168</sup> 301 So. 2d 815 (Fla. Dist. Ct. App. 1974).

on the part of the prosecutrix sufficiently widespread to show a pattern of conduct which would bear on the issue of consent."<sup>169</sup> This decision conflicts directly with traditional authority which would have admitted the evidence on the question of consent.<sup>170</sup>

In *State v. Hill*,<sup>171</sup> the victim was dragged to the scene of the rape and threatened with death. Arguing that the victim had consented, the defendant offered to prove that the victim had engaged in sexual relations with two boyfriends. The court held as a matter of law that the "evidence of complainant's prior cohabitation with two men did not have sufficient probative value in the context of this case to permit its introduction on the issue of whether or not she consented to sexual relations with this defendant."<sup>172</sup> The court also noted the contrast between the evidence of previous cohabitation and the circumstances of the present case:

Isolated instances of cohabitation as distinguished from evidence of promiscuity, do not in themselves lend credence to a claim of consent such as defendant here raises. Accordingly, we reject the contention that complainant's prior unchastity is material to the question of whether she consented to a sexual encounter in a parking lot with a total stranger in the middle of the night after an acquaintance of only momentary duration.<sup>173</sup>

In drawing this contrast, *Hill* represents a significant departure from case law broadly supporting the admissibility of sexual history evidence even though the use of force has been shown.<sup>174</sup>

The decisions in *Huffman* and *Hill* relating the victim's pattern of behavior to the sexual act in issue accord with the analysis advocated here. The results in these cases demonstrate that use of a prior-similar-act analysis will limit rather than broaden the admissibility of sexual history evidence on the issue of consent.

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<sup>169</sup> *Id.* at 817. Although the events in *Huffman* took place before Florida enacted its statute limiting the admissibility of chastity evidence in rape cases, the court's analysis accords with that of the statute. See FLA. STAT. ANN. § 794.022(2) (West 1976), quoted in relevant part in note 6 *supra*.

<sup>170</sup> See, e.g., *People v. Walker*, 150 Cal. App. 2d 594, 310 P.2d 110 (1957); *Campos v. State*, 122 Tex. Crim. 179, 356 S.W.2d 317 (1962).

<sup>171</sup> 244 N.W.2d 728 (Minn. 1976), *cert. denied*, 429 U.S. 1065 (1977).

<sup>172</sup> 244 N.W.2d at 731.

<sup>173</sup> *Id.*

<sup>174</sup> See cases cited in note 136 *supra*.

## III

SEXUAL HISTORY AND CREDIBILITY—THE  
PROPER PATH OF REFORM

A number of jurisdictions admit evidence of unchastity to impeach the complainant's credibility.<sup>175</sup> Wigmore assumed that unchaste women tend to make false and imaginary charges of sexual abuse.<sup>176</sup> He concluded therefore that evidence of unchastity should be admissible to prove circumstantially the victim's bad character for truth and veracity.<sup>177</sup>

Summarizing Wigmore's position fails to impart the full flavor of his hysteria. Although he admits the lack of relevance when consent is not in issue, Wigmore concludes that "a certain type of feminine character predisposes to imaginary or false charges of this sort and is psychologically inseparable from a tendency to make advances, and its admissibility to discredit credibility . . . cannot in practice be distinguished from its present bearing."<sup>178</sup> Wigmore later states:

There is, however, at least one situation in which chastity may have a direct connection with veracity, viz. when a *woman or young girl testifies* as complainant against a man charged with a sexual crime . . . . Modern psychiatrists have amply studied the behavior

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<sup>175</sup> See, e.g., *Brown v. State*, 291 Ala. 789, 280 So. 2d 177 (1973); *People v. Pantages*, 212 Cal. 237, 297 P. 890 (1931); *Fraday v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955); *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948); *State v. Cole*, 20 N.C. App. 137, 201 S.E.2d 100 (1973); 3A WIGMORE § 924a. Cf. *People v. Rowland*, 262 Cal. App. 2d 790, 69 Cal. Rptr. 269 (1968) (evidence of assault victim's homosexuality admissible to impeach credibility). Under the Federal Rules, impeachment evidence, other than evidence of prior convictions (see FED. R. EVID. 609(a)), must refer specifically to the witness's character for truth and veracity, rather than to other character "traits" such as unchastity. See FED. R. EVID. 608 & Advisory Committee's Note. But see notes 200-06 and accompanying text *infra*.

<sup>176</sup> See 1 WIGMORE § 62; 3A WIGMORE § 924a; Berger, *supra* note 6, at 21-22. The typical jury instruction on this subject appears in note 36 *supra*. In *State v. Coella*, 3 Wash. 99, 105-106, 28 P. 28, 29 (1891), the court observed that if a witness had admitted at trial to being a prostitute, "[s]he could not have ruthlessly destroyed that quality upon which most other good qualities are dependent, and for which, above all others, a woman is revered and respected, and yet retain her credit for truthfulness unsmirched." In *Camp v. State*, 3 Ga. 417, 422 (1847), the Georgia Supreme Court observed:

[N]o evil habitude of humanity so depraves the nature, so deadens the moral sense, and obliterates the distinctions between right and wrong, as common, licentious indulgence. Particularly is this true of women, the citadel whose character is virtue; when that is lost, all is gone; her love of justice, sense of character, and regard for truth.

<sup>177</sup> See 3A WIGMORE § 924a.

<sup>178</sup> 1 WIGMORE § 62, at 467.

of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim.<sup>179</sup>

Although Wigmore uses phrases that seem to limit the scope of these passages—*e.g.*, “errant young girls,” “a certain type”—other language in the same discussion broadens the class of presumed liars to include not only unchaste women but all women who testify as complainants. Thus, Wigmore concludes: “*No judge should ever let a sex offense charge go to the jury unless the female complainant’s social history and mental makeup have been examined and testified to by a qualified physician.*”<sup>180</sup> The practical effect of Wigmore’s approach is to render the complainant’s character the most prominent issue in the case.

Given Wigmore’s dogmatic conclusions regarding false charges and the need for psychiatric examination, one would expect him to produce a body of reputable authority to demonstrate that accusations of sexual abuse are false or imaginary in a substantial number of cases.<sup>181</sup> In the current edition of his treatise, however, Wigmore relies for the most part upon *Ballard v. Superior Court*,<sup>182</sup> the studies cited in that case, and a few additional pieces of research to support his conclusions.<sup>183</sup> *Ballard*, however, does not even support the proposition for which Wigmore cites it, and itself relies in part on an earlier edition of Wigmore’s treatise.<sup>184</sup>

Wigmore cites the research of psychologists and social workers

<sup>179</sup> 3A WIGMORE § 924a, at 736 (emphasis in original).

<sup>180</sup> *Id.* at 737 (emphasis in original).

<sup>181</sup> On the contrary, in *People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975), the court recognized that “[t]he low rate of conviction of those accused of rape and other sexual offenses does not appear to be attributable to a high incidence of unwarranted accusations.” *Id.* at 880, 538 P.2d at 258, 123 Cal. Rptr. at 130. “[T]hose who make . . . accusations [of sexual crimes] should be deemed no more suspect in credibility than any other class of complainants.” *Id.* at 883, 538 P.2d at 260, 123 Cal. Rptr. at 132.

<sup>182</sup> 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966).

<sup>183</sup> See 3A WIGMORE § 924a, at 737 n.1. For a discussion of Wigmore’s reliance on doubtful and outdated psychological studies, see Berger, *supra* note 6, at 27 & n.168.

<sup>184</sup> See 64 Cal. 2d at 171-77, 410 P.2d at 846-50, 49 Cal. Rptr. at 310-14.

conducted between 1898 and 1933, quoting copiously from one group of case studies which showed that several seriously disturbed young women and girls had made false accusations of sexual abuse.<sup>185</sup> Wigmore's authorities recount incidents of false accusation by girls in early adolescence or during menstrual disturbances,<sup>186</sup> by pathological liars,<sup>187</sup> and by a "hysterical sex delinquent."<sup>188</sup> Largely on the basis of these abnormal and singular examples, Wigmore ultimately concludes that *all* rape complainants should be subjected to psychiatric examination; *Ballard*, however, reached no such conclusion.<sup>189</sup> It merely held that a trial court *had the power* to order the complainant's psychiatric examination when the defendant made a convincing showing of its necessity.<sup>190</sup> Although there is ample authority for this view,<sup>191</sup> the decision in *Ballard* hardly supports Wigmore's conclusion that courts should require an examination in every case.

Several studies have addressed the question of false charges. The studies fail to state how researchers determined that any particular charge was false. Nonetheless they provide support for several interesting conclusions:

- (1) Rape is one of the most under-reported crimes in the United States;<sup>192</sup>
- (2) When the victim reports the rape to a male police officer,

<sup>185</sup> W. HEALY & M. HEALY, *PATHOLOGICAL LYING, ACCUSATION, AND SWINDLING* 172-87, 195-97, 214-17 (1915), *quoted in* 3A WIGMORE § 924a, at 740-43.

<sup>186</sup> W. HEALY & M. HEALY, *supra* note 185, at 162.

<sup>187</sup> *Id.* at 172-87, 195-97, 214-17; E. SOUTHARD & M. JARRETT, *THE KINGDOM OF EVILS* 189-92 (1922), *cited in* 3A WIGMORE § 924a, at 746 n.4.

<sup>188</sup> E. SOUTHARD & M. JARRETT, *supra* note 187, at 69-80, *cited in* 3A WIGMORE § 924a, at 746 n.4.

<sup>189</sup> In response to Wigmore's view, the court stated:

We submit however, that a general rule requiring a psychiatric examination of complaining witnesses in every sex case or, as an alternative, in any such case that rests upon the uncorroborated testimony of the complaining witness would, in many instances, not be necessary or appropriate. Moreover, victims of sex crimes might be deterred by such an absolute requirement from disclosing such offenses.

64 Cal. 2d at 175-76, 410 P.2d at 849, 49 Cal. Rptr. at 313.

<sup>190</sup> *Id.* at 176-77, 410 P.2d at 849, 49 Cal. Rptr. at 313. "Such necessity would generally arise only if little or no corroboration supported the charge and if the defense raised the issue of the effect of the complaining witness' mental or emotional condition upon her veracity." *Id.* at 177, 410 P.2d at 849, 49 Cal. Rptr. at 313.

<sup>191</sup> *See, e.g.,* *People v. Russel*, 69 Cal. 2d 187, 443 P.2d 794, 70 Cal. Rptr. 210 (outlining criteria for admissibility of psychiatric evidence obtained in *Ballard* examination), *cert. denied*, 393 U.S. 864 (1968). *Accord, Mosley v. Commonwealth*, 420 S.W.2d 679 (Ky. 1967); *State v. Clasey*, 252 Or. 22, 446 P.2d 116 (1968). *See generally* Berger, *supra* note 6, at 68-69.

<sup>192</sup> *See* M. AMIR, *PATTERNS IN FORCIBLE RAPE* 27-28 (1971); Berger, *supra* note 6, at 5.

the percentage of false charges—fifteen percent—is higher than the average for other violent crimes;<sup>193</sup> and

(3) When the victim makes her report to a female police officer, the incidence of false accusations—two percent—is precisely the same as in all other cases of violent crime.<sup>194</sup>

With regard to false charges some other aspects of the crime of rape warrant mention. A study of 646 cases of forcible rape in Philadelphia conducted between 1958 and 1960 showed that 71% of the rapes were fully planned and an additional 11% involved some degree of planning.<sup>195</sup> Moreover, 43% of the cases involved more than one assailant.<sup>196</sup>

Personality studies of rapists are also revealing. They demonstrate that there are essentially five types of rapist: (1) the assaultive rapist, who needs violence for sexual gratification; (2) the amoral delinquent, who views women as objects expressly available for his sexual use; (3) the drunken rapist, whose underlying hostile impulses are released by intoxication; (4) the explosive rapist, whose violence is inexplicable and often unpredictable; and (5) the double-standard rapist, who sees two classes of women, good and bad, the latter to be used for sexual gratification, forcibly if necessary.<sup>197</sup>

Although cases undoubtedly exist in which false accusations of sexual abuse have resulted in conviction of an innocent defendant, none of the studies to date has isolated a discrete category of convicted rapists that could be described as the falsely accused.

In summary, no evidence has been cited to support the assumption that unchaste women are more likely to make false rape accusations than chaste women. Since traditional theory proceeds from the false premise that the unchaste place false charges, the conclusion that unchastity supports an inference of bad character for truth and veracity must fall.<sup>198</sup> Wigmore's argument for the admissibility of chastity evidence to impeach credibility seems to

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<sup>193</sup> S. BROWNMILLER, *AGAINST OUR WILL* 387 (1975).

<sup>194</sup> *Id.*

<sup>195</sup> M. AMIR, *supra* note 192, at 142. The Kinsey Institute has concluded that 70% of all rapes are planned. J. CSIDA & J. CSIDA, *RAPE: HOW TO AVOID IT AND WHAT TO DO ABOUT IT IF YOU CAN'T* 30 (1974).

<sup>196</sup> M. AMIR, *supra* note 192, at 200.

<sup>197</sup> See J. CSIDA & J. CSIDA, *supra* note 195, at 29-30; P. GEBHARD, J. GAGNON, W. POMEROY, & C. CHRISTENSON, *SEX OFFENDERS: AN ANALYSIS OF TYPES* 197-205 (1965); MacNamara, *Sex Offenses and Sex Offenders*, 376 *ANNALS OF AM. ACAD. POL. & SOC. SCI.* 148, 151-52 (1968).

<sup>198</sup> See Berger, *supra* note 6, at 17, 55.

rest on nothing more than moral bias.

The discussion thus far has centered on the specifics of Wigmore's assumption that the unchaste place false charges. The same view, however, raises a more technical evidentiary problem involving the relationship between prior "bad acts" and character for truthfulness, a subject lying at the heart of Federal Rule 608.<sup>199</sup> Since the traditionalists' connection between unchastity and lack of veracity is wholly unproven, Rule 608 should operate to exclude cross-examination referring to lack of chastity.

Nevertheless, Wigmore's view continues to dominate the thinking of modern courts and commentators. In their discussion of Rule 404(a)(2), Weinstein and Berger note that, contrary to Wigmore,<sup>200</sup> Rule 405 would exclude evidence of specific instances of unchastity on the issue of consent.<sup>201</sup> In a footnote to this discussion, they also suggest that the assumption underlying Wigmore's argument for the admissibility of such evidence to impeach credibility—*i.e.*, that unchaste women are more likely than chaste women to make false accusations—"warrants some checking."<sup>202</sup> They defend Rule 405's exclusion of specific acts, however, by noting that "a fairly free attack" on the victim's credibility remains available under Rule 608.<sup>203</sup> This Rule allows the cross-examiner to inquire into specific instances of conduct, provided such conduct is probative of the victim's character for truth and veracity.<sup>204</sup> The

<sup>199</sup> FED. R. EVID. 608 provides:

(a) *Opinion and reputation evidence of character.*—The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

<sup>200</sup> See 1 WIGMORE § 200, at 682-83.

<sup>201</sup> 2 WEINSTEIN ¶ 404[06], at 404-36.

<sup>202</sup> *Id.* at 404-36 n.1.

<sup>203</sup> *Id.* at 404-36.

<sup>204</sup> FED. R. EVID. 608(b). Under Rule 608(b), the defense may question the victim on

Rule also permits an attack on credibility through the use of reputation or opinion evidence offered to establish character for untruthfulness.<sup>205</sup> Thus, despite their call for "checking," Weinstein and Berger seem to accept Wigmore's conclusion that evidence of the victim's unchastity may support the inference of poor credibility.<sup>206</sup>

A rejection of Wigmore's connection of unchastity with untruthfulness and an appreciation of current attitudes toward nonmarital sex materially alter the permissible scope of cross-examination. Since nonmarital intercourse *per se* is no longer "immoral,"<sup>207</sup> it cannot be considered a "prior bad act" relevant to character for truthfulness.<sup>208</sup> Furthermore, there is no empirical evidence linking chastity and veracity. Thus the complainant's mere lack of chastity should be irrelevant to credibility.<sup>209</sup>

Although the previous discussion demonstrates the inapplicability of the character concept, it must be noted that cross-examination is not limited to impeaching the credibility of the witness. Evidence adduced in cross-examination may be relevant to the complainant's direct testimony on the issue of consent.<sup>210</sup> Pattern-of-behavior evidence demonstrably relevant to consent might be relevant not only in challenging the complainant's general credibility but in contradicting or clarifying specific elements of her direct testimony. In such cases, pattern-of-behavior evidence should be received pursuant to proper safeguards.<sup>211</sup> Similarly, cross-examination may seek to impeach specific credi-

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her specific "bad acts," but may not offer extrinsic evidence of such acts. *See generally* *United States v. Whiting*, 311 F.2d 191, 196 (4th Cir. 1962); *People v. Schwartzman*, 24 N.Y.2d 241, 245, 247 N.E.2d 642, 644, 299 N.Y.S.2d 817, 821 (1969); *People v. Sorge*, 301 N.Y. 198, 201, 93 N.E.2d 637, 639 (1950). Rule 405(b), on the other hand, bars evidence of specific acts on the question of consent, since the victim's character has only inferential significance under Rule 404(a)(2). *See* note 63 and accompanying text *supra*. Thus, although cross-examination concerning specific acts is permissible for purposes of impeachment, extrinsic evidence of such acts is inadmissible with regard to both credibility and consent.

<sup>205</sup> FED. R. EVID. 608(a).

<sup>206</sup> McCormick also relies upon Wigmore in this regard. *See* MCCORMICK § 44, at 92 n.2.

<sup>207</sup> *See* notes 41-55 and accompanying text *supra*.

<sup>208</sup> *See* notes 39-40 and accompanying text *supra*.

<sup>209</sup> *See* *McLean v. United States*, 377 A.2d 74, 79 (D.C. 1977), quoted in note 76 *supra*.

<sup>210</sup> *See* Note, *supra* note 7, at 1561-63. *See generally* MCCORMICK § 47, at 99.

<sup>211</sup> This approach differs from the proposal in S. 1 (*see* note 5 *supra*), which would have barred completely evidence of the victim's sexual history for purposes of impeachment.

"Proper safeguards" might call for the trial judge's initial review of the evidence *in camera* or away from the hearing of the jury, and perhaps a written order specifying the man-

bility by showing bias, prejudice, or ulterior motives.<sup>212</sup> Where the victim's prior sexual behavior is relevant to these issues such behavior provides a proper subject of cross-examination.

Thus, when pattern-of-behavior evidence satisfies the same strict standards applicable when offered to prove consent, it should also be relevant on cross-examination to test the truthfulness of the complainant's direct testimony.

#### CONCLUSION

Courts should exclude evidence of the rape victim's sexual history unless the evidence shows a pattern of sexual conduct so closely related to the facts of the present case that the jury may reasonably and directly infer consent or lack of credibility. Even if courts find that the proffered evidence is relevant, they should limit its presentation to evidence of patterns of specific similar acts. Reputation or opinion evidence of the victim's unchastity, whether offered to prove consent or lack of credibility, should be excluded as inherently unreliable.

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ner and extent to which any of the proffered evidence found admissible may be introduced at trial. For a discussion of how the new state statutes employ such procedural devices, see Berger, *supra* note 6, at 37-39.

<sup>212</sup> See, e.g., Motley v. State, 207 Ala. 640, 640-41, 93 So. 508, 509 (1922) (evidence of victim's prior relations with defendant); State v. Elijah, 206 Minn. 619, 621, 289 N.W. 575, 577 (1940) (same). Cf. McFarland v. United States, 174 F.2d 538, 539-40 (D.C. Cir. 1949) (evidence of "illicit relationship" between witness and defendant in perjury trial admissible to show bias); People v. Peters, 23 Cal. App. 3d 522, 532-33, 101 Cal. Rptr. 403, 409-10 (evidence of homosexual relationship between witness and defendant in conspiracy case admissible to show bias), *cert. denied*, 409 U.S. 1064 (1972). See generally McCORMICK §§ 40, 47.