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## California Evidence Code Section 1103: Further Abuse of the Rape Victim

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# CALIFORNIA EVIDENCE CODE SECTION 1103: FURTHER ABUSE OF THE RAPE VICTIM

## I. INTRODUCTION

According to Dean Wigmore, “[n]o question of evidence has been more controverted”<sup>1</sup> than the admissibility at trial of a rape victim’s previous sexual conduct. The controversy entails important political as well as legal considerations.

Reputation and opinion evidence of a rape victim’s previous sexual conduct, used in a rape case to prove consent, is arguably irrelevant and prejudicial in a society where neighbors are often strangers and premarital or nonmarital sex is commonly accepted. However, because such evidence is frequently deemed admissible, women are discouraged from pursuing complaints after being raped because of their fear of harassment on the witness stand. The fears of victims in this regard are not unfounded. Because they are permitted by rules of evidence to do so, defense attorneys dwell on reputation and opinion testimony filled with rumors of the victims’ sexual lives. Thus, the focus of the judicial proceedings shifts, placing the victims rather than the defendants on trial.

Adoption in California of Rule 412 of the Federal Rules of Evidence, which severely limits the defense counsel’s inquiry into the victim’s past sexual conduct, could potentially alleviate these problems. Over the last few decades, state legislatures gradually have begun to respond to the growing fears of women and to the criticisms of the laws relating to the crime of rape. Perhaps it is now time for California to make such a response.

This Comment evaluates section 1103 of the California Evidence Code (CEC) and Rule 412 of the Federal Rules of Evidence (FRE). The author concludes that California should adopt the substantive provisions of Rule 412 regarding methods of proving consent in rape cases.

## II. CHARACTER EVIDENCE

In preparing a consent defense in a rape trial, a defense attorney often focuses upon the victim’s prior sexual conduct to suggest her willingness to consent on the specific occasion in question. Such a defense is usually introduced through circumstantial evidence,<sup>2</sup> as opposed to di-

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1. 1 J. WIGMORE, EVIDENCE § 200, at 682 (3d ed. 1940).

2. “The circumstantial use of character involves not only the establishment of the rele-

rect evidence,<sup>3</sup> of the character of the rape victim.

There are three possible methods of proving an individual's relevant character traits: (1) reputation evidence, (2) opinion evidence, and (3) evidence of specific instances of conduct. Reputation evidence is "evidence of the subject's community reputation for possessing the character trait in question."<sup>4</sup> Opinion evidence is "testimony by a witness who is familiar with the person in question and who can state his opinion whether the subject has a certain character trait."<sup>5</sup> Specific instances of conduct refer to specific prior acts of the individual in question.

#### A. Section 1103 of the CEC

Section 1103 of the CEC is also known as the Robbins Rape Evidence Law. According to its provisions, all three types of evidence (referred to above) may be offered to prove the victim's character trait for consenting to sexual activity with the defendant as circumstantial evidence in a rape case.<sup>6</sup> It can be inferred from section 1103 that the use of these three types of testimony is limited to evidence of conduct between the victim and the particular defendant in question.<sup>7</sup>

Section 1101(a) of the CEC<sup>8</sup> reveals the California Legislature's suspicion and disfavor of the use of character evidence. As a general rule, section 1101(a) states the basic presumption in California that character evidence is inadmissible as proof that a person acted in conformity with

vant character trait, but also the inference that the conduct in question was consistent with the actor's character." G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 105 (1978).

3. Direct use of character evidence occurs when the particular character trait in question is an *essential element* in the case, and that occurs rarely in criminal cases. LILLY, *supra* note 2, at 102 n.5.

4. *Id.* at 102.

5. *Id.*

6. CAL. EVID. CODE § 1103(b)(1)-(2) (West Supp. 1985). These provisions are limited to two circumstances: (1) when the defendant offers it to prove conduct of the victim in conformity with such character and/or (2) when the prosecution offers it to rebut evidence revealed by the defendant in the first circumstance. CAL. EVID. CODE § 1103(a)(1)-(2) (West Supp. 1985).

7. Section 1103(b) provides in pertinent part:

(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261 or 264.1 of the Penal Code . . . or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any such section . . . *opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the complaining witness.*

(b) *Paragraph (a) of this subdivision shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.*

CAL. EVID. CODE § 1103(b) (West Supp. 1985) (emphasis added).

8. CAL. EVID. CODE § 1101(a) (West 1966).

that character on a specified occasion.<sup>9</sup> The California Legislature recognizes the need for this general presumption because of the inherent unreliability of character evidence. The authors of section 1101 state their rationale for prohibiting the use of character evidence in civil cases in the following manner:

*First*, character evidence is of slight probative value and may be very prejudicial.

*Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters.

*Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.<sup>10</sup>

Section 1101's legislative history indicates an awareness by the California legislature of the danger of possible prejudice to the individual and of confusion to the jury when character evidence "is offered as a basis for an *inference* that [a person] behaved in conformity with that character on a particular occasion."<sup>11</sup> This is a statutory recognition that it is unfair to permit a proponent of evidence to imply that evidence of an individual's past sexual conduct justifies an inference of similar conduct on the occasion in question.<sup>12</sup>

Despite the California Legislature's reluctance to allow the use of character evidence and its explanation of why such evidence should be inadmissible, it has abandoned this fundamental protection in the crucial, sensitive area of rape. In safeguarding the rule precluding the use of character evidence, the legislature has permitted only two exceptions. Ironically, one of these limited exceptions to the general presumption that such evidence is inherently unreliable and prejudicial involves its admissibility in rape cases, in which introduction of such evidence is not only unreliable and prejudicial, but extremely traumatic for the rape victim and irrelevant given today's society. In contrast, the FRE restrict

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9. Section 1101(a) of the CEC provides in pertinent part: "[E]vidence of a person's character or a trait of his character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his conduct) is inadmissible when offered to prove his conduct on a specified occasion."

10. CAL. EVID. CODE § 1101 Law Revision Commission comment (West 1983) (emphasis in original).

11. *Id.* (emphasis added).

12. To permit the inference would be to ignore a basic principle of our democratic society that people are innocent until proven guilty.

the admissibility of character evidence in rape cases by limiting the methods of proving consent.

### B. Rule 412 of the FRE

Rule 412 of the FRE was enacted as the Privacy Protection for Rape Victims Act of 1978.<sup>13</sup> The provisions of Rule 412 are limited to crimes of rape and assault with intent to rape.<sup>14</sup>

Rule 412 prohibits the introduction of reputation and/or opinion evidence concerning the rape victim's past sexual behavior.<sup>15</sup> However, it permits evidence of specific instances of the victim's prior sexual conduct in these prescribed circumstances: (1) when the evidence is "constitutionally required to be admitted;" (2) when the accused offers evidence of sexual behavior between the victim and a third party to show whether the accused "was or was not, with respect to the alleged victim, the source of semen or injury;" or (3) when the accused introduces evidence of the alleged victim's past sexual behavior with the accused relevant to the issue of consent.<sup>16</sup>

### III. LEGISLATIVE INTENT BEHIND RULE 412

Traditionally, defense counsel has been permitted to interrogate the victim and to introduce evidence of her reputation in the community regarding her prior sexual activity. This practice is a clear reflection of a deeply rooted societal assumption that such information is relevant to proving the innocence of guilt of the accused.<sup>17</sup>

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13. Pub. L. No. 95-540, 92 Stat. 2046 (1978); FED. R. EVID. 412.

14. FED. R. EVID. 412(a) provides: "Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible."

15. *Id.*

16. FED. R. EVID. 412(b) provides in pertinent part:

Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, *unless such evidence other than reputation or opinion evidence is—*

(1) . . . constitutionally required to be admitted; or

(2) . . . evidence of—

(A) past 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 semen or injury; or

(B) 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.

FED. R. EVID. 412(b) (emphasis added).

17. The following is California's former standard jury charge on chastity in rape cases which is an example of this traditional community belief:

Representative Elizabeth Holtzman, the House sponsor of Rule 412, emphasized that “[t]oo often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself.”<sup>18</sup> She added that “rape trials become inquisitions into the victim’s morality, not trials of the defendant’s innocence or guilt . . . . It is estimated that as few as one in ten rapes is ever reported.”<sup>19</sup>

The effect of Rule 412 is a sharp limitation on admissible character evidence to discredit the victim in a federal rape trial. The rule excludes all reputation and opinion testimony regarding a rape victim’s prior sexual conduct. However, it allows evidence of the victim’s specific prior sexual acts in specified circumstances.<sup>20</sup>

It is interesting to compare the provisions of Rule 412 with those of the federal rules which formerly governed the admission of character evidence at rape trials. Under the previous method for admission of character evidence under Rules 404<sup>21</sup> and 405<sup>22</sup> of the FRE, reputation and/or opinion testimony was admissible to show the victim’s propensity to consent.

Rule 404 provided for the admission of evidence of a victim’s pertinent character trait to prove that she acted in conformity with it on the particular occasion in question. Rule 405 permitted the character trait to be proved by means of reputation and opinion evidence. Because the new Rule 412 prohibits the use of such evidence, it improves in this regard the protection accorded rape victims in federal court.

Rule 412 marks an attempt to circumvent constitutional problems surrounding rape evidence as well as to encourage rape shield legisla-

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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.

Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 15 n.96 (1977) (emphasis added).

18. FED. R. EVID. 412 congressional discussion.

19. *Id.* See also *infra* note 71 and accompanying text.

20. See *supra* note 16 and accompanying text.

21. FED. R. EVID 404(a)(2) provides that “[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same” is admissible.

22. FED. R. EVID. 405(a) provides in pertinent part that “[i]n 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.”

tion.<sup>23</sup> Although it affects only a small number of cases due to the limitations on federal jurisdiction,<sup>24</sup> Rule 412 is intended to serve as a model for those states without rape shield legislation. Representative Holtzman advocated the passage of Rule 412 "to suggest to the remaining states that reform of existing rape laws is important to the equity of our criminal justice system."<sup>25</sup> Senator Joseph R. Biden supported her views. He noted that "[t]his bill will modernize the Federal Rules and at the same time serve as a model for reform in the remaining states."<sup>26</sup>

#### IV. PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT

##### A. Procedure

Rule 412 requires the fulfillment of several procedural steps in order to introduce evidence of specific instances of an alleged rape victim's prior sexual conduct with the defendant.<sup>27</sup> At a pretrial hearing, if the court determines that the evidence is probative enough to outweigh the danger of unfair prejudice, it may be admitted at trial. However, it must be admitted in accordance with a court order specifying the evidence that may be offered and the scope with respect to which the alleged victim

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23. FED. R. EVID. 412 congressional discussion.

24. Federal jurisdiction extends to rape cases where the alleged offense occurred within the areas of maritime and territorial jurisdiction of the United States or on an Indian reservation. *See, e.g., Doe v. United States*, 666 F.2d 43 (4th Cir. 1981); *United States v. Nez*, 661 F.2d 1203 (10th Cir. 1981).

25. FED. R. EVID. 412 congressional discussion.

26. *Id.*

27. FED. R. EVID. 412 provides in pertinent part:

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer . . . evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion . . . shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. . . .

(3) If the court determines on the basis of the hearing . . . that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

may be examined or cross-examined.<sup>28</sup> California has a similar procedure.<sup>29</sup>

The issue of consent is of the utmost importance in a rape trial. It is interesting to note that evidence of the *complainant's* general character or reputation for unchastity is admissible on the issue of her consent in a majority of jurisdictions.<sup>30</sup> Yet, "the character of the *defendant* becomes an evidentiary matter *only* when *he* chooses to place it in issue."<sup>31</sup>

The trial becomes a credibility contest between the victim and the defendant when the victim claims that she was raped and the defendant claims that it was consensual. "[T]he defense has an added advantage in that details of the woman's sexual history may be brought to the attention of the court while the man's sexual and criminal history oftentimes is never questioned."<sup>32</sup> "For many rape victims, the legal procedures following rape may further threaten the woman's emotional state. It has been said that there are, in fact, two rapes for the woman who reports the

28. The balancing procedure and requisite court order are not applicable to evidence "constitutionally required to be admitted." FED. R. EVID. 412(b)(1).

29. CAL. EVID. CODE § 782 (West Supp. 1985) provides for the procedure for the admissibility of evidence of sexual conduct of a complainant:

(a) In [a rape prosecution], if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at such hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352 of this code, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(b) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this section.

30. L. SCHULTZ, *RAPE VICTIMOLOGY* 183 (1975). See also *Coles v. Peyton*, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (attorney's failure to investigate character of complainant in rape case constitutes ineffective assistance of counsel).

31. L. SCHULTZ, *supra* note 30, at 186 (citing *Michelson v. United States*, 335 U.S. 469 (1948)). "The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character." 1 J. WIGMORE, *EVIDENCE*, § 57, at 456 (3d ed. 1940).

32. C. GOLDSTEIN, *THE DILEMMA OF THE RAPE VICTIM: A DESCRIPTIVE ANALYSIS* 20 (1976).



crime: 'First, by her assailant; and then again by the system.'"<sup>33</sup> And further still, as one commentator added, "[i]n no other crime is the victim's word doubted as in a rape case."<sup>34</sup>

### B. Relevance

Rule 412 excludes opinion and reputation evidence because of its unreliability.<sup>35</sup> Rule 412 permits the introduction of evidence of prior specific instances of sexual activity between the victim and the accused.<sup>36</sup>

33. *Id.* at 18 (citations omitted). The victim's relationship with the accused is unnecessarily and unfairly examined in great detail.

If [the defendant] is a former boyfriend, acquaintance, or a bar "pick-up", the jury tends to condemn the victim as having precipitated the crime or falsely accused her "lover" after a quarrel. There seems to be a general assumption that "once a woman consents at a prior time, it is automatically assumed that there is an implied consent at *this* time." However, as reported by several studies on rape, rapes of this type are often reported as the most brutal and physically violent of all reported rapes.

*Id.* at 20 (emphasis in original) (citations omitted).

34. *Id.* at 8.

35. FED. R. EVID. 412 congressional discussion.

36. Rule 412 further limits the methods of proving consent by restricting even the use of specific instances of conduct because there are weaknesses with this method of proving consent. See *supra* note 16 and accompanying text. Character evidence of a specific instance of the victim's consent with the defendant in the past does not necessarily prove she consented to sexual relations with the defendant at the moment of the alleged rape in question. The existence of such evidence does not lead to the conclusion that the victim has forfeited her right to choose her sexual partner in the future.

Many rapes occur between a victim and an assailant who know each other. According to a study on reported rapes, approximately forty percent of the rapists are known to their victims. C. GOLDSTEIN, *supra* note 32, at 6. Thus, although there may be reputation or opinion testimony that the victim and assailant have had prior sexual relations together, it does not conclude that the victim consented on the particular occasion in question.

Presence of any of the three types of evidence revealing a past relationship—whether as friends or lovers—between the victim and the defendant does not necessarily prove that the victim consented to sexual intercourse on the occasion in question. One commentator pointed out a false assumption:

[I]n cases of rape by friends, it is usually assumed that the victim colludes in her own victimization. It is frequently suggested that the word "rape" be confined to cases where the woman is raped by a stranger and that another word be invented for cases in which the woman is raped by a friend, acquaintance, lover, or husband.

D. RUSSELL, *THE POLITICS OF RAPE* 87 (1975). Also, interviews with rape victims contradict the preconceived idea that rape by a friend, lover, or husband is less traumatic than rape by a stranger. See *generally id.* at 87-97.

Sexual aggression by husbands has been given much recent attention. According to the law in a majority of states, "a husband, by definition, cannot rape his wife; that is, forced sexual intercourse with one's wife is legal." L. HOLMSTROM & A. BURGESS, *RAPE AND EVERYDAY LIFE* 1 (1983). The notion that a wife consents at the time of marriage is merely a "legal fiction." *Id.* It is a fact that many men actually *do* rape their wives. However, because of this law in a majority of the states and because of the obvious problems with presenting evidence of the wife's character trait for consenting in the past, many women are left without recourse.

Its refusal to admit reputation and opinion testimony signifies a recognition in the federal rules that these methods of proving consent in rape cases are irrelevant and prejudicial in today's society. Evidence of prior *specific* instances of conduct is considered more relevant because it enables the fact finder to evaluate more objectively and more fairly (in comparison to problems associated with the evaluation of reputation and opinion evidence) the probability that consent was given on the particular occasion in question.

A strong argument can be made in favor of Rule 412's inadmissibility of reputation and opinion evidence of the victim's previous sexual conduct in rape cases. Testimony of reputation and opinion is unreliable and irrelevant given today's society.<sup>37</sup> Due to the expansion of urban society, neighbors are often less familiar with each other. The concept of the "community" through which interpersonal relationships are nurtured is becoming obsolete, as is the concept of one's "reputation in the community."

In addition, premarital or nonmarital sex is more commonly accepted in today's open-minded society. Thus, the question of the relevance of reputation and opinion evidence is an unrealistic condition precedent to its admission. It is clear that this type of evidence is irrelevant in today's society. Thus, it is time that California consider adopting Rule 412's prohibition against such admission.

### C. *Prejudice and Confusion of Issues*

Another major criticism of the admissibility of this type of evidence is that it opens the gates to collateral issues which may confuse the jury. Character evidence naturally reflects moral judgments. One attorney pointed out the unique problems associated with the jury in prosecuting rape cases. He stated:

From the prosecutor's point of view, there is no such thing as a good rape case. I've tried plenty of them over the years and I have never won more than half of them. It is the most difficult kind of case to win before a jury. Juries are funny. Usually they think that if it *did* happen, the girl was asking for it. You know, the defense goes into her prior experience, in their mind that means a girl who gives consent.<sup>38</sup>

The jury tends to act emotionally and in accordance with its own values rather than rationally when reputation and opinion testimonial

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37. See *infra* generally section V.

38. C. GOLDSTEIN, *supra* note 32, at 20 (citations omitted) (emphasis in original).

evidence is introduced. A member of the New York City's Mayor's Task Force on Rape concluded:

The issue of "promiscuity" is brought but only to prejudice a jury. Our position is that no facts should come out to prejudice a jury unless they are relevant to the case. For example, if a woman is plying her trade as a prostitute, and the defendant says that she promised to do it for \$10, and then at the last minute, when they were in bed, she [sic] she said she wouldn't do it for less than \$25 . . . and a rape happened in that context, that would be relevant. But if a "promiscuous" woman is walking along and gets dragged into the bushes and raped, her promiscuity is totally irrelevant. No questions about her earlier sexual experience should be allowed.<sup>39</sup>

As noted by one commentator, it is unfortunate that "many times in the eyes of the jury, submission by the victim to the rape implies consent to the act of intercourse."<sup>40</sup>

[I]f attacked, [the victim] may be condemned because she submitted to the act of forcible intercourse rather than fighting to the death to show her lack of consent to the act. It seems to be society's viewpoint that a dead rape victim, or one that is severely injured, is much more socially acceptable than one who has survived the experience emotionally and physically. This, in itself, places a tremendous emotional burden upon the victim.<sup>41</sup>

The significance and extent of factors generally associated with the adjudication of rape cases have been evaluated in a survey involving participants from a majority of the states.<sup>42</sup> In the area of rape, prosecutors were asked what degree of impact they thought the admissibility of evidence concerning the victim's sexual conduct had on the prosecution of rape cases. A majority of the respondents felt that admission of such evidence played a major role in jury deliberation.<sup>43</sup> The degree of the impact was significantly reduced when cases were considered by the court alone *rather than by a jury*. On the issue of whether the impact of character evidence was thought to be "considerable," the survey disclosed a seventy-four percent impact in a jury trial as compared to a

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39. *Id.* at 20 (citations omitted).

40. *Id.* See also *supra* note 33.

41. C. GOLDSTEIN, *supra* note 32, at 23.

42. 1 G. CAPLAN, *FORCIBLE RAPE—A NATIONAL SURVEY OF THE RESPONSE OF PROSECUTORS* 25 (1977).

43. *Id.* at 26-27.

twenty-two percent impact in a court trial.<sup>44</sup> Thus, the use of character evidence promotes distraction of a jury away from the factual determination of the question of consent on the particular occasion in question.

Other studies indicate that juries tend to scrutinize the victim heartlessly and to sympathize with the defendant whenever there is the narrowest representation that the victim's character is anything less than perfect.<sup>45</sup> Thus, rather than basing its determination solely upon the issue of consent at the moment of the alleged rape, the jury instead focuses upon the victim's sexual history. Regardless of the judge's instructions, this is the result.<sup>46</sup> As a result, the defense is able to hide the material issues presented by the prosecution behind the shield which evolves from the admission of prejudicial reputation or opinion testimony.

It is common for a distracted jury to fail to grasp the true issues in a case. This problem was clearly recognized by the drafters of the Federal Rules of Evidence:

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>47</sup>

Ironically, the concern for the jury when character evidence is presented also was revealed by the drafters of the CEC. In stating their reasons for excluding character evidence in civil cases, the California drafters explained their concern that the "introduction of character evidence may result in confusion of issues and require collateral inquiry."<sup>48</sup>

The United States Supreme Court, as well, has recognized these dangers. In *Michelson v. United States*,<sup>49</sup> the Court stated that "[t]he

44. *Id.* at 27.

45. *Id.*

46. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 249 (1966).

47. FED. R. EVID. 404 advisory committee note (citing *Cal. Law Revision Comm'n, Rep., Rec. & Studies*, 615 (1964)).

*See also Michelson v. United States*, 335 U.S. 469 (1948) (reputation of defendant convicted of bribing a federal officer in issue). In *Michelson*, the Supreme Court recognized that instructions to the jury tend to produce the opposite effect of what is desired. The Court noted, that with character evidence,

once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly.

The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.

*Id.* at 474-75 n.5 (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932)).

48. CAL. EVID. CODE § 1101 comment (West 1966).

49. 335 U.S. 469 (1948).

overriding policy of excluding [character] evidence . . . is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."<sup>50</sup>

Thus, it is clear that evidence of a victim's prior sexual behavior often will assume disproportionate importance in the proceedings and will distract a jury's attention from the relevant proof of the crime.<sup>51</sup> In *Michelson*, the Court recognized that character evidence tends to shift the focus of the proceeding,<sup>52</sup> placing the victim rather than the defendant on trial. It stated that character evidence "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."<sup>53</sup> James E. Hendricks, of the Criminal Justice Department warned: "We must realize that the rapist is engaged in criminal behavior, not the victim."<sup>54</sup>

Some defense lawyers consciously try to prejudice jurors against the rape victim in the hope of increasing the accused's chances of acquittal. For example, one defense attorney stated to a judge: "I think her extracurricular activities are a very important bit of evidence. Her reputation has a great deal of bearing on this case."<sup>55</sup> By encouraging the jury to try the victim rather than the defendant, defense attorneys are "bootlegging . . . the tort concepts of contributory negligence and assumption of risk into the criminal law."<sup>56</sup>

## V. RELEVANCE OF REPUTATION AND OPINION EVIDENCE IN TODAY'S SOCIETY

### A. *Expanding Urban Society*

Section 1103 of the CEC fails to reflect the social norms present in today's society. Also, it ignores the basic principle of relevance which is recognized for every other type of evidence.

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50. *Id.* at 476 (footnote omitted).

51. H. KALVEN & H. ZEISEL, *supra* note 46, at 250-54. See, e.g., *Roberts v. State*, 268 Ind. 127, 373 N.E.2d 1103 (1978). In *Roberts*, the defendant allegedly kidnapped and raped a woman, abandoned her infant beside the road in subfreezing weather and left the victim locked in the trunk of her car. This defendant attempted to distract the focal point of the proceedings in the eyes of the jury by seeking to prove consent to the rape. *Id.* at 130, 373 N.E.2d at 1106.

52. 335 U.S. at 476.

53. *Id.*

54. Hendricks, *Criminal Justice Intervention With the Rape Victim*, 11 J. POLICE SCI. & AD. 255 (1983).

55. *Id.*

56. H. KALVEN & H. ZEISEL, *supra* note 46, at 243.

In *Michelson v. United States*,<sup>57</sup> the defendant called five witnesses to prove that he had a good reputation in his community. Defendant Michelson was convicted of bribing a federal revenue agent. The government proved that Michelson made a large payment to this agent in an attempt to influence his official action. Michelson, acting as his own witness, admitted having made the payment. However, he added that he did so in response to the agent's demands, threats, solicitations, and inducements which amounted to entrapment. Resolution of the issue turned on whether the jury believed the agent or the accused.

In *Michelson*, the Supreme Court engaged in a discussion of reputation evidence—its purpose, its relevance, and its problems.<sup>58</sup> The *Michelson* Court recognized that “[s]erious and responsible criticism has been aimed . . . at common-law doctrine on the whole subject of proof of reputation or character.”<sup>59</sup> The *Michelson* Court admitted that reputation testimony “at its best opens a tricky line of inquiry as to a shapeless and elusive subject matter. At its worst it opens a veritable Pandora’s box of irresponsible gossip, innuendo and smear.”<sup>60</sup>

The Supreme Court in *Michelson* examined the history of the usefulness and relevance of reputation testimony in our society. It stated:

In the frontier phase of our law’s development, calling friends to vouch for defendant’s good character, and its counterpart—calling the rivals and enemies of a witness to impeach him by testifying that his reputation for veracity was so bad that he was unworthy of belief on his oath—were favorite and frequent ways of converting an individual litigation into a community contest and a trial into a spectacle. Growth of urban conditions, where one may never know or hear the name of his nextdoor neighbor, have tended to limit the use of these techniques and to deprive them of weight with juries.<sup>61</sup>

Keep in mind that *Michelson* was decided in 1948. Since that time,

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57. 335 U.S. 469 (1948).

58. The *Michelson* Court stated that

[t]he 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. This has been well described in a different connection as “the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect . . . . It is for that reason that such general repute is permitted to be proven.”

*Id.* at 477 (citation omitted).

59. 335 U.S. at 473-74 (footnote omitted).

60. *Id.* at 480.

61. *Id.*

there has been extensive urban growth throughout this country, suggesting that the Court's earlier interpretations have become even more appropriate in today's society where it is not uncommon to find that neighbors are often strangers. Thus, the concept of reputation and opinion evidence has become elusive and virtually obsolete.

### B. *Nonmarital Intercourse*

Nonmarital intercourse has become more accepted in today's society. Studies taken over a period of thirty years indicate that many young women engage in premarital sexual relationships.<sup>62</sup> With this change in societal behavior and attitudes, testimony as to the reputation and opinion of a witness regarding a victim's sexual conduct becomes irrelevant.

The California Legislature ignores the notion that "character" is defined as the degree of conformity to the prevailing customs or standards of the culture at a particular time. Research findings reflect increasing premarital and extramarital sexual activity among women in America.<sup>63</sup> One study indicates that this probably encompasses the majority of American women.<sup>64</sup> It necessarily follows that the number of rape victims who may be subjected to trauma and humiliation at trial due to presentation of such evidence is also increasing.

Traditional beliefs about the sexual attitudes and practices of American women began to vanish with the publication of the famous Kinsey Report.<sup>65</sup> This report indicates that fifty percent of the women interviewees who were married before the age of twenty had engaged in premarital sex.<sup>66</sup> The same was true for those married women between the ages of twenty-one and twenty-five.<sup>67</sup> Among the married women between the ages of twenty-six and thirty, approximately forty percent to sixty-six percent had engaged in premarital sex.<sup>68</sup>

Section 1103 is based on the moral judgment that women who engage in nonmarital intercourse are immoral and, therefore, are more likely to consent to intercourse.<sup>69</sup> Once this immorality is established,

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62. See A. KINSEY, W. POMEROY, C. MARTIN, & P. BEGHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953) [hereinafter cited as A. KINSEY]. See also R. SORENSON, *ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA* 121-22 (1973) (45% of females aged 13-19 had experienced intercourse).

63. See M. HUNT, *SEXUAL BEHAVIOR IN THE 1970's* 149-55 (1974).

64. See Ardover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 99-102 (1977).

65. A. KINSEY, *supra* note 62.

66. *Id.* at 287.

67. *Id.*

68. *Id.*

69. See *supra* text accompanying notes 38, 40-41.

the fact finder may infer consent from the presentation of reputation or opinion evidence concerning the victim's "unchastity." Section 1103 allows juries to speculate about consent on the basis of inferences which recent statistics indicate are no longer relevant in today's society.

### C. *Discouragement of Victims to Seek Prosecution*

A push for new federal and state regulation in the rape area was prompted by an uneasy feeling in society that in rape cases there was too much indiscriminate cross-examination and evidence regarding the sexual behavior of the victim. Defense attorneys strategically use character evidence to shift the jury's focus. Victims feel as though they, rather than the defendants, are the ones on trial. As pointed out by a commentator, "rape is a unique crime in that legal and social pressures oftentimes condemn the victim, rather than focusing the blame where it actually belongs."<sup>70</sup> These courtroom attacks on victims, together with the severe effect on their psyches and senses of privacy, apparently discourage them from reporting the crime, testifying at trial, or cooperating with the police and the prosecutor. According to the Federal Bureau of Investigation, forcible rape "is one of the most under-reported crimes due primarily to fear and/or embarrassment on the part of the victim."<sup>71</sup>

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70. C. GOLDSTEIN, *supra* note 32, at 23.

71. Federal Bureau of Investigation, Uniform Crime Reports 15 (1973).

Police and courts view immediate notification of a rape as an indication that a crime actually occurred. In a study on rape, it was found that "police and society tend to give more credence to a victim who conforms to the following provisions: 'if she reports the crime immediately, if she can provide evidence of the attack and of her active resistance.'" C. GOLDSTEIN, *supra* note 32, at 6 (citations omitted).

However, for various reasons, victimized women usually are hesitant to report a rape directly to the police *immediately* after its occurrence. *Id.* The Women Organized Against Rape (WOAR) and other rape crisis centers stated several reasons:

One is that the crime of rape bears a stigma of shame and humiliation for the victim. Women are brought up in the belief that rape only happens to "bad girls" and thus, after being raped, they question their own attitudes, beliefs, and sexual fantasies, diverting the blame for the crime from the offender to themselves. They have also heard and accepted the common ditties about rape which "prove" its impossibility, and they are conditioned to believe that rape is only an hysterical outcry from an emotionally disturbed woman, and has no real basis. Therefore, when they are raped they suffer an even deeper emotional shock.

Many women have heard unflattering reports of police conduct in the questioning of a rape victim, and they only want to forget what has happened to them instead of repeating the details to curious men. Many women's first instinct after being raped is to cleanse themselves of touch and scent of their assaulter, and thereby destroying evidence of the attack. Other women, particularly those who have been raped by an acquaintance and who not [sic] virgins at the time of the attack, rationalize that physically there was no harm done and that the police will be reluctant to pursue the offender and so the crime is never reported.

"One past victim . . . remarked that a woman must be bruised, bloody, and



As a common strategy, the accused merely claims that the intercourse was consensual. Thus, the victim, having been put on trial, can then be attacked with evidence of her general reputation within the community. A defendant could very likely evade a rape conviction by emphasizing the victim's sexual history introduced during the trial. There is significant potential for a guilty man to avoid a rape conviction due to false reputation or opinion testimony of a vindictive ex-lover or blackmailer.

## VI. CONSTITUTIONALITY

### A. *Constitutional Rights*

The Sixth Amendment of the United States Constitution entitles a defendant to the right to confront and to cross-examine adverse witnesses. This amendment states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>72</sup> This right is also guaranteed by section 686 of the California Penal Code.<sup>73</sup>

The right to confront adverse witnesses is fundamental to the right

damned near dead in order for the crime to be considered not consensual." Other rapists may threaten their victim with further harm if a report is made to the police.

All of these reasons cause rape to be the most underreported crime in this country. Estimates go as high as only one rape in ten being reported to the police.

C. GOLDSTEIN, *supra* note 32, at 6-7 (citations omitted) (quotations omitted).

72. U.S. CONST. amend. VI.

In criminal cases, the accused is entitled to use character evidence in presenting his defense. The interests of the accused must be protected because of the serious penalties that may arise, i.e., life imprisonment.

The gravity of a criminal conviction, involving the possible loss of life or liberty, has influenced all courts to give special dispensation to an accused: he is permitted to show character traits (e.g., honesty, peacefulness) inconsistent with the crime charged. The dangers of prejudice to the accused do not exist with respect to evidence of a relevant trait of "good" character offered by the accused, although the potential costs to the trial process of increased time consumption and distraction are present. The courts, however, consider paramount the accused's interest in protecting his freedom and hence they subordinate the countervailing practical considerations.

G. LILLY, *supra* note 2, at 109-10 (footnote and citations omitted). For additional comments on the use of character evidence in rape trials, see *supra* text accompanying notes 30-32.

Fourteenth amendment due process also grants the criminal defendant access to the prosecution's evidence. In *Giles v. Maryland*, 386 U.S. 66 (1967), the defendants were convicted of rape and given death sentences which were later changed to life imprisonment. They claimed that they were denied due process of law by the prosecution's suppression of evidence favorable to them and by knowing use of perjured testimony. *Id.* at 67-68.

73. *People v. Foster*, 67 Cal. 2d 604, 606, 432 P.2d 976, 977, 63 Cal. Rptr. 288, 289 (1967) (en banc); CAL. PEN. CODE § 686 (West Supp. 1984). Section 686 provides in pertinent part:

In a criminal action the defendant is entitled:

to a fair trial. However, it is not absolute. In *Chambers v. Mississippi*,<sup>74</sup> the Supreme Court pointed out that other legitimate interests in the trial process must be considered.<sup>75</sup> The *Chambers* Court suggested a balancing test to weigh these conflicting interests.<sup>76</sup> It recognized that “[t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the ‘accuracy of the truth-determining process.’”<sup>77</sup> However, it warned that “the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.”<sup>78</sup>

### B. California Case Law

In *Pointer v. Texas*,<sup>79</sup> the Supreme Court extended the sixth amendment’s confrontation clause to state criminal proceedings through the

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3. To produce witnesses on his behalf and to be confronted with the witness against him, in the presence of the court, except that:

(a) Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this state.

(b) The deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this state.

CAL. PEN. CODE § 686 (West Supp. 1984).

74. 410 U.S. 284 (1973).

75. *Id.* at 295.

76. *Id.* The petitioner, Chambers, was tried by a jury and convicted of murdering a police officer. The jury assessed punishment of life in prison. McDonald, a witness, orally admitted to the murder on three separate occasions, each time to a different friend. Following Chambers’ arrest, McDonald made, but later repudiated, a written confession. *Id.* at 285-88. Chambers claimed his due process rights had been violated because he was not allowed to cross-examine McDonald or to introduce the testimony of the three people to whom McDonald had confessed. Chambers filed a pretrial motion requesting the court to order McDonald’s appearance. *Id.* at 291. He also sought a ruling that would allow him to call McDonald as an adverse witness in case the state itself chose not to do so. *Id.* Upon conclusion of the state’s cross-examination, Chambers renewed his motion to examine McDonald. *Id.* The trial court denied these requests. *Id.* These denials were the result of the trial court’s strict application of certain Mississippi rules of evidence. *Id.* at 289. Thus, at trial, Chambers was not permitted either to cross-examine McDonald or to present his own witnesses who would have discredited McDonald’s reputation regarding the prior confession. *Id.* at 294. The Court held that the state rule violated Chamber’s constitutional right to confrontation. *Id.* at 296-297.

77. *Id.* at 295 (citations omitted).

78. *Id.*

79. 380 U.S. 400 (1965). In *Pointer*, the defendant was arrested in Texas and brought before a state judge for a preliminary hearing on a charge of having robbed a man named Phillips. Pointer was not represented by counsel. He did not choose to cross-examine Phillips at that time. Before the trial took place, Phillips moved to California. At the trial, the state offered the transcript of Phillips’ testimony given at the preliminary hearing as evidence against Pointer. Pointer’s counsel at trial unsuccessfully objected to introduction of the transcript claiming that it denied the defendant the right to confront the witness. Pointer was subsequently convicted. *Id.* at 401-02.

due process clause of the fourteenth amendment.<sup>80</sup> In *People v. Flores*,<sup>81</sup> a California Court of Appeal noted that a full cross-examination is a matter of absolute right and not of privilege.<sup>82</sup>

It is clear that a defendant has a constitutional right to due process; otherwise, an innocent defendant could suffer loss of life or liberty unjustly.<sup>83</sup> However, the risk of prejudice to the rape victim in the court's admission of reputation or opinion testimony is significant. Evidence of reputation and opinion is arguably entirely irrelevant in today's society.<sup>84</sup> It appears that the California courts have begun to recognize this problem.

For example, in *People v. Blackburn*,<sup>85</sup> a 1976 case, a defendant contended that section 1103, which at that time precluded him from introducing evidence of a rape victim's sexual conduct with *other men* in order to prove her consent to sexual intercourse with him, deprived him of his due process rights to confront witnesses against him and to a fair trial.<sup>86</sup> The California Court of Appeal rejected these contentions.<sup>87</sup>

The *Blackburn* court held that section 1103 did not deprive the defendant of a fair trial for two reasons. First, the due process right to a fair trial does not require that all relevant evidence that may tend to exonerate a defendant be admissible.<sup>88</sup> And second, evidence concerning a victim's sexual conduct with other men has slight relevance to prove that the victim consented to sexual intercourse with the defendant.<sup>89</sup>

In *People v. Belmontes*,<sup>90</sup> a 1983 decision, the California Supreme Court held that section 1103, as amended in 1981, precludes the admission of character evidence not only in prosecutions involving rape, but in

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80. *Id.* at 406.

81. 15 Cal. App. 2d 385, 59 P.2d 517 (2d Dist. 1936). In *Flores*, a woman provided evidence showing that she had been physically forced into an alley by 12 men and then brutally raped by nine of them. *Id.* at 388-89, 59 P.2d at 518-19. However, after examining the record, the court stated that "when the evidence is 'in such sharp conflict' as is the evidence in this case, and that when the evidence is such as *appears* to be incredible, that the rulings and instructions of the court become of grave consequence." *Id.* at 401, 50 P.2d at 525-26 (emphasis in original) (quoting *People v. Jones*, 160 Cal. 358, 363, 117 P. 176, 177 (1911)). Thus, the court in *Flores* reasoned that "on a record such as this 'the utmost latitude compatible with our rules of evidence should have been permitted in the cross-examination of . . . a witness.'" 15 Cal. App. 2d at 401, 59 P.2d at 526 (citations omitted).

82. *Id.*

83. See *supra* note 72. But see also *infra* text accompanying notes 100-03.

84. See *supra* generally section V.

85. 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (2d Dist. 1976).

86. *Id.* at 689, 128 Cal. Rptr. at 866.

87. *Id.* at 691, 128 Cal. Rptr. at 867.

88. *Id.*, 128 Cal. Rptr. at 867.

89. *Id.* at 690, 128 Cal. Rptr. at 866-67.

90. 34 Cal. 3d 335, 667 P.2d 686, 193 Cal. Rptr. 882 (1983).

prosecutions involving oral copulation and sodomy as well.<sup>91</sup> In *Belmontes*, a case involving kidnapping, rape, oral copulation and sodomy, the defendant attempted to assert evidence that his brother had sexual intercourse with the victim at least six times in the past few months. He asserted its relevance to show consent to the oral copulation and sodomy charges. The court found it irrelevant to the issue of consent.<sup>92</sup>

It appears that the California Legislature, through the 1974 amendment to section 1103, and the California courts, through case law, have recognized that the rape victim's sexual conduct with those other than the defendant is irrelevant when the issue of consent has been raised. However, the question remains whether the California Legislature and courts will extend the rationale to preclude opinion and reputation evidence of the victim's past sexual conduct even *with the defendant*.<sup>93</sup> The California Legislature needs to strike a balance between the accused's right to confront and adequately cross-examine the state's witnesses and the likelihood of prejudice to the victim and of confusion of the issues. It can be so by adopting the provisions of Rule 412 of the FRE.

### C. *Constitutionality of Rule 412*

Unlike most of the other federal rules, Rule 412 specifically refers to the United States Constitution. It allows the introduction of evidence of the victim's past sexual activities when "constitutionally required to be admitted."<sup>94</sup> It is clear that this provision was established in the event of a due process or confrontation clause challenge.<sup>95</sup> Congress must have recognized the potential for constitutional scrutiny of the statute.

This constitutional provision is necessary in light of the fact that all reputation and opinion evidence is excluded under Rule 412. Without this provision, a defendant who claims he has never had prior sexual relations with the victim would be completely barred from revealing implications of the victim's consent.

Thus, Rule 412 is a constitutional protection which strikes a compromise between the rights of the victim and those of the accused. The victim is protected against potential humiliation and trauma by the prohibition of arguably irrelevant reputation and opinion testimony. How-

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91. *Id.* at 341, 667 P.2d at 668-69, 193 Cal. Rptr. at 884-85 (citing *People v. Blackburn*, 56 Cal. App. 3d 685, 690, 128 Cal. Rptr. 864, 866 (2d Dist. 1976)).

92. *Id.* at 341, 667 P.2d at 688, 193 Cal. Rptr. at 884.

93. See *supra* note 7 and accompanying text.

94. FED. R. EVID. 412(a)(1).

95. FED. R. EVID. 412 congressional discussion.

ever, there is still an element of uncertainty. Rule 412 is not equipped with clear advance notice of the extent to which the victim's private life may be questioned if she decides to testify at trial.

Under Rule 412, there is a right to introduce evidence to prove a defense, balanced with certain restrictions. These restrictions are based upon considerations of extrinsic social policy, such as the functioning of the criminal justice system and the protection of the witness' privacy. Rule 412 limits the available methods of proving consent to specific instances of sexual conduct with the accused. However, whenever the evidence is "constitutionally required," the Constitution prevails to make it admissible. Thus, Rule 412 specifically and expressly provides the defendant constitutional protection in the case of highly probative evidence of sexual conduct.

## VII. STATE INTEREST IN PROMOTING CRIMINAL JUSTICE

It is a common misperception that rape is a crime of sexual gratification. Studies indicate that a female does not contribute to the perpetration of rape merely by her appearance or actions.<sup>96</sup> There is a growing acknowledgement that rape is "a very ugly . . . crime of violence *motivated by hostility and rage*, not sexual passion."<sup>97</sup>

Rape is an act of violence which subjects the victim not only to pain, but to emotional humiliation, as well. When a woman decides to prosecute her assailant, she must be prepared to discuss her story with the police, the hospital, and the courts, and to face the skepticism of both society and the courts. One commentator remarked that a woman might be better off not prosecuting the crime. He states:

One of the great injustices that the victims of criminal rape must suffer is the necessity of reliving the experience in minute detail over and over again from the first complaint to the police to the last phase of the trial. By attempting to prosecute the man who has raped her, a woman disassociates herself from the crime and endeavors to reconstitute her self-esteem, but it is a rare woman who is so independent of the evaluation of others that she can survive the contemptuous publicity that her attempt will draw upon her . . . . The odds against her succeeding in her prosecution, even after the police have

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96. See M. AMIR, PATTERNS IN FORCIBLE RAPE 74, 96 (1971). Amir accumulated his data from a study of 646 rape cases in Philadelphia. He found that rapists select their victims with a degree of randomness. Thus, his study rebutted the theory of victim-precipitated rape. *Id.* at 257.

97. O'Connor, *Texas Sex Laws*, THE TEXAS OBSERVER, Dec. 15, 1978.

reluctantly agreed to charge her assailant, are rather worse than four to one. If a woman's only concern is for herself and her eventual recovery from the experience, then she is much better advised not to prosecute.<sup>98</sup>

Reactions from a victim's family, friends and community are serious and difficult enough to encounter without imposing a fear of harassment on the stand, as well. As reported by the United States Department of Justice:

Psychological and emotional trauma follow a rape. Left untreated, the repercussions can be far more damaging to the victim in the long run than the physical assault itself. The trauma that all victims endure varies in degree. Symptoms may include insomnia, anxiety, depression, fear of being alone and/or fear of men.

The reactions of family, friends and community to rape, particularly if the crime is publicized, may be confused and negative in their impact. The family reaction to children who have been raped is often extremely emotional, and may be manifested in a variety of responses which are disruptive to the lifestyle of the entire family. Adult members of the family often lose sleep, and react with insecure feelings about reoccurring acts of violence. The initial response may be a need to blame either the child, the assailant, or the parents themselves. Following these reactions is the long-term process of reorganizing their children's lives, as well as their own. Rape will also cause a family to have to deal with the issue of sexuality, and the parents may feel thrust into situations they feel unable to handle. Often professional counseling is an appropriate way to resolve these conflicts. Community reaction is changing as public agencies, rape crisis centers and women's rights groups educate the public about rape; however, a long social history perpetuates attitudes that change slowly.<sup>99</sup>

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98. C. GOLDSTEIN, *supra* note 32, at 18 (citations omitted).

Obviously, for the rape victim, the trial can be a degrading and humiliating experience. She may be viewed with disbelief, and is often ridiculed and denigrated by lawyers, judges and juries. After going through this humiliating experience, her assailant is more often than not set free to resume his life, while she may take months to recover from both the rape and the assault on her character in the courtroom.

*Id.* at 21. California Dep't of Justice, Information Pamphlet No. 12, Rape: The Crime and Its Prevention 12 (1979).

99. OFFICE OF THE ATTORNEY GENERAL, CRIME PREVENTION UNIT, CALIFORNIA DEP'T OF JUSTICE, INFORMATION PAMPHLET NO. 12, RAPE: THE CRIME AND ITS PREVENTION 12 (1979).

"Although it is true that an innocent man may be falsely charged with rape, both the incidence of this happening and the results are far different than the public believes. Statistics citing cases of falsely reported rape range from ten to fifteen percent."<sup>100</sup> An assistant district attorney claimed that "those women who falsely claim rape seldom go any further in the judicial process than making a complaint to the police."<sup>101</sup>

While there is reason to protect the innocent man accused of rape, one must remember that rape is frequently not reported.<sup>102</sup> In a study of rape victims conducted by Medea and Thompson, it was found that "70 percent of the victims never even reported the crime. Of the cases reported, only 33 percent of the rapists were apprehended. And of the rapists caught, 50 percent were convicted of the crime. This was a grand total of three convictions out of sixty rapes."<sup>103</sup>

The increasing incidence of rape and the widespread reluctance of rape victims to report the crime has led to a reevaluation of the treatment of the victim and the accused by the criminal justice system. The law recognizes rape as one of the most serious crimes known. As a state interested in the promotion of criminal justice, California should adopt Rule 412's provisions for the protection of the increasing number of rape victims.

#### VIII. DISCUSSION OF CALIFORNIA'S RELUCTANCE TO ADOPT RULE 412

As far back as 1856, California has exhibited a desire to adopt a rule similar to Rule 412 of the FRE, but has been reluctant to do so. In *People v. Benson*,<sup>104</sup> an 1856 case, the defendant was indicted for the rape of a thirteen year old girl. The victim was the prosecution's sole witness.

At trial, the defendant in *Benson* introduced evidence of the victim's reputation for unchastity.<sup>105</sup> On appeal, the California Supreme Court stated: "I cannot understand why, upon any sound rule, general reputation should be preferred to particular facts. . . . It appears to me that *proof of particular acts of lewdness should be admitted in preference to general reputation, which may be good or bad, either deservedly or undeservedly.*"<sup>106</sup> Thus, as early as 1856, the court recognized the adverse

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100. C. GOLDSTEIN, *supra* note 32, at 9 (citations omitted).

101. *Id.*

102. *Id.*

103. *Id.* (citations omitted).

104. 6 Cal. 221 (1856).

105. The defendant also attempted to introduce evidence of specific past sexual conduct of the victim. This evidence was excluded. *Id.* at 222.

106. *Id.* at 223 (emphasis added).

effects of reliance upon reputation testimony and expressed a preference for evidence of specific acts.

In *People v. Guthreau*,<sup>107</sup> a California Court of Appeal affirmed a conviction by a jury of forcible rape and forcible oral copulation. As to the rape charge, the accused raised the defense that the victim had consented. The court in *Guthreau* held that the trial court's refusal to allow inquiry into the victim's prior sexual conduct was proper under section 1103.<sup>108</sup> It stated: "The relevance of past sexual conduct of the alleged victim of the rape with persons other than the defendant to the issue of her consent to a particular act of sexual intercourse with the defendant is slight at best." <sup>109</sup>

It can be inferred from these statements that the California courts have acknowledged to some extent the rationale behind the provisions of Rule 412, which permits only evidence of specific instances of conduct between the victim and the particular defendant on trial. It is ironic that California's legislature, considering its liberal views in many other areas of law, has been so reluctant to adopt the provisions of Rule 412.

## IX. CONCLUSION

Acceptance of the notion that reputation and opinion testimony concerning a victim's past sexual conduct is irrelevant to the issue of consent may be difficult for California's court system and legislature. Nevertheless, a reevaluation of California's attitudes toward the crime of rape is imperative. The incidence of the crime of rape is increasing at an alarming rate.

Reputation and opinion testimony regarding the victim's unchastity should not be admitted because of its remoteness to the issue of consent. It also increases the dangers of jury confusion and prejudice. These types of evidence do not establish the *fact* of unchastity. They merely allow the fact finder to draw irrelevant *inferences* which are significantly prejudicial to the rape victim.

Admissibility of these types of testimony subtly undermines the adversary system. The purpose of this system is to settle disputes by discovering the facts of the particular incident in question. Its purpose is not to make a moral judgment following an examination of the parties' history of sexual relations.

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107. 102 Cal. App. 3d 436, 162 Cal. Rptr. 376 (4th Dist. 1980).

108. *Id.* at 444, 162 Cal. Rptr. at 380.

109. *Id.*, 162 Cal. Rptr. at 380 (quoting *People v. Blackburn*, 56 Cal. App. 3d 685, 690, 128 Cal. Rptr. 864, 866 (2d Dist. 1976)).



Facts concerning a woman's previous sexual conduct are not automatically relevant to the present issue of consent. Today, our society is a mobile and urban one. Thus, the probative value of a female's reputation within a "community" is minimal and most likely will be outweighed by its prejudicial effect. Reputation and opinion evidence of the victim's prior sexual activity, when offered to prove consent, should be excluded as inherently unreliable.

An indication of the California judicial system's bias against the rape victim is apparent by its allowance of reputation and opinion testimony, which puts the *victim* rather than the accused on trial. The time has come to reject the automatic assumption that "unchastity"—the definition of which depends on the individual trier of fact—is relevant to the issue of consent and to minimize the trauma at trial for rape victims.

The enactment of Rule 412 represents a legislative attempt to balance the conflicting rights of the rape victim and the accused. This balance is accomplished by the narrow limits imposed on the admissibility of evidence of prior sexual conduct to prove consent and the broad scope of admissibility of such evidence "when constitutionally required."

Rule 412 is a natural response to the changing needs and demands of our society. It is time that California adopt its provisions in accordance with our changing society.

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