No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials

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No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials

by

AVIVA ORENSTEIN*

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* Associate Professor of Law, Indiana University School of Law—Bloomington. J.D. Cornell 1981. I am grateful for summer research support from the Indiana University School of Law. I also wish to thank my dear friends and colleagues, Professors Kathryn Abrams, Katharine Baker, Fred H. Cate, Lynne Henderson, Seth Lahn, Lauren Robel, Harry Pratter, Andrew Taslitz, Emily Van Tassel, and Susan Williams for their encouragement and helpful comments. Thanks to Dawn Polaski, Brad Zehr, and Terry Kaczmarek for their patience and tact in expertly typing multiple drafts and to Erika Schneller for her fine research assistance, and to Erika Barnes and Kathryn Davis of the Hastings Law Journal for shepherding the piece through the production process. Finally, I would like to thank my children, David, Michael, and Benjamin, who make life meaningful and fun, and without whom this work would have been completed much earlier. To quote Al Franken, “I believe the best thing a parent can give his kid is time. And not just quality time, but big stinking, lazy, non-productive quantity time. In fact that’s why this article is so badly written. Believe me, you’d be enjoying the experience of reading this article a lot more if I weren’t so dedicated to my children.” AL FRANKEN, RUSH LIMBAUGH IS A BIG FAT IDIOT AND OTHER OBSERVATIONS 71 (1996).
Introduction

Women who "cry rape" are not believed. Even women who eschew the cry and calmly report sexual violence are not believed (because they don't behave like real victims). Women are disbelieved because they delay reporting rape. Those who report promptly are suspected of malice or delusion. Attempts to address problems of rape through changes in evidence law and substantive criminal law have met with questionable success.\(^1\) Many have bemoaned the ineffectiveness of legal measures, arguing that social attitudes must change before any significant improvement in the treatment of rape victims occurs.\(^2\)

I reject the notion that disbelief of women is entirely a problem of social attitude which is intractable to legal reform. Although social attitudes influence the decision to report, investigate, prosecute and believe rape, even the procedural law of evidence, affects how rape influences the general tenor of social belief. The relationship between law and social beliefs is dynamic; courtrooms shape, as well as mirror, cultural truths.

In this article I analyze how various uses of character evidence in rape trials can help address this problem. My proposals, informed by feminist principles,\(^3\) strive to counteract jurors' stereotypes and to

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1. The affirmatively misogynist requirements of substantive rape law—that the victim must resist her attacker and that her testimony must be corroborated by other evidence—is no longer required. Additionally, evidence law has eliminated the cautionary instruction warning the jury about the danger of false rape accusations which are, according to the instruction, easily made and difficult to disprove.


3. Obviously no consensus exists on the definition of feminism and my brief discussion is necessarily tendentious and incomplete. I identify three major goals of feminism: (1) Tangibly improving the lives of women including, most importantly, eliminating subordination of women; (2) Deriving knowledge and power from the experiences of women; (3) Providing empathy and support for all oppressed people. These aims transcend the limited goals of strict, formal parity and include the subtle ways in which law, as well as informal social and cultural arrangements, may discriminate against women. For a more detailed explanation of my feminist philosophy, see Aviva Orenstein, “MY GOD!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159 (1997) (using a feminist method to criticize and propose reforms of the excited utterance doctrine, a codified exception to the hearsay rule); Aviva Orenstein, Get off the Blue Bus: Incorporating a Feminist Analysis into Evidence Policy Where You’d Least Expect It.
educate jurors and society at large, about rape.\textsuperscript{4}

It is undeniable that trials, particularly notorious ones, serve a pedagogical function in modern America. Trials serve as cultural fables, sparking debate and relaying their own object lessons. These stories have exploded into popular culture, and their audience is anyone who watches television. Part melodrama, part morality play, and, for the layperson, part inscrutable lawyer talk, recent rape trials have introduced serious questions into public discourse about the legal process, rape law, and perhaps most importantly for our focus here, how and when we know things to be true.\textsuperscript{5}

In this article, I examine current approaches to evidence law in rape trials, and I speculate about how rape trials can perform their educational function in ways that are fair to the accused and the victim.\textsuperscript{6} I briefly present the current rules of character evidence in Sec-

\textit{And Advocating an Exception for Apologies, __Sw. U. L. Rev. __} (forthcoming 1998).

\textsuperscript{4} It should come as no surprise that feminism, which is deeply concerned with how women are heard, should have much to say about evidence law, particularly in the area of rape. Evidence law is an ideal candidate for feminist analysis because both evidence and feminism are concerned with questions of relevance, communication, and credibility. Recently, feminist scholarship has begun to examine evidence. \textit{See, e.g.,} Kit Kinports, \textit{Evidence Engendered}, 1991 U. Ill. L. Rev. 413, 430-452 (offering insights into how the evidence rules may ignore the experiences of women and instead reflect male values and norms); Kathy Mack, \textit{Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process}, 4 Crim. L.F. 327 (1993) (drawing on psychological research that the gender task force reports to discuss women's problems in gaining respect and credibility in the courtroom); Rosemary Hunter, \textit{Gender in Evidence: Masculine Norms vs. Feminist Reform}, 19 Harv. Women's L.J. 127, 127, 155-62, 166 (1996) (exploring questions of credibility and relevance and arguing that women's stories must first be allowed into court, and "then they must be taken seriously"); Kim Lane Scheppele, \textit{Just The Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth}, 37 N.Y.L. Sch. L. Rev. 123, 123 (1992) (examining why the "stories women tell in court, particularly in cases of sexualized violence like rape, are vulnerable to attack as unbelievable.").

\textsuperscript{5} Thus, in determining the "truth" of a rape case, we must recognize it not only in a narrow case-specific adjudicatory sense, but also as it influences the larger cultural debate. In searching for truth, it is useful to acknowledge that honesty is not among our best qualities as students and purveyors of courtroom procedure. Evidence scholars operate in a world of denial about what juries can and will do. For example, in applying Rule 609, we instruct juries to consider felonies for the purpose of impeachment only, and not criminal propensity, even though we know such mental gymnastics are unachievable.

\textsuperscript{6} I use the terms "victim," "survivor," and "complaining witness" interchangeably, aware of the deficits of each. The nomenclature reflects the core dilemma of rape. Before conviction, we must presume the accused to be innocent. Yet, by referring to the woman as the "alleged victim" or "alleged survivor," we trigger a special form of deep mistrust that seems reserved for women who report rape (as opposed to other crimes). "Complaining witness" seems to trivialize rape. The term "victim" connotes helplessness. \textit{See Martha R. Mahoney, Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings, 65 S. Cal. L. Rev. 1283, 1311 n.115 (1992) (explaining that "survivor" has replaced "victim" in feminist vocabulary to refute the notion that the woman in rape and battering situations is passive). "Victim," however, also has the benefit of reinforcing
tion II. Next, in Section III, I analyze the special challenges of rape trials, positing that rape trials depend on and perpetuate a paradigmatic tale of rape, involving an attractive, modestly dressed victim who is brutally beaten and sexually attacked by a deviant sociopath with whom she has no prior relationship. Deviation from the paradigm, such as when the woman is dressed provocatively or is on a date with the perpetrator, often leads to disbelief of the woman. This cultural fable affects the course of rape trials because it drowns out the voices of victims who do not fit the paradigm.\(^7\) I will punctuate the discussion with examples from the recent Alex Kelly rape trials to illustrate and humanize these special problems.\(^8\) The Alex Kelly case

\(^7\) As Mary Coombs has observed, “The range of ‘credible’ stories is narrower than the range of true ones.” Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & THE L. 277, 280 (1993).

\(^8\) In 1987, at age 19, Alex Kelly fled to Europe after having been accused of two rapes in the same week. Both women reported that he raped them in his car on the way home from a party, threatening further harm if they reported him. Two additional women have come forward to report that as teenaged girls they were raped by Kelly. See Lynne Tuohy, *Prosecutors Have More Rape Claims; If Kelly Took Stand, 3 Others Reportedly Were Ready to Testify*, THE HARTFORD COURANT, Nov. 15, 1996, at A1. Although Kelly denied the allegations and claimed that the women consented, he nevertheless skipped bail. Upon his return ten years later, Kelly was tried for the rape of Adrienne Bak Ortolano, who was 17 at the time of the rape. Ms. Ortolano came forward to discuss her experiences. See Monte Williams, *Victim of Rape Goes Public After 11 Years of Nightmares*, N.Y. TIMES, June 20, 1997, at A1. Ms. Ortolano had physical evidence of choking and vaginal bruising. The opinion of the doctor who examined Ms. Ortolano was that she had been “viciously raped.” See Rafael A. Olmeda, *Doc Recalls ‘86 Rape Case Says She ‘Will Never Forget’ Girl's Bruises*, DAILY NEWS, Oct. 23, 1996, at 7. Nevertheless, the trial ended in a hung jury and the judge declared a mistrial. The jury was concerned about some discrepancies in Ms. Ortolano's story concerning how Mr. Kelly could have simultaneously choked her and lowered the seat in the car. See *Turning Point* (ABC television broadcast, Dec. 5, 1996) (transcript # 168-1) [hereinafter *Turning Point*]. The jury did not learn about Kelly's other rape charge. However, a second jury, which also did not learn about any other rape accusations against Mr. Kelly, convicted him of raping Ms. Ortolano. As of this writing, Kelly will soon stand trial for the second rape charge and for various breaches of the peace which arose when he was on bail. Because of his “ski bum” status when he was on the run, Kelly was derided in the press as a spoiled rich kid. The Daily News referred to him as the “preppie rape suspect Alex Kelly,” though he attended public school. Rafael A. Olmeda & Wendell Jamieson, *Victim's Sis Reveals Rape Suspect Threat*, DAILY NEWS, Oct. 19, 1996 at 8; see also David Stout, *Former Fugitive Is Facing New Troubles*, N.Y. TIMES, Sept. 24, 1996, at B5. Mr. Kelly's story will soon be a CBS movie made for television. See Entertainment Briefs BPI Entertainment News Wire (Aug. 11, 1997). It is fitting that his story serve as the anecdotal counterpart to the psychological, social, and legal evidence discussed in this article. As Thomas Puccio, Mr. Kelly's attorney, complained, Kelly “has become the poster boy for everyone who wants to say something about the crime of rape.” Lynne Tuohy, *Kelly Gets 16 Years*, THE HARTFORD COURANT, July 25, 1997, at A1.
is particularly apposite because it involved character questions concerning the other accusations against Kelly. It is also a good source for illustration because, in the words of the attorney for the rape survivor, Alex Kelly's defense "pandered to every stereotype we have ever heard about rape victims."\(^9\)

Section IV questions how we can craft character evidence rules to counteract the cultural pull of the rape fable in ways that are both fair to individual defendants and respectful of feminist principles. I evaluate four potential character-based solutions to the problem of proving rape: (1) Rape shield, which limits certain types of character evidence about the victim; (2) Rule 413, and to a lesser extent Rule 404(b) and the doctrine of chances, all of which, albeit under different theories, admit evidence concerning prior wrongful acts by the accused; (3) Trial techniques that affirmatively use jurors' stereotypical thinking about rape to fit the case within a familiar story of rape and thereby convince the jury to convict; and (4) Expert testimony that admits additional background, providing the jury with relevant information about rape victims, perpetrators, and the crime itself to contravene popular stereotypes.

I argue that the twin goals of listening to women and protecting the rights of defendants can be accomplished by undermining the rape paradigm and educating the jury about rape. I applaud evidentiary rules such as rape shield that prevent juries from learning information that reinforces the cultural paradigm. To further subvert the paradigm, I suggest expert testimony should be expanded to allow experts to educate the jury about the incidence and nature of rape, including demographics and social science.

However, not all the currently proposed character-based solutions for gaining increased rape convictions are moral, feminist, or even good for women in the long run. I reject the new Rule 413 and other attempts to admit evidence of prior bad acts by the accused, which rest on anti-feminist principles and stereotypes about rapists. Similarly, I oppose trial tactics that rely on rape myths and persuade the jury to convict by matching the facts of the case to a cultural paradigm. Evidentiary mechanisms that reinforce cultural paradigms or somehow capitalize on them because the survivor just happens to fit the stereotype of the "innocent" victim, are undesirable and ultimately counterproductive from a feminist perspective: We must reject strategies for rape trials that are grounded in our culture's fondly held but demonstrably wrong fables of rape, even if resorting to the paradigm would, in the short term, achieve the laudable goal of conviction.

I. The Current State of Character Evidence

A. Doctrine

The traditional rule prohibits circumstantial use of character evidence, known as "propensity" evidence, whereby evidence of a person's particular characteristic or trait is offered to argue that the person acted in conformity with that trait or characteristic. For example, the prosecution cannot use evidence that the accused has a violent temper to argue that she probably started the fight in question. Similarly, evidence that the accused once started a fight on another occasion would also be inadmissible.

With the exception of questioning the character of witnesses for honesty, the rule against using character evidence to prove behavior on a particular occasion is absolute in civil cases. In criminal cases, however, certain exceptions have arisen where the accused may choose to raise the issue of his own good character or the bad character of the victim (and the prosecutor may rebut the same).

Although not an exception to character evidence, Rule 404(b) is intimately related to the ban on propensity evidence. Rule 404(b), in addition to reiterating the ban on character evidence to prove propensity, also clarifies that specific acts (that may have some propensity overtones) can be admitted for other legitimate purposes. Rule 404(b) provides examples of specific act evidence, such as proving motive or plan, which are admissible because they are not being used to prove propensity, or generalized character, but rather are independently relevant for another legitimate purpose. For our pur-
poses, the two most important exceptions to this general scheme are Federal Rule of Evidence 412 (Rape Shield) and Rule 413. Although Rape Shield laws vary by jurisdiction, they were all designed to prevent the practice of putting rape survivors on trial and using women's past sexual activity to prove consent. To varying degrees, they prohibit examining a rape survivor's sexual history. Essentially, Rape Shield is an exception to an exception. The general rule bans all character evidence. The exception, provided in Rule 404(a), allows the accused in a criminal case to raise character issues concerning the victim. Rape Shield, the exception to that exception, prohibits the accused from raising the sexual "character" of the victim in a rape case.

The recent and controversial new Federal Rule 413 allows the prosecutor to introduce the accused's prior similar acts in rape cases. Rule 413 provides that in criminal cases of sexual assault, "evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." This means that past instances of sexual assault may be used to make the generally forbidden propensity argument: if the defendant raped a woman once before, he has the character of a rapist and probably did it again. Rule 413 represents a marked departure from traditional character evidence rules. Unlike the Rape Shield rule, which limits an exception to the general bar against character evidence, this rule expands the scope of admissible character evidence.

B. Reasons Behind the Rules

Scholars and jurists debate the fairness of admitting such character evidence, particularly evidence of other bad acts. Even assuming

15. Id.
16. The rules do not admit all character evidence or all arguably relevant specific wrongs, but are limited instead to evidence of the same type of criminal offenses as those with which the accused is formally charged. Rule 413 also includes a notice requirement. The prosecutor must disclose in advance any evidence of the uncharged offenses to the defendant, including statements of witnesses or a summary of the substance of any testimony that will be offered.
18. There are many areas in law and life where we use prior acts to draw conclusions
that such evidence is reliable, a proposition which is itself open to
doubt, character evidence can be invasive, unfair, and prejudicial.
Below, I outline six traditional reasons for excluding character evi-
dence.  

First, character evidence is objectionable because it is, at best,
only minimally relevant to the issues of the trial. In part, this concern
derives from psychological questions surrounding the reliability of
color figure evidence, particularly in the manner such evidence is pre-
sented in a courtroom. People are not predictable characters; many
question whether we can reliably determine how someone behaved
on one particular occasion by reviewing his or her past deeds.  

Second, even if past deeds or proclivities of character are mar-
ginally relevant, character evidence is still objectionable because
whatever little probative value it possesses may be more than offset
by the dangers of jury distraction or confusion. Character evidence
diverts the jury from the facts in the case and allows the jury to be-
come bogged down in the facts of the proof of character.  

Third, juries may overvalue the persuasiveness of character evi-
dence. They will take what is essentially a weak circumstantial argu-
ment—"he did it once, he'll do it again," or "he's the type of person
who would do such a thing"—and prove too much with it. The
worry is that jurors will be overly influenced by prior similar acts
and that their reasoning facilities will be impaired. 

about character. As David Leonard observed in a speech to the AALS (Oct., 1996), we
consider it before we hire a babysitter, thereby engaging informally in propensity-type
thinking. Our experience leads us to believe that by knowing someone's past behavior we
can determine his character, and that we can therefore predict something about his be-
behavior, or, as in the case with trials, figure out what he did based on his character. David

19. Additionally, administrative concerns about the waste of time and cumulative na-
ture of character evidence also contribute to the general disfavor of character evidence. If
the trait or other similar act is contested, much valuable court time can be wasted proving
the extrinsic issue of character.

20. For an assessment of the psychological value of character evidence, see Miguel A.
Mendez, California's New Law on Character Evidence: Evidence Code Section 352 and the
Impact of Recent Psychological Studies, 31 UCLA L. REV. 1003, 1044-59 (1984). See also
David R. Bryden & Roger C. Park, Other Crimes Evidence in Sex Offense Cases, 78 MINN.

21. See generally Susan M. Davies, Evidence of Character to Prove Conduct: A Reas-
sessment of Relevancy, 27 CRIM. L. BULL. 504, 511-33 (1991); FED. R. EVID. 403.

22. This concern echoes the principles of Rule 403, which provides that relevant
evidence may be excluded if its probative value is substantially outweighed by its unfair
prejudice.

23. "The natural and inevitable tendency of the tribunal . . . is to give excessive
weight to the vicious record of crime." 1A JOHN HENRY WIGMORE, EVIDENCE § 58.2 at

often relies on the proposition that juries can reasonably extrapolate a reliable pattern of predictable character traits from reputation, opinion, or isolated events. Psychologically, this is highly doubtful. An affinity for context and a yearning for understanding the whole person is not necessarily satisfied by learning about one isolated prior incident.²⁵

Fourth, the jury may be outraged by the conduct or character trait and may unconsciously desire to punish the person or accused for previous misconduct. Punishing someone for prior misconduct, particularly if the person has already paid his debt to society, is unfair.

Fifth, in a related concern, jurors might ignore the standard of proof, or at least fret less over reasonable doubt. Whereas jurors might have agonized over the possibility of convicting an innocent man, hearing that the accused had committed similar bad acts might make them less cautious.²⁶ At the very least, the jurors' consciences are eased because they know that the defendant is not blameless.

Finally, in criminal cases where the first identification is often through mug shots, the use of character evidence, similar bad acts in particular, can serve to reinforce unfair police techniques. Allowing the jury to consider these prior bad acts for propensity purposes would further disadvantage a group that is already partially selected by the similarity of their past crimes to the current charge.²⁷

All these arguments about unfair prejudice—that jurors overvalue the evidence, punish the defendant for his personality or past misdeeds, and may ignore the reasonable doubt standard—are more than academic quibbling. There is widespread agreement that introduction of such evidence, particularly prior bad acts, affects conviction rates.²⁸ Moreover, as will be discussed in the next section, the question of whether and when to rely on character evidence transforms from an interesting debate to a compelling dilemma in cases of rape, where juries tend to disbelieve the victim and uninvolved witnesses are rare.


25. See Mendez, supra note 20, at 1049.

26. See D. Craig Lewis, Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases, 64 WASH. L. REV. 289, 326 (1989) (describing "diminished regret about possible error in a determination of guilt when the fact-finder learns that the accused is an 'evil person.'") (quoting RICHARD O. LEMPERT & STEPHEN A. SALTZBERG, A MODERN APPROACH TO EVIDENCE 213 (1977)).

27. See LEMPERT, A MODERN APPROACH, supra note 26, at 211-12 (describing this phenomenon with reference to Casablanca's famous order to "round up the usual suspects").

28. See Mendez & Imwinkelried supra note 12, at 474 (citing various studies and empirical evidence that jurors are highly persuaded by evidence of the accused's immoral conduct).
II. The Challenge of Rape Trials: A Feminist View

A. Denial of Rape

Rape mars many women's lives and is a fact that is of central concern to feminists. The specter of rape limits the lives of almost all women, controlling their movements and participation in the outside world. Also, rape law and our culture's tolerance of rape goes to the heart of the relationship between men and women.

Despite a harsher posture on rape reflected in part by recent changes to the Federal Rules of Evidence, our society tolerates, and some would even say condones, rape. The new rules are rooted in anti-crime rhetoric, replete with class and race stereotyping. Our society has adopted punitive attitudes toward those who inflict "real

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29. Adrienne Bak Ortolano, the survivor in the Alex Kelly Rape Case, explained the effect on her life: "'I have been living in constant fear since I was 16... I may look O.K., but inside, I am not O.K. I will never be O.K.'" Monte Williams, Alex Kelly Receives a 16-Year Sentence in Girl's 1986 Rape, N.Y. TIMES, July 25, 1997, at A1. The effect of the rape on her marriage was severe: "'I have to ask my husband for patience and understanding because I can't have a normal healthy sexual relationship,'" she said. "'There are normal, intimate things that a wife and husband should be able to do and I can't do them. This has consumed my life, my marriage, my family.'" Id.

30. See CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 149 (1989) ("[A]ll women live all the time under the shadow of the threat of sexual abuse."); see also Robin L. West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 WIS. WOMEN'S L.J. 81 (1987) (arguing that women experience suffering that men do not, and that the legal system trivializes these gender-based sufferings); P.M. Mazelan, Stereo-Types and Perceptions of the Victims of Rape, 5 VICTIMOLOGY: AN INT'L J., 121 (1980) (noting that many argue that the fear of rape affects all women, influencing women's actions, including the way they dress and the places they go).

31. In fact, much of feminist theory surrounds the power dynamics between the sexes. Dominance feminism focuses on the power differential between women and men, analyzing women's place in society by examining male subjugation of women, focusing particularly on sex. Dominance feminism traces women's oppression to threats to women's safety and physical integrity, and argues that women's oppression may be so entrenched that it has become part of the unconscious cultural order of things. See Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory. 95 COLUM. L. REV. 304, 304 n.1 (1995) (describing Abrams' definition of dominance feminism).


rape,"\(^{34}\) while at the same time disbelieving or dismissing other rape accounts that are "inconsistent with deep cultural images of 'legitimate' stories of sexual violence."\(^{35}\) Evaluations of rape articulate community values, communicating not only through fear of attack, but also social approbation about how women must behave and under what circumstances sex against their will is deemed inappropriate and punishable. Though arguably not conscious, societal disbelief of women functions as a method of social control, affecting women's movements by determining what types of behavior and demeanor are deemed worthy of protection, and what others will be dangerous. Evidence law, including everything from the formal rules of evidence to the more customary folk wisdom of trial advocacy techniques, reflects this ostensibly ambivalent and complicated attitude toward rape.

The ways that women's tales of rape are discredited are legion. Even where the woman's story is technically believed to be true, the jury often finds sufficient fault with the woman or her behavior (or both) so that it refuses to label her a victim or to punish the rapist.\(^{36}\) Admittedly, some of this disbelief is attributable to questions about the nature of the crime itself. Where the defense is consent, there are often no witnesses other than the accused and the victim, and serious disagreements arise over what happened. However, this factor tends to be overemphasized by those who do not detect gender politics in the so-called "swearing matches" between the victim and the accused.\(^{37}\)

\(^{34}\) The term "real rape" was originally coined by Susan Estrich who wrote a book by the same name in which she argues that the law prosecutes and treats aggravated rapes involving violence from a stranger more seriously than acquaintance rapes. I use the term to include any rape that fits within the cultural paradigm. See SUSAN ESTRICH, REAL RAPE (1987).

\(^{35}\) COOMBS, supra note 7, at 278.

\(^{36}\) This is what Lynne Henderson calls the assumption of female guilt and male innocence. Henderson observes that the dominant cultural story of heterosexuality holds women morally responsible for the sexual conduct of both and hold men morally responsible for neither. See Lynne Henderson, Getting to Know: Honoring Women in Law and in Fact, 2 TEX. J. WOMEN & LAW 41, 43, 51 (1993); COOMBS supra note 7, at 280 (offering "a useful heuristic device to think about the situations in which fact finders discredit women's claims of sexual violation by dividing them into two categories: 'Not True' and 'So What'"); see also Katharine K. Baker, Once a Rapist? Motivational Evidence and Relevancy in Rape Law, 110 HARV. L. REV. 563, 586-89 (discussing blaming the rape victim and distinguishing between jury disbelief of women and jury disregard of harm to women who breach sex-role expectations).

\(^{37}\) The conundrum posed by these so-called "swearing matches" seems overstated. To convict, the jury would have to believe that the accused forced a woman to have sex and now is lying about it to avoid prosecution. To acquit, the jury would have to have reasonable concern that the victim is making it all up or is out of touch with reality. The purported reasons that women might be lying include: conniving to cover for an unintended
There are compelling explanations for this disbelief of women’s stories of rape. First, even when the circumstances are not physically brutal and do not involve added torture, rapes are painful events. Sexual behavior is rarely talked about openly in public, even in the context of love and mutual respect. Discomfort and psychological distancing regarding the sex acts of rape are prodigious.

Second, although men are also victims of rape, outside the prison population the issue separates into a huge gender divide: men are usually the perpetrators and women are usually the victims. This factor makes talking about rape necessarily fraught with sexual politics. Women charging rape go unheeded, in part, because women in the courtroom (as well as the street or the boardroom) are often not heard or taken seriously.

There is an additional level of discomfiture about rape because in keeping with their roles in interpreting the rape narrative, men will identify with the perpetrator, women with the victim. Also, suspicions about the rape victim are reinforced by some general differences in communication—in style and substance—between men and women.

pregnancy, making excuses for not being a virgin, vindictiveness for love scorned, a desire to sue the accused for a large amount of money or regret for unpleasant consensual sex. None of these reasons seem likely for pursuing a criminal case for rape. Given the humiliation (diminished somewhat by Rape Shield laws), heartache, public exposure, time, and inconvenience, it seems unlikely that many women would invent rapes. Thus, our acceptance of the swearing-match explanation seems, as a matter of course, suspect.

38. "I — I do believe that despite the enormous progress that has been made clearly in terms of awareness and prosecution of rape cases, they are still not treated the same as other violent crimes because sex is involved, and we’re — we’re nuts about sex in our society.” The Geraldo Rivera Show: Funny, He Doesn’t Look Like A Rapist (ABC television broadcast, June 25, 1997).

39. The effects of sexual assault on male survivors are traumatic, and may be quite similar to women’s documented reactions to sexual assault, including shame and denial. See generally GILLIAN C. MEZEY & MICHAEL B. KING, MALE VICTIMS OF SEXUAL ASSAULT (1992).

40. This disbelief and desire to silence women are rooted in our western tradition’s suspicion of women’s talk and the danger of women’s seductive powers. Starting with Eve, it seems Western culture has been convinced that women tempt men and get them in trouble. “[Women’s] role is to learn, listening quietly and with due submission. I do not permit women to teach or to dictate to men; they should keep quiet. For Adam was created first, and Eve afterwards; moreover it was not Adam who was deceived; it was the woman who, yielding to deception, fell into sin.” 1 Timothy 2:10-14. “Yosé ben Yochanan of Jerusalem says: Do not engage in too much idle talk with women. This has been said even with regard to one’s own wife; how much more does it apply to the wife of one’s neighbor. Accordingly, the Sages said: He who engages in too much idle talk with women brings trouble on himself; he neglects the study of the Torah and will in the end inherit Gehinnom [an evil afterlife].” Chapters of the Fathers I: 5 (1967) [R. Samson Raphael Hirsch trans.]

41. Linguistic and anthropological studies indicate that women and other subordinated groups employ speech patterns and communication strategies that are perceived as
Third, and most important, is the process of denial. Women's stories of rape paint a terrifying portrait of their everyday lives. To blame the woman for where she walked or what she wore is also a form of denial. Implicit in that accusation is the erroneous notion that a woman who walks in the right places or dresses correctly can shield herself from rape. Rather than acknowledge that women are in danger, society looks for psychological comfort by denying the problem and concluding that the victim must be lying, or at least exaggerating. One form of denial ascribes to the woman's reasons for lying, such as vindictiveness, fear of being perceived as willingly sexual, or less credible in the courtroom. Hallmarks of this powerless speech include tentativeness, hedging, hiding statements within questions, and using modifiers that tend to undermine the content of the statement. These patterns reinforce the hierarchy of speakers and invite the listener to discount the speaker personally and substantively. See Barbara Bezdek, Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process, 20 Hofstra L. Rev. 533, 583-84 (1992) (citing ROBIN LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975) and studies by William O'Barr in which jurors asked to assess witnesses' testimony after hearing tapes of identical transcripts in both powerful and powerless styles, assessed the powerless style speakers as less credible); see also HUNTER, supra note 4, at 165 (noting that women's speech patterns, "such as 'ums,' rising intonations, and hesitancy, are associated with powerlessness"); John M. Conley et al., The Power of Language: Presentational Style in the Courtroom, 1978 Duke L.J. 1375, 1380 (defining a powerless speech style and noting that the style is used more frequently by female witnesses); Peggy C. Davis, Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style, 66 N.Y.U. L. Rev. 1635, 1647-54 (1991) (discussing discourse patterns associated with gender, including signs of uncertainty). A look at popular culture indicates the pervasiveness of belief in the differences in gender communication style, such as the recently popular Broadway hit Defending the Caveman, and the Men Are From Mars, Women Are From Venus book genre.

42. People use the psychological defense mechanism of denial to screen out distressing realities and the resultant painful feelings. See Christine Adams, Note, Mothers Who Fail to Protect Their Children from Sexual Abuse: Addressing the Problem of Denial, 12 Yale L. & Pol'y. Rev. 519, 521 (citing KARIN C. MEISELMAN, RESOLVING THE TRAUMA OF INCEST 8 (1990)). In psychoanalytic terms, denial is a way for the ego to repress painful facts and thoughts by crowding them out of consciousness. See David S. Caudill, Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis, 66 Ind. L.J. 651, 658-59 (1991) (citing C. HALL, A PRIMER OF FREUDIAN PSYCHOLOGY 96 (1954)). Denial can happen on an individual level (such as an alcoholic who denies having a drinking problem) or can affect an entire society (such as German villagers who claimed to be unaware of Nazi genocide in nearby concentration camps). See id. at 661; see generally DANIEL GOLEMAN, VITAL LIES, SIMPLE TRUTHS: THE PSYCHOLOGY OF SELF-DECEPTION (1985) (describing society-wide denial).


44. See FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 24 (1989) (revealing the belief that women lie or exaggerate about domestic violence), cited in HUNTER, supra note 4, at 135 n.50.
hiding pregnancy. As part of the process of denial, jurors will look to things that don't add up. Professor Kim Lane Scheppele observes that abused and sexually assaulted women may exhibit many of the characteristics commonly associated with liars—they delay in reporting, change their stories, and sound equivocal because of self-blame.

Another form of denial is to see rape as exceptional or unusual. Despite the statistics, people tend to see rape as drastically divergent from typical interactions between men and women. Because it is viewed as wildly aberrational, the threat of rape seems more distant, and hence less threatening.

45. For instance, Kelly's attorney, Thomas Puccio, portrayed the survivor as "a good Catholic girl from a good Catholic family who cried rape when she lost her virginity," quoted in Turning Point, supra note 8. According to the New York Times, in his defense of Mr. Kelly, Mr. Puccio said Ms. Ortolano had "concocted a tale of rape out of shame of losing her virginity in the back of a Jeep to an 18-year-old she had just met, a youth with whom she would have no future because he had a girlfriend." Williams, supra note 8.

46. See Schappele, supra note 4, at 126-27. For instance, in Alex Kelly's mistrial, one of the jurors reported being troubled by the fact that the survivor did not report the rape until the next day. See Glaberson, supra note 9.

47. Professor Coombs has observed that "it is in [men's] gendered interest to believe rape and sexual harassment are rare events, attributable only to monsters: these situations have nothing to do with their own lives and require no reexamination of their own behavior." Coombs, supra note 7, at 285. Accord Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 11 (1991); Scheppele, supra note 4, at 142; Joan S. Meier, Notes from the Underground: Integrating Psychological and Legal Perspectives of Domestic Violence in Theory and Practice, 21 Hofstra L. Rev. 1295, 1311 (1993) (skepticism of women's stories "is far easier than acceptance of the reality that so many men are so dangerous, and that there is little (or nothing) many women can do on their own to be safe.")

48. Recent victim surveys indicate that approximately 500,000 women are victims of some sort of rape or sexual assault, yet in 1994, only approximately 100,000 rapes were reported and only approximately 37,000 arrests were made for forcible rape. See Brydans & Lengnick, supra note 2, at 1211.

49. See Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. Davis L. Rev. 1013, 1022 (1991); see also Susan Brownmiller, Against Our Will: Men, Women and Rape (1975); cf. Lisa Marie DeSanctis, Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence, 8 Yale J.L. & Feminism 359, 371 (1996) ("[J]urors, like all other members of society, would much rather believe that heinous crimes do not happen, and that at the very least, they do not happen without good cause . . . . Thus, the jury is predisposed to want this charge of violence to be a mistake, a misunderstanding, an accident, or a lie.").

50. A related form of denial, deriving from the "just world" hypothesis, rests on the belief that the woman is somehow at fault. "Just world" theory posits that people have an intense psychological need to view the world as a fair place because this perception provides a sense of control over their lives. See K.D. McCall et al., Understanding Attributions of Victim Blame for Rape: Sex, Violence and Foreseeability, 20 J. Applied Soc. Psychol. 1, 3 (1990). The "just world" theory predicts that people will blame a rape victim to maintain the belief that the world is fair, people get what they deserve, and there is a sense of order over the environment. Part of the denial of rape is a search for victim be-
B. The Cultural Paradigm

To understand how and why this denial of women's experience works, we must scrutinize the various stories—the heuristic models of rape—against which the jurors measure the victim's story.51

According to Taslitz, jurors use their past experiences or cultural assumptions, much the way a judge uses precedent, to interpret an event. Patriarchal scripts are the most available and persuasive to jurors. These patriarchal scripts form the basis of the rape story. In fact, story credibility and structural coherence are better explanations of juror reasoning than logical proof.52 What is the rape story? In its barest form, our cultural story of rape is a tale of female chastity and male perfidy. The prototypical fable of rape, what I will refer to as the cultural paradigm, relies on cultural rape myths.53 It involves a heroine—young, attractive, respectable—who has been brutally attacked and raped despite fierce resistance. At the time of the rape, she is modestly dressed and where she is supposed to be. She has no promiscuous past or lascivious inclinations.54 Thus she has done nothing, be it seductive or incautious, to “invite” the violent attack. She reports this violation immediately. The anti-hero of this fable is the brutish male aggressor. He is a sex-crazed, deviant sociopath. He has no previous acquaintance with the victim. He is violent and sadis-

51. Professor Mary Coombs calls these prototypical rape stories the “cultural scripts” of rape. Coombs, supra note 7, at 3. Professor Andrew Taslitz refers to them as “patriarchal stories” and demonstrates how these recurrent cultural narratives of rape communicate and reinforce the assumptions of the patriarchal system. See Andrew E. Taslitz, Patriarchal Stories I: Cultural Rape Narratives in the Courtroom, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 439 (1996). Taslitz explains that stories and storytelling are essential to individual’s memory and understanding of themselves and their relation to the world. See id. at 436. People are able to understand and communicate with others because they share common cultural stories. This is particularly true in the case of jury trials where the jurors try to piece together a coherent narrative of the events.

52. See id. at 426-28. Taslitz also provides strategic and legal solutions to the problems presented by such patriarchal stories in rape cases. See id.

53. Rape myths are empirically untrue, but are nevertheless firmly held notions about the incidence and nature of rape. Rape myths are defined as “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists.” Torrey, supra note 49, at 1017-18 (citing Martha R. Burt, Cultural Myths and Supports for Rape, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 229-30 (1980)). For instance, one rape myth is that rape is an unusual event. See Baker, supra note 36, at 563 (“Many men rape. They have all done something very wrong. Most of them have not done something particularly extraordinary.”).

54. In a survey of seventeen hundred Rhode Island sixth to ninth graders, thirty-one percent of the boys and thirty-two percent of the girls believed it would not be improper to rape a woman who is sexually active. See Torrey, supra note 49, at 1021-22.
tic, using extreme force to violate his victim. He is a "loser" who has no girlfriend.\textsuperscript{55}

\textit{(1) Cultural Profile of the Rapist}

Our cultural paradigm of rape reflects various rape myths purporting to describe men who rape. For our purposes the most pertinent myths are: (1) "nice" (well educated, white,\textsuperscript{56} middle class, employed) men do not rape;\textsuperscript{57} (2) only men who cannot secure normal consensual sex resort to rape.\textsuperscript{58} Some psychologists have created a "loser scale: variables such as being unmarried, being childless, being unemployed, lacking a sexual partner and presenting a negative appearance to jurors all lead to convictions.\textsuperscript{59} In truth, many men rape and even more say they would do so if they were sure they could get away with it.\textsuperscript{60} Interestingly, one strong predictor of a rapist is a subscription to various myths about rape. Men who believe these rape myths are more likely to report that under the appropriate circum-

\textsuperscript{55.} See generally, HELEN BENEDICT, VIRGIN OR VAMP (1992) (discussing media's reliance on rape myths in portraying rapists and victims).
\textsuperscript{56.} Both Professor Taslitz and Professor Katharine Baker discuss the role of race and racism in rape culture. See Baker, supra note 36, at 594-97; see also Taslitz, supra note 51 at 453-59.
\textsuperscript{57.} See Coombs, supra note 7, at 281 ("Rapists are aggressive, uncouth, lower-class strangers, probably African-American or Hispanic.").
\textsuperscript{58.} See Torrey, supra note 49, at 1040. Professor Coombs quotes reactions to William Kennedy Smith being charged with rape. One court watcher said, "I just find it hard to believe that someone with that much money would have to resort to rape to get what he wants." Coombs, supra note 7, at 301 n.96. A similar statement was made by the U.S. Military about soldiers who raped a girl in Japan (they had money, they could have gone to a prostitute, therefore they are innocent). Certainly Alex Kelly, in securing his first hung jury, used this rape myth to his advantage, always appearing in the company of his girlfriend, and projecting the image of a nice young man who could easily attract women to his bed without resorting to force. See Geraldo Rivera, supra note 38 ("So there's this nagging suspicion... that the woman did something to bring about her own violation. And that's especially the case when the perpetrator's a good looking, popular, wealthy, well-connected guy. Alex Kelly does not look like a rapist. I'm sorry. He's walking every day. Amy — Amy Molitor [Kelly's girlfriend] is holding on to his hand. His mom's there. His dad's there. His family loves him. She's been suffering — the girlfriend's been suffering for years. She's still by his side. And anyway, those girls were probably just dying to get, you know — you know, be — made love to by this guy.").
\textsuperscript{59.} See Bryden and Lengnick, supra note 2, at 127.
\textsuperscript{60.} In one experiment, 30\% of the men polled indicated that if they would not be caught, there would be some likelihood of their raping (rating themselves two or above on a five-point scale). See James V.P. Check & Neil M. Malamuth, Sex-Role Stereotyping and Reactions to Depictions of Stranger versus Acquaintance Rape, 45 J. PERSONALITY & SOC. PSYCHOL. 344, 346-47 (1983). According to Torrey, one study found that over half the college-age male population surveyed would rape if they were assured that they would not be caught or punished. Torrey, supra note 49, at 1023.
stances they might commit rape.  

(2) Cultural Profile of the Survivor

Many myths surround the survivor of rape, including general stereotypes of women as vindictive, hysterical, and unreliable narrators. I will focus here on four myths peculiar to rape.

The traditional image of a rapist as a "knife wielding maniac unknown to his attacker," is simply false. According to psychological studies, prior romantic involvement with the attacker mitigates the perceived seriousness of the rape and is seen as a potential justification for sexual attack. Arguably, stranger rapes are perceived to be prototypical and much more likely to be taken seriously. Defendants in stranger rapes are much more likely to argue mistaken identity. However, in acquaintance rape cases it's essential for the defense to discredit the rape victim's perception and credibility. Jurors tend to discredit acquaintance rape victims who acknowledge having sexual involvement with the defendant in the past both, because it seems likely to the jury that she consented again and because it indicates a motive for fabricating a rape charge. For instance, Alex Kelly called an expert sexologist who testified that the victim's hysteria could have resulted from guilt and anxiety over her first sexual experience. Also, Kelly's attorney argued that the victim lied out of shame. Furthermore, a tale of a woman's sexual reluctance is not necessarily disturbing because it is consistent with a belief that

61. See K.D. McCall et al., Understanding Attributions of Victim Blame for Rape: Sex, Violence and Foreseeability, 20 J. APPLIED SOC. PSYCHOL. 1, 3 (1990); Check & Malamuth, supra note 60, at 345-47 (noting a higher percentage of men who report they might rape among those who scored high for beliefs in sexual stereotypes). Many clinical reports support the finding that rapists believe in rape myths and tend to have callous perceptions of their victim's reaction to being raped. See id. at 346.

62. Bryden and Lengnick, supra note 2, at 1202 (quoting Susan Estrich).

63. See Check & Malamuth, supra note 60, at 344-45.

64. In an article entitled Judgements About Victims and Attackers in Depicted Rapes: A Review, Professor Paul Pollard canvasses the extensive literature on attribution of victim responsibility in rape. Pollard, supra note 33, at 312. Most of the research was conducted on American undergraduates who evaluated vignettes about rape. Although psychology experiments cannot replicate the conditions of a jury, the use of vignettes fits nicely with the story-model of jury thinking. Pollard speculates that the failure to define sexual attack as rape occurs because of the belief that such attacks are justified in certain circumstances. See id; but see Bryden & Lengnick, supra note 2, at 1273 (no different outcome under Michigan's most stringent and advanced rape shield law).

65. See id; Taslitz, supra note 51, at 469.

66. See Bryden & Lengnick, supra note 2, at 1204.


68. See Elizabeth Gleick, The Fugitive Goes on Trial, TIME, Nov. 4, 1996, at 84.
women, uncomfortable with sexuality, muster only token resistance. This dynamic is reflected in cultural beliefs about dating, including such gems as "her lips say no but her eyes say yes." This conceptualization of sex as feigned struggle leads to a tolerance of coerced sex. Moreover, struggle is seen as part of normal dating behavior and different from rape.

Second, there is the related belief that women, who are either sexually confused, vindictive, or trying to cover up some indiscretion, have a strong incentive to lie about rape.

Third is the myth that women use their sexual wiles as a basis for controlling men, or at least getting what they want from them. In this view, a sexual act is often seen as a bargained-for exchange between a man and a woman. In psychological experiments, subjects justified coerced sex based on various factors including whether the man paid for dinner or the woman expressed sexual interest. One prominent and particularly alarming aspect of this rape myth is that a woman on a date who receives dinner or presents "owes" the man sex.

Fourth is the belief that women are somehow to blame for being raped if their behavior facilitated the rape in some way.

69. Torrey, supra note 49, at 1015 (elaborating on the familiar rape myth that no really means yes).

70. See id. at 344.

71. See Coombs, supra note 7, at 280-85 (discussing cultural explanations including the "woman scorned" theory of why women would lie about rape). Over fifty percent of Americans believe that fifty percent or more of reported rapes are only reported because the woman is trying to get back at a man or cover an illegitimate pregnancy. See Torrey, supra note 49, at 1018.

72. In fact, even so-called champions of rape reform subscribe to this view. Professor Donald Dripps has advocated a crime akin to theft of services for unconsented intercourse without the use of force. See Donald Dripps, Men, Women, and Rape, 63 Fordham L. Rev. 125, 144 (1994). He offers examples such as the widow who has sex with the banker in order to avoid foreclosure, as an example of a reasonable bargained-for exchange of a woman's sexual favors for something a man can give her. See id. at 169.

73. This may also explain why previous acquaintance between rapist and victim is a significant factor in blaming the victim. See Pollard, supra note 33, at 309-10. Another factor is the issue of victim resistance where victims who do not resist were rated to have been harmed less and were deemed to be less credible. Pollard concludes, however, that because of conflicting research no firm conclusion can be drawn on the affect of resistance. See id. at 313; but see ESTRICH, supra note 34.

74. "In a survey of 1700 sixth to ninth graders from Rhode Island, 24% of the boys and 16% of the girls said it is acceptable for a man to force a woman to have sex with him if he has spent money on her." Torrey, supra note 49, at 1021.

75. See Bryden & Lengnick. supra note 2, at 1254 (citing Kalven & Zeisel study that showed juries, in non-violent rape cases, often apply a form psuedo-assumption of the risk and contributory fault, because the victim's conduct somehow brought on the rape): Coombs, supra note 7, at 283 ("[R]ape myths are doubly dangerous when the woman was sexually active or when she 'misbehaved' on the occasion in question by drinking alcohol or dressing provocatively.") (footnote omitted). For instance, Alex Kelly's attorney fo-
ple, Alex Kelly's attorney focused his defense on the fact that the survivor was drinking or might have taken drugs. A prominent Connecticut defense attorney, William F. Dow III, commented on jury selection in Kelly's case: "Contrary to what many people think, I would consider people somewhat older, who might feel that the complaining witnesses put themselves in a position where intimate relations were inevitable."

Abundant evidence from psychology experiments indicates that various rape myths and other sexist stereotypes play a vital role in determining whether and how much the victim is held responsible. Behaviors that increase the risk of victimization often tend to correlate with behaviors that violate generally understood sex roles. Survivors are held more accountable and their attackers less so where the woman is out late at night or where she accepts a lift from a stranger. Women who push the limits of their sex roles by doing things such as being outside their homes unaccompanied late at night, risk, and some might even say invite, rape. Other factors enhancing victim blame include her reputation (including her sexual history),

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76. See Glaberson, supra note 75.
77. Fromm, supra note 75, at 2.
78. For instance, Pollard cites research that longer sentences were recommended for rape of a married woman than for rape of a virgin or divorced woman. Pollard speculates that this distinction is both because married women are considered more "reputable" and because of the sexist notion that women are commodities and the husband's rights of sexual access had been diminished by the rape of his wife. See Pollard, supra note 33, at 308-09 (citing Jones & Aronson and Kanekar & Kolsawalla (1977)). Interestingly, people with more traditional sexual attitudes are more likely to attribute responsibility to the victim of the rape, blaming the woman for deviating from the sexual norms. See id. at 317-21.

The influence of alcohol presents an often interesting example. In psychology experiments, an inebriated rape victim was viewed less sympathetically and was deemed to have contributed to her harm. An inebriated attacker, however, was deemed to be less responsible for his actions. One theory for this discrepancy is that it is inappropriate for women to be drunk but acceptable for men. See id. at 314-15. The role of sexism in blaming the victim is particularly apparent in vignettes that used men as rape victims. In these vignettes, men were perceived as much less blameworthy than women victims for the same types of behavior such as hitchhiking or jogging at the time of the rape. See id. at 318.

79. Less reputable victims were thought to be more blameworthy. The absence of casual partners was clearly part of the definition of respectability, a survivor with many casual relationships was considered responsible for the attack in large measure. Although victim-attacker acquaintance cannot itself be verified as a factor for enhanced victim
tiveness, and manner of dress.

C. The Paradigm in Action

When a rape is reported, it may be measured by everyone—friends, police, prosecutors, and most important for our purposes, jurors—against the patriarchal tale of rape that our culture inculcates and that we use to measure the credibility of any given charge of rape. Deviation from the paradigm may prompt juries to believe that no rape occurred or that the incident was the victim’s fault. This cultural paradigm of rape serves at least four interrelated functions.

First, as with any other paradigm or cognitive model, it assists the fact-finder in ordering and comprehending the narrative. It is, therefore, an organizing mechanism for making sense out of a conflicting tale.

Second, the cultural rape fable fosters denial by discrediting rape stories that fall outside its purview. Jurors sense that the prior story is somehow insufficient. Rape stories that do not fit social myths and preconceptions will not comport with traditional assumptions, and jurors, the research subjects were much more likely to attribute blame to the victim if the rape occurred on a date. See id. at 311.

80. Less attractive victims were deemed more blameworthy because, unlike the attractive victims who are assumed to be naturally enticing, the evaluators believe that the unattractive women must have done something to invite all that attention. See id. at 311. Since the rape myth is about sexual desire, an unattractive woman was supposed to have somehow facilitated her own attack by trying to arouse the man’s desires.

81. Provocative dress by the victim leads to blaming the victim either because of a “just world” hypothesis that she was not exercising due care or because of the image of woman as vixen, tantalizing men and frustrating them sexually. This focus on dress emphasizes the sexual rather than the violent aspect of rape. See Check & Malamuth, supra note 63, at 345.

82. There is evidence that police are highly influenced by rape myths. A rape victim’s background and character can even affect the way reports are classified by police. See Mazelan, supra note 30, at 121.

83. See Coombs, supra note 7, at 292 (discussing the effects of rape myths on prosecutors).

84. Psychological surveys indicate that jurors will operate based on such myths concerning victim behavior. See Neil J. Vidmar & Regina A. Schuller, Juries and Expert Evidence: Social Framework Testimony, 52 LAW & CONTEMP. PROBS. 133, 155-58 (1989). Vidmar and Schuller cite extensive evidence from the psychological literature that laypeople accept rape myths supporting the view that “the average juror may have inadequate information about rape or may hold attitudes that would predispose him or her to skeptical of complainant testimony in a trial involving a consent defense.” Id. In one sociological study cited by Mary Coombs, jurors explained their acquittals in rape trial with such explanations as “[S]he led him on. [She] accepted a ride in the middle of the night.” Coombs, supra note 7, at 284 (quoting GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 218 (1989)).

85. See Taslitz, supra note 51, at 434-35.
Third, by defining rape in a way that ignores much sexual violence against women, the rape paradigm maintains the status quo. It discredits victims and silences them (enhancing the ability to deny the problem because we don’t have to hear about it), implicitly asserting that the current situation isn’t so bad. To the extent that one sees rape and, more importantly, the threat of rape as a mechanism limiting women’s independence, the paradigm reinforces this method of social control.

Fourth, the rape paradigm dehumanizes and marginalizes perpetrators. A distant, dysfunctional, and diabolical cousin to the boy next door, the rapist is seen as a sex-crazed monster. He is not a co-worker or a date or anyone else a woman might know. This stilted and empirically inaccurate demographic of the rapist allows people to dismiss the magnitude of the problem and lets many men off the hook. By demonizing a chosen few who are branded as deviant, the vast majority of men appear blameless and the world seems safe for women who are willing to adhere to the restrictions of their gender roles.

III. Evaluating the Potential Character-Based Solutions

In analyzing character evidence from a feminist viewpoint I distinguish between those solutions that enrich the rape narrative told at the trial and those that impoverish it. By “enrich” or “enhance” the narrative, I refer to solutions that allow the jury to listen to the rape survivor, and expand its appreciation of the nature of rape. By “impooverish” the narrative, I refer to methods of gaining convictions that are disrespectful of the survivor or of all women, drawing upon rape myths, and otherwise reinforcing the cultural paradigm and ultimately (even if they secure convictions) injuring the interests of women.

86. What emerges is a picture of jury behavior that reflects what we know about society generally. Influenced by unconscious and unarticulated patriarchal values transmitted and reinforced through stories, jurors have trouble seeing anything that deviates from the classical patriarchal story as rape. Torrey outlines what she calls cognitive inflexibility where jurors find that the rape story does not fit with their cognitive structure of what rape should be like. See Torrey, supra note 49, at 1050 (citing DONALD E. VINSON, JURY TRIALS: PSYCHOLOGY OF WINNING STRATEGY (1986)).

87. The ‘likelihood of a rape complaint actually ending in conviction is generally estimated at 2%-5%.’ Bryden & Lengnick, supra note 2, at 1210.

88. I do not deal here with the substantive issues in rape law such as the corroboration requirement or the rule that resistance by the victim is an essential element of the crime.
A. The Good: Rape Shield

The most important rule of character evidence from a feminist standpoint is the special ban of Rape Shield. Rape Shield laws, adopted first by the Federal Rules of Evidence and then by almost every state, prohibit intrusive questions about the victim's sexual history and "character" for chastity. Without the protection of Rape Shield, evidence about the victim could arguably be admissible under the Rule 404(a)(2) exception, which permits the accused to raise pertinent character traits about the victim. In criminal cases, the ban is not absolute. It allows "evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence" and "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution." Rule 412 also provides an undefined exclusion where failure to admit the evidence "would violate the constitutional rights of the defendant."

Traditionally, Rape Shield is justified on grounds of logic, humanity, and necessity. On a strictly logical basis, one can argue that what a woman has done in the past in her sex life has little or no bearing on whether she agreed to have sex on a particular occasion. (Men are not fungible and even the same man can be desired on one occasion and rejected on another). From the perspective of basic human decency, Rape Shield is desirable because it prevents humiliating questions that embarrass victims who have already suffered considerably. Thus, Rape Shield laws help cabin unfair prejudice against the victim and limit the introduction of irrelevant evidence.

In terms of the cultural paradigm, Rape Shield deprives the jury of precisely the type of information that feeds rape myths and thereby poisons the narrative. Withholding information about the victim counteracts unfair prejudices about the woman's activities, dress or

89. The Federal Rape Shield statute excludes "(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and (2) evidence offered to prove any alleged victim's sexual predisposition." FED. R. EVID. 412. The advisory committee also interpreted the prohibition on the victim's "sexual behavior" to include "the alleged victim's mode of dress, speech, or lifestyle." FED. R. EVID. 412 advisory committee's note.

90. I say "arguably" because I think that, even absent Rape Shield, a victim's sexual history is not pertinent to whether she was raped on one particular occasion and hence outside the exception of 404(a)(2). FED. R. EVID. 404(a)(2) ("Evidence of a pertinent trait of character of the victim of the crime offered by the accused . . . ."). Nonetheless, the pervasiveness of rape myths and the cultural importance of previous sexual history raise the question of whether a judge or jury would be able to transcend the paradigm and see such facts as irrelevant. Rape Shield laws came about in response to real abuses.
sexual history, and prevents the jury from relying on the rape myth that the survivor "asked" to be raped. 91 In constructing the narrative of what happened in the case before them, jurors cannot as easily rely on the paradigm for a culturally comfortable answer (e.g., she was dressed scantily, she must have wanted sex, therefore no rape occurred). By depriving the jury of this information, the rules of evidence actually facilitate more deliberation and thought. 92

Rape Shield laws serve not only to focus the trial and eliminate irrelevant, distracting, and potentially prejudicial information, they also serve the policy of promoting rape prosecutions, particularly because the sponsors of these laws intended them to serve as a model for the states. 93 By sparing women trauma, Rape Shield encourages reporting and allows the government to prosecute rape cases.

Rape Shield laws are commendable in their desire to limit jury's access to a victim's sexual history, but they do not change the attitudes so much as limit their applicability by withholding information. Even when sexual history evidence is excluded under Rape Shield, the victim's so-called contributory negligence and other non-

91. See Schepple, supra note 4, at 154-55.

92. Certainly there is controversy surrounding Rape Shield. Some of it arises out of a failure to understand the lure of rape myths and ends up sounding like Henry Higgins' complaint: "Why can't a woman be more like a man?" Others who accept the basic principles of Rape Shield, raise Sixth Amendment constitutional concerns about an accused's right to question the victim, arguing that Rule 412's constitutional exception must be triggered frequently to protect the accused. See, e.g., Merry C. Evans, The Missouri Supreme Court Confronts the Sixth Amendment in Its Interpretation of the Rape Victim Shield Statute, 52 MO. L. REV. 925, 926-27 (1987); Frank Tuerkheimer, A Reassessment and Redefinition of Rape Shield Laws, 50 OHIO ST. L.J. 1245, 1262-69 (1989); J. Alexander Tanford & Anthony J. Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. PA. L. REV. 544, 582-83 (1980); Pamela J. Fisher, Comment, State v. Alvey: Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law, 76 IOWA L. REV. 835, 835-36 (1990) (expressing concern over defendant who because of rape shield would not be allowed to bring up the woman's past false charges of rape). For an interesting response to these concerns, see Elizabeth Kessler, Pattern of Sexual Conduct Evidence and Present Consent: Limiting the Admissibility of Sexual History Evidence in Rape (written before the new version of Rule 412, and arguing that pattern evidence is "poorly applied and frequently misused."); see also Ann Althouse, Thelma and Louise and the Law: Do Rape Shield Rules Matter, 25 LOYOLA L.A. L. REV. 757, 764 (1992) (demonstrating how Rape Shield law can be undermined by judges' and jurors' mistrust of the rape survivor and that judges often apply "generous interpretation to the rape shield exceptions"). I am more sympathetic to the critique that Rape Shield does not go far enough. Given myths about acquaintance rape and the vindictiveness of women who charge rape, some observers would contain the Rape Shield exceptions, allowing the jury to learn about prior sex with the accused only insofar as that is necessary to tell a coherent story. See Taslitz, supra note 51, at 391, 392.

93. See 137 CONG. REC. S3191, S3239 (daily ed. Mar. 13, 1991) ("The proposed new rules would apply directly in federal cases, and would have broader significance as a potential model for state reforms.").
traditional behaviors will often be revealed during the testimony about events surrounding the rape. 94

Obviously in our current media age the woman is not protected from all such intrusive and demeaning characterizations, many of which are made outside the courtroom. For instance, Alex Kelly’s attorney tapped into rape myths concerning how “real” victims behave when he asserted that Ms. Ortolano and her family were “unvictim victims” who enjoyed coming to court “totally coifed and dressed to kill.” 95 And even though the Rape Shield law prohibited the defense from raising questions of the victim’s character, the unfolding of the rape story permitted the jury to hear that the victim was an underage minor who drank at a party, knew Alex Kelly, and accepted his offer of a ride home. Arguably, it spares women trauma and encourages reporting, thereby facilitating arrests and prosecutions for rape. The mere exclusion of affirmative reference to stereotypes and otherwise irrelevant sexual information, however, cannot, alone, solve the problem.

B. The Bad: Rule 413

Nowhere is the conundrum of establishing a feminist position on character more difficult or more interesting than in considering the new evidence Rule 413 which admits evidence of the defendant’s prior rapes. 96

(1) The Best Case for Rule 413

Supporters of Rule 413 argue that the probative value of the prior rapes is high because the sexual aggressiveness and proclivities of defendants are distinctive enough to warrant a propensity argument. 97 Supporters also argue that the potential unfair prejudice is

94. See Bryden & Lengnick, supra note 2, at 1288
95. Williams, supra note 8, at A1.
97. See infra notes 112-137 and accompanying text (discussing theories of 413’s relevancy in detail). The notion of a rule informing the jury of the defendant’s tendency to assault women or children is not new. A few states still have a depraved sexual instinct or lustful disposition rule, permitting evidence of the defendant’s tendency to molest or rape. Technically, Rule 413, as part of the Federal Rules, will only apply to rape on military bases and Indian Reservations. Yet the influence of the Federal Rules is so pervasive that its adoption is of vital importance. See Pickett, supra note 17, at 893 (discussing “lustful disposition”); Anne Elsberry Kyl, Note, The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 And 414, 37 ARIZ. L. REV. 659 (1995) (discussing state adoption of Rule 413). The proposed rules do, however, effect a major
David Karp, chief architect and defender of the new rules, argues that the concern about unfair prejudice reflects the "anti-jury" assumption "that the ordinary people who serve on juries will behave unreasonably, if they are allowed to have this type of information and to accord it its natural probative value." Rule 413 appears particularly appealing in consent cases. Rule 413 appears to address the phenomenon of sexual aggressors and abusers who commit repeat offenses but nevertheless manage to discredit each individual woman who accuses them of rape by arguing consent. Professor Roger Park has argued that where identification and sexual contact are admitted, but consent is in question, there is a strong policy argument in favor of admitting prior similar sexual attacks. Admitting evidence of the accused's prior rapes where the issue is consent (a narrower proposition than the current rule) seems to address the vexing problem of circularity in identification in stranger rape cases. For this reason I will confine my critique to consent cases, where the strongest arguments can be made in favor of Rule 413.

On a simple and yet compelling level, Rule 413 seems good for women's physical safety and psychological well-being. Discussing change in the doctrine and tenor of character evidence. In a letter to Judge Ralph K. Winter, Jr., Chair of the Advisory Committee on Evidence Rules, a group of law professors expressed concern over numerous ambiguities including questions concerning the discretion of the trial judge and the interaction with other rules concerning hearsay, best evidence and limitation on impeachment of witnesses. See David P. Leonard, Perspectives on Proposed Federal Rules of Evidence 413-415: The Federal Rules of Evidence and the Political Process, 22 FORDHAM URB. L. J. 305, 335 (1995) (quoting and discussing the letter). 98 David Karp's recent address to the AALS carried the weight, according to the sponsors of Rule 413. See David J. Karp, Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 CHI.-KENT L. REV. 15 (1994). Karp was senior counsel for the Office of Policy Development, United States Department of Justice. The ideas for new rules originated in the Department of Justice and Karp was one of the original drafters. 99 Id. at 26-27 (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 62.2 (Tillers rev. ed. 1983)). 100 Roger Park, Perspectives on Proposed Federal Rules of Evidence 413-415: The Crime Bill of 1994 and the Law of Character Evidence: Congress has Right about Consent Defense Cases, 22 FORDHAM URB. L. J. 271, 271-72 (1995). 101 No aspect of misidentification serves feminist interests: an innocent man wrongly accused, a rapist still out on the loose, and social complacency following the apprehension of "the perpetrator." Hence, many have argued that the newly proposed rules are particularly unfair and unwise in rape cases where identification is an issue. In the case of stranger rape, where the search for the culprit begins with mug shots of known rapists, there is a significant possibility of false accusation built into the system. See Baker, supra note 36, at 592-97 (expressing concern over wrongful convictions and perpetuation of a criminal class drawn disproportionately from minorities and the poor). 102 See Karen M. Fingar, And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence, S.
the defendant's similar prior bad acts and his "character" for sexual attack will increase conviction rates, thereby protecting women (assuming we've convicted the right person). Supporters emphasize the necessity of the new rules, arguing that without such evidence, victims are not believed and convictions cannot be won. Rule 413 addresses the maddening problem of repeat offenders who manage to discredit each survivor individually. Arguably, such testimony will sensitize our society about the prevalence of rape. In turn, the increased numbers of rapes brought to trial and, ultimately, to conviction, will assist in general deterrence by signaling our seriousness about rape.

The new rules arguably empower women, allowing victims to speak out in confidence, knowing that they will be supported in their assertions and treated with respect by the jury. Representative Kyl in support of Rule 413 argued that they would "go a long way toward neutralizing the psychological damage a rape victim often experiences going through the judicial process." This focus on empowering women is consonant with the drive behind "dominance" feminism, which seeks to rectify power differences between men and women.

Some feminists see Rule 413 as respect for jurors' common sense and a desire to enrich the context in which the jury makes decisions. This argument taps into difference feminism, which posits that


103. Part of the justification of Rule 413 rests on unbridled need. As Representative Susan Molinari, the principal sponsor in the House of Representatives, explained: "The enactment of this reform is first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system's tools for bringing the perpetrators of these atrocious crimes to justice." 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

104. As Senator Robert Dole explained of the new rules: "evidence of this type is frequently of critical importance in establishing the guilt of a rapist or child molester, and that concealing it from the jury often carries a grave risk that such a criminal will be turned loose to claim other victims." 137 CONG. REC. S4925, S4927 (daily ed. Apr. 24, 1991) (statement of Sen. Dole).

105. The power of women testifying together is undeniable. In fact, the reason for Alex Kelly's flight was that in 1987 the Judge had ruled both rape charges would be tried together. Kelly's attorney told him he was sure to be convicted. George Judson, New Image Is Sought In a Trial, N.Y. TIMES, May 2, 1996, at B5.

106. 140 CONG. REC. H5437-03, H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl). Kyl also noted that even where the victim is "too traumatized, intimidated, or humiliated to file a complaint and go through the full procedure of a criminal prosecution," such victims "are often willing to bear the burden of testifying when they find out that the person who marred their lives has also victimized others and that these revelations will come out at trial." Id.
women have a "different voice," unique ways of knowing and relating that differ from men's approaches. To the extent that additional background about the accused provides additional information and context, that result seems consonant with the different voice. Adding character information provides context to the arid, often skeletal facts adduced at trial. Such character evidence can increase the jury's information about the parties and their ability to put the evidence within a framework that makes the trial narrative more comprehensible. Whether from the perspective of "dominance" or "difference" feminism, Rule 413 thus confronts the essential feminist concern that women are not heard in the courtroom.

A final argument in favor of the new rules is quasi-procedural. Courts, primarily through Rule 404(b), but in some states also through "lustful disposition" exceptions, are letting in evidence of prior crimes anyway. It is questionable, however, whether this ex-

107. Difference feminism is strongly influenced by the "ethic of care" articulated by Nel Noddings and Carol Gilligan, in NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984); CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). The ethic of care relies on "webs of interconnectedness." See id. at ch. 2 (emphasizing the human relationship between people rather than formal hierarchies. In accordance with women's focus on relationships, the female voice immerses itself in the particulars of problems, seeking context-based solutions. See id. See Mari J. Matsuda, Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice, 16 N.M. L. REV. 613, 620 (1986) (noting that "[t]ime and again women have found that their own experiences are more valuable truth-seeking tools than the abstractions of others."); see also Menkel-Meadow, Portia, supra note *, at 48 ("Women solve problems by seeking to understand the context and relationships involved and understand that universal rules may be impossible."). There is no claim that this different voice is descriptive of all women, or necessarily superior.

This approach to difference is also open to serious criticism because it seems to echo traditional excuses for sexism, for example, that women are too anecdotal, emotional, or spiritual for active participation in public life. See Frances Olsen, The Sex of Law, in THE POLITICS OF LAW, 453, 458-59 (David Kairys ed., 1990); see also Anne M. Couglin, Excusing Women, 82 CAL. L. REV. 1, 90-91 (1994) (arguing that the ethic of care replicates negative qualities traditionally associated with women, thereby contributing to women's oppression in society); Note, Patriarchy Is Such A Drag: The Strategic Possibilities of a Postmodern Account of Gender, 10 HARV. L. REV. 1973, 1974 (1995). This "different voice" can also be seen as perpetuating male power by objectifying a male prototype and establishing it as the norm from which women are supposedly "different."

108. Lustful disposition exceptions, though they vary from state to state, generally provide forthrightly the evidence of rape and sexual molestation as categorically different from other prior bad acts, much in the same way that Rule 413 does.

109. Critics and fans of the new rules alike have observed that courts seem to be more expansive in their application of Rule 404(b) in sex abuse cases than in other areas of criminal law. Evidence of prior rapes and child molestations is sometimes inappropriately labeled as other purposes (besides propensity) listed in 404(b), such as plan, intent, and identity. See, e.g., Mendez & Imwinkelried, supra note 12, at 473 (criticizing the California Supreme Court's expansion of its interpretation of "plan" to allow prior bad acts to be admitted against a defendant in a child molestation case).
pansion is as prevalent in rape cases as in child abuse. The advocates of the new rules argue that the stretching of current doctrine proves the inadequacy of the character rules in dealing with the unique principles of rape and child molestation. Rather than do violence to current character evidence, they propose a frank exception for rape and child molestation.

(2) A Feminist Critique of Rule 413

Despite its initial and obvious appeal, Rule 413 raises many concerns. It is extraordinarily unpopular with evidence scholars, but my focus is different (though I agree with their critiques). I will discuss six serious feminist concerns, arguing that despite its initial appeal, Rule 413 is dangerous and bad for women.

First, allowing character evidence of prior acts raises some difficult problems for feminists whose philosophy includes empathy for the stigmatization of outsiders. Certainly, women’s experiences be-

110. Courts allowing a back-door admission of the prior crimes through 404(b) where the argument, in truth is propensity, is bad for evidence law and the rule of law in general. See id.

111. As then Senator Robert Dole explained: “[I]f an exception admitting such evidence cannot be avowed openly and honestly, then the temptation is strong to achieve admission by manipulating other exception categories, and by applying evidentiary rules in a manner that is not consistent with their interpretation and application in non-sex offense cases. This state of affairs is undesirable because judges should not have to bend or break the law to do the right thing.” 137 CONG. REC. S4925, S4927 (daily ed. Apr. 24, 1991) (statement of Sen. Dole).

112. See, e.g., Leonard, supra note 97, at 305 (arguing that although the political process has always informed the rules, these new amendments are so politically motivated as to have “radically changed the shape of the rules” and to have created an exception to the principle that different types of cases and different types of litigants should be treated similarly); see also James Joseph Duane, The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea, 157 F.R.D. 95, 125 (1994); Pickett, supra note 17, at 883.

113. Although the feminism advocated here is concerned about what is good for women, it aims to transcend the parochial or chauvinistic. It is deeply concerned with compassion for others. Such empathy and compassion is a natural outgrowth of taking the ethic of care seriously and of questioning the status quo with post-modern skepticism. See Deborah L. Rhode, The “No-Problem” Problem: Challenges and Cultural Change, 100 YALE L.J. 1731, 1735-36 (1991). If indeed women value webs of connection and express an ethic that elevates concern for outsiders born out of women’s experience as “other” or outsider, a philosophy of feminism must include these concerns. See Susan Bandes, Empathy, Narrative, and Victim Impact Statements, 63 U. CHI. L. REV. 361 (1996); Henderson, supra note 36, at 56. As Professor Deborah Rhode has explained in her definition of feminism: “Any ethical framework adequate to challenge gender subordination must similarly condemn the other patterns of injustice with which it intersects.” See Rhode, supra at 1736. Sometimes, particularly in the rape cases discussed in this article, there will be a conflict between empathy for the accused (particularly when he comes from an oppressed minority) and practical concern for what is good for women. Often, how-
fore the enactment of Rape Shield laws serve as a warning of how “character” evidence can be used as an oppressive tool. Support for the idea of “character evidence” in one context may lead to applications in other contexts that injure women.

For a long time it has been apparent to feminists that more information does not equal more fairness. More irrelevant but potentially prejudicial information can obscure the truth-finding mission. Indeed, the whole notion of relying on “character” runs counter to the historical experience of women. Women branded with bad or “loose” character in rape cases must be leery of our culture’s collective intuition. This is especially true because psychological evidence suggests that the average person’s intuitions about rape contradict the empirical evidence. Such a blind devotion to “context” can lead to disastrous results for women and for fairness.

Second, the rules rest on anti-feminist assumptions. In arguing the relevance and persuasiveness of these prior acts, the advocates of 413 display attitudes and assumptions that betray basic anti-feminist biases.

Rule 413 assumes that some facet of a rapist’s character exists that makes him not only a likely recidivist, but particularly aberrational and dangerous. Prior rapes are probative because they are distinctive, because rape is so deviant, and because rapists are psychopaths so different from the rest of the men in our society. David Karp, who argued for a “common sense ground” of propensity, explained that “[o]rdinary people do not commit outrages.” Karp emphasized the probative value of character evidence with respect to an accused who committed similar acts, contending that “evidence
showing that the defendant has committed sexual assaults on other occasions places him in a small class of depraved criminals, and is likely to be highly probative in relation to the pending charge. This central assumption about rapists—that they are a deviant, discrete group of outsiders and psychopaths—unveils the anti-feminist origins and dangers of these new rules.

A feminist understanding of rape and the rapist differs significantly from the assumptions of those who sponsored Rule 413. Rather than seeing rape as an aberration and rapists as a small group of sick individuals, feminists examine the factors in our society that make us tolerant of rape. Feminists would reject the notion that only a small, discrete cadre of miscreants and the criminally insane are responsible for rapes. Feminists believe, and there is abundant empirical evidence for this belief, that many otherwise normal seeming, socially acceptable men are potential rapists, and that rape may be as much a crime of opportunity as a test of character. Rape, and acquaintance rape in particular, is wide-spread, occurring throughout all strata of society. Rapists are not marked by any obvious character traits or appearance, nor are they of a particular class or race, but are often merely physical manifestations of a generalized tolerance for violence against women. Indeed, the concern surrounding date rape stems from the fact that the nice guy, whom one would never suspect, turns coercive and violent.

Because, as a feminist, I resist the initial assumption that rape is a rarity perpetrated by a discrete group of sick individuals, I must, as an evidence scholar, question the logic of using prior similar acts to prove rape occurred in a principal case, even in cases of consent. Here, the traditional evidence critique of Rule 413 can be informed and enhanced by feminist insight. As a logical matter, a feminist would argue that given the tolerance for rape and its widespread perpetration throughout society, evidence that the accused has raped someone before is not necessarily probative in determining whether a rape occurred in the principal case. To use an overstated analogy, if witnesses established that the perpetrator wore a baseball hat while committing a crime, how probative would it be if the person accused

117. Id. at 24.
118. See Baker, supra note 36, at 576-78 (discussing Rule 413 singling out of rapists as deviant and providing empirical evidence that “the class of rapists is neither small nor particularly likely to be depraved”).
119. “Because rape is common, because rapists are often psychologically ‘normal’ . . . the prevalence of rape is more positively correlated to social norms regarding the acceptance of sexual violence and traditional gender roles than it is to any particular sexual need, the given rationale fails to justify Rule 413.” Baker, supra note 36, at 589.
120. See id. at 576, 577.
121. See infra notes 123 and 124.
of the crime also wore a baseball hat sometimes? Not very. It might have some minuscule probative value, but given the number of people who wear hats, it wouldn't tell you much.\textsuperscript{122} Tragically, the magnitude and extent of rape in the population warrants a similar conclusion. The fact that a man raped once before is not necessarily probative given the number of men who rape.

On the other side of the evidentiary balance, however, information concerning the prior rape is extraordinarily prejudicial and unfair. This prejudice derives from traditional sources, such as the tendency of the jury to overvalue the evidence, the desire of the jury to punish the accused for past crimes, and the willingness of the jury to ignore the high threshold of reasonable doubt.\textsuperscript{123} A feminist analysis adds another crucial insight, citing a unique source of potential unfairness: the jury's willingness to be swayed by evidence of a prior rape is heightened because of its own misconceptions about the prevalence of rape. The prejudice plays on the notion inherent in the new rules that only a few rotten deviants are terrorizing women. Psychologically, the jurors may need to find "the rapist," which is to say to locate one cadet in the small corps of deviant individuals who seem to be causing women such misery.\textsuperscript{124}

Once a jury is faced with a bona fide rapist — that is, one who has been accused or convicted before — the temptation to demonize that person and ignore the depth and breadth of the problem of rape is overwhelming. How psychologically comforting for the jury that the prosecution located the person who is deviant and repulsive, "the one" who victimizes women. By relying on the anti-feminist assumption that rapists are a small group of sick, dangerous men, Rule 413 prejudices the accused by offering up someone who has already been branded as a member of that small anti-social set.\textsuperscript{125}

\textsuperscript{122} This is also true on an individual level given our lack of knowledge regarding rapists' recidivism rates.

\textsuperscript{123} See infra notes 134-137 and accompanying text (discussing the potential unfair prejudice of admitting prior related bad acts).

\textsuperscript{124} This of course taps into one form of denial, in which we as a society believe that rapes are rare events and the product of a demented individual. By limiting the perpetrators to those outside the cultural norm, the jury is spared the pain of confronting the epidemic proportions and widespread perpetration of rape. Women are spared the realization of their own vulnerability to violent attack. Righteous men are spared facing the fact that they may not be able to protect wives, sisters, daughter, or friends. "Normal" men who occasionally coerce sex are spared facing their crimes.

\textsuperscript{125} Applying traditional evidence lingo, given the widespread nature of rape and our subtle tolerance of it, the fact that an accused has raped before may not be particularly probative. Concomitantly, jurors may overvalue the prior rapes. Their desire to eradicate rape may cause jurors to focus on the prior accusations and may distract them from considering the facts of the case in front of them. Most troubling, the jury may be infected by irrational emotions, blinded by their antipathy for someone branded as a rapist and by
Third, Rule 413 may soon become yet another barrier to prosecuting rape cases. After a few years of Rule 413, how long will it be before a prosecutor tells a woman that her case is no good—or at least unwinnable—because there doesn’t seem to be any other evidence of prior rape by the defendant? What starts as a boon to women easily transforms into a requirement or a litmus test. Where the prosecution can find no evidence of prior similar conduct on the part of the accused, the woman may somehow become suspect.

It might be argued that to be believed in rape prosecutions under Rule 413, a rape survivor needs someone to back her up. Rule 413 provides an opportunity for this type of vouching, which may make an individual woman seem more credible, but it operates at the cost of reinforcing our suspicion of all women. Rule 413 harks back to the old corroboration requirements in rape law, which mandated independent corroboration of the woman’s story as a requirement for conviction. Certainly, there is a distinction in motivation and tone between the common law distrust of women and the modern approach of 413, which rests on the presumption that juries will mistrust women. Both, however, are predicated on the same assumptions. Both reinforce the suspicion of women, undermine women’s credibility, and ultimately reinvigorate rape myths. The very appeal of the proposal, that it shores up women’s stories and adds credibility to the

their own psychological need to focus the problem of rape on a few select individuals.

126. See Baker, supra note 36, at 591 (expressing the concern that under Rule 413 jurors may learn to expect other act evidence and fail to convict if "only" one rape is proved).

127. For instance, Rape Trauma Syndrome, which was designed to explain the counter-intuitive behavior of rape victims occasionally replaces one set of expectations of the "proper" way for a rape survivor to react with another set of rigid expectations. See infra notes 154-155 and accompanying text. Women who do not fit the syndrome can be impeached and disbelieved. See Torrey, supra note 49, at 1064-65; cf. Myrna S. Raeder. The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batters in Cases Implicating Domestic Violence, 67 COLO. L. REV. 789 (1996).

128. As Representative Kyl explained in discussing Rule 413: “In most rape cases, it is the word of the defendant against the word of the victim. If the defendant has committed similar acts in the past, the claims of the victim are more likely to be considered truthful if there is substantiation of other assaults.” 139 CONG. REC. H10349, H10368 (daily ed. Mar. 13, 1991) (statement of Rep. Kyl).

129. The explanations of the old corroboration requirement ring sexist and stupid to our more modern sensibilities. Commentators today don’t generally argue that women are confused about their sexuality and therefore need force as an excuse for indulging sexual pleasure. See Note, Forcible and Statutory Rape: An Exploration of the Operation of the Consent Standard, 62 YALE L. J. 55 (1952) (cited in SUSAN ESTRICH, REAL RAPE 39 n. 42 (1987)). “[S]ince stories of rape are frequently lies or fantasies, it is reasonable to provide that such a story, in itself, should not be enough to convict a man of a crime.” Note, Corroborating Charges of Rape, 67 COLUM L. REV. 1137, 1138 (1967) (cited in ESTRICH, REAL RAPE at 42, 43 n. 57.). Nevertheless, the overarching message is the same. Without additional evidence, a woman’s story is not enough to convict.
numbers, is also the best evidence of its ineffectiveness. Rule 413 is an inelegant, wrongheaded, and not particularly valiant attempt to even the scales of credibility by piling more women on to one side of the scale. If enough women tell the same story, the logic goes, it must be true. The unfortunate consequence of the Rule's policies and premises is that rape myths are further entrenched, and belief in women will be increasingly tied to corroboration by others. Furthermore, the goals of Rule 413 are accomplished at the expense not only of a genuine understanding of the nature of rape, but also at the expense of individual criminal defendants.

Fourth, Rule 413 may open the door to another type of defendant's character witness, well beyond the standard opinion testimony generally allowed by the current rules. Once the prosecutor, in the case-in-chief, introduces evidence of three prior women who claim that the defendant attempted to attack them, the door will be opened to all sorts of "character" witnesses who will testify that when they went on dates with the defendant, he behaved like a perfect gentleman. This supportive testimony will reinforce another rape myth of the jury—that somehow the rape survivor asked for it or behaved provocatively, or possibly that she and her corroborators brought out something unpleasant in the accused, but that he is capable of behaving well, and thus could not be among that small group of psychopaths who commit all the rapes.

Fifth, feminists must be on the lookout for differences in the law that may cross the line from acknowledging women's different voice and experience to patronizing women by providing them increased "protection." One hint that Rule 413 may be more paternalistic than feminist is the fact that its wording is nearly identical to Rule 414, which deals with children. Feminists would not necessarily presume, as the Federal Rules seem to, that the rule should be the same for women and children—what I call the "lifeboat syndrome" (women and children first). Instead, a feminist analysis would inquire into the special circumstances of crimes against children and the particular needs of child witnesses. The melding of the two categories of victims suggests an infantilization of women.

130. See Baker, supra note 36, at 591 (arguing that Rule 413 may secure additional convictions, but only by playing into the rape myth that nice boys don't rape).
131. I am grateful to my colleague Lynne Henderson for pointing this out.
132. The conflation of the interests of women rape victims and child victims of molestation also suggests a bit of doctrinal slight of hand. On many occasions, the argument in favor of the probative value of prior similar crimes is stronger in cases of child molestation, where there is believed to be a higher recidivism rate for perpetrators. See Michele L. Earl-Hubbard, The Child Sex Offender Laws: The Punishment, Liberty, Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s, 90 Nw. U. L. REV. 788, 795 (1996) (citing results from a National Institute study finding that each child
Finally, the source of the proposed changes in the rules may be of some concern for women. Rule-making makes strange bedfellows, and some feminists have in the past found themselves in coalition with the far right on issues such as pornography and hate speech. Because so much of feminism focuses on process and relationships, the issue of allies and cohorts is a legitimate concern. At the very least, feminists must acknowledge that the chief proponents of these depraved sexual instinct rules seem motivated by a desire to convict criminals at all costs. In attitude and action they are not motivated by feminist concerns.

These objections do not disappear if the prior rape convictions are admitted via Rule 404(b) and the doctrine of chances. Katharine Baker, after rejecting Rule 413, advocates admitting some prior acts under a theory of 404(b) motive to explain motivation and social context. One motivational category cited by Baker, the need to rape, would ostensibly admit prior rapes if rape is a special means of violent expression for the accused. For instance, the category would include angry men who rape to alleviate their frustration. Although Baker's solution avoids some of the anti-feminist assumptions of Rule 413, it still replicates many of its evils in demonizing defendants and in magnifying unfair prejudice.

133. Baker sets out different motives for rape including sexual desire, power and anger, and cementing relationships among men. See Baker, supra note 36, at 612-23. Baker argues that for rapes committed within the context of a group that uses sex as a means of bonding with other men (such as a gang) evidence of how such sexual activity serves that purpose should be admissible to show motive. See id. It is unclear to me, however, how this will implicate prior rapes by the defendant and not merely provide background about the defendant's motives and associations. Baker also argues that evidence of a rapist's anger towards a particular victim should be admissible under the motive exception. See id. Although this type of background motive evidence strikes me as unassailable, it does not get at the heart of what 413 is about.

134. Additionally, Baker advocates absence of mistake as another ground for 404(b) admissions. I think this presents the best 404(b) argument concerning prior rapes, but it is quite limited. A prior rape could come in the absence of mistake prong of 404(b) to show the implausibility of defendant's belief that the woman consented. To the extent that a

molester abuses an average of 117 children); Robert A. Prentky et al., Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis, 21 L. & HUM. BEHAV. 635 (1997) (finding that recidivism rates among rapists and child molesters are higher than generally estimated). In addition, to quote the language of an older case, the "criminal impulse which makes such an act possible is unnatural and unusual. The felony itself suggests a carnal pervert." Abbott v. State, 204 N.W. 74, 75 (Neb. 1925) (cited in Julius Stone, Exclusion of Similar Fact Evidence, 51 HARV. L. Rev. 988, 1031 n.204 (1938)). Interestingly, the argument in favor of the new rules is often supported most strongly by the experience of children—with whom consent defense is legally impossible. See, e.g., 139 CONG. REC. S15137-04, S15138, S3240 (daily ed. Nov. 5, 1993) (statement of Sen. Dole) ("The importance of admitting this evidence is still even greater in child molestation cases."). Doctrinally, however, the defenses are distinct. In adult rape cases the most difficult issue is consent. There is no consent defense to child molestation.
Similarly, I don't think that the doctrine of chances argument can allow admission of prior rape. Theoretically, the doctrine of chances argues from probability. A jury, aware of five prior charges of rape all defended with consent, might rightfully surmise that there was no consent in the sixth, charged episode. According to the supporters of 413, the doctrine of chances argument runs: How likely is it that a man accused of rape before was falsely accused this time as well? It is possible for a man to be accused falsely once, but three accusations indicate that there is some pattern and that it is the man, not the woman who is lying. However, I believe that a more accurate description of the genuine question being posed by the doctrine of chances argument would run: How likely is it that three unrelated women would all choose to lie about one innocent man? When so many women get behind the same argument, it seems impossible that they are all lying.

Furthermore, even if the elegant distinctions that some scholars try to uphold are valid, and the doctrine of chances is merely an appeal to jurors' notions of probability and coincidence. How many times can there be smoke without fire? It seems that whatever evils flow from a propensity argument do not apply equally to the doctrine of chances approach.

defendant argues that he mistook the survivor's behavior for consent, this argument might work (i.e., the last rape charge should put him on notice that what he thinks of as consent is not). This “absence of mistake” approach can only apply, however, where the argument is that the accused was legitimately mistaken (I did not realize she said no) and not where the accused argues actual consent (she said yes). Any contrary result goes to the heart of propensity, basically saying that the defendant has a tendency to have sex without consent. Another important use of 404(b) is for modus operandi. Where the prior rapes identify a particular and unique method of rape, there is a strong argument for admissibility. See Baker, supra note 37, at 612-13.

135. David Karp supported Rule 413 with a doctrine of chances rationale. He contended that evidence of other assaults by the defendant is highly probative in light of the law of probabilities. “It would be quite a coincidence if a person who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type.” Karp, supra note 98, at 20-21.

136. Professor Susan Estrich discussed the “credibility quotient: one woman might lie, but four? One might have a motive to fabricate, but all of them? And if four women are saying the same thing about one man, then maybe it’s the man who’s lying.” See Susan Estrich, Palm Beach Stories, 11 LAW & PHIL. 5, 13 (1992).

137. As the Senate Report explained more neutrally: “the improbability of multiple false charges normally gives similar crimes evidence of high degree of probative value.” 137 CONG. REC. S3192, S3241 (daily ed. Mar. 13, 1991). Even without a feminist interpretation, the doctrine of chances is problematic because it is hard to distinguish from a propensity argument. I am persuaded by Myrna Raeder and others who believe that it is merely a dressed up version of an inadmissible propensity argument that innocent people tend to act differently from guilty ones. See Raeder, supra note 127, at 1491 n.152 (discussing the work of Professor Paul Rothstein).
Some Second Thoughts Raised & Resolved

These feminist objections to 413 are real and heartfelt, yet I will confess to being conflicted. There are certainly individual cases—William Kennedy Smith’s is emblematic—where one can surmise that failure to admit evidence of other rapes has influenced the jury’s decision to acquit. Furthermore, I agree with the notion that women may find support and power from others who have been raped by the same defendant. Those who testify may feel that they are contributing to the safety of all women, thereby erasing some of the feelings of powerlessness that they felt as rape victims.

I also worry about the educational message for the jurors who acquit and then feel sandbagged. The jurors may feel guilty for having reached the wrong verdict (though in stranger rape cases, it is not obvious that they have), angry at having been denied what they perceive to be vital information, and embarrassed at appearing to have reached a ridiculous result. Thus, the system failed the jurors personally and appears to have failed systematically in its pursuit of “truth.”

As to a more general educational message, the public, which usually knows facts not admitted into evidence, is also apt to be disappointed and confused by acquittal. Often, these unadmitted facts are precisely the kind considered here: character evidence of prior similar acts. Given the public’s interest in these trials and the media’s dedication to uncovering, reporting and debating new information regardless of admissibility, it is inevitable that a wider gap is developing between the “truth” as perceived by juries and the “truth” as perceived by the public at large.

138. William Kennedy Smith, nephew of JFK, was arrested and charged with forcible rape in 1991. Three other women came forward and claimed they had also been sexually assaulted by Smith in the 1980’s. The trial judge excluded this evidence as improper character evidence, unfairly prejudicial and outside 404(b) because insufficient proof of similarity existed between the alleged offense and the prior accusations. Smith was acquitted. See Margaret C. Livnah, Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415, 44 CLEV. ST. L. REV. 169, 173 (1996).

139. For instance, we all heard about the three other women who had written affidavits that William Kennedy Smith had made sudden, violent sexual overtures to them. We all know that the affidavits were excluded from the jury and that the women were not allowed to testify. Similarly, the fact that Alex Kelly was charged with a second, similar rape allegation close in time to the first was not known to the jury (which hung despite medical evidence of forced intercourse).

140. See, e.g., William Glaberson, For Juries, the Truth vs. the Whole Truth, N.Y. TIMES, Nov. 17, 1996, at 5 (complaining of the exclusion of evidence of second alleged rape in the Alex Kelly trial). Alternatively, to the extent that the public does not understand the limitations on the jury’s information, the jury may be deemed doltish and the public may believe that anyone with a fancy-pants lawyer can persuade a jury of innocence, no matter how guilty the accused. Robert Frost once said: “A jury consistsw of 12 persons chosen to decide who has the better lawyer.” Statement by Robert Frost.
have been raped) may despair, believing simply that it is hard to con-
vict on rape.

The problem stems not from exclusion of prior rapes, but from lack of legal sophistication. The jury assumes that the absence of any discussion of prior bad acts means there are none. Most jurors believe that they would hear about prior rapes if such prior rapes had happened; thus, they possess an unspoken and perhaps not fully con-
scious belief that no such prior bad act occurred. Although cer-
tainly inferior to encouraging legal literacy, Rule 413 would address this misconception.

Finally, in its own back-handed way, Rule 413 does subvert some rape myths, undermining, to a certain extent, the nice boys don't rape myth. Any convictions of an atypical seeming rapist can serve the cause of debunking myths. For instance, after Alex Kelly's conviction, the Geraldo Rivera Show ran a segment: Funny, He Doesn't Look Like A Rapist, in which he asserted, "The Alex Kelly verdict is in and women across America are rethinking their definition of who is capable of rape."\(^{142}\)

I take heart from the fact that, on retrial, Kelly, despite his reliance on rape myths, was convicted without mention of his prior rapes.\(^{143}\) In this small way Rule 413 may educate the jury, but only by redirecting the jury's attention to an equally pernicious myth. It labels the accused as one of those deviant recidivists (who just hap-
pened not to look the part).

Therefore, at most, Rule 413 is a symptomatic cure for a systemic infection in our judicial system and our society at large. Its apparent benefit for women's safety and validation of women's experiences is, in fact, only apparent. Ultimately, Rule 413 is not particularly effective even as a palliative, masking rather than addressing underlying symptoms, while visiting devastating side effects on criminal defend-
ants.

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\(^{141}\) In many respects, this is similar to jury confusion with the exclusionary rule. Jurors are often confused because a relevant item (such as the stolen items or the drugs) is not introduced into evidence. They presume that the failure to do so indicates that the relevant items were never found. Consequently, the narrative makes no sense, there are suspicious holes in the story, and the police seem inept or worse.

\(^{142}\) Geraldo Rivera Show, supra note 38. Geraldo Rivera asked the audience, "Do you think you could spot a rapist? I think you'll think again after you hear the stories of women raped by clean-cut, upstanding, good-looking guys."

\(^{143}\) Interestingly, the case cited by Senator Dole, Getz v. Delaware, 582 A.2d 935 (Del. 1990), as exemplifying the need for new rules admitting prior sex crimes resulted similarly. See Livnah, supra note 138, at 171. Though the original conviction was overturned for introducing prior acts of child molestation, the accused (Kelly) was convicted on retrial without that evidence. See id.
C. The Ugly: Patriarchal Stories

Having identified the harm caused by the cultural rape paradigm, it is reasonable to question whether it can serve any positive purpose in rape cases. Professor Mary I. Coombs observes: “In an attempt to persuade the fact finder that this particular situation should be acknowledged as a sexual violation, the story is likely to be crafted, within the limits of the facts, to resonate rather than to clash with the fact finder’s cultural script.” 144 Professor Taslitz forwards the strategic solution of fitting the particular case into existing rape themes. For example, in prosecuting Mike Tyson, the government successfully tapped into rape myths. The victim, Desiree Washington, fit the paradigm by playing the role of the young innocent Sunday school teacher who agreed to meet Tyson because her father admired him. This virginal, “blameless” image, and the fact that she promptly reported, helped convict Tyson. While Taslitz explicitly rejects any reliance on racist portrayals of perpetrators, he reluctantly supports reliance on rape myths surrounding the victim 145 as a transitional device aimed at getting juries to credit women. Taslitz acknowledges that using these themes serves to reinforce them; he nevertheless believes that the prosecutor at this cultural moment has to engage such cultural stories to paint a picture that will seem plausible to the jury. He argues that because jurors are not likely to deviate from these themes, it is not wise for the prosecution to attempt to reject them wholesale. 146 This approach has, at least, the benefit of securing convictions, making the world slightly safer, and convictions more common.

It is obvious that Taslitz is aware of the dangers of relying on the patriarchal stories he so aptly chronicles, and that he struggles with the prospect. Ultimately, however, I believe that he reaches the wrong conclusion. True, there may be a conviction, but rape myths are certainly reinforced. The jury and the public at large are satisfied that rape did occur because, to pursue the example of the Tyson case, a sweet, young, “innocent” Sunday school teacher was attacked.

Even as a transitional device, the reinforcement of rape myths is pernicious on many levels. It distracts the jury, convincing them to convict upon sexist stereotypes. The perpetrator is punished for who he is perceived to be (sex-craved, deviant, violent, etc.) and who his victim is perceived to be (blameless, virginal, cautious, et cetera)

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144. Coombs, supra note 7, at 278.
145. Coombs argues: “The process of crafting a story that is as consistent as possible with current understandings of what qualifies as a true story of sexual violation leaves those understandings unchallenged. Worse, it reinforces these cultural scripts by instantiating them in the current case.” Id. at 278-79.
146. See Taslitz, supra note 51, at 493-94.
rather than for what each did. More practically, the ramifications for the safety of women are enormous.

For people to care about rape and address it, they have to see it fully for what it is, including forced sex perpetrated by a "nice young man" on a date gone sour; a crime that can be committed against a prostitute or one's own wife; a crime that is not lessened because the woman was out late or provocatively dressed. The reinforcement of rape myths by affirmative use of patriarchal stories may win a battle, but it contributes to losing the war against rape.

This is not merely an academic concern or a desire for theoretical purity; it is absolutely clear that rape myths endanger women, not just humiliate them after the fact. On a societal level, rape myths allow us to deny and thereby ignore sexual violence against all but the few women who fit the paradigm's profile. Moreover, psychologists tell us that acceptance of rape myths is an excellent predictor of who will commit rape. A man who believes the myth that women really desire to be raped, that only virgins can be raped, or that one is owed sex (forced if necessary) after providing a nice dinner, is more likely to commit such sexual attacks. In addition, the woman who believes these myths is more likely to ignore the suspicious signals sent by a "nice young man" and less likely to report a rape that deviates from the paradigm, both because she may doubt herself and because she feels that no one would believe her. Such reinforcement of rape myths would also affect prosecutors' willingness to charge and, of course, juries' willingness to convict when the case deviates from the paradigm. Therefore, shoring up rape myths and appealing to patriarchal stories will perpetuate not only our tolerance but also the incidence of rape.

D. The Hopeful: Expert Evidence on Dynamics and Demographics of Rape

Because evidence law is so intertwined with culture, it is tempting to say that rape myths will inevitably influence fact-finding in rape cases until society itself changes its ideas about rape. I believe, however, that a paradigm shift is possible, if we take the educational func-

147. Men who self-reported that they would rape if they could be assured of not getting caught scored disproportionately high in accepting rape myths. See infra notes 196 and accompanying text.

148. Many clinical reports support the finding that rapists believe in rape myths and tend to have callous perceptions of their victim's reaction to being raped. See Check & Malamuth, supra note 60, at 346 (citations omitted).

149. The issue of whether defense attorneys should be allowed to rely on trial tactics that reinforce rape myths raises fascinating questions about legal ethics outside the scope of this article.
tion of a trial seriously, and realize that a trial can shape public opinion as well as reflect it.\textsuperscript{150}

Experts who debunk myths about rape survivors can play a vital role in educating judges and juries about women’s experiences.\textsuperscript{151} Currently, the most common way this is done is through expert testimony concerning rape trauma syndrome (RTS).\textsuperscript{152} RTS is a form of post-traumatic stress disorder that describes various physical, behavioral, and psychological reactions that can result from rape.\textsuperscript{153} In addition to other things, an expert, relying on RTS, can explain why many women, because of shame, trauma, or shock, do not report a rape right away.\textsuperscript{154} This educational task is particularly important and difficult because, as noted in Section III, jury members may find the expert’s message counterintuitive or psychologically uncomfortable.\textsuperscript{155}

The debate about expert testimony in rape tends to center around the nature and scientific quality of RTS\textsuperscript{156} and its proposed

\textsuperscript{150} Also, Professor Mary Coombs discussed interesting non-litigation opportunities for challenging the paradigm such as teaching, legal scholarship and personal conversation. \textit{See} Coombs, \textit{supra} note 7, at Section III (Expanding the Cultural Repertoire of Stories).


\textsuperscript{152} \textit{See generally} McCord, \textit{supra} note 151, at 1144.

\textsuperscript{153} \textit{See} Vidmar & Schuller, \textit{supra} note 84, at 135, 155. RTS charts two phases of reaction to rape: (1) an acute phase marked by disorganization where the victim may be hysterical or may be withdrawn and subdued; and (2) a long-term re-organizational phase characterized by nightmares, phobias, and sexual fears. The diagnosis of Rape Trauma Syndrome was originally designed as a psychological tool to help treat survivors of rape and other sexual violence, and developed as an outgrowth of Post-Traumatic Stress Syndrome. \textit{See} I Paul C. Giannelli & Edward J. Imwinkelried, \textit{Scientific Evidence §§} 9-1 to 9-6 (2d ed. 1993). \textit{See} Massaro, \textit{supra} note 151, at 424-26; David McCord. \textit{ Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Non-traditional Psychological Evidence in Criminal Cases}, 66 OR. L. REV. 19, 38-41 (1987).

\textsuperscript{154} \textit{See} Bridget A. Clarke, \textit{Making the Woman’s Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California}, 39 UCLA L. REV. 251, 274-78 (1991) (noting that expert testimony concerning RTS is relevant to dispel myths and misconceptions about rape, including the notion that a woman who has been raped should appear outwardly upset, report immediately, and demonstrate physical injury).

\textsuperscript{155} \textit{See} Karla Fischer, \textit{Defining Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome}, 1989 U. ILL. L. REV. 691, 728 n.296 (citing anecdotal evidence that jurors are ignorant about the effects of rape including reports that they acquitted because the alleged rape victim showed too little emotion while testifying).

\textsuperscript{156} Commentators debate whether syndrome evidence is scientific or specialized knowledge under Rule 702. If classified as science, it must meet the standards set out in \textit{Daubert v. Merrell Dow Pharmaceuticals}, 509 U.S. 579 (1993) (arguing that expert scientific testimony must be based on valid scientific knowledge). \textit{See} David L. Faigman. \textit{The Evidentiary Status of Social Science under Daubert: Is It “Scientific,” “Technical,” or
use. Courts are most likely to admit evidence by RTS experts where the evidence comes in as rebuttal to assertions by the accused that the woman did not act the way a "real" survivor of rape would. Because the questions are initially raised by the accused, courts see no unfairness in allowing experts to rebut these overt challenges to the victim's credibility.

Courts are particularly concerned that the expert does not use RTS to vouch for the credibility of a victim witness (i.e., the victim demonstrates RTS so she must be telling the truth; this victim isn't faking). Additionally, courts are leery of admitting RTS to prove that the rape was actually committed. For instance, courts typically

"Other" Knowledge, 1 PSYCHOL. PUB. POL'Y AND L. 960 (1995) (arguing that psychology should be subject to the structure of Daubert and should not be classified as technical or other specialized knowledge); Teresa S. Renaker, Comment, Evidentiary Legerdemain: Deciding When Daubert Should Apply to Social Science Evidence, 84 CAL. L. REV. 1657, 1686-87 (1996) (arguing for a functional approach in which scientific conclusions based on psychology are subject to Daubert but applying a "helpfulness" standard where experts do not draw explicit conclusions about the facts of the case). See generally Edward J. Imwinkelried, The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony, 15 CARDozo L. REV. 2271, 2272-74 (1994); Jennifer Sparks, Comment, Admissibility of Expert Psychological Evidence in the Federal Courts, 27 ARIZ. ST. L.J. 1315, 1315 (1995). This debate is beyond the scope of this article. Because much of the evidence I advocate is based on scientifically reliable empirical studies and demographics it would pass the Daubert test.

157. See, e.g., State v. Robinson, 431 N.W.2d 165, 172-73 (Wis. 1988) (holding "where a defendant has suggested to the jury that some conduct of the victim after the incident is inconsistent with her claim of having been sexually assaulted, the use of expert testimony in relating observations of the way other sexual assault victims actually behave serves a particularly useful role by disabusing the jury of some widely held misconceptions about sexual assault victims."). See also Steward v. State, 652 N.E.2d 490, 496 (Ind. 1995) (finding that "behavioral characteristics of child abuse victims, even where inadmissible to prove abuse, are far less controversial when offered to rebut a claim by the defense that a child complainant's behavior—such as delayed reporting or retracting allegations—is inconsistent with her claim of abuse").

158. See Renaker, supra note 156, at 1670-71; Fischer, supra note 155, at 725 ("Almost all courts prohibit expert testimony that states the victim was raped, or is not lying, on twin rationales that this testimony invades the jury's province or that it directly bears on the witness' credibility."); see, e.g., Hutton v. Maryland, 663 A.2d 1289, 1297 (Md. 1995) (providing extensive support for the position that where "PTSD expert testimony also addresses the credibility of the victim, it has been held inadmissible because it invaded the province of the jury."); cf. Plata v. Texas, 1996 Tex. App. LEXIS 2722, at *7 (Tx. Ct. App. July 3, 1996) ("It is improper for an expert to offer an opinion on whether the child complainant is telling the truth.... Testimony is also prohibited on whether a class of persons is generally truthful.").

159. See State v. Alberico, 861 P.2d 219, 222-23 (N.M. Ct. App. 1991) (contrasting psychological testimony used to "rehabilitate the credibility of the alleged victim when that credibility may be called into question because of behavior by the alleged victim that could seem inconsistent with having been sexually assaulted," with testimony used "to support the direct inference that the alleged victim was sexually assaulted"); cf. State v. MacRae, 677 A.2d 698, 701 (N.H. 1996) (holding that "the State may offer expert testi-
reject expert testimony which asserts that evidence of RTS proves that the woman did not consent (the theory being that her post-traumatic stress symptoms demonstrate the fact she was raped). A more complicated question arises concerning the extent that the expert describing RTS may opine about the relationship between victim and syndrome. Many courts prohibit an expert from testifying that the victim "fits" the syndrome or that her behavior is consistent with sexual abuse.

Courts’ use of expert testimony in rape trials is too narrow in two mony explaining the behavioral characteristics commonly found in child abuse victims to preempt or rebut any inferences that a child victim witness is lying [but not] to prove that a particular child has been sexually abused”) (citations omitted). But see People v. Beckley, 456 N.W.2d 391, 398 n.17 (Mich. 1990) (noting that some courts admit rape trauma evidence to show lack of consent and citing cases).

160. Courts reason that there are many explanations of trauma and although certainly relevant to a conclusion that a rape occurred, expert testimony would be unfairly prejudicial both because it is scientifically unsupportable and because of the status of the expert to whom the jury may be likely to defer for the “answer” to a tough question (and ultimate issue) of what happened. Cf. Lisa R. Askowitz and Michael H. Graham, The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions, 15 CARDOZO L. REV. 2027, 2098 (1994) (“[T]here are a variety of stressors in a child’s life that can produce PTSD-type symptoms, and there is no baseline data about the presence of PTSD-type symptoms in nonabused and otherwise nonstressed children.”). But see Louis A. Trosch, Jr., State v. Strickland: Evening the Odds in Rape Trials! North Carolina Allows Expert Testimony on Post Traumatic Stress Disorder to Disprove Victim Consent, 69 N.C. L. REV. 1624, 1641 (1991) (arguing that RTS should be admissible to prove non-consent); Clarke, supra note 154, at 252, 293.

161. For a slightly dated but thorough discussion of the case law, see Fischer, supra note 155, at 724-26.

162. See id. at 720-22 (citing cases where the experts testified that the victim fit the syndrome). The distinction between expert testimony that the victim was raped and expert testimony that the victim fits the syndrome involves some very fine line-drawing. See, e.g., United States v. Whitted, 11 F.3d 782, 786 (8th Cir. 1993) (reversing admission of a physician’s diagnosis that the alleged child victim had been sexually abused, but allowing physician to summarize the medical evidence and express his opinion that the findings were consistent with sexual abuse). I agree with the New Hampshire Supreme Court, in State v. Cressey, 628 A.2d 696, 699–700 (N.H. 1993), that there was “no appreciable difference” between a statement that “the children exhibited symptoms consistent with those of sexually abused children . . . and a statement that, in her opinion, the children were sexually abused.” (emphasis omitted). But see Renaker, supra note 156, at 1677. See Steward v. State, 652 N.E.2d 490, 495-99 (Ind. 1995) (discussing the disagreement among state courts as to whether experts may describe "certain behavioral characteristics as being consistent with sexual abuse, thereby offering direct proof through implication, rather than where the expert explicitly draws the conclusion for the jury” and concluding “we decline to distinguish between expert testimony which offers an unreserved conclusion that the child in question has been abused and that which merely uses syndrome evidence to imply the occurrence of abuse.”). Cf. Thomas D. Lyon & Jonathan J. Koehler, The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases, 82 CORNELL L. REV. 43, 50-54 (1996) (criticizing as misleading physician’s testimony that child’s behavior is consistent with abuse).
closely related respects. First, the use of RTS is too restrictive and unimaginative. Second, the scope of expert testimony about rape should routinely transcend RTS information about victims’ reactions. It should also include information about rape myths and stereotypes. Experts should provide demographic, psychological, and sociological background information about rape, including the frequency of rape and the wide range of victims and perpetrators.

(1) Using RTS More Creatively and Expansively

Although significant differences exist, courts tend to engage in dualistic thinking. Often, courts analyze RTS as either proof of the ultimate fact of rape in the particular case or as educational evidence to rebut the accused’s assertion that the victim’s behavior indicates that she is lying.\(^{163}\) There is an alternate use that many courts have tended to ignore. Courts should admit expert testimony on RTS for educational purposes even where the accused has not questioned the victim’s behavior in order to discredit her and even where the victim’s behavior is not outrageous or bizarre.\(^{164}\) As discussed in Section III, rape myths permeate our culture. There is every reason to believe that even without prompting by the accused, jurors will question: Why did she delay reporting? Why did she agree to go back to his apartment? Even where the accused makes no open appeal to rape myths, these myths, though unspoken, are compelling and pervasive, prompting the jury to be suspicious of women who have reported rape.\(^{165}\) Therefore, the prosecution should be allowed to introduce expert evidence where there is no overt resort to rape myths by the

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163. See, e.g., People v. Bledsoe, 681 P.2d 291, 299-302 (Cal. 1984). In Bledsoe, the California Supreme Court held that RTS is inadmissible when offered to prove that the complaining witness was in fact raped. Id. The court, however, reasoned that such testimony would be admissible to rehabilitate the complaining witness when her credibility was impeached by a defendant suggesting that her conduct after the incident, such as delay in reporting, was inconsistent with her testimony about being raped. Id. at 298. The Court reasoned that “in such a context expert testimony on rape trauma syndrome would play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths.”

164. See Fischer, supra note 155, at 713-17.

165. See United States v. Hammond, 17 M.J. 218 (1984) (approving in punishment phase evidence of effect of rape trauma from expert witness who never met the victim and noting that “one of the great obstacles to proper adjudication of rape prosecutions is the jury members’ (or court-martial members’) relative lack of education as to the psychological aspects of the crime of rape and that expert testimony may be properly used to provide that education.”) (citing John L. Ross, The Overlooked Expert in Rape Prosecutions, 14 UNIV. OF TOL. L. REV. 707 (1983); see supra notes 62-84 and accompanying text (explaining rape myths and their effects on jurors).
Whenever an expert testifies, she must provide information to assist the jury. To justify admission of this expert testimony, we must overcome the false belief that most people know something about the typical behavior of rape victims. Such education is especially important for judges who initially rule on the admissibility of expert testimony and may be swayed by popular notions of how rape victims behave. Admissibility of such educational background evidence would not operate on a theory of propensity (e.g., the complaining witness seemed in a state of shock and did not report immediately, therefore she suffered RTS, and therefore was probably raped). Rather, this use of RTS would educate the fact-finder that there are many different potential reactions to the trauma of rape, some of them in direct opposition to popularly held beliefs and stereotypes.

(2) Adding Background Evidence About the Nature of Rape and Rapists


See Fed. R. Evid. 702.

See State v. Kelly, 478 A.2d 364, 378 (N.J. 1984) (finding that social research about battered women examined “an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors’ logic, drawn from their own experience, may lead to a wholly incorrect conclusion, and an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge”).

See Vidmar & Schuller, supra note 84, at 135 n.17 (“Judges might equally benefit from the expert evidence if they are ignorant of certain social science findings about human behavior.”); Robert P. Mosteller, Is the Jury Competent? Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence, 52 LAW & CONTEMP. PROBS. 85, 85 n.3 (1989) (“It should not necessarily be assumed, however, that judges are immune to the effects of myths and misconceptions, particularly in the highly charged areas of rape and child sexual abuse.”); Massaro, supra note 151, at 468 (arguing that myths and fears concerning rape may influence judicial decisions not to admit expert evidence concerning the rape trauma syndrome).

In a study of average citizens' understanding of rape based upon a fourteen-question quiz, “the scores showed that, in general, most people knew very little about the facts regarding rape. The average score of the respondents on the fourteen-item test was less than four items correct.” H. FIELD & L. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 89 (1980).
demographic and sociological information about rape. One way to conceal of this type of expert evidence on rape would be to consider it as a unique form of group character evidence.171

This type of background evidence would subvert common rape myths, and address issues above and beyond RTS.172 For instance, experts could state information about the nature of rape, such as the fact that most victims are raped by people they know, or that victims are less likely to report a rape when they are acquainted with the perpetrator.173 An expert could discuss the demographics of rape survivors, such as the fact that women of all ages and socio-economic backgrounds are victims. Providing statistics about the wide-spread nature of rape should not encourage the jury to engage in probabilistic reasoning that it is somehow likely that the accused committed the rape.174 Rather, such statistics undermine the notion that all rapes conform to our restrictive cultural paradigm. Like the expansion of RTS evidence, this background evidence on rape is not limited to the rebuttal of specific rape myths, but instead anticipates the sway of those myths and addresses them in the prosecutor's case-in-chief.

Finally, and most controversially, experts could undermine rape myths about rapists. For instance, expert testimony providing background evidence could debunk the myth that nice (read: rich, educated, white) boys don't commit rape. The expert would not present a "profile" (and certainly should not attempt to provide a match-up from the profile to the rapist), but would refute the often unspoken, but firmly held notion that only desperate, poor, sex-starved, anti-social deviants commit rape.175 For example, in McAlpin, the California Supreme Court permitted a police officer to testify that there is no profile of a "typical" child molester.176 Rather, such an individual can be of any social or financial status, any race, any age, any occupation, any geographical origin, and any religious belief or no religious belief at all.177 The officer testified that such offenders can also be persons of good or even impeccable reputations in the community.178

171. See Mosteller, supra note 169, at 86, 104-05 (analogizing the concept of social framework background evidence to character evidence).
172. By "background evidence" I refer to statistically verifiable social science demographics and observations by competent professionals based on clinical experience.
173. See e.g., People v. Hampton, 746 P. 2d 947, 952 (Colo. 1987).
174. See Andrew E. Taslitz, Myself Alone: Individualizing Justice Through Psychological Character Evidence, 52 MD. L. REV. 1, 28 (1993) ("One other form of the corrective or educational use of psychological character evidence involves the comparison of an individual to 'normal,' not for probabilistic predictive reasons, but to help the jury understand how normal people react in certain situations.").
176. See id.
177. See id. at 568, 571.
178. See id.
The officer testified in the prosecution's case-in-chief, but also accurately anticipated the accused's defense that the accused was respected in his community.\textsuperscript{179} Another example stems from \textit{Key v. State},\textsuperscript{180} where the Texas Court of Appeals affirmed the admissibility of testimony from a rape crisis counselor, Sue James, in the prosecutor's case-in-chief. The counselor testified about how rapists choose their victims, explaining that it was not uncommon for a rapist to establish a brief relationship with the victim, such as being seen in public with the victim before raping her so that she would not suspect any potential danger and so that her credibility would be diminished.\textsuperscript{181} The Court of Appeals concluded that "the expert's testimony here assisted the jury in resolving a contested issue. As established by James, the average person does not understand how a rapist chooses his victim and might not understand the victim's passive conduct."\textsuperscript{182} Although it recognized the potential prejudice, the court held that the probative value outweighed any unfair prejudice.\textsuperscript{183} The court explained:

James drew no conclusions as to the truthfulness of the victim or the believability of her story. She only provided a context within which the jury might understand certain behavior. The testimony complained of did not directly concern this victim, this defendant or this sexual assault. Rather, the witness testified as to particular classifications and behavior patterns.\textsuperscript{184}

The use of expert testimony to educate the jury is not a new concept.\textsuperscript{185} This notion of providing background information is similar to Professors Walker and Monahan's proposal to use social science and empirical evidence to create social frameworks.\textsuperscript{186} These social

\textsuperscript{179} See id. at 570-71.
\textsuperscript{180} 765 S.W.2d 848, 850 (Tex. Crim. App. 1989).
\textsuperscript{181} See id. at 849.
\textsuperscript{182} Id. at 850.
\textsuperscript{183} See id. at 851.
\textsuperscript{184} Id.
\textsuperscript{185} As part of the debate among scholars about the extent to which the judicial system should defer to experts and the extent to which experts should be used to educate the fact-finder (mostly surrounding the Rule 703 question of whether courts or experts themselves should determine the reasonableness of reliance on inadmissible evidence), many have extolled the educational value of experts. See, e.g., Ronald J. Allen & Joseph S. Miller, \textit{The Common Law Theory of Experts: Deference or Education?}, 87 Nw. U. L. REV. 1131 (1993).
frameworks allow jurors to "construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case." Although my vision is broader than the limits imposed by Walker and Monahan, my goal is similar: to construct a framework within which the jury can build an understanding of rape.

Others have also noted the need for such background information and have suggested expert testimony as a means of providing it. Professor Morrison Torrey proposes "de-programming" jurors, judges, and others involved in the criminal justice system through the use of expert testimony. Similarly, Myrna Raeder advocates education of the jury about domestic violence in murder cases where a pattern of domestic violence ends in the death of the woman. Professor Raeder argues "that jurors need background evidence about the dynamics of domestic violence in order to make rational decisions about the significance of the evidence presented at trial." Professor Raeder distinguishes this background evidence from Battered Woman Syndrome, arguing that we must transcend the reliance on

data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate." Id. at 567 (quoting State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984)).

187. Id. at 559. Walker and Monahan recommend using jury instructions to educate about social framework. They analogize between social science results to precedent and make a good case for having the judge instruct the jury on certain background information verified by social science in much the same way that she instructs the jury on the law. See id. at 585-88. Walker and Monahan anticipate that parties would submit brief on social framework evidence. They note that the judge must play an activist role evaluating the social science and searching it out on her own, measuring the fit and seeing how other courts have used it. See id. at 588-91. Although the notion of enhanced jury instructions is intriguing, it is objectionable for at least four reasons. First, it departs from our current method of imparting non-legal information to the jury, and would require significant scientific knowledge and activism on the part of the judge. Second, jury instructions, which come at the end of the trial, are often boring and confusing and the social science could get lost in the myriad of definitions and explanations. Third, the important functions of helping the narrative make sense, dispelling rape myths, and allowing the jury to hear the story without having it overshadowed by the cultural paradigm are undermined considerably if the jury has to wait till the end of the trial to get oriented about the nature of rape. It may be too late for jurors to really hear the testimony which they apprehended via the screening mechanism of rape myths. Finally, acceptance of rape myths is not limited solely to juries. Judges need the education too; who will instruct them? See Mosteller, supra note 169, at 109-12 (critiquing the judicial instruction solution).

188. Professor Torrey suggests that courts allow expert testimony not only on rape trauma syndrome but also concerning the falsity of rape myths. See Torrey, supra note 49, at 1064-65.

189. See Raeder, supra note 127, at 790-95.

190. Id. at 790. A jury's acquaintance with information about battered women and the dynamic with the batterer will counteract certain misconceptions about domestic abuse, such as the belief that if the woman stayed the abuse could not have happened or must have been very mild.
syndromes, which often have a way of backfiring on women. Instead, Professor Reader advocates a broad, educational approach that uses experts to explain the sexual and cultural dynamics of violent relationships between the sexes. Debunking rape myths benefits not only the individual trial, but also society at large. As noted above, belief in rape myths correlates with the willingness to rape and the tolerance of rape. By educating the jury and educating society at large, we protect women.

(3) Practical Issues Raised by Expanding Expert Testimony on Character

How would this background evidence be put into practice? Obviously the rules of relevancy and the Rule 702 helpfulness standard limit the type of evidence that can be introduced. To provide useful and pertinent testimony, the expert must describe the phenomenon of rape myths and refute any rape myths and misconceptions that are relevant to the case. The party (mostly, as I explain below, the prosecution) that wishes to admit evidence of rape myths bears the burden of demonstrating that the rape myth actually exits and that it is relevant to the particular case. An expert can rely on the myriad psychological studies that define, catalog, and measure the potency of various rape myths. Ideally, common law will develop around the definition of rape myths and their admissibility. Appellate courts could develop standards, and after a while, trial court judges could take judicial notice of the existence and falsity of certain rape myths. Obviously, there must be a "fit" between the myth and the facts of the case. If, for instance, the rape survivor is twenty years old, there is no relevance to debunking the rape myth that only younger women are attacked.

Although I expect the nature of the testimony to develop over time, it is worthwhile to briefly sketch the type of expert testimony I advocate. For this purpose I will again rely on the facts of the Alex Kelly case. Under my proposal, an expert (either a social worker, rape crisis therapist, psychologist or psychiatrist) would first explain

191. See id. at 796 (discussing how feminists have attacked BWS as a doctrine). See also Susan Stefan, The Protection Racket, 88 NW U. L. REV. 1271 (1994); Melanie Frager Griffith, Note, Battered Woman Syndrome: A Tool for Batterers?, 64 FORDHAM L. REV. 141 (1995) (discussing how accused batterers attempt to use BWS to show they did not rape).

192. See Raeder, supra note 127, at 805-07. Raeder observes that "[s]ocial science evidence acts as the glue binding the prosecution's case together, providing the background that the jurors lack about the societal and psychological context in which the contested facts occurred so they can understand and evaluate claims about the ultimate fact." Id. at 792.

193. See supra notes 148-153 and accompanying text.

194. See supra note 8.
what rape myths are. Next, the expert would relate demographics about rape, including its frequency and the fact that it is wildly under-reported. For these facts, the judge could probably take judicial notice, particularly because many of these statistics emanate from government reports. Next, the expert would explain the nature and effect of rape myths, relying both on the psychological literature and the expert’s clinical experience. Finally, the expert would explain the falsity of those rape myths that are relevant to the facts of the case. In the rape trial of Alex Kelly, those myths might include: (1) that acquaintance rape is rare; (2) that women who are truly raped report immediately; (3) that women commonly lie about rape to hide sexual indiscretions from their families; (4) that a woman who accepts a ride in a young man’s car is “asking for it”; (5) that only desperate men who have no other outlets for their sexual needs commit rape; and (6) that all rapists appear dangerous and deviant.

The expert would articulate these myths and systematically refute them with empirical evidence and clinical observations. In addition, the expert would explain the psychological pull of the cultural paradigm. Only the relevant rape myths would be triggered. For the Alex Kelly case, there would be no need to refer to the rape myth that all rapes result in demonstrable physical injuries because the survivor did in fact have such injuries.

The background evidence I advocate raises at least four additional concerns. First, does it work? The groundbreaking work of Jody Armour who writes about confronting stereotypes about African Americans is very instructive and inspiring. Armour has delved into the psychological and neurological evidence of how stereotypes are formed and how they can be defeated. He distinguishes between prejudice, which he defines as a conscious derogatory personal belief and stereotypes, which he defines as “well-learned internal associations about social groups that are governed by automatic cognitive processes.” Although it may be impossible to overcome firmly ingrained conscious discriminatory beliefs, it is possible, according to Armour, to develop techniques to help jurors combat unconscious discriminatory tendencies that have been learned as stereotypes at an early age. By explicitly challenging jurors to confront their biases against blacks and to consciously monitor their habitual responses to

196. See id. at 741.
197. Id. at 733, 741. Stereotypes such as rape myths have some basis in experience but are typically over-broad caricatures of reality. They inhibit careful individual judgment and encourage generalized, sweeping assumptions.
198. Armour cites psychological evidence that proactive strategies that draw attention to unconscious tendencies can be very successful.
the stereotyped litigant, 199 Armour holds out “a narrative of hope.” 200 The good news is that by talking about stereotypes and making jurors aware of inherent biases, it is possible to mitigate the harmful effect of stereotypes. This awareness, this self-consciousness, address problems of deep-rooted bias that are otherwise averse to legal solutions.

Similarly, psychological data indicates that an expert’s strong refutation of rape myths and discussion of the horror of rape can effectively counteract the effects of these myths. Subjects usually exposed to sexually violent depictions of rape, which tend to enhance rape myths, showed a lower acceptance of rape myths even weeks after exposure where they also received strong statements about the trauma of rape and the inaccuracy of rape myths. 201 Expert testimony on the potential problems with eyewitness accounts has been similarly found to improve juror decision-making. 202 The expert does not tell the jury who or what to believe, rather the expert fills in gaps based on scientific knowledge and clinical experience that allows the jury to fashion a coherent story. It is true that the “ultimate culprit may be cultural stereotypes.” But that does not mean law is bereft of any role. The opposition of “bad laws” versus “bad attitudes” develops an either or philosophy that need not be so stark 203 and reveals the lack of integration between law and social values. 204 The key to the dilemma of cultural bias is to think creatively about what trials can do to shape, or at least to shake up, the views of fact finders and all those who follow trials.

Second, we must examine whether such expert testimony raises problems of unfair prejudice and confusion. Will an expert “Herr Doctor Professor” overawe the jury, cause jurors to stop thinking in-

199. See id. at 770.
200. Id. at 762.
201. See Torrey, supra note 49, at 1067-69 (discussing a study performed by Canadian researchers Neil Malamuth and James Check).
202. See Mosteller, supra note 169, at 89 n.17; see generally Steven D. Penrod & Brian L. Cutler, Eyewitness Expert Testimony and Jury Decisionmaking, 52 LAW & CONTEMP. PROBS. 43 (1989); Michael R. Leippe, The Case for Expert Testimony About Eyewitness Memory, 1 PSYCHOL. PUB. POL’Y AND L. 909, 909 (1995) (“Trial simulations that test the reliability of eyewitness expert testimony indicate that it promotes modest, appropriate increases in skepticism about eyewitnesses, even when the expert gives a general overview of research and admits to limitations. The psychological and legal professions should develop responsible guidelines for use of expert testimony in court.”).
203. See Bryden & Lengnick, supra note 2, at 1228. They conclude that “the evidence, although mixed, suggests that rape reporting rates are generally unresponsive to changes in a particular jurisdiction’s rape law. Even when those changed signal a desire to reduce victim blaming in rape trials.” Id.
204. See id. at 1224.
dependently, and merely defer to the expert’s conclusions? Such concern, though typical in evidence scholarship, is not necessarily borne out by psychological studies. Psychological experiments with eyewitness testimony (a good analog because it is another matter jurors might believe they know about, but don’t) indicate that while expert testimony has an effect on jury deliberation, it is not determinative. Empirical studies demonstrate that fact-finders tend to give expert testimony on eyewitness identification less weight than logic would dictate, so there is little danger of the jury overvaluing this background information. Furthermore, one would expect juries to be even more suspicious of expert testimony on rape where the message is not only counterintuitive but also psychologically uncomfortable. Additionally, although far from a panacea, limiting instructions provide an additional buffer against a jury’s overvaluing expert testimony. A related and more realistic fear is that the jury may be confused or distracted by a battle of the experts.

Third, how does such background evidence about rapes, when conceived as a form of character evidence, fit within the rules? Walker and Monahan believed that their social framework evidence would only be admissible to the same extent that all other character evidence is admissible: such as in criminal cases and only if raised by the defense or brought by the prosecution to rebut same. Although I am persuaded that this type of background evidence has many theoretical connections with the concept of “character” writ large, I agree with Professor Mosteller that the rules of admission need not be so

205. See People v. Bothuel, 252 Cal. Rptr. 596, 599 (1988) (expressing concern that juries may overvalue or misunderstand expert testimony — “even if reference to the specific victim is avoided”) (citation omitted).

206. See Walker & Monahan, supra note 186, at 578 (noting that information about eyewitness deficits is often not common knowledge).

207. See id. at 576-77. “The introduction of a social framework thus creates little risk of inciting turmoil and appears unlikely to be accorded ‘excessive’ probative value.” Id. at 577.

208. See Massaro, supra note 151, at 444-45; McCord, supra note 151, at 1205 (rejecting the notion that juries will slavishly follow expert testimony).

209. See Bothuel, 252 Cal. Rptr. at 601 (where the California Court of Appeals believed the expert went too far, but the court nevertheless refused to reverse because of the defense’s lack of objection and because the trial court clearly admonished the jury of its limited use). “[T]he jury must be admonished ‘that the expert’s testimony is not intended and should not be used to determine whether the victim’s molestation claim is true .... The evidence is admissible solely for the purpose of showing that the victim’s reactions as demonstrated by the evidence are not inconsistent with having been molested.’” Id. at 599-600 (quoting People v. Bowker, 203 Cal. App. 3d 385, 394 (1988)) (emphasis omitted).

210. See Walker & Monahan, supra note 186, at 581-82. Clearly Walker and Monahan wrote before Rule 413 was adopted or even seriously entertained.
restrictive. The purpose of such evidence is not to argue for propensity, but rather to undermine our culture’s limited understanding of rape, including sexist and class-based notions about victims and racist and class-based notions about attackers. Furthermore, given Rule 413’s drastic departure from the ban on character evidence, advocacy of expansive background testimony seems tame by comparison.

This leaves one final, vital issue: the use of such background evidence by the defense. Both RTS and Battered Woman Syndrome have demonstrated the possibility of a potential catch-22. These forms of evidence merely replaced one set of rigid expectations about the “proper” way for a rape survivor or battered woman to react with another set of rigid expectations. Women can suffer when they don’t fit patriarchal presumptions, or if they do fit those presumptions, then they are suspected of making it all up because they don’t fit the syndrome “requirements.”

Although this problem is real, the danger is less likely to arise with the type of background evidence I advocate. This expert testimony is relevant and helpful because it refutes rape myths. The appropriate message of such background evidence is that rape is a complex phenomenon; there are many potential responses to the trauma, and many faces of the rapist. Rather than conceive of any one authoritative model, expert background testimony should debunk the cultural paradigm as the exclusive rape narrative. Because the message is the heterogeneity of victims and perpetrators and the variety of rapes and motives for rape, it is hard to imagine how the defense would be able to subvert this evidence by relying on rape myths of a lying woman or any other myths for that matter. For this reason, a defense attorney in a stranger rape case cannot solicit expert testimony that stranger rape is a myth and most rapes are by people known to the survivor. Such testimony is not relevant to debunking an established myth. Hence it is not helpful and potentially confusing to the jury. The one area in which I could imagine defense testimony about rape myths concerns African American men, who are sometimes stereotyped as sexual predators, out to stalk and violate white women. To the extent that the jury may become aware of such myths

211. See Mosteller, supra note 169, at 109-12.
212. See supra notes 148-153.
213. To the extent that the defendant in a rape trial relies on the argument that he is a nice person who would never commit such a heinous act, he should be allowed to do so even though it may trigger the rape myth that nice boys do not rape. The constitutional underpinnings of a right to present favorable character evidence, no matter how suspect, support this result. See Fed. R. Evid. 404 comments; see generally Taslitz, supra note 174. Obviously, to the extent the accused raises such character evidence, the prosecution may rebut same.
about African American men, I believe it is consonant with the overall fairness of trials and desirable from a feminist perspective to allow the defense to debunk this myth using expert testimony.

**Conclusion**

Rape trials often fail women. I have presented a feminist version of the truth of rape trials, attempting to diagnose and heal the jury’s tin ear in hearing and believing women. How, then, can jurors who may feel threatened or pained by the stories of rape overcome these feelings and truly listen to the woman victim, rather than blame or dismiss her? Perhaps it is impossible for a jury to transcend the cultural image of the unbelievable, conniving woman who ensnares and then falsely accuses. But if a jury could envision a different, feminist truth, one which we can justify as being more righteous, more descriptive, and more empathetic, we must search for methods to aid the jury in overcoming its proclivity for rape myths.

In reviewing recent changes in character evidence as well as considering potential innovations, I evaluated various methods of using character evidence in communicating such a feminist vision to the jury. I have tried to present defensible criteria for measuring the success and fairness of various types of character evidence in rape trials, thus allowing women to be heard in a new way by jurors, without fundamentally altering the rights of the defendants or the fairness of the process. To that end, I distinguished between evidence and courtroom practices that enhance and enrich the survivor’s narrative from those that impoverish and infect it with unfair prejudice by appealing to stereotyped or misogynist thinking. I reject character evidence that appeals to juries based on rape myths or misconceptions about rape.

With mixed feelings I reject Rule 413. Such use of character evidence strikes me as unacceptable not only from evidence theory and doctrine (a point made by many), but also from a feminist perspective. Rule 413 holds out the enticing prospect of increased convictions. It also may subvert some rape myths—by obtaining more convictions, by convicting those who may depart from our cultural image of rapists by providing increased information and offering a forum for victims to speak out. Nevertheless, Rule 413’s expansion of character evidence to include the prior similar crimes of the accused will actually distort the narrative with sexist assumptions, and ultimately perpetuate rape myths about perpetrators and victims.

I also reject evidentiary techniques that use character evidence of the survivor or accused to “match” the rape paradigm. For instance, I believe it is ultimately a mistake for the prosecutor to portray the victim as virginal or to highlight her modest dress. Such resort to the
rape paradigm may indeed assist in the conviction of the case at bar, but at tremendous cost to women and society at large because it contributes to the overall mistrust of women. Belief in rape myths correlates with willingness to rape and tolerance of rape. By educating the jury and perforce educating society at large, we protect women. If we are to take the educational function of a trial seriously, we cannot tolerate resort to fables that reinforce stereotypes and demonize the accused.

Ultimately, the best, albeit slow, mechanism for educating both the jury and society at large is the use of experts as teachers. Experts offering background information about the frequency and dynamics of rape present the best compromise on how to use character evidence to promote feminist principles while preserving defendants' rights.