ARTICLES

RAPE SHIELD EVIDENCE AND THE HIERARCHY OF IMPEACHMENT

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INTRODUCTION

The federal rape shield law creates a bar against the use of evidence of "other sexual behavior" of a complainant in a rape case, permitting such evidence only within strictly defined circumstances.[1] Unlike most other evidentiary rules of exclusion, which define an impermissible use of otherwise relevant evidence but do not purport to enumerate an exhaustive list of permissible uses, Rule 412 reverses the ordinary approach of such rules and prohibits the use of any and all rape shield evidence unless it is explicitly permitted by the Rule. This rigid approach to rulemaking itself poses nearly impossible problems of foresight.[2] As it must, this legislatively created rule recites that it yields in criminal cases where the exclusion of such evidence "would violate the defendant's constitutional rights."[3] To date, the United States Supreme Court has recognized that those rights are

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1. Federal Rule of Evidence 412 provides:

> (a) **Prohibited Uses**. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
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> (1) evidence offered to prove that a victim engaged in other sexual behavior; or.
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> (2) evidence offered to prove a victim's sexual predisposition.
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> (b) **Exceptions**.
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> (1) **Criminal Cases**. The court may admit the following evidence in a criminal case:
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> (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
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> (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
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> (C) evidence whose exclusion would violate the defendant's constitutional rights.

2. *See* section I *infra*. *Compare* FED. R. EVID. 412 *with* FED. R. EVID. 407 *and* FED. R. EVID. 408 (narrowly defining evidence to be excluded for enumerated purposes and thereby affirming that any relevant evidence not barred is admissible, subject to Rule 403). This reverse approach to a rule of exclusion also puts unnecessary interpretive pressure on section (C), permitting evidence the exclusion of which would violate the constitutional rights of the defendant, as the only section not hopelessly narrow in its reach and therefore the last hope for admissibility.

3. FED. R. EVID. 412(C).

implicated *only* where the exclusion of material pursuant to the rape shield rule represents a "denial of a defendant's opportunity to impeach a witness for bias."[4] Although Article IV of the Federal Rules of Evidence deals with the substantive use of evidence, the Court approved this exception to the exclusion of rape shield material pursuant to a longstanding theory of impeachment, or general attack on the "credibility" or "reliability" of the central witness against the defendant.[5] In so doing, the Court established a difference in treatment of rape shield evidence that defies both logic and common sense, pursuant to which one theory of impeachment may be pursued while all others are forbidden. While this would be merely disappointing in other contexts, where, as here, the difference purports to have a constitutional foundation, a closer look at the rationale and results seems warranted.

The Court has long recognized and reinforced a hierarchy of impeachment, allowing evidence on a theory of bias virtually without restriction,[6] even while approving strict legislative regulation of evidence that impeaches on theories other than bias, such as impeachment through character for untruthfulness or impeachment by contradiction.[7] Frankly acknowledging that these other theories are "less favored forms of impeachment,"[8] the Court nevertheless gives little satisfaction to those seeking an explanation for this favoritism or wondering why one mode of

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4. Olden v. Kentucky, 488 U.S. 227, 231-32 (1988) (per curiam) (holding that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination" and that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness'") (quoting Davis v. Alaska, 415 U.S. 308, 316-317 (1974); Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986)).

5. *Id*. at 232 ("[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination") (quoting *Van Arsdall*, 475 U.S. at 680). The Court's reliance on the Confrontation Clause as a basis for invoking the constitutional exception to FED. R. EVID. 412 further underscores that the evidence relies on a theory of impeachment.

6. *See* U.S. v. Abel, 469 U.S. 45, 52 (1984) (reversing a conviction where the government sought to impeach a witness by proof that the accused and the witness were both members of a prison gang, holding that "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony," and that "[t]he 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to 'take the answer of the witness' with respect to less favored forms of impeachment"); *see also* Commonwealth v. Joyce, 415 N.E.2d 181, 185 (Mass. 1981) (holding evidence that the complainant had twice been convicted of prostitution was admissible to show possible reason for alleging rape, to avoid arrest for prostitution and stating, "We do not believe that the prohibition in the rape-shield statute sweeps so broadly as to render inadmissible evidence of specific instances of a complainant's sexual conduct in situations when that evidence is relevant to show the complainant's bias").

7. *See, e.g*., FED. R. EVID. 608 (restricting impeachment through character for untruthfulness to proof in the form of reputation or opinion and prohibiting such proof by extrinsic evidence); FED. R. EVID. 403 (construed to embody the modern prohibition on the use of extrinsic material to impeach on a theory of contradiction with respect to a collateral matter); Attorney-General v. Hitchcock, 1 Exch. 91, 99 (Eng. 1847) (allowing impeachment with extrinsic evidence where the target of the impeachment had "such a connection with the issue that [one]would be allowed to give it in evidence").

8. *Abel*, 469 U.S. at 52.

impeachment exists on such a different footing from others that might, in individual cases, "bear on the accuracy and truth of a witness' testimony[,]"[9] and might in those instances be far more likely than bias evidence to be determinative of a jury's assessment of a witness or a defense.[10] Indeed, with respect to rape shield evidence, the rule that treats bias as the only constitutionally required theory on which prohibited material may be offered elevates impeachment through bias above even some substantive uses of that evidence.[11] Yet the Court's discussion of the basis for this exceptional treatment of bias evidence is deeply unsatisfying, and linked as it is to constitutional doctrine, begs for some coherent elaboration.

In this Article, I seek to place other theories, both substantive and impeaching, on an equal footing with that of bias, such that they, too, can be the basis, in appropriate cases, for admissibility of rape shield material. In doing so, I necessarily suggest that the long-established hierarchy of impeachment that governs in all criminal trials, for rape or any other crime, and that places bias above both character and contradiction as a basis for juror evaluation of witness reliability, is constitutionally insupportable and bears reconsideration.

I. THE RAPE SHIELD RULE AND THE PROBLEM WITH COMPREHENSIVE RULES OF EXCLUSION: GENERAL BACKGROUND

The structural problem facing the drafters—and now the interpreters—of Rule 412, was to prohibit the use of a broad class of concededly relevant[12] evidence and, in addition, to anticipate *all* possible permitted uses.[13] They attempted to

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10. Examples of other theories that might well be determinative of guilt or innocence in a case of sexual assault include evidence that bears on the defendant's state of mind (in those jurisdictions where a defendant's mens rea as to non-consent must be proven) (Section III.A); evidence that the complainant has lied in the past, including evidence that a complainant has, in the past, transformed an episode of consensual sex into a false accusation of rape (Section III.B.1); evidence that contradicts a complainant's testimony (Section III.B.2); and evidence that gives context to a defendant's narrative where that narrative might otherwise appear implausible or unlikely (Section III.B.3). *See* discussion *infra*, Section III.

11. For example, rape shield evidence that bears on the substantive question of whether or not the accused had the mens rea required for commission of the offense is, at present, excludable under Rule 412 as not required by the Constitution, although the Supreme Court has held, in non-rape shield contexts, that the common law requirement of proof of mens rea may indeed have a constitutional dimension, albeit vaguely defined to date. *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37, 48–49 (1996); *see infra*, Section III.A (proof of mens rea as a basis for admissibility of rape shield evidence in rape cases).

12. The bar for mere relevance under FED. R. EVID. 401, which defines relevance as having "any tendency" to make more probable or less probable a fact that is "of consequence" in the action, is quite easy to meet, and even the most avid supporter of a rape shield evidence ban would recognize that evidence of a complainant's other sexual behavior meets this very low threshold. The premise of Rule 412 is not that such evidence is not relevant, but rather that, although relevant, it should be excluded for reasons of public policy that substantially outweigh its limited probative value. *See infra*, note 16.

13. In his classic but now outdated and stereotyping characterization, Newton Minow jokingly said:

> After 35 years, I have finished a comprehensive study of European comparative law. In Germany, under the law, everything is prohibited, except that which is permitted. In France, under the law, everything is permitted, except that which is prohibited. In the Soviet Union, under the law,

accomplish this in just two narrow exceptions and a constitutional "catch-all."[14] The rule is itself superfluous, since Rule 404, barring proof of character or a trait of character to prove conduct in conformity with that trait, would, if properly applied, exclude evidence of prior sexual conduct unless offered for something *other* than to prove consent in the charged case. This broad "French" rule, which would not pertain to non-propensity uses of rape shield evidence, such as the uses described in sections *A, B, C* and *D* below, obviates the need for the more troublesome "German" Rule 412, and would leave all forms of impeachment on an equal footing for purposes of admissibility. Rule 412, then, is a markedly different approach from that of other rules of exclusion which state with specificity only that which is excluded but maintain the general approach of broad admissibility (subject to the ordinary considerations of Rules 401 and 403) for all else, without attempting to enumerate such permissible uses.[15] In enumerating the few permissible uses, the rape shield rule is, in keeping with its policy goals of protecting the interests of complainants in such cases,[16] as well as reducing the deterrent effect on reporting of rape that resulted from the admissibility of such evidence,[17] quite grudging. It allows a limited use of rape shield evidence where the evidence relates to sexual conduct with someone other than the accused,[18] a similarly limited use of such evidence where it relates to sexual conduct with the accused,[19] and then contains only

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everything is prohibited, including that which is permitted. And in Italy, under the law, everything is permitted, especially that which is prohibited.

DONALD BALL & WENDELL H. MCCULLOCH, JR., INTERNATIONAL BUSINESS: INTRODUCTION AND ESSENTIALS 368 (Richard Irwin ed. 1993). In this formulation, Rule 412 would be a "German" rather than a "French" rule, which, for the reasons set forth above, is far more problematic to draft and to implement.

14. *See* FED. R. EVID. 404(b).

15. *See, e.g.*, FED. R. EVID. 407 (prohibiting the use of subsequent remedies "to prove negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction" but reciting that "the court may admit this evidence for another purpose . . ."); FED. R EVID. 404 ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," but noting that "[such] evidence may be admissible for another purpose . . .").

16. *See* Harriet Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764 (1986) (describing the impetus behind rape shield laws and quoting one legislative sponsor as saying that "[t]oo often in this country victims of rape are humiliated and harrassed [sic] when they report and prosecute [a] rape") (quoting Representative Elizabeth Holtzman).

17. *See id.* at 767 nn.11 & 13. *See e.g.* United States v. Dorsey, 16 M.J. 1, 7 (C.M.A. 1983), (enumerating state interests in exclusion of evidence under rape shield rule as: preventing the jury from deciding "guilt on the basis . . . that the [victim] had a poor moral character"; "sheltering victims of rape from humiliation and psychological damage" and "encouraging the reporting and prosecution of rape offenses"). *But see* J. Alexander Tanford and Anthony Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 572 (1980) (noting that "[t]he available statistics do not support the argument that it is sexual history evidence that results in acquittals. According to the F.B.I. uniform crime statistics, the acquittal rate has been fairly constant before and after the advent of rape victim shield laws.").

18. FED. R. EVID. 412(b)(1)(A) (permitting "evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence").

19. FED. R. EVID. 412(b)(1)(B) (permitting "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor").

one other, superfluous, phrase: "evidence whose exclusion would violate the defendant's constitutional rights."[20] Accordingly, the use of rape shield evidence under the wide range of possible circumstances not anticipated and expressly permitted by the drafters falls into the default category of exclusion, unless those circumstances can be elevated to the exalted category of that which is constitutionally compelled.

To date, the class of cases in which evidence otherwise barred by the rape shield statute has been deemed to be constitutionally compelled is restricted to those which demonstrate a theory of witness bias or motive to lie.[21] So, challenges to the rule based on other theories have been largely unsuccessful, including challenges where the proffered evidence demonstrated a general character for untruthfulness based upon other episodes of dishonesty, such as but not limited to prior false accusations of rape whose probativeness depends upon the theory that the complainant has lied in the past, permitting a jury to infer that she might also be lying at trial;[22] where the witness has made other contradictory statements or where there is extrinsic evidence that contradicts the complainant's testimony;[23] and where the evidence of prior sexual conduct supports an inference that the accused lacked a culpable mens rea with respect to the complainant's non-consent,[24] or where the

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20. FED. R. EVID. 412(b)(1)(C). Plainly, even without this language, evidence whose exclusion would violate a defendant's constitutional rights cannot be excluded by any rule or act of Congress.

21. Olden v. Kentucky, 488 U.S. 227, 231 (1988) (per curiam) (holding that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness'") (quoting Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986); Davis v. Alaska, 415 U.S. 308, 318 (1974)).

22. *See* FED. R. EVID. 608(b) (permitting evidence of specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness if probative of truthfulness or untruthfulness, and if in the proper form); Commonwealth v. Bohannon, 378 N.E.2d 987, 991 (Mass. 1978) ("Evidence of prior false accusations of the specific crime which is the subject of the trial might itself have seriously damaged the complainant's credibility"); State v. Smith, 743 So. 2d 199, 202–03 (La. 1999) (holding that "defendant was not seeking to prove that the victim had engaged in prior sexual behavior or that she had an unchaste character" and that "[b]ecause the evidence defendant attempted to introduce did not concern the victim's prior sexual behavior" but did "directly concern[] the victim's credibility" it should have been admitted). Allegations about sexual conduct having been non-consensual are more complex, since they require offering evidence of some actual sexual conduct of the complainant, as opposed to a pure fabrication. Although one might acknowledge that such evidence would also be highly probative on character for untruthfulness, on the theory that if the complainant has lied in the past about consensual sexual conduct having been non-consensual, he or she might, in the instant case, be similarly inaccurate or dishonest, courts have held that this poses a deeper problem due to rape shield prohibitions. *See, e.g., Bohannon*, 378 N.E.2d at 991(stressing that the proposed questions on appeal dealt with prior allegations of rape; they in no way sought to elicit a response concerning the complainant's prior sexual activity or reputation for chastity, and that the court did not therefore reach any issues related to the Massachusetts rape shield statute).

23. State v. Steele, 510 N.W.2d 661, 667 (S.D. 1994).

24. GA. CODE ANN. § 38-202. This is, of course, permissible only in those states where the mens rea as to consent is at issue and where a defense of mistake of fact about consent is a permissible defense. *See, e.g.*, People v. Mayberry, 542 P.2d 1337, 1345 (Cal. 1975) (recognizing this defense for the first time in any American state). Since *People v. Mayberry*, at least nine other states have recognized the defense of mistake of fact as to consent

accused wishes to offer evidence of other sexual conduct on a res gestae theory, to corroborate his account of the encounter that gave rise to the indictment.[25]

To get beyond bias, an advocate would have to persuade the trial court as to each of the theories above that his interest in presenting evidence purportedly barred by the rape shield rule rises to the level required for relief in non-bias cases.[26] This is because the constitutional exception to the rape shield rule simply incorporates existing law regarding the parameters of the defendant's constitutional right to put on a defense. To date, that has proven impossible to expand.

While it has not been many years since courts refused to allow the uncorroborated testimony of an alleged victim of rape to stand as the sole basis for a conviction,[27] or instructed juries that "it must be remembered that [rape] is an accusation easily to be made and hard to be proved,"[28] this swing in the opposite direction, refusing to allow any theory other than bias as a basis for impeaching a rape complainant with evidence of other sexual conduct, is little better. The rigidity of the rape shield rule in this respect, categorically denying jurors access to evidence that might well have a significant impact on their assessment of a witness's credibility, ought to be reexamined and relaxed.

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in rape. *See* Reynolds v. State, 664 P.2d 621, 625 (Alaska Ct. App. 1983); People v. Lowe, 565 P.2d 1352, 1354 (Colo. Ct. App. 1977); State v. Smith, 554 A.2d 713, 717 (Conn. 1989); In Interest of J.F.F., 341 S.E.2d 465, 467 (Ga. Ct. App. 1986); State v. Dizon, 390 P.2d 759, 769 (Haw. 1964); State v. Williams, 696 S.W.2d 809, 812 (Mo. Ct. App. 1985); Green v. State, 611 P.2d 262, 266 (Okla. Crim. App. 1980). In other states, such evidence is not material and is excludable for that reason. *See* FED. R. EVID. 401 (evidence is relevant if it tends to make more or less probable a fact that is "of consequence in determining the action"). *See, e.g.*, Commonwealth v. Lopez, 433 Mass. 722, 727 (2001) (rejecting mistake defense).

25. *See* Stephens v. Miller, 13 F.3d 998, 1003 (7th Cir. 1994).

26. *See infra* text accompanying notes 28–39.

27. *See* George Fisher, *The Rise of the Jury as Lie Detector*, 107 YALE L.J. 575, 701 (1997) ("Until about a generation ago, a rape victim's uncorroborated word was in many places insufficient to convict") (citing 7 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 345 (3d ed. 1940)); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L. J. 1365, 1368 (1972) (noting that in 1972, 15 American jurisdictions maintained some form of corroboration requirement in rape cases); *see also* Fisher, *supra*, at 702, n.594 (collecting cases of limited corroboration requirements for marital rape, statutory rape, rape where lack of consent is due to mental defect or incapacity, or rape when the victim made no complaint within a year of the episode unless the victim was less than 18). Fisher roots the corroboration requirement in the deeper historical concern about the institutional reliability of the oath as guarantor of the credibility of a witness since a contrary rule would require juries to choose between the sworn testimony of individuals. In that respect, the corroboration requirement in rape cases is of a piece with a similar rule prohibiting conviction based solely on the testimony of an accomplice. *Id.*, at 701–02. But with this oath-based rationale having fallen away nearly a century ago, the enduring requirement of corroboration in rape cases was more likely based upon the general skepticism with which rape complainants have long been met by courts and juries. *See, e.g.*, *Id.* at 701, n. 592, quoting Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967) ("Surely the simplest, and perhaps most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false")).

28. *See* Fisher, *supra* note 27, at n.592 (quoting 7 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §2061, at 345 (3d ed. 1940).

II. DEFENDANT'S RIGHT TO PUT ON A COMPLETE DEFENSE: *ROCK, LUCAS,* AND BIAS

The constitutional bases of the right to present evidence are several. They include the right to confront witnesses,[29] the right to due process,[30] the right to compulsory process of witnesses,[31] and the right against self-incrimination.[32] Pursuant to each of these constitutional guarantees, the fundamental task for a court facing a challenge to an evidentiary rule of exclusion is to weigh the rule and the interests that underlie it against the defendant's interest in placing the excluded evidence before the finder of fact, usually a jury.[33] The Supreme Court has instructed that courts should not adopt per se rules for excluding evidence but must instead determine, on a case-by-case basis, whether such a rule "is 'arbitrary or disproportionate' to the State's legitimate interest."[34] This case-by-case balance of interests would seem to suggest that it is not the categorical frame in which the evidence is proffered (bias, character, contradiction, or substantive theories such as lack of culpable mens rea) that determines the outcome of the balance, but rather the relative weight that the particular evidence and the opposing state interest carry in the context of an entire and quite particular trial record.[35] So, one might imagine that weak bias evidence could, in some cases, be outweighed by a very strong state interest in a rule of exclusion. Conversely, very strong impeaching character evidence demonstrating that a witness is persistently dishonest might be deemed to

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29. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (accused has the right "to a fair opportunity to defend against the State's accusations"). The Court has established an analytical framework for determining the circumstances in which an evidentiary rule unconstitutionally abridges that right, either by excluding evidence or by limiting the scope of a defendant's own testimony. *See* Michigan v. Lucas, 500 U.S. 145, 151 (1991) (applying *Rock* to exclusion of evidence under Michigan's rape-shield rule and stating that rule must not be "arbitrary and disproportionate" to a state's legitimate interests); Rock v. Arkansas, 483 U.S. 44, 55–56 (1987) (reversing application of per se rule excluding all hypnotically refreshed testimony and stating, "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve" and "a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify").

30. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law").

31. U.S. CONST. amend. VI (("[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"); Washington v. Texas, 388 U.S. 14 at 17–19 (1967) (an accused enjoys the "right to present his own witnesses to establish a defense" and this right is "a fundamental element of due process of law").

32. U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself").

33. *See supra* note 29 (outlining the Rock/Lucas test).

34. Michigan v. Lucas, 500 U.S. 145, 151 (1991) (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)); *see also* Barbe v. McBride, 521 F.3d 443, 445 (4th Cir. 2008) (finding that it was a violation of defendant's Sixth Amendment right of confrontation to apply a per se rule restricting the scope of defendant's cross-examination of prosecution's expert with respect to the opinion that complainant had been sexually abused).

35. Indeed, to say that bias evidence always trumps an evidentiary rule of exclusion but character evidence never does is plainly a per se rule. *See* Boggs v. Collins, 226 F.3d 728, 737 (citing Davis v. Alaska, 415 U.S. 308 (1974) and Delaware v. Van Arsdall, 475 U.S. 673 (1986)); *see also* Olden v. Kentucky, 488 U.S. 227, 232 (1988).

outweigh a weaker state interest in another evidentiary rule. Indeed, on the facts of *Abel* itself, it is not at all apparent that the bias theory of impeachment (that the witness and the accused were both members of a prison organization) would be more powerful or persuasive on the question of the witness's credibility than the character theory (being a member of an organization whose members swear to lie and even kill on each other's behalf). Nevertheless, decisional law does not reflect this particularistic approach to the constitutional analysis but instead assigns determinative weight to the category—the evidentiary theory—on which the excluded evidence is offered.

The state interests underlying the rape shield rule have been articulated with great frequency and consistency since its adoption. They are: preventing the jury from deciding "guilt on the basis . . . that the [victim] had a poor moral character"[36]; "sheltering victims of rape from humiliation and psychological damage"[37] and "encouraging . . . report[ ] and prosecution of rape offenses."[38]

While each of these interests is an important one, there is no doubt that their importance, when balanced against the probative value of any particular piece of impeaching evidence will vary. Indeed, the link between any particular use of rape shield evidence and each of these state interests is not always demonstrable let alone compelling. Studies have, for example, suggested that rape shield statutes have not affected the frequency with which rapes have been reported since their enactment.[39] And depending on the nature of the evidence and the facts of the particular case, it is not always clear that rape shield material will either improperly shift the jury's focus away from the guilt or innocence of the accused, or protect the complainant from embarrassment.[40]

The Rock/Lucas test itself makes plain that when considering a challenge to a procedural or evidentiary rule, the court should not take a per se approach, yet in implementing that test across an array of challenges to the rape shield rule, that is

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36. United States v. Dorsey, 16 M.J. 1, 7 (C.M.A. 1983). Again, existing rules regarding the use of propensity evidence could have met this concern. FED. R. EVID. 404(b).

37. *Dorsey*, 16 M.J. 1, 7 (C.M.A. 1983). This has also been described as an "a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." Michigan v. Lucas, 500 U.S. at 150. Existing rules, requiring that evidence be relevant and establishing the power of the court to exclude even relevant evidence where its probative value is substantially outweighed by unfair prejudice, might themselves have adequately met this concern. *See* FED. R. EVID. 401 & 403.

38. United States v. Dorsey, 16 M.J. 1, 7 (C.M.A. 1983)*; see also* Stephens v. Miller, 13 F.3d 998, 1010 (7th Cir. 1994) (Cummings, J., dissenting) (enumerating state interests in excluding rape shield evidence in a criminal case).

39. Richard W. Miller III, *Stephens v. Miller: Placing Rape Shield Statutes Between Rock and a Hard Place*, 27 U. TOL. L. REV. 217, 252 (1995) (citing David Haxton, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WISC. L. REV. 1219, 1267 (citing studies suggesting no change in reporting of rapes since enactment)).

40. That is because the excluded evidence is often in addition to evidence of sexual conduct that is admissible, and is itself explicit and/or embarrassing. It is the unusual case in which the question is whether or not to allow *any* evidence of other sexual conduct; more often the issue is whether additional evidence of other sexual behavior will be admitted.

precisely what courts have done. Only where the theory of impeachment is based on bias has the Supreme Court permitted evidence of other sexual conduct of a complainant to be admitted despite a rape shield rule of exclusion. In *Olden v. Kentucky*, the defendant alleged that the complainant lied about an episode of consensual sex in order to "protect her relationship with [her boyfriend] who would have grown suspicious upon seeing her disembark from [the defendant's] car [after the episode]."[41] The Court recognized that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately *draw inferences relating to the reliability of the witness*.'"[42] The Court noted that "[a] reasonable jury might have received a *significantly different impression of* [*the witness*'] *credibility*" had the trial court permitted this line of cross-examination.[43]

If indeed this is the measure of the necessity of the excluded evidence—that it could permit a jury to form a "significantly different impression of a witness's credibility" or could permit a jury to "appropriately draw inferences relating to the reliability of the witness,"[44] that is a fairly low bar, and does not turn on a particular theory of impeachment. This language does not characterize the strength of the inference, nor does it provide a measure of the impact of any impeachment, other than the vague measure in the term "significantly." It neither hinges on the centrality of the witness's testimony, nor suggests any reason why bias evidence would support stronger inferences about reliability or credibility than might other forms of impeachment.[45]

The right to put on evidence in one's defense is, the Court has frequently affirmed, not without limitation, but must instead "bow to accommodate other

41. Olden v. Kentucky, 488 U.S. 227, 230 (1988) (per curiam).

42. *Id*. at 231 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986)) (emphasis added).

43. *Id*. at 232 (emphasis added). Other courts have articulated the measure of an excluded piece of evidence in similar ways. *See, e.g*., White v. Coplan, 399 F.3d 18, 24 (2005) ("Factors that the Supreme Court has deemed relevant are the importance of the evidence to an effective defense, [and] the scope of the ban involved") (citing Davis v. Alaska, 415 U.S. 308, 319 (1974); *Van Arsdall*, 475 U.S. at 679). *See also* Montgomery v. Commonwealth, 320 S.W.3d 28, 33 (Ky. 2010) ("Exclusions have been found invalid where the probative value of the excluded evidence was substantial, [White v. Coplan, 399 F.3d 18, 24 (2005); Barbe v. McBride, 521 F.3d 443, 445 (4th Cir. 2008)], and where the trial court failed to consider its probative value, [Holmes v. South Carolina, 547 U.S. 319 (2006)], but they have been upheld where the probative value of the excluded evidence was deemed slight, [United States v. Pumpkin Seed, 572 F.3d 552, 558 (8th Cir. 2009)] . . ."); *see also* State v. Steele, 510 N.W.2d 661, 665–66 (S.D. 1994) (noting that for *Brady* purposes, the measure of materiality of withheld evidence has been stated as "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," and whether the withheld evidence would have had "a 'significant potential effect' on the jury's determination of . . . guilt or innocence.").

44. *Olden*, 488 U.S. at 231.

45. Again, the facts of *Abel* themselves suggest that bias does no more work than character and that indeed character may do far more work to undermine the witness who is the target of the impeachment. U.S. v. Abel, 469 U.S. 45 (1984).

legitimate interests in the criminal trial process."[46] Accordingly, any interest asserted by a defendant seeking to offer evidence that is presumptively barred by the rape shield statute would have to be demonstrably greater than those interests traditionally cited in support of that rule of exclusion. Rather than determining the value or weight of that defense interest by reference to its theory or category of relevance – bias versus character, for example – an appropriate assessment of whether a defense interest could withstand the challenge of other legitimate state interests should be made case by case, not categorically.[47] It makes little sense, for example, to say that a character theory of impeachment can never withstand a legitimate state interest in encouraging the reporting or prosecution of rapes. Yet the effect of the Supreme Court's decision in this area is to do just that. An array of examples makes this abundantly clear.

III. USES OF RAPE SHIELD EVIDENCE THAT MIGHT DESERVE CONSTITUTIONAL STATUS

A. Substantive Theories: Mens Rea as to Consent

In those jurisdictions in which the crime of rape requires proof not only of force and non-consent[48] but also some degree of mental culpability as to the fact of non-consent,[49] it is not hard to imagine a scenario in which evidence that touches on the prior sexual conduct of the complainant might support a defendant's claim that he in good faith and reasonably perceived the complaint to be a consenting participant in the sexual act.

Consider the facts of *United States v. Knox*,[50] in which the complainant and the accused worked together in the same shop at a U.S. air base in Japan. The accused testified that he entered a room where the complainant was engaging in sexual activity with a third coworker, and that he interpreted her "suggestive looks and motions" as an invitation to join them.[51] He sought to offer evidence that he had

46. Chambers v. Mississippi, 410 U.S. 284, 295 (quoted in Rock v. Arkansas, 483 U.S. 44, 55 (1987)).

47. *See* Michigan v. Lucas, 500 U.S. 145, 152–53 (1991); Rock v. Arkansas, 483 U.S. 44, 56–57 (1987).

48. *See, e.g.*, Mass. Gen. Laws ch. 265, sec. 22(b) (2018) ("Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury . . . shall be punished by imprisonment in the state prison for life or for any term of years.").

49. About half of American states, and the federal system, currently allow inquiry into the accused's mens rea as to consent as part of the proof of a charge of rape. *See* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977). Most often, this is articulated as a defense of mistake of fact, or a claim of reasonable belief, but it is in effect a mode of demonstrating that the state has failed to prove the necessary mens rea for the crime. *See* Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L & CRIMINOLOGY 815, 816 n. 6 (1996) (cited in Commonwealth v. Lopez, 433 Mass. 722, 728 (2001)). At least one state allows an exception to the rape shield rule of exclusion where the evidence goes to defendant's state of mind as to consent. The federal rule does not itself recognize this as an exception, although mistake of fact as to consent is a defense in some courts in which the Federal Rule applies, such as the U.S. Court of Military Justice. *See* United States v. Short, 4 C.M.A. 437, 447 (1954).

50. United States v. Knox, No. ACM 28628, 1992 WL 97157, at *1 (U.S.A.F. Ct. Mil. Rev. Apr. 20, 1992) aff'd, 41 M.J. 28 (Ct. Mil. App. 1994), cert. denied, 513 U.S. 1153 (1995).

been told that the complainant was a "bimbo" who liked to "party," and that she had engaged in various sexual acts in the presence of others that were the basis of the accused's (reasonable) belief that she, on this occasion, consented to sexual conduct with the accused.[52] While such evidence, if offered to prove actual consent, would not only tread into the forbidden area of propensity reasoning already barred by Rule 404(b)—that the complainant had consented to certain sexual acts in the past cannot be offered to prove that she is the kind of person who readily consents—it would also likely be excludable on strict relevance grounds. Most courts today would not permit a defendant to prove actual consent by proving previous sexual conduct, since a complainant may readily consent to and engage in all manner of sexual conduct without that tending to make it any more likely that she would therefore consent to sex on a particular occasion. Where, however, mens rea as to consent is required, an accused who contends that his hearing tell of certain prior sexual conduct of a complainant formed the basis for his genuine and reasonable belief that she would and did consent is evidence that he should, constitutionally, be entitled to present. Evidence of those prior episodes would then be probative on the question of whether or not the defendant had actually heard such stories.[53] Any such evidence on a question of the actuality or good faith of a defendant's belief would then be resolved by the jury, which would be free to disbelieve the defendant and therefore convict. Yet under the present regime in which this theory of defense is not considered to be constitutionally protected,[54] any rape shield evidence that might bear on the accused's state of mind regarding consent would have to be excluded.[55]

Whereas the traditional forbidden chain of inference that the rape shield statute was designed to preclude—that because a complainant in a rape case had had other sexual experiences in the past, she was likely consenting on the day of the charged

51. *Id.* at 5.

52. *Id.*

53. *See, e.g.*, U.S. v. James, 169 F.3d 1210, 1214 (9th Cir. 1999) (finding evidence in the form of court records demonstrated that the victim in a self-defense case had been criminally charged in several episodes of violence was relevant to support defendant's testimony that the victim had bragged to her about his conduct in those episodes, giving defendant an actual and good faith reason to fear him).

54. Montana v. Egelhoff, 518 U.S. 37, 51 (1996) suggests that in an appropriate case, the Court might be willing to assign constitutional significance to the mens rea element of a crime, and preclude conviction of an accused where such proof is lacking, but that remains only a possibility as of now. *See id.* at 38 (holding that "[a]lthough a rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to mens rea has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental"); *see also* In re Winship, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime); Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that a jury instruction which shifts to the defendant the burden of proof on a requisite element of mental state violates due process); Powell v. Texas, 392 U.S. 514, 535–536 (1968) (plurality opinion) ("The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.").

55. FED. R. EVID. 412.

episode[56]—relies on evidence of other sexual behavior to prove actual consent, the theory of mistake relies upon a different inferential chain: that even if the complainant was not in fact consenting, it was reasonable for the accused to believe that she was.[57] Pursuant to this theory, prior sexual conduct that could not permissibly be used to support an inference of actual consent (on a theory of propensity) might be highly probative on this theory of honest, reasonable belief.[58] Again, properly instructed, a jury would then be able to decide this critical question of fact.

Resistance to this line of argument is in part driven by judicial distaste for the merits of the defense of mistake of fact itself,[59] but if the defense is recognized as a matter of law, then proof of that defense must also be allowed.[60] That is the very definition of materiality.[61]

Moreover, to the extent that proof of mens rea approaches constitutional status, exclusion of such evidence becomes increasingly problematic. If mens rea is an

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56. *See* Harriet Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 808 (1986) (before the advent of rape shield laws, "[e]vidence that a complainant had engaged in sexual relations outside of marriage was admissible to establish unchaste character, from which the inference of consent on a particular occasion could be drawn"). A secondary, less common, inference from prior sexual conduct in trials prior to rape shield legislation was that a woman's (but not a man's) prior sexual conduct could be used to support an inference of character for untruthfulness. *See, e.g.*, State v. Sibley, 33 S.W. 167, 171 (Mo. 1895) ("It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman.").

57. *Compare* Commonwealth v. Lopez, 433 Mass. 722, 729 (2001) *with* People v. Williams, 841 P.2d 961, 966–67 (Cal. 1992) (recognizing actual consent and mistake as to consent as overlapping but distinguishable and resting on different evidentiary predicates).

58. Consider, for example, United States v. Knox, No. ACM 28628, 1992 WL 97157, at *2 (U.S.A.F. Ct. Mil. Rev. Apr. 20, 1992) aff'd, 41 M.J. 28 (Ct. Mil. App. 1994), cert. denied, 513 U.S. 1153 (1995), in which the defendant invited the complainant and her boyfriend to his room after a night of drinking, then engaged in sexual contact with the complainant believing, according to his testimony, that she had, by a gesture and a look, invited him to do so. The defendant sought to offer testimony that the complainant had a reputation for promiscuity and that he had seen her take off her shirt at a bar, as bearing on the issue of his belief that the complainant had consented to sex with him.

59. *See, e.g.*, *Williams*, 841 P.2d at 967 (upholding a refusal to instruct on mistake of fact in a rape case where the evidence of conduct that would support an instruction on mistake was not "equivocal"); Tyson v. State, 619 N.E.2d 276, 296–97 (Ind. Ct. App. 1993) (affirming trial court's refusal to instruct on mistake where the testimonies of complainant and defendant were radically different and there was no evidence of "equivocal" conduct that would support a mistake defense); *see also* Cavallaro, *supra* note 49, at 815 (1996) (arguing that courts have increasingly resisted and misunderstood the defense of mistake, adding requirements for giving an instruction on a mistake that are logically incoherent).

60. At least one state recognizes the logic of this distinction and includes this theory as the basis of an additional exception to its rape shield rule. *See* GA. CODE ANN. § 24-4-412 (2013) (permitting evidence of "past sexual behavior of the complaining witness . . . . if the court . . . finds that the past sexual behavior . . . supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of"). *But see* Johnson v. State, 246 S.E.2d 363, 364–65 (Ga. 1978) (rejecting defendant's claim that he should have been permitted to offer evidence that the complainant was not a virgin as a basis for such a reasonable belief, explaining that "[i]t is against just such reasoning (if she did it once, she did it again) that rape shield laws have been enacted").

61. FED. R. EVID. 401 requires that evidence tend to make more or less probable a fact that is of consequence to the determination of the action.

element of criminal punishment that is, if not constitutional, just short of constitutional, then it seems strange to suggest that generic policy concerns about witness embarrassment and the need to report rapes categorically trump proof of mens rea in all cases, irrespective of the facts. Yet the present rule strikes precisely that odd, categorical balance of interests.

B. Impeachment Theories

1. Character for Untruthfulness: Prior False Allegations of Rape

The theory of admitting evidence of prior false allegations of rape is that, just like any other past conduct that is probative of untruthfulness, such prior false allegations allow the jury to find that the complainant has lied in the past, therefore has an untruthful character and might therefore be untruthful when testifying about the facts of the charged episode.[62] Typically, if the complainant testifies, the cross-examination of her would be the examination within which such specific instances could properly be inquired into. So, it might be proper to ask the complainant if she had, for example, ever made false statements on a loan application,[63] and, on the same theory, she might properly be asked if she had ever falsely stated that she had been raped when in fact she had never had any sexual contact with the person previously accused. If the circumstances of a false allegation did not involve any *actual* sexual conduct, but were instead a whole cloth fabrication, then some courts have held that this impeachment would not constitute evidence of "other sexual behavior" and hence would not implicate the rape shield rule at all, so would be permitted subject only to 608(b) and general 403 constraints.[64] Accordingly, as the Massachusetts Supreme Judicial Court explained in *Commonwealth v. Bohannon*, with respect to the false allegation at issue in that case, "the proposed questions . . . in no way sought to elicit a response concerning the complainant's prior sexual activity or reputation for chastity," and the court did not, therefore, reach "any issues" related to the Massachusetts rape shield statute.[65]

A separate obstacle to the admissibility of such an episode of conduct probative of untruthfulness is that even those courts that have recognized that prior false allegations where there has been no sexual conduct should be admissible have set a sometimes impossibly high bar on the issue of the "falsity" of the prior allegation. The evidence of falsity should, since it is the basis for a question on cross-

62. FED. R. EVID. 608(b) ("Specific instances of conduct . . . may, on cross-examination, . . . be inquired into if they are probative of the character for truthfulness or untruthfulness of the witness").

63. FED. R. EVID. 608(b). Such an episode would plainly be "probative of . . . untruthfulness" within the meaning of the rule, although a judge might choose not to allow such questioning as a matter of discretion. *See* United States v. Crowley, 318 F.3d 401, 416–418 (2d Cir. 2003).

64. State v. Smith, 743 So. 2d 199, 202 (La. 1999) (holding that "defendant was not seeking to prove that the victim had engaged in prior sexual behavior or that she had an unchaste character" and that "[b]ecause the evidence defendant attempted to introduce did not concern the victim's prior sexual behavior" it should have been admitted).

65. Commonwealth v. Bohannon, 378 N.E.2d 987, 991 (Mass. 1978).

examination, theoretically be permitted at the very low bar of a mere good faith basis,[66] not the higher bar of evidence "sufficient to support a finding," which applies to proof of a condition when evidence is conditionally relevant,[67] or the still higher bar of preponderance of the evidence. Some courts have, however, imposed additional rigor in the inquiry into prior false allegations.[68] Indeed, courts have held that a prosecutorial decision not to bring charges based upon a complaint is an inadequate basis for permitting a question about that complaint,[69] as is a dismissal at a preliminary hearing for lack of probable cause.[70] Other courts have required that the defendant "establish [] to the satisfaction of the trial judge outside of the presence of the jury that there is a strong probability that the alleged victim's other statements are false,"[71] and that the prior allegation be adjudicated false,[72] which would presumably derive from a not guilty finding after trial. Thus one court refused to permit a question about a charge that was brought to trial and ended in a hung jury,[73] while another held that an acquittal after trial is inadequate to support a determination of "falsity" in order to propound such question,[74] leaving open the question of what the defendant's burden of proof would be as a prerequisite to being permitted to simply propound the question.[75]

Precluding the use of questions about prior accusations in the absence of a prosecutorial decision to charge or a jury verdict of guilt based on those accusations is a restriction well over and above that imposed by Federal Rule of Evidence 608(b) for specific instances probative of untruthfulness, and the imposition of such a threshold demonstrates further the general judicial hostility to the use of evidence of sexual behavior of the complainant.

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66. *See* Michelson v. United States, 335 U.S. 469, 481 (1948); United States v. Taylor, 522 F.3d 731, 736 (7th Cir. 2008) (citing United States v. Adames, 56 F.3d 737, 745 (7th Cir. 1995) (finding the trial court properly excluded questioning of a witness about murder where there was no good faith basis for the question)); United States v. Guay, 108 F.3d 545, 552 (4th Cir. 1997) ("A cross-examiner inquiring into specific instances of a defendant's misconduct must have a good-faith factual basis for such questions.").

67. FED. R. EVID. 104(b); Huddleston v. United States, 485 U.S. 681, 690–91 (1988).

68. *See, e.g.*, Bohannon, 378 N.E.2d at 987 (requiring that the prior allegation be adjudicated false).

69. Phillips v. State, 545 So. 2d 221, 224 (Ala. Crim. App. 1989) (holding that a decision not to proceed "does not represent a determination that the charge lacks legal or factual merit").

70. State v. Hutchinson, 688 P.2d 209, 213 (Ariz. App. 1984) (holding that "dismissal for want of probable cause could have been for reasons other than the insufficiency of the evidence presented.").

71. Barbe v. McBride, 521 F.3d 443, 455 (4th Cir. 2008).

72. Commonwealth v. Bohannon, 378 N.E.2d 987, 991 (Mass. 1978).

73. People v. Alexander, 452 N.E.2d 591, 595 (Ill. App. 1983) ("The intrinsic veracity of the complainant's allegations should not be confused with the inability of the State to meet its burden of proof for a criminal conviction").

74. State v. Schwartzmiller, 685 P.2d 830, 833 (Idaho 1984) ("A not guilty verdict, standing by itself, can never be taken to establish that the charges brought were based on false accusations, since one may not be convicted of a crime unless a jury finds beyond a reasonable doubt the guilt of the defendant").

75. People v. Weiss, 133 P.3d 1180, 1188 (Colo. 2006) (requiring that to invoke a rape shield hearing on the issue of whether a complainant can be questioned about a prior accusation, "defendant's motion must be accompanied by an offer of proof . . . sufficient to demonstrate, by a preponderance of the evidence . . . that the alleged victim made multiple reports of prior or subsequent sexual assaults that were in fact false").

Murkier situations arise, however, where there is an episode of other sexual behavior that the complainant has described as nonconsensual, but there is other evidence[76] that there was in fact consent. This would amount to a specific instance of conduct probative of untruthfulness (lying about whether the episode was indeed consented to), but would appear to be barred by the rape shield statute since any questions about it would elicit evidence of "other sexual behavior" and hence be prohibited unless expressly permitted.[77]

Yet this scenario—in which a complainant has in the past alleged that a sexual assault took place when there is evidence that the sexual conduct was instead consensual—provides perhaps the strongest instance of an impeachment through character for untruthfulness that the hierarchies of impeachment established by the Court would prohibit, even while allowing much more attenuated and perhaps far less probative evidence of impeachment through bias. A jury being asked to determine whether or not a complainant was lying about a sexual episode in which she consented and testified under oath that she had not consented would undoubtedly find it helpful to learn that there was evidence of identical conduct in the complainant's past.[78] Indeed, it must be acknowledged that such evidence could be at least as helpful as evidence that she had some relationship with the defendant or one of his friends or acquaintances that might cause her to accuse him of rape when she had consented to sex. Using the language of the Court in *Rock* and *Lucas*, such evidence could undoubtedly "permit a jury to form a significantly different impression of a witness's credibility" or "to draw inferences relating to the reliability of the witness."[79] Yet the theory of the impeachment—through character for untruthfulness, rather than through bias—dictates conclusively, according to decisions to date, that it is categorically ineligible to reach the jury since it is within the reach of the rape shield rule's exclusion and is not of constitutional stature.

Unlike the weighing approach set out in *Rock*,[80] which allows a court to consider the competing interests in admitting evidence and protecting some other policy represented by the applicable rule of exclusion, this categorical determination of inadmissibility of *any* character impeachment that touches on a complainant's prior sexual history (non-constitutional hence barred by rape shield) is plainly

76. A conflict in evidence about whether or not there was consent in a prior episode in which the complainant made an allegation should not preclude a determination that counsel has a good faith basis for inquiring about the accusation as one which is "probative of untruth."

77. FED. R. EVID. 412; *see, e.g.*, State v. Smith, 743 So. 2d 199, 202–03 (La. 1999). Whether the episode was consented to, in which case an accusation of rape is false and probative of the witness's untruth, or there was consent, in which case the accusation was accurate and not an appropriate subject for 608(b) cross examination, in either instance the question references "other sexual conduct" of the complainant and therefore falls within the prohibitory scope of Rule 412.

78. Similarly, one might expect that a conviction for perjury would be the most powerful tool of impeachment of a witness under FED. R. EVID. 609, since it is the identical conduct—lying under oath—in which the impeaching party proposes the witness is then engaging.

79. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) ("significantly different impression"); Davis v. Alaska, 415 U.S. 308, 318 (1974).

80. *See supra* text accompanying notes 29–39.

irrational, since it absolutely prohibits any such evidence no matter how probative or how likely it would be to persuade. It is hard to see how it would matter to a jury which theory of impeachment causes them to doubt or discount the testimony of a complainant/witness; far more important in their assessment of credibility would be the strength of the inference from the prior false allegation of rape to the present testimony, as compared to the strength or weakness of the alleged bias. Yet the Supreme Court's categorical approach gives this theoretical label dispositive weight and, in the context of rape shield material, makes one category absolutely admissible and the other absolutely inadmissible.

Nevertheless, courts have consistently resisted the effort to treat prior false allegations as they have treated bias impeachment, the exclusion of which would state a constitutional claim for violation of a defendant's Confrontation right. As the U.S. Court of Appeals for the Sixth Circuit explained in *Boggs v. Collins*, "[c]ourts after *Davis* and *Van Arsdall* have adhered to the distinction drawn by those cases and by Justice Stewart in his concurrence—that cross-examination as to bias, motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not."[81] In that case, the court described a "fine line[,]" on one side of which is a constitutional right to expose "witness bias or prejudice," and on the other is cross-examination "aimed solely to diminish a witness's general credibility[,]"[82] in which category they placed impeachment with a prior false allegation of rape.[83]

2. Contradiction

Impeachment by contradiction has the potential to be a powerful tool of impeachment, since it invites the jury to disregard or minimize the significance of a witness's testimony because they have learned that it is inaccurate in some respect. The maxim "*falsus in uno, falsus in omnibus*"[84] captures the impact on a witness of cross-examination about contradiction. As Wigmore wrote, "[t]he notion was that

81. Boggs v. Collins, 226 F.3d 728, 737 (6th Cir. 2001).

82. *Id.*

83. *Id.* at 738 (citing Hughes v. Raines, 641 F.2d 790, 793 (9th Cir. 1981)) (affirming exclusion of evidence and holding that it amounted to a defense request that the jury infer "that because the complaining witness made a false accusation of attempted rape on a prior occasion, her accusation in this case was false"); *see also* Hogan v. Hanks, 97 F.3d 189, 191 (7th Cir. 1996) (refusing to hold that "the longstanding rules restricting the use of specific instances and extrinsic evidence to impeach a witness's credibility pose constitutional problems").

84. The phrase translates as "false in one matter, false in all matters." *See* Enying Li v. Holder, 738 F.3d 1160, 1162 (9th Cir. 2013) (upholding doctrine); Siewe v. Gonzales, 480 F.3d 160, 170 (2d Cir. 2007) (holding that "a finding of fraudulent evidence redounds upon all evidence the probative force of which relies in any part on the credibility of the petitioner"); *see also* George Fisher, *The Jury's Rise As Lie Detector*, 107 YALE L. J. 575, 654 (1997) ("The rule of *falsus in uno, falsus in omnibus* held that a witness who lied about any material fact must be disbelieved as to all facts. As Thomas Starkie argued in his 1824 evidence treatise, the rule created an exception to the usual presumption that sworn evidence was true: 'The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional . . . .'") (quoting THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE § LXXXVII, at 524 (Boston, Wells & Lilly 1826)).

the testimony of one detected in a lie was wholly worthless and must of necessity be rejected."[85] Yet despite its potential impact on a jury's view of a witness's credibility, this mode of impeachment also does not enjoy the constitutional status of bias, and can be and is regulated by courts by application of the rape shield rule.[86] As with character evidence, limitations on the use of contradiction evidence are rooted not in the nature or particular gravity of the contradiction, but rather on the categorical status of the impeachment. Yet one can imagine areas of contradiction so significant that they raise major issues for the jury about a witness's credibility.

A handful of courts have considered instances in which contradiction of the witness is on a matter of a sexual nature and arguably requires reference to other sexual behavior, and have sought to balance the defendant's need for this testimony on cross-examination against the interests that undergird the rape shield statute. So, in *State v. Steele*,[87] the South Dakota Supreme Court held that it was reversible error for the prosecution to have withheld information demonstrating that that complainant in a rape case had chlamydia and had claimed and then retracted her claim that she contracted it from defendant.[88] In considering the materiality of such evidence under *Brady v. Maryland*,[89] the court concluded that "[t]he fact that [the accused] and his wife tested negative for chlamydia, while the alleged victim tested positive should have been given to the jury so that this could be weighed along with other evidence as they decided which version of the events was more believable."[90] The court noted that the complainant's "public accusation" together with her later offer of retraction "goes directly to her credibility" and that "this information may well have raised a reasonable doubt in the minds of jurors."[91]

In *Steele*, the court was using the *Brady* standard to determine whether the withholding of such evidence upon request stated a due process violation, rather than a confrontation clause violation. Nevertheless, the essential inquiry was as to the impact of the suppressed evidence. The court held that the complainant's testing

85. *See* Fisher, *supra* note 27, at 655 (quoting 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §1009, at 675 (3d ed. 1940)).

86. That is, where the matter that the witness is being contradicted on relates to other sexual conduct, then the rape shield rule would prevent that witness being questioned on it. This could include, for example, contradicting a witness's testimony that she was a virgin, Johnson v. State, 246 S.E.2d 363, 366 (Ga. 1978), or that she had acquired a sexually transmitted infection from the accused. *See* State v. Steele, 510 N.W.2d 661, 667 (S.D. 1994) (noting that "[i]f evidence was offered that the victim had chlamydia . . . the jury would become aware that the victim had been engaged in some prior sexual contact with a third person. However, this is not 'specific instances of victim's prior sexual conduct'" for purposes of the South Dakota rape shield rule) (citing SDCL 23A-22-15). In *Steele*, the court distinguished evidence of complainant's chlamydia from "specific instances of [complainant's] prior sexual conduct[,]" noting that the proffered evidence was "evidence that had direct bearing on the believability of the two versions of [the events.]" *Id.*

87. *Steele*, 510 N.W.2d at 667.

88. *Id.* at 664.

89. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment").

90. *Steele*, 510 N.W.2d. at 666.

91. *Id.*

positive for chlamydia when the accused had not would have had "a 'significant potential effect' on the jury's determination of the defendant's guilt." For *Brady* purposes, the threshold for the impact of the excluded evidence is fairly high, that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[92] Notwithstanding that the impeachment would not have been on a theory of bias, it is hard to see how this constitutional due process standard can be met by impeachment through contradiction while the same evidence would properly be excludable under *Rock*/*Lucas*, even as against the interests that underlie the state's rape shield rule. Moreover, the court's approach, which is predicated on recognition of the possibility that the impeaching evidence, whatever the theory of impeachment, might have affected the jury's view of the witness, is a significant camel's nose under the tent of the categorical approach to impeachment that courts generally follow.

3. Narrative Integrity or Res Gestae

An additional area of proof in which the ban on the use of rape shield evidence may impair a defendant's ability to put on a complete defense is captured under the somewhat vague heading of narrative integrity or res gestae.[93] It is not difficult to imagine scenarios in which the testimony of the complainant and the defendant are at odds, and the question for the jury is, essentially, why would a complainant consent to sexual conduct and then withdraw that consent or, alternatively, testify that she had done so. One possible explanation might arise from the defendant's crude or insensitive reference to other sexual behavior on the part of the complainant.

In *Stephens v. Miller*,[94] for example, the complainant testified that the defendant entered her trailer home without her permission while she slept, refused to leave when told to do so, and forced her onto the floor where he struggled to remove her clothing. She further testified that she screamed and pushed defendant off her and that he then fled to the nearby home of a friend.[95] According to the defendant's story, the complainant consented, and while they were engaged in a sexual act, the defendant said, "[d]on't you like it like this? . . . . Tim Hall said you did." He also claimed to have suggested switching sexual partners.[96] These portions of the defendant's testimony were excluded as referencing other sexual conduct of the complainant, barred by the relevant rape shield statute.[97] Yet without these explanatory portions of the narrative, the defendant's argument that complainant

92. *Id.* at 665 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

93. *See* Stephens v. Miller, 13 F.3d 998, 1003 (7th Cir. 1994) (describing the phrase res gestae as useless, harmful, and almost [incapable] of a definition and holding that "for purposes of the Constitution and federal law, the term res gestae is without significance").

94. *Id.* at 1000.

95. *Id.*

96. *Id.*

consented initially and then withdrew her consent and fabricated a charge of rape would be unlikely to persuade a reasonable jury. With them, in all their offensiveness, they might well have allowed a reasonable jury to conclude that the defendant's testimony was credible.

As with evidence that contradicts a complainant's testimony, evidence that contextualizes and frames otherwise implausible testimony (either of the defendant or the complainant) might well have "a 'significant potential effect' on the jury's determination of the defendant's guilt," raising "a reasonable probability," one sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different.[98] And, as with contradiction, there is no compelling reason to regard this mode of exculpation as *categorically and always* inadequate to override a state's interests as articulated in its rape shield rule.[99] Yet the Court's approach, which singles out bias as the exclusive theory that can ever be and indeed always is sufficient to trump those interests, places all other potentially exculpatory evidence, no matter how compelling in any individual case, in a constitutionally subordinate position.

CONCLUSION

While a rule of exclusion of other sexual behavior of a complainant in a rape case enjoys broad support for a host of reasons well and thoroughly examined, it is an entirely different question why certain theories of impeachment that require

97. *Id*. at 1003 (citing Ind. Code 35-37-4-4 (1994)) ("Stephens offers nothing, probably because nothing exists, to support his res gestae argument as a constitutional violation. In fact, the use of the term res gestae, for purposes of federal law, is essentially obsolete. The Federal Rules of Evidence, adopted in 1976, govern evidentiary questions in federal court, and, more significantly given the issue here, no court has ever held that res gestae is a concept with any constitutional significance.").

98. State v. Steele, 510 N.W.2d 661, 665 (S.D. 1994) (citing United States v. Bagley, 473 U.S. 667, 682 (1985)). The court in *Stephens* somewhat obtusely chose to regard the excluded evidence as a "generalized inquiry into the reputation or past sexual conduct of the victim," ignoring that the evidence was *not* offered to invite an inference that because complainant may have consented to certain sexual acts in the past, she was therefore more likely to have consented on the occasion at bar, but was instead offered on the very particular theory that defendant's malicious reference to those acts during an intimate encounter with the complainant might have caused her to react in the precisely the way that defendant testified she had. *See Stephens*, 13 F.3d at 1002. The court held that to permit the testimony that the trial court excluded "would effectively gut rape shield statutes" because "criminal defendants could always circumvent [them] by claiming they said something near in time and place to the alleged rape or attempted rape about the victim's past sexual history or reputation." *Id*. at 1003. This rationale does little to address the issue, and much to obscure it. A defendant might lie about any number of things in order to evade to reach of a rule of exclusion, but if a defendant wishes to offer testimony of words and/or conduct that occurred *during* a disputed sexual encounter, it seems plain that he should be permitted to do so lest the jury have a view of that encounter distorted by potentially significant omissions. Those words and conduct should not be categorically off limits because they might also permit the jury to infer that a complainant may have engaged in other, similar sexual conduct in the past.

99. In *Stephens*, the court identified the usual interests as superior to that of the defendant to present exculpatory and impeaching evidence, holding that "rape shield statutes . . . like Indiana's, represent the valid legislative determination that victims of rape and, as here, attempted rape deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Id*. (citing Michigan v. Lucas, 500 U.S. 145, 150 (1991)).

reference to or use of that evidence should enjoy constitutional status, while others do not. To date, the Court's explication of this distinction has been tautological and hence unsatisfying. The language of Rule 412 is not itself the problem: it simply incorporates the truism that the Rule must yield to the Constitution in appropriate cases, thereby embracing, for rape shield purposes, a hierarchy of impeachment that obtains much more broadly. It is time to reconsider that hierarchy, not only in trials of sexual assaults, but in any criminal trial.