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The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases

Cover Page Footnote

Richard Friedman Normal Garland Eileen Scallen David P. Bryden

THE CRIME BILL OF 1994 AND THE LAW OF CHARACTER EVIDENCE: CONGRESS WAS RIGHT ABOUT CONSENT DEFENSE CASES

Roger C. Park*

I.

The debate about receiving evidence of other sexual assaults to show a defendant's propensity will undoubtedly continue for a long time. The essential decisions will most likely be made in the states, where almost all sex crime cases are prosecuted. The Federal Rules of Evidence will be an important model, but if experience with rape shield legislation is any guide, states will not slavishly follow the federal model.¹ State prosecutors and members of the state criminal justice community will have their own ideas about what rules the states should adopt. Whatever the fate of the federal legislation,² reform will be advocated and resisted on its merits in the individual states, and the policy issues discussed below will arise time and again.

I believe that state reformers should wholeheartedly embrace the feature of Congress's recent reform package that makes evidence of other sexual assaults freely receivable in cases in which the accused raises a defense of consent.³ These cases include the

* Fredrikson & Byron Professor of Law, University of Minnesota. I am grateful to Richard Friedman, Norman Garland, Eileen Scallen, and of course David P. Bryden for his insights. I also thank my colleagues at the University of Minnesota Law School and at Hastings College of Law for their helpful comments when I discussed these ideas during faculty presentations, and to the participants in the Internet debate on the Evidence list. I invite readers to send comments to me at the University of Minnesota Law School or by email to parkx003@maroon.tc.umn.edu.

1. The variegated approach of state legislators to rape shield rules is amply documented in Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986).

2. I am referring to the Evidence provisions of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong., 2d. Sess. (1994). [hereinafter the Crime Bill].

3. Specifically, I favor providing that when the defendant raises a defense of consent to a charge of sexual assault, prior acts of nonconsensual sexual assault by the defendant be admissible in evidence. The question whether a defendant's previous sex offenses should automatically be received in evidence in cases involving allegations of child sexual abuse is beyond the scope of this Essay.

I do not favor allowing free proof of prior sex offenses in adult "stranger rape" cases where the defense is misidentification. Allowing free proof of propensity to rape in stranger rape cases would create a startling anomaly in the law of evidence. It

“acquaintance rape” cases of which the celebrated William Kennedy Smith case is the archetype.⁴

Common sense tells us that evidence of propensity to rape has probative value. If a college student were deciding whether she would be wise to accept an invitation to drive cross-country with a certain male student, no one would say that she would be unreasonable to take into account evidence that the male student had raped other women. The case against receiving character evidence is based not upon denial of its basic relevancy, but upon fear that the jury will give the evidence too much weight, will punish the defendant for the other crimes, or will play fast and loose with the reasonable doubt standard. I am more of a skeptic about these arguments than many of my colleagues. I particularly doubt that personality theory and attribution error research throw much light on the subject,⁵ and I do not find fireside inductions about the way jurors may use the character evidence to be compelling one way or the other. Giving respect to tradition and credence to the legitimate fears that lie behind the character evidence rule, however, I still think that rape cases involving a defense of consent deserve to have the benefit of the categorical rule of admissibility—a rule that simply lets in evidence that the defendant attempted or committed other rapes, whether or not there was some further “similarity” between the present rape and the others.

When a rule of exclusion flies in the face of common sense and is based on dubious generalizations about the danger of misdecision, it does not take much to justify an exception that will let the trier hear more of the relevant data. There is more than ample justification for making an exception in rape cases where the defense of consent is used, for three separate reasons:

would mean that in stranger-on-stranger rape cases, evidence of other rapes would be freely admissible to show propensity to rape, but that in stranger-on-stranger robbery, murder or mayhem cases, evidence of other crimes would not be admissible to show propensity to rob, murder or assault. Nothing in common sense or systematic study justifies that distinction. For discussion, see David P. Bryden and Roger C. Park, “Other Crimes” Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 572-74 (1994) [hereinafter *Other Crimes Evidence*].

4. See generally Timothy Clifford, *Smith's Case Promises to be a Landmark*, NEWSDAY, Oct. 29, 1991, at 6; see also *Smith Trial Offers Mixed Message about Date Rape*, USA TODAY, Dec. 12, 1991, at 10A.

5. For further discussion, see *Other Crimes Evidence*, *supra* note 4, at 561-65. See also LEONARD BERKOWITZ, *AGGRESSION: ITS CAUSES, CONSEQUENCES, AND CONTROL* 127-59 (1993) (arguing that there is considerable cross-situational stability of aggressive behavior).

1. *There is no "round up the usual suspects" danger*

Were there no rule excluding character evidence, the authorities might be more tempted than ever to just "round up the usual suspects" when looking for a perpetrator.⁶ After showing the suspects, or their photos, to the victim and eliciting an identification, the authorities might not look hard for further evidence, not pursue other leads, and not do DNA or other forensic tests. They might trust that the trier would believe the identification testimony, even if otherwise somewhat questionable, when it is bolstered by testimony that the accused had committed other sex crimes. The specter of conviction based solely upon the combination of eyewitness identification of a stranger and evidence of the stranger's criminal history should give even the most fervent proponent of free proof some pause. Moreover, the defense might not be able to demonstrate that there was a link between the prior crimes and the fact that the defendant came under suspicion for this crime. The jury, thinking it unlikely that the victim would by chance identify an innocent person who just happened to have a record for the same offense, might give the evidence more weight than it deserved. If it did, the justice system would be convicting a person who was innocent of *that* act, while at the same time allowing the true perpetrator to go free and prey on others.

In contrast, in consent defense cases, the accused does not dispute that he had sexual contact with the complainant. There are not any DNA tests to conduct or other suspects to pursue. There is no danger that letting in character evidence will detract from the development of better evidence. These cases often boil down to a credibility contest between the victim and the defendant. Aside from the testimony of those two people, the uncharged misconduct evidence is likely to be the best evidence available. Moreover, the only danger of misuse of the evidence is the danger of a false positive (convicting an innocent person). There is no danger that another person who actually committed the crime will go free.

Of course, consent defense cases are not the only possible cases that can reduce to a credibility contest between the complainant and the defendant. Such a contest might occur, for example, in a drug case where the defendant testifies that he did not sell drugs to the informer on the day charged, and the police have no evidence other than the informer's uncorroborated testimony. But here the

6. See, e.g., RICHARD O. LEMPert & STEPHEN A. SALTzBURG, A MODERN APPROACH TO EVIDENCE 211-212 (1977).

police can take precautions, for example, by searching the informer and making sure that the informer has no drugs on him before encountering the defendant, and by having the informer use marked money in making the purchase. There is no feasible way to plan "stings" in rape cases,⁷ and there is often no way to gather evidence to corroborate the victim after the fact.

2. *The regret matrix needs to be re-set*

Opponents of the use of propensity evidence fear that it will have the practical effect of changing the burden of proof.⁸ The jurors may think, "Now that we know what else this guy did, we're not going to worry as much as Blackstone would about convicting an innocent man. Sure, it's better to let ten guilty men go free than to convict an innocent man in the case where the man's really completely innocent. But here, he's not completely innocent—he has done it before. So we're not going to give him the benefit of the doubt if we think he's probably guilty."

This point has been expressed in terms of decision theory. Jurors will seek to minimize their expected regret over reaching incorrect decisions. They will weigh the regret they expect from a conviction against the regret they expect from an acquittal. Jurors will anticipate less regret over wrongfully finding the defendant guilty if they believe that the defendant committed other crimes.⁹

That may be a valid point, but if lawmakers are going to base legal rules upon the danger that jurors will disobey instructions about reasonable doubt, they ought to take into account the idea that those instructions can be disobeyed in more than one way. Jurors also can have a higher than optimal level of expected wrongful-conviction regret. If in acquaintance rape cases jurors are likely to act on conceivable doubts that are not really reasonable doubts, then re-setting their regret levels can give them a more appropriate

7. As with every other statement about the legal system, this one has exceptions. For an account of a "sting" operation on a dentist whose modus operandi involved sexually assaulting patients under anesthesia, see LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 159-62 (1993).

8. Like several of the arguments to which I respond in this Essay, this argument was advanced by one of the participants in an Internet discussion among Evidence scholars that occurred in September and October, 1994. Because of the informal nature of the discussion, and because I am not sure that the remarks by the participants represented their final views on the subject, I have not quoted them directly. However, the archives of the discussion may be viewed by sending the text message "Index EVIDENCE" to listserver chicagokent.kentlaw.edu.

9. See Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032-41 (1977).

attitude toward reasonable doubt. There is good evidence that jurors are prejudiced against the prosecution in consent defense cases.¹⁰ The admission of evidence about the defendant's prior sexual assaults may therefore push jurors closer to the right standard of proof.

To use a numerical hypothetical, suppose that lawmakers believe that having ten rapists go free for every innocent defendant convicted is the appropriate price to pay in order to strike the proper balance. Suppose also that they believe that jurors are favoring rape defendants too much, and improperly letting one hundred rapists go free for every innocent person convicted. In response, the lawmakers decide to expose the jurors to influences that will cause them to use the right standard of proof. They try judicial instructions; that doesn't work. They try giving the jury evidence about prior rapes by defendants; that does work. Jurors may use the appropriate proof standards in cases where there is prior rape evidence. Would letting in the extra evidence be wrong?

It seems to me that the argument for allowing other rape evidence in consent defense cases ought to prevail if either (a) the jury would make the same kind of appropriate, nonprejudiced use of the evidence that the ideal trier would make of it, or (b) the jury would use the evidence in a way that the ideal trier would not use it, but the evidence nevertheless would cause the jury's criteria for reasonable doubt to be closer to the optimal criteria than it otherwise would be. The counterargument ought to prevail only if the evidence would cause jurors to change their proof standards *and* the change would not be an improvement.

3. *There is a need to re-adjust the level of victim ordeal*

Even with the protection of rape shield laws, victims of rape must endure an unusual second ordeal when the accused presents a consent defense.¹¹ The defense will likely investigate the complainant's sexual history and attempt to put in evidence about it. That

10. See HARRY KALVEN, J. & HANS ZEISEL, *THE AMERICAN JURY* 249-57 (1966) (describing judge-jury disagreement in cases in which jurors acquit because of "contributory negligence" of the victim); see also GARY LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 200-28 (1989) (describing prejudicial impact on jurors, in consent defense and no-sex defense cases, of conduct of the victim that falls outside her "gender role").

11. For examples of ways in which a consent-defense rape trial can be an ordeal for the complainant even if the defendant does not seek to introduce sexual history evidence, see ZSUZSANNA ADLER, *RAPE ON TRIAL* 88-112 (1987). See also FAIRSTEIN, *supra* note 8, at 137-54.

process can be intrusive and embarrassing even if the judge excludes the evidence in a pretrial hearing. The defense will also try to show that the victim is lying. A defense counsel who ordinarily would prefer to try to show that a crime victim is honestly mistaken rather than lying is, in a consent-defense rape case, forced to attack the truthfulness of the victim. The need to make that attack will lead to a search for evidence (sexual or not) that portrays the victim as a liar. The defense will also try to show that the victim provoked the sexual event. It may try to portray her behavior just before the rape as brazen, or her clothing and manner as provocative. In addition, the defendant may seek a psychiatric examination or psychiatric records in an attempt to impeach the victim's credibility as a witness.¹² In some jurisdictions the defense would be allowed to put in expert testimony of absence of rape trauma syndrome to cast doubt upon the victim's veracity.¹³ In short, the defense will try to cast the victim in the role of a solitary, mentally unstable woman who behaved irresponsibly and provocatively, and who is now lying under oath.¹⁴

One approach to reducing victim ordeal is through the exclusion of evidence that embarrasses the victim. We may, however, be approaching the limits of that approach. Due process requires that the defendant be allowed to question the veracity of the victim and to put in evidence of her behavior with the accused.¹⁵ Another approach is to allow the victim to have the support of other women who testify that they have had the same experience with the defendant. That is an approach that does not restrict the evidence that the jury will hear or result in the exclusion of evidence that a rational fact-finder would want to consider.

I suppose that there is some value to having a *degree* of ordeal for rape complainants. Otherwise, it would be too easy to make

12. See, e.g., *Mosley v. Commonwealth*, 420 S.W.2d 679 (Ky. 1967) (error to exclude defense psychologist's testimony about victim's mental instability).

13. Usually the defense testimony will come in response to testimony by a prosecution expert, but at least one case supports admitting defense evidence of absence of rape trauma syndrome even when the prosecution produces no expert testimony. See *Henson v. State*, 535 N.E.2d 1189 (Ind. 1989) (holding it was an error to preclude defense psychologist from answering question about whether a person who had been raped would go back to same place to socialize, drink and dance on the same day as the alleged act).

14. While victims of crimes committed by strangers also have a courtroom ordeal, it is comparatively tolerable. A defense based on mistaken identity, for example, will respect the autonomy, privacy and veracity of the victim, merely trying to show that she made a human mistake that is understandable in light of the severe stress accompanying the crime.

15. *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam).

false claims. Without such an ordeal, the jury might also be less willing to believe victims who had true claims. The inference that the victim would not have gone through the ordeal unless the rape had actually occurred could no longer be argued in the jury room. The system, however, has a comfortable latitude to reduce the ordeal before it reaches the optimal level.

II.

A.

In Part I, I suggested reasons why consent defense cases are different enough from other criminal cases to justify admitting evidence of propensity to rape. Now, in Part II, I will respond to a quite different argument, the argument that admitting propensity evidence about the accused in a rape case is inconsistent with excluding propensity evidence about the victim.

Some critics have asserted that admitting evidence about the other crimes of the accused is inconsistent with the policy of the rape shield rule.¹⁶ They assert that it is wrong to say that the victim's prior history of consent with others is inadmissible to prove consent in the present case, but the defendant's history of rape with others is admissible to prove rape. There are several good answers to this argument.

First, rape shield laws are not only designed to protect against jury misdecision. They are also aimed at goals outside the courtroom. Rape shield laws are designed to protect victims from embarrassment in order to encourage them to report rape. This encouragement rationale does not apply to evidence of prior sexual history of the defendant because revealing that evidence would not suppress conduct that society wants to promote.

Also, victims have a legitimate privacy interest in keeping facts about their (noncriminal) sexual history secret. A defendant who previously committed a serious sex offense does not have the same interest in maintaining secrecy. That is, his personal interest in maintaining the secrecy of his criminal act is not one that society need to accept as valid.

Finally, evidence about a victim's sexual history is less probative than evidence about the defendant's prior sex offenses because the victim evidence cuts both ways. If the victim frequently consented to casual sex, that fact tends to show, however slightly, that she is more likely to have consented to casual sex on a particular occa-

16. This argument was raised in the Internet debate. *See supra* note 9.

sion than another woman who never consents. It also tends, however, to show that she does not readily make accusations of rape.¹⁷ Otherwise, why didn't she accuse one of her many other partners of rape? The defendant's history of other rapes does not cut both ways. It simply tends to show that the defendant is a rapist who is more likely to be guilty in this case than he would be without the evidence.¹⁸

While I think that the rape shield evidence is distinguishable, I do not mean to say that victim history can never be worthwhile evidence. There are some situations in which I would admit it even though it does not fall into any of the narrow categories specifically set forth in Rule 412.¹⁹ Suppose that a rape prosecution arises from sexual intercourse that occurred on the pavement of a parking lot on a cold rainy night. The jury is likely to think that the complainant would not have consented because of the circumstances. Evidence that she had consensual intercourse with another man on the same pavement earlier in the evening, however, leads to inferences that help the defense more than the prosecution, even if she did not claim rape on the earlier occasion. Evidence of prior consensual conduct does not lead to inferences that are equally helpful to both sides in every conceivable situation. However, it *usually* cuts both ways and is *usually* useless, and that

17. See *infra* note 19.

18. One of the Internet correspondents found a clever way to make the prior rape evidence cut both ways. He argued that if the accused committed the previous rape in a different fashion from the charged rape, then the other crimes evidence also led to two inferences—one that the defendant has again committed a sex offense; the other is that the defendant did not commit this offense because it is not his usual *modus operandi*. While the correspondent did find a way to make the prior rape evidence cut both ways, I do not think that the second inference he argued for is very compelling. If a woman goes from having consensual sex without claiming rape to having consensual sex and then fabricating a rape claim, she has made a rather drastic change in her behavior. When a man goes from committing one kind of rape to committing another type of rape, it seems to me that he has not made such a drastic change. Suppose in a world with no evidence rules a perfectly rational trier of fact was undecided about whether the defendant's guilt has been proven beyond a reasonable doubt. Then the trier heard additional evidence that (a) the alleged victim consented to sex with another man (but without claiming rape) and (b) the defendant raped another woman (but using a different method). Should the trier say to herself, "here are two equally worthless pieces of evidence?"

19. See FED. R. EVID. 412. When the evidence is of sex with someone other than the accused, offered for some purpose other than showing source of semen, injury or other physical evidence, the only out that Rule 412 leaves to the defense is its redundant provision that if the Constitution requires that the evidence be admitted, then it must be admitted.

is all that is needed for a rule that excludes it in all but exceptional cases.²⁰

B.

Other critics have complained that the Crime Bill would let in unsubstantiated allegations. The Leonard-Kirkpatrick letter²¹ states the criticism this way:

The new rules open the door broadly to evidence of past sexual offenses. They are not limited to past convictions or even to events that the judge finds by a preponderance of evidence occurred. Mere allegations of past sexual offenses appear to be made admissible, even if they are unsubstantiated, uncorroborated, and even if the charges are made for the first time at defendant's trial. The court may be required to admit the allegations even where the judge personally believes them to be false.

The letter expresses a legitimate fear, to which I have two responses.

My first, and admittedly somewhat speculative, response is that the danger may be overstated because "kitchen sink" evidence can hurt the prosecution more than the defense. A number of trial lawyers subscribe to "sponsorship" theory under which a case is only as strong as its weakest link.²² The theory is that jurors hold lawyers responsible for the witnesses they present. If the prosecution puts on a weak witness, then the jury will assume that the prosecutor thought that the case was not good enough without the

20. See *supra* note 9.

21. Letter of October 12, 1994 to Judge Ralph K. Winter, Jr. This letter was prepared under the leadership of David P. Leonard of Loyola-Los Angeles School of Law and Laird Kirkpatrick of the University of Oregon Law School, and was signed by twenty law professors.

22. See ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS 30-31 (1990). The authors believe that when an advocate presents a strong witness and a weak witness, the jurors are likely to infer that the advocate felt that he or she needed the inferior evidence in order to win. The authors argue that,

[T]he weight given to an advocate's superior evidence will be influenced by any inferior evidence that he introduces. In general, the introduction of inferior evidence reduces the probative impact of the advocate's other, superior evidence. For example, when an attorney puts on a strong witness and a weak witness on the same point, the jury is likely to conclude that the attorney himself was not sufficiently convinced by the strong witness and felt compelled to produce additional evidence to make his case. In short, the advocate who uses inferior evidence risks that the consideration of his superior evidence will be significantly prejudiced.

Id. at 31.

witness—there must be something wrong with the rest of the prosecution's case, otherwise why would the weak witness be needed? Though it has anecdotal support, the theory has not been extensively studied using the methods of social science.²³ At any rate, I think that alarm over the prospect of junk rape testimony can be tempered somewhat by the possibility that if the prosecution puts on an unnecessary witness who is not credible, then the tactic might well backfire.

My primary response, however, is that the proposed standard would create an anomaly by applying a more stringent proof rule to rape cases than is applied in other cases. These other cases involve other crimes evidence under Rule 404(b) for purposes other than showing propensity.²⁴ Other crime and bad act evidence frequently finds its way into the prosecution's case through this route. For example, when a defendant is accused of receiving stolen goods and denies knowing that they were stolen, this evidence is admitted to show knowledge. When the defendant denies intent to sell in a drug case, other drug offenses are often admitted to show intent.²⁵

23. I know of only one study, Kipling D. Williams, Martin J. Bourgeois, and Robert T. Croyle, *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 *LAW AND HUMAN BEHAVIOR* 597 (1993), that examines one of the Klonoff-Colby hypotheses. However, it deals with the quite a different issue than the one that is relevant here. The study examined whether Klonoff & Colby might be wrong in saying that defense counsel would be better off letting the prosecution bring out prior convictions on cross-examination rather than "stealing thunder" by bringing them out on direct examination. As for the hypothesis of interest here—that a weak witness can spoil the rest of the case—an experiment in which I participated is suggestive. We found subjects were *less* likely to convict when they were exposed to a scenario that added pro-prosecution hearsay evidence to pro-prosecution eyewitness testimony than when they were exposed to the very same pro-prosecution eyewitness testimony by itself. However, the experiment was not designed to test the Klonoff-Colby hypothesis and it may not be generalizable to rape evidence. For accounts of the experiment, see Peter Miene, Eugene Borgida, and Roger C. Park, "The Evaluation of Hearsay Evidence: A Social Psychological Approach," in N. JOHN CASTELLAN, JR., *INDIVIDUAL AND GROUP DECISION-MAKING: CURRENT ISSUES* 151-66 (1993); Peter Miene, Roger C. Park, and Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 *MINN. L. REV.* 683 (1992).

24. FED. R. EVID. 404(b) in pertinent part provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

25. See, e.g., EDWARD J. IMWINKELREID, *UNCHARGED MISCONDUCT EVIDENCE* § 4:11 (1984); *Huddleston v. United States*, 485 U.S. 681 (1988) (receiving stolen

Under current federal law, other crimes allegations that fit a 404(b) category are admitted if they meet a very minimal standard of proof: if a reasonable jury could find that the accused was the author of the other crimes or bad acts, the proof requirement is satisfied, whether the judge believes the crimes or bad acts occurred or not.²⁶ I see no reason to treat rape evidence differently, or to think it is any more likely to be fabricated. After all, the other rapes situation is one in which evidence of other crimes will almost invariably consist of something better than the usual testimony of accomplices, informers and persons bargaining for leniency.

Perhaps it is a good idea to have a clear and convincing standard for all other crime and bad act evidence, so long as one considers all incidents together in making the preliminary determination whether any particular incident occurred. Lawmakers should not, however, single out other-rape evidence and exclusively apply an enhanced-proof requirement to it.

C.

Another evidence-list correspondent²⁷ raised the argument that the Crime Bill's approach conflicts with the policy of Rule 609 of the Federal Rules of Evidence.²⁸ As he pointed out, character evidence is admissible by reason of Rule 609 only when the defendant takes the stand; evidence offered under Rule 609 may be excluded under a balancing test (unless the crime involves dishonesty or false statement), and the evidence is admissible only for impeachment purposes (a limiting instruction must be given). The correspondent also noted that under the Crime Bill's proposed rules, the evidence would come in even if the defendant did not take the

goods); *United States v. Adrian*, 978 F.2d 486, 492 (9th Cir. 1992) (intent to distribute drugs).

26. *Huddleston*, 485 U.S. at 689.

27. *See supra* note 9.

28. Rule 609, Impeachment by Evidence of Conviction of Crime, reads:

(a) General rule. —For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. Fed. R. Evid. 609(a).

stand; the judge would have no authority to exclude after balancing prejudice against probative value, and there would be no limiting instruction telling the jury to use the evidence only for impeachment.²⁹

All of that is true, but the comparison of Rule 609 to the Crime Bill's approach to other rape evidence is far-fetched. The probative value of other crimes evidence to *impeach* an accused who is defending against a serious offense is extremely low.³⁰ So it is not surprising that Rule 609 is hedged with restrictions.³¹ Evidence of a prior rape to show propensity to commit rape has much greater probative value than evidence of a prior crime used to show propensity to lie, because just about anyone would lie on their own behalf to avoid conviction of a serious offense. The fact that Rule 609 has restrictions is a not a strong argument for placing restrictions on other rape evidence used to show propensity to rape.

If Rule 609 is pertinent to this debate at all, it is because it provides an *a fortiori* argument to the proponents of free proof. If evidence of such little value as that allowed under Rule 609 is admissible to cast doubt on character for truthfulness, then surely evidence of prior rapes to show propensity to rape should be admitted. On this point, I will leave the reader with a comparison inspired by an article by Professor Richard Friedman.³² The first paragraph below is an example of the odd inference ostensibly involved in an unquestionably admissible (in fact, mandated) form of character evidence—impeaching the credibility of the accused with evidence that the accused had been previously convicted of a felony involving deceit. The second describes the reasoning that would be involved in using a single prior instance of rape.

i.

At first I thought it was very unlikely that, if Defoe committed robbery, he would be willing to lie about it. But now that I know he committed forgery a year before, that possibility seems substantially more likely.

29. *Id.*

30. For a persuasive argument on this point, see Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!/?] Analysis and A Proposed Overhaul*, 38 U.C.L.A. L. REV. 637, 655-64 (1991).

31. See Fed. R. Evid. 609(a), *supra* note 8.

32. See FRIEDMAN, *supra* note 31, at 655-64. The first "Defoe" paragraph comes from the prologue to Professor Friedman's article. He sets it forth to evoke the faulty reasoning behind the conventional justification for allowing impeachment of a criminal defendant with prior convictions.

ii.

When Julia first told me Defoe had raped her, I thought it very unlikely. But now that I know he raped another woman a year before, that possibility seems substantially more likely.

Which reasoning is more persuasive?

