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Sliding Backwards: The Impact of California Evidence Code Section 1108 on Character Evidence, Rape Shield Laws and the Presumption of Innocence

Celia McGuinness*

The last twenty years have seen striking changes in the law of character evidence in criminal trials. For hundreds of years, common law prohibited the use of character evidence against a defendant in a criminal trial. It was believed that although character evidence may be relevant, it was so prejudicial that its introduction would deny the defendant a fair trial. When a woman complained of rape, however, common law allowed the defendant to use her sexual character against her. It was considered relevant to show her “character for unchastity,” i.e., “her propensity to engage in consensual sexual relations outside of marriage.”

In the 1970s, rape shield laws dramatically changed that position. These laws prohibited the use of a rape complainant’s sexual history except under limited circumstances. The laws protected women and re-focused the case on proving the defendant’s guilt rather than proving the complainant’s morality.

In 1995, another dramatic change occurred. California, following the federal system’s lead, enacted section 1108 of the California Evidence Code. It enables prosecutors to use a defendant’s history of sexual bad

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1. See generally 1 B.E. WITKIN, CALIFORNIA EVIDENCE § 334 (3d ed. 1986) (discussing the universal rule against character evidence).
2. See id.
4. Id. at 765-66.
5. See CAL. EVID. CODE § 1103(c) (West 1995); CAL. EVID. CODE § 782 (West 1995). All subsequent statutory references are to the California Evidence Code, unless otherwise stated.
acts to show his propensity to commit a sex crime.\textsuperscript{8} Never before has character evidence been admitted to show that the defendant is the kind of person who would commit the crime with which he is charged. As with rape shield laws, the stated purpose of this change was to aid victims of sexual assault.\textsuperscript{9} In actuality, the law does great injustice both to complainants and to defendants in sex crime cases.

The law eliminates the protection against conviction for who you are, not what you did. It makes any evidence of any prior sex crimes admissible.\textsuperscript{10} It places almost no limit on the nature of the prior act which may be used.\textsuperscript{11} It requires no similarity to the offense charged.\textsuperscript{12} The prior act need not have resulted in a conviction or even an arrest.\textsuperscript{13} A mere allegation is enough.\textsuperscript{14} The evidence may be used in the prosecution’s case in chief; the prosecutor need not wait until the defendant raises his good character.\textsuperscript{15}

Section 1108 also endangers the advances made by rape shield laws for complainants in sex crimes. Although section 1108 is intended to aid victims of sex crimes, it reflects an attitude which rape shield laws were supposed to have squelched: the attitude that a woman’s credibility is insufficient to sustain a criminal complaint. Moreover, it endangers the rape shield laws themselves. The constitutional infirmities inherent in section 1108 may undermine the protections of rape shield laws upon which women have come to rely. The dramatic changes in the law of character evidence will, in this case, turn out to be a step backwards.

This article first explains the nature and goals of laws prohibiting the use of character against the defendant. Part I and II describe how rape shield laws provided similar protections to complainants in sex crimes. Part III describes section 1108, which explicitly allows character evidence against a defendant in almost every sex-related crime. Part IV points out how the new law is a step backwards in protecting women. It emphasizes the risk that the statute will cause innocent people to be convicted. Finally, it demonstrates how section 1108 violates the constitutional principles of fundamental fairness and reciprocity, which may weaken the rape shield laws we now take for granted.

\textsuperscript{8} See id.
\textsuperscript{9} See ASSEMBLY COMM. ON PUBLIC SAFETY, COMM. REP., A.B. 882, 1995-96 Reg. Sess. 3 (Cal. 1995) [hereinafter PUBLIC SAFETY REPORT].
\textsuperscript{10} See CAL. EVID. CODE § 1108.
\textsuperscript{11} See id.
\textsuperscript{12} See id.
\textsuperscript{13} See id.
\textsuperscript{14} See id.
\textsuperscript{15} See id.
I. THE COMMON LAW DISPARITY: THE USE OF CHARACTER EVIDENCE WAS PROHIBITED AGAINST DEFENDANTS BUT ADMITTED AGAINST COMPLAINANTS IN SEX CRIMES

A. DEFENDANTS

Character evidence means evidence of a person’s moral character: the propensity to do something because of the kind of person one is. 16 Before section 1108 was enacted, the prohibition against the prosecution’s introduction of character evidence in its case in chief was “the universal rule.” 17 If prior crimes evidence was admitted, “[t]he prosecutor could not argue, nor could the court instruct, that the jury could consider such evidence to prove the defendant’s character (as opposed to some valid, non-character purpose), let alone that proof of the defendant’s character could be used to prove the defendant’s guilt in the current offense.” 18

The exception was codified in Evidence Code section 1102, which provides that evidence of the defendant’s character is admissible only if offered by the defendant or the prosecution to rebut character evidence offered by the defendant. 19 The prosecution may not introduce the defendant’s character in its case in chief.

Character evidence is excluded because of its inflammatory effect on juries. 20 Witkin states: “[s]uch evidence is some indication of the likelihood of [the defendant’s] guilt and is therefore relevant, but it would be highly prejudicial in its tendency to draw the attention of the jury away from the evidence dealing with the crime charged.” 21 One aspect of the

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16. See Witkin, supra note 1.
17. Id.
18. Albert J. Menaster, The Floodgates Have Opened, 23 CAL. ATT’YS FOR CRIM. JUST. F., 1996, at 44. California allows the admission of prior bad acts against a defendant if relevant to prove some disputed issue in the case. Evidence Code section 1101(b) allows it for motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, “or whether a defendant in a prosecution for an unlawful sexual act or an attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented . . . .” CAL. EVID. CODE § 1101(b) (West 1995). Of course, courts have the discretion to exclude the evidence if it is more prejudicial than probative. See CAL. EVID. CODE § 352 (West 1995). Recently, the courts have expanded the rules to broaden the circumstances in which such prior crimes evidence is admissible. See People v. Balcom, 7 Cal. 4th 414, 422 (1994); People v. Ewoldt, 7 Cal. 4th 380, 404 (1994). The practical effect has been to make almost all prior bad acts admissible against a defendant to prove some point at issue. Since intent is almost always at issue, it has become very easy for prosecutors to use a defendant’s prior act to show his intent in the new offense. The proscription against using prior bad acts explicitly to show character remains, however.
19. CAL. EVID. CODE § 1102 (West 1995).
presumption of innocence is the fundamental axiom that the accused must be tried only for what he did, not for who he is.\textsuperscript{22}

As will be argued below, evidence of the defendant's past acts may prove little or nothing about his propensity to commit the current crime. The proof of whether someone committed a crime lies in the evidence of the incident itself, not in whether he is the kind of person who might be capable of committing a crime. The danger of character evidence is that it distracts the jury from judging the real, physical, direct and circumstantial evidence of a crime, and instead leads to a judgment of the defendant himself. In my practice, I have seen that jurors' verdicts may, consciously or subconsciously, turn on whether or not they liked the defendant. Jurors may acquit, not from an overt desire to excuse someone they like, but rather from the natural inclination to be more skeptical of evidence against a person whom they consider worthy of protection. In the minds of jurors, the legal presumptions of innocence and the burden of proof beyond a reasonable doubt are often construed more strictly in favor of a person who is considered a good person, or at least, not a bad one.

B. COMPLAINANTS

Although character evidence against defendants has always been excluded, the character of a woman who complained of sexual assault was traditionally fair game.\textsuperscript{23} A woman's character for sexual conduct was considered highly relevant and probative of two things: her likelihood to consent to sex and her character for truthfulness in general.\textsuperscript{24} A woman who said yes to sex before was considered likely to say yes again.\textsuperscript{25} A woman who was sexually experienced had loose morals and, therefore, was generally considered less credible.\textsuperscript{26}

Naturally, having one's morals attacked on the witness stand is a humiliating experience. Anyone, no matter how injured, would be hesitant to expose herself to a trial of her past.\textsuperscript{27} Moreover, the rule allowing the victim's sexual character into evidence promoted the idea that there are two

\begin{itemize}
\item \textsuperscript{22} See United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980).
\item \textsuperscript{23} See, e.g., People v. Walker, 150 Cal. App. 2d 594, 601 (1957).
\item \textsuperscript{24} See Garth E. Hire, \textit{Holding Husbands and Lovers Accountable for Rape: Eliminating the "Defendant" Exception of Rape Shield Laws}, 5 S. CAL. REV. L. & WOMEN'S STUD. 591, 593-94 (1996); Galvin, supra note 3.
\item \textsuperscript{25} "[A] woman who has previously consented to an act of sexual intercourse would be more likely to consent again to such an act, thereby negating the charge that force and violence were used against her in order to accomplish the rape." Walker, 150 Cal. App. 2d at 601.
\item \textsuperscript{26} "[P]revious intercourse with other persons may be shown, as tending to disprove the allegation of force, and such evidence would seem to be highly proper, as it must be obvious to all that there would be less probability of resistance upon the part of one already debauched in mind and body, than there would be in the case of a pure and chaste female." People v. Benson, 6 Cal. 221, 223 (1856).
\item \textsuperscript{27} See Hire, supra note 24.
\end{itemize}
kinds of women: “good” women who deserve protection by the jury system and “bad” women who do not.28

II. RAPE SHIELD LAWS MADE THE COMPLAINANT’S SEXUAL CHARACTER IRRELEVANT

Beginning in the 1970’s, California and most other jurisdictions enacted evidentiary rules popularly known as Rape Shield laws.29 California enacted two statutes, sections 1103(c) and 782 of the California Evidence Code.30 Section 1103(c) makes evidence of prior sexual conduct by a complaining witness inadmissible to prove that she consented.31 Section 782 allows evidence of prior sexual conduct to attack a complainant’s credibility only if the defense makes a sworn offer of proof concerning its relevance and the court holds a relevancy hearing outside the presence of the jury.32

Even if a defendant offers the sworn proof and affirmatively proves relevance, the court may nevertheless exclude sexual conduct evidence as more prejudicial than probative.33 Courts caution that the relevance asserted must relate to credibility only and not to consent. “Great care must be taken to insure that this exception to the general rule barring evidence of a complaining witness’s prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a ‘back door’ for admitting otherwise inadmissible evidence.”34

Thus, courts have supported the policy behind the rape shield laws even when defense attorneys look for creative ways around it. For example, in People v. Steele, the defendant was accused of raping, in his car, a woman whom he had just met.35 The defense sought to introduce evidence that the woman had, at an earlier date, had sex in a car with another man

30. California also passed two statutes concerning jury instructions in rape and related sexual offense cases. Penal Code section 1127(d) prohibits judges from instructing juries that consent in the past is proof of consent in this instance or that prior sexual conduct in and of itself is proof of credibility of the complaining witness. CAL. PENAL CODE § 1127(d) (West 1995). Section 1127(e) prohibits use of the hackneyed phrase “unchaste character.” CAL. PENAL CODE § 1127(e) (West 1995).
31. CAL. EVID. CODE § 1103(c)(1). This prohibition applies to conduct with people other than the defendant; conduct with the defendant remains admissible under section 1103(c)(2).
32. CAL. EVID. CODE § 782.
34. Id. at 918-19.
she had just met. The defense argued that it was evidence of the woman's modus operandi, which is a standard use of prior bad acts evidence. What the defense was really trying to prove was that "she did it before, therefore, she would do it again." The California Supreme Court ruled that the fact that the woman had done something before under similar circumstances did not prove her modus operandi. Just because she had said yes before did not prove that she said yes this time. The evidence was not admitted.

III. THE NEW LAW: EVIDENCE CODE SECTION 1108

After the advent of rape shield laws, the status of character evidence for both victims and defendants was in balance. The defense could not use a complainant’s sexual character against her and the prosecution could not use a defendant’s sexual character against him. Section 1108, enacted in 1995, changed all that. It allows the prosecution to use evidence of prior sex-related crimes to show a defendant’s propensity to commit the crime with which he is currently charged. Now, the assumption, "she did it before, therefore she would do it again" applies to defendants.

The essential language of the statute is: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by section 1101, if the evidence is not inadmissible pursuant to section 352." Once the reader works out the double negative, it appears to mean

36. See id. at 72-73.
37. See id. at 76; see CAL. EVID. CODE § 1101(b).
38. See Steele, 210 Cal. App. 3d at 76.
39. See id.
40. CAL. EVID. CODE § 1108.
41. The entire statute reads:
1108. (a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.
(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 30 days before the scheduled date of trial or at such later time as the court may allow for good cause.
(c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.
(d) As used in this section, the following definitions shall apply:
(1) “Sexual offense” means a crime under the law of a state or of the United States that involved any of the following:
(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2, or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6 of the Penal Code.
(B) Contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person.
(C) Contact, without consent, between the genitals or anus of the defendant and any part of another person’s body.
that there is no limitation—other than section 352—to the possible uses of other crimes evidence concerning sexual offenses. In its reference to section 1101, which prohibits character evidence, the statute by its terms permits the use of prior sex-related offenses as proof of the defendant’s character: his predisposition to commit the crime with which he is charged.

Lest there be any doubt that the legislature intended to permit character evidence to show predisposition, the legislative history is explicit. The Legislative Counsel’s Digest summarizes the bill as follows:

Existing law provides that, except as specified, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

This bill would create a further exception to this rule by providing that in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not inadmissible under the above rule, except as specified. 42

The Assembly Digest of the bill states, “[e]vidence admitted under this new section would be subject to rational assessment by a jury as evidence concerning the probability or improbability that the defendant has been falsely or mistakenly implicated in commission of [sic] charged offense.” 43

The author himself, James Rogan (R-Glendale), is quoted in the bill’s analyses by the Senate Committee on Criminal Procedure. 44 In this report, he explains:

Under current law, evidence that a particular defendant has committed rape, acts of child molestation, or other sexual offense against other victims is not necessarily admissible in a trial where the defendant is being accused of a subsequent sexual offense. The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should

(D) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

(E) An attempt or conspiracy to engage in conduct described in this paragraph.

(2) “Consent” shall have the same meaning as provided in Section 261.6 of the Penal Code, except that it does not include consent which is legally ineffective because of the age, mental disorder, or developmental or physical disability of the victim. CAL. EVID. CODE § 1108.


43. PUBLIC SAFETY REPORT, supra note 9, at 1.

44. James Rogan, CRIM. PROC. REPORT., supra note 6, at 2.
be considered by [the trier] of fact when determining the credibility of a victim’s testimony. This proposal will amend the Evidence Code so as to establish, in sexual offense actions, a presumption of admissibility for evidence that the defendant has committed similar crimes on other occasions.45

Significantly, the statute does not require that a defendant have been convicted previously of a sex-related crime. Nor does it require an arrest. The mere fact of the previous allegation is admissible to show that he has the character of a sex offender. Gossip, in the form of reputation or opinion, may be sufficient.

What prior sex-related crimes does the statute permit? Nearly any kind. The statute specifically makes twenty-one offenses admissible, including pornography distribution offenses, as well as violent acts.46 It includes offenses which are misdemeanors and wobblers, i.e., crimes that may be charged either as a felony or as a misdemeanor.47 For example, knowing development, duplication, or exchange of any video or photograph depicting sexual conduct by a minor; indecent exposure; and annoying or molesting a child under age eighteen are all misdemeanors for the first offense.48 Several of the other pornography distribution offenses, such as distribution of lewd material to a minor, are wobblers, as are sexual battery and statutory rape—consensual sex with a person under age eighteen.49 Eight of the listed statutes require no physical contact whatsoever.50

Additionally, section 1108 sweeps most other criminal sexual conduct under its ambit by including “[c]ontact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person” and “[c]ontact, without consent, between the genitals or anus of the defendant and any part of another person’s body.”51 As the Senate Judiciary Committee pointed out, “the inclusion of these acts are already covered under sexual battery and therefore seem redundant.”52

Section 1108 also permits evidence of acts “[d]eriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person,”53 which appears to make evidence of sadomasochistic

45. Id.
46. See CAL. EVID. CODE § 1108 (d)(1)(A).
47. See id.
49. See id.
50. See CAL. EVID. CODE § 1108 (d)(1)(A).
51. CAL. EVID. CODE §§ 1108 (d)(1)(B) and (C).
52. S. JUDICIARY REPORT, supra note 48, at 10.
53. CAL. EVID. CODE § 1108(d)(1)(D).
practices admissible. Finally, it ends with a catchall provision for "[a]n attempt or conspiracy to engage in conduct" described in the statute. 54

Section 1108 does not require that the previous bad conduct have any similarity to the offense for which the defendant is currently on trial. An Assembly Committee Report stated that "[t]his legislation would not generally authorize the admission of evidence of other 'bad acts' by the defendant, but only evidence of criminal sexual offenses of the same type as those with which he is formally charged." 55 Yet, the Senate Judiciary Committee Analysis noted, "[t]he text of the measure itself, however, does not restrict the introduction into evidence of 'similar' crimes." 56 The Judiciary Committee Analysis then queried, "[s]hould not the measure be narrowed to allow the admissibility of similar sexual offenses?" 57

The bill was never amended. It passed into law without any restrictions on the nature of the evidence which may be admitted. As the Senate Judiciary Committee report concluded, "[t]he measure makes the value judgment that an alleged misdemeanor indecent exposure incident is evidence of the character of a defendant who is charged with spousal rape or sodomy." 58

Three advisory committees of the U.S. Judicial Conference unanimously opposed the language and intent of section 1108 in the federal context. 59 Federal Rules of Evidence 413-415 are almost identical to section 1108. 60 The U.S. Judicial Conference Committees on Evidence, Criminal Rules and Civil Rules each reviewed Federal Rules of Evidence 413-415. 61 The Judicial Conference Report stated:

It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice. 62

IV. THE IMPACT OF THE NEW LAW

Aside from supplanting years of jurisprudence which prohibited char-

54. CAL. EVID. CODE § 1108(d)(1)(E).
55. PUBLIC SAFETY REPORT, supra note 9, at 2.
56. CRIM. PROC. REPORT, supra note 6, at 9.
57. Id. at 10.
58. Id. at 9-10 (emphasis added).
59. See CRIM. PROC. REPORT, supra note 6, at 5.
60. FED. R. EVID. §§ 413-415 (1997).
61. See CRIM. PROC. REPORT, supra note 6, at 5.
acter evidence *per se*, section 1108 poses three serious problems. First, it revives the corroboration requirement in rape cases, or at least provides an excuse not to prosecute cases where the defendant has no history of sex-related crimes. Second, it increases the risk of convicting the innocent. Finally, it violates due process, creating a constitutional infirmity which may jeopardize our current rape shield laws.

A. A CHALLENGE TO WOMEN’S CREDIBILITY

As late as 1972, fifteen states required corroboration of a complainant’s testimony in order to sustain a rape conviction. Some required corroboration of each material element: force, penetration, and the identity of the accused. Others required corroboration by “material facts and circumstances which tend to support the testimony of the complainant.”

Three rationales were generally given to justify the corroboration requirement: the emotion raised in a jury by a rape charge, the difficulty of disproving a rape charge, and the frequency of false rape charges. The first rationale raises the concern that in a rape case, jurors will be unable to retain their impartiality. Because of the nature of the offense and from sympathy for a “wronged female,” the jury may rush to convict. This rationale is belied by the low conviction rate for sex offenses. Yet, implicit is the idea that a conviction on merely the complainant’s word would be unjust. A conviction on her word alone would be a conviction on insufficient evidence.

The second justification—that rape charges are difficult to defend against because there are rarely independent witnesses also reveals hesitance to believe a complainant. It is indeed difficult to defend a charge when the only witnesses are the defendant and the complainant. But that holds true of many offenses for which there is no corroboration requirement. A late-night mugging may well have no other witnesses. “The corroboration requirement, in effect, is a prior determination that if the prosecution’s case stands solely on the testimony of the complainant, the

64. See id. at 1369-70.
65. See id. at 1369. A cautionary instruction, that “in prosecutions for sex offenses, accusations are easy to make and difficult to disprove, and the testimony of complaining witnesses should be examined with caution,” has been approved well into the 1970’s. See People v. Merriam, 66 Cal. 2d 390, 394 (1967); People v. Rincon-Pineda, 14 Cal. 3d 864, 874 (1975).
66. See Friedman, supra note 63, at 1373.
67. See id. at 1378.
68. See id. at 1379.
69. See id. at 1382-84.
70. Corroboration was required at common law for perjury charges but for no other offense. See id. at 1366.
defendant shall win."71 In other words, without corroboration, a prosecution should not prevail.

The third rationale, the prevalence of false accusations,72 simply states more explicitly what the other two rationales imply: without corroboration, we cannot trust that a woman is telling the truth. This justification maintains that a woman is likely to make false rape charges from shame or to protect her reputation after having consensual sex; to shield another man who has made her pregnant; from hatred; for blackmail; or for simple notoriety.73 "Psychiatrists [attribute false rape allegations] to the fact that for some women it is better to be raped than ignored."74

The corroboration requirement is gone but not forgotten. These laws have been repudiated for the most part. Some states, however, still require corroboration if the victim's testimony is impeached or incredible.75 While they existed, these corroboration laws did a great disservice: "a rape trial involved a systematic process of disqualification of the complainant's story."76 The legacy of rape corroboration requirements "casts a shadow, in that the law still suggests that rape cases and rape complainants occupy a separate category when it comes to credibility."77

Why should a woman's testimony need corroboration? Legalistic rationales aside, Susan Estrich suggests that the corroboration requirement arose in "response to a man's nightmarish fantasy of being charged with simple rape' and the 'institutionalization of the law's distrust of women victims through rules of evidence and procedure."78 Section 1108 appears to revive that nasty fantasy. Underlying section 1108 is the attitude that a woman's word is insufficient. Section 1108 implies that a woman's testimony cannot secure a conviction standing on its own. Look again at Senator Rogan's comment: "[E]vidence that a particular defendant has such a propensity [to commit sexual offenses] ... should be considered by [the trier] of fact when determining the credibility of a victim's testimony."79 The Assembly Committee on Public Safety

71. Id. at 1382.
72. See id. at 1373-78.
73. See id. at 1373.
74. Id. at 1373 n.60. As a criminal defense practitioner, I have seen women lie from hatred or because they fear another man more than they fear the defendant. Some women do, therefore, make false rape complaints. In my experience, however, women do not lie more frequently about rape than about other matters. Nor do women in general lie more than men in general.
76. Id. at 155.
77. Id. at 156.
79. PUBLIC SAFETY REPORT, supra note 9, at 2 (emphasis added).
considered that "[e]vidence admitted under this new section would be subject to rational assessment by a jury as evidence concerning the probability or improbability that the defendant has been falsely or mistakenly implicated in commission of [sic] charged offense."80 The focus is on bolstering the woman's credibility, rather than proving the defendant's guilt.

In no other category of crime is the defendant's propensity to commit the crime admissible. Perhaps, this is because in no other crime is the victim's testimony automatically suspect. California, along with other states, has made a legislative statement, in section 411 of the California Evidence Code, that the testimony of a victim need not be corroborated.81 Section 1108 revives the corroboration requirement through the back door. It perpetuates the myth that the victim's credibility in sex cases is categorically suspect.

In addition to undermining the credibility of rape victims, section 1108 may provide police and prosecutors an excuse not to prosecute sex offenses. Because of heavy caseloads, "[investigators] work from a profile of the kind of case likely to get a conviction."82 "[Victims] left out of that profile are people of color, prostitutes, drug users and people raped by acquaintances,"83 in other words, those whose credibility is perceived to be suspect. The availability of section 1108 evidence may well become part of the "success profile," leading police and prosecutors to ignore cases where it is not available. Thus, the state has an excuse not to prosecute where there is no corroboration for a woman's complaint. Cases with no section 1108 evidence look less winnable because those cases rely more heavily on the victim's testimony.

B. A DANGER TO THE INNOCENT

The implicit premise of section 1108 is that a complainant's testimony needs corroboration. The explicit premise is that the defendant's character

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80. Id. at 1 (emphasis added).
81. See CAL. EVID. CODE § 411 (West 1995). This section does have some exceptions, e.g., prohibiting the conviction of a defendant solely upon the testimony of an accomplice (CAL. PENAL CODE § 1101), and another archaic expression for procuring abortion or luring a girl under age eighteen into prostitution (CAL. PENAL CODE § 1108). Id. For other states' statutes, see Hunter, supra note 75, at 167 n.199.
83. Id. In 1989, almost 25% of women who reported a rape to the Oakland, California Police Department were told, in effect, that they were lying, even before their cases had been investigated. The reports were closed and labeled "unfounded." Police said those cases "were hopelessly tainted by women who are transient, uncooperative, untruthful or not credible as witnesses in court." Id. After an investigation, police concluded that 90% percent of the cases labeled unfounded in 1989 and 1990 actually occurred. See Alix Christie, Police Admit Error in Dismissed '89-'90 Rape Cases, OAKLAND TRIB., Feb. 2, 1991, at A11.
provides that corroboration. "The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative . . . ."84 Are prior bad acts probative of guilt in a current offense? That premise has not been conclusively proven. Yet, jurors may give sexual character evidence undue emphasis. As a result, a defendant may be convicted because of his perceived character when the evidence would otherwise not merit a conviction.

The statute’s premise that prior crimes evidence is probative, i.e., that having previously committed one of the enumerated offenses, a defendant is more likely to commit another sexual offense, is not necessarily born out by recidivism studies. In a 1989 study from the Bureau of Justice Statistics, researchers measured re-arrest rates as a measure of recidivism.85 Almost 32% of burglars were re-arrested for burglary, 24.8% of drug offenders were re-arrested for drug offenses, and 19.6% of violent robbers were re-arrested for robbery.86 The recidivism rate for rape, at 7.7%, was lower than all other crimes except homicide.87 These figures contradict bill author James Rogan’s belief that prior sex-related crimes are probative of current guilt.88

Psychological research does not necessarily support the premise, known as “trait theory,” that character evidence predicts behavior.89 Trait theory has been highly criticized in the last decade:

[E]mpirical research, however, has not only failed to validate trait theory but has generally rejected it. ‘The initial assumptions of trait-state theory were logical, inherently plausible, and also consistent with common sense and intuitive impressions about personality. Their real limitation turned out to be empirical—they simply have not been supported adequately.’ Instead, the research shows that behavior is largely shaped by situational determinants

84. PUBLIC SAFETY REPORT, supra note 9, at 2 (statement of Assemblyman James Rogan, author of A.B. 882).
86. See id.
87. See id. A 1997 Bureau of Justice Statistics study compared recidivism for any crime, not just rape. It found that about 41% of all violent offenders had been arrested for new felonies but only 19.5% of rapists were arrested for a new crime. See Matthew Purdy, States Taking Swift Action to Confine Sex Offenders, S.F. EXAMINER, June 29, 1997, at A8.
88. I was unable to find any support for the proposition that the other offenses enumerated in section 1108 were evidence of a particular trait of character. I invited Assemblyman (now U.S. Congressman) Rogan’s office to provide the source of his assertion about the probative value of character evidence in sex crimes. No answer was ever provided.
that do not lend themselves easily to predictions about individual behavior. 90

Trait theory in the context of character evidence has been the subject of numerous legal articles since 1984. 91 Professor Mendez takes a strong position that traditional trait theory has been discredited and recent research is too new to have practical application. 92 Others express varying levels of confidence in trait theory. 93 However, trait theorists "willingly concede that they are unable to predict a single instance of behavior on a particular occasion with confidence." 94 In other words, one cannot rely on a person's character traits to "accurately predict a single, isolated instance of conduct" at issue in a criminal charge. 95

The research clearly shows that the more dissimilar the situation, the less likely behavior will be consistent. 96 As noted by Mendez, "[e]ven seemingly trivial situational differences may reduce correlations to zero." 97 Bryden and Park conclude that "the character trait 'sex criminal,' a propensity to commit many different sex crimes, may not exist. Even the propensity to commit a specific sex crime such as rape may be situational." 98

90. Id. (quoting WALTER MISCHEL, PERSONALITY AND ASSESSMENT 6, 22 (1968)).
92. See Mendez, California's New Law, supra note 89, at 1051-52; Mendez, Search for a Stable Personality, supra note 91, at 227-28.
93. See, e.g., Cammack, supra note 91, at 400 (rejecting "crude global character trait theories which posit general character traits assumed to produce consistent conduct in diverse situations" and discussing non-character purposes for similar crimes evidence); Mendez, Search for a Stable Personality, supra note 91, at 233, 237 (proposing a more sophisticated theory which shows some correlation of behavior across situations, though not the direct correspondence which trait theorists expected, and recognizing that if the new theory were capable of predicting behavior, it would require expert testimony to explain the variables involved).
94. Davies, supra note 91, at 517.
95. Leonard, supra note 91, at 29.
96. See Mendez, California's New Law, supra note 89, at 1052.
97. Id.
98. Bryden & Park, supra note 85, at 563. Despite acknowledging that trait theory has not been proven, they nevertheless advocate the relevance of such evidence. "Unless one knows that this propensity does not extend to the situation in which the crime charged alleg-
The research supports what the California Supreme Court ruled in *People v. Steele*. In *Steele*, the court held that a woman’s prior sexual conduct was not admissible to prove her current sexual conduct. Just because a woman consents to sex in one context, does not mean that she will consent again. Just because a man committed a sex-related offense does not mean that he will commit one again. We cannot assume that a person always acts the same way, even if that provides us a comforting way of viewing the world. Similarly, we cannot assume there is a character for the propensity to commit sex-related crimes.

There is little empirical basis for the assumption that prior acts prove propensity to commit future crime. There is, however, empirical evidence that juries may convict based on character evidence, instead of evidence of the current crime.

The real danger in admission of character evidence is that the jury will give the evidence more weight than it deserves, either by overestimating its probative value on the crime charged or by concluding that even if the defendant is innocent of the crime charged, he is a ‘bad man’ who belongs in jail.

The danger of convicting the innocent is greatest in stranger rape cases.

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100. *Id.* at 76. For an analysis of the court’s reasoning, see discussion *supra* pp. 107-108.
101. This is particularly true when the two crimes are unrelated as with indecent exposure and sodomy.
102. It is often difficult to distinguish between character for committing an offense and Evidence Code section 1101(b) (evidence admissible as evidence of lack of mistake, intent, modus operandi or lack of good faith belief in consent). In child molestation cases particularly, that line has become blurred. For instance, prior offenses of forced oral copulation on a minor were held relevant to show common design or plan in a prosecution for lewd and lascivious conduct upon a child in which the main issue was whether the acts described by the victim occurred. See *People v. Dancer*, 45 Cal. App. 4th 1677, 1688-89 (1996). In another case, photographs which the defendant possessed of young boys and other pedophilic pornography were admitted to show intent to molest a young boy. See *People v. Memro*, 11 Cal. 4th 786, 861-62 (1995). The court held that though the photographs themselves were not explicit, the jury could infer from them that the defendant had a sexual attraction to young boys and proceeded to act on it. See *id.*
103. *See Mendez, California’s New Law, supra* note 89, at 1045 (“[J]urors may give greater weight to evidence of misconduct and dishonesty than to favorable evidence.”).
where the defense is misidentification. The prosecution will use the character evidence to argue that it cannot be a coincidence that the person identified has a history of sex-related crimes. The jury will believe the identification is corroborated and so convict. However, eyewitness identification can be very unreliable.\textsuperscript{105} The media report numerous examples of men wrongly convicted in identification cases who were exonerated by DNA evidence, often after years of imprisonment.\textsuperscript{106}

Our justice system cannot rely on physical evidence to save someone from a wrongful conviction. The constitutional burden falls in the other direction. The government carries the burden of proving the identity of the defendant and should not be allowed to use character evidence indirectly to show identity. The focus should be on the accuracy of the identification. The danger of admitting character evidence lies in the possibility that juries will convict based on the character of a defendant without testing the sufficiency of the identification.

C. A Violation of Due Process

Prior to the enactment of rape shield laws, a complainant was at risk of having her sexual history dragged into the public arena. Because her history was considered relevant to show her character, defense attorneys had the ethical obligation to gain whatever knowledge they could about her private life.\textsuperscript{107} Now, however, rape shield laws protect women by allowing them to press a complaint while knowing that their privacy remains protected.\textsuperscript{108}

Section 1108, however, does not protect women. Some may argue that making convictions in sex cases easier for the prosecution benefits women.

\footnotesize

\begin{itemize}
\item \textsuperscript{105} See, e.g., Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969, 975-88 (1977).
\item It must be acknowledged that historically, rape allegations have been used for political, especially racist, purposes. "[T]he rape charge has been indiscriminately aimed at Black men, the guilty and the innocent alike." Angela Y. Davis, Women, Race and Class 172 (1983). Between 1930 and 1967, 405 of the 455 men executed for rape were black. See id. See also Friedman, supra note 63, at 1368 n.103 (referring to the Bureau of Prisons National Prisoner Statistics No. 45, Capital Punishment 1930 - 1968). The Scottsboro Boys trial, in which nine young southern black men were accused of raping two white women, is merely the most notorious example. See Powell v. Alabama, 287 U.S. 45 (1932). For further discussion, see Sakthi Murphy, Rejecting Unreasonable Sexual Expectation: Limits on using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent, 79 Cal. L. Rev. 541, 576 n.32 (1991).
\item \textsuperscript{108} See Cal. Evid. Code § 1103(c)(1).
\end{itemize}
But that benefit comes at the cost of constitutional principles which protect us all. Exclusion of character evidence is based on due process notions of fundamental justice and the right to a fair trial. The risk of conviction based on a jury's perception that the defendant is of bad character undermines the presumption of innocence and lessens the state's burden of proof of the crime. A person should be tried based on facts, not on speculation, prejudice, or fear.

The United States Supreme Court has never directly decided whether using prior crimes as character evidence violates due process. In Spencer v. Texas, however, the question came before the Court in the context of a habitual offender law. The issue was whether using prior convictions in the prosecution's case in chief to prove a defendant was a habitual offender violated due process. Three defendants were charged with being recidivist offenders under a Texas statute which allowed the jury to enhance the defendant's sentence if he had previous convictions. The convictions were admitted into evidence during the prosecution's case in chief. However, the juries were each instructed that they could not use the prior convictions as evidence of guilt of the charges for which the defendants were currently being tried.

A divided Court held that use of the prior convictions did not offend due process principles. The majority opinion noted that it did not necessarily consider the Texas statute the wisest or fairest way to prove recidivism and that it might prefer a two-step trial which introduced the prior convictions only after the jury had determined guilt of the charges alleged. Yet, it cited its traditional hesitance to dictate rules of criminal procedure to the states as a reason to refrain from finding that the Texas statutes violated due process.

The Court also noted that prior crimes evidence may be introduced for other legitimate purposes, such as to prove intent or to rebut the defendant's credibility after he testifies. The Court acknowledged the legitimate purpose of recidivist statutes—to punish habitual criminals more se-

110. See McKinney v. Rees, 993 F.2d 1378, 1384 (9th Cir. 1993); Henry v. Estelle, 993 F.2d 1423, 1426 (9th Cir. 1993); Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991).
112. See id.
113. See id.
114. See id.
115. See id.
116. See id. at 563-65.
117. See id. at 564-65. Chief Justice Warren and Justice Stewart both agreed that the two-step trial method was "far superior" to Texas' method as a way to decrease potential prejudice. Id. at 569 (Stewart, J., concurring), 579-80 (Warren, J., concurring and dissenting).
118. See id. at 568.
119. See id. at 560.
The Court reasoned that the admission of prior convictions for purposes of proving recidivism was a legitimate state purpose outweighing the acknowledged prejudice which prior crimes evidence creates. The main difference between *Spencer* and section 1108 is that in *Spencer*, prior convictions were not admitted for the purpose of proving the defendants' bad character. All three juries were instructed that they may not consider the conviction as evidence of the defendant's guilt or innocence of the charge for which he was on trial. The very purpose of section 1108, on the other hand, is to use prior acts as character evidence to prove the defendant's guilt.

Further, the *Spencer* majority noted that the sort of evidence introduced to show a conviction is "usually, and in recidivist cases almost always, of a documentary kind." That is, the prosecution introduces the docket to prove the conviction. The Court pointed out that "in the cases before us there is no claim that its presentation was in any way inflammatory." Yet, section 1108 seems to permit live witnesses and physical evidence, photographs, and whatever else the prosecution considers necessary to prove the uncharged prior bad acts regardless of the inflammatory nature of the evidence.

Chief Justice Warren, in his dissent and concurrence, pointed out that the majority in *Spencer* "never faces up to the problem" of whether using prior convictions as evidence of criminal propensity to prove guilt would violate due process. He powerfully demonstrated that it would. First, he noted that recidivist statutes have never been thought to allow the State to use prior convictions to show probability of guilt. "The fact of prior convictions is not intended to make it any easier for the State to prove the commission of a subsequent crime." He argued that if it were so, the statutes would violate the Due Process Clause:

Whether or not a State has recidivist statutes on its books, it is well established that evidence of prior convictions may not be used by the State to show that the accused has a criminal disposition and that the probability that he committed the crime currently charged

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120. See id. at 556.
121. See id. at 566-69.
122. Nor was unproven evidence admitted. The *Spencer* Court was considering only prior convictions, not mere allegations, as section 1108 allows. *Spencer*, 385 U.S. at 558.
123. See id. at 557-60. Note that three cases were consolidated upon appeal. See id. at 555.
124. See CRIM. PROC. REPORT, supra note 6.
126. Id.
127. See CAL. EVID. CODE § 1108(b).
129. See id.
130. Id.
is increased. While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. 131

Chief Justice Warren further concluded that using prior crimes as evidence of criminal propensity is unconstitutional because it interferes with the defendant’s ability to have a fair trial:

Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a “bad man,” without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant’s previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, “[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.” 132

Chief Justice Warren also pointed out the illogic involved in the majority’s assertion that because recidivist statutes have a legitimate purpose, just as there is a legitimate purpose in admitting prior convictions for non-character uses, admitting the prior conviction to show recidivism outweighs any prejudice to the defendant. 133 He noted that this apparently plausible syllogism fails because the two premises together do not add up to the majority’s conclusion: 134

I believe the Court has fallen into the logical fallacy sometimes known as the fallacy of the undistributed middle, because it has failed to examine the supposedly shared principle between admission of prior crimes related to guilt and admission in connection with recidivist statutes. That the admission in both situations may serve a valid purpose does not demonstrate that the former practice justifies the latter any more than the fact that men and dogs are

131. Id. at 572-74.
132. Id. at 575 (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).
133. See id.
134. See id. at 577-78.
animals means that men and dogs are the same in all respects. 135

Chief Justice Warren concluded that the majority allowed its approval of recidivist statutes’ goals to cloud its judgment about whether the statutes were constitutional. 136 The same danger confronts us with section 1108. No one argues with the proposition that it is right to convict sex offenders. However, such an emotionally powerful argument begs the question of whether admission of prior bad acts to show character is the proper way to obtain convictions. Because of the potential for reducing the prosecution’s burden and the violence such evidence does to the presumption of innocence, the admission of this evidence is more likely to result in convictions of the innocent, as well as the guilty.

Two federal cases illustrate how the United States Courts of Appeal have dealt with the use of prior bad acts to show character. 137 Both found that doing so violated due process principles. 138 The first, Lovely v. United States, involved the same kind of circumstances to which section 1108 applies. 139 A woman alleged she had been raped. 140 The defendant admitted they had sex, but claimed it was consensual. 141 Consent was the only issue in the trial. 142 Over defense objections, the trial court allowed the testimony of another woman who alleged that he had raped her fifteen days before the rape for which he was on trial. 143 On direct appeal, the court reversed. 144 It noted:

[T]he only question was whether he had had carnal knowledge of her forcibly and against her will. The fact, if it was a fact, that he had ravished another woman some weeks before, threw no light whatever on that question. It showed merely that he was a bad man, likely to commit that sort of crime; and this is precisely what the prosecution is not allowed to show in a criminal case. 145

The court held:

The rule which thus forbids that introduction of evidence of other offenses having no reasonable tendency to prove the crime

135. Id. at 578-79.
136. Id. at 579-80.
137. See Lovely v. United States, 169 F.2d 386, 389 (4th Cir. 1948); Panzavecchia v. Wainwright, 658 F.2d 337, 341 (5th Cir. 1981). See also McKinney v. Rees, 993 F.2d at 1385.
138. See Lovely, 169 F.2d at 389; Panzavecchia, 658 F.2d at 350-54.
139. 169 F. 2d at 388-89.
140. See id. at 388.
141. See id.
142. See id.
143. See id.
144. See id. at 391.
145. Id. at 388.
charged, except insofar as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. If such evidence were allowed, not only would the time of courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defenses on the issues really on trial.146

In the second case, Panzavecchia v. Wainwright, the court considered a writ of habeas corpus from a state court case in which the defendant had been simultaneously tried for first degree murder and for being a felon in possession of a firearm.147 The defense motion for severance of the charges had been denied.148 The prosecution introduced evidence of the defendant’s prior counterfeiting charge in order to prove the felon in possession of a firearm.149

The Fifth Circuit held that the cases should have been severed.150 The effect of admitting the prior conviction for the firearm was to permit evidence in the murder case that, in the context of that charge, was nothing more than propensity evidence.151 It concluded that admitting the evidence as merely propensity evidence violated the Due Process Clause of Fourteenth Amendment to the United States Constitution:152

[T]he counterfeiting conviction . . . was totally irrelevant to the murder charge and the only purpose it served was to show bad character and propensity to commit a crime. Had the two offenses been tried separately, the counterfeiting conviction would never be admitted in the murder trial . . . . The prejudice which Florida and the federal courts have proscribed clearly existed and this prejudice rose to such a level as to make the petitioner’s trial fundamentally unfair and in violation of the Fourteenth Amendment.153

If evidence of a prior conviction violated due process, then so must evidence where there was no conviction. If evidence of a guilty plea or conviction is so highly prejudicial as to deny the defendant a fair trial, then evidence of unproven allegations must have the same prejudicial effect without any assurance of reliability.154

146. Id. at 389.
147. 658 F.2d at 388-89.
148. See id. at 338.
149. See id.
150. See id. at 341.
151. See id.
152. See id. at 338.
153. Id. at 341.
154. This analysis depends, of course, on the particularly prejudicial nature of pure charac-
Allowing states to use sex crime propensity evidence also violates due process in another way; it violates the reciprocity requirement. Reciprocity simply means that the defendant should be allowed the same rights to present evidence as the prosecution enjoys. The United States Supreme Court, in *Wardius v. Oregon*, recognized that the Fourteenth Amendment right to due process incorporates the right to reciprocity. The Court stated, "the Due Process Clause . . . does speak to the balance of forces between the accused and his accuser." It added, "[t]his Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant’s ability to secure a fair trial." Thus, the Court held that a rule requiring the defense to give notice of alibi witnesses without a reciprocal requirement that the prosecution disclose its witnesses violated due process.

In making its ruling, the *Wardius* Court relied in part on *Gideon v. Wainright*, the seminal case holding that a criminal defendant has the right to an attorney. One reason the *Gideon* Court gave for its holding was that if the State has a lawyer, the defendant is entitled to have one, too. The *Wardius* Court also relied on *Washington v. Texas*, which held that the State could not limit the defendant’s right to call witnesses. Referring to England’s history of prohibiting defense witnesses, the *Washington* Court noted that the Framers of the Constitution felt it necessary to provide defendants the right to compulsory process of the court "so that their own evidence, as well as the prosecution’s, might be evaluated by the jury."

Several California cases have recognized that the right of reciprocity extends to the reciprocal right to introduce evidence. In *Evans v. Superior Court*, the California Supreme Court recognized the right of the defendant to hold a line-up for purposes of introducing exculpatory evidence on the issue of identification. "Because the People are in a position to compel a line-up and utilize what favorable evidence is derived therefrom, fairness requires that the accused be given a reciprocal right to discover and utilize contrary evidence."

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*See Dowling v. U.S., 493 U.S. 342, 350-54 (1990) (holding that introduction of evidence relating to crime that defendant had previously been acquitted of committing did not violate double jeopardy or due process).*

156. *Id.* at 474.
157. *Id.* at n.6.
158. *See id.* at 472.
159. *Id.* at 474 n.6; *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).
164. *Id.* at 623.
Similarly, the defendant has a right to introduce hearsay evidence through a police officer, since the same right has been granted to the State under Penal Code section 872(b).\textsuperscript{165} The California Supreme Court first addressed the issue in\textit{Whitman v. Superior Court}\textsuperscript{166} which, while discussing a related issue, intimated in dicta that it might allow the defendant to call a police officer to testify to hearsay because the prosecution had the same right.\textsuperscript{166} When directly faced with the issue, the Court of Appeal concluded that the right of reciprocity meant the defense had the right to introduce the same kind of hearsay evidence as the State.\textsuperscript{167}

The rule of reciprocity should also apply to the use of character evidence. The purpose is the same: to ensure basic fairness and enable the defendant to mount a complete defense. In\textit{People v. Hansel}, the California Supreme Court stated that:

The reciprocal pretrial discovery required in\textit{Wardius} and\textit{Evans} helps defendants to present their defense. Without equal access to any favorable evidence, defendants would be placed at a disadvantage in relation to the state, and their ability either to demonstrate their own innocence or to avoid unfair surprise at trial would be reduced. The nonreciprocal procedures addressed in\textit{Wardius} and\textit{Evans}, therefore, directly implicate the right of the accused to a fair trial, even though the proceedings at issue occur before trial.\textsuperscript{168}

\textit{Wardius} and its progeny recognized that what one side may do, the other side may do as well. Now, section 1108 opens the door to defense attorneys seeking to introduce a complainant’s sexual history. If a defendant’s character is probative and admissible, so therefore is a complainant’s. In our attempt to secure the conviction of sex offenders, we may have made women less secure.

There are only three ways out of this conundrum. We can weaken the rape shield laws so that a woman’s character is again admissible in sexual assault cases, to give defendants reciprocity with prosecutors; choose to protect rape shield laws by undermining the principle of due process and fundamental fairness in a jury trial; or finally, determine that section 1108 is unconstitutionally infirm. In practice, using section 1108 will lead to injustice for someone—will it be women or the accused?

V. CONCLUSION

Section 1108 was unnecessary because legitimate, non-character use of

\textsuperscript{165} CAL. PENAL CODE § 872(b) (West 1985).
\textsuperscript{166} Whitman v. Superior Court, 54 Cal. 3d 1063, 1082 (1991).
\textsuperscript{168} People v. Hansel, 1 Cal. 4th 1211, 1221 (1992).
prior crimes evidence was already available to the prosecution. Yet, in the quest to ensure convictions, the California Legislature, like Congress, has dramatically and precipitously eradicated hundreds of years of common law prohibitions against the use of character evidence. Section 1108 undermines due process, endangers the presumption of innocence, and imperils the protections victims have gained in sex crimes cases. Bolstering the credibility of complainants may have seemed like a good idea at the time, but its consequences will be severe.