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Prior Bad Acts: The Legal Ethics of California Evidence Code Section 1108

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**PRIOR BAD ACTS:
THE LEGAL ETHICS OF CALIFORNIA EVIDENCE CODE
SECTION 1108**

Marta Hafner*

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INTRODUCTION

California Evidence Code section 1108 allows prosecutors to bring in evidence of the defendant's past sexual misconduct, alleged and otherwise, when they are currently on trial for a sex crime.¹ As such, section 1108 functions as a loophole to the California Evidence Code rules against character evidence, reflecting how sex crimes are treated differently than other offenses.

This Comment will examine whether section 1108 potentiates miscarriages of justice. I will begin with a general discussion of character evidence and the justifications for its general prohibition in California's criminal courts. I will discuss the sexual offense exception to the rules against character evidence, including whether it is ethical or even relevant to allow evidence of criminal sexual misconduct in the prosecutor's case-in-chief. Using a feminist lens, I will compare and contrast section 1108 to other special sex crime evidence provisions, such as California Evidence Code sections 1103 and 752, colloquially known as rape shield laws. Looking to the science and mythology of sex crime propensity, I will examine whether section 1108 is actually the right solution to prevent serial offenders from offending again, and I will end with suggestions to narrow the breadth of section 1108 to prevent due process violations in its utilization.

DEFINING CHARACTER EVIDENCE

According to California Evidence Code section 1101, character evidence is not admissible in a California criminal jury trial to show that a person acted in accordance with his or her character on a particular occasion.² Beyond the California Evidence Code's boilerplate,³ it is hard to actually pin down what character evidence is because the definition of the word "character" is nebulous:

A survey of cases dealing with character evidence shows that courts often attempt their own definitions. Some court-created definitions of character include '[a] fixed disposition or tendency' . . . the 'disposition or propensity to commit certain crimes, wrongs or acts'; and 'a person's tendency to act in a certain way in all varying situations of life,' among others. At best, these definitions are too

1. CAL. EVID. CODE § 1108 (West 2016).

2. CAL. EVID. CODE § 1101(a) (West 2016): Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, 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.

3. *Id.*

general, confusing, and vague. They do not distinguish, for example, between a character trait on one hand, and a person's habit, mental disorder, or sexuality on the other.⁴

WHY IS CHARACTER EVIDENCE GENERALLY EXCLUDED?

There are two primary reasons for the rule against character evidence.⁵ First, the notion of character as predictive of actual behavior is actually a kind of mythology.⁶ According to Professor Mark Cammack, “while we typically use the notion of character for organizing our perceptions of other people, generalizations about character do not correlate as strongly with actual behavior as is generally believed.”⁷ Professor Cammack further describes the conundrum as follows: “[t]he problem is not one of logical relevance, since evidence of a person’s generalized disposition has some probative value on the issue of whether she behaved consistently with that disposition.”⁸ Rather, the problematic aspect of character evidence is its resulting prejudice.⁹

Jurors can overestimate the importance and predictive value of character evidence, and subsequently give it more weight and persuasive value than is merited.¹⁰ In the words of former Supreme Court Justice Robert H. Jackson, “The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.”¹¹ Justice Jackson further asserts that “[t]he overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.”¹²

The second main tenant in the prohibition against character evidence of prior bad acts highlights the risk of jury misuse.¹³ There is substantial concern that jurors may use evidence of character to decide

4. Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1922 (2012).

5. Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered*, 29 U.C. DAVIS L. REV. 355, 358 (1996).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Cammack, *supra* note 5.

11. *Michelson v. United States*, 335 U.S. 469, 475–76 (1948).

12. *Id.* at 476.

13. Anderson, *supra* note 4, at 1929–930.

whether a person should be convicted and punished, rather than base their decision of the culpability of that person on the act that precipitated the trial.¹⁴ As the backbone of our legal system is the notion of guilt based on conduct rather than personal qualities or attributes, the idea that guilt rests on the juror's valuing of the character of the person on trial is clearly improper.¹⁵

In attorney Celia McGuinness' article for UC Hastings Law Review, she describes her personal experiences with the dangers of character evidence:

[I]t 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.¹⁶

For the aforementioned reasons, under California Evidence Code section 1101, character evidence is not admissible in the prosecutor's case-in-chief to show propensity. However, since the 1995 passage of California Evidence Code section 1108, character evidence is admissible as evidence of propensity when prosecuting sex crimes.¹⁷

BACKGROUND OF THE SECTION 1108 EXCEPTION

In 1995, the California State Legislature enacted Evidence Code section 1108. As the California Supreme Court purports, "evidence of a defendant's other sex offenses constitutes relevant circumstantial evidence that he committed the charged sex offenses."¹⁸ Under California Evidence Code section 1108, in a sex crimes trial the prosecutor is permitted to introduce evidence that the defendant has committed other sex crimes in the past.¹⁹ There is virtually no limit on

14. *Id.*

15. *Id.*

16. Celia McGuinness, *Sliding Backwards: The Impact of California Evidence Code Section 1108 on Character Evidence, Rape Shield Laws and the Presumption of Innocence*, 9 HASTINGS WOMEN'S L.J. 97, 100 (1998).

17. *Id.* at 102.

18. *People v. Falsetta*, 21 Cal. 4th 903, 920 (1999).

19. CAL. EVID. CODE § 1108(a) (West 2016): In a criminal action in which the

the nature of the previous act which may be used.²⁰ The defendant need not have actually been convicted or even arrested of a past sex crime; instead, the prosecutor can introduce evidence that he was merely arrested in a case where charges were dropped, or that he committed a sex crime for which charges were never filed.²¹ An allegation is enough.²² Even gossip, in the form of reputation or opinion, may be sufficient.²³ Perhaps most critically, past acts need not be similar to the charged offense as long as they are under the same proscribed umbrella of sexual misconduct.²⁴

Further, section 1108 differs from all other rules regarding character evidence because it allows the introduction of the evidence in the prosecution's case in chief; the door for admissibility does not need to be first opened by the defendant's introduction of his good character.²⁵ The Assembly Digest of the bill states that "evidence admitted under this new section would be subject to rational assessment by a jury as evidence of the defendant's disposition to commit such crimes, and as evidence concerning the probability or improbability that the defendant has been falsely or mistakenly implicated in the commission of charged offense."²⁶ The author of the bill, Senator James Rogan (R-Glendale), explains his motivation for the development of section 1108:

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 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

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.

20. See CAL. EVID. CODE § 1108 (West 2016).

21. *Id.*

22. See *id.*

23. McGuinness, *supra* note 16, at 104.

24. See *id.* at 105.

25. See CAL. EVID. CODE § 1108 (West 2016).

26. CALIFORNIA LEGISLATIVE COUNSEL'S DIGEST, A.B. 882, 1995-96 Reg. Sess., (Cal. 1995).

crimes on other occasions.²⁷

Additionally, as with all evidence introduced in California criminal trials, character evidence regarding past sex crimes may be excluded under California Evidence Code section 352 if its value is substantially outweighed by either the probability that it would take too much time to present, or the risk that it would either cause undue prejudice against the defendant, confuse the issues, or mislead the jury.²⁸ The court has the discretion to decide whether or not to exclude sex crimes character evidence for one of these reasons.²⁹

California Evidence Code section 1108 specifically makes twenty-one offenses admissible,³⁰ including pornography distribution offenses, as well as violent acts.³¹ Eight of the offenses require no actual physical contact.³² The Code allows the admission of such proclivities as sadomasochism, permitting evidence of acts "[d]eriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person."³³ Section 1108 broadly ends with a catch-all provision for "[a]n attempt or conspiracy to engage in conduct described in this paragraph."³⁴

DUE PROCESS DILEMMA

In *People v. Falsetta*, the California Supreme court unanimously held that the section 1108 exception to the ban on character evidence does not violate the Due Process Clause of the federal Constitution.³⁵ However, this conclusion contradicts the fundamental notions of due process that motivated the exclusion of character evidence in the first place,³⁶ such as a right to a fair trial.³⁷ Convictions based on a jury's perception, enabled by section 1108, that the defendant is a bad

27. McGuinness, *supra* note 16, at 103–04.

28. *Id.*; see also CAL. EVID. CODE § 352 (West 2016): The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

29. *Id.*

30. CAL. EVID. CODE § 1108 (West 2016); see also McGuinness, *supra* note 16, at 104.

31. CAL. EVID. CODE § 1108 (d)(1)(A) (West 2016) (referring to, *inter alia*, conduct prohibited by CAL. PENAL CODE § 311.2(b) (West 2016)); see also McGuinness, *supra* note 16, at 104.

32. CAL. EVID. CODE § 1108 (d)(1)(A) (West 2016); see also McGuinness, *supra* note 16, at 104.

33. CAL. EVID. CODE § 1108(d)(1)(E) (West 2016); see also McGuinness, *supra* note 16, at 104–05.

34. CAL. EVID. CODE § 1108(d)(1)(F) (West 2016).

35. *People v. Falsetta*, 21 Cal. 4th 903, 907, 915–22 (1999).

36. See *Michelson v. U.S.*, 335 U.S. 469, 475–76 (1948).

37. See *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993).

character sabotages the presumption of innocence and lessens the state's burden of proof.³⁸ Facts should supersede speculation, prejudice, and fear in criminal trials.³⁹

Since the constitutionality of section 1108 under the Due Process Clause is facially problematic, one would think that the United States Supreme Court would address such policies head-on. However, in *Spencer v. Texas*, regarding a Texas state habitual offender law similar to section 1108, the Court held that utilizing prior convictions does not offend the principles of due process.⁴⁰ Even though the United States Supreme Court expressed doubt regarding the scope of the habitual offender law contested in *Spencer*,⁴¹ “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.”⁴² According to Justice Benjamin Cardozo,⁴³ “a state rule of law ‘does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.’”⁴⁴ However, in *Spencer*, the evidence of prior specific acts was admitted as proof of recidivism to prove the defendant was a habitual offender, which, unlike character evidence, is a standard method of evaluating defendants and is not limited to sex offenders.⁴⁵ Further, the court in *Spencer* considered prior convictions, not the allegations or even gossip that can be admitted under section 1108 to prove uncharged prior bad acts.⁴⁶

Although *Spencer* was decided decades before California's legislature passed section 1108, in his dissent and concurrence in *Spencer*, Chief Justice Earl Warren points out issues directly relevant to the code's constitutionality: “Recidivist statutes have never been thought to allow the State to show probability of guilt because of prior convictions.”⁴⁷ Relatedly, Justice Warren observed, “[t]he fact of prior convictions is not intended by recidivist statutes to make it any easier for the State to prove the commission of a subsequent crime.”⁴⁸ He

38. McGuinness, *supra* note 16, at 113.

39. *Id.*

40. *Spencer v. Texas*, 385 U.S. 554, 563–65 (1967).

41. McGuinness, *supra* note 16, at 113. “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 113 n.117.

42. *Spencer*, 385 U.S. at 113.

43. *Id.* at 564.

44. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

45. McGuinness, *supra* note 16, at 113–14.

46. *Id.* at 114 n.122.

47. *Id.* at 571 (Warren, C.J., dissenting and concurring).

48. *Id.*

was in favor of striking statutes like 1108 on pre-emption grounds, claiming that they would violate the Due Process Clause.⁴⁹

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 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.⁵⁰

Justice Warren further elaborates that using previous crimes for propensity purposes sabotages the accused individual's opportunity for a fair trial, and is thus unconstitutional.⁵¹

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 Justice Jackson put it in a famous phrase, "the naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction."⁵²

Justice Warren would presumably recoil at laws like section 1108; despite the claim by the Ninth Circuit Court of Appeals that allowing the evidentiary admission of prior specific crimes to show propensity "is not a blank check entitling the government to introduce whatever evidence it wishes, no matter how minimally relevant and potentially devastating to the defendant."⁵³ The safeguards against this "blank check" are contingent on the court's judgment call on the highly

49. McGuinness, *supra* note 16, at 114.

50. *Spencer v. Texas*, 385 U.S. 554, 572-74 (1967).

51. McGuinness, *supra* note 16, at 115.

52. *Spencer*, 385 U.S. at 575 (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

53. *United States v. LeMay*, 260 F.3d 1018, 1022 (9th Cir. 2001) (considering the public policy behind similar federal rules).

fraught topic of sex offenses, where even the most even-keeled judge may harbor knee-jerk reactions, not to mention the political pressures of reelection. Justice Warren points out that this “apparently plausible syllogism”⁵⁴ crumbles when the Court’s majority conclusion is not actually comprised of the two premises:⁵⁵

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 vast purpose does not demonstrate that the former practice justifies the latter any more than the fact that men and dogs are animals means that men and dogs are the same in all respects.⁵⁶

Chief Justice Warren concluded his pointed dissent in *Spencer* by lamenting that the majority of his peers on the bench were focused on the recidivist statutes’ goals to the detriment of analyzing their constitutionality.⁵⁷ Likewise, courts face the same risks with section 1108.⁵⁸ It is safe to surmise that judges want to convict sex offenders.⁵⁹ The constitutional propriety of seeking convictions via prior specific acts character evidence is less apparent.⁶⁰ Since section 1108 character evidence eases the burden on the prosecution and irreparably harms any presumption of innocence,⁶¹ it creates an environment where an innocent person is more likely to be convicted.⁶²

Nevertheless, California Courts of Appeal have disavowed such concerns in cases like *People v. Fitch*, where the defendant in a rape trial challenged the use of section 1108 to admit evidence of his guilt in an earlier rape.⁶³ The holding in *Fitch* limited the scope of the Due Process Cause to the specific guarantees of the Bill of Rights, narrowly defining the category of judicial actions that violate fundamental fairness.⁶⁴ In *Fitch*, California’s Third District Court of Appeal stated that admitting evidence of prior specific sex crimes does not offend “some principle of justice so rooted in traditions and conscience of

54. McGuinness, *supra* note 16, at 115.

55. *Id.*

56. *Spencer*, 385 U.S. at 578–79 (Warren, C.J., dissenting and concurring).

57. *Id.* at 569–71.

58. McGuinness, *supra* note 16, at 116.

59. *Id.*

60. *Id.*

61. *See Spencer* 385 U.S. at 571, 575 (Warren, J., dissenting and concurring).

62. *Id.*

63. *See People v. Fitch*, 55 Cal. App. 4th 172, 175–76 (1997).

64. *Id.* at 178–79.

people as to be ranked as fundamental.”⁶⁵ Courts defend this reasoning by pointing out section 352’s balancing test as section 1108’s built-in safeguard against the use of uncharged sex offenses in cases where its admission could result in a fundamentally unfair trial.⁶⁶

SECTION 352 BALANCING: DOES IT REALLY PREVENT MISCARRIAGES OF JUSTICE?

Ostensibly, Evidence Code section 352 serves as a prophylactic shield against the use of prior sex crimes under section 1108 if such evidence would potentiate an unduly compromised trial.⁶⁷ Section 1108 evidence is subject to exclusion under section 352’s balancing test,⁶⁸ which evaluates the probative value of evidence to ensure that it will not be substantially outweighed by danger of unfair prejudice.⁶⁹ The California Supreme Court dubs section 352 “a realistic safeguard” for the admission of sex offense evidence to show propensity.⁷⁰ Rather than admit or exclude every sex offense, trial judges must consider a multiplicity of non-dispositive factors like nature, relevance, and possible remoteness in time, the certainty of the offense’s commission, whether it confuses, misleads, or distracts the jurors, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and if there are any less prejudicial alternatives to its outright admission, such as allowing some but not all of the other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.⁷¹

FEMINISTS AGAINST SECTION 1108

Even though section 1108 is supposed to help victims of sex crimes, some feminist scholars believe it actually subverts the advances made by rape shield laws for complainants in sex crimes.⁷² The rationale for this conclusion is that the need for propensity evidence facilitated by section 1108 reflects the attitude that a woman’s credibility is insufficient to sustain a criminal complaint.⁷³ Further,

65. *Id.* at 179.

66. *See* CAL. EVID. CODE § 1108(a) (West 2016).

67. *People v. Chatman*, 38 Cal. 4th 344 (2006) (citing CAL. EVID. CODE, § 352).

68. CAL. EVID. CODE § 1108(a) (West 2016).

69. CAL. EVID. CODE § 352 (West 2016).

70. *People v. Falsetta*, 21 Cal. 4th 903, 918 (1999).

71. *Id.* at 917.

72. McGuinness, *supra* note 16, at 98.

73. *Id.*

section 1108 could compromise rape shield laws by making the sexual character of the defendant take center-stage, which would seem to make the sexual character of the victim more relevant by proxy.⁷⁴

Enacted in the 1970s, sections 1103(c)⁷⁵ and 782⁷⁶ of the California Evidence Code are commonly known as rape shield laws.⁷⁷ The purpose of rape shields was to combat the societal tendency to victim-blame that can infiltrate juror consciousness, particularly when the victim may not adhere to normative standards of sexual virtue.⁷⁸ Rape shield laws also contradict laws requiring corroboration of rape accusations, because the latter convey that without a third party vouching for her story, we cannot trust that a woman is telling the

74. *See id.*

75. CAL. EVID. CODE § 1103(c)(1)-(6) (West 2016):

(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, 262, or 264.1 of the Penal Code, or under Section 286, 288a, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

(2) Notwithstanding paragraph (3), evidence of the manner in which the victim was dressed at the time of the commission of the offense shall not be admissible when offered by either party on the issue of consent in any prosecution for an offense specified in paragraph (1), unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence shall make an offer of proof outside the hearing of the jury. The court shall then make its determination and at that time, state the reasons for its ruling on the record. For the purposes of this paragraph, "manner of dress" does not include the condition of the victim's clothing before, during, or after the commission of the offense.

(3) Paragraph (1) shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.

(4) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.

(5) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.

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

76. This section of the law says that it *may* be permissible to introduce evidence about the accuser's sexual past that is used to *challenge the accuser's credibility*. CAL. EVID. CODE § 782 (West 2016).

77. Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 (1986); *see also* Peter M. Hazelton, *Rape Shield Laws: Limits on Zealous Advocacy*, 19 AM. J. CRIM. L. 35, 36 (1991).

78. Hazelton, *supra* note 77, at 36–37.

truth.⁷⁹ “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.”⁸⁰ Further, in the 1970s, mainstream psychiatrists attributed false rape allegations “to the fact that for some women it is better to be raped than ignored.”⁸¹

Although the corroboration requirement is now defunct, its legacy “casts a shadow, in that the law still suggests that rape cases and rape complainants occupy a separate category when it comes to credibility.”⁸² Attorney and feminist scholar Susan Estrich asserts that the corroboration requirement emerged 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.”⁸³

Accordingly, feminist legal scholars assert that section 1108 has revitalized this notion that a woman’s testimony cannot be relied upon to convict on its own.⁸⁴ This notion is reinforced by Senator Rogan in the Public Safety Report: “Evidence that a particular defendant has such a propensity (to commit sexual offenses) is especially probative and should be considered by the trier of fact when determining credibility of a victim’s testimony.”⁸⁵ Therefore, one of the purposes of section 1108 appears to be the admission of evidence concerning the probability that the defendant has been falsely or mistakenly implicated in commission of the charged offense, based on the defendant’s history.⁸⁶ The focus is not the defendant’s guilt as much as bolstering or corroborating the woman’s credibility.⁸⁷

Scholars suggest the admission of defendant’s propensity evidence is unique to sex crimes because “in no other crime is the victim’s testimony automatically suspect.”⁸⁸ As such, “section 1108

79. See Donald J. Friedman, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1367–70 (1972). Since the 1970s, rape corroboration laws have since become defunct. McGuinness, *supra* note 16, at 107.

80. *Id.*

81. Friedman, *supra* note 79, at 1373 n.60.

82. Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 156 (1996).

83. Lisa R. Eskow, *The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing its Prosecution*, 48 STAN. L. REV. 677, 694–95 (1996).

84. McGuinness, *supra* note 16, at 107.

85. ASSEMBLY COMM. ON PUBLIC SAFETY, COMM. REP., A.B. 882, 1995-96 Reg. Sess. (Cal. 1995).

86. *Id.*

87. McGuinness, *supra* note 16, at 108.

88. *Id.* at 108.

revives the corroboration requirement through the back door. It perpetuates the myth that the victim's credibility in sex cases is categorically suspect."⁸⁹

Designed to protect the "categorically suspect" victim, rape shield laws like California Evidence Code section 1103(c) disallow evidence of prior sexual conduct to prove that the alleged victim consented.⁹⁰ Section 782 requires a signed document attesting to the relevance of the evidence and a private relevancy hearing without the jury present before any evidence of the complainant's prior sexual conduct can come into evidence.⁹¹ And even with sworn proof of relevancy, section 782 evidence can be excluded if the court finds it more prejudicial than probative.⁹² Further, the relevant evidence must pertain to credibility rather than consent: "Great care must be taken to insure that this exception to the general rule barring evidence of a complaining witness' prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a 'back door' for admitting otherwise inadmissible evidence."⁹³ Thus, when rape shield laws emerged in the 1970s, neither the defense nor the prosecution could use each other's respective sexual character against one-another.⁹⁴ When section 1108 was enacted in 1995, it tipped the sexual character balance scale out of equilibrium, since the prosecution is now allowed to use evidence of prior sex crimes to show the defendant's propensity to commit the charged sex crime.⁹⁵ This is not to suggest that our society and our legal system should not concern itself with sex crime recidivism, but to illustrate the discrepancy between the evidence allowed in sex crimes via section 1108 and similar laws and the admissible evidence for all other violent crimes, which are generally subject to the restrictions on evidence of prior specific acts to show propensity.⁹⁶

THE SCIENCE AND MYTHOLOGY OF RECIDIVISM

California's Supreme Court acknowledges that section 1108 is intended to allow justices to consider the propensity of the defendant to

89. *Id.*

90. CAL. EVID. CODE § 1103(c)(1) (West 2016). This prohibition applies to conduct with people other than the defendant; conduct with the defendant remains admissible under section 1103(c)(3).

91. CAL. EVID. CODE § 782 (West 2016).

92. *People v. Rioz*, 161 Cal. App. 3d 905, 916 (1984).

93. *Id.* at 918–19.

94. McGuinness, *supra* note 16, at 102.

95. CAL. EVID. CODE § 1108 (West 2016); *see also* McGuinness, *supra* note 16, at 102.

96. *See* CAL. EVID. CODE § 1101 (West 2016).

commit sex crimes.⁹⁷ Section 1108 is predicated on the notion that “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.”⁹⁸ However, at least one analysis has found no definitive proof that prior bad acts are probative of guilt in the current offense.⁹⁹

Nevertheless, sexual character evidence may be a focus for many jurors, and defendants may be convicted on this basis even when the evidence would not otherwise merit a conviction.¹⁰⁰ This is particularly acute when the prior act was particularly reprehensible but related only to the trial in that it was sexual. And the justification for section 1108—that prior crimes evidence is probative—is not a conclusion consistent with the results of some recidivism studies.¹⁰¹ One study from the Bureau of Justice compared recidivism across the criminal spectrum and found that the recidivism rate for rape was 7.7%, compared to 31.9% for burglars and 19.6% for violent robbers.¹⁰² Only homicide has a lower recidivism rate.¹⁰³ These statistics directly contradict the section 1108 proponents who believe that prior sex crimes are probative of future guilt.

Further, there is evidence of some variation in recidivism rates within the sex crime category itself¹⁰⁴ and within different categories of perpetrators within a given crime.¹⁰⁵ For example, true pedophiles, who have an exclusive sexual propensity towards children,¹⁰⁶ are sure to have much higher child sexual abuse recidivism rates in general than situational child molesters, who do not necessarily prefer children: “pedophilia [is] a mental abnormality that critically involves what a lay person might describe as a lack of control. DSM-IV 571-572 (listing as a diagnostic criterion for pedophilia that an individual have acted on, or been affected by, “sexual urges” toward children).”¹⁰⁷ In the 1997

97. *People v. Falsetta*, 21 Cal. 4th 903, 907 (1999).

98. ASSEMBLY COMM. ON PUBLIC SAFETY, COMM. REP., A.B. 882, 1995-96 Reg. Sess. (Cal. 1995) (statement of Assemblyman James Rogan, author of A.B. 882).

99. McGuinness, *supra* note 16, at 109.

100. *Id.*

101. *Id.*

102. See David P. Bryden & Roger C. Park, “Other Crimes” Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 572 n.182 (1994).

103. See *id.*

104. Keith Soothill, *Sex Offender Recidivism*, 39 CRIME & JUST. 145, 156–61, 203 (2010); see, e.g., R.K. HANSON & M.T. BUSSIERE, (1998). *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 63 J. CONSULTING CLINICAL PSYCHOL. 348-62 (1998) (evaluating and comparing types of sexual offenses and recidivism rates).

105. *Id.* at 156–61.

106. See *id.*; see also Hanson & Bussiere, *supra* note 104, at 348-62.

107. *Kansas v. Crane*, 534 U.S. 407, 414 (2002).

Supreme Court case *Kansas v. Hendricks*, the Court described how the defendant personifies the preferential child molester's high risk for recidivism: the defendant conceded that, "when he becomes 'stressed out,' he cannot 'control the urge' to molest children."¹⁰⁸ The Court goes on to discuss Hendricks' diagnosis as a pedophile, "which qualifies as a "mental abnormality": "[t]his admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons . . ."¹⁰⁹ Cases like Hendricks' exemplify how certain types of sex crimes have a heavy, but not exclusive, overlap with medical psychopathy like pedophilia or sexual sadism. However, detailed studies show that "sex offenders referred for psychiatric assessment or treatment cannot be considered as representative of all sex offenders."¹¹⁰ Thus section 1108 paints all sex offenders with the broad brush of propensity when only certain, relatively defined subsets within the category show a markedly higher risk of recidivism. If a defendant is not within one of those high-risk groups, it is much more likely that section 1108 would bring into evidence information that would weigh heavy on the jury without substantiation of its probative value. In addition to the heightened propensity for recidivism of the preferential sex offender, the age of the offender is another measurable variable that directly correlates to repeat offenses.¹¹¹ Thus the admission of a young defendant's previous sex offense under California Evidence Code section 1108 would be more probative of present guilt than it would of a much older defendant, particularly if the past incident was distant in time from the present charge. From extensive data and meta-analysis, "the understanding is that there is an inverse relationship between sexual offenders' age at the time of their release from incarceration and their sexual recidivism risk."¹¹²

REMEDIES

Non-Character Compromises: How About Habit?

Section 1108 is an unnecessary tool. There is no per se ban on admitting evidence of a defendant's previous actions.¹¹³ Accordingly, even with section 1101's ban on character evidence, prior sex crimes

108. *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997).

109. *Id.*

110. Soothill, *supra* note 104, at 158.

111. *Id.* at 163–64.

112. *Id.* at 164.

113. Cammack, *supra* note 5, at 360.

can theoretically come into evidence as long as they are admitted for non-propensity purposes.¹¹⁴ The constitutional ambiguities of section 1108's exception to the ban on character evidence could be avoided if section 1108 was supplanted by pre-existing mechanisms for admitting the same types of evidence. For example, before section 1108 and its federal counterpart's delineated exceptions to the ban on character evidence, courts in sex crime trials admitted evidence of the defendant's prior acts "to show a passion or propensity for unusual and abnormal sexual relations."¹¹⁵ In other words, courts could admit evidence that past criminal perversions were habitual and thus admissible under California Evidence Code section 1105.¹¹⁶ As such, habit evidence could replace section 1108 as a more precise means to admit prior bad acts that would seem more conducive to due process, since the offenses would have to closely parallel the instant case in order to show a habit.¹¹⁷

The difference between character and habit can be described as follows:

Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness. Habit, in the present context, is more specific. It denotes one's regular response to a repeated situation. If we speak of a character for care, we think of the person's tendency to act prudently in all the varying situations of life—in business, at home, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of responding to a particular kind of situation with a specific type of conduct. Thus, a person may be in the habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day's work, or of driving his automobile without using a seatbelt. The doing of the habitual act may become semi-automatic.¹¹⁸

Accordingly, habit evidence is considered more reliable than character evidence.¹¹⁹ The relative precision of habit is oppositional to the breadth of section 1108, where a rape of a middle-aged woman ten years before the trial could potentially come as character evidence in a

114. See CAL. EVID. CODE § 352 (West 1995).

115. 1 *McCormick* § 162 (1952).

116. CAL. EVID. CODE § 1105 (West 2016): Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

117. *Id.*

118. 1 *McCormick* § 195 at 574–75.

119. See FED. R. EVID. 406 advisory committee's note.

child molestation case.

Perhaps a Plan to Prevent Prejudice?

In addition to replacing section 1108's propensity evidence with the more tailored section 1105 habit evidence, there are other non-character mechanisms that are better tailored to the fair admission past misconduct. One common example is to admit past acts for the non-character purpose of showing a plan or design.¹²⁰ Evidence of prior similar acts can be admitted under plan or design if it is probative of case specifics:¹²¹ "the number of events must be shown to be significantly more numerous than would be expected in the absence of design."¹²² Further, the defendant's uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan."¹²³ Here, the jurors are not being asked to conclude that the defendant acted in a particular manner because of the defendant's inherent nature towards a certain kind of criminality.¹²⁴ Rather, they are instructed to draw conclusions from an existing plan that would include acts both charged and uncharged.¹²⁵ Unlike section 1108's showing of character or propensity for sexual criminality, evidence showing plan would seem more focused and material:

It is reasonable to infer from evidence showing that the defendant has committed a series of similar crimes that she has settled on a single technique for committing that crime, either because she has had success with the technique or because using the same technique will economize on imaginative effort.¹²⁶

Although evidentiary use of prior bad acts by a defendant is undoubtedly unfavorable to the accused, the non-character means of admission are more focused and precise, and their utilization instead of section 1108 would reduce the prosecutorial free-for-all that skirts the limits of due process.¹²⁷

Sever the Shield

More controversially, remedying the disparity in reciprocity

120. For commonly recognized non-character uses of uncharged misconduct evidence, see 1 McCormick § 190.

121. Cammack, *supra* note 5, at 362.

122. *Id.* at 389.

123. *People v. Ewoldt*, 7 Cal. 4th 380, 401-02 (1994).

124. Cammack, *supra* note 5, at 362.

125. *Id.*

126. Cammack, *supra* note 5, at 372.

127. *Id.*

may mediate the disparate prejudice wrought by propensity evidence against the defendant.¹²⁸ In other words, if the defendant can have past uncharged sexual behavior and misconduct used against him, perhaps the “rape shield”¹²⁹ should be lifted off of the complaining witnesses.¹³⁰ Reciprocity in “digging up dirt” on the sexual predilections of both the complaining witness and accused would seem more congruent to standards of judicial balance.¹³¹ In *Wardius v. Oregon*,¹³² the United States Supreme Court recognized the right to reciprocity was built into due process: to “speak to the balance of forces between the accused and his accuser.”¹³³

The reciprocity requirement allows the defendant to enjoy rights equivalent to the prosecution in regards to the presentation of evidence.¹³⁴ When a defendant is subject to character evidence under section 1108, justifying the exclusions of rape shield statutes because of governmental interest in protecting a complainant's privacy unreasonably disadvantages the defense.¹³⁵ Privacy should not outweigh the due process or the interests of justice in admitting relevant evidence.¹³⁶ The California Constitution does guarantee a right of privacy; however, the interest in due process for one accused should still outweigh a constitutional guarantee. That the defendant stands to lose so much should preclude shutting the door to helpful and possibly exculpatory information.

Reciprocity should also apply to the usage of character evidence.¹³⁷ In *People v. Hansel*, the California Supreme Court stated that required reciprocal pretrial discovery helps defendants to present their defense.¹³⁸ Keeping in line with the precedent of reciprocity from of *Hansel* and *Wardius*, section 1108 should theoretically open the door to defense attorneys seeking to introduce a complainant's sexual history.¹³⁹

128. See McGuinness, *supra* note 16, at 118.

129. See CAL. EVID. CODE § 782 (West 2016).

130. See McGuinness, *supra* note 16, at 119.

131. David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, WIS. L. REV. 1219, 1256 (1985).

132. *Wardius v. Oregon*, 412 U.S. 470 (1973).

133. *Id.* at 474.

134. McGuinness, *supra* note 16, at 118.

135. *Id.* at 119.

136. Haxton, *supra* note 131, at 1259.

137. McGuinness, *supra* note 16, at 119.

138. *People v. Hansel*, 1 Cal. 4th 1211, 1221 (1992).

139. McGuinness, *supra* note 16, at 119.

CONCLUSION

Section 1108 will lead to injustice for someone—the question is whether it “will [] be women or the accused?”¹⁴⁰ It seems like there are only two viable options to bring due process back to equilibrium: either cease the admission of propensity evidence to secure the conviction of sex offenders, or relinquish rape shield laws, making women less secure, but assuring that the scales of justice are more evenly weighted.¹⁴¹

140. *Id.*

141. *Id.*