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Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment

ABSTRACT. This Note demonstrates that the American rules for impeaching witnesses developed against a cultural background that equated a woman's "honor," and thus her credibility, with her sexual virtue. The idea that a woman's chastity informs her credibility did not originate in rape trials and the confusing interplay between questions of consent and sexual history. Rather, gendered notions of honor so permeated American legal culture that attorneys routinely attempted to impeach female witnesses by invoking their sexual histories in cases involving such diverse claims as title to land, assault, arson, and wrongful death. But while many courts initially accepted the notion that an unchaste woman might be a lying witness, most jurisdictions ultimately rejected unchastity impeachment as illogical or irrelevant. In the process, the gendered notion of honor may have influenced judicial preference for reputation evidence over evidence regarding specific acts as a form of impeachment. The unchaste/incredible equation remained viable in the law of rape as courts continued to insist that the victim's sexual history was relevant to credibility, consent, or both. Although legal reforms have narrowed the use of sexual history evidence in rape trials, the concept that a woman's sexual virtue signifies her credibility survives today in moral turpitude law and in the treatment of prostitution as a crime that bears on credibility.

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INTRODUCTION

Our legal system hinges on evaluations of credibility. Whom do we expect to tell the truth? When will they tell it? And how do we know they are telling it? These questions must arise, consciously or not, in the mind of any judge or juror who is asked to evaluate witness testimony. The need to judge credibility has been discussed by legal scholars and practitioners and addressed in evidentiary rules dealing with the use of character evidence at trial to impeach witnesses.[1] Missing from this dialogue, however, has been an understanding that the answers to these basic questions about truthfulness have differed on gender lines.[2]

This Note shows that as American courts developed rules for determining what could and could not be asked in order to impeach the credibility of witnesses, they did so against a cultural background that connected women's truthfulness to their chastity. A woman's "honor," or her culturally recognized moral integrity,[3] so depended on her sexual virtue that her credibility suffered

1. *See, e.g.*, FED. R. EVID. 404 (defining the use of character evidence to prove conduct); FED. R. EVID. 405 (defining methods of proving character); FED. R. EVID. 608 (allowing, with limitations, the use of evidence of opinion or reputation to attack or support the credibility of a witness); FED R. EVID. 609 (allowing the credibility of a witness to be impeached with evidence of conviction of a crime, subject to limitations); ROBERTO ARON, KEVIN THOMAS DUFFY & JONATHAN L. ROSNER, IMPEACHMENT OF WITNESSES: THE CROSS-EXAMINER'S ART (1990); W.M. BEST, A TREATISE ON THE PRINCIPLES OF EVIDENCE AND PRACTICE AS TO PROOFS IN COURTS OF COMMON LAW; WITH ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES (London, S. Sweet 1849); IRVING YOUNGER, THE ART OF CROSS-EXAMINATION (1976).

2. Feminist writers and legal scholars have, of course, written extensively on the sexual double standard and gender bias that has existed in both substantive and procedural areas of law, including the law of evidence. *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90 (1977); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). These critiques, and others, particularly those of sexual history evidence in rape trials, have led to important legal reforms, most significantly the rape shield laws. I am indebted to this scholarship, but this Note addresses a historical aspect of the issue that deserves closer attention.

3. For the purposes of this Note, "honor" is a stand-in for those circumstances of personality that, from an outside perspective, might make a witness believable. As Dean John Wigmore noted, "That which induces us to believe that a witness is or is not likely to be speaking truthfully is usually some circumstance of his actual personality." 2 JOHN HENRY WIGMORE,

from any real or perceived failings of that virtue. Part I argues that for men, while honor, credibility, and a reputation for truthfulness were fairly interchangeable in the popular imagination of the eighteenth century, the story for women was quite different. For women, honor and credibility depended on chastity and on the reputation for sexual virtue. Because female honor emphasized women's reputation for sexual purity and not their reputation for truth telling, truth itself was prescribed differently for women and men. Women were supposed to appear chaste, so they experienced social pressure to dissemble rather than present the appearance of impropriety. Men, to the contrary, were praised most when they were true to their word.

Part II shows how this gender difference resonated in early evidence cases as courts struggled to regulate the impeachment of female witnesses. While many courts questioned the rationality of using evidence of unchastity to prove untruthfulness, particularly just for one sex, others seemed to accept as a given the probative value of such chastity evidence. Even beyond the question of relevance, the unique importance of reputation for women's honor resonated in decisions on the type of proof to be allowed in character impeachment—whether to allow evidence of reputation or specific acts. Early courts' inability to reach a consensus on the relevance of a woman's sexual virtue to her credibility—and, if so, how unchastity evidence should be adduced—illustrates the resilience of the gendered notion of honor. At the same time, that most jurisdictions ultimately prohibited lawyers from impeaching female witnesses with sexual history evidence marks a triumph of legal principle over a pervasive cultural norm. Unfortunately, this rationalist triumph did not extend to rape law.

That women who pressed rape charges were typically forced to respond to sexual history evidence will not surprise readers familiar with the history of rape law. Modern rape scholarship has effectively documented the gender biases that permeated the law of rape, biases that included routine permission to explore the victim's sexual history and thus to undermine her credibility.[4] This Note contributes the simple but important point that the link between female honor and chastity did not arise from the law of rape, but rather predated and informed rape law's development. Far from originating in rape

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A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 920, at 298 (2d ed. 1923) [hereinafter WIGMORE ON EVIDENCE].

4. *See, e.g.*, Berger, *supra* note 2 (describing the practice of admitting sexual history evidence at trial and the attendant harm to rape victims). As discussed in Part III, sexual history evidence, although admitted formally on the issue of consent, functioned to undermine the victim's credibility by suggesting that she had lied about her nonconsent and by evoking the cultural link between unchastity and dishonesty.

trials and the confusing interplay between questions of consent, credibility, and sexual history, the idea that a woman's chastity informs her credibility so permeated American culture that attorneys in cases involving claims as diverse as title to land, assault, arson, and wrongful death routinely attempted to impeach female witnesses by invoking their sexual histories.[5] While early courts sometimes claimed to admit or exclude this chastity-related evidence depending on its purported relevance to the subject matter of the case at hand, they did not do so consistently.[6]

Three points emerge from Part II's review of early law in this area. First, America's vision of the truthful woman incorporated ideas about her sexual purity and these ideas informed perceptions of the female witness. Second, the idea that an unchaste woman was also a lying woman arose in early impeachment jurisprudence even in cases where the female witnesses were not the victims of sexual crimes. Third, early courts more often than not thought independently and carefully enough to reject a sexual double standard for testing credibility, at least in cases not involving rape.

Part III shows that what seemed like a progressive retreat from the unchaste/incredible equation halted when the issue was rape. In rape cases, unchaste and incredible became unchaste and consenting, a development that might be viewed as a form of "preservation through transformation."[7] If legal logic had enabled many courts to reject the idea that chastity had a bearing on female credibility, the idea resurfaced when the question was posed as one of consent. Although the impossibility of drawing a bright line between evidence admitted to prove consent as opposed to credibility of the victim in a rape case

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5. *See* Lane v. Commonwealth, 121 S.W. 486 (Ky. 1909) (reporting the impeachment of the credibility of a prosecution witness in an arson case with evidence of a reputation for unchastity); Bakeman v. Rose, 18 Wend. 146, 150 (N.Y. 1837) (reporting an attempted impeachment of the credibility of a prosecution witness in an assault case with evidence of prostitution); Jackson v. Lewis, 13 Johns. 504 (N.Y. 1816) (reporting an attempted impeachment of the credibility of a defense witness in a dispute over a land title with evidence of a witness's prostitution); Kolb v. Union R.R. Co., 49 A. 392 (R.I. 1901) (reporting an attempted impeachment of credibility of plaintiff widow in a wrongful death suit with evidence of a character for chastity); *see also infra* Part II.

6. *Compare* Logan v. Commonwealth, 191 S.W. 676, 679 (Ky. 1917) (holding that a female witness in a murder case could be impeached with evidence of her bad reputation for virtue), *with* Shartzer v. State, 63 Md. 149, 152 (1885) (holding that "the prosecutrix could not be asked the question whether she had previously had connection with another person").

7. *See* Siegel, *supra* note 2 (arguing that by recasting a husband's prerogative to beat his wife into a right to marital privacy, the law continued to protect wife-beating even after laws no longer expressly allowed such conduct).

seems obvious and has been well-documented,[8] courts often insisted that sexual history was admissible to prove consent in a rape trial, although not credibility.

Both before the passage of the rape shield laws in the 1970s and more recently in criticizing those laws, legal scholars and others have pointed out an inherent illogic and sexism in the law's approach to rape.[9] The very definition of the crime as the "carnal knowledge of a female forcibly and against her will" meant that courts often required proof of sufficient "resistance" on the part of the woman.[10] Further, corroboration requirements[11] and mandatory jury instructions advising that the rape complainant's "testimony be scrutinized with caution" spoke to the enduring stereotype that "[r]ape [was] . . . an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[12] Scholars have generally understood this bias to come from the "longstanding suspicion of rape victims"[13] that developed under the "purview of ancient masculine codes"[14]

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8. *See, e.g.*, Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986). Professor Galvin puts the connection nicely: "Evidence that establishes consent by the complainant will simultaneously impeach her credibility, and evidence that impeaches her credibility will raise the likelihood of consent." *Id.* at 775-76.

9. *See* Estrich, *supra* note 2, at 1091 ("Sexism in the law of rape is no matter of mere historical interest; it endures, even where some of the most blatant testaments to that sexism have disappeared."); *see also* Berger, *supra* note 2; Ordover, *supra* note 2.

10. Galvin, *supra* note 8, at 769; s*ee, e.g.*, Maxey v. State, 52 S.W.2d 2, 3 (Ark. 1899) (including a jury instruction to the same effect); State v. Shields, 45 Conn. 256 (1877) (listing the "two elements in the crime [of rape]-carnal knowledge by force by one of the parties, and non-consent thereto by the other."); *see also* SUSAN ESTRICH, REAL RAPE 29-41 (1987); Roger B. Dworkin, Note, *The Resistance Standard in Rape Legislation,* 18 STAN. L. REV. 680 (1966).

11. *See* Note, *The Rape Corroboration Requirement: Repeal Not Reform,* 81 YALE L.J. 1365 (1972).

12. Estrich, *supra* note 2, at 1094-95 (quoting 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (photo. reprint 2003) (1778)). These rules were eliminated as part of rape reform legislation in the 1970s. *See* Galvin, *supra* note 8, at 769-70 ("In terms of evidentiary law, reformers . . . dispensed with the requirement that the complainant's testimony be corroborated and with the mandatory jury instructions that her testimony be scrutinized with caution.").

13. Estrich, *supra* note 2, at 1094; *see also* Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 155 (1996) ("The law has historically considered women alleging rape to be particularly in-credible, and policymakers and judges developed special evidentiary rules, such as corroboration requirements, cautionary instructions, and the prompt complaint doctrine, to guard against the possibility that an innocent man would be convicted on the word of a vindictive, lying woman." (footnote omitted)).

14. BROWNMILLER, *supra* note 2, at 423.

centered around controlling women, often through the use of violence.[15] That discourse has been powerful within its sphere, but it has not fully accounted for the proposition that, for women, "promiscuity imports dishonesty."[16] Section III.A explores the extent to which early rape jurisprudence was formed by the culturally entrenched equation of unchaste and incredible.

While our cultural definition of sexual virtue has shifted drastically since the eighteenth century and even since the initial enactment of the rape shield statutes, the idea that a woman's sexual virtue bears upon her credibility is still present today. As Section III.B shows, modern courts admit evidence of prostitution as a crime bearing on credibility.[17] Although prostitution is no longer defined in gendered terms, women are still far more likely to be prosecuted for prostitution-related offenses. That evidence of prostitution can still be admitted to impeach the female witness shows the continuing vitality of the chastity/credibility equation. Even now, at the beginning of the twenty-first century, courts decide whether or not to believe women based on perceptions of their sexual purity.

The cases this Note examines are illustrative, and the conclusions it draws from them are impressionistic. In the period covered, American courts in various states were developing a jurisprudence on these evidentiary questions that was confused and often confusing.[18] Close and often almost metaphysical distinctions were and continue to be drawn. The distinction between evidence of reputation and evidence of specific bad or immoral acts is one example. This Note does not propose to survey the law in various jurisdictions on the questions of gender, sexual purity, and credibility. Instead, it shows that a connection between the three existed, that it was treated differently by different courts, and that it continues to be a salient connection today, even though it may be differently articulated. Honor, in sum, has been and still is gendered.

I. CHASTITY AS THE THRONE OF WOMEN'S HONOR

Honor is a cultural construct that connotes moral character, integrity, and trustworthiness.[19] As such, it often served at least historically as a proxy for

15. *Id.* at 421-24.

16. Berger, *supra* note 2, at 16.

17. *See generally infra* Section III.B.

18. *See* Annotation, *Cross-Examination as to Sexual Morality for Purpose of Affecting Credibility of Witness*, 65 A.L.R. 410 (1930).

19. As Professor Gross points out, "'Honor' can mean many things in different societies." ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM

truthfulness in credibility determinations.[20] The more honorable a person was perceived to be, the more believable he or she was.[21] Importantly, as American evidence jurisprudence began to develop in the nineteenth century and courts grappled with the need to make rules surrounding credibility determinations, the understanding of honor differed along gender lines. A woman's sexual virtue was entwined with her truthfulness to such an extent that the two were often perceived as conceptually identical.[22] Justice Sutherland's majority opinion in the landmark *Lochner*-era case *Adkins v. Children's Hospital* testifies eloquently, if indirectly, to this reality.[23] In an opinion arguing against special wage rules for women, he proclaimed: "[F]or, certainly, if women require a minimum wage to preserve their morals men require it to preserve their honesty."[24] The Court apparently considered neither rationale good enough to overcome the right to contractual freedom, but its characterization of what was at stake shows how utterly women's sexual purity could and did take the place of truthfulness.

SOUTHERN COURTROOM 47 (2000). And, certainly, there were geographic differences even among the early states in the meaning of "honor." Professor Wyatt-Brown argues, for example, that as the eighteenth century progressed, "[h]onor in the antebellum North became akin to respectability" whereas "[h]onor, not conscience, shame, not guilt, were the psychological and social underpinnings of Southern culture." BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 20, 22 (1982).

20. In 1848, Justice Greene of the Iowa Supreme Court argued against allowing a male witness to be impeached with evidence that he was "a good or bad man, without reference to his character for truth." Carter v. Cavenaugh, 1 Greene 171 (Iowa 1848). Even in jurisdictions that accepted his logic, however, excluding reputation or character evidence was easier said than done. *See generally infra* Part II.

21. *See, e.g.*, STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND 66-74 (1994) ("Through the Renaissance and into the eighteenth century an *honorable man* and an *honest man* were interchangeable designations: 'honesty' *included* the notion of truth-telling but was understood far more broadly to include concepts of probity, uprightness, fair-dealing, and respectability.").

22. This Note focuses on an honor system and honor codes developed in middle-class and elite communities. These codes were not universal, nor could they be, given the wholly different social, economic, and practical realities of life for poor women, and particularly for black women in the nineteenth century. Nonetheless, it was the elite's understanding of honor, inherited from an ancient canon through the common law and European immigration, in the shadow of which American evidence jurisprudence developed and that informed its overarching attitudes toward women and credibility.

23. 261 U.S. 525 (1923).

24. *Id.* at 556.

In her 1975 essay, *Women and Honor: Some Notes on Lying*, Adrienne Rich wrote that "[h]onesty in women has not been considered important."[25] While it would be an oversimplification to maintain that honesty itself was not valued in women, part of Rich's point is that it was sexual virtue, not honesty as such, that traditionally formed the substance of a woman's honor.[26] A woman's moral integrity was defined by her ability to remain chaste, run an efficient household, remain true to her husband, and guide men by her influence in the home.[27]

Rich describes women's honor as having to do with "virginity, chastity, [and] fidelity to a husband."[28] The Oxford English Dictionary (OED) provides a similar definition for the honor "of a woman": "[c]hastity, purity, as a virtue of the highest consideration; reputation for this virtue, good name."[29] The dictionary provides no parallel definition for specifically "male" honor, leaving the impression that all other definitions, by default, refer to men and not women.[30] The OED's examples of the uses of these definitions show how the definitions equate honor with truth and justice, and even specifically with men. For example: Wordsworth writes, "Say, what is Honour? Tis the finest sense Of justice which the human mind can frame."[31] In a 1708 example from Susanna Centlivre's *Busie Body*, honor as a bond interacts directly with the female form of honor—chastity. Mrs. Centlivre is quoted as follows by the

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25. Adrienne Rich, *Women and Honor: Some Notes on Lying*, *in* ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966-1978, at 185, 186 (1979).

26. *See, e.g.*, GROSS, *supra* note 19, at 49. Professor Gross writes that women's honor in the antebellum South was "approximately synonymous with sexual virtue and purity." *Id.*

27. Harriet Beecher Stowe and Sarah Josepha Hale, among other American writers on domesticity in the nineteenth century, espoused the popular view that, just as a woman's place was as a moral beacon in the home, an "efficiently run, morally uplifted home would save the American republic from degradation." Michael Goldberg, *Breaking New Ground: 1800-1848*, *in* NO SMALL COURAGE: A HISTORY OF WOMEN IN THE UNITED STATES 179, 195 (Nancy F. Cott ed., 2000).

28. Rich, *supra* note 25, at 186.

29. 7 OXFORD ENGLISH DICTIONARY 357 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) [hereinafter OED].

30. *Id.* Honesty is not specifically mentioned in the definition of honor. Yet the definition of honesty refers to honor. Thus the first definition given for "honest" is "the quality of being honest," which is further explained in terms of honor. In the third example, the OED refers to "honour gained by action or conduct; reputation, credit, good name." *Id.* at 349; *see also* GROSS, *supra* note 19, at 49 ("Central to Southern white male honor culture, like its antecedents in traditional English honor culture, were '[t]he concept and practice of truth.'" (citing SHAPIN, *supra* note 21, at 67)).

31. 7 OED, *supra* note 29, at 357 (citing WILLIAM WORDSWORTH, *Untitled Sonnet*, *in* SHORTER POEMS, 1807-1820, at 52 (Carl H. Ketcham ed., 1989) (1809)).

OED, "He had given her his Honour, that he never would . . . Endeavour to know her till she gave him leave."[32] The man's *honor* is his bond, his sworn statement to respect the woman's *honor*, her chastity. If he does not hold to his promise, he will have dishonored himself by being false.[33] Thus, the oath, truth telling, and a sense of justice all combine to form a male morality that emerges in stark contrast to the prescriptions of chastity and purity that define female honor.

Early references to honor in American jurisprudence show that "[h]onor was indisputably a gendered system."[34] A selection of pre-1900 cases reveals that when referring to transactions among men, advocates and judges commonly and unselfconsciously employed the term honor to convey the idea that a man will be true to his word.[35] Justice Greene, writing for the Iowa Supreme Court in 1848, attempted to chart the relation between honor and honesty for men. According to the Justice, honesty was a necessary, though not a sufficient element of honor. Thus, though "to be honorable, a man must be strictly honest; still, he may be honest without being honorable."[36] Nonetheless, a dishonorable man would generally be perceived as untrustworthy. For this reason, siblings would go to great lengths to "save the

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32. *Id.* (citing Susanna Centlivre, *The Busybody*, *in* FEMALE PLAYWRIGHTS OF THE RESTORATION 293, 305 (Paddy Lyons & Fidelis Morgan eds., 1994) (1749)).

33. A similar definition of male honor can be found in the "Code of a Gentleman" of the Virginia Military Institute cited by Justice Scalia in his dissent in *United States v. Virginia*, 518 U.S. 515, 602-03 (1996) (Scalia, J., dissenting). The "Code of a Gentleman" of the formerly all-male institution began by stating, "The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles." *Id.* at 602.

34. GROSS, *supra* note 19, at 49. The fact that prescriptions for male chastity do not surface as part of the definition of male honor no doubt reflects the double standard that historically prescribed premarital virginity for women but not for men. In the early United States, "virginity before marriage was expected" for women. Goldberg, *supra* note 27, at 187. At the same time, "most Northern males . . . had sexual experience before marriage," and particularly in the South, "[y]oung men made sexual experience a point of honor." WYATT-BROWN, *supra* note 19, at 294-95.

35. *See, e.g.*, Smith v. Richards, 38 U.S. (13 Pet.) 26, 31-32 (1839) ("[B]elieving the appellant to be a man of strict honour, honesty, truth, and veracity, he reposed the most implicit faith in his declarations . . . ."); Monroe Mercantile Co. v. Arnold, 34 S.E. 176, 177 (Ga. 1899) ("The undersigned members of said company pledge their honor as gentlemen to execute and deliver to the payee or holder of this note . . . a mortgage on all the assets of said company . . . ."); Loomer v. Wheelwright, 3 Sand. Ch. 135, 146 (N.Y. Ch. 1845) ("There was no promise or condition, but he trusted to Mr. Wheelwright's honor."). In a sampling of cases taken from a set of almost 3500 pre-1900 cases returned in a Westlaw search for "honor" (excluding certain phrases, such as "your honor"), the vast majority refer to a man's honor as indicative of his faithfulness to an oath.

36. Carter v. Cavenaugh, 1 Greene 171, 175 (Iowa 1848).

honor" of a defaulting brother by paying or taking on his debts.[37] The resulting loss of credit in the community was so severe that it was to be avoided at all costs.[38]

References to women's honor in pre-1900 cases do not invoke the transactional oath or bond.[39] As the OED definition predicts, the word "honor" as applied to women, when it did come up in the courtroom, meant chastity or fidelity to a husband. The argument in a mid-nineteenth century New Hampshire breach of promise suit highlights the conceptual divide between male honor, or bond keeping, and female honor, or chastity.[40] The male plaintiff had accused a woman of breaching her promise to marry him and offered evidence to show she had instead married another man. In seeking to exclude that evidence, the defense lawyer argued that it would only be relevant if it "went directly to prove acts inconsistent with the honor" of his client.[41] By invoking his client's honor, however, the attorney did not mean to refer to whether or not she broke her word. Instead, he used the word to refer to her chastity, arguing that the prosecution's evidence was irrelevant since it could, at most, prove acts of unchastity, not her marriage to the other man. Thus,

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37. Michoud v. Girod, 45 U.S. (4 How.) 503, 561 (1846); *see also* Morris v. Terrell, 23 Va. (2 Rand.) 6 (1823) (Coalter, J., dissenting) ("Charles Terrell, to save the honor and credit of his brother, took in the bill, and gave his own bond . . . .").

38. The rare instance in which a man's honor shows up as unrelated to his bond in these early case reports tends to come at the intersection of male and female honor, in seduction and breach of promise cases. In those cases, the injury to a wife or daughter's honor has reflected back upon her family, damaging a father or husband in the process. *See, e.g.*, Brownell v. McEwen, 5 Denio 367, 369 (N.Y. Sup. Ct. 1848) (holding that a father may receive damages in a seduction action as "reparation to [his] injured honor"). This understanding of the importance of a woman's honor to the men with whom she associates dates back to ancient times and was reinvigorated by the Humanists who believed that "[w]ives, by their actions, and in particular by their sexual behavior, brought honor or dishonor to the man and his family." 2 BONNIE S. ANDERSON & JUDITH P. ZINSSER, A HISTORY OF THEIR OWN: WOMEN IN EUROPE FROM PREHISTORY TO THE PRESENT 28 (1988). The dishonor derived in part from men's role as "proprietors and protectors" of female virtue. WYATT-BROWN, *supra* note 19, at 294.

39. That women were not an enfranchised part of the contractual world of business during that time goes some way toward explaining this discrepancy. When they worked outside the home, women were typically employed as factory workers, domestic servants, teachers, or similar positions. *See* Goldberg, *supra* note 27, at 187-95. For a comprehensive exploration of the doctrine of "separate spheres" and its operation on the daily lives of women in the latter half of the nineteenth century, see JULIE HUSBAND & JIM O'LOUGHLIN, DAILY LIFE IN THE INDUSTRIAL UNITED STATES 1870-1900, at 99-119 (2004).

40. Pettingill v. McGregor, 12 N.H. 179 (1841).

41. *Id.* at 183.

even when a woman's pledge was the issue in the case, when defense counsel spoke of her "honor," he did so to connote chastity, rather than truthfulness.[42]

Not only were women supposed to be chaste, loyal, and pure; they were also supposed to maintain a reputation for being so. The late-eighteenth and early-nineteenth century discourse on women's honor illuminates the tension between valuing reputation and valuing truth telling in its own right.[43] Jean-Jacques Rousseau elaborates one of the most repercussive views of the "moral difference between the sexes" in *Émile*, his influential treatise on education.[44] Available in translation in late colonial America and in the early years of the Republic, Rousseau's "work on women had very definite and far-reaching American influence."[45] According to Rousseau, the key to female virtue lies equally in the thing itself and in its appearance. He justifies his claim that women must maintain both their chastity and their reputations by referring to the difficulty of establishing paternity. If a woman does not preserve her reputation, a husband may doubt his wife's fidelity.[46] This doubt can in turn

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42. Another early New York case, *Cruger v. Cruger*, 5 Barb. 225 (N.Y. Sup. Ct. 1849), shows a further nuance in the nineteenth-century concept of female honor. Hendrik Hartog tells the full story of this contentious marital property case in MAN AND WIFE IN AMERICA: A HISTORY 176-92 (2000). At issue was whether a wife had been coerced into assigning to her husband half of her own property, which he had originally agreed to reserve to her in trust. The court reasoned that "[i]t could not have been considered an abuse of her power, to devote a portion of her income . . . to promote the welfare and advance the interests of one whom she had solemnly promised to love, honor and obey." *Cruger*, 5 Barb. at 269. The very marriage contract in which traditionally "[t]he husband assumed the payment of his wife's debts in exchange for . . . the wife's marriage vow 'to love, honor, and obey,'" NANCY ISENBERG, SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA 172 (1998), meant that demonstrations of loyalty to a husband would not be construed as other than the natural product of wifely devotion, *see* HARTOG, *supra*, at 186. Ironically, even as the court asserted that a married woman could be treated as a "free and independent property holder," it used the idea of women's oath of loyalty to her husband to support its conclusion. *Id.*

43. Professor Gross argues that Southern male honor, in contrast to its Northern counterpart, contained a similar emphasis on appearance. GROSS, *supra* note 19, at 48 ("Whereas New Englanders recognized a strong division between external appearances and one's inner, 'true' self, so that reputation could serve only as evidence of character, to nineteenth-century Southerners, appearances were what mattered." (emphasis omitted)).

44. JEAN-JACQUES ROUSSEAU, ÉMILE 325 (Barbara Foxley trans., Dent & Sons Ltd. 1974) (1762).

45. PAUL MERRILL SPURLIN, ROUSSEAU IN AMERICA, 1760-1809, at 76 (1969). Apparently, Justice Joseph Story often quoted Rousseau and "the peculiar doctrines of this great enthusiast seem to have deeply affected him." *Id.* at 35 (quoting 1 LIFE AND LETTERS OF JOSEPH STORY 75-76 (W.W. Story ed., 1851)).

46. Rousseau was far from the first to argue for the importance of women's chastity as a guarantor of paternity. In their history of women in Europe, Bonnie S. Anderson and Judith P. Zinsser describe how most of the writings and legends about daughters in Greek, Roman, Hebrew, Celtic, and Germanic cultures focus on the girl's virginity. 1 ANDERSON & ZINSSER,

lead to the husband's inability to love his children because he is "haunted by the suspicion that this is the child of another."[47] Thus, a husband's doubt of his wife's fidelity is as damaging as her actual infidelity would be. By such reasoning, Rousseau completes the path from a woman's failure to appear virtuous to the disintegration of her family.[48]

Using the word honor, Rousseau defines what he sees as the moral imperative for women. He writes:

> Worth alone will not suffice, a woman must be thought worthy; nor beauty, she must be admired; nor virtue, she must be respected. A woman's honour does not depend on her conduct alone, but on her reputation, and no woman who permits herself to be considered vile is really virtuous.[49]

Unlike male honor, for Rousseau, women's honor depends on "what people [will] think."[50] Thus, a woman must both be pure and appear to be pure in

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supra note 38, at 34. Following in this great tradition, male Enlightenment thinkers "insisted that chastity was woman's highest virtue and left the double standard of sexual behavior intact." 2 ANDERSON & ZINSSER, *supra* note 38, at 118.

47. ROUSSEAU, *supra* note 44, at 325.

48. Rousseau's emphasis on appearances for women is born out in the literature of his day and throughout the nineteenth century. The great heroines of nineteenth century novels constantly worry about the need to protect their reputations. In Jane Austen's *Pride and Prejudice*, Lizzy and Jane Bennet resign themselves to the possibility that they will never marry after their sister, Lydia, sullies the family name by running away with her lover. JANE AUSTEN, PRIDE AND PREJUDICE 197-99 (Donald Gray ed., W.W. Norton 1993) (1813). Frances Burney's Evelina, although an extremely innocent young woman, constantly threatens her own honor by placing herself in apparently compromising social situations, the most memorable of which is, perhaps, her stroll through the public gardens in the company of two prostitutes. FRANCES BURNEY, EVELINA 274-75 (Kristina Straub ed., Bedford Books 1997) (1778). The cultural ubiquity of instructional guides for women further emphasizes the importance of a woman's reputation to her social acceptability. Conduct books sought to help women achieve a kind of visible purity necessary for establishing reputation, which was in turn the key to a successful marriage. For extensive discussion of conduct books and their role in women's lives, see NANCY ARMSTRONG, DESIRE AND DOMESTIC FICTION: A POLITICAL HISTORY OF THE NOVEL (1987); EVE TAVOR BANNET, THE DOMESTIC REVOLUTION: ENLIGHTENMENT FEMINISMS AND THE NOVEL (2000); SARAH E. NEWTON, LEARNING TO BEHAVE: A GUIDE TO AMERICAN CONDUCT BOOKS BEFORE 1900 (1994); and WOMEN IN THE EIGHTEENTH CENTURY: CONSTRUCTIONS OF FEMININITY (Vivien Jones ed., 1990).

49. ROUSSEAU, *supra* note 44, at 328.

50. *Id.* Of course, Rousseau did not originate this idea. As John Lyly explained in 1580, "All women should be as Caesar would have his wife, not only free from sin but from suspicion." JOHN LYLY, EUPHUES AND HIS ENGLAND 313 (1916).

order to be virtuous. Rousseau goes on to describe a concern for reputation as the "grave of a man's virtue and the throne of a woman's."[51] By creating such a startling division between male and female definitions of honor, Rousseau problematizes truth for women. Whereas men may "defy public opinion" as long as they do right, doing right is only "half" the task for women.[52] With this pivotal assertion, Rousseau implicitly denies women the freedom to act on conscience. By admitting that doing right could involve defying public opinion, he indicates that society's prescriptions may not always encourage truth. And if we acknowledge that actual truth and virtue are often misperceived by society, women's need to maintain their reputations may create the paradoxical situation in which they are socially required to deceive. Thus, women's honor not only differs from men's in its emphasis on purity or loyalty to one's spouses, but it also equates credibility with the appearance of chastity while ignoring actual truthfulness as an independent value.

In her *Vindication of the Rights of Woman*, published thirty years after *Émile* and a favorite of early feminists in the United States,[53] Mary Wollstonecraft rejects Rousseau's definition of female virtue precisely because of the insidious effect it has on truth telling for women.[54] She traces the path from what

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51. ROUSSEAU, *supra* note 44, at 328. An 1899 New York case recalls Rousseau's vision of a woman's reputation as the throne of her honor. In a suit for divorce, the court chastised a male witness who testified that he had had an affair with the plaintiff's wife: "When a man voluntarily appears in court, and swears away the reputation of a woman, who, as he claims, has sacrificed her honor for him, his testimony should be viewed with suspicion." Fawcett v. Fawcett, 61 N.Y.S. 108, 109 (Sup. Ct. 1899). In this case, the word honor functions in a gendered way as a synonym for fidelity to a husband. Rather than take the side of the husband, however, *Fawcett* emphasized the sacred status of a woman's reputation for virtue. This move can also be interpreted as the court's striving to protect the institution of marriage and to reserve divorce for cases in which more than one witness could testify to infidelity or other serious breaches of the marital vow.

52. ROUSSEAU, *supra* note 44, at 328. Rousseau's conception of male honor, that it has to do only with internal truthfulness, presents one side of an age-old conflict in conceptions of male honor. Scholars have argued that the Rousseauian vision of male honor was more prevalent in the early northern United States, while for white southern men, "[u]pholding honor required public display." GROSS, *supra* note 19, at 47; *see also,* WYATT-BROWN, *supra* note 19. Thus, male honor sometimes suffered from the need for its exterior display. Still, it centered on oaths and truth telling, whether public or private, while women faced the problem of needing to appear virtuous and chaste in order to maintain their honor.

53. Wollstonecraft's work reached a large and receptive audience in the United States and helped lay the theoretical foundation for the first women's rights convention at Seneca Falls. *See* THE ELIZABETH CADY STANTON-SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITINGS, SPEECHES 2-3 (Ellen Carol DuBois ed., rev. ed. 1981).

54. MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN (Carol H. Poston ed., W.W. Norton 2d ed. 1988) (1792).

Rousseau called women's "throne"—her reputation—to deceit. Wollstonecraft argues that women necessarily lose sight of the divine spirit of truth because "it is the eye of man that they have been taught to dread."[55] This dread of man's condemnation or the loss of man's respect is also reinforced by society and its products. Wollstonecraft explains, "Advice respecting behaviour, and all the various modes of preserving a good reputation, which have been so strenuously inculcated on the female world, [are] specious poisons, that incrusting morality eat away the substance."[56] She eschews the "puerile attention to mere ceremonies," which she sees as corrupting women's sense of true values.[57] In a perfect society, the good woman and the reputedly good woman would be the same. In the kind of imperfect society that Rousseau himself exposes in *Émile*, however, social prescription and truth are not always aligned. Thus, Wollstonecraft highlights a logic that meant both that chastity and truth telling were one and the same for women and that even chaste women might have to lie in order to keep up appearances and maintain their credibility. In addition to its likely contribution to the enduring stereotype of the female liar,[58] this entwinement of chastity and honor meant that for a woman, if either her chastity or reputation for chastity were lost, her honor and reputation for truthfulness went with them.

Women's honor, then, encompassed a fraught set of values that privileged chastity and the reputation for sexual virtue over truthfulness. As a result, when a woman was "unchaste" or appeared so, she not only lost her honor in the eyes of her community, but also her credibility.

II. THE LEGAL HISTORY OF GENDERED HONOR: EVIDENCE LAW

If this eighteenth- and nineteenth-century cultural discourse suggests gendered answers to the basic questions about truth telling—"Whom do we

55. *Id.* at 131.

56. *Id.*

57. *Id.* at 133.

58. *See, e.g.*, Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in* Jones v. Clinton, 31 U.C. DAVIS L. REV. 123, 125 (1997) ("Custom and law have taught that women are not to be taken seriously and not to be believed. For most of this country's history, the law classed women with children and the mentally impaired and forbade us to own property, enter into contracts, or vote. The rape laws were a codified expression of mistrust. Although the laws have changed, social science and legal research reveal that women are still perceived as less credible than men." (quoting Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGE'S J., Winter 1995, at 5)); Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625 (2000).

expect to tell the truth? When will they tell it? And how do we know they are telling it?"—then we would expect to see women's credibility being attacked in court through questions about their chastity or reputation for sexual purity. Whether this was indeed the case is a question that can be answered by looking at early case law on the ground rules for impeaching witnesses.[59] The form that impeachment could take, however, remained far from settled as the United States developed its evidence jurisprudence. As one New York judge pointed out in evident frustration in 1837, "It is a little remarkable, considering the great number of times the subject must have come under discussion, that it is not incontestably settled, what is the precise form of inquiry to be resorted to for the purpose of impeaching the general credibility of a witness."[60] However, one method of inquiry resorted to with frequency and contention was the use of evidence of unchastity to attack women's credibility.[61]

This Part paints a portrait of the early law on the permissibility of impeaching witnesses with evidence of unchastity.[62] Section II.A takes up two early cases that shaped American jurisprudence on this issue. One, from Massachusetts,[63] permitted unchastity evidence to impeach the credibility of a female witness. The other, from New York,[64] reached the opposite conclusion but did so on a technical ground that avoided the core question. Even as these courts were divided on how to respond to impeachment with "sexual morality,"[65] their opinions reflect a culture unable to conceptualize the credibility of women without reference to their chastity to the extent that when

59. It is important to note that although the rules for impeaching witnesses differ materially from those on impeaching parties, particularly defendants, early courts did not always differentiate between these various types of impeachment.

60. Bakeman v. Rose, 18 Wend. 146, 150 (N.Y. 1837).

61. *See, e.g.*, *Cross-Examination as to Sexual Morality for Purpose of Affecting Credibility of Witness*, *supra* note 18.

62. The account given in this Part is not strictly linear because, like the common law they sought to apply, these cases' import is better understood by analogy than by date. Just as courts in these early cases almost invariably looked to out-of-state precedent for guidance, I have paired cases from various states that best articulate major themes. Because cultural constructs of honor have maintained their vitality even after they had seemingly been abandoned, the Note also pairs cases separated by many years. Nevertheless, this Part shows the law for what it was: a cubist portrait, but a portrait nonetheless of a country confronting difficult questions of proof and entrenched gender stereotypes.

63. Commonwealth v. Murphy, 14 Mass. 387, 13 Tyng 387 (1817).

64. *Bakeman*, 18 Wend. at 147-51.

65. The 1930 American Law Report on the subject concluded weakly that "there [was] rather abundant authority to support either side." *Id.* at 411.

rejecting such impeachment attempts, judges often implicitly acknowledged that an unchaste woman reasonably might be thought of as untrustworthy.

Section II.B explores the technical question that was at the center of the New York case: whether a witness's character can be impeached with evidence of specific acts as opposed to reputation evidence. This question, long familiar to legal scholars, has special ramifications in cases involving women and chastity. Section II.C uses Missouri's experience as a case study to demonstrate courts' movement away from allowing women to be impeached with evidence of their unchastity. The Missouri cases tell a story whose narrative line is otherwise hard to trace in the patchwork of cases nationwide. Missouri courts initially admitted evidence of women's unchastity as bearing on their credibility but, after almost a century of conflicting case law on the topic, ultimately disallowed such impeachment. Section II.D outlines the general movement away from permitting evidence of chastity as a signal of credibility. Evidentiary principles instructed judges to inquire into the logical connection between a woman's chastity and her credibility, an inquiry that generally led to the evidence being excluded as irrelevant or improperly adduced. Ultimately, this history underscores the extent to which jurists felt constrained by legal principles to reject a fallacious probative link between a woman's chastity and her credibility.

The developments traced in this Part reveal three important insights. First, this country's vision of the truthful woman was fraught with ideas about her sexual purity, and this vision informed how women's credibility was judged at trial. Second, the equation between unchastity and untruthfulness entered early impeachment jurisprudence involving women even in cases where the female witnesses were not the victims of sexual crimes.[66] Third, although proceeding in fits and starts, states ultimately barred the use of unchastity evidence to impeach credibility in cases other than rape trials, a surprising outcome for an evidentiary system that has been criticized as benefiting men at the expense of women.[67]

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66. While this evidentiary question also arose in the context of sexual assault prosecutions, the women being impeached with unchastity evidence were often merely witnesses at the trials of others. This Part focuses almost exclusively on the latter situation. The two exceptions are both statutory rape cases in which consent was not an issue: in one the victim's credibility was being impeached, *see* State v. Apley, 141 N.W. 740 (N.D. 1913), and in the other the defendant's character was at issue, *see* State v. Sibley, 33 S.W. 167, 168 (Mo. 1895).

67. *See, e.g.*, Hunter, *supra* note 13 and accompanying text.

A. Setting the Stage: Murphy*'s Legacy*

In 1817, the Supreme Judicial Court of Massachusetts decided in *Commonwealth v. Murphy* that proof of unchastity could be used to impeach a female defense witness in a rape case.[68] Although the recorded account of the case contains barely over one hundred words and Massachusetts first limited its holding and then explicitly overruled it in 1846,[69] the case continued to have currency in other jurisdictions for nearly a century.[70] For example, thirty-four years after Massachusetts disavowed *Murphy*, Missouri used it to strengthen its own version of the rule that a woman could be impeached with unchastity evidence.[71] New York, by contrast, firmly rejected *Murphy* in 1837 as an anomalous and incorrect statement of the common law.[72] Deployed on both sides of the debate, *Murphy* is an obvious starting point and a helpful guide to judicial attitudes toward impeaching female witnesses with chastity evidence.

Although *Murphy* was a rape case, the woman the state's attorney sought to discredit was a defense witness who was allegedly known as a prostitute and had borne several children out of wedlock.[73] The defendant's lawyer objected to the use of this evidence to impeach her, but unsuccessfully. The judge ruled that "[t]he credibility of a witness may . . . be properly impeached, by proving her to be of such a character."[74] The judge directly linked the witness's chastity to her truthfulness, observing that "a common prostitute must necessarily have greatly corrupted, if not totally lost, the moral principle, and of course her respect for truth and her regard to the sacredness of an oath."[75] This argument followed logically from the cultural belief that a woman who is unchaste has

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68. 14 Mass. at 387, 13 Tyng at 387-88.

69. *See* Commonwealth v. Churchill, 52 Mass. (11 Met.) 538, 539 (1846) (confining impeachment "to the general character of the witness for veracity"). A mere seven years after *Murphy*, in fact, the Supreme Court of Massachusetts began to distance itself from that opinion, holding that "[e]vidence to impugn the character of a witness [should] be confined to his general character for veracity" and limiting *Murphy* to the case of a common prostitute. Commonwealth v. Moore, 20 Mass. 194, 196, 3 Pick. 208, 209-10 (1825).

70. *See, e.g.*, Black v. State, 47 S.E. 370 (Ga. 1904); Craft v. State, 3 Kan. 450 (1866); State v. Sibley, 33 S.W. 167, 168 (Mo. 1895); State v. Grant, 79 Mo. 113 (1883); Bakeman v. Rose, 18 Wend. 148 (N.Y. 1837); State v. Apley, 141 N.W. 740 (N.D. 1913).

71. *Grant*, 79 Mo. at 133; *see also infra* Section II.C.

72. *Bakeman*, 18 Wend. at 149.

73. 14 Mass. at 387, 13 Tyng at 387.

74. *Id.* at 388, 13 Tyng at 388. The name of the judge who issued this ruling is not given.

75. *Id.*

lost her honor. A woman without honor, in turn, could not be trusted to tell the truth, even when sworn under oath.

Because *Murphy* involved an alleged "common prostitute," the court's unwillingness to trust such a witness could be attributable to the perceived immorality (or illegality) of prostitution itself. The crimes of men, however, were treated differently. As the New York court noted twenty years later in *Bakeman v. Rose*, "[I]t is perfectly well settled, both in [New York] and in England" that evidence that a person had a reputation for committing crimes, such as being a "murderer, forger, adulterer, gambler, [or] swindler," could not be admitted to impeach a witness.[76] Such a rule points away from perceived immorality or illegality alone to explain why prostitution would signal untruthfulness. Indeed, courts that rejected the use of prostitution evidence for impeachment pointed out that a reputation for immoral conduct or criminal behavior was not generally admissible to discredit a witness.[77]

Bakeman v. Rose serves as an instructive counterpoint to *Murphy*. In *Bakeman*, a female witness was called to testify for the prosecution in an assault and battery case. The defendant sought to impeach her with testimony that she was a common prostitute. *Bakeman* firmly rejected such impeachment, but it did so by resting on the form of the evidence. The majority[78] explained: "[T]he general character of the witness alone can be inquired into for the purpose of impeaching his credibility: that is, what is his general character for truth and veracity . . . . But you cannot prove that he has been guilty of any particular

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76. *Bakeman*, 18 Wend. at 148. The Chancellor's opinion in *Bakeman* cites *Murphy*, and at this early date, the courts of the two states shared a fairly common stock of legal precedent. *Id.* at 149; *see also* text accompanying note 83. *People v. Culter*, 163 N.W. 493 (Mich. 1917), a murder case, places this same emphasis on criminality as central to impeaching men, but not women. *Id.* at 496. The case involved the impeachment of the female defendant accused of murdering her husband. In holding that she could be discredited "upon cross-examination by showing a want of chastity," the court almost unwittingly articulated a gendered rule: a male witness might be asked "whether he has committed certain crimes, whether he ran a saloon . . . in violation of law, whether he has been criminally intimate with a certain person, or whether he swore falsely on a certain occasion . . . ." *Id.* (quoting 40 CYCLOPEDIA OF LAW AND PROCEDURE 2616, 2618 (William Mack ed., 1909)). A female witness, by contrast, could be asked about any type of sexual impropriety such as "whether she is a prostitute, is living in adultery, or is or has been the kept mistress of a particular man, or has had illegitimate children, or has kept girls for the purpose of prostitution." *Id.* (quoting 40 CYCLOPEDIA OF LAW AND PROCEDURE, *supra*, at 2614).

77. *See, e.g.*, Jackson v. Lewis, 13 Johns. 504 (N.Y. 1816) (rejecting prostitution impeachment because an inquiry as to particular immoral conduct was not admissible). *See generally infra* Section III.B; *infra* text accompanying note 188.

78. In *Bakeman*, as in many of the early cases discussed herein, the opinions were not designated as "majority," "concurrence," or "dissent," but instead bore the name or title of the judges who wrote them. This Note infers the more modern labels for ease of reading.

crime, or species of crimes, or immoralities . . . ."[79] By focusing on whether the evidence used in impeaching the witness spoke to her general character or to some specific act, the majority left ambiguous how much of its holding was due to the absence of a connection between truth and chastity, and how much to the technical form of impeaching evidence.

The concurrence, however, did not hesitate to suggest that a woman's honor is bound up in her chastity:

> [I]f the mode of impeaching her credibility had been to inquire of the witnesses, first as to their knowledge of her general moral character, and then whether from such knowledge they would believe her upon her oath, I imagine it would have been difficult to find a witness, having any regard to his own character, and knowing her general reputation to be that of a public prostitute, who would have ventured to maintain for her the credibility of an ordinary witness.[80]

This nod to the conventional wisdom of the day is particularly noteworthy in an opinion that praises the rationality of the common law by distinguishing it from the "Mahomedan or . . . Hindoo codes, or . . . the fastidious refinements of the Roman law."[81] Yet, even as it lauded the common law for "reject[ing] the conclusion that a person guilty of one immoral habit, is necessarily disposed to practice all others,"[82] the concurrence still implicitly connected mendacity with unchastity. By its logic, such evidence could reasonably be admitted so long as it was filtered through the mind of the impeaching witness who would silently use the knowledge that a woman was a prostitute to decide that she was not credible.

By assuming that want of chastity signals a woman's willingness to lie in court, the judges in *Murphy*, and even *Bakeman*, reflect the gendered understanding of honor that Rousseau articulated. This mode of judicial reasoning bespeaks a culture that, even as it demanded purity from women,

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79. *Bakeman*, 18 Wend. at 146, 148. An earlier New York case presages this reasoning. In *Jackson v. Lewis*, 13 Johns. 504 (N.Y. 1816), a case involving a real estate transaction, the court refused to allow the proposed impeachment of a female witness with evidence that she had been a prostitute in part because "the inquiry as to any *particular* immoral conduct is not admissible against a witness." *Id.* at 505-06 (emphasis added).

80. *Bakeman*, 18 Wend. at 153.

81. *Id.* at 154. At argument, the appellant had invoked an Islamic rule prohibiting women from testifying unless the circumstance meant that no male witness could have been present. *Id.* at 149. Neither of the two opinions in the case welcomed this attempt to influence the result by invoking foreign law.

82. *Id.*

privileged a reputation for chastity over actual truth telling, making that reputation for sexual virtue the pinnacle of female honor. Although *Murphy* proved to be an anomaly in Massachusetts, which ultimately adopted a rule similar to that of New York,[83] the idea that a woman's unchastity could be used to impeach her credibility on the witness stand would resonate across the nation for over a century.

B. Reputation Versus Specific Acts: Proving Immorality

As is evident from the *Bakeman v. Rose* majority opinion, courts' preoccupation with the mechanics of character impeachment further complicated the analysis of whether a woman's sexual history was relevant to her honesty. Whether specific act or reputation evidence should be used for character impeachment[84] is a debate that accounts for much of the ink expended in nineteenth-century opinions on impeachment.[85] It centered on whether to allow evidence of "[p]articular acts" to impeach a witness or to confine the inquiry "to the *general* character of the witness, or to his *general* character for veracity."[86] That debate continues today.[87]

The majority of courts came to prefer reputation evidence. The stated rationale for this preference was that admitting evidence as to particular facts would weigh down the trial with time-consuming collateral detail.[88] Dean

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83. *See* Commonwealth v. Churchill, 52 Mass. (11 Met.) 538, 539 (1846) (citing *Bakeman*, 18 Wend. 148 (citing New York precedent in adopting "the established rule of the common law on the subject")).

84. The reputation/specific act dichotomy in the impeachment context differs from and should not be confused with the issue of the admissibility of pattern evidence as bearing on the character and propensities of a criminal defendant.

85. *See, e.g.*, Black v. State, 47 S.E. 370, 371 (Ga. 1904) (holding that the credibility of a rape complainant may be impeached by showing lewdness "only by proof of general bad character, and not by specific acts").

86. 1 SEYMOUR D. THOMPSON, A TREATISE ON THE LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL § 524, at 449 (Chicago, T.H. Flood & Co. 1889).

87. *Compare* FED. R. EVID. 608(b) (permitting cross-examination on specific instances of misconduct), *with* N.J. R. EVID. 608 (limiting character impeachment to opinion or reputation evidence and forbidding the use of specific instances of conduct unless to show that the witness made a prior false accusation).

88. *See, e.g.*, 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS § 182, at 181 (1837) (arguing that the reputation rule avoids freighting the trial "with such an accumulated burthen of collateral proof, that the administration of justice would become impracticable"). Essentially, courts relied on an efficiency explanation to justify their preference for reputation over specific act evidence. Wigmore refers to the exclusion of specific act evidence as an "Auxiliary Policy"

Wigmore, on the other hand, believed that the rule limiting impeachment to reputation evidence was an American perversion of the earlier English rule that focused on the personal belief of the impeaching witness grounded in his or her "personal knowledge" of the person whose credibility was at issue.[89] Wigmore cites the phraseology of two prominent evidence treatises as possible reasons for the shift, but acknowledges that "the exact course of the change is obscure."[90] This Note offers another explanation.[91]

The debate in American courts over the use of reputation versus specific acts evidence in the context of efforts to impeach female witnesses with unchastity evidence suggests why many courts ultimately settled on reputation as the more desirable mode of proof. For the same reason that the use of reputation evidence was singularly damaging to female witnesses who were expected, under the rubric of female honor, to maintain spotless reputations, judges may have been more receptive to the idea that evidence of reputation would be a relevant and informative method of impeachment. Thus, the development of procedural rules in the area of character impeachment may also be a story informed by the nation's complex view of women and their credibility.

In seeking to use sexual history to attack a female witness's credibility, attorneys necessarily engaged the difficult procedural questions surrounding "bad character" impeachments.[92] And, like the judges in *Bakeman*, many jurists responded by focusing on the reputation/specific acts question rather than on the probative value of sexual history, however proved.[93] The majority

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concern rather than a problem with relevance. 2 WIGMORE ON EVIDENCE, *supra* note 3, § 979, at 360.

89. 4 WIGMORE ON EVIDENCE, *supra* note 3, § 1982, at 216-19.

90. *Id.* § 1985, at 224-25.

91. For another scholarly account of the reputation versus specific act debate in the context of rape, see Berger, *supra* note 2, at 17-22. Professor Berger argues that rape was treated differently in this evidentiary context because of the historic mistrust of rape victims. *Id.* at 21.

92. THOMPSON, *supra* note 86, § 522, at 448.

93. In an early defamation case, for example, the Kentucky court seemed to want to set the record straight on its impeachment rules when it decided to notice an unappealed error committed by the plaintiff's lawyer when impeaching a female witness. Evans v. Smith, 21 Ky. 364, 5 T.B. Mon. 237 (1827). At trial, the plaintiff's counsel had asked whether a defense witness had the reputation of an "unchaste woman" who had "lived with a certain man as his wife four or five years, without having been married to him." *Id.* at 366. The court's concern was not, as a modern reader might assume, that the plaintiff's lawyer had brought up irrelevant evidence about the woman's personal life. Instead, the judge focused on the method of impeachment, noting that it had been attempted with reference to "particular instances of moral turpitude." *Id.* The case report provides the following summary: "It may

preference for reputation evidence[94] had particular ramifications for female witnesses, whose honor depended as much on their reputations as their actual moral integrity.[95] At the same time, those courts may have made what scholars have labeled a "misguided choice"[96] in favor of reputation evidence to prove character precisely *because* the question arose so often in the context of female witnesses and their chastity. Since reputation seemed probative in the context of female witnesses, courts dealing with character impeachments of women would have been more inclined to adopt that mode of proof. In other words, reputation's centrality to female honor may explain both why it was especially problematic for women to be impeached using what Wigmore referred to as "the secondhand, irresponsible product of multiplied guesses and gossip that we call 'reputation'"[97] and why courts adopted reputation as the proper method for impeaching character.

The majority opinion in *Bakeman* underscores the most basic concern with proof by reputation:

> [I]t would be much safer for a female witness to permit the adverse party to prove the fact that she was a common prostitute, than to attempt to impeach her credit by showing it by general reputation; as there would be some chance of refuting the charge, if it was false, in the one case, when there would not be any in the other.[98]

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be proved against the credit of a witness, that she has the reputation of an unchaste woman, but not that she does in fact live in a state of concubinage." *Id.* Thus, not only did it take for granted the connection between chastity and credibility, the court ignored any special implications a rule focusing on reputation would have in that context.

94. *See, e.g.*, BEST, *supra* note 1, § 248, at 290 ("The *credibility* of a witness is always in issue, and accordingly general evidence is receivable to show that the character and reputation which he bears are such that he is unworthy to be believed, even when upon his oath. But evidence of *particular* facts, or *particular* transactions, cannot be received for this purpose . . . ."); STARKIE, *supra* note 88, § 182, at 181 ("It is perfectly well settled that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts."). *But cf.* 4 WIGMORE ON EVIDENCE, *supra* note 3, § 1985, at 226 ("Just which . . . solution[] is the accepted law of a given jurisdiction to-day is not always easy to say . . . .").

95. *See supra* Part I.

96. 1 MCCORMICK ON EVIDENCE § 43, at 201 (Kenneth S. Broun ed., 6th ed. 2006) (largely adopting Wigmore's criticism of the reputation rule and arguing that it introduces speculative evidence that is difficult to disprove).

97. 4 WIGMORE ON EVIDENCE, *supra* note 3, § 1986, at 232.

98. Bakeman v. Rose, 18 Wend. 146, 147-48 (N.Y. Sup. Ct. 1837).

By arguing that a woman would prefer to refute an actual accusation of prostitution than to contest her "reputation" for the same, the *Bakeman* court offers a powerful condemnation of the latter form of proof.[99]

The majority's argument against reputation evidence—that it is better to be accused of something specific, which a witness might then have a chance of disproving—could apply to all kinds of impeaching testimony, not just that involving unchastity. Yet courts' preference for reputation evidence is both more disturbing and more easily explained in cases where the question was a woman's reputation for sexual virtue. As Rousseau taught, a woman's reputation for virtue was to be protected as a separate commodity.[100] As such, it became its own measure of truth in a society that thought of a woman's credibility as measured by her sexual virtue.

Craft v. State, an 1866 Kansas decision, attests to the cultural notion that notorious unchastity would be worse than private transgressions, particularly for women.[101] At trial, the defendant, who was accused of murder, sought to exclude or limit the testimony of a female witness on the grounds that she was a prostitute. The Chief Justice rejected the idea that a prostitute's testimony should be excluded as a matter of law unless it was corroborated.[102] He sought to make his point by analogy to a result he seemed to believe his audience would find absurd: even outwardly virtuous women would be implicated under a logic that equated any loss of virtue with untruthfulness. He argued:

> A woman's chastity should be the "immediate jewel of her soul," and, with reference to consequences to herself, the very last virtue she would be willing to surrender; but when it is considered that she is regarded as the weaker vessel . . . it ought not to be said when, in the warmth of sexual excitement . . . she submits to the embraces of her lascivious lover, that she pours from her heart at Venus' shrine with her virtue every other good quality with which, in our thoughts, we endow her sex. Yet the position assumed must come to that. If, as a matter of law, her testimony must be rejected when her virtue is lost, the principle will be the same whether she habitually flaunts her frailty in the face of the

99. The judge may have been freer to make this observation because he viewed any evidence of unchastity as inadmissible and held that the only inquiry was as to evidence of a general character for truth and veracity. *See supra* Section II.A.

100. ROUSSEAU, *supra* note 44, at 325, 328.

101. Craft v. State, 3 Kan. 450 (1866).

102. *Id.*; *see also infra* Section II.D.

> world, or attempts to hide it in retiracy, or garnish it with garlands of good works.[103]

While acknowledging the cultural importance of female chastity, the court clearly felt that a bright line rule connecting chastity with credibility, if taken to its logical conclusion, would be socially overinclusive by implicating women who were outwardly chaste.

Almost a half century later in a bleak and contentious statutory rape case from North Dakota, *State v. Apley*, the majority opinion still reflected a belief that a woman's reputation for unchastity was more informative than unchaste acts themselves. In *Apley*, however, the court ruled that a woman's reputation for unchastity was relevant to credibility. A fifteen-year-old girl had accused her father of raping her when she was twelve. The court held that she could be asked on cross-examination if she had lived in a brothel because "[i]t bore upon her general credibility."[104] Although the girl was under the age of consent, the judge ruled that, indeed, evidence that she had "immoral habits" would affect her credibility.[105] In making his point, the judge adduced a "distinction . . . between permitting such cross-examination and the cross-examination upon specific acts of unchastity."[106] According to the judge, living in a "house of prostitution"[107] and other such "escapades" "evince[] a degree of general depravity affecting credibility, while, generally speaking, [specific acts of intercourse] may not."[108] He also cites with approval several treatises to the effect that "want of chastity must be shown by general reputation and not by proof of specific acts . . . ."[109] While this opinion no doubt reflects distaste for the teen prostitute, it also demonstrates the widely held view that notorious unchastity differed from private transgressions.[110] Reputation for chastity was

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103. *Craft*, 3 Kan. at 480.

104. State v. Apley, 141 N.W. 740, 746 (N.D. 1913).

105. *Id.*

106. *Id.* at 747.

107. The court's distinction between what constitutes a specific act and what is a matter of reputation is not entirely obvious. *Id.* The judge deemed living in a brothel to be reputational rather than a specific act, such as a witness's testimony that he had slept with the complainant at a specific time or place. *Id.*

108. *Apley*, 141 N.W. at 747.

109. *Id.* at 745 (citing 10 ENCYCLOPEDIA OF EVIDENCE 604 (Edgar W. Camp ed., 1907); 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 214, at 203 (14th ed. 1883); 33 CYCLOPEDIA OF LAW AND PROCEDURE, *supra* note 76, at 1479, 1480, 1482).

110. Judge Goss's opinion may also show something of a cultural shift from viewing any act of extramarital sex as a stain on a woman's honor to drawing the line at more extreme acts of sexual deviance, such as prostitution. Whereas earlier a woman could sully her reputation

a touchstone of female honor. The prostitute, like the open adulteress or the loose woman, by her open "depravity" had marred both her chastity and her reputation.

When focused on women and evidence of perceived sexual promiscuity, the specific act versus general reputation debate recapitulates Rousseau's description of reputation as the throne of female honor. The ascendancy of reputation over truthfulness or even chastity in the calculus of women's honor meant that a rule excluding facts while allowing reputation evidence about chastity would be uniquely damaging to a female witness. Because a woman's reputation was of paramount importance, the fact that she had the reputation for committing adultery would condemn her without more. It would not matter if that reputation were deserved or not. Its existence would mean that the woman was dishonored and therefore untrustworthy. Further, a woman impeached by such reputation evidence would be perceived as having committed the dual sin of protecting neither her reputation nor her chastity.

C. Missouri: A Case Study

Beginning in 1850, the Missouri courts produced a series of opinions that provide a helpful lens for understanding the nineteenth-century case law on this issue. The Missouri cases are particularly instructive because they arose in relatively quick succession, generated extensive debate among various jurists in the state, and grappled explicitly with the question of gender-specific rules for impeachment with unchastity.[111] They illustrate how difficult it was for courts to reject the idea that a woman's chastity might bear on her credibility. At the same time, when Missouri eventually rejected the rule, it brought itself in line with a majority of its fellow states, most of which had experienced a corresponding evolution.

In the first case in this sequence, *State v. Shields*, the issue was whether a lower court in an assault and battery trial had improperly excluded a question about a female witness's "general character for chastity."[112] The court decided

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and thereby her honor and credibility with a single indiscreet act, Judge Goss implies that a woman's reputation would still be tarnished by claims of prostitution but possibly not by single acts of unchastity. This apparent cultural shift seems to have been arrested at the boundary of prostitution. *See infra* Part III.

111. Missouri cases would also provide useful texts for the study of the influence of race on this issue. For example, both the case in which Missouri initially admitted evidence of a woman's unchastity to impeach her, State v. Grant, 79 Mo. 113 (1883), and the case in which that decision was overturned, State v. Williams, 87 S.W.2d 175 (Mo. 1935), involved witnesses who were black women.

112. State v. Shields, 13 Mo. 165, 166 (1850).

that the question should have been allowed. In doing so, it relied on the Kentucky Court of Appeals ruling in *Evans v. Smith*, a defamation case holding that a woman could be impeached with evidence of her reputation for unchastity (but not with specific acts).[113] Even so, the opinion in *Shields* was relatively gender-neutral, holding simply that "[a] bad moral character generally, or a depravity not necessarily allied to a want of truth, may yet to some extent shake the credibility of a witness, and therefore, is a fair subject of investigation."[114]

The next case of note, *State v. Grant*, reached the Missouri Supreme Court in 1883. The court referred to what had by then become a line of cases dating back to *Evans* to hold that a witness could be impeached by general evidence of moral character.[115] Possibly influenced by the nature of the case—a white police officer had been shot and the main witness for the black male defendant was a black woman—the court reached back to the long-overruled *Murphy* decision in Massachusetts to hold that a female witness's general reputation for having "descended into . . . miscegenous prostitution" would be relevant for impeachment purposes.[116]

Until the early 1890s, however, Missouri's appellate courts had not determined whether a man could be impeached with chastity evidence. The two most likely explanations for this derive from an understanding of the way in which honor was gendered. Either men were simply not being impeached (or permitted to be impeached) with evidence regarding their chastity at the trial court level or such impeachment was not viewed as particularly harmful and therefore not appealed, or both. The second of three conflicting Missouri Supreme Court decisions on the impeachment question bears out the latter possibility.[117] The court in *State v. Shroyer* held that a male defendant accused of attempted rape could be impeached with general evidence concerning his "sobriety and chastity."[118] The majority opined that the usual objections to

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113. Evans v. Smith, 21 Ky. 364, 366, 5 T.B. Mon. 237, 238 (1827); *see supra* text accompanying note 93.

114. *Shields*, 13 Mo. at 166.

115. *Grant*, 79 Mo. 133. Judge Sherwood cited five cases as authority for the proposition that the "general moral character or reputation of the witness" could be impeached. *Id.* (citing State v. Miller, 71 Mo. 590 (1880); State v. Clinton, 67 Mo. 380, 386 (1878); State v. Breeden, 58 Mo. 507 (1875); State v. Hamilton, 55 Mo. 520 (1874); *Shields*, 13 Mo. 165).

116. *Grant*, 79 Mo. at 133 (discussing Commonwealth v. Murphy, 14 Mass. 387, 13 Tyng 387 (1817)).

117. *See* State v. Sibley, 33 S.W. 167, 168 (Mo. 1895); State v. Shroyer, 16 S.W. 286, 287 (Mo. 1891); *Grant*, 79 Mo. at 133.

118. *Shroyer*, 16 S.W. at 287.

admitting chastity evidence for men were illogical: "If it be true that the general character of a man is not affected by his reputation for unchastity, the evidence of such reputation will do him no injury."[119] It is not clear why, if it believed male unchastity to be irrelevant to truth, the court did not go on to conclude the evidence should have been excluded as irrelevant. If it did not wish to overturn the verdict, the court could have called this harmless error.

The Supreme Court's oblique opinion in *Shroyer* left open the question whether, in fact, Missouri courts would hold the credibility of a man to be affected by his reputation for unchastity. Prior to *Shroyer*, the St. Louis Court of Appeals had twice answered that question in the negative.[120] Both of these appellate opinions seem to take for granted a distinction between male and female honor on the issue of chastity, refusing to allow chastity evidence to impeach male witnesses.[121] In one, the court bluntly stated that a man's reputation for unchastity, in contrast to that of a woman, was not relevant to his credibility for reasons that were "obvious and need[ed] no comment."[122]

Finally, in 1895, in an opinion issued over strenuous dissent, the Missouri Supreme Court adopted a gender-specific rule. *State v. Sibley* involved a male defendant who appealed his conviction for rape on the ground, among others, that evidence of his sexual proclivities had been improperly admitted.[123] The defendant, L.D. Sibley, had been convicted of "defiling, debauching, and carnally knowing" his stepdaughter Lula Hawkins beginning when she was between twelve and thirteen years old. Ms. Hawkins testified that she was repeatedly raped by her stepfather, that when she became pregnant he gave her medicine that made her hallucinate and vomit, but that the drugs did not succeed in aborting the fetus. Ms. Hawkins testified that she told her mother about the rapes, but that her mother took no steps to stop them until she sent Lula away when she became pregnant.[124] On the stand, Lula's mother denied knowledge of any improper relations between her husband and her daughter.

Of the five questions on appeal, the most divisive was whether a man's reputation for chastity was admissible to impeach his credibility. During the trial, "[w]itnesses [had been] permitted . . . to testify that [Sibley's] general

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119. *Id.*

120. State v. Coffey, 44 Mo. App. 455, 457 (1891); State v. Clawson, 30 Mo. App. 139, 144 (1888).

121. *Coffey*, 44 Mo. App. at 457; *Clawson*, 30 Mo. App. at 144.

122. *Clawson*, 30 Mo. App. at 144.

123. State v. Sibley, 33 S.W. 167 (Mo. 1895).

124. *Id.* at 168; *see also* Scheppele, *supra* note 2 (discussing how women like Lula Hawkins likely faced other embedded legal obstacles in their rape trials, such as biases against women who delayed reporting their rapes or who failed to confide in others after being raped).

character for chastity and virtue was bad."[125] On appeal, the *Sibley* majority held that this testimony was irrelevant and harmful. After acknowledging a conflict in recent Missouri precedent, the majority reasoned, "It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman."[126] The court's explanation for such a stark divide in the markers of male and female honesty recalls the central role chastity played in determining a woman's reputation relative to that of a man:

> It is no compliment to a woman to measure her character for truth by the same standard that you do that of a man's predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for truth of the other. Thus . . . it is said: "Adultery has been committed openly by distinguished and otherwise honorable members [of the bar] as well in Great Britain as in our own country, yet the offending party has not been supposed to destroy the force of the obligation which they feel from the oath of office." Dr. Johnson said, in discussing the difference of turpitude between lewdness in a man and in a woman, "that he would not receive back a daughter because her husband, in the mere wantonness of appetite, had gone into the servant girl." And so McCaulay said, respecting the weakness of Lord Byron for sexual pleasure, "that it was an infirmity he shared with many great and noble men,—Lord Somers, Charles James Fox, and others."[127]

While bereft of any attempt to reason through the different treatment of male and female "wantonness," the majority opinion exposes the dual nature of honor and its relation to truthfulness. An "honorable" man could commit adultery without harming his reputation for truthfulness, but a woman's honor, and thereby her credibility, were damaged when she was accused of lewdness.

The dissent points out the fallacy, if not the cultural falsity, of the theory advanced by the majority with its list of unchaste and prominent men. If a prostitute has "so impaired her moral sense that the obligation to speak the

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125. *Sibley*, 33 S.W. at 170.

126. *Id.* at 171. With this quote, Judge Burgess assured his place in legal history. Feminist scholars have quoted it repeatedly as an example of the law's sexism. *See, e.g.*, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 75 (2002); Galvin, *supra* note 8, at 787 n.116.

127. *Sibley*, 33 S.W. at 171.

truth is no longer binding," the dissent asks, why is the same not true of her customers?[128] Why would a man's "disregard of the laws of chastity" not equally tend to prove a "disposition to lightly regard the obligations of his oath?"[129] Although unable to rebut the principal strength of the majority position—its cultural accuracy—the dissent's logical reasoning ultimately did prove itself more powerful in courts across the country.

In 1935, Missouri abandoned the rule admitting evidence of a witness's "bad reputation for morality" that had allowed women to be impeached with evidence of their unchastity.[130] In *State v. Williams*, the Missouri Supreme Court ruled that it was error to impeach a woman accused of killing her husband with evidence "that her general reputation in the community for morality . . . was bad."[131] The court recognized the prejudicial nature of such impeaching evidence, particularly for a defendant, "[f]or a bad reputation for morality imports moral turpitude."[132] Instead, it held "the impeaching testimony should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity."[133]

Although coming to this conclusion later than many, Missouri's decision in *Williams* aligned it with a majority of jurisdictions banning the use of various forms of so-called morality evidence to impeach a witness. As evidenced much earlier in New York and then Massachusetts,[134] these courts determined that a reputation for truth and veracity was the sine qua non of honesty and formed the only relevant inquiry when impeaching a witness. By 1935, according to the court in *Williams*, "[i]n twenty-two states the impeachment evidence is confined to the reputation of the witness for truth and veracity."[135] Further, in

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128. *Id.* at 172 (Gantt, J., dissenting in part).

129. *Id.*

130. State v. Williams, 87 S.W.2d 175, 181 (Mo. 1935).

131. *Id.* at 180.

132. *Id.* at 181.

133. *Id.* at 182.

134. *See supra* Section II.A.

135. *Williams*, 87 S.W.2d at 183. The majority lists the following states as confining impeachment to the witness's reputation for truth and veracity: Colorado, Connecticut, Florida, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, and West Virginia. *Id.* at 183 n.5. The Missouri court also cited the Wigmore, Jones, and Greenleaf treatises as support for its holding. *Id.* at 183. The relevant section of Wigmore's treatise states: "In the United States, only veracity-character [evidence] is admissible, in the great majority of jurisdictions." 2 WIGMORE ON EVIDENCE, *supra* note 3, § 923, at 304.

those jurisdictions still allowing evidence of bad general character, many courts maintained that "the line be drawn at bad general character, and that *no specific quality other than that of veracity* be considered."[136]

D. Rationality's Triumph, or Merely a Transformation?

To the extent that courts eventually eliminated the general use of morality evidence to impeach a witness, the debate over chastity and credibility represents something of a success story for the Enlightenment rationality espoused by early jurists.[137] Although scholars have pointed out that concomitant problems arise from an evidence system that privileges "fact over value, reason over emotion . . . and perception over intuition,"[138] in this instance that very concern with the "science of proof,"[139] as Wigmore calls it, seems to have allowed the judiciary to overcome a prejudice still present in the culture. In *Williams*, for example, Judge Ellison wrote that "reason" favored admitting only evidence of truth and veracity; to make that point, he went on to identify the rationales for such a rule.[140] In *Craft*, the Kansas case refusing to

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136. 2 WIGMORE ON EVIDENCE, *supra* note 3, § 924, at 309.

137. "Enlightenment rationality" refers to attempts by courts to rely on logic, reason, and scientific precepts to decide issues that cultural norms might distort. For a feminist critique of this "rationalist tradition," see Donald Nicolson, *Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory*, *in* FEMINIST PERSPECTIVES ON EVIDENCE 13 (Mary Childs & Louise Ellison eds., 2000).

138. Hunter, *supra* note 13, at 129. Professor Hunter argues that the evidence laws impart greater value to stereotypically "masculine" attributes such as reason to the detriment of those, such as sexual assault victims, who are, by virtue of their particular victimization, necessarily perceived as stereotypically "feminine." *Id.* at 130; *see also* Nicolson, *supra* note 137 (arguing that mainstream evidence scholarship has a masculine bias).

139. JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 12 (1935). This is not to suggest that Wigmore's "science" actually succeeded in being unaffected by cultural bias. *See, e.g.*, Leigh B. Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W. L. REV. 235, 236 (1983).

140. *Williams*, 87 S.W.2d. at 183. Judge Ellison's reasons were:

> (1) [t]hat it reaches directly the fundamental object of the inquiry; (2) that a general bad reputation for morality does not always necessarily import a lack of veracity; (3) that the conclusions of an ordinary impeaching witness on such a question are apt to be drawn inexactly from uncertain data, or to rest on personal prejudice or honest differences of opinion on points of belief or conduct; (4) that impeachment by methods so loose and inconclusive often . . . introduces collateral issues; (5) and that while witnesses may be directly discredited by proof of former convictions, or admissions of fact involving moral turpitude, still they ought not to be subjected to impeachment by indefinite hearsay, i. e. [sic] by proof of bad repute for morality.

automatically exclude the evidence of a prostitute, the Chief Justice explained that "[t]he law is certainly not so unreasonable."[141] And as early as 1835, Chief Justice Gibson had used a similar argument to make Pennsylvania one of the first states to clearly ban evidence of prostitution to impeach the credibility of a female witness.[142] Refusing even to acknowledge the possibility that her chastity might bear directly on a woman's veracity, Chief Justice Gibson wrote: "If character for veracity be the legitimate point of inquiry, and if to this complexion it must come at last, it follows that it is the only one, and that an inquiry into anything else is illegitimate."[143]

Whether influenced by the rule of law and its attendant demand for relevant, logically probative evidence, by better information, or by some degree of cultural change, courts in early twentieth century cases regularly excluded sexual history evidence as a method of impeachment. In 1913, a North Dakota opinion marshaled over eighty cases to support the proposition that evidence of "moral character," or specifically chastity evidence, "should not be admitted for the purpose alone of impeachment."[144] Significantly, however, this opinion was written in dissent from *State v. Apley*, the statutory rape case. The dissenters wished to "protest against [the] adoption" of a rule allowing a woman to be impeached with chastity evidence. Thus, despite those eighty-odd cases, the serpentine grip of chastity on a woman's credibility had yet to be fully disengaged.[145] And although the *Apley* dissent argues courageously against the majority's decision, it also points to the new frontier for women's honor: the use of chastity evidence to prove consent in sexual assault cases. For at the same time that *Apley*'s dissent condemned the "admissibility of the testimony as to the girl's prior chastity to the sole purpose of affecting her credibility," it explicitly left open the question whether such evidence would be relevant to prove consent.[146]

Id.

141. Craft v. State, 3 Kan. 450, 481 (1866); *see supra* Section II.B.

142. Gilchrist v. McKee, 4 Watts 380, 381 (Pa. 1835). *Gilchrist* was a suit over money resulting from a real estate transaction in which a woman, Mary Ford, was called as a witness for the plaintiff and the defendant proposed to give evidence of her general character for chastity. *Id.* at 380.

143. *Id.* at 381; *see also* Morse v. Pineo, 4 Vt. 281, 283 (1832) ("There is no way to ascertain, how far the reputation of a prostitute affects her truth, but by proving her character for truth.").

144. State v. Apley, 141 N.W. 740, 754 (N.D. 1913) (Burke, J., dissenting); *see also supra* Section II.B.

145. *Id.* at 755.

146. *Id.* at 754-55. Because it was a statutory rape case, consent was not directly at issue in *Apley*.

III. GENDERED HONOR: MODERN EVIDENCE

A. Proving Consent: Gendered Honor Retouched

Even as these early cases ultimately seemed to reject a gendered vision of honor, the portrait was actually being retouched. Logic had taught that although lawyers almost invariably sought to influence juries by impeaching a female witness's credibility with chastity evidence, this type of questioning could not reasonably be permitted in a court of law. Yet, the same courts that denied the link between unchastity and credibility when a female witness testified in a case not involving her own honor often abandoned that logic when the witness was a woman bringing a rape accusation.[147] In sexual assault trials, many judges meticulously noted that evidence of the victim's sexual history was entirely relevant on the question of consent even though it would not be relevant on the question of credibility.[148] They did not explain exactly how, particularly in light of the history of such impeachment, unchastity evidence could speak to consent without at the same time shaping the jury's view of the victim's credibility. Further, by a definition of rape as nonconsensual sex,[149] evidence intended to prove consent would also implicate credibility.[150]

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147. Courts often justified the use of unchastity evidence in rape trials technically as a form of character or propensity evidence. This usage itself represented an exception to the general rule that character or propensity evidence is inadmissible as substantive evidence to prove that the person acted in conformity with the character trait. *See* Galvin, *supra* note 8, at 777-78. Professor Galvin provides a detailed and lucid explanation of this and other evidentiary biases that led to the rape shield laws and other rape law reforms in the early 1970s. She explains that at common law, evidence of the victim's character was admissible in only two types of cases: homicide cases in which the defendant claimed self-defense and rape cases in which the defendant claimed consent. *Id.* at 78-83. In the prototypical self-defense case, the defendant claims that the victim was the aggressor and offers the character evidence to show that the victim was a violent person and that he acted violently again. In the prototypical rape case, the defendant says that the complainant agreed to sexual activity and offers the chastity evidence to show that she "had a propensity to engage in nonmarital sexual activity." *Id*. at 783.

148. *See, e.g.*, Maxey v. State, 52 S.W.2d 2, 6 (Ark. 1899) (noting that the victim's reputation for a lack of chastity or the fact of prostitution is material on the issue of consent); People v. Gray, 96 N.E. 268, 273 (Ill. 1911) (noting that a reputation for chastity was only admissible on the question of consent, although not in a statutory rape case); Harris v. Neal, 116 N.W. 535, 536 (Mich. 1908) (noting that proof of a reputation for unchastity is admissible in a criminal trial on the question of consent). *But see* State v. Rivers, 74 A. 757, 759 (Conn. 1909) (holding acts of unchastity admissible to discredit a witness in a rape case).

149. Early definitions of rape focused on nonconsent as "the essence of rape." Berger, *supra* note 2, at 8. Berger cites Lord Coke's definition of rape as "unlawful and carnal knowledge and

Not surprisingly, then, courts invariably touched upon credibility as they attempted to explain why unchastity evidence should be admissible in rape trials even though it could not be used to impeach credibility in other types of cases. For example, in an 1890 Maryland case, *Brown v. State*, the court identified cases of rape as a "well-recognized exception" to the "general rule" that "the character for veracity of a female witness cannot . . . be impeached by evidence as to her character for chastity."[151] In rape cases, the court observed, the general character of the prosecutrix for chastity is always admissible "for obvious reasons."[152] While acknowledging that a rape could conceivably be committed "even upon a lewd . . . woman," the court nevertheless felt that her lewdness "may have a material bearing upon the question whether the act was committed with or against her consent."[153] Here the court seemed to understand chastity evidence as bearing both on consent and credibility. Although the court agreed that chastity is not ordinarily a predictor of credibility, in an echo of that disavowed logic, the court saw rape as a

abuse of any woman above the age of ten years against her will." *Id.* at 3 n.8 (quoting EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 60 (photo. reprint 1979) (1628)). In many jurisdictions, an additional emphasis on force or resistance later crept into this definition, although it was often understood as probative of consent. *Id.* (citing Moran v. People, 25 Mich. 356, 359 (1872) ("As a practical matter, the state will usually offer proof of force (or threats) as well as absence of consent since the former bears so directly on the latter.")). Although the force requirement imposed a "special burden of opposition" in some jurisdictions, Berger, *supra* note 2, at 8, "female nonconsent" generally remained the "rubric under which all of the issues in a close case [were] addressed and resolved." ESTRICH, *supra* note 10, at 29.

150. Katherine Baker has framed this link between a woman's sexual history and her credibility in terms of "juror disregard" rather than "juror disbelief." Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 589 (1997). In other words, "[i]f a woman breaches [very rigid norms of appropriate sexual conduct], her credibility becomes largely irrelevant because the jury will not bother to vindicate her violation." *Id.* This modern articulation of the problem with admitting sexual history evidence helps articulate the fallacy in trying to parse the question of consent from other issues influencing the jury. To try to separate jurors' disregard of a woman's plight from their disbelief, however, seems equally fallacious. If we understand a woman's honor and by extension her credibility and her very integrity as a person to be implicated by any breach of sexual norms, then juror disregard in the face of such information is the natural product of the disbelief that comes with a woman's sullied honor. Whether jury members think a woman is incapable of being raped or evince a pure skepticism about her lack of consent, at root they disbelieve her statement that she has, in fact, been violated based on the implications they derive from her sexual past.

151. 20 A. 186, 188 (Md. 1890).

152. *Id.*

153. *Id.*

circumstance where the connection between chastity and truth was "obvious."[154]

The statutory rape case from North Dakota, *State v. Apley*, suggests even more strongly that in rape cases unchastity evidence functioned primarily to interrogate the victim's credibility.[155] Because it was a statutory rape case, credibility, not consent, was the issue, and the defendant offered sexual history evidence to impeach the victim's testimony. The majority, which ruled in favor of admitting the evidence, seemed unconcerned with the precise boundaries between consent and credibility. In contrast, the dissent argued that if unchastity evidence were admissible at all, it would be admissible only to prove consent, not to undermine credibility. To defend its position, the majority cited treatises by Wigmore and Greenleaf,[156] two encyclopedias of evidence,[157] and a long list of cases purporting to hold that "want of chastity may be shown as affecting credibility of the prosecutrix as a witness."[158] The dissent painstakingly reviewed much of the same law to show that unchastity evidence, if admissible at all, could only be introduced to show consent or some material fact other than credibility.[159] Although both sides marshaled an impressive array of sources, the sources themselves were replete with ambiguity. While in seeming agreement that chastity evidence was relevant in a rape trial, the treatises did not consistently identify consent as the rationale.

Professor Greenleaf's treatise on evidence demonstrates just how little guidance courts received from such compilations. In the section titled "Facts not affecting credibility," the treatise states:

> There is another class of questions . . . the answers to which, though they may disgrace the witness in other respects, yet *will not affect the credit* due to his testimony. . . . Such are the questions frequently

154. *Cf.* State v. Clawson, 30 Mo. App. 139 (Ct. App. 1888) ("The reason for the distinction [in allowing testimony about a woman's chastity and not a man's] is obvious and needs no comment.").

155. 141 N.W. 740 (N.D. 1913); *see supra* Section II.B.

156. 141 N.W. at 745 (citing GREENLEAF, *supra* note 109, § 214, at 203; 1 WIGMORE ON EVIDENCE, *supra* note 3, § 200, at 245).

157. *Id.* (citing 33 CYCLOPEDIA OF LAW AND PROCEDURE, *supra* note 76, at 1479-82; 10 THE ENCYCLOPÆDIA OF EVIDENCE (Edward W. Camp ed., 1907)).

158. *Apley*, 141 N.W. at 745.

159. *Id.* at 748-55.

> attempted to be put to the principal female witness, in trials for seduction . . . , and on indictments for rape, &c.[160]

Yet, in the section titled, "Character of prosecutrix," the treatise advised that "[t]he *character of the prosecutrix for chastity* may also be impeached,"[161] the only caveat being that it "must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity."[162] Ironically, Francis Wharton's treatise on criminal law, another treatise cited by the majority in *Apley*,[163] does identify the purpose of impeaching a rape victim with her sexual history as consent, not credibility:

> At common law and under statute, in the absence of a specific provision to the contrary, the chastity or want of chastity on the part of the female is immaterial in the commission, or the charge of the commission, of the crime of rape; for carnal knowledge of a woman, without her consent and against her will, constitutes rape where she is lewd and immoral or unchaste, just the same as though she were of the most spotless purity and virtue; but on accusation of the commission of the offense against a woman of unchaste or immoral character, her want of chastity may be shown as bearing on the question of consent to the act.[164]

It seems counterintuitive that the majority in *Apley*, as it defended the admission of sexual history evidence in a statutory rape case, would cite to language from Wharton that explicitly excludes evidence of sexual history unless consent is at issue. Yet the majority seems indifferent to the point.

People v. Abbot, an early New York case relied upon by the *Apley* majority, shows that, even in a nonstautory rape case, unchastity evidence functioned to undermine the victim's credibility.[165] *Abbot* involved a rape prosecution on behalf of a woman who had been a servant in the house of the married defendant, a clergyman. The defendant appealed his conviction, arguing that he should have been permitted to ask the victim "whether she had not had

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160. 1 GREENLEAF, *supra* note 109, § 458, at 555.

161. 3 *id.* § 214, at 203.

162. *Id.*; *see also supra* Section II.B.

163. *Apley*, 141 N.W. at 745.

164. 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 695, at 864-65 (11th ed. 1912) (citations omitted).

165. People v. Abbot, 19 Wend. 192 (N.Y. Sup. Ct. 1838).

previous criminal connection with other men."[166] The court reversed. Only one year after the Court of Errors had held, in *Bakeman v. Rose*,[167] that prostitution evidence was inadmissible to impeach general credibility, the *Abbot* court articulated a seemingly contradictory position: "Without expressing an opinion whether it may commonly be used even as an item in the estimate of general credibility, I do not feel clear that it should be repudiated in respect to the prosecutrix, where the trial is for rape."[168]

The majority in *Apley* cited *Abbot* for the proposition that a female rape victim's credibility could be impeached by showing her to be a prostitute.[169] And, indeed, this is one way of interpreting the above language. The *Abbot* opinion proceeds, however, to try to distinguish evidence bearing on consent from that bearing on credibility. In concluding that this instance of specific act impeachment was proper, the court argued for its relevance to consent:

> In such a case the material issue is on the willingness or reluctance of the prosecutrix—an act of mind. These offences . . . are in their very nature committed under circumstances of the utmost privacy. The prosecutrix is usually, as here, the sole witness to the principal facts, and the accused is put to rely for his defence on circumstantial evidence. Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance, is always received. . . . [A]re we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? . . . And how is the latter case to be made out? How more directly . . . than by an examination of the prosecutrix herself?[170]

The court went on to claim that precedents such as *Bakeman* mistakenly supposed that unchastity testimony was designed to "shake the general credibility of the witness, as if it went to truth and veracity."[171] To the contrary, the court insisted that "it goes to her credibility in the particular matter, to a circumstance relevant to the case in hand, from which the jury are asked to say she did consent."[172] We need look no further than *Apley* for confirmation that,

166. *Id.* at 194.

167. 18 Wend. 146 (N.Y. Sup. Ct. 1837); *see also supra* Sections II.A-B.

168. *Abbot*, 19 Wend. at 197-98.

169. *Apley*, 141 N.W. at 746.

170. *Abbot*, 19 Wend. at 194-95.

171. *Id.* at 197.

172. *Id.*

despite these efforts, the *Abbot* majority did not succeed in convincingly reframing credibility as consent.

If the idea that a rape victim's credibility was bound up in her sexual history is a direct descendant (if not a sibling) of the equation between female honor and chastity, why were courts able to understand the irrelevance of chastity evidence except in the case of rape? In addition to the answers already developed in scholarship discussing rape's distinctive treatment among crimes,[173] another lies in the courts' own explanation: in the rape trial, such evidence could be admitted on another ground, namely consent.[174]

Consent, a question that, as we have seen, necessarily encompasses the issue of credibility in a rape trial, became the way station of women's honor, the place where a woman's credibility would continue to be judged by her

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173. Susan Brownmiller articulated one of the most influential theories on the reasons behind American culture's treatment of rape. She explained,

> The real reason for the law's everlasting confusion as to what constitutes an act of rape and what constitutes an act of mutual intercourse is the underlying cultural assumption that it is the natural masculine role to proceed aggressively toward the stated goal, while the natural feminine role is to "resist" or "submit."

BROWNMILLER, *supra* note 2, at 432. Note that Ronald J. Berger, Patricia Searles & W. Lawrence Neuman, *Rape-Law Reform: Its Nature, Origins, and Impact*, *in* RAPE & SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 223 (Patricia Searles & Ronald J. Berger eds., 1995) provides a brief, but useful overview of the scholarship on genesis of the various rape biases in the law. Those explanations include: that "rape law regulated women's sexuality and protected male rights to possess women as sexual objects," "sociolegal conceptions of women as the property of males," "concern that women would deliberately lie about rape in order 'to explain premarital intercourse, infidelity, pregnancy, or disease, or to retaliate against an ex-lover or some other man,'" *id.* at 224 (quoting C. SPOHN & J. HORNEY, RAPE LAW REFORM: A GRASS ROOTS REVOLUTION AND ITS IMPACT 24 (1992)), and the idea that "when a woman married she impliedly and irrevocably consented to the sexual advances of her husband," *id.*

174. Courts often expressed real concerns about protecting the rights of defendants when explaining the admission of sexual history evidence. For example, a 1909 Connecticut opinion invokes the Sixth Amendment right to confrontation when explaining why sexual history evidence would be admissible in a statutory rape case:

> [Rape is a crime] of the gravest character. Its punishment may by statute be imprisonment in the state prison for 30 years. From the nature of the offense charged, the testimony of the female who claims to have been assaulted is generally the principal, and may be the only, evidence that the crime has been committed. In a case of this character a broad latitude of cross-examination should be allowed the accused in order to test the veracity of such a witness.

State v. Rivers, 74 A. 757, 759 (Conn. 1909). These concerns are weighty, but, as rape law reformers pointed out in their bid to have such evidence excluded, they are not met by the use of sexual history evidence to impeach victim credibility or to prove conduct in conformity with a character for promiscuity on the part of the victim.

chastity and her reputation.[175] As time went on, courts increasingly accepted the relevance of unchastity as a given that required no reasoned rationale. Judge Riley's opinion for the West Virginia Supreme Court in a 1953 case is illustrative.[176] After finding that the victim's sexual history was "admissible to show that she probably gave her consent to the alleged intercourse," the judge goes on to recommend readers to Wigmore "[f]or a detailed and scholarly discussion of the question" of the admissibility of such evidence in a prosecution for rape.[177] In fact, many courts seem to have relied on Wigmore or penal codes based on his teachings as a substitute for reasoned explanation of the rule.[178]

When courts did attempt to explain the relevance of unchastity evidence in rape trials, their explanations inevitably returned to credibility. In yet another *Brown v. State*, this time a 1953 Alabama rape case, the court provided this description of the dual function of sexual history evidence:

> This rule is based on the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral

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175. Rape law continues to be plagued by double standards. Federal Rule of Evidence 413, which became effective in 1995, "singles out sexual assault as the only crime to which the general prior act rule [excluding evidence of prior bad acts to prove a propensity of the defendant to act in conformity therewith] does not apply," Baker, *supra* note 150, at 569. Ironically, "enhancing victim credibility" was a major rationale given by proponents of the additional evidentiary rule. *Id.* at 583.

176. State v. Franklin, 79 S.E.2d 692 (W. Va. 1953).

177. *Id.* at 704. Wigmore's views on women and the "psychology" suggesting that they often invent complaints of sexual outrage, 3A JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 924(a), at 736-47 (rev. ed. 1970), are beyond the scope of this paper and have been deservedly and thoroughly discredited. *See, e.g.*, Bienen, *supra* note 139.

178. *See, e.g.*, Caldwell v. State, 349 A.2d 623, 625-26 (Md. 1976) (citing 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 62, at 464-67 (3d ed. 1940)) ("[T]he character of a rape-complainant for chastity or the lack thereof has, in a majority of common law jurisdictions, been held admissible as tending to show that the act of intercourse, if committed at all, was with the consent of the prosecutrix."); State v. Steele, 224 A.2d 132, 135 (N.J. Super. Ct. App. Div. 1966) (citing 1 WIGMORE, *supra*, § 62, at 464-67) ("[C]ross-examination upon proper foundation has been permitted with respect to the complaining witness's general reputation for chastity, or lack of it, as bearing on the issue of consent in a rape case."); Commonwealth v. Dulacy, 205 A.2d 706, 708 (Pa. Super. Ct. 1964) ("A distinguished text writer has said that . . . 'the character of the woman as to chastity is of considerable probative value in judging the likelihood of . . . consent . . . .'" (citing 1 WIGMORE, *supra*, § 62, at 464-67)).

> character, and that a woman who is chaste will be less likely to consent to an illicit connection, than one who is unchaste.[179]

The court, perhaps sensing that a rule that unchastity is relevant to consent cannot be defended on the mere assertion that chaste women consent less, unwittingly grounded its rationale on our old friend credibility. Although courts and treatise writers had banished the trappings of gender-specific honor from ordinary impeachment,[180] in rape trials, unchastity and reputation were still closely allied as substantive markers of female truth.

B. Moral Turpitude, Honor, and the Prostitute

Rape shield laws substantially limited the types of sexual history evidence that could be introduced,[181] usually by excluding evidence of the complainant's sexual history unless with the defendant. Nonetheless, certain perceived offenses against sexual morality still recall the link between female honor and sexual purity. One of those offenses is prostitution. It stands as a remnant of a seemingly antiquated moral code, particularly to the extent that it is still a crime and one that most often targets female offenders.[182] Prostitution is also still overtly linked to untruthfulness in many states through the idea that a prior prostitution conviction can be used to impeach the credibility of a witness.[183] Although most states have adopted language from the Uniform

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179. Brown v. State, 280 So. 2d 177, 179 (Ala. Crim. App. 1973).

180. *See supra* Section II.D; *supra* note 135.

181. *See generally* Anderson, *supra* note 126 (arguing that the "chastity requirement" in rape law that conditioned the vindication of a rape complainant on her sexual virtue persists, particularly in acquaintance rape cases and cases where the defense is mistaken consent); Marah deMeule, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. REV. 145 (2004) (arguing that the privacy concerns the rape shield laws sought to address are being overlooked outside the courtroom).

182. *See, e.g.*, Beverly Balos, *Teaching Prostitution Seriously*, 4 BUFF. CRIM. L. REV. 709, 721 (2001) ("Statistics show women in prostitution are arrested and prosecuted at far higher rates than the men who 'patronize' them."); Julie Lefler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 17 (1999) ("[S]ome states preserve America's historical inequitable treatment of prostitutes and johns. . . . For example, Kentucky law . . . specifically states that a man cannot be convicted of prostitution, and does not provide penalties for patronizing a prostitute . . . .").

183. *See, e.g.*, FED. R. EVID. 609(a)(2) (allowing admission of evidence of a criminal conviction to impeach credibility if "the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness"). Since 1974, the Uniform Rules of Evidence, rules recommended to the states by the National Conference of Commissioners on Uniform

Code of Evidence limiting the use of prior convictions for impeachment to convictions of a crime punishable by more than a year in prison (generally a felony), or of a crime involving "dishonesty," these limitations have not always prevented courts from admitting evidence of prostitution convictions.[184] Some states are still amenable to arguments that prostitution is a crime involving "dishonesty."[185] Still others adhere to the common law idea that a witness can be impeached with evidence of a crime involving "moral turpitude."[186] Not surprisingly, in jurisdictions employing the term "moral turpitude," prostitution is generally held to be such a crime.[187] In this way, the law once again links unchastity, now in the form of prostitution, with untruthfulness.

In nineteenth- and early twentieth-century cases, it is difficult to distinguish prostitution from adultery, cohabitation, or a plethora of other lapses of female virtue. While not overly fond of prostitutes, judges in early cases seemed not to differentiate them greatly from other offenders against

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State Laws, have conformed to the Federal Rules in form and number. PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE, at vi (3d ed. 2007).

184. *See* Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 691-92 (2003) ("Twenty-five states have adopted FRE 609(a) virtually verbatim, and these states allow impeachment with either felonies or misdemeanors involving dishonesty. Thirteen other states have adopted statutes that permit impeachment with convictions but do not limit these convictions to the categories set forth in FRE 609(a) . . . ." (citations omitted)).

185. *See, e.g.*, Brown v. United States, 518 A.2d 446 (D.C. 1986) (finding that evidence of a conviction for prostitution is not excluded by the rule excluding evidence of a prior crime unless it involves "dishonesty" or "false statement").

186. *See, e.g.*, People v. Feaster, 125 Cal. Rptr. 2d 896, 902 (Ct. App. 2002) (articulating the evidence standard in California that conduct involving "moral turpitude" is relevant to a witness's credibility); *see also* People v. Castro, 696 P.2d 111, 118 (Cal. 1985) (defining "moral turpitude" as involving the general "readiness to do evil" (quoting Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884))); Sara M. Walsh, Krista Eckhardt & Steve Russell, *Sex, Lies, and Law: Moral Turpitude as an Enforcer of Gender and Sexuality Norms*, SEXUALITY RES. & SOC. POL'Y, June 2006, at 37 (suggesting that turpitude law is a legal link between sexual conduct and dishonesty and providing several specific examples of that link).

187. *See, e.g.*, People v. Chandler, 65 Cal. Rptr. 2d 687, 691 (Ct. App. 1997) (discussing California's rule); *see also* Lininger, *supra* note 184, at 692; Nate Carter, Comment, *Shocking the Conscience of Mankind: Using International Law To Define "Crimes Involving Moral Turpitude" in Immigration Law*, 10 LEWIS & CLARK L. REV. 955 (2006) (discussing the lack of adequate objective criteria for determining whether a crime involves moral turpitude in the context of immigration law); Karin S. Portlock, Note, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1406 (2007) ("[P]rostitution evidence is admitted in some jurisdictions to impeach the witness because prostitution is considered a crime of 'moral turpitude' at common law.").

norms of female chastity.[188] Courts seemed to view prostitution as one smudge on the spectrum of female dishonor. At times, in fact, early cases seem particularly unbiased toward prostitutes, as in the 1846 case in which Massachusetts overruled its previous decisions to bar the use of evidence that a female witness was a prostitute to impeach her credibility.[189]

Recent developments in Massachusetts and elsewhere in the country, however, reveal a changed role for prostitution in the calculus of female honor.[190] For example, the District of Columbia has espoused the view that a witness's credibility is linked to her identity as a prostitute despite the seeming restraints of modern evidence rules.[191] In *Brown v. United States*, the government impeached a woman who was defending an assault charge with her two prior convictions for soliciting prostitution.[192] On appeal, the court rejected her argument that "such convictions do not involve 'dishonesty or false statement'" as required under the District of Columbia code.[193] The court ruled, inscrutably, that the terms "dishonesty" and "false statement" were merely meant to exclude the use of offenses "involving passion and short temper, such as simple assault."[194] Crimes such as soliciting prostitution, however, were judged to bear on the question of honesty. Likewise, California courts have ruled that prostitution is a crime of moral turpitude and that, even

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188. *See, e.g.*, Rau v. State, 105 A. 867 (Md. 1919) (holding that veracity may not be attacked by proving bad character for chastity or prostitution); Commonwealth v. Churchill, 52 Mass. (11 Met.) 538 (1846) (holding that evidence that a female witness is a prostitute is no longer admissible to impeach credibility); Bakeman v. Rose, 18 Wend. 146 (N.Y. Sup. Ct. 1837) (holding that a female witness cannot be impeached with evidence of prostitution.); Jackson v. Lewis, 13 Johns. 503 (N.Y. 1816) (holding that a female witness cannot be impeached with evidence that she had been a common prostitute); Spears v. Forrest, 15 Vt. 435 (1843) (holding that evidence of prostitution is not admissible to impeach the character of a witness).

189. *Churchill*, 52 Mass. (11 Met.) 538.

190. *See Chandler*, 65 Cal. Rptr. 2d at 690-91; *Brown*, 518 A.2d 446; Commonwealth v. Harris, 825 N.E.2d 58 (Mass. 2005).

191. *Brown*, 518 A.2d 446. The provision at issue, D.C. CODE § 14-305 (1981), states:

> for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered, but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment).

This provision is modeled on Rule 609(a)(2) of the Uniform Rules of Evidence.

192. *Brown*, 518 A.2d at 446.

193. *Id.* at 447.

194. *Id.*

without a conviction, evidence the victim participated in prostitution is admissible for impeachment purposes.[195]

Nowhere is the modern attitude toward prostitution evidence more striking than in Massachusetts, a state that first rejected impeachment of a witness's credibility with evidence of prostitution in 1846.[196] In 2005, the Massachusetts Supreme Court heard Richard Harris's appeal of his rape conviction.[197] The original crime had many elements of the stranger rapes that studies have shown are least likely to breed skepticism in judges and juries[198]: the victim had never met the alleged rapist, she was dragged into a stairway where she was allegedly raped, witnesses saw her run screaming back to the bar as soon as she could break free, and she immediately told the bartender she had been raped.[199] The victim, however, had previously been convicted of "Nightwalking."[200] Mr. Harris's defense was that the sex was a consensual transaction.[201] Accordingly, one of the issues on appeal was his contention that the trial judge had "discretion to admit evidence of a complaining witness's conviction of a prior sexual offense for purposes of impeaching that witness."[202] Although the Massachusetts rape shield statute prohibited evidence of a sexual assault victim's "sexual conduct,"[203] the Supreme Court reversed the conviction and remanded for a new trial.[204] The majority found that despite the common law rule on the issue of consent and despite the rape shield statute's addition of a "prohibition of evidence of the complainant's 'reputation' in such matters," an older statute allowing a witness's prior criminal conviction to "affect [the witness's] credibility" should be allowed to "carv[e] out an extremely narrow exception" to the rape shield law.[205] Thus, it

195. *Chandler*, 65 Cal. Rptr. 2d at 690-91 (discussing this rule in the context of California's rape shield law).

196. Commonwealth v. Churchill, 52 Mass. (11 Met.) 538 (1846).

197. *Id.*

198. *See, e.g.*, Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1010-11 (1993) (describing the stranger rape paradigm and police and prosecutor skepticism of rapes not conforming to that mold).

199. Commonwealth v. Harris, 825 N.E.2d 58, 61 (Mass. 2005).

200. *See* MASS. GEN. LAWS ANN. ch. 272, §§ 53, 53(a) (2008).

201. *Harris,* 825 N.E.2d at 62.

202. *Id.* at 63.

203. MASS. GEN LAWS. ANN. ch. 233, § 21B (2008).

204. *Harris*, 825 N.E.2d at 73.

205. *Id.* at 63, 65, 68.

found that the trial judge should have considered the possibility of admitting the evidence of prostitution.

In her dissent, Chief Justice Marshall identifies prostitution evidence as a new frontier for gendered notions of honor. After underscoring the difficulty in persuading juries that prostitutes are victims of rape, she cites the 1846 case overruling *Murphy* as evidence that courts "have long sought means to minimize jury bias against prostitutes."[206] Contrary to the case's holding, she argues, the *Harris* majority essentially invites juries to "infer that an alleged rape victim is more likely to be fabricating an accusation of rape because she has been convicted of a crime involving sexual conduct, such as being a 'common nightwalker.'"[207] Even though the prostitution conviction must, by statute, be brought in "solely 'to affect [the witness's] credibility,'" she notes that in a case "where the witness is a rape complainant who claims lack of consent, the issue of her credibility mirrors precisely the issue of her consent."[208]

With its decision in *Harris*, the Massachusetts Supreme Court returned to the interconnected paths of sexual purity, credibility, and the new signpost, consent, suggesting that chastity or the lack thereof, continues to function as the marker of a woman's credibility. Where that marker applies has merely shifted from all women, to any rape victim, to prostitutes. Thus, although courts have made progress in crafting gender-neutral impeachment rules, they are still open to the suggestion that a woman who offends sexual norms cannot be believed. Only time will tell whether Massachusetts, which took almost thirty years to overrule its decision in *Murphy*, will act more quickly this time to re-sever the probative link between a woman's chastity and her credibility.

CONCLUSION

This Note has demonstrated that "honor," "reputation," and "truthfulness" are gendered concepts with a powerful cultural history that continues to reverberate in legal rules that strive for neutrality. These reverberations are not simple oddities that may bemuse the scholar who delves into old case law and superseded precedent. They have consequences in the courtroom and in the imagination. The problematic of gender and honor, nonetheless, cannot be readily extinguished through model legislation or rule changes. Its cultural

206. *Id.* at 75 (Marshall, C.J., concurring in part and dissenting in part).

207. *Id.* at 73.

208. *Id.* at 76.

roots are too deep. At best, we can hope to explore those roots and recognize their latest offshoots in our courts.