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The Fantasy of the Unchaste Mentality

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THE FANTASY OF THE UNCHASTE MENTALITY: NORTH CAROLINA'S ILLUSORY EXCEPTION TO THE RAPE-SHIELD RULE

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> The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim.
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> 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 924a (3d ed. 1940).

ABSTRACT

For the past forty years, North Carolina's rape-shield legislation has served as a laboratory of experimentation. Like the rape-shield legislation of every state, it generally prevents the admission of complaining witnesses' past sexual history in sexual assault prosecutions. However, North Carolina's rape-shield rule contains a unique exception not found elsewhere in the country. The exception, which we label the "fantasy exception," permits the admission of a complaining witness's past sexual behavior when it is offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the charged assault.

This Article is the first to rigorously scrutinize the fantasy exception. We conclude that the North Carolina experiment has failed. The fantasy exception's potential policy justifications range from misogynistic at worst to unsound at best. In its application, the fantasy exception fails to confer any positive protections to criminal defendants yet carries the potential to confuse and intimidate sexual assault victims. In such a sensitive area of the law that especially needs clear and logical rules, the fantasy exception only harms; it never helps. In short, other jurisdictions should continue to avoid the fantasy exception, and North Carolina should remove it from its rape-shield legislation.

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I.
INTRODUCTION[1]

The treatment of complaining witnesses in sexual assault prosecutions presents a difficult issue. Its history is fraught with unfortunate beliefs and patently incorrect assumptions, like the one espoused in the quotation reproduced above.[2] On the one hand, sexual assault victims deserve protection from abusive cross-examination that is meant only to embarrass or intimidate.[3] On the other, criminal defendants possess the right to confront witnesses against them.[4] A tension arises from the clash of opposing anxieties; concern for fair treatment of sexual assault victims must be balanced against concern for fair treatment of individuals accused of sexual assault.

This Article seeks to incrementally ease this tension by offering a modest step forward. It starts with a narrative told in two parts. Part II, familiar to many, presents the story of the callous treatment of complaining witnesses in sexual assault prosecutions through much of this country's history. It ends on a promising note, however, with the proliferation of "rape-shield" legislation that generally prevents a complaining witness's sexual history from being admitted into evidence.

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1. While victims of sexual assault include individuals from across the entire spectrum of sex, gender, and gender identity, this Article addresses the way that sex stereotyping and misogynistic characterizations of female victims contributed to the creation of the fantasy exception to the rape-shield rule in North Carolina, which was enacted at a point in time when women were commonly seen as the paradigmatic victim of sexual assault.

2. A recent biography of John Henry Wigmore labeled his beliefs about complaining witnesses in sexual assault prosecutions as a "tragic legacy [which] must temper any depiction of Wigmore as a progressive." ANDREW PORWANCHER, JOHN HENRY WIGMORE AND THE RULES OF EVIDENCE: THE HIDDEN ORIGINS OF MODERN LAW 83 (2016).

3. *See* Nancy E. Snow, *Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims*, *in* A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 245, 255–56 (Keith Burgess-Jackson ed., 1999) ("Victims of other kinds of crime need not open their private lives to public scrutiny in order to press their claims.").

4. U.S. CONST. amend. VI.

Part III presents the second, and likely less familiar, story. It details the development of North Carolina's rape-shield legislation. The story begins familiarly enough with the mistreatment of complaining witnesses. Like many other jurisdictions, the reform movement gained momentum in North Carolina in the late 1970s. This led to a detailed report from the Legislative Research Commission that suggested reform. That report led to a bill that was similar to other jurisdictions' rape-shield legislation. But then there was a surprise twist. The rape-shield legislation that was passed by the North Carolina General Assembly included an exception that was not recommended by the Legislative Research Commission and that exists nowhere else in the United States. This unusual exception permits the admission of a complaining witness's past sexual behavior when it is "offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged."[5] This exception, which this Article refers to as the "fantasy exception," has received very little scholarly or judicial attention in its forty-two years of existence.

In Part IV, we remove our storytelling caps and don our prescriptive ones. In this Part, the Article recommends that the General Assembly repeal the fantasy exception to North Carolina's rape-shield rule. The fantasy exception has failed. It confers only burdens on sexual assault victims and provides no benefit to criminal defendants. North Carolina has served the country well as a laboratory of invention,[6] but the time has come for it to end its experiment with the fantasy exception.

II.
THE HISTORY OF CHASTITY AS CHARACTER EVIDENCE

This Part provides the context necessary to understand North Carolina's experiment. It chronicles the common law approach, as augmented by John Henry Wigmore's influential treatise on evidence law, to the admission of complaining witnesses' sexual histories into evidence in sexual assault cases. It then briefly summarizes the reform movement and related legislation that emerged throughout the country in the latter part of the 1970s.

A. Common Law Treatment of Chastity as Character Evidence

At common law, defendants in sex offense cases were permitted to present evidence of the complaining witness's sexual history to demonstrate the complainant's bad character.[7] This was done to prove that the complaining witness either

5. N.C. R. EVID. 412(b)(4).

6. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

7. *See, e.g.*, Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 91 (1977).

consented to the sexual conduct or was lying about the entire incident.[8] These same principles, however, did not apply to the defendant accused of the offense.[9] Evidence of a defendant's character was not accepted at trial.[10]

The rationale was that a defendant might be found guilty on one charge "not because he [wa]s believed to be guilty, but because his bad character may [have] be[en] thought by the jury to deserve punishment."[11] This rationale extended no protection to the complaining witness, however, because the witness was "not on trial and c[ould] be found guilty of nothing."[12] This simplistic approach neglected reality.[13] Complaining witnesses in sex offense cases also needed protection.[14] They too were being put on trial, not to determine whether they were guilty, but to determine whether they were trustworthy as evidenced by their chastity.[15]

Traditionally, defendants charged with rape would use a woman's past sexual behavior to argue that she consented to intercourse.[16] Unchaste women were considered "much more likely to consent [to intercourse] than . . . [those] whose past reputation was without blemish."[17] Defense attorneys routinely employed this method of cross-examination because jurors and courts often linked any act of unchastity with consent to all nonmarital sexual intercourse.[18] As one court put it, promiscuous sexual behavior "tend[ed] to show . . . consent, as the natural operation of [a woman's] . . . propensities, and rebut the inference or necessity of actual

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8. *See infra* notes 16–36 and accompanying text.

9. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 921 (3d ed. 1940).

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* Cassia Spohn & Julie Horney, *"The Law's the Law, but Fair is Fair:" Rape Shield Laws and Officials' Assessments of Sexual History Evidence*, 29 CRIMINOLOGY 137, 137–38 (1991).

14. *See id.* at 138.

15. As summarized by one commentator:

> For the better part of this country's history, defense attorneys in rape and sexual assault cases used to parade into court the alleged victim's sexual partners to, in effect, prove that she had a propensity to consent to sexual relations and that she acted in conformity with this propensity, and thus consented, at the time of the alleged rape or sexual assault. Or, more generally, defense attorneys used this evidence to prove that the alleged victim was a liar.

COLIN MILLER, EVIDENCE: RAPE SHIELD RULE 1 (2012) (emphasis omitted).

16. *See* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 15 (1977) ("Generally, courts have considered the victim's character for chastity pertinent to whether or not she consented to the act that led to the charge of rape."); 1 WIGMORE, *supra* note 9, § 200 ("[T]he bad character for chastity of the complainant in a rape charge [wa]s relevant and admissible to show the probability of her consent to the intercourse.").

17. People v. Johnson, 39 P. 622, 623 (Cal. 1895).

18. *See* Ordover, *supra* note 7, at 91. Indeed, there is "empirical evidence showing that jurors used evidence of the victim's sexual conduct admitted under the common law rule, not to infer credibility or consent as that law authorized but, instead, to determine whether the victim was a 'good' woman entitled to protection or a 'bad' woman who forfeited that right." 23 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 5372 nn.81–83 (2d ed. 2018).

violence."[19] Therefore, evidence of a woman's sexual history was considered "important to ascertain whether her consent would, from her previous habits, be the natural result of her mind, or whether it would be inconsistent with her previous life, and repugnant to all her moral feelings."[20] Accordingly, a woman's morality perceived as was tied to her sexual experience, and female complainants were scrupulously examined while alleged rapists were often seen as "the real victim[s]."[21]

In addition, some courts linked chastity to a woman's credibility.[22] For example, the Supreme Court of Missouri concluded that it was "common knowledge that the bad character of a man for chastity d[id] not even in the remotest degree affect his character for truth . . . while it d[id] that of a woman" and "[w]hat destroy[ed] the standing of . . . [women] in all the walks of life ha[d] no effect whatever on the standing for truth of [men]."[23] As such, sexual assault victims were often subjected to invasive cross-examinations regarding their sexual histories to demonstrate their lack of credibility.[24] Worse yet, this practice gained in its seeming legitimacy with the support of John Henry Wigmore's influential evidence treatise.[25]

Starting in 1934 with the second edition's supplement[26] and carrying through the third and final edition published in 1940,[27] Wigmore's treatise espoused powerful skepticism toward the reliability of women as witnesses in sexual offense prosecutions. In section 924a of the treatise, entitled *Woman Complainant's Chastity in a Charge of Sexual Crime*, Wigmore took the position that chastity had a direct connection with veracity whenever a woman or young girl testified as a complainant against a man charged with a sexual crime:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences

19. State v. Johnson, 28 Vt. 512, 514 (1856).

20. *Id.*

21. 3 WIGMORE, *supra* note 9, § 924a.

22. *See* Berger, *supra* note 16, at 16 (succinctly summarizing this approach as "promiscuity imports dishonesty").

23. State v. Sibley, 33 S.W. 167, 171 (Mo. 1895).

24. If a woman's unchastity was truly related to a lack of credibility, the chastity of female witnesses should have been relevant any time a woman testified, not just in sexual assault prosecutions. *See infra* note 92.

25. *See, e.g.*, David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1297 (1997).

26. 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a (2d ed. Supp. 1934).

27. 3 WIGMORE, *supra* note 9, § 924a.

> by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface, the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.[28]

Wigmore lamented the "many innocent men [who] have gone to prison because of tales whose falsity could not be exposed."[29] To help remedy this plight, Wigmore recommended that "[*n*]*o judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician*."[30] To support this view, Wigmore cited what he referred to as "modern psychiatry"[31] and warned of the "sinister possibilities of injustice that lurk in believing . . . a [female] witness without careful psychiatric scrutiny."[32]

With Wigmore's influence, character evidence continued to be used to determine whether a female complainant was trustworthy and whether she consented to sexual intercourse.[33] To demonstrate a complaining witness's unchastity, some jurisdictions allowed evidence of both reputation and past conduct,[34] while others permitted evidence of reputation alone.[35] Either way, many jurisdictions allowed evidence of the complaining witness's chastity.[36]

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Wigmore's (mis)use of medical literature in section 924a of his treatise is discussed in Part IV. *See infra* notes 235–41 and accompanying text.

32. 3 WIGMORE, *supra* note 9, § 924a.

33. *Id.* § 979 ("To ascertain such a witness' veracity without an inquiry into her life-history is psychologically impossible, for her testimonial trustworthiness is often linked inseparably with her other traits. These cannot be ascertained without considering specific acts of her past behavior.").

34. *See* J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 548 (1980).

35. *E.g.*, Commonwealth v. Harris, 131 Mass. 336, 336 (1881) (allowing reputation evidence, but not evidence of past sexual conduct).

36. *See* Berger, *supra* note 16, at 15–16. Indeed, in some jurisdictions, chastity was a required element of certain sexual offenses, and therefore the issue of the complaining witness's chastity was an element of the offense. *See* 1 WIGMORE, *supra* note 9, § 200 ("But if by any definition of rape, or of statutory rape, the woman must be of *chaste character*, then her unchaste character may be *in issue*, and her particular acts with other men are admissible to evidence it . . . this is a different thing from evidencing her consent, and is allowable even where consent is immaterial.").

B. The Reform Movement and Emerging Protections for Victims in Sex Offense Cases

Spurred by the social movement in favor of women's rights and civil rights more broadly, advocates for change began to call into question the traditional assumptions that led to the admissibility of a complaining witness's sexual history.[37] By the mid-1970s, advocates across the country started to push for legislation to exclude or limit the admissibility of a complaining witness's character and past sexual conduct.[38] These laws, dubbed rape-shield laws, proliferated with impressive speed,[39] starting with Michigan in 1974.[40] By 1977, over half of the states had some form of rape-shield legislation.[41] The federal government followed suit in 1978.[42] By 1980, the tally was up to forty-five states.[43] And, by 1986, it was up to forty-eight states.[44] Today, all states have some form of rape-shield legislation that limits the admissibility of a complaining witness's sexual history in sexual assault prosecutions.[45] Although there is unanimous, nationwide consensus that

37. *See, e.g.*, Commonwealth v. Manning, 328 N.E.2d 496, 501 (Mass. 1975) (Braucher, J., dissenting) ("The 'established law' on which the court's opinion rests is part of a legal tradition, established by men, that the complaining woman in a rape case is fair game for character assassination in open court. Its logical underpinnings are shaky in the extreme."); *see also* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 791 (1986) ("The impetus for rape-law reform in general may be traced to the resurgence of the Women's Movement in the late 1960's and its focus on rape and the administration of rape law as powerful symbols of the oppression of women by men."); MILLER, *supra* note 15, at 2 (noting that the enactment of protective legislation was "an offshoot of the civil rights movement of the 1960s and 1970s").

38. *See* Galvin, *supra* note 37, at 797–98.

39. *See id.* at 808.

40. *See id.* at 765 n.3; *see also* MICH. COMP. LAWS § 750.520j (1975).

41. *See* Berger, *supra* note 16, at 32 (noting that by 1977, "bills on this subject are constantly being introduced in the legislatures of other states and in Congress as well").

42. *See* FED. R. EVID. 412. The history of the enactment of Federal Rule of Evidence 412 is chronicled in WRIGHT & GOLD, *supra* note 18, § 5371. Before the enactment of Federal Rule of Evidence 412, the admissibility of a complaining witness's sexual history fell within the compass of Rule 404(a), the rule regarding character evidence of crime victims in general. *Id.*; *see also* FED. R. EVID. 404(a)(2).

43. Tanford & Bocchino, *supra* note 34, at 551.

44. *See* Galvin, *supra* note 37, at 765 n.3. As of 1986, the two holdouts were Arizona, which restricted the admissibility of a complaining witness's sexual history through judicial precedents, and Utah, which conferred no protection to complaining witnesses at that time. *Id.*

45. For a survey on rape-shield laws in the country, see NAT'L CTR. FOR THE PREVENTION OF CHILD ABUSE, NAT'L DIST. ATT'Y'S ASS'N, *Rape Shield Statutes* 1–3 (2011), https://ndaa.org/wp-content/uploads/NCPCA-Rape-Shield-2011.pdf [https://perma.cc/E2UL-JEFD].

complaining witnesses need to be protected, the scope of that protection varies by state.[46]

This Article focuses on a peculiar subspecies of admissible evidence that is unique to North Carolina—the fantasy exception.[47] Under this exception, evidence of a complaining witness's past sexual behavior is admissible to support expert testimony that the witness "fantasized or invented the act or acts charged."[48] The little academic scrutiny that this provision has received has been decidedly negative.[49] This Article provides the first rigorous examination of North Carolina's fantasy exception.

III.
THE NORTH CAROLINA EXPERIMENT

This Part chronicles how North Carolina developed its rape-shield legislation, now codified as North Carolina Rule of Evidence 412. In many ways, North Carolina's experience with sexual assault prosecutions follows the national trend explained in Part II. In at least one way, however, it stands in stark contrast. North Carolina is the only jurisdiction in the country with an exception to its rape-shield protections motivated by a concern that the victim may have fantasized or otherwise invented the assault.[50]

The first section below summarizes the pre-legislation landscape and the Legislative Research Commission Report that directly led to proposed legislation. The second section summarizes the 1977 enactment of North Carolina's rape-shield

46. The various categories of approaches have been exhaustively documented elsewhere, and we will not attempt to meticulously redocument them here. *See* Galvin, *supra* note 37, at 812–903 (summarizing and critiquing the four dominant approaches to rape-shield legislation). To very briefly summarize, the "Texas approach" assumes evidence of a complainant's sexual history is inadmissible, but ultimately permits the judge to admit the evidence if it is found to be more probative than prejudicial. *Id.* at 876–78. Under the "California approach," evidence of past sexual conduct is divided into two categories: that offered to prove the complaining witness's consent and that offered to attack the complaining witness' credibility. *Id.* at 894. The first category cannot be introduced unless it is related to the complainant's earlier sexual conduct with the defendant. The second category is weighed under a probative versus prejudicial analysis. *See id.* at 894 & n.619. The "Michigan approach" generally forbids all evidence of the complaining witness' sexual conduct unless it is "evidence of sexual conduct between the complainant and the accused" or "evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." *Id.* at 871 & n.518. The "federal approach" follows Federal Rule of Evidence 412 and contains an exception allowing the admissibility of all evidence necessary to satisfy the defendant's constitutional rights. *Id.* at 883–85.

47. N.C. R. EVID. 412(b)(4); *see also* Galvin, *supra* note 37, at 863 n.476.

48. N.C. R. EVID. 412(b)(4).

49. *See* Colin Miller, *But It Was Only a Fantasy: North Carolina Opinion Reveals Troubling Exception to the State's Rape Shield Rule*, EVIDENCEPROF BLOG (Nov. 2, 2009), https://lawprofessors.typepad.com/evidenceprof/2009/11/but-it-was-only-a-fantasy-north-carolina-opinion-reveals-troubling-exception-to-the-states-rape-shie.html [https://perma.cc/6ZNZ-AY5Y] ("To me, North Carolina's approach seems horribly misguided . . . ."); *see also* Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1386 (2005) (labeling the North Carolina approach as "deeply problematic").

50. N.C. R. EVID. 412(b)(4); *see also* Wilkinson-Ryan, *supra* note 49, at 1386–87.

statute and its subsequent recodification as Evidence Rule 412. Finally, the third section summarizes the judicial interpretation and application of the state's rape-shield rule, with a particular emphasis on the fantasy exception.

A. The Pre-Legislation Landscape and the Legislative Research Commission Report

Against the backdrop of the national reform movement,[51] the 1975 North Carolina General Assembly directed its Legislative Research Commission to study several issues surrounding sexual assault in the state.[52] One directive instructed the Commission to "review the North Carolina criminal code, examine pertinent court procedures and develop recommendations for revision of those statutory provisions and procedural policies it deem[ed] appropriate."[53] The Commission formed a committee, the Legislative Research Commission Committee Studying the Problems of Sexual Assault, which included five legislators and two non-legislators.[54] Starting in October 1975, the committee met eight times and held one public hearing before issuing its report in January 1977.[55]

Over the course of its meetings, the committee heard from numerous sources on the topic of whether and how the legislature should restrict cross-examination of complaining witnesses in sexual assault prosecutions.[56] On one end of the spectrum, Professor Barry Nakell of the University of North Carolina School of Law shared his opinion that too much emphasis was placed on the victim in rape prosecutions and that rape allegations were often fabricated.[57] In Professor Nakell's view, the law properly permitted questioning a sexual assault victim about her past sexual history because such history may demonstrate that the victim has "a particular psychological tendency to falsely 'cry rape.'"[58] In the same vein, a participant from the North Carolina Criminal Justice Academy warned the committee that

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51. *See supra* Part II.B.

52. Act of June 25, 1975, ch. 851, § 11.7, 1975 N.C. Sess. Laws 4–5. Pursuant to a directive of the General Assembly, the Legislative Research Commission has the power to study "matters of public policy as will aid the General Assembly in performing its duties" and to report the results of its studies to the General Assembly along with recommended legislation. N.C. GEN. STAT. § 120-30.17 (2017).

53. Act of June 25, 1975, ch. 851, § 11.7, 1975 N.C. Sess. Laws 5.

54. The membership of the committee was Senator William D. Mills (chairman), Senator Mary H. Odom (co-chairman), Representative David W. Bumgardner (co-chairman), Senator John W. Winters, Representative Carolyn Mathis, Miriam Wallace of the Charlotte Rape Crisis Center, and Professor Thomas J. Andrews of the University of North Carolina School of Law. STATE OF N.C. LEGIS. RESEARCH COMM'N, 1977 LEGISLATIVE RESEARCH COMMISSION REPORT TO THE 1977 GENERAL ASSEMBLY OF NORTH CAROLINA: SEXUAL ASSAULTS 1, 104 (1977). The committee also drew upon assistance of the staff of the Legislative Services Office. *Id.* at 1.

55. *Id.* at 3.

56. *See id.* at 7–30. Note that direct quotations in the following paragraphs are direct quotations to the 1977 Report's summary of the information presented to the committee. Direct quotations should not be attributed as the exact wording used by particular participants.

57. *Id.* at 7.

58. *Id.* at 8.

false reports were "often a problem in connection with adult female rape" and that falsely accused individuals deserved protection because "[m]any careers ha[d] been ruined even though the accused was cleared of the offense charged against him."[59]

A former state senator "warned not to act quickly in limiting the cross-examination of the past acts of sexual conduct of an alleged rape victim, because the racial factor [was] still evident in many cases tried before North Carolina juries."[60] Although not expressly stated in the report, the reasoning appears to be that Black defendants would often not receive a fair trial in sexual assault prosecutions, particularly when the victim was white. Thus, to help restore the balance of fairness, the former senator apparently felt that Black defendants needed to be able to undermine the credibility of complaining witnesses by interrogating their sexual histories.

A local attorney stated that, under the current law, defense attorneys already carefully weighed the decision whether and to what extent to cross-examine the victim in a sexual assault prosecution.[61] According to that attorney, juries often sympathized with sexual assault victims and felt that any attempt at cross-examination was simply an attempt by the defense attorney to badger and embarrass the victim.[62] Thus, no protective legislation was needed.

On the other hand, various stakeholders endorsed the general idea of limiting cross-examination into the sexual history of complaining witnesses in sexual assault prosecutions. Advocates for this position included the North Carolina Rape Crisis Association,[63] the Carrboro-Chapel Hill Rape Crisis Center,[64] the North Carolina Association of Law Enforcement Legal Advisors,[65] the North Carolina District Attorney's Association,[66] and representatives of the Chief Justice of the State Supreme Court and the Administrative Office of the Courts.[67]

One district attorney stated that protecting complaining witnesses from extensive cross-examination into their sexual pasts would be the "key thing" to increase the percentage of convictions in rape prosecutions.[68] Another stated that rape victims often feel that they are the ones being put on trial and, understandably,

59. *Id.* at 20.

60. *Id.* at 10.

61. *See id.* at 10–11.

62. *Id.* at 11.

63. *Id.* at 30.

64. *Id.* at 29 (advocating that "[t]he limitation on evidence section is favored since our major concern is the effect of the court process on the victim").

65. *Id.* at 28.

66. *Id.* at 25–26.

67. *Id.* at 24.

68. *Id.* at 26 ("[W]hat is the relevance of whether she had sex with 15 other people but not this defendant?").

become reluctant to testify when they will likely be questioned about their earlier sexual experiences.[69]

The committee also heard from psychology professors. One professor shared experimental results that demonstrated that a jury's perception of a rape victim's respectability influenced both the jury's willingness to convict the defendant and the amount of punishment the jury deemed appropriate.[70] Based on these findings, one professor suggested that the legislature exclude evidence regarding the complaining victim's respectability and character from rape trials unless it bears directly on the case.[71] Another psychology professor stated that rapists were aware of public skepticism regarding sexual assault victims' trustworthiness and intentionally exploited such public skepticism to their advantage.[72]

In its findings, the committee found that many rapes went unreported because the victim was reluctant to undergo the burden of the legal process and face cross-examination during trial.[73] As a result, the committee concluded it was impossible to estimate the actual frequency of rape in North Carolina.[74] But "[i]t [was] almost universally agreed that reported rapes represent[ed] merely the 'tip of the iceberg.'"[75]

Although the committee cited numerous contributing reasons for the low percentage of reported rapes,[76] it pinpointed victims' anxieties surrounding the "external consequences" of reporting the assault as the main underlying reason that rapes were so heavily underreported.[77] The committee observed that "[s]uch anxiety seem[ed] to be well-founded":

> Deep-rooted public attitudes have fostered an image of the "classic" sexual assault victim as either a liar or a tramp. In many cases,

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69. *Id.* at 9.

70. *Id.* at 11–12. In one experiment, participants were presented with fact patterns involving a rape in which the victim was a novice nun (the "high respectability" victim) or a topless dancer (the "low respectability" victim). *Id.* at 108. When the victim was the nun, participants opined that the victim would suffer severe psychological damage and the rapist should be severely punished. *Id.* at 110. When the victim was the dancer, the victim was seen as suffering less harm and as more deserving of the assault. *Id.* Consequently, the dancer's rapist was punished less severely. *Id.* Additional experiments confirmed these basic results and also demonstrated that male jurors are more likely to be influenced by the perceived respectability of the victim than female jurors. *See id.* at 111–13. In one similar experiment, male participants selected an average sentence of fifty years imprisonment when the victim was deemed respectable but only seventeen years imprisonment when the victim was deemed not respectable. *Id.* at 111.

71. *Id.* at 11, 110.

72. *Id.* at 13–14.

73. *Id.* at 32 (finding "that publicity and the legal process impose such a burden on the victim that, in all probability, many rapes go unreported").

74. *Id.* at 32, 34.

75. *Id.* at 34 (stating that reported rapes represent only "a small proportion" of actual rapes). And, of the rapes that were reported, only "very few" resulted in conviction. *Id.* at 33–34 (citing a study finding that the national conviction rate was estimated at 9%).

76. *See id.* at 35–38.

77. *Id.* at 37.

> this has resulted in the victim being "assaulted" twice: the physical sexual assault and the indignity of public suspicion and ridicule. Several victims suggested that in a very real sense the second "assault" was more painful and more difficult to overcome. In the final analysis, it is because so many victims who reported the assault have subsequently expressed resentment and anger at the public's insensitivity to them that such a large percentage of sexual assaults still are not reported.[78]

For reported-but-unprosecuted rape cases, the committee found that the main reason criminal offenses were not prosecuted was that victims were unwilling to undergo cross-examination regarding their entire past sexual history.[79]

Additionally, the committee found that the demands on complaining witnesses in rape prosecutions "tend[]to inhibit [the victims'] recovery from the trauma of the assault."[80] Even in situations where inquiry into the victim's sexual history was deemed irrelevant, the committee found that a defense attorney merely posing the question in open court damaged a victim's reputation and privacy.[81] Moreover, the committee found that "[r]apists are aware that the public has a skeptical attitude about the crime" that reduced their risk of conviction.[82]

After the committee heard a "substantial amount of testimony on all sides of th[e] issue" about limiting cross-examination of complaining witnesses, the committee recommended what it deemed a "'compromise' approach."[83] The committee recommended that the General Assembly enact legislation that would "establish procedural guidelines and limit the kind of evidence which is admissible in a sexual assault prosecution concerning the prior sexual behavior of the victim or the defendant."[84] In relevant part, the committee's proposed legislation stated:

> The sexual behavior of the defendant or victim is irrelevant to any issue in a sexual assault prosecution, unless such behavior:
>
> (1) Was between the victim and the defendant; or
>
> (2) Shows an origin of semen other than in the alleged sexual assault; or
>
> (3) Occurred in specific instances under circumstances or as part of a pattern of behavior so similar to the alleged assault that its relevance to a material issue in such prosecution clearly outweighs any prejudice, confusion of issues, or invasion of privacy

78. *Id.* at 37–38.
79. *Id.* at 40.
80. *Id.* at 45.
81. *Id.* at 41.
82. *Id.* at 48.
83. *Id.* at 41–42; *see also id.* at 94 ("The draft law's approach to relevance falls somewhere in the middle of the range of approaches found in other states.").
84. *Id.* at 50.

> which would result from introduction of evidence or reference to it during the proceeding.
>
> Whenever such sexual behavior is relevant, it shall be proved only by otherwise admissible evidence of specific acts and not by opinion or by evidence of reputation or character.[85]

Furthermore, the proposed legislation defined "sexual behavior" as "any sexual activity or conduct other than the sexual contact or act which is an element of the assault alleged in a particular sexual assault prosecution."[86] Additionally, any attempt to introduce evidence of sexual behavior must first be screened by the court outside of the presence of the jury.[87]

The committee offered detailed commentary along with the proposed legislation.[88] The commentary noted that the committee was persuaded "that sexual assault prosecutions [we]re too often conducted in a way that embarrasses or intimidates the victim beyond the defendant's legitimate interest in a fair trial."[89] Further, the commentary stated that the "chief evil [was using] evidence of irrelevant sexual behavior to influence the court and jury" by creating prejudice against the victim.[90] The commentary noted that many prosecutions featured evidence regarding the victim's sexual behavior that was "so general and so remote that it could not possibly have any logical bearing on any issue in [the] case."[91]

The committee directly found that a witness's sexual promiscuity was not related to her credibility.[92] Moreover, it found that "bad sexual character" did not itself demonstrate "such a general tendency to consent to sexual activity that the victim would do so under any and all circumstances."[93] Such evidence did, however, tend to bias the jury against the complaining witness.[94] Because sexual history is generally irrelevant and prejudicial, the proposed legislation only permitted its introduction into evidence if "it deal[t] with specific conduct which was engaged in under circumstances which [were] similar enough to those which may have existed in the alleged assault so that the legitimate relevance of that activity clearly outweighs its possible prejudicial effect."[95]

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85. *Id.* at 57–58.

86. *Id.* at 57.

87. *Id.* at 58.

88. *Id.* at 64–102. The commentary was authored by committee member Professor Thomas J. Andrews of the University of North Carolina School of Law. *Id.* at 64 n.*.

89. *Id.* at 86.

90. *Id.*

91. *Id.* at 87.

92. *Id.* at 87–88 ("If sexual immorality were really related to truthfulness, one would expect evidence of such immorality to be introduced to impeach the credibility of any witness in any trial and not just sexual assault prosecutions; yet it would be absurd to attempt to impeach the chief witness in a bank robbery case simply by showing that she is sexually promiscuous.").

93. *Id.* at 88.

94. *Id.* at 88–89 ("[T]hey think the victim deserved it, no matter how serious it was.").

95. *Id.* at 89.

The committee felt that the legislature needed to enact a clear rule to assure sexual assault victims that "the ordeal of a criminal prosecution [would] not be unnecessarily exaggerated by subjecting them to a sea[r]ching hostile inquiry into irrelevant character traits or sexual behavior."[96] It acknowledged that the public's interest in the conviction and punishment of sexual assault perpetrators would be "further frustrated by a legislative silence which may confirm their fear that the decision to prosecute will trigger an extended inquiry into collateral matters."[97] Moreover, the committee found that a clear rule was necessary to deter would-be perpetrators.[98] Such individuals were considered highly calculating and aware that "the risk of conviction is unusually low" in sexual assault prosecutions.[99] Additionally, a clear rule would "give appropriate guidance to courts, prosecutors and law enforcement personnel in this difficult area."[100] The committee acknowledged that trial judges should already be excluding irrelevant evidence of sexual history under the current law, yet it found that uncertainty within the criminal justice system could "lead to the continued introduction of irrelevant evidence even when its irrelevance and prejudice are clear."[101]

The proposed legislation was meant to "completely reject[] the notion that all sexual behavior, however proved, has some intrinsic relevance in a sexual assault proceeding."[102] The three exceptions to the proposed rule were designed to identify situations in which the probative value of the victim's past sexual behavior outweighed the potential for prejudice by requiring "some specific similarity between the [prior] sexual behavior and the assault."[103]

Under the first exception, evidence of past sexual acts between the victim and the defendant was deemed relevant because such acts may demonstrate the victim's bias against the defendant or that the victim was motivated to falsify an accusation or "misinterpret the facts of an encounter."[104] The committee also deemed this type of evidence less prejudicial than evidence of general sexual behavior.[105] Under the second exception, evidence of past sexual history was relevant only if it explained the presence of semen in a way that called into question this particular corroboration of the victim's testimony.[106]

The third exception served as a catch-all. It applied to all sexual behavior and employed a balancing test for determining admissibility.[107] Balancing evidence's

96. *Id.* at 90–91.
97. *Id.* at 91.
98. *Id.* at 90.
99. *Id.*
100. *Id.* at 91.
101. *Id.*
102. *Id.* at 92.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 93.
107. *Id.* at 93–94.

probative value against its likelihood of prejudice is seen elsewhere in the evidentiary rules.[108] In the ordinary context, the thumb is placed on the side of admitting the evidence because relevant evidence is excluded only if its probative value is substantially outweighed by the danger of prejudice.[109] In the case of the third exception, however, evidence of past sexual behavior was only admitted if its relevance to a material issue clearly outweighed the likelihood of prejudice.[110] This may occur:

> only when the particular circumstances under which specific acts carried out were so similar to those of the alleged assault that they help to demonstrate either that the victim may have a bias against the defendant, or that the victim may have some other motive falsely to accuse the defendant or to alter or misconstrue the facts of a given encounter or that the victim may have consented despite the presence of facts which would ordinarily negate consent.[111]

The report's commentary further noted, however, that the protection provided in the draft legislation extended only to evidence of actual sexual behavior.[112] Thus, evidence of non-sexual behavior was not expected to fall within its compass, even if the evidence was sexual in nature or related to sexual behavior.[113]

B. The 1977 Enactment of North Carolina's Rape-Shield Legislation

After the Legislative Research Commission's January 1977 Report to the General Assembly, little time passed before the report's proposed legislation was introduced as a bill. Senators Carolyn Mathis and John Winters introduced the report's proposed legislation as 1977 Senate Bill 84 on February 10, 1977, and the bill was immediately referred to the Senate Judiciary II Committee.[114] The text of the original bill was identical to the proposed legislation in the committee's report.[115] In particular, the bill deemed evidence of sexual behavior irrelevant except for the three enumerated exceptions discussed above.[116]

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108. *See, e.g.*, N.C. R. EVID. 403.

109. *Id.*

110. *See* STATE OF N.C. LEGIS. RESEARCH COMM'N, *supra* note 54, at 93–94.

111. *Id.* at 93.

112. *Id.* at 94.

113. *Id.* (noting, for example, that an earlier accusation of a sexual assault is not "sexual behavior" and that the term is not meant to capture activity that falls short of "actual participation in sexual activity").

114. BILL HISTORY OF 1977–78 SENATE, N.C. GEN. ASSEMB., at 26, https://www.ncleg.gov/Files/Library/studies/Bill_Histories/1977_78_Senate.pdf [https://perma.cc/L8VX-LNMP]. Senators Mathis and Winters were both committee members on the Legislative Research Commission's study into sexual assaults. STATE OF N.C. LEGIS. RESEARCH COMM'N, *supra* note 54, at 1.

115. *Compare* S.B. 84, 1977 Gen. Assemb., 1977 Sess. (N.C. Feb. 10, 1977), *with* STATE OF N.C. LEGIS. RESEARCH COMM'N, *supra* note 54, at 52–60. The original version of the bill was included in the committee minutes of the 1977–78 Senate Judiciary II committee.

116. *See supra* Part III.A.

The version of the bill that left the Senate Judiciary II committee a few months later looked quite different from the original bill. Unfortunately, the publicly available record of the committee's 1977 proceedings consists of summaries rather than detailed accounts. Thus, we are unable to pinpoint exactly when each change was made and by whom; instead, this Article recounts the bill's journey through the General Assembly with as much detail as possible.[117]

The bill was first discussed in the Judiciary II Committee on February 22, 1977.[118] At that meeting, Senator Mathis presented the bill to the committee and Professor Tom Andrews further explained it.[119] By late May, the bill had apparently undergone three re-writes.[120] The bill was then referred to a special subcommittee of senators for further study.[121]

In early June, the subcommittee reported back to the full Senate Judiciary II Committee.[122] Senator Soles, acting as chairman of the subcommittee, circulated the subcommittee's substitute version of the bill.[123] The committee heard several speakers in support of the bill on June 9,[124] and discussed the subcommittee's substitute version on June 14.[125] After some minor alterations, the subcommittee's substitute version was favorably reported out of the Senate Judiciary II Committee.[126] Senator Soles oversaw the committee's revisions to the bill.[127]

Although the exact part of the process that yielded the changes cannot be identified, the bill that departed the Senate Judiciary II Committee was substantially different from the version that entered it four months earlier.[128] First, the substitute bill was significantly slimmer than the original.[129] In fact, the portion

117. In researching for this Article, we reviewed the committee's minutes and all available accompanying materials from the microfilm collection at the North Carolina Legislative Library.

118. S. JUDICIARY II COMM., MINUTES OF THE FEBRUARY 22, 1977 MEETING (N.C. Comm. Print 1977).

119. *Id.* Professor Andrews was another member of the Legislative Research Commission's committee on sexual assaults. STATE OF N.C. LEGIS. RESEARCH COMM'N, *supra* note 54, at 1. Two other members of the Legislative Research Commission's committee—Senator Odom and Representative Bumgardner—were also in attendance at the committee meeting. *Id.*

120. S. JUDICIARY II COMM., MINUTES OF THE MAY 26, 1977 MEETING (N.C. Comm. Print 1977). The substance of those re-writes is unknown. Indeed, the re-writes may not have pertained to the evidentiary portion of the bill.

121. The subcommittee comprised Senators Luther J. Britt (chairman of the Senate Judiciary II committee), R.C. Soles (co-chairman of the Senate Judiciary II committee), I.C. Crawford, and McNeill Smith. *Id.*

122. S. JUDICIARY II COMM., MINUTES OF THE JUNE 9, 1977 MEETING (N.C. Comm. Print 1977).

123. *Id.*

124. *Id.*

125. S. JUDICIARY II COMM., MINUTES OF THE JUNE 14, 1977 MEETING (N.C. Comm. Print 1977).

126. *Id.*

127. *Id.*

128. *Compare* S.B. 84, 1977 Gen. Assemb., 1977 Sess. (N.C. Feb. 10, 1977), *with* S.B. 84, 1977 Gen. Assemb., 1977 Sess. (committee substitute adopted June 15, 1977).

129. *Compare* N.C.S.B. 84 (Feb. 10, 1977), *with* N.C.S.B. 84 (June 15, 1977).

of the bill that related to entering evidence in sexual assault cases was the only portion to survive.[130] Second, the surviving portion looked markedly different in June 1977 than it had when it arrived in the Senate Judiciary II Committee in February 1977:

Table A[131]

Original Bill as Recommended by the Legislative Research Commission and as Introduced by Senator Carolyn W. Mathis	Substitute Bill Reported Favorably by Senate Judiciary Committee II, incorporating Revisions by Senator R.C. Soles' Subcommittee
Version date: February 10, 1977	Version date: June 15, 1977
Sexual assault prosecutions-restrictions on evidence and procedure. (a) As used in this section, the term 'sexual behaviour' means any sexual activity or conduct other than the sexual contact or act which is an element of the assault alleged in a particular sexual assault prosecution. The sexual behavior of the defendant or victim is irrelevant to any issue in a sexual assault prosecution, unless such behavior: (1) was between the victim and the defendant; or (2) shows an origin of semen other than in the alleged sexual assault; or (3) occurred in specific instances under circumstances or as part of a pattern of behavior so similar to the alleged assault that its relevance to a material issue in such prosecution clearly outweighs any prejudice, confusion of issues, or invasion of privacy which would result from introduction of evidence or reference to it during the proceeding.	Restrictions on evidence in rape cases. (a) As used in this section, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial. (b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior: (1) was between the complainant and the defendant; or (2) is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or (3) is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or (4) is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

130. *See* N.C.S.B. 84 (June 15, 1977).
131. N.C.S.B. 84 (Feb. 10, 1977); N.C.S.B. 84 (June 15, 1977) (emphasis omitted).

Although the first two exceptions underwent little substantive change, the third morphed significantly.[132] And, for the first time, a fourth exception emerged that would allow evidence of sexual behavior to serve as the basis of expert testimony that the victim had invented or fantasized the assault.[133] This substitute version of the bill is the predecessor to Rule 412 of North Carolina's modern evidence rules.[134] It has not been meaningfully updated since it departed the Senate Judiciary II Committee in June 1977.[135]

Publicly available records do not indicate exactly when the fantasy exception was added to the bill. It is fairly safe to infer, however, that the bill was significantly revised for the final time during the two weeks in Senator Soles' subcommittee.[136] In the Committee minutes, the subcommittee's version was not deemed a re-write, but instead was labeled a "substitute version."[137] This denotes that the subcommittee's version of the bill was not a minor revision; it was essentially a new bill.[138]

As stated above, Senator Soles was the chairman of the subcommittee that produced the substitute version of the bill. Soles has the distinction of being North Carolina's longest-serving senator.[139] He was newly elected to the Senate in 1977 when he chaired the subcommittee, and he served until 2011.[140] His career and personal life, however, have not been without turmoil. In 1983, he was indicted for conspiracy, vote buying, perjury, and aiding and abetting bribery.[141] The first three charges were dismissed, and Soles was found not guilty of the aiding and abetting bribery charge.[142]

Soles' political tenure ended in 2011 after he declined to seek reelection.[143] His decision to relinquish his seat came on the heels of an incident in August 2009,

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132. *Compare* N.C.S.B. 84 (Feb. 10, 1977), *with* N.C.S.B. 84 (June 15, 1977).

133. N.C.S.B. 84 (June 15, 1977).

134. N.C. R. EVID. 412; N.C.S.B. 84 (June 15, 1977).

135. *See infra* text accompanying notes 155–64.

136. *See supra* text accompanying notes 1201–35.

137. S. JUDICIARY II COMM., MINUTES OF THE JUNE 9, 1977 MEETING (N.C. Comm. Print 1977).

138. *See How an Idea Becomes a Law in North Carolina*, NORTH CAROLINA GENERAL ASSEMBLY, https://www.ncleg.gov/Files/EducationalResources/HowAnIdeaBecomesALaw.pdf [https://perma.cc/UR79-EDFH] (differentiating committee substitutes from committee amendments).

139. Editorial, *It's Best for All If Soles Doesn't Seek Re-Election*, SANFORD HERALD (N.C.), Dec. 31, 2009.

140. Before serving in the Senate, Soles served in the House starting in 1968. *Id.*

141. *Timeline of R.C. Soles' Career*, WILMINGTON STAR NEWS (Jan. 9, 2010, 12:01 AM), https://www.starnewsonline.com/news/20100109/timeline-of-rc-soles-career [https://perma.cc/T4Q7-6D9Z].

142. *Id.*

143. *See Soles' Retirement as Legislator Is Top Story of 2010*, NEWS REPORTER (Whiteville, N.C.), Dec. 30, 2010; Deuce Niven, *R.C. Soles Jr. Won't Seek Re-Election*, BRUNSWICK BEACON (Shallotte, N.C.) (Dec. 30, 2009, 12:00 AM), https://www.brunswickbeacon.com/content/rc-soles-jr-wont-seek-re-election [https://perma.cc/3KP5-MFKL].

in which Soles shot a young man who was allegedly attempting to kick in the door to Soles' home.[144] Although Soles claimed self-defense, he was indicted for assault with a deadly weapon inflicting serious injury.[145] Soles pleaded guilty to assault with a deadly weapon in 2010 and was fined $1000.[146] A second incident involving Soles shooting at a young man outside his home occurred in 2011.[147]

The most troubling allegations against Soles are those involving sexual abuse. In August 2009, a Wilmington television station aired a video in which a 27-year-old alleged that Soles attempted to molest him when he was fifteen.[148] That accusation was recanted,[149] but the accuser later told reporters that Soles had paid him $3000 to recant.[150] Since then, at least two other men have publicly accused Soles of sexual abuse, molestation, and rape.[151] One accuser claimed that Soles forcibly raped him in 1975, when the accuser was thirteen years old, and that the sexual abuse continued for another six months until the accuser moved away.[152] Another individual claimed that Soles started having sex with him in 2001, when the individual was fifteen years old.[153] Although not formally charged with any of those sexual assaults, Soles has faced assault charges involving physical altercations with other young men.[154] To summarize: subsequent accusations against Senator

144. David Reynolds, *State Sen. R.C. Soles Shoots One of Two Home Intruders*, WILMINGTON STAR NEWS (Aug. 23, 2009, 11:41 PM), https://www.starnewsonline.com/article/NC/20090823/News/605069540/WM [https://perma.cc/M79Q-6XWA].

145. Deuce Niven, *Sen. Soles Indicted on Assault Charge*, FAYETTEVILLE OBSERVER (N.C.), Jan. 8, 2010.

146. Shelby Sebens, *Soles Fined for Shooting*, STAR-NEWS (Wilmington, N.C.), Feb. 26, 2010, at 1A.

147. Matt Tomsic, *Incident at R.C. Soles' Home Leads to Gunshot, Foot Chases, Injured Police*, WILMINGTON STAR NEWS (Feb. 28, 2011, 7:13 AM), https://www.starnewsonline.com/article/NC/20110228/News/605065682/WM [https://perma.cc/J3GC-EV9P].

148. *See* Shelby Sebens, *Soles Denies Molesting Teen 12 Years Ago*, WILMINGTON STAR NEWS (Aug. 14, 2009, 7:09 PM), https://www.starnewsonline.com/article/NC/20090814/news/605069545/WM [https://perma.cc/UC9C-AF42]; *see also* Bob High, *Sen. Soles Shocked at Charge; Welcomes Probe*, NEWS REPORTER (Whiteville, N.C.), Aug. 17, 2009.

149. Deuce Niven, *Accuser Recants, Says 'I Was High,'* BRUNSWICK BEACON (Shallotte, N.C.) (Aug. 19, 2009, 12:00AM), https://www.brunswickbeacon.com/content/accuser-recants-says-i-was-high [https://perma.cc/7ZCQ-D8V6].

150. Kevin Maurer & Shelby Sebens, *R.C. Soles Accused of Taking Advantage of Troubled Teens; Ex-Senator Denies Allegations*, WILMINGTON STAR NEWS (June 19, 2011, 7:14 AM), https://www.starnewsonline.com/news/20110620/rc-soles-accused-of-taking-advantage-of-troubled-teens-ex-senator-denies-allegations [https://perma.cc/44YM-SKZX].

151. *See id.*; *see also* Don Carrington, *Man Alleges Sexual Assault by Soles*, CAROLINA JOURNAL (Oct. 28, 2009, 12:00 AM), https://www.carolinajournal.com/news-article/man-alleges-sexual-assault-by-soles [https://perma.cc/FM7C-KR3E].

152. *See* Maurer & Sebens, *supra* note 150; Carrington, *supra* note 151.

153. Maurer & Sebens, *supra* note 150.

154. *See* Deuce Niven, *Law Client Accuses Ex-Sen. Soles of Assault*, TABOR-LORIS TRIBUNE (N.C. & S.C.), Sept. 14, 2016, at 3; *Soles Arrested for Assault on Man, 29*, NEWS REPORTER (Whiteville, N.C.), Sept. 11, 2011.

Soles allege that he was sexually abusing children both before and after he oversaw the subcommittee that produced the final version of North Carolina's rape-shield legislation.

The substitute bill, produced under Senator Soles' oversight, departed the Senate Judiciary II Committee and returned to the Senate body on June 15, 1977.[155] The substitute bill received minimal discussion on the Senate floor and was voted favorably out of the Senate the next day.[156] Once in the House on June 16, the substitute bill was referred immediately to the House Judiciary III committee.[157] The committee discussed the substitute bill only once and favorably reported the bill to the full House on June 21.[158] The House subsequently passed the bill on June 30, 1977.[159]

Once enacted, the substitute bill took effect on January 1, 1978.[160] Because the North Carolina Rules of Evidence were not codified as such until 1984,[161] the rape-shield legislation was originally enacted as a general statute titled "Restrictions on Evidence in Rape Cases," codified in the statutory chapter "Evidence."[162] Since 1984, however, the rape-shield statute has resided in the North Carolina Rules of Evidence as Rule 412, "Rape or Sex Offense Cases; Relevance of Victim's Past Behavior."[163] The substance of the rule has remained unaltered since the substitute bill left the Senate Judiciary II Committee on June 15, 1977.[164] Other than substituting the word "rule" for the word "section," the language of the current evidentiary rule is nearly identical to the language that appears on the right-hand side of Table A.[165] In very real terms, Senator Soles was the last person to meaningfully touch North Carolina's rape-shield legislation.

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155. BILL HISTORY OF 1977–78 SENATE, *supra* note 114, at 26.

156. *Id.*

157. *Id.*

158. *See* H. JUDICIARY III COMM., MINUTES OF THE JUNE 9, 1977 MEETING (N.C. Comm. Print 1977).

159. BILL HISTORY OF 1977–78 SENATE, *supra* note 114, at 26. Because no audio recordings or detailed notes of House floor sessions from this time period are available, it is unknown whether the substitute bill received discussion on the House floor.

160. An Act to Amend the Rules of Evidence in Rape Cases, ch. 851, 1977 N.C.S.B. 84, § 8-58.1 (1977).

161. An Act to Simplify and Codify the Rules of Evidence, ch. 701, 1983 N.C.H.B. 96, § 8B-1 (1983).

162. *See* N.C. GEN. STAT. §§ 8-58.6–.11 (repealed 1984).

163. N.C. R. EVID. 412.

164. *Compare* N.C. R. EVID. 412(a)–(b) (providing sections of current rape-shield evidence rule), *with* An Act to Amend the Rules of Evidence in Rape Cases, N.C.S.B. 84 (providing sections of rape-shield statute enacted in 1977 that are substantively the same as current evidence rule).

165. *See supra* Table A. *Compare* N.C. R. EVID. 412(a)–(b) (providing sections of current rape-shield evidence rule), *with* An Act to Amend the Rules of Evidence in Rape Cases, N.C.S.B. 84 (using "section" instead of "rule" and omitting the phrase "[n]otwithstanding any other provision of law" that is present in current rule).

C. Judicial Interpretation and Application of the Fantasy Exception[166]

Like many jurisdictions, the scope of North Carolina's rape-shield rule only extends to evidence of the complainant's sexual behavior.[167] Anything that is not sexual behavior falls outside of the protections of the rape-shield rule.[168] Thus, discussion of the rule's fantasy exception must necessarily begin with a discussion of the definition of sexual behavior.

The rule defines *sexual behavior* as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial."[169] North Carolina courts have interpreted sexual behavior to include physical acts, such as intercourse and masturbation.[170] Sexual behavior also includes physical evidence indicative of sexual activity, such as semen stains,[171] birth control pills,[172] and sexually transmitted diseases.[173] Similarly, evidence of the complaining witness's lack of sexual activity, such as questioning the witness's virginity, falls within the scope of sexual behavior.[174]

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166. The University of North Carolina School of Government's Administration of Justice Bulletin series was very helpful in locating cases on this topic. *See generally* Jeff Welty, *Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*, ADMIN. OF JUST. BULL., Aug. 2009; *see also* Robert L. Farb & Anne S. Kim, *North Carolina's Evidence Shield Rule in Rape and Sex Offense Cases*, ADMIN. OF JUST. MEMORANDUM, Mar. 1994.

167. N.C. R. EVID. 412(b).

168. *Id.*

169. N.C. R. EVID. 412(a).

170. State v. Wright, 392 S.E.2d 125, 127 (N.C. Ct. App. 1990).

171. *See* State v. Fortney, 269 S.E.2d 110, 117 (N.C. 1980) (stating that evidence of three different semen stains on articles of the complaining witness's clothing was "precisely the kind of evidence the statute was designed to keep out because it is irrelevant and tends to prejudice the jury, while causing social harm by discouraging rape victims from reporting and prosecuting the crime"); *see also* State v. Langley, 324 S.E.2d 47, 48 (N.C. Ct. App. 1985) (excluding evidence of semen stain on complaining witness' jeans).

172. *See* State v. Galloway, 284 S.E.2d 509, 513 (N.C. 1981) (stating with approval that defendant conceded that a question regarding whether the complaining witness used birth control pills would fall within the rape-shield rule).

173. *See* State v. Jacobs, 811 S.E.2d 579, 581–83 (N.C. 2018) (applying Rule 412 to evidence of complaining witness's history of sexually transmitted diseases).

174. *See Galloway*, 284 S.E.2d at 513 (holding that trial court properly excluded question regarding the complaining witness's virginity under the rape-shield rule); State v. Autry, 364 S.E.2d 341, 345 (N.C. 1988) ("Here, the victim's virginity or lack thereof does not fall within any of the four exceptions and is therefore an area prohibited from cross-examination by Rule 412."). However, a complaining witness is not precluded from willingly testifying regarding her own lack of sexual activity:

> It would strain credulity for this Court to hold that, while a victim may testify to the details of her rape and corroborate that testimony with further testimony concerning her pregnancy and subsequent abortion, she may not testify as to the lack of sexual involvement with anyone except the defendant and thereby fail to fix responsibility for the pregnancy on the defendant.

State v. Stanton, 353 S.E.2d 385, 390 (N.C. 1987).

Outside of physical acts and physical evidence, North Carolina courts have narrowly construed the definition of sexual behavior. For example, evidence of communications indicating that a complainant sought a sexual encounter has been held to fall outside the rape-shield rule's protection because such communications are not considered sexual behavior.[175] In one case, the Court of Appeals of North Carolina held that a letter written by the complainant inviting a friend to have sex with her was not protected by Rule 412 because the letter itself was only "evidence of language" and not evidence of sexual behavior.[176] However, another line of cases has held that communications that reference a *specific* past sexual encounter do constitute sexual behavior and therefore fall within Rule 412(b)'s protections.[177]

Because a past *false* sexual assault accusation is not indicative of actual past sexual activity, it is not sexual behavior.[178] However, a past *true* sexual assault accusation falls within the bounds of sexual behavior; the nonconsensual nature of the past sexual activity does not remove it from Rule 412's protection.[179] When the truthfulness of a past accusation is questioned, the defendant bears the burden of demonstrating that a past allegation was false.[180]

Having reviewed the case law regarding sexual behavior, we now turn to the fantasy exception itself. The fantasy exception to North Carolina's rape-shield rule hardly makes an appearance in the reported case law. Its most notable appearance came in the matter of *State v. Heath*, a rape and sexual offense prosecution.[181] In *Heath*, the prosecutor sought to ask an expert in the field of clinical psychology whether he had "an opinion . . . as to whether or not [the complaining witness] was suffering from any type of mental condition [at the time of the alleged sexual assault] which could or might have caused her to make up a story about the sexual

175. In other jurisdictions, such communications would fall within the scope of the rape-shield rule. *See, e.g.*, State v. DeNoyer, 541 N.W.2d 725, 730–31 (S.D. 1995) (holding that a complaining witness's proposal to a friend to engage in oral sex was properly excluded under South Dakota's rape-shield rule).

176. State v. Guthrie, 428 S.E.2d 853, 854 (N.C. Ct. App. 1993) ("[L]anguage or conversation is not sexual activity.").

177. *See, e.g.*, State v. Brodie, 615 S.E.2d 97 (N.C. Ct. App. 2005) (unpublished table decision) (citing State v. Rhinehart, 316 S.E.2d 118, 121 (N.C. Ct. App. 1984)); State v. Shoffner, 302 S.E.2d 830, 832 (N.C. Ct. App. 1983).

178. *See, e.g.*, State v. Thompson, 533 S.E.2d 834, 841 (N.C. Ct. App. 2000) ("The rape shield statute, codified in Rule 412 of our Rules of Evidence, is only concerned with the *sexual activity* of the complainant. Accordingly, the rule . . . does not apply to false accusations.") (citation omitted); State v. Baron, 292 S.E.2d 741, 743 (N.C. Ct. App. 1982) ("We believe that the Legislature intended to exclude the actual sexual history of the complainant, not prior accusations of the complainant.").

179. *See* State v. Wrenn, 340 S.E.2d 443, 446 (N.C. 1986); *see also* State v. Anthony, 365 S.E.2d 195, 196–97 (N.C. Ct. App. 1988). *But see* State v. Durham, 327 S.E.2d 920, 926 (N.C. Ct. App. 1985) (stating that an accusation of sexual assault "to the extent it is evidence of conversation or language, is not excluded by the Rape Shield Statute").

180. *See Wrenn*, 340 S.E.2d at 446 (finding that "defendant fail[ed] to show that the [complaining witness's past] accusations were false").

181. 335 S.E.2d 350 (N.C. Ct. App. 1985), *rev'd*, 341 S.E.2d 565 (N.C. 1986).

assault."[182] Defense counsel objected to the question, but the trial court overruled the objection.[183] The expert testified that "[t]here is nothing in the record or current behavior that indicates that [the complaining witness] has a record of lying."[184] The *Heath* defendant was convicted and appealed the admission of the expert's response.[185]

On appeal, the Court of Appeals affirmed. According to the majority, the prosecutor's question did not improperly inquire into the complaining witness's character, but rather properly sought to elicit an expert opinion regarding the complaining witness's mental condition.[186] To support its ruling, the court invoked the fantasy exception to the rape-shield rule.[187] Although the exception was not applicable to the psychology expert's testimony because the testimony was not about past sexual behavior, the court found that the fantasy exception supported the conclusion that an expert witness should be permitted to testify about whether the complaining witness "suffer[s] from a mental condition suggestive of fabrication."[188]

In dissent, Judge Becton opined that, "[o]n the facts of this case, the distinction between a character trait of lying or fantasizing and a mental condition causing one to lie or fantasize is subtle at best and, perhaps, illusory."[189] In the dissent's view, the psychology expert's testimony opining on the complaining witness's credibility violated North Carolina Rule of Evidence 405(a), which bars "[e]xpert testimony on character or a trait of character . . . as circumstantial evidence of behavior."[190] Judge Becton disagreed with the majority's reliance on the fantasy exception to Rule 412(b); rather, the dissent's view was that the fantasy exception provided no relevant insight into propriety of the expert's testimony in *Heath*.[191]

The North Carolina Supreme Court reversed the Court of Appeals' majority opinion in *Heath*.[192] The state supreme court held that the prosecutor's question and the expert witness's testimony ran afoul of caselaw that prohibits an expert

182. *Id.* at 354.
183. *Id.*
184. *Id.*
185. *Id.* at 353.
186. *Id.* at 354.
187. *Id.*
188. *Id.*
189. *Id.* at 356 (Becton, J., dissenting).
190. *Id.*; *see also* N.C. R. EVID. 405(a).
191. State v. Heath, 335 S.E.2d 350, 356 (N.C. Ct. App. 1985) (Becton, J., dissenting) (noting that Rule 412 "was enacted to deal with the special and unique problems presented by the attempt to introduce evidence of the complainant's past sexual behavior" and that "neither the [prosecutor's] question not the [expert witness's] answer involved such evidence"), *rev'd*, 341 S.E.2d 565 (N.C. 1986). Commentators have sided with Judge Becton's view rather than the majority's. *See, e.g.*, Farb & Kim, *supra* note 166, at 6 n.35.
192. State v. Heath, 341 S.E.2d 565 (N.C. 1986).

from expressing an opinion as to the defendant's guilt or innocence.[193] Because the prosecutor asked whether the complaining witness suffered from a mental condition that might cause her to make up the alleged sexual assault, the court interpreted that the question was not truly about the complaining witness's mental condition.[194] Rather, "in essence it was a question designed to elicit an opinion of the [expert] witness as to whether [the complaining witness] had invented a story, or lied, about defendant's alleged attack on her."[195] As such, the prosecutor sought to elicit expert testimony regarding whether the alleged attack actually occurred. Thus, the testimony was impermissible because an expert witness may not offer an opinion about the defendant's guilt or innocence.[196] On that reasoning, the North Carolina Supreme Court reversed the Court of Appeals' opinion in *Heath* and ruled that the defendant was entitled to a new trial on the basis of improperly admitted evidence.[197] The North Carolina Supreme Court's opinion did not mention the fantasy exception to Rule 412(b).

The North Carolina Supreme Court's decision in *Heath* is not the only opinion holding that an expert witness cannot testify about the guilt or innocence of the defendant. To further illustrate this principle, consider the North Carolina Supreme Court's decision in *State v. Keen*.[198] In *Keen*, the defendant was charged with sexually assaulting an adolescent.[199] An expert psychiatrist who had treated the adolescent was permitted to testify at trial that, in his opinion, the adolescent had not fantasized the assault and that "an attack occurred on him; that this was reality."[200] The North Carolina Supreme Court found that this testimony overstepped the bounds of an expert witness's province.[201] "In so answering, the witness went beyond the point of *assisting* the jury in determining a fact in issue. He, in effect, expressed an opinion as to the guilt of the defendant."[202] The court identified two reasons the testimony was improper: (1) it went beyond stating that the adolescent's mental state was consistent with that of one whom had been sexually attacked, instead conclusively stating that the attack occurred; and (2) in doing so, it expressed an opinion about the defendant's guilt or innocence.[203] Because the

193. *Id.* at 568 (citing State v. Brown, 268 S.E.2d 201, 203 (N.C. 1980); State v. Keen, 305 S.E.2d 535, 538 (N.C. 1983)). For a description of *Keen*, see *infra* text accompanying notes 198–205.

194. *Heath*, 341 S.E.2d at 568.

195. *Id.*

196. *Id.* Additionally, the court found that the prosecutor's question and the expert witness's response violated Rule 405(a)'s prohibition "against the use of expert testimony of character or a character trait as circumstantial evidence of behavior" and Rule 608's prohibition against "using expert testimony to show the propensity of a witness for truth and veracity." *Id.*

197. *Id.* at 569.

198. 305 S.E.2d 535 (N.C. 1983).

199. *Id.* at 536.

200. *Id.* at 537.

201. *Id.* at 538–39.

202. *Id.*

203. *Id.*

defendant was the only other person with the adolescent at the time of the alleged attack, the only reasonable conclusion that could have been drawn from the expert's opinion testimony was an attack occurred and that the attack was perpetrated by the defendant.[204] Thus, like in *Heath*, the court ordered a new trial on the basis of the improperly admitted testimony.[205] On similar reasoning, subsequent case law has repeatedly confirmed that it is improper for a trial court to permit an expert to testify regarding whether an assault actually occurred.[206]

Additionally, recall that the fantasy exception requires expert testimony by a psychologist or psychiatrist about the complaining witness's mental state.[207] Another line of cases have held that a trial court lacks the authority to order a witness to undergo psychological evaluation.[208] Moreover, a patient's relationship with a psychologist or psychiatrist is generally protected by privilege.[209] Thus, it would be exceedingly rare for defense counsel to have access to the type of expert psychological or psychiatric testimony about the complaining witness's mental state that is necessary to trigger the fantasy exception,[210] and rarer still for a prosecutor to forge ahead with a prosecution knowing that defense counsel would seek to

204. *Id.*

205. *Id.* at 539.

206. State v. Stancil, 559 S.E.2d 788, 789 (N.C. 2002) (per curiam) ("In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility."); State v. Aguallo, 350 S.E.2d 76, 81 (N.C. 1986) (finding that pediatrician's testimony that the complaining witness was believable "amounted to an expert's opinion as to the credibility of the victim" and was thus inadmissible per *Heath*); State v. Horton, 682 S.E.2d 754, 758 (N.C. App. Ct. 2009) (holding that it was erroneous for the trial court to allow expert testimony that the complaining witness had "more likely than not been sexually abused").

207. N.C. R. EVID. 412(b)(4).

208. *See* State v. Looney, 240 S.E.2d 612, 627 (N.C. 1978) ("To permit the defendant to obtain a court order, directing [a witness] to submit to a psychiatric examination as a condition precedent to his testifying, may well further chill his or her enthusiasm for taking the stand or at least give him a way out of doing so."); *see also* State v. Liles, 379 S.E.2d 821, 823 (N.C. 1989) (listing cases in support of contention that "trial judges do not have discretionary power to compel an unwilling witness to submit to a psychiatric examination"); 14B STRONG'S N.C. INDEX 4th *Evidence and Witnesses* § 2405 (2010) ("A trial judge does not have the authority to compel an unwilling witness to submit to a psychiatric examination.").

209. N.C. GEN. STAT. § 8-53.3 (2017); *see also* JENNIFER A. BROBST, ADMISSIBILITY OF EVIDENCE IN NORTH CAROLINA § 25:35 (2020).

210. *See* Welty, *supra* note 166, at 9. ("[I]t will be a rare case in which the defense is able to muster evidence of a kind that is likely to fall within [the fantasy exception to Rule 412(b)]."); *see also* Farb & Kim, *supra* note 166, at 3 ("Evidence will rarely be admissible under [the fantasy exception] because a judge does not have the authority to order the victim to undergo a psychiatric or psychological evaluation."). Indeed, the ability of defense counsel to access such psychological expert testimony was questioned contemporaneously with the fantasy exception's passage. *See* INST. OF GOV'T, UNIV. OF N.C. AT CHAPEL HILL, NORTH CAROLINA LEGISLATION 1977: A SUMMARY OF LEGISLATION IN THE 1977 GENERAL ASSEMBLY OF INTEREST TO NORTH CAROLINA PUBLIC OFFICIALS 95 (Joan G. Brannon ed., 1977) ("[Q]uestions remain about this new law. Will category four (evidence offered by a psychologist or psychiatrist that the victim fantasized the act) subject victims to court-ordered mental examinations requested by defense lawyers?").

introduce such evidence.[211] Accordingly, even at the time of its enactment, commentators predicted that the fantasy exception would rarely be used.[212]

IV.
THE FAILURE OF NORTH CAROLINA'S FANTASY EXCEPTION

Our proposed reform is simple: the North Carolina General Assembly should repeal the fantasy exception from Rule of Evidence 412(b). The fantasy exception has never reflected sound policy. Moreover, as the evidence rules relating to expert testimony have been subsequently judicially interpreted, the fantasy exception can never be applied. The exception's only current function is to intimidate and confuse victims of sexual assault, thereby reducing the likelihood that sexual assault cases will be fairly and successfully prosecuted. In short, the fantasy exception creates no benefits to the administration of justice, and instead causes some of the exact harms that Rule 412 was meant to alleviate.[213] Not only does the fantasy exception run counter to the specific motivating purpose of Rule 412, but it undermines the rationale of the entire Evidence Code.[214]

The fantasy exception is not grounded in sensible policy. Recall how the fantasy exception came into existence.[215] The Legislative Research Commission spent two years studying issues involving sexual assault in North Carolina.[216] As a result, the Commission generated a 136-page report for the General Assembly.[217] The report included draft legislation that shielded complaining witnesses from cross-examination about their sexual history, subject to *three* exceptions.[218] Those three exceptions represented the situations in which the Commission—in

211. Robert L. Farb, *The New Rape Evidence Law*, ADMIN. OF JUST. MEMORANDUM, Dec. 1977, at 6. ("This subdivision [the fantasy exception] will probably rarely be used since a prosecutor would very seldom proceed to trial knowing that the defense will present expert psychiatric or psychological testimony showing that the victim fantasized the sexual act charged.").

212. *See id.*

213. *See* Wilkinson-Ryan, *supra* note 49, at 1388 ("The North Carolina law is an explicit expression of distrust of women accusing men of rape."); Miller, *supra* note 49 ("[H]ow can North Carolina have a rape shield rule and yet include in it an exception which allows for the routine admission of the very type of evidence that rape shield rules were passed to exclude?").

214. North Carolina's evidentiary rules are meant to secure fairness and to promote the growth and development of the law of evidence "to the end that the truth may be ascertained and proceedings justly determined." N.C. R. EVID. 102(a).

215. This paragraph and the next summarize the genesis of the fantasy exception. This same history is chronicled in greater detail in Part II.B, *supra*.

216. *See* STATE OF N.C. LEGIS. RESEARCH COMM'N, *supra* note 54.

217. *See id.*

218. *Id.* at 57–58.

its careful and detailed study—deemed the complaining witness's sexual history to be relevant to a sexual assault prosecution.[219]

The proposed legislation was introduced and referred to the Senate Judiciary II Committee.[220] A subcommittee was formed to further study the proposed legislation.[221] The subcommittee substituted a new version of the bill, and this substitute bill was where the fantasy exception likely was created.[222] The subcommittee's chairman, Senator Soles, has since faced allegations that he was sexually abusing children contemporaneously with rewriting the state's rape-shield legislation.[223] The written legislative history contains no explanation for why the fantasy exception was added or what it was designed to do. It was passed into law and there it has remained—without justification—for the past forty-two years.[224] North Carolina was squarely in the middle of the pack in the timing of its adoption of rape-shield legislation.[225] At that time, no other jurisdiction had an exception akin to North Carolina's fantasy exception.[226] Since that time, no other jurisdiction has adopted an exception like North Carolina's fantasy exception.[227]

Of course, that the bill was rewritten in a subcommittee does not necessarily make it bad policy. Senator Soles' likely involvement in the creation of the fantasy exception does not automatically make it bad policy, nor does the fact that the exception is unique to North Carolina. These combined circumstances, however, raise questions about the fantasy exception's soundness. States may surely act as laboratories to experiment with various policy approaches.[228] But at some point, an experiment's results should be measured. Forty-two years serves as a sufficiently lengthy observation period. The General Assembly should admit that the

219. *Id.* at 92–93. The more common exceptions to the rape-shield rule have been sufficiently discussed by other commentators. *See, e.g.*, Galvin, *supra* note 37, at 812–71 (analyzing and criticizing multiple exceptions); Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461 (2012) (criticizing the sexual pattern exception); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002) (criticizing the sexual-history-with-the-defendant exception and the constitutional exception); Karin S. Portlock, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404 (2007) (criticizing the sex worker exception). Because this Article's focus is the unique fantasy exception, we will not further discuss the other exceptions here.

220. *See supra* note 114 and accompanying text.

221. *See supra* note 121 and accompanying text.

222. *See supra* notes 121–37 and accompanying text.

223. *See supra* notes 148–54 and accompanying text.

224. *See* N.C. GEN. STAT. §§ 8-58.6–.11 (repealed 1984); N.C. R. EVID. 412(b)(4).

225. STATE OF N.C. LEGIS. RESEARCH COMM'N, *supra* note 54, at 94 (noting that at least twenty-six other states had adopted rape-shield legislation between 1974 and 1977).

226. *See* Wilkinson-Ryan, *supra* note 49, at 1386–87; Miller, *supra* note 49.

227. *See* Wilkinson-Ryan, *supra* note 49, at 1386–87; Miller, *supra* note 49.

228. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

fantasy exception experiment has failed.[229] The rest of the country has got on quite well without this exception. North Carolina would be better off without it.

Without any surviving public legislative history to support the fantasy exception, we are left to speculate about its intended purpose. Some view the exception as an unfortunate relic of Wigmore's misguided mistrust of girls' and women's ability to testify accurately in sexual assault prosecutions.[230] Wigmore's view that women were prone to fantasize and invent sexual assaults remained influential well past his death in 1943; as one biographer noted "the influence of the *Treatise* all but assured a nationwide incredulity toward sexual assault victims."[231] Such views were only beginning to erode in the 1970s.[232] Recall that the Legislative Research Commission committee heard testimony—from a law school professor in 1976—that cross-examination into a complaining witness's sexual history was necessary because rape allegations are "often fabricated."[233] The fantasy exception most likely extended from this line of thinking—that defendants in sexual assault prosecutions need protection from complaining witnesses' fantasies.[234]

In Wigmore's treatise on evidence, section 924a addresses testimony by complaining witnesses in sexual assault prosecutions.[235] Wigmore has been criticized for misportraying supposedly objective and scientific information in his effort to support the belief "that all females who allege sexual assault should be assumed to be lying."[236] As one critic observed, Wigmore "was so wholeheartedly committed to his view that he deliberately misrepresented the supposed objective, scientific authorities upon which he relied."[237] Wigmore was not only wrong about women as complaining witnesses, but he apparently distorted his sources so that they appeared to support his conclusion.[238] In her excellent article on Wigmore's use of scientific evidence, Leigh Bienen critically examined each and every source that Wigmore supposedly relied upon in section 924a.[239] Bienen demonstrated

229. *See* Miller, *supra* note 49.

230. *See id.* ("I couldn't find any legislative history on the subject, but it seems clear to me that the [fantasy] exception was born out of the writings of John Henry Wigmore, probably evidence's greatest scholar but also possibly its biggest misogynist."); *see also* Wilkinson-Ryan, *supra* note 49, at 1388 ("The North Carolina law is an explicit expression of distrust of women accusing men of rape.").

231. PORWANCHER, *supra* note 2, at 83. The same biography noted that "[s]ometimes, the sheer dominance of the [Wigmore] *Treatise* was problematic." *Id.*

232. *See, e.g.*, Berger, *supra* note 16, at 32–33.

233. STATE OF N.C. LEGIS. RESEARCH COMM'N, *supra* note 54, at 7 (summarizing Professor Barry Nakell's March 1976 testimony to the Commission).

234. *See supra* note 230 and accompanying text.

235. 3 WIGMORE, *supra* note 9, § 924a.

236. 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).

237. *Id.*

238. *Id.* at 237–38.

239. *Id.* at 243–62.

that—even in the 1930s and 1940s—scientific sources did not support the assertion that women lied about sexual assaults.[240] Wigmore did not foolishly trust faulty science; rather, he distorted science to support his belief.[241]

If Wigmore's false science was the fantasy exception's original justification, it should be roundly rejected by the North Carolina General Assembly. Over three-quarters of a century after his death, Wigmore's antiquated, biased, and prejudicial views toward women should not only be abandoned, but also condemned. Fears that women are prone to fantasize sexual assaults—and then later believe them to have occurred—should not continue to be propagated through the fantasy exception to North Carolina Rule of Evidence 412(b). These fears are not backed by fact.[242] Indeed, the North Carolina Supreme Court has already expressly rejected Wigmore's view, espoused in section 924a of his treatise, that all female complainants in sexual offense cases should undergo mental examination: "Notwithstanding our great respect for this eminent authority on the law of Evidence, this statement never has been and is not in accord with the law of this State and is, in our opinion, completely unrealistic and unsound."[243] The General Assembly should join the supreme court in rejecting Wigmore's view by removing the fantasy exception from North Carolina's rape-shield legislation.

Giving North Carolina legislators of the 1970s the benefit of the doubt, perhaps the fantasy exception was not grounded in Wigmore's distrust of women. Perhaps the fantasy exception was created to guard against sexual assault accusations that arise from delusions produced by mental illness or trauma.[244] If that was the case, then the exception misses the mark because it could never actually operate as intended.

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240. *Id.* at 236–38 (internal citations omitted).

241. *Id.* at 241 ("Wigmore writes as a man convinced, apparently so convinced that he actually suppressed factual evidence contradicting his assertions."). A recent Wigmore biography describes his treatise's approach to complaining witnesses in sexual assault prosecutions as "[b]ased on a severe misrepresentation of the relevant psychiatric literature." PORWANCHER, *supra* note 2, at 83.

242. *See generally* Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?*, 7 YALE J.L. & FEMINISM 243 (1995) (examining the use of prior false allegations in rape cases and the admissibility of those earlier statements); Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in* Jones v. Clinton, 31 U.C. DAVIS L. REV. 123 (1997) (discussing how the stereotype of women as liars, despite that men and women are equally adept at telling lies, affects the perception of women's credibility in court).

243. State v. Looney, 240 S.E.2d 612, 622 (N.C. 1978).

244. For example, an individual who suffered sexual abuse as a child may suffer from delusions of sexual assaults later in life. These delusions could lead to a false accusation of a sexual assault. *See, e.g.*, Grégoire Baudin, Andrei Szoke, Jean-Romain Richard, Antoine Pelissolo, Marion Leboyer & Frank Schürhoff, *Childhood Trauma and Psychosis: Beyond the Association*, 72 CHILD ABUSE & NEGLECT 227, 232 (2017) (finding that "[t]he elevated [odds ratio] for Physical/Sexual Abuse, and results from previous studies indicate Physical/Sexual Abuse exposure during childhood to be a significant risk factor for a psychotic disorder"); John Read & Nick Argyle, *Hallucinations, Delusions, and Thought Disorder Among Adult Psychiatric Inpatients with a History of Child Abuse*, 50 PSYCHIATRIC SERVS. 1467, 1468 (1999) (discussing the relationship between sexual assault and delusions and finding, among other things, that "adult incest survivors are more likely to experience sexual delusions than are other [psychiatric] inpatients").

Under the fantasy exception, the complaining witness's past sexual behavior is admissible to support expert testimony by a psychologist or psychiatrist that the witness had fantasized the charged assault.[245] Recall that North Carolina courts interpret sexual behavior quite narrowly.[246] Sexual behavior only includes sexual acts and physical evidence indicative of such acts.[247] Earlier false accusations of sexual acts are not sexual behavior.[248] Communications of a sexual nature are not sexual behavior in North Carolina[249] and it follows that neither are sexual thoughts, fantasies, or delusions. Thus, the rape-shield rule would not exclude evidence that the complaining witness suffered from sexual delusions or made previous false accusations. The fantasy exception is not needed to ensure that this evidence is admitted.[250] Rather, the fantasy exception could only operate to admit evidence of *actual sexual acts*.

But which actual sexual acts? Presumably, evidence that the complaining witness was sexually assaulted in the past in order to support a defense that the witness is delusional about the current accusation. On the surface, this resembles the exact type of stereotyping that rape-shield rules were designed to combat.[251] It stereotypes sexual assault victims as broken individuals whom not only suffer from delusions but are incapable of recognizing the difference between reality and delusion.[252] Followed to its logical extension, this line of reasoning casts doubts on the credibility of every past victim of sexual assault. It subtly shifts Wigmore's fear. Instead of deeming all women unworthy of trust, it labels all sexual assault victims as unworthy of trust.

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245. N.C. R. EVID. 412(b)(4).

246. *See supra* notes 169–80 and accompanying text.

247. *See* N.C. R EVID. 412(a) ("As used in this rule, the term 'sexual behavior' means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial."); *see also supra* notes 170–74 and accompanying text.

248. *See supra* note 178 and accompanying text.

249. *See supra* notes 175–76 and accompanying text.

250. Indeed, other jurisdictions have dealt with similar issues without enacting a separate fantasy exception. *See, e.g.*, United States v. Begay, 937 F.2d 515, 521 (10th Cir. 1991) (deciding the defendant had a right to introduce past sexual abuse of the victim to test whether the victim had confused the earlier incidents with the charged crime); State v. Rolon, 777 A.2d 604, 617 (Conn. 2001) (explaining where the child may have confused the defendant with another person who abused her in the past, the defense was entitled to question her about those past events); State v. Robinson, 803 A.2d 452, 457–58 (Me. 2002) (concluding where the victim had been sexually assaulted by another person at the same party where the charged crime took place, evidence that the trauma of the first assault could have impaired the victim's ability to recall details of the second incident, including the identity of her assailant, was admissible under Rule 412 of the Maine Rules of Evidence); *see also* FED. R. EVID. 412(a) advisory committee's note to 1994 amendment (noting that, under the federal approach, sexual fantasies are included within the scope of sexual behavior).

251. *See* Miller, *supra* note 49 ("[H]ow can North Carolina have a rape shield rule and yet include in it an exception which allows for the routine admission of the very type of evidence that rape shield rules were passed to exclude?").

252. *See* Wilkinson-Ryan, *supra* note 49, at 1390 ("North Carolina's rape shield law almost perfectly cites the bygone notion that women are likely to fantasize rape scenarios and confuse them with reality.").

The fantasy exception signals to people who have been sexually assaulted before that their second and subsequent allegations are going to be met with skepticism.[253] With the fantasy exception in effect, sexual assault victims may be hesitant to bring subsequent allegations out of concern that their past victimization will be raised at trial to undermine their credibility.[254] A sexual assault victim with a new allegation may understandably fear that the defendant's attorney and psychiatric experts may attempt to paint the new allegation as nothing but an imaginative embodiment of the accuser's earlier trauma. Because of that, sexual assaults may go unreported or unprosecuted. Cunning sexual assaulters may learn to target individuals who have been victimized in the past for the very reason that such individuals' accounts may be discounted as delusions. These negative consequences are eerily reminiscent of the ill effects that rape-shield rules were originally designed to combat.

Thus, the North Carolina fantasy exception is a problem with significance that extends far outside the state's boundaries. The existence of the fantasy exception anywhere demeans sexual assault victims everywhere. It should not be suffered by modern society. Society at large has come a long way since Wigmore's heyday of the 1930s and 1940s. Considerable progress has been made even since the movements that spurred the original enactment of rape-shield rules in the 1970s. Recent movements have helped to lessen the stigma from sexual assault victimization.[255] Within the context of this modern culture, the existence of North Carolina's fantasy exception is not only anachronistic, it is archaic. Not only should other jurisdictions continue to eschew the fantasy exception, but national organizations should lobby for its repeal. Its existence stands as both a symbolic and a tangible impediment to the positive evolution of societal perception toward sexual assault victims.

What makes the fantasy exception more troubling is that its harm is not offset by any countervailing benefits. Even in the rare situation in which a sexual offense

253. *See id.* at 1388 ("The existence of the statute implies an authoritative stance on a supposed female predisposition to confuse fantasies of rape with the real thing.").

254. *See* Ramona C. Albin, *Appropriating Women's Thoughts: The Admissibility of Sexual Fantasies and Dreams Under the Consent Exception to Rape Shield Laws*, 68 KAN. L. REV. 617, 659 (2020) (arguing that permitting a complaining witness's sexual dreams or fantasies to be admitted to demonstrate consent to a sexual act "invades her private internal life" in a way that is highly intrusive, "infuses sexual stereotypes and innuendos into the trial process," and "contravenes the purpose of rape shield laws").

255. *See generally* Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371 (discussing how #MeToo has created opportunities for victims of sexual violence to be seen and heard); Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45 (discussing social change brought by #MeToo and Time's Up through the frame of transitional and restorative justice); *see also* andré douglas pond cummings & Caleb Gregory Conrad, *From "Mind Playing Tricks on Me" to "Trauma": Adverse Childhood Experiences and Hip Hop's Prescription*, 59 WASHBURN L.J. 267, 284 (2020) ("Survivors of sexual assault could finally see that although they felt utterly alone and powerless, they were not. The #MeToo movement embodies the impact of showing people they are not alone.").

accusation was the product of a mental delusion and the State proceeded with a prosecution, the fantasy exception would not effectively provide any actual safeguard for the criminal defendant. The fantasy exception is only triggered by the admission of "expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged."[256] However, that exact subject—whether the alleged acts occurred or were fantasized—is impermissible territory for expert testimony.[257] An expert witness may not permissibly testify to whether a complainant in a sexual assault prosecution was actually victimized.[258] Thus, the event necessary to trigger the fantasy exception—expert testimony that the alleged sexual assault was all in the complaining witness's head—can never occur.

In short, the fantasy exception is doctrinal dead weight. It can never properly operate to shield a criminal defendant from a false accusation. Rather, it only hurts complainants in sexual assault cases. Perhaps some dead letter statutes are harmless—relics that operate in name only and occupy rarely visited pages in law books. The fantasy exception, however, is no such innocent artifact. Indeed, it is a false grail.[259] The fantasy exception's continuing legacy is to perpetuate misguided ideology and to confuse and intimidate sexual assault victims. Because of the special need for clear rules in this sensitive area of the law,[260] the mere existence of the fantasy exception disserves both those who fear sexual assault and those who fear false sexual assault allegations. Courts or counsel may easily misunderstand or misapply the fantasy exception.[261] It should no longer be permitted to contaminate North Carolina's evidence code. The fantasy exception has always been illusory. Now is the time for it to simply vanish.

V.
CONCLUSION

Wigmore believed that unchaste girls and women were "distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, [and] partly by temporary physiological or emotional conditions."[262] Thus, he cautioned, we must fear false accusations born of their fantasies.[263] Ironically, hindsight and reason have taught us that Wigmore's beliefs—

256. N.C. R. EVID. 412(b)(4).

257. *See supra* notes 192–206 and accompanying text.

258. *See, e.g.*, State v. Heath, 341 S.E.2d 565, 568 (N.C. 1986) (holding that a prosecutor's question was impermissible when it was designed to extract an expert witness's opinion as to whether the defendant actually assaulted the complaining witness); State v. Keen, 305 S.E.2d 535, 538 (N.C. 1983) (holding that expert witness's claim that "an attack occurred" and "this [attack] was reality" impermissible).

259. *See* INDIANA JONES AND THE LAST CRUSADE (Lucasfilm Ltd. 1989) ("[North Carolina] chose poorly.").

260. *See supra* text accompanying note 96.

261. For an example of the fantasy exception's ability to invite misapplication and confusion, see State v. Heath, 335 S.E.2d 350, 354 (N.C. Ct. App. 1985), *rev'd*, 341 S.E.2d 565 (N.C. 1986).

262. 3 WIGMORE, *supra* note 9, § 924a.

263. *Id.*

and the fantasy exception that they likely spawned in North Carolina[264]—are themselves distorted and inherently defective. It is time for North Carolina to end its experiment on sexual assault victims by repealing the fantasy exception from Rule 412(b) of its Evidence Code.

264. *See* N.C. R. EVID. 412(b)(4).