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Evidence--Stuck in a Serbonian Bog: State v. Jean and the Future of Character Impeachment in North Carolina

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NOTES

Evidence—Stuck in a Serbonian Bog: *State v. Jean* and the Future of Character Impeachment in North Carolina

The 1983 North Carolina General Assembly enacted a state evidence code that became effective July 1, 1984.[1] One of the legislature's objectives in enacting the Code was to redefine the standard of admissibility for certain types of evidence.[2] Consistent with this objective, important new restrictions were placed on the use of character evidence for impeachment purposes. Under North Carolina common law, state courts had permitted trial attorneys to ask opposing witnesses whether they had engaged in specific acts of "misconduct."[3] North Carolina Rule of Evidence 608 modifies the common law by permitting cross-examination concerning specific instances of conduct that did not result in a criminal conviction only if the acts in question are directly probative of the witness' veracity.[4]

A recent North Carolina Supreme Court decision, however, has cast doubt on the significance of the statutory change. *State v. Jean*,[5] decided after passage of the Code but before its effective date, appears to reaffirm North Carolina's

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1. An Act to Simplify and Codify the Rules of Evidence, ch. 701, 4 1983 N.C. Adv. Legis. Serv. 212 (codified at N.C. GEN. STAT. § 8C-1 (Cum. Supp. 1983)). At least one commentator had suggested the adoption of an evidence code based on the Federal Rules of Evidence. *See* Blakey, *Moving Toward an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1 (1981). The Legislative Research Commission's Evidence Laws Study Committee met 18 times between 1979 and 1983, LEGISLATIVE RESEARCH COMMISSION, REPORT TO THE 1983 GENERAL ASSEMBLY OF NORTH CAROLINA i (1983), and ultimately recommended approval of a code based largely on the Federal Rules of Evidence. *Id.* at v. The General Assembly adopted the Committee's recommendations with only a few significant changes. INSTITUTE OF GOVERNMENT, UNIV. OF N.C. AT CHAPEL HILL, NORTH CAROLINA LEGISLATION 1983: A SUMMARY OF LEGISLATION IN THE 1983 GEN. ASSEMBLY OF INTEREST TO NORTH CAROLINA PUBLIC OFFICIALS 65 (A. Sawyer ed. 1983).

2. The General Assembly's purposes in enacting the new evidence code were to make the state's evidence rules more accessible, to fill gaps in the law, and to effect needed reforms. LEGISLATIVE RESEARCH COMMISSION, *supra* note 1, at iii.

3. *See, e.g.*, State v. Lynch, 300 N.C. 534, 543, 268 S.E.2d 161, 166 (1980). Attorneys are required to cross-examine in good faith. *See id.* This good faith restriction had only limited practical effect, however, when the field of inquiry was as expansive—and expandable—as it was under North Carolina case law. *See infra* text accompanying notes 35-41.

4. North Carolina Rule of Evidence 608 states:

> (a) *Opinion and Reputation Evidence of Character.*—The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion . . . but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness . . . .
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> (b) *Specific Instances of Conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . .

N.C.R. EVID. 608. The language quoted is identical to that in the Federal Rules of Evidence. *See* FED. R. EVID. 608.

5. 310 N.C. 157, 311 S.E.2d 266 (1984).

traditional impeachment rule. The trial court had allowed the prosecution to question defendant, charged with rape, about his viewing of a pornographic movie several days after the alleged assault. A plurality of three justices held that admission of this testimony was not reversible error.[6] Justice Exum, in a lengthy and persuasive dissent joined by Justice Frye, relied heavily on the state's nascent evidence code to argue that this testimony was not admissible.[7] This Note focuses on the *Jean* court's apparent reluctance to abandon North Carolina's traditional impeachment practice and on the need to repudiate *Jean* as a guide to construction of rule 608.

Lesly Jean, a black twenty-two year-old Haitian immigrant who was serving in the United States Marine Corps at Camp LeJeune,[8] was convicted in Onslow County Superior Court of one count of first degree rape and three counts of first degree sexual offense.[9] Jean admitted on cross-examination that five days after the alleged rape he had watched a pornographic movie in a Jacksonville, North Carolina hotel room with a "young lady."[10] On appeal[11] defendant argued that the prosecutor should not have been permitted to introduce this incident because it was irrelevant, "highly inflammatory," and "extremely prejudicial."[12]

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6. *Id.* at 169, 311 S.E.2d at 273.

7. *Id.* at 171-82, 311 S.E.2d at 274-80 (Exum, J., dissenting).

8. *See* Record on Appeal at 29.

9. *Jean*, 310 N.C. at 158, 311 S.E.2d at 266. The victim, a 27 year-old kindergarten teacher, *see* Transcript of Trial at 209, was assaulted during the early morning hours of July 21, 1982. *Jean*, 310 N.C. at 158, 311 S.E.2d at 267. Between 3:00 a.m. and 4:15 a.m. she was beaten, threatened with a pair of vise grips, and forced "to submit to various acts of sexual and oral intercourse within her bedroom." *Id.* at 158-59, 311 S.E.2d at 267. The youngest of the victim's three children was asleep in the bedroom throughout the ordeal. *Id.*

10. *Jean*, 310 N.C. at 168, 311 S.E.2d at 272.

11. Defendant was sentenced to two consecutive life sentences. *Id.* at 158, 311 S.E.2d at 266. Life sentences are appealed directly to the North Carolina Supreme Court. N.C.R. APP. P. 4(d).

12. *Jean*, 310 N.C. at 168, 311 S.E.2d at 272. Three other assignments of error were considered and rejected by the court. *See id.* at 158, 311 S.E.2d at 267.

Defendant argued that the trial court erred in refusing to suppress the victim's identification testimony. *Id.* The victim had identified Jean as her assailant in a live lineup approximately two months after the alleged assault. *Id.* at 162, 311 S.E.2d at 268-69. Prior to identifying defendant in this lineup, the victim had failed to identify him in a photographic lineup. *Id.* at 161, 311 S.E.2d at 268. In a second photographic lineup, the victim had said only that Jean's picture "made her feel sick." *Id.* at 164, 311 S.E.2d at 270. Jean was the only person who had appeared in both the photographic and the live lineups; thus, he argued that the identification procedure had been "impermissibly suggestive." *Id.* Moreover, the victim had been hypnotized before the live lineup to determine why Jean's photograph upset her. *Id.* at 165, 311 S.E.2d at 270. "This fact, according to defendant, 'greatly enhanced the possibility of an unconscious transference causing her to mistakenly relate to her recollection of defendant's photograph rather than to the features of the assailant she actually observed on the night of the crime.' " *Id.* (quoting Brief for Appellant at 15).

Defendant's claim of impermissible suggestiveness was rejected on three grounds. First, the victim testified that her identification of Jean at the live lineup had been based on her observation of features not visible in the photographic lineup. *Id.* at 164-65, 311 S.E.2d at 270. Second, the victim had provided police with a complete and accurate description of her assailant immediately after the assault. *Id.* at 165, 311 S.E.2d at 270. Last, "the victim testified that no new information developed as a result of the hypnotic session." *Id.*

The rationale of the court's third contention is questionable. In State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984), the court ruled that a witness who has been hypnotized may not testify at trial "to any fact not related by the witness before the hypnotic session." *Id.* at 533, 319 S.E.2d at 188. The *Peoples* holding, however, was limited expressly to cases not finally determined on direct appeal. *Id.* at 534, 319 S.E.2d at 188-89. Jean filed a motion for appropriate relief and a new trial

Justice Meyer's plurality opinion noted that the movies watched by Jean depicted "acts of sexually deviant behavior . . . [including] the same type of sexual acts that had been forced upon the victim five days earlier."[13] The court briefly reviewed cases supporting admissibility of the contested evidence,[14] but ultimately avoided the question. Justice Meyer announced that even if the alleged error existed, it had been harmless.[15] Blood tests, clothing found in defendant's locker, and the victim's identification testimony all supported the guilty verdict.[16] Justice Meyer concluded that "in the minds of the jurors" the movie testimony could not have been "a determining factor in assessing defendant's guilt."[17]

Justice Martin, in a concurring opinion joined by Chief Justice Branch, argued that the evidence was admissible[18] under the rationale of *State v. Gurley*.[19] In *Gurley*, "evidence of defendant's possession of, familiarity with, and interest in pornographic magazines and photographs of nude women . . . was held competent for purposes of impeachment."[20] Justice Martin equated attempts to make moral judgments of the sort implicit in *Gurley*[21] to "a journey through a Serbonian bog,"[22] but ultimately he remained firmly planted in the mire: "This Court has not overruled *Gurley*. So long as *Gurley* stands, we are bound thereby."[23]

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based on the inadmissibility of the victim's hypnosis-influenced identification testimony. Telephone interview with James Miller, attorney for Lesly Jean (Sept. 20, 1984). The motion was denied. Jean plans to file a petition for certiorari. Telephone interview with James Miller (January 7, 1985).

Defendant's second assignment of error contended "that he was denied due process when the trial judge refused to permit defense counsel to view the victim's statement prior to cross-examining her during the *voir dire* hearing on the motion to suppress her identification testimony." *Jean*, 310 N.C. at 165-66, 311 S.E.2d at 271. The court held that statements of a prosecution witness are not discoverable for the purpose of cross-examination at a *voir dire* hearing. *Id.* at 166, 311 S.E.2d at 271 (citing State v. Williams, 308 N.C. 357, 302 S.E.2d 438 (1983); N.C. GEN. STAT. § 15A-903(f) (1983)).

Last, defendant contended that the trial court should have dismissed the charges against him because there was insufficient evidence that he had "either employed a deadly weapon or inflicted serious personal injury on the victim." *Jean*, 310 N.C. at 169-70, 311 S.E.2d at 273. The court rejected this argument; the victim had been threatened with vise grips and had suffered "a bruised and swollen cheek, a cut lip, and two broken teeth" during the assault. *Id.* at 170, 311 S.E.2d at 273.

13. *Jean*, 310 N.C. at 168, 311 S.E.2d at 272. Actually, defendant admitted watching only one film, which depicted vaginal and anal intercourse, fellatio, and cunnilingus. *See* Brief for Appellant at 25-26. There is no indication in the record that the movie depicted a rape or any other violent act.

14. *Jean*, 310 N.C. at 168-69, 311 S.E.2d at 272-73; *see infra* note 62.

15. *Jean*, 310 N.C. at 169, 311 S.E.2d at 273. Reversible error results only when there is a reasonable possibility that a different verdict would have been returned if the error had not been committed. *See* N.C. GEN. STAT. § 15A-1443(a) (1983).

16. *Jean*, 310 N.C. at 169, 311 S.E.2d at 273.

17. *Id.*

18. *Id.* at 170, 311 S.E.2d at 274 (Martin, J., concurring).

19. 283 N.C. 541, 196 S.E.2d 725 (1973).

20. *Jean*, 310 N.C. at 171, 311 S.E.2d at 274 (Martin, J., concurring).

21. *Gurley*, as interpreted by Justice Martin, *see id.*, appears to stand for the proposition that possession of pornographic materials is the kind of "misconduct" for which a witness could be impeached under North Carolina case law. *See supra* note 3 and accompanying text.

22. *Jean*, 310 N.C. at 171, 311 S.E.2d at 274 (Martin, J., concurring). The phrase is from *Paradise Lost*, in which Milton refers to Egypt's Lake Serbonis, a marshy tract "Where Armies whole have sunk." J. MILTON, PARADISE LOST, Book II, Lines 592-94 (1667); *see* 9 OXFORD ENGLISH DICTIONARY 491 (1933).

23. *Jean*, 310 N.C. at 171, 311 S.E.2d at 274 (Martin, J., concurring).

Justice Exum's dissent contended that the question of defendant's guilt was less certain than suggested by the plurality opinion.[24] This argument was founded on the substantial credibility of Jean's alibi, which was supported at trial by four witnesses.[25] Justice Exum also noted that evidence of defendant's taste in movies was irrelevant to his veracity, highly prejudicial, and therefore inadmissible.[26]

The most important issue faced by the *Jean* court was the appropriate scope of character impeachment. Generally, the prosecution in a criminal trial is permitted to introduce evidence of the defendant's character only under limited circumstances.[27] If the accused neither testifies at trial nor introduces evidence of his good character, the prosecution may not attempt to demonstrate that his character is bad.[28] On the other hand, if the accused introduces evidence of his good character,[29] the state is entitled to rebut this showing with evidence of its own.[30] Finally, if the defendant testifies, the state may introduce evidence of his bad character for purposes of impeachment.[31] The object of impeachment is to

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24. *Id.* at 171-74, 311 S.E.2d at 274-76 (Exum, J., dissenting). Several factors contributed to the dissenters' conclusion. First, the dissent noted the victim's equivocation during the pretrial identification process. *See supra* note 12. Justice Exum's comments on the victim's preidentification hypnosis, *see Jean*, 310 N.C. at 172 n.1, 311 S.E.2d at 274 n.1 (Exum, J., dissenting), presaged his later opinion in State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984); *see supra* note 12.

Second, the blood test on which the plurality relied, *see supra* text accompanying note 16, was inconclusive. "Suffice it to say simply that these results mean only that defendant, along with a large portion of the population, could have committed the crime." *Jean*, 310 N.C. at 173, 311 S.E.2d at 275 (Exum, J., dissenting).

Third, differences between clothing owned by defendant and that allegedly worn by the victim's assailant were significant. The police found blue and white jogging shorts and a pair of Nike sneakers laced with black shoestrings in defendant's locker. The victim's statement to police had not mentioned the white stripes on the shorts or the black shoelaces—the latter, according to Justice Exum, "being a relatively unusual fact." *Id.*

Finally, defendant had a substantially credible alibi. *See infra* note 25 and accompanying text.

25. *See Jean*, 310 N.C. at 173-74, 311 S.E.2d at 275-76 (Exum, J., dissenting). The victim alleged that she had been assaulted in her home between 3:00 a.m. and 4:15 a.m. *See supra* note 9. Defendant testified that he was on "mess duty" at Camp LeJeune and had arrived for work at the base "chow hall" at 4:00 a.m. *See Jean*, 310 N.C. at 173, 311 S.E.2d at 275 (Exum, J., dissenting). Three of the four witnesses who corroborated Jean's account testified that they had seen him in his bed on the base at 3:30 a.m. *Id.* at 174, 311 S.E.2d at 276 (Exum, J., dissenting). Justice Exum concluded: "The quantity and quality of this evidence makes defendant's case on its face at least as strong as that of the state. I find the majority's contrary position to be unsupported by the record." *Id.*

26. *See Jean*, 310 N.C. at 174-75, 311 S.E.2d at 276 (Exum, J., dissenting); *infra* text accompanying notes 87-89.

27. *See* 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 104, at 387 (1982); C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 190, at 557 (E. Cleary ed. 1984).

28. *See* 1 H. BRANDIS, *supra* note 27, § 104, at 387; C. MCCORMICK, *supra* note 27, § 190, at 557.

29. For example, the defendant might have witnesses testify to his good reputation in the community. *See* N.C.R. EVID. 405(a).

30. *See* 1 H. BRANDIS, *supra* note 27, § 104, at 389; C. MCCORMICK, *supra* note 27, § 191, at 566-70. "[W]hen such evidence of general character is offered, immediately the prosecution has the right to offer evidence of the defendant's bad character either by cross-examination [if the defendant has testified] or by other witnesses." State v. Nance, 195 N.C. 47, 49, 141 S.E. 468, 469 (1928). Character evidence offered in this situation may be used by the jury to aid in its determination of the defendant's guilt or innocence. *See, e.g.*, 1 H. BRANDIS, *supra* note 27, § 104, at 389.

31. *See* 1 H. BRANDIS, *supra* note 27, § 108, at 400; C. TORCIA, WHARTON'S CRIMINAL EVIDENCE, § 478, at 444-45 (1972). "When defendant testifies as a witness, he occupies the same position as any other witness . . . and is equally liable to be impeached or discredited." 4 STRONG'S

reduce the credibility of the witness—in this case the defendant—in the eyes of the jury.[32] Character impeachment may be limited to attacks on "the particular character-trait of truthfulness,"[33] or it may be expanded to encompass general evidence of bad character "for its undoubted though more remote bearing on truthfulness."[34]

Traditionally, North Carolina embraced the latter approach.[35] According to Dean Brandis, this practice was based on the longstanding and popular belief "that a bad man probably includes lying among his vices."[36] When cross-examining opposing witnesses, trial counsel have been permitted to elicit "all kinds of disparaging facts."[37] Attempts to state the general rule have tended to expand rather than limit the field of inquiry: "[C]ross-examination for impeachment purposes . . . encompasses any act of the witness which tends to impeach his character."[38] Courts applying this open-ended rule have permitted prosecutors to ask whether a defendant witness previously had committed adultery,[39] performed abortions,[40] or called the district attorney a "punk."[41]

The Federal Rules of Evidence,[42] and the rules of evidence in most states,[43] take the narrower view of character impeachment. Federal rule 608, like its new

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NORTH CAROLINA INDEX 3D, Criminal Law, § 86.1, at 386 (1976) (citing State v. Garrison, 294 N.C. 270, 240 S.E.2d 377 (1978); State v. Sheffield, 251 N.C. 309, 111 S.E.2d 195 (1959)). If the testifying defendant has not introduced evidence of his good character, the state's evidence goes *only* to the defendant's credibility as a witness. It is not substantive evidence of guilt. *See* State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978); State v. Norkett, 269 N.C. 679, 153 S.E.2d 362 (1967); 1 H. BRANDIS, *supra* note 27, § 108, at 400. It is questionable, however, whether juries make such fine distinctions, even when properly instructed by the judge. *See infra* text accompanying notes 83-84. Defendant in *Jean* put his character in issue, *see* Transcript of Trial at 538, and the trial judge duly instructed the jury that character evidence could be considered for both substantive and impeachment purposes. Record on Appeal at 27. Use of character evidence for substantive purposes, however, was not discussed on appeal.

32. *See* State v. Nelson, 200 N.C. 69, 72, 156 S.E. 154, 157 (1930) (listing various methods approved to impeach witnesses); 1 H. BRANDIS, *supra* note 27, § 38, at 151-52.

33. C. MCCORMICK, *supra* note 27, § 41, at 89; *see also* 98 C.J.S. *Witnesses* § 498, at 390, 391 (1957) (noting that jurisdictions differ on the admissibility of attacks on a witness' general moral character).

34. C. MCCORMICK, *supra* note 27, § 41, at 89; *see* 98 C.J.S. *Witnesses* § 498, at 390, 391 (1957).

35. *See* State v. Boswell, 13 N.C. (2 Dev.) 133 (1829); State v. Stallings, 3 N.C. (2 Hayw.) 271 (1804); 1 H. BRANDIS, *supra* note 27, § 107, at 398.

36. 1 H. BRANDIS, *supra* note 27, § 107, at 398.

37. *Id.* § 111, at 407.

38. State v. McKenna, 289 N.C. 668, 684, 224 S.E.2d 537, 548, *death penalty vacated*, 429 U.S. 912 (1976).

39. State v. Small, 301 N.C. 407, 432-33, 272 S.E.2d 128, 143 (1980) (defendant accused of unrelated homicide).

40. State v. Broom, 222 N.C. 324, 325, 22 S.E.2d 926, 927 (1942) (defendant accused of unrelated homicides).

41. State v. Lynch, 300 N.C. 534, 543, 268 S.E.2d 161, 166-67 (1980) (defendant accused of rape and kidnapping). *See also* State v. Hampton, 294 N.C. 242, 239 S.E.2d 835 (1978) (defendant accused of murder asked whether he previously had stolen beer); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976) (defendant accused of murder asked about circumstances of his undesirable discharge from military service); State v. Gurley, 283 N.C. 541, 196 S.E.2d 725 (1973) (defendant accused of rape asked about his possession of and familiarity with pornographic magazines and photographs); State v. Hansley, 32 N.C. App. 270, 231 S.E.2d 923 (1977) (defendant accused of armed robbery asked if he stored marijuana in his apartment).

42. *See* FED. R. EVID. 608. The federal rules were adopted in 1975 and since have served as a model for the evidence codes of North Carolina, *see supra* note 1, and at least 17 other states. *See*

North Carolina counterpart, provides that specific instances of a witness' conduct, other than conviction of crime, may be brought up on cross-examination only if those acts are probative of truthfulness or untruthfulness.[44] Courts and commentators generally identify fraud, forgery, perjury, bribery, false pretenses, swindling, false advertising, and embezzlement—behavior that in itself evidences a lack of truthfulness—as conduct probative of veracity.[45] Commonly excluded are assault,[46] bad check writing,[47] robbery,[48] adultery,[49] homosexuality,[50] and sexual immorality.[51]

The incorporation of the federal standard into North Carolina's evidence code[52] was expected to make major changes in state impeachment practice. Dean Brandis commented that the new rules are "[c]learly . . . intended to exclude much evidence previously admitted under our case law."[53] Justice Exum, in a paper written for the North Carolina Bar Foundation, also predicted that rule 608 would "significantly alter the law in North Carolina."[54]

Analysis of the plurality and concurring opinions in *Jean* indicates that Justice Exum's prediction may have been premature. The *Jean* plurality seemed particularly reluctant to reject North Carolina's traditional impeachment rule.[55] By failing to resolve the admissibility issue,[56] the plurality left open the possibility that the old character impeachment standard could be incorporated into rule 608.[57] The proscription of rule 608 is clear: Character evidence not related to a

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Blakey, *supra* note 1, at 8. Four states had evidence codes before the federal rules were proposed and three others enacted codes based on drafts of the federal rules. *Id.*

43. C. MCCORMICK, *supra* note 27, § 42, at 92; *see* Vogel v. Sylvester, 148 Conn. 666, 174 A.2d 122 (1961); State v. Pokini, 57 Hawaii 17, 548 P.2d 1397 (1976); State v. O'Connell, 275 N.W.2d 197, 203 (Iowa 1979); Taylor v. State, 258 S.C. 369, 188 S.E.2d 850 (1972); CAL. EVID. CODE §§ 786-87 (West 1966); FLA. STAT. ANN. §§ 90.608-09 (West 1979); KAN. STAT. ANN. § 60-422 (1983); NEB. REV. STAT. § 27-608 (1979); NEV. REV. STAT. § 50.085 (1975); OKLA. STAT. ANN. tit. 12, § 2608 (West 1980); S.D. CODIFIED LAWS ANN. § 19-14-10 (1979); WIS. STAT. ANN. § 906.08 (West 1975); ARIZ. R. EVID. 608; ARK. R. EVID. 608; DEL. R. EVID. 608; MICH. R. EVID. 608; MINN. R. EVID. 608; MONT. R. EVID. 608; N.J.R. EVID. 22; N.M.R. EVID. 608; N.C.R. EVID. 608; N.D.R. EVID. 608; OHIO R. EVID. 608; UTAH R. EVID. 22; WASH. R. EVID. 608; WYO. R. EVID. 608.

44. FED. R. EVID. 608(b); *see supra* note 4 (text of rule).

45. *See, e.g.*, 3 J. WEINSTEIN, WEINSTEIN'S EVIDENCE § 608[05], at 608-33 (1982); *see also* United States v. Reid, 634 F.2d 469 (9th Cir. 1980) (falsification of information in letter to government).

46. United States v. Alberti, 470 F.2d 878, 882 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973).

47. United States v. Estell, 539 F.2d 697, 700 (10th Cir. 1976).

48. *See* 3A J. WIGMORE, EVIDENCE § 982, at 840 (Chadbourn rev. ed. 1970).

49. *Id.*

50. United States v. Provoo, 215 F.2d 531, 535-36 (2d Cir. 1954).

51. State v. Thompson, 59 Wash. 2d 837, 844, 370 P.2d 964, 968 (1962).

52. *See supra* notes 1, 4.

53. 1 H. BRANDIS, *supra* note 27, § 111, at 114 (Supp. 1983).

54. NORTH CAROLINA BAR FOUNDATION, THE NEW NORTH CAROLINA RULES OF EVIDENCE 4-28 (1984) (author's commentary to N.C.R. EVID. 404 by Justice James E. Exum and M. Gordon Widenhouse, Jr.).

55. *See infra* text accompanying notes 59-67.

56. *See supra* text accompanying notes 14-15.

57. When *Jean* was decided, the North Carolina Rules of Evidence were not effective and the court was not required to apply them. *See supra* text accompanying note 5. The rules had been approved by the General Assembly, however, and thus that body had indicated its intention to

criminal conviction must be probative of veracity or it cannot be admitted for purposes of impeachment.[58] It remains for the court, however, to decide what conduct satisfies this requirement.

The *Jean* plurality was convinced of defendant's guilt.[59] Consequently, Justices Meyer, Copeland, and Mitchell would have found it somewhat awkward to adopt a restrictive impeachment rule in this case.[60] Given that *Jean* was decided at a time when North Carolina's evidence law was in flux—after the legislature had rejected the state's traditional impeachment practice but before the new standard took effect—the plurality apparently found it convenient to avoid the admissibility question by falling back on a holding of harmless error.[61] This approach might not have caused any problems if the court had simply ended the matter there. Instead, both the plurality and the concurrence made additional comments that create uncertainty as to how the court would handle a similar situation under rule 608.

The overall tenor of Justice Meyer's opinion, for example, seemed to indicate reluctance to depart from traditional impeachment practice. First, cases supporting admissibility of the contested evidence were treated sympathetically by the plurality.[62] Second, the acts depicted in the movie watched by Jean were pointedly labelled "sexually deviant behavior."[63] This brought the plurality within one step of finding the contested evidence admissible under North Carolina's traditional impeachment rule.[64] The only thing missing was a finding that

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substitute a new standard of procedural justice for the one embodied in North Carolina case law. *See supra* text accompanying notes 1-2. Prospective application of this new standard of justice, if not rule 608 itself, would have been fairer to defendant and would have eliminated the uncertainty created by the plurality and concurring opinions. *See infra* text accompanying notes 59-73. Judicial use of an impending statutory change may be relatively uncommon, but it is not unknown. *See, e.g.*, Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982).

58. *See* N.C.R. EVID. 608.

59. *See supra* text accompanying notes 13-17.

60. If the court had wanted both to narrow the scope of impeachment and to preserve the verdict below, it would have had to find the movie evidence inadmissible while simultaneously holding that its admission at trial had been harmless error.

61. *See supra* note 15 and accompanying text.

62. Justice Meyer stated:

> The cases and authorities which tend to support the State's position are: State v. Sparks, 307 N.C. 71, 296 S.E.2d 451 (1982) (Exum, J., citing the general rule that a criminal defendant who testifies may be cross-examined for purposes of impeachment concerning any prior specific acts of criminal and degrading conduct . . .); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980) (Exum, J., holding no error in admissibility of evidence regarding defendant's sexual relations with other women and other forms of misconduct brought out on cross-examination of defendant himself); State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 [(1980)] (Copeland, J., holding that district attorney could properly ask defendant on cross-examination if he had called the district attorney a "punk" and had mouthed the word "mother" to him); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976) (Exum, J., holding that an accused person who testifies as a witness may be cross-examined regarding prior acts of misconduct, in this case circumstances of defendant's undesirable discharge from military service); [and] State v. Gurley, 283 N.C. 541, 196 S.E.2d 725 (1973) (Lake, J., holding defendant properly cross-examined about his possession of, familiarity with, and interest in pornographic magazines) . . . .

Jean, 310 N.C. at 168-69, 311 S.E.2d at 272-73.

63. *Id.* at 168, 311 S.E.2d at 272.

64. *See supra* text accompanying note 3.

watching "deviant" acts on television is a form of "misconduct."[65] Justice Meyer did not take this final step; the holding did not require it.[66] Yet in his dicta he seemed to be indicating that the old impeachment rule could have been applied reasonably and fairly in this case, had that been necessary.[67]

The plurality's apparent sympathy for North Carolina's traditional impeachment rule leaves the bar guessing as to how at least three justices will interpret restrictions on the use of character evidence under rule 608. Trial attorneys might even wonder whether the court, in some future case, will hold that viewing of a pornographic movie is conduct probative of a witness' veracity.[68]

The uncertainty created by the plurality opinion is exacerbated by the concurrence. Justice Martin expressed reservations about the wisdom of judicial moralizing,[69] but nevertheless found evidence of Jean's indiscretion to be competent for impeachment purposes.[70] He reasoned that *Gurley* had held similar evidence admissible;[71] therefore, the movie evidence also was admitted properly.[72]

Although this insistence on the integrity of precedent provided a convenient resolution of the appeal in *Jean*, it further obscures the proper interpretation of rule 608's restrictions on character impeachment. As Justice Martin noted, "[s]o long as *Gurley* stands we are bound thereby."[73] *Jean* and *Gurley* now stand together; so long as they do, it is doubtful whether rule 608 actually changes the impeachment standard.

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65. *See* State v. Lynch, 300 N.C. 534, 543, 268 S.E.2d 161, 166-67 (1980); *cf. Gurley*, 283 N.C. at 547, 196 S.E.2d at 729 (defendant properly cross-examined concerning his familiarity with and interest in pornographic magazines).

66. *See supra* notes 14-15 and accompanying text.

67. The counter-argument is that the old rule could *not* have been reasonably and fairly applied, because the old rule was unreasonable and unfair per se. *See supra* note 57; *infra* text accompanying notes 74-84.

68. Such a holding would conflict with other courts' interpretations of rules substantially similar to N.C.R. EVID. 608. *See supra* text accompanying notes 46-51. Furthermore, Justice Exum would reject such a holding.

> That a person may watch a sexually explicit movie in the privacy of a motel room with someone of the opposite sex has no bearing, *i.e.*, is not relevant, on the question of that person's propensity to tell the truth. That such conduct may be morally offensive to some (although certainly not all) people, does not imbue it with a logical tendency to prove or disprove a propensity for truthfulness.

Jean, 310 N.C. at 175, 311 S.E.2d at 276 (Exum, J., dissenting). Unfortunately, only one other justice joined Justice Exum in dissent. *See supra* text accompanying note 7.

69. *Jean*, 310 N.C. at 171, 311 S.E.2d at 274 (Martin, J., concurring).

70. *See id.* at 170, 311 S.E.2d at 274 (Martin, J., concurring).

71. *Id.* at 171, 311 S.E.2d at 274 (Martin, J., concurring).

72. *Id.* at 170, 311 S.E.2d at 274 (Martin, J., concurring).

73. *Id.* at 171, 311 S.E.2d at 274 (Martin, J., concurring). In his *Jean* dissent, Justice Exum did not argue that *Gurley* should be overruled. Instead, he attempted to demonstrate that the majority had misinterpreted the holding. According to Justice Exum, defendant Gurley's familiarity with pornographic magazines was not introduced into evidence for impeachment purposes. *Id.* at 177, 311 S.E.2d at 277 (Exum, J., dissenting). The victim in *Gurley* testified that her assailant had taken her to his apartment, where he showed her a pile of magazines " 'full of nude girls and stuff.' " *Id.* (Exum, J., dissenting) (quoting Record on Appeal at 40, *Gurley*). Therefore, defendant's possession of and familiarity with pornographic magazines "tended to identify him as the victim's assailant" and was substantive evidence of his guilt. *Id.* at 177, 311 S.E.2d at 277-78 (Exum, J., dissenting).

Jean seems to affirm the traditional notion "that a bad man probably includes lying among his vices."[74] If this view accurately reflects human psychology, then perhaps the general bad character of a witness should be admitted to discredit his testimony. Evidence of sexual immorality, for example, may be probative of a witness' veracity. Yet, as Justice Martin suggested in his allusion to the Serbonian bog,[75] defining immorality can be a sticky business.[76] As Justice Exum noted, " 'one man's vulgarity is another's lyric.' "[77] The court of appeals,[78] he added, has recognized that "a court cannot properly determine what is and is not 'immoral.' "[79]

Narrowly construed, rule 608 enables courts to avoid the morality quagmire by diverting attention from misconduct to probativeness. The rule is intended to be restrictive;[80] only behavior that *in itself* evidences a lack of truthfulness should be admitted.[81] Broadening the scope of admissibility "paves the way to an exception which will swallow the rule."[82] If a witness' viewing of a pornographic movie is admitted for purposes of character impeachment, the restrictions built into rule 608 are rendered meaningless.

Restrictions on the use of character evidence also help prevent juries from convicting defendants for the wrong reasons. According to Justice Exum, "evidence of a defendant's bad acts always tends to draw a jury's attention away from the real issues. . . . The damaging force of such evidence is that it inclines the jury to convict simply because it disapproves of a defendant as a person."[83] This problem is particularly acute when a testifying defendant has not put his character in issue, and character evidence against him therefore is not admissible for substantive purposes.[84] By narrowing the scope of admissiblity, rule 608 makes it less likely that impeachment evidence will be applied improperly by the jury. This protection was largely absent under North Carolina's common-law standard.

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74. 1 H. BRANDIS, *supra* note 27, § 107, at 398; *see supra* note 36 and accompanying text.

75. *Jean*, 310 N.C. at 171, 311 S.E.2d at 274 (Martin, J., concurring); *see supra* note 22.

76. North Carolina courts have not spoken in terms of immorality per se. Instead, conduct admitted for impeachment purposes has been characterized as "wrongful," "degrading," or "misconduct." *See, e.g.*, State v. Williams, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971). Such conduct, however, need not be illegal to be admissible. *See* State v. McKenna, 289 N.C. 668, 684, 224 S.E.2d 537, 548, *death penalty vacated*, 429 U.S. 912 (1976).

77. *Jean*, 310 N.C. at 180, 311 S.E.2d at 279 (Exum, J., dissenting) (quoting Cohen v. California, 403 U.S. 15, 25 (1971)).

78. *See* State v. Sanders, 37 N.C. App. 53, 245 S.E.2d 397 (1978).

79. *Jean*, 310 N.C. at 179, 311 S.E.2d at 279 (Exum, J., dissenting). Such talk will be little comfort to those who fear the triumph of ethical relativism over traditional morality in American jurisprudence. *See, e.g.*, Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 61 (1978). Indeed, even those who are relatively uninterested in preserving traditional morality might find this assertion of ethical impotence somewhat problematic.

80. *See* 3 J. WEINSTEIN, *supra* note 45, at 608-33.

81. Specific lies told by the witness, as well as crimes such as perjury, forgery, and embezzlement, are examples of behavior that evidences a lack of truthfulness. *See supra* note 45 and accompanying text.

82. 3 J. WEINSTEIN, *supra* note 45, at 608-34.

83. *Jean*, 310 N.C. at 181, 311 S.E.2d at 280 (Exum, J., dissenting).

84. *See supra* note 31 and accompanying text.

Justice Exum suggested that a two-stage analysis be applied to determine whether character evidence is admissible for impeachment purposes. First, evidence of specific conduct should be admitted on cross-examination only if the acts in question were "illegal, deceitful, or show contempt for the very process by which the defendant is being tried."[85] Second, the probative value of the contested evidence must not be outweighed by its prejudicial effect, even if the evidence is otherwise competent.[86] According to Justice Exum, the character evidence at issue in *Jean* failed to satisfy any of his relevancy criteria.[87] Moreover, the probative value of the movie testimony was virtually nil,[88] although its prejudicial effect was potentially great.[89]

Justice Exum's first test was formulated to narrow the overly broad relevancy standard created by North Carolina case law.[90] That job is better left to rule 608, with its general requirement that character evidence used for impeachment purposes relate to conduct probative of truthfulness or untruthfulness.[91] Although Justice Exum's test might have worked well in *Jean*, such a rule could prove unwieldy in different fact situations.[92] For example, not all illegal acts are probative of veracity.[93] Witnesses cannot be subject to impeachment based on conduct irrelevant to truthfulness if rule 608 is to retain any meaning.[94]

The second test—balancing of probative value and prejudicial effect—is mandated by the evidence code.[95] Under rule 403, "[t]he absence of an unduly prejudicial effect in otherwise relevant evidence essentially becomes a second, threshold requirement for admissibility."[96]

The probative value of the contested evidence in *Jean* clearly was outweighed by its prejudicial effect. A young Marine's viewing of a pornographic

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85. *Jean*, 310 N.C. at 180, 311 S.E.2d at 279 (Exum, J., dissenting).

86. *Id.* at 175, 311 S.E.2d at 276 (Exum, J., dissenting).

87. *Id.* at 180, 311 S.E.2d at 279 (Exum, J., dissenting).

88. *See id.*

89. *See id.* at 181, 311 S.E.2d at 280 (Exum, J., dissenting); *see also supra* text accompanying note 83 (evidence of bad general character inclines juries to convict simply because they do not like defendant).

90. *See Jean*, 310 N.C. at 176-80, 311 S.E.2d at 277-79 (Exum, J., dissenting).

91. N.C.R. EVID. 608; *see supra* note 4.

92. Judge Weinstein notes that:

> a mechanical test of admission may be incapable of achieving justice in a particular case. Rule 608(b) should accordingly be interpreted in a manner consonant with the basic aims of the rules of evidence: to strike a balance between the needs of the judicial system and the needs of the individual witness as determined by the unique circumstances of the case in which he is appearing.

3 J. WEINSTEIN, *supra* note 45, at 608-28.

93. *See supra* text accompanying notes 46-51.

94. Impeachment based on conduct leading to a conviction—as opposed to conduct that is merely illegal—is permitted under rule 609 in appropriate circumstances. *See* N.C.R. EVID. 609; *see also supra* note 4 (text of rule 608, referring to rule 609).

95. N.C.R. EVID. 403, which is identical to its federal counterpart, FED. R. EVID. 403, states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." The legislative commentary accompanying rule 608 indicates that a rule 403 balancing analysis is *required* when counsel seeks to cross-examine a witness concerning specific instances of conduct. *See* N.C.R. EVID. 608 comment.

96. NORTH CAROLINA BAR FOUNDATION, *supra* note 54, at 4-17.

movie does not indicate that he is likely to be a liar, let alone a rapist. Jean was black, a member of an arguably unpopular immigrant group, and spoke with a strong foreign accent.[97] He was charged with raping a white woman[98] who taught kindergarten in a Christian school.[99] On cross-examination the prosecutor carefully pointed out that the acts depicted in the offending movie were similar to those perpetrated on the victim.[100] The possibility of prejudice inherent in this situation is obvious.

Damage done by the *Jean* decision can be mitigated if trial judges and appellate courts take seriously the balancing requirements built into the evidence code.[101] The prejudicial nature of a particular question cannot be allowed to outweigh the probative value of its answer in a system of rules designed to produce substantial justice. As for the competency of character evidence offered for impeachment purposes, the courts should embrace both the letter and the spirit of rule 608. Testimony concerning conduct that has not resulted in a criminal conviction[102] should not be admitted during cross-examination unless that conduct is directly probative of the witness' propensity for telling the truth.[103] Cases suggesting a broader standard of admissibility—cases such as *Gurley* and *Jean*—should be overruled or disclaimed as precedent in light of rule 608. Otherwise, North Carolina courts and attorneys will continue to run the risk of finding themselves stuck in a Serbonian bog.

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97. Brief for Appellant at 5-7.

98. Telephone interview with Ernie Wright, trial counsel for Lesly Jean (Sept. 20, 1984).

99. Transcript of Trial at 209.

100. *See supra* note 13 and accompanying text.

101. Balancing of probativeness and prejudice is primarily the responsibility of the trial judge, who is best positioned to weigh the effects of particular evidence on the jury. *See* NORTH CAROLINA BAR FOUNDATION, *supra* note 54, at 4-12 to -13.

102. *See supra* note 94.

103. *See* N.C.R. EVID. 608(b).