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was not the result of coercion.[33] Accordingly, if the accused is to be assured of a fair and impartial trial, the admissibility of all extra-judicial statements of the accused, be they admissions or confessions in a proper sense, should be subject to the same safeguards. If the accused alleges that his admissions were the result of improper inducement, he should be entitled to a preliminary hearing on that issue.[34]

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Psychiatric Testimony for the Impeachment of Witnesses in Sex Cases

In the recent New Jersey case of *State v. Wesler*[1] the accused was charged with carnal abuse of an escaped inmate of a correctional institution for wayward girls. At the trial two psychiatrists testified that the complaining witness, against whom the offenses were alleged to have taken place, was psychopathic and immoral and because of these characteristics was not to be believed, for which reasons the defendant contended that the complainant was incompetent to testify. The trial court permitted the complainant to testify and the jury found the defendant guilty, although there was insufficient evidence to convict without the testimony of the complaining witness. On appeal, the court held that even assuming that the psychopathic personality of the prosecutrix had been satisfactorily shown and that persons with like personality are generally prone to lie, still the jury should be allowed to hear her testimony.

Two questions are raised by this case: (1) How far can counsel for the defendant go in impeaching the character of the prosecutrix in sex cases generally? (2) Where it is alleged that the prosecutrix should be denied credence because of her pathological disposition to lie or her abnormal personality traits with respect to sex, should testimony of a psychiatrist supporting these charges go to the weight of the complaining witness' testimony or to her competency to testify at all?

The present rules of evidence permit character impeachment of witnesses within certain severe limitations.[2] In most jurisdictions such

33 In cases of search and seizure, the evidence, unlike coerced statements, is nevertheless trustworthy. A conviction based on such evidence reaches a just result, yet it is excluded. A conviction based on a coerced statement (be it an admission or confession) may lead to an unjust result. Yet, in many states these statements, as long as they do not meet the requirements of a confession, are admitted. It would seem that courts would be more reluctant to admit an untrustworthy statement obtained by coercion or other illegal acts than to admit illegally obtained evidence which is admittedly trustworthy.

34 It may well be that this test will also give the government a fair trial. For if the judge admits evidence of an admission without a preliminary hearing the admission of such evidence may well be the basis of a subsequent reversal by an appellate court. In the meantime, the state prosecutors, acting in reliance upon the admission of such evidence, may fail to continue investigations as to the defendant's guilt, and upon reversal by the higher court, a dangerous criminal may be at large merely because the prosecutor had conducted his interrogations incorrectly and had failed to carry out his duty in searching out all evidence possible to sustain a conviction. Thus, by treating admissions and confessions equally, the prosecutor will realize beforehand that the judge will subject all such extra-judicial statements to a preliminary hearing if coercion is alleged, and accordingly he will conduct both interrogations and investigations as they should be conducted.

1 59 A. (2d) 834 (N. J., 1948).

2 Professor Wigmore suggests that the word "impeachment" is too strong and that "discrediting" would perhaps be more appropriate.

impeachment is permissible only if directed to the character of the witness for veracity. For this purpose, two kinds of evidence are available:[3] the reputation of the witness as evidenced by community judgment, and particular instances of misconduct. The majority of jurisdictions allow only the first type of evidence to be admitted;[4] the reputation of the witness for truth,[5] and any reference to the general bad moral character of the witness is excluded. A few states, however, have liberalized these rules of evidence and now permit the witness' general bad moral character to be introduced.[6] Within this small group, a further conflict exists in the decided cases as to whether in showing the general bad moral character of the witness, evidence of particular acts of misconduct can be introduced.[7] In all jurisdictions a further limiting factor on impeachment is the opinion rule.[8] Thus, an impeaching witness cannot testify from his personal opinion of the complainant but must base his opinion upon her general reputation in the community in which she lives.[9]

Unfortunately, the present rules of evidence hinder rather than aid a proper inquiry into the veracity of complaints about sexual misconduct. These rules are usually adequate and appropriate in the ordinary case, but there are certain factors in sex cases which require a relaxation of the common law exclusionary rules respecting evidence as to character. Adequately probing the truth of a complaint against a man charged with a sexual crime is difficult when the charge may stem from the psychic complexes of the female complainant. What appears on the surface to be a straightforward and convincing story is often the fabrication of a perverted mind. Because the sympathy of the judge and jury naturally go out to the wronged female, easy credit is given to plausible sounding tales, often at the expense of the innocent male.[10] There do exist female

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3 3 Wigmore, Evidence (3d ed. 1940) §920.

4 For collection of cases as to states, see 3 Wigmore, Evidence (3d ed. 1940) §925.

5 Arguments for excluding general moral character of a witness and limiting the impeachment to his character for truth and veracity are that bad general disposition does not necessarily involve lack of quality or veracity and is therefore of little value while there is no doubt that the general reputation of a witness for truth and veracity goes directly to discredit his testimony. Mercer v. State, 40 Fla. 216, 24 So. 154 (1898); Phillips v. Kingfield, 19 Me. 375 (1841); People v. Abbott, 97 Mich. 484, 56 N. W. 862 (1893); State v. Burpee, 65 Vt. 1, 25 Atl. 964 (1892).

6 The argument in favor of showing not only a witness' reputation for truth and veracity but his general reputation as well is that general moral degeneration inevitably means degeneration of veracity and it is easier to observe and detect the former than the latter. Lodge v. State, 122 Ala. 97, 26 So. 210 (1898); Grammer v. State, 239 Ala. 633, 196 So. 268 (1940); State v. Shields, 13 Mo. 165 (1850); State v. Beckner, 194 Mo. 281, 91 S. W. 892 (1906).

7 Teese v. Huntingdon, 64 U.S. 2 (1859); Deck v. Baltimore & Ohio RR Co., 100 Md. 168, 59 Atl. 650 (1905); Miller v. Journal Co., 246 Mo. 722, 152 S. W. 40 (1912). The reasons for the rule are twofold: (1) A witness can't be expected to be prepared to disprove or explain, without notice, every particular act of his life, while he is generally in a position to sustain his general character or reputation; (2) Introduction of past acts would lead to a confusion of the issues due to the number of witnesses needed and the amount of time consumed. Proof of prior conviction of a crime is an exception to the rule as instances of conviction will be few and one convicted of a crime is not entitled to the same credit as one without a criminal record. State v. Forsha, 190 Mo. 296, 88 S. W. 746 (1905); Carroll v. State, 24 S. W. 100 (Tex. Crim. App. 1893).

8 Where the data observed can be exactly and fully reproduced by the witness so that the jury can equally well draw any inference from them, the witness' opinion is superfluous and will be excluded.

9 Teese v. Huntingdon, 64 U. S. 2 (1859); State v. Magill, 19 N. D. 131, 122 N. W. 330 (1909); Griffin v. State, 26 Tex. App. 157, 9 S. W. 459 (1888).

10 People v. Smallwood, 306 Mich. 49, 10 N. W. (2d) 303, 305 (1943).

types of excessive or perverted sexuality who have the ability to narrate a lucid and plausible story which should actually be received only with great skepticism.

Because of the nature of the accusations in a sex case, the testimony of the complaining witness is difficult to refute directly. The alleged charge usually occurs under circumstances where the only witnesses are the complainant and the defendant. This, combined with the fact that many of these charges stem from a psychopathic mind, make it essential that the rules of evidence permit complete investigation into the truth of the charges. The most useful kind of evidence in a sexual case is the opinions of psychiatrists, social workers and probation officers as to the moral and mental traits of the prosecutrix.[12] Under the present rules of evidence, which invoke the opinion rule, this vital evidence is not admissible. Nor will the courts admit in evidence the life history of the complainant, which might indicate the reasons for her abnormal instincts. Even in those jurisdictions which allow impeachment by general bad moral character, the rule against impeachment by particular instances of misconduct prevents a showing, for instance, that the witness is a prostitute or keeps a house of ill fame.[13] Under narrow and inflexible rules of admissibility it is difficult to refute a fabricated charge by a female sexual pervert.

The calling of experts and observers to testify to the social and mental history of the witness and to interpret the significance of certain traits has been occasionally attempted and allowed. In a Michigan case, where the defendant had been convicted of statutory rape, it was held that the exclusion of evidence offered through medical witnesses to prove acts of the prosecutrix showing sexual perversion and lascivious conduct was reversible error, as such evidence could bear on the weight of her testimony and on the question whether her mind was so warped as to lead her to fabricate a claimed sexual experience.[14] In a similar case a Wisconsin court allowed an eminent and competent physician to testify that the complainant, a minor girl who charged the defendant with indecent liberties, had a mental condition calculated to induce unreal and phantom pictures in her mind.[15] In an action for rape under age, an Oklahoma court permitted physicians to testify that the prosecuting witness was a nymphomaniac and was "guilty of such depraved moral practices as to make her unworthy of belief."[16] These are examples of cases where the court has attempted to place before the jury the mental makeup of the complainant. Unfortunately these instances are rare. The majority of courts refuse to admit the opinions of psychia-

11 Dr. Karl A. Menninger (Menninger Clinic of Psychiatry and Neurology, Topeka, Kansas); MS. letter Sept. 5, 1933. See 3 Wigmore, Evidence (3d ed. 1940) §924a for a collection of case histories from "Pathological Lying, Accusation and Swindling" by Wm. Healy and Mary Tenney Healy.

12 3 Wigmore, Evidence (3d ed. 1940) §924b.

13 Birmingham Union R. Co. v. Hale, 90 Ala. 8, 8 So. 142 (1890); Tucker v. Tucker, 74 Miss. 93, 19 So. 955 (1896); State v. Stimpson, 78 Vt. 124, 62 Atl. 14 (1905). In the latter case, the court states: "As a general rule, particular acts of misconduct are not provable by extrinsic evidence. In this state you cannot prove by such evidence that a woman is a prostitute for the purpose of impeaching her credibility."

14 People v. Cowles, 246 Mich. 429, 224 N. W. 387 (1929).

15 Rice v. State, 195 Wisc. 181, 217 N. W. 697 (1928) (judgment against defendant was reversed as without sufficient support in the evidence).

16 Miller v. State, 49 Okla. Cr. 133, 295 Pac. 403 (1930) (conviction for rape under age was affirmed, the prosecution offering medical witness who testified witness was normal girl).

trists and social workers as to the moral and mental character of a witness, applying the usual rule that the opinion of a witness must be based on the community judgment and not on personal observation.[17] With a court using broader rules of evidence and enlightened as to the value of the scientific testimony of psychiatrists, proper impeachment of the prosecutrix, which might prove the falsity of her story, would be possible.

Liberalizing the rules of evidence in sex cases would permit testimony of the psychiatrist to go to the weight of the evidence offered by the prosecutrix. The defendant's contention which the New Jersey court rejected in the *Wesler* case[18] went further than this and asked that where a complaining witness in a sex case is adjudged to be psychopathic by a psychiatrist, her testimony should be excluded entirely. The basis of this proposition is that a psychopath is prone to lie, and because of her propensity to fabricate, her testimony should not be admitted. Obviously there would be much merit to this view if psychiatrists could accurately diagnose in all cases which witnesses were psychopathic. But the accuracy of the psychiatrist's examination depends upon many factors. A good case history of the witness being examined facilitates examination greatly. Physical examination is essential, as it may disclose physical stigmata.[20] The cooperation of the witness herself is very helpful. Thus, the reliability of the psychiatrist's examination will depend on factors often outside his personal skill. With these uncertain factors to consider, the New Jersey Court appears to have been correct in refusing to declare the prosecutrix's testimony incompetent, as the examination may not have fully disclosed the exact condition of the witness.

Under the present rules of evidence, a complaining witness in a sex case will be deemed competent if she has the ability to observe, recollect, and communicate the essentials about which she is called to testify, with accuracy sufficient to make the testimony correspond to knowledge and recollection[21] and if she appreciates the nature and obligation of the oath, or, more correctly, obligation to tell the truth.[22] Insanity,[23] the presence and nature of which cannot be ascertained with any degree of certainty, does not bar the witness. Nor will an adult of retarded

17 In State v. Driver, 88 W. Va. 479, 107 S.E. 189 (1921) the court refused to admit testimony of psychiatrists that the complainant, a child alleging attempted rape, was a moral pervert and not trustworthy. The court's reasoning was based on a statement from 1 Greenleaf, Evidence (16th ed. 1899) §461d: "A witness to reputation must be one who, by residence in the community or otherwise, has had opportunity to learn the community's estimate and the preliminary inquiry, whether he knows the person's reputation, is usually insisted upon." In Strand v. State, 36 Wyo. 78, 252 Pac. 1030 (1927), an action for rape of a minor daughter of 10 years, the prosecution called two witnesses to testify to the mental capacity of the complainant including her "intelligent quotient". This was objectionable but not prejudicial as she was prima facie competent. This would seem to be highly desirable confirmation in a charge of a sexual crime.

18 Note 1 *supra*.

19 This information concerning the reliability of a psychiatrist's examination of a female suspected of being a psychopath was obtained in an interview with Dr. Harold S. Hulbert, Consultant in Psychiatry, in Chicago.

20 Dr. Hulbert stated that over one-half of sexual psychopaths have physical stigmata.

21 State v. Leonard, 60 S.D. 144, 244 N.W. 88 (1932); 1 Wigmore, Evidence (3d ed. 1940) §488.

22 1 Wigmore, Evidence (3d ed. 1940) §488.

23 Allen v. State, 60 Ala. 19 (1877); People v. Enright, 256 Ill. 221, 99 N.E. 936 (1912); Weeks v. State, 126 Md. 223, 94 Atl. 774 (1915).

mentality be declared incompetent. The modern tendency has been to abolish mental disqualifications, allowing testimony of subnormal or abnormal witnesses, admittedly tainted because of defect, to be given appropriate weight by the jury rather than excluded altogether.[24] With further advances by psychiatrists in this field, added weight might ultimately be given to their testimony.[25]

Some jurisdictions have attempted to cope with the problem of avoiding unfounded charges of sexual offenses by providing, almost always by statute, that charges of sex offenses must be corroborated. These statutes are mostly piecemeal legislation applying to a variety of sex offenses but never to sex offenses in general.[26] An eye-witness of the act charged is not required, but corroboration of the complainant's testimony in the form of other evidence is necessary. In a prosecution for rape where the prosecutrix testified to the commission of the crime, evidence of complaint by her soon after the injury, or at her first opportunity, was held competent to corroborate her testimony.[27] Some confusion exists, as the rules are not consistent even within particular jurisdictions. Thus, although the rule requiring corroboration is followed,[28] an exception is often made where the testimony of the prosecuting witness is clear and convincing.[29] These statutes have been useful to a limited extent but have tended to produce reliance upon a rule of thumb rather than on a truly scientific method.

It is quite apparent that the circumstances of a sex case are unique in that the charge often stems from the mental traits of the prosecuting witness. Therefore, the courts should freely admit the testimony of psychiatrists consisting of a diagnosis of the witness in order to impeach a sexual deviant, and opinion evidence should be allowed as to the possible lack of veracity based on such diagnosis. The rules of evidence should be made flexible enough to permit this exception in a field where it is so clearly needed.

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24 Tucker v. Shaw, 158 Ill. 326, 41 N. E. 914 (1895) (test was allowed although witness was judicially feebleminded); State v. Crouch, 130 Iowa 478, 107 N. W. 173 (1906) (testimony admitted although witness generally incapable of consent to criminal attack). State v. Simes, 12 Idaho 310, 85 Pac. 914 (1906) (same).

25 The term "psychopathic personality" has not yet been sufficiently defined. See Curran & Mallinson, Psychopathic Personality (1944) 90 J. Ment. Soc. 278 (the only conclusion that seems warrantable is that at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character); 37 J. Crim. L. & Criminology 42 (1946) (the term adds nothing to understanding of the subject. With more knowledge the term will be replaced by one or several more exact concepts).

26 Thus, in Illinois, the statute applies only to seduction. Ill. Rev. Stat. (1937) c. 38, §537 (no conviction is to be had for seduction "upon the testimony of the female unsupported by other evidence"). For collection of American and English cases on this subject, see 4 Wigmore, Evidence (3d ed. 1940) §2061.

27 People v. Nemes, 347 Ill. 268, 179 N. E. 868 (1932); this was held to be an exception to the general rule which excluded heresay evidence.

28 People v. Carruthers, 379 Ill. 388, 41 N. E. (2d) 521 (1942).

29 People v. Polak, 360 Ill. 440, 196 N. E. 513 (1935); People v. Sciales, 345 Ill. 118, 177 N. E. 689 (1931); People v. Vaughn, 390 Ill. 360, 61 N. E. (2d) 546 (1945).