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THE PARADOX OF THE FRESH COMPLAINT RULE

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I. INTRODUCTION: THE PARADOX DEFINED

The fresh complaint rule¹ creates a paradox²—although it is meant to help sexual assault complainants, it may be more harmful than helpful. The paradox is complicated by recent changes in some courts'

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¹ The rule discussed in this article has a variety of names, including fresh complaint, prompt complaint, first complaint, report of rape rule and complaint of rape rule. I recognize that many of these terms are archaic and sexist. See *The Doctrine of "Fresh Complaint" in Rape Cases: Hearing Before the Joint Subcommittee of the New Jersey Supreme Court Committee on Criminal Practice and Rules of Evidence* (1993) (written submissions on file with author) [hereinafter *Fresh Complaint Hearing*] (written submission of Leigh B. Bienen, Lecturer in Public and International Affairs, Princeton University, [hereinafter *Bienen Submission*] at 3-8). Although I agree with Professor Bienen that the name should be changed, I use the term "fresh complaint" for clarity in this Article and suggest a new term at the end of this Article.

² "Paradox" is defined as:

1: a tenet contrary to received opinion 2 a: a statement that is seemingly contradictory or opposed to common sense and yet is perhaps true b: a self-contradictory statement that at first seems true c: an argument that apparently derives self-contradictory conclusions by valid deduction from acceptable premises 3: something . . . with seemingly contradictory qualities or phases

WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 853 (1991).

articulation and application of the fresh complaint rule because the changes reduce, without eradicating, the rule's harmful effects. The paradox has led to considerable disagreement among courts, lawyers and scholars about whether the rule should be retained.³

The fresh complaint rule is a special evidentiary rule applicable only in sexual assault trials that permits the prosecution to introduce, in its case in chief, out-of-court statements made by the complainant shortly after the assault, alleging that the sexual assault occurred.⁴ Because the rule permits admission of fresh complaint evidence in the prosecution's case in chief, it is an exception to the general evidentiary policy that prohibits admission of prior consistent statements until after a witness has been impeached on cross-examination.⁵

The evidence is admitted in the prosecution's case in chief to prevent jurors from assuming that the victim did not make an immediate complaint and is therefore lying about the assault, an assumption I call the "timing myth."⁶ The rationale for the rule is that a woman who was truly sexually assaulted would naturally complain immediately; fresh complaint evidence is necessary to show that a sexual assault victim behaved like a "true" victim.⁷ Because of this rationale, only

³ In 1993, the Joint Subcommittee of the New Jersey Supreme Court Committee on Criminal Practice and Rules of Evidence held a hearing on what to do with the fresh complaint rule. Those who attended and testified disagreed sharply on whether to retain the fresh complaint rule. See *Fresh Complaint Hearing*, *supra* note 1. Compare *id.*, *supra* note 1, *Bienen Submission* (reluctantly rejecting the fresh complaint doctrine) and *id.* (written submission of Zulima V. Farber, Department of the Public Advocate, State of New Jersey) (strongly rejecting the fresh complaint doctrine) with *id.* (written submission of Rutgers Women's Rights Litigation Clinic) (arguing to keep the fresh complaint doctrine) and *id.* (written submission of Fred DeVesa, Attorney General of the State of New Jersey) (advocating in favor of retaining fresh complaint rule). See also Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1062-71 (1991) (rejecting the fresh complaint doctrine); Dawn M. DuBois, Note, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1087, 1109-15 (1988) (arguing to abandon the prompt complaint doctrine); Christine Kenmore, Note, *The Admissibility of Extrajudicial Rape Complaints*, 64 B.U. L. REV. 199, 240 (1984) (rejecting the fresh complaint doctrine).

⁴ See, e.g., *Commonwealth v. Licata*, 591 N.E.2d 672, 673-75 (Mass. 1992); *People v. McDaniel*, 611 N.E.2d 265, 268-70 (N.Y. 1993); *Commonwealth v. Freeman*, 441 A.2d 1327, 1331-32 (Pa. Super. Ct. 1982).

⁵ 4 JOHN HENRY WIGMORE, EVIDENCE § 1124 (James H. Chadbourn Revision 1972). Although some courts characterize the fresh complaint rule as an exception to the hearsay rule, see, e.g., *McDonald v. State*, 578 So. 2d 371, 373 (Fla. Dist. Ct. App. 1991), fresh complaint evidence used to rebut the inference raised by the alleged silence of the complainant is not hearsay, because it is not offered for the truth. See FED. R. EVID. 801.

⁶ See Torrey, *supra* note 3, at 1014-15 (introducing the idea and the term "rape myth" to describe the widely believed stereotypes that unfairly damage the credibility of rape complainants). I use the term "rape myth" throughout this Article to refer to the false stereotypes surrounding sexual assault and its victims.

⁷ See, e.g., *People v. Harris*, 480 N.E.2d 1189, 1196 (Ill. App. Ct. 1985) (permitting fresh

complaints made immediately or shortly after the sexual assault are admissible.⁸

The paradox arises because the rule is both effective and harmful. Fresh complaint evidence effectively helps sexual assault complainants recover from credibility damage caused by the timing myth by preventing jurors from drawing an erroneous conclusion that the complainant was silent after the assault.⁹ Supporters of the rule argue that because sexual assault complainants continue to suffer credibility damage caused by rape myths, it is a mistake to take away a rule that effectively deals with one of these myths.¹⁰ Moreover, the role of fresh complaint evidence may be pivotal in cases where jurors are likely to focus on the timing issue either because of the sequence of events or because the complainant has credibility problems stemming from stereotypes other than the timing myth.¹¹

Despite its positive aspects, the rule has some harmful effects. Because it counteracts the timing myth by showing that a victim complained promptly, it has the paradoxical effect of reinforcing the timing myth by giving the jury evidence that equates promptness with veracity.¹² Moreover, the rationale for the rule gives the law's endorse-

complaint evidence on the basis that it is entirely natural that a rape victim would speak out regarding it); *Commonwealth v. Shade*, 363 A.2d 1187, 1189 (Pa. Super. Ct. 1976) (presuming that a bona fide complaint of rape will be made promptly); *Scoggan v. State*, 799 S.W.2d 679, 680-81 (Tex. App. 1990) (explaining that a conviction for rape could not rest on the uncorroborated testimony of a female who failed to make a prompt outcry).

⁸ *People v. Denny*, 608 N.E.2d 1313, 1325 (Ill. App. Ct. 1993) (delay of 24 hours was both unexplained and too long where complainant went through day at work before telling police of rape at knifepoint); *State v. Evans*, 527 N.E.2d 448, 458 (Ill. App. Ct. 1988) (two-hour delay excused because of defendant's threats against complainant and her family); *State v. Lewis*, 803 S.W.2d 260, 264 (Tenn. Crim. App. 1990) (three-day-old complaint admissible because justified by threats against complainant).

⁹ *State v. Hill*, 578 A.2d 370, 377-78 (N.J. 1990) (discussing how fresh complaint deals with jurors who believe timing myth "on their own terms"); *Fresh Complaint Hearing*, *supra* note 1, Tr. at 11 (testimony of Appellate Division Judge Sylvia Pressler) (stating to Assistant Prosecutor Julia L. McClure, "[y]ou like [fresh complaint] because it works"). The effectiveness of fresh complaint evidence explains the strong support for the rule by the New Jersey Attorney General's Office and District Attorney's Office. See *Fresh Complaint Hearing*, *supra* note 1 (written submission of Fred DeVesa, Attorney General of the State of New Jersey at 3-8) (advocating in favor of retaining fresh complaint rule); *id.* (written submission of County Prosecutors Association of New Jersey at 1-5) (supporting retention of rule).

¹⁰ See *Battle v. United States*, 630 A.2d 211, 220-22 (D.C. 1993); *Hill*, 578 A.2d at 377-78; *Fresh Complaint Hearing*, *supra* note 1 (written submission of Julia L. McClure, Middlesex County, N.J., Prosecutor's Office at 1-5).

¹¹ See *infra* notes 38-53 and accompanying text. The complainants most frequently helped by fresh complaint evidence are minors and acquaintance rape victims.

¹² See DuBois, *supra* note 3, at 1107 (explaining there is a risk of creating in the minds of jurors the same negative inference of the timing of complaint it seeks to forestall); *Fresh Complaint*

ment to the timing myth and treats the testimony of sexual assault complainants as inherently suspect. The myth-reinforcing effects of the rule are also aggravated by archaic terms such as "fresh complaint" and the history of the rule.¹³

The paradox is complicated by a recent evolution in some courts' articulation of the rule's rationale and application of the freshness requirement. The evolving rationale renounces the timing myth as false and unfair, but acknowledges that fresh complaint evidence is necessary because of widespread belief in the myth.¹⁴ Courts also have begun to whittle away at the freshness requirement—that a complaint must be almost immediate to be admissible—by admitting complaints made after lengthy delays.¹⁵ These changes in the rule alleviate some of the harmful myth-reinforcing effects of the original rule.

There is no easy solution to the paradox. Although the rule has some harmful effects, eradication of all versions of the rule not only takes away credibility-restoring evidence from complainants who need it, but also misses the opportunity to use the evolving rationale to educate attorneys, judges and jurors about the power and prevalence of the timing myth in rape trials. Instead of abrogating the fresh complaint rule, therefore, courts should take the more prudent approach of adopting an interim rule. This intermediate step would retain the credibility-restoring aspects of the rule while facilitating the eventual abrogation of the rule by using the evolving rationale to educate the legal community. To this end, the interim rule should adopt the evolving rationale, and courts should instruct the jury using that rationale. Moreover, the interim rule should explicitly permit admission of prior complaints without a prerequisite of freshness and eliminate myth-reinforcing terms such as "fresh complaint."

The interim rule is not a perfect solution to the paradox, but serves the goals of helping rape complainants counteract the timing myth on a case by case basis while educating the legal community about the timing myth. Although at some point elimination of the rule may be not only possible but preferable, until rape cases are free of the

Hearing, *supra* note 1, *Bienen Submission*, at 4 (arguing that to admit fresh complaint evidence may be counterproductive).

¹³ See *Fresh Complaint Hearing*, *supra* note 1, *Bienen Submission*, at 3–7; DuBois, *supra* note 3, at 1097–1109; Kenmore, *supra* note 3, at 200–02.

¹⁴ See *Hill*, 578 A.2d at 376–77. The rule is necessary not because the late complainant is probably lying, but because others believe she might be lying and will only be convinced of her veracity by proof of prompt complaint. *Id.* at 377.

¹⁵ See *Battle*, 630 A.2d at 222 (six-week delay did not render complaint inadmissible under fresh complaint rule); *Hill*, 578 A.2d at 377–78 (permitting admission of complaint made almost two months after the alleged rape).

damaging effects of the timing myth, abrogation of the rule without a workable substitute is premature.

This Article explores the paradox of the fresh complaint rule, evaluates the proposed solutions, and suggests a modified rule as an interim solution. Part II of this Article explores the fresh complaint rule, from its historical roots in the English common law to its evolution in the United States, with special attention to the rationale for the rule, the requirement of freshness, and the standards for the rule's application. Parts III and IV examine the paradox raised by the need for and effectiveness of the rule and its concurrent harmful effects. Part V describes proposed solutions to the paradox and suggests adoption of a modified interim rule.

II. THE FRESH COMPLAINT RULE

The fresh complaint rule has changed significantly over time, and the changes reflect an evolution in the jurisprudence of sexual assault. The most significant changes have occurred in the rationale for the rule and the requirement of freshness. The following sections describe the rule and chart the evolution in the rationale for the rule, the erosion of the freshness requirement, and the standards for the rule's application.

A. *The Evolution of the Rationale for the Fresh Complaint Rule*

Although the fresh complaint rule can vary from jurisdiction to jurisdiction,¹⁶ the most common version of the rule permits the prosecution in a sexual assault case to introduce, in its case in chief, prior prompt complaints by the alleged victim.¹⁷ The rationale for the rule is that fresh complaint evidence is necessary because without it, jurors will assume that the victim did *not* complain immediately after the rape and conclude that her trial testimony charging rape is a recent fabrication.¹⁸ This may seem like an unlikely assumption until one examines the history of the fresh complaint rule, which began as a response to the legal presumption that a sexual assault victim's silence is evidence of consent. The following sections of the Article describe the history

¹⁶ *Fresh Complaint Hearing*, *supra* note 1, *Bienen Submission*, at 5 (explaining that some courts invoke the rule to exclude evidence, others invoke it to include evidence).

¹⁷ *See, e.g.*, *Commonwealth v. Licata*, 591 N.E.2d 672, 673-75 (Mass. 1992); *People v. McDaniel*, 611 N.E.2d 265, 268-70 (N.Y. 1993); *Commonwealth v. Freeman*, 441 A.2d 1327, 1331-32 (Pa. Super. Ct. 1982).

¹⁸ WIGMORE, *supra* note 5, § 1135, at 298-99.

of that presumption and the emergence and evolution of the fresh complaint rule that was devised to rebut it.

1. The Hue and Cry Rationale

The fresh complaint rule evolved from the common-law requirement of "hue and cry," which was based on the expectation that victims of violent crimes would cry out immediately and which required proof of the details of the victim's prompt complaint as part of the prosecution's case in chief.¹⁹ In the mid-1700s, English law eliminated the "hue and cry" requirement, but the rule continued to be applied in rape cases.²⁰ In some jurisdictions in the United States, the hue and cry requirement emerged in the form of a short statute of limitations for sexual assault cases.²¹ In other jurisdictions, the hue and cry rule translated into a presumption that the lack of evidence of an immediate complaint in sexual assault cases indicated that no sexual assault had occurred.²² If the prosecution offered no fresh complaint evidence, the defense could request the court to instruct the jurors to draw an inference against the complainant.²³ Thus, the fresh complaint rule emerged to permit the prosecution to rebut the presumption with evidence that the complainant made a fresh complaint.²⁴

Although prior consistent statements, like fresh complaint evidence, are generally inadmissible prior to impeachment, the hue and cry presumption provided a loophole for the admission of fresh complaint evidence.²⁵ Essentially, the victim's silence after the rape, demonstrated by the lack of fresh complaint evidence, is presumed to be equivalent to a prior inconsistent statement that impeaches the credibility of the complainant.²⁶ This rationale is related to the common-law

¹⁹ *Hill*, 578 A.2d at 374; DuBois, *supra* note 3, at 1089.

²⁰ *Hill*, 578 A.2d at 374; WIGMORE, *supra* note 5, § 1760, at 240-41; DuBois, *supra* note 3, at 1089.

²¹ See TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 1993) (requiring rape victims over age of 18 to inform someone within one year of the alleged offense in order to render uncorroborated testimony of the victim admissible); see also 18 PA. CONS. STAT. ANN. § 3105 (1973) (amended 1976) (requiring rape victims to complain to public authorities within three months of the offense, or for victims under age of 16, within three months after a parent, guardian, or other competent person learns of offense). The Pennsylvania statute was amended in 1976 to eliminate the statute of limitations. *Id.*

²² DuBois, *supra* note 3, at 1089.

²³ *Hill*, 578 A.2d at 374-75 (citing *State v. Thomas*, 174 S.W.2d 337, 345 (Mo. 1943)); see DuBois, *supra* note 3, at 1096 (citing 1 NEW YORK JURY INSTRUCTIONS, CRIM. 7.27, at 306 (1983)).

²⁴ DuBois, *supra* note 3, at 1089-90.

²⁵ See DuBois, *supra* note 3, at 1094.

²⁶ WIGMORE, *supra* note 5, § 1135, at 298; see DuBois, *supra* note 3, at 1094 (noting that admissions by silence were used predominantly to impeach criminal defendants who failed to

policy that silence in the face of circumstances naturally compelling speech is a prior inconsistency that justifies rehabilitation by evidence of prior consistent statements.²⁷

The presence of the hue and cry presumption remains strong in courts' articulation of the rationale for the fresh complaint rule. A comparison of courts' descriptions of the rationale from the earliest days of fresh complaint to the present reveals the strong presence and tenacity of the presumption. For example, in 1914, the Supreme Court of New Mexico articulated the rationale for the fresh complaint rule:

[N]o self-respecting woman, after an outrage of this kind, can refrain from proclaiming the same to some friend, and from seeking such aid and comfort as the circumstances will admit of. If she remains silent, except in exceptional circumstances, the inference is strong that the outrage was not in fact committed.²⁸

In 1991, seventy-seven years later, the Supreme Court of Illinois articulated the rationale for the rule almost identically:

[I]t is entirely natural that the victim of forcible rape would have spoken out regarding it, and the fact that she did not do so would in effect be evidence of the fact that nothing violent had occurred.²⁹

Thus, the rationale for the fresh complaint rule embodies and perpetuates what I call the timing myth,³⁰ the erroneous assumption that sexual assault is a "circumstance compelling speech" and that it is natural for those truly sexually assaulted to complain immediately.³¹

protest their innocence and questioning whether it is appropriate to apply the same standard to rape victims as to persons accused of crimes).

²⁷ See DuBois, *supra* note 3, at 1094. Under the common law, "[the] failure to speak when it would have been natural to do so [was] in effect an inconsistent statement or self-contradiction." WIGMORE, *supra* note 5, § 1135, at 298 (failure of witness to have made same assertion in prior testimony as witness makes at trial is contradictory).

²⁸ State v. Ellison, 144 P. 10, 13 (N.M. 1914).

²⁹ People v. Lawler, 568 N.E.2d 895, 901 (Ill. 1991) (quoting People v. Damen, 193 N.E.2d 25, 30 (Ill. 1963)); see also State v. Calor, 585 A.2d 1385, 1387 (Me. 1991) (fresh complaint evidence admissible to "forestall the natural assumption that in the absence of a complaint," no rape occurred) (quoting State v. True, 438 A.2d 460, 464 (Me. 1981)); State v. Devall, 489 N.W.2d 371, 375 (S.D. 1992) ("[I]t is natural for a woman or child to complain to someone responsible for her welfare of an outrage of this character, the failure to complain could be urged by the defense to contradict or discredit her testimony.").

³⁰ See *supra* note 6 and accompanying text.

³¹ WIGMORE, *supra* note 5, § 1135, at 298; Professor Torrey identified what I call the timing myth as a prevalent and harmful falsehood about sexual assault complainants. Torrey, *supra* note 3, at 1042-43.

Moreover, the rationale reflects the law's deep distrust of sexual assault victims because it treats the testimony of sexual assault complainants as presumptively false.³² Because the rationale reinforces myths about sexual assault and the "nature" of female sexual assault victims, it has led many to urge abolition of the fresh complaint rule.³³

2. The Evolving Rationale

Recently, a few courts, called upon to reexamine the rationale for the fresh complaint rule, have found the original rationale no longer a valid basis for the admission of fresh complaint evidence.³⁴ Instead of abrogating the rule, however, these courts have articulated a new rationale for admission of fresh complaint evidence that departs from the rape-myth-based hue and cry history of the rule.

The evolving rationale rejects the timing myth as false and the product of gender stereotypes and rape myths.³⁵ Courts adopting the evolving rationale recognize, however, that because of the hue and cry presumption and the history of rape mythology in sexual assault cases, jurors may erroneously believe the timing myth and draw an unfair inference against rape complainants based on it.³⁶

The evolving rationale posits that despite the falsity of the original rationale, the fresh complaint rule remains necessary for a number of reasons. First, the law has embraced the hue and cry presumption for so long that jurors will inevitably wonder about the timing of the complaint if no evidence of a prior complaint is offered.³⁷ Moreover, jurors may hear evidence through the testimony of prosecution wit-

³² See Torrey, *supra* note 3, at 1042 (underpinning of fresh complaint rule is a basic distrust of the sworn testimony of women); see also WIGMORE, *supra* note 5, § 1135, at 298. Wigmore describes the rationale for the rule as follows:

Now, when a woman charges a man with a rape . . . and the accused denies the act itself, . . . the circumstance that at the time of the alleged rape the woman said nothing about it to anybody constitutes in effect a self-contradiction. . . . It was entirely natural, after becoming the victim of an assault against her will, that she should have spoken out. That she did not, that she went about as if nothing had happened, was in effect an assertion that nothing violent had been done.

WIGMORE, *supra* note 5, § 1135, at 298.

³³ See, e.g., *Fresh Complaint Hearing*, *supra* note 1, *Bienen Submission*, at 7-8; DuBois, *supra* note 3, at 1111-15.

³⁴ See *People v. Brown*, 883 P.2d 949, 950 (Cal. 1994) (fresh complaint rule, as traditionally defined, no longer provides a sound basis for admission of extrajudicial statements of rape victims); *State v. Hill*, 578 A.2d 370, 377-78 (N.J. 1990) (rejecting the rule's traditional justification of the "natural" manner of how a woman is expected to act).

³⁵ *Battle v. United States*, 630 A.2d 211, 220-22 (D.C. 1993).

³⁶ *Battle*, 630 A.2d at 220-21; *Hill*, 578 A.2d at 377-79.

³⁷ See *Hill*, 578 A.2d at 376-77.

nesses that raises the issue of whether and when the complainant made a prior complaint, such as if the complainant testifies to a series of events that demonstrate foregone opportunities to complain or testimony that indicates that the complainant delayed filing a formal complaint.³⁸ In either case, fresh complaint evidence is necessary to repair unfair damage to the complainant's credibility caused by juror belief in the timing myth.³⁹

In *Commonwealth v. Licata*, for example, the Massachusetts Supreme Judicial Court confronted the question of whether to abolish the fresh complaint doctrine.⁴⁰ In *Licata*, the complainant met the defendant at a hotel bar, talked to him for about two hours and exchanged telephone numbers with him.⁴¹ The complainant accepted defendant's offer of a ride to her car because it was raining and she was parked some distance from the bar.⁴² The defendant then raped the complainant in his car.⁴³ After she left the defendant's car, the complainant went straight to her car and drove away; she did not go to the bar or hotel to ask for help or complain of the attack.⁴⁴ While the complainant was on her way home, a police officer stopped her for speeding and she told him that she had been raped.⁴⁵ The police officer took the complainant to the hospital, where she repeated her complaint to a nurse.⁴⁶ In upholding the admission of the testimony of both the police officer and the nurse, the Massachusetts Supreme Judicial Court stated:

We strongly disagree with the notion that a rape victim naturally will complain of an attack soon after it occurs. It is not difficult to understand a rape victim's reluctance to discuss with others, particularly strangers, the uncomfortably specific

³⁸ See *Brown*, 883 P.2d at 950 (admission of prior complaints especially relevant where victim testifies to a series of alleged sexual offenses over a considerable period of time during which victim had opportunity to complain but did not); see also *Fresh Complaint Hearing*, *supra* note 1, Tr. at 49-50 (testimony of Julia L. McClure, Assistant Prosecutor, Middlesex County) (arguing that jurors will hear evidence of gaps between the rape and time of complaint through the testimony of the investigating police officers).

³⁹ *Hill*, 578 A.2d at 377.

⁴⁰ 591 N.E.2d 672, 673 (Mass. 1992). Just one year before *Licata*, the court had criticized the fresh complaint rule because of the "sexist reasoning behind the theoretical underpinning of the . . . rule." *Commonwealth v. Lavallee*, 574 N.E.2d 1000, 1004 n.7 (Mass. 1991).

⁴¹ *Licata*, 591 N.E.2d at 673.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Licata*, 591 N.E.2d at 673.

details of a sexual attack. Additionally, a victim must endure the “[s]uspicion and disbelief” with which society greets those who allege sexual assault. . . .

Troubled as we are by a doctrine which has its origins in outmoded, and invalid sexual myths, we need not embrace those views to recognize the unfortunate skepticism that exists as to the truth of allegations of rape where the victim is perceived as having remained silent. “Whatever may have been the historical origin of the fresh complaint doctrine, it should now be seen in relation to the common observation . . . that juries tend toward considerable and perhaps inordinate skepticism in rape cases, above all where there is a suggestion of willingness or acquiescence on the part of the victim.” Thus, we continue to perceive a need for the fresh complaint doctrine.⁴⁷

In *State v. Hill*, the Supreme Court of New Jersey considered the continued viability of the fresh complaint rule.⁴⁸ In deciding to retain the fresh complaint rule, the court reasoned:

It is true that the fresh-complaint rule does not necessarily contradict sexist notions of how a woman should act after she has been raped, but merely serves to establish that a woman acted in the “correct” or “natural” manner expected by society. Still, our judicial process cannot remove from every juror all subtle biases or illogical views of the world. The fresh-complaint rule responds to those jurors on their own terms.

. . . .

. . . Hence, until there is a clearer understanding of the perception of rape and its women victims, we think that the better solution is to allow fresh-complaint testimony to be admitted.⁴⁹

⁴⁷ *Id.* at 674 (quoting *Commonwealth v. Bailey*, 348 N.E.2d 746 (Mass. 1976) (other citations omitted)).

⁴⁸ 578 A.2d 370, 377 (N.J. 1990).

⁴⁹ *Id.* at 377–78; see also *Battle v. United States*, 630 A.2d 211, 221 (D.C. 1993). The *Battle* court made many of the same points in deciding to retain the “report of rape” rule:

Modern courts have recognized that society, and jurors, often erroneously believe that the only normal behavior of a sexual offense victim is to report the offense almost immediately. There is no reason to conclude that all District of Columbia jurors are free from such biases. The report of rape rule was designed to confront jurors’ assumptions . . . that if a victim did not report a sexual assault to someone else, the victim is probably lying about the occurrence of the offense. Thus, . . . the practical necessity for such evidence exists because persistent and regrettable assumptions about the credibility of the victims of sex crimes still remain.

Battle, 630 A.2d at 221 (citations and footnote omitted).

The Supreme Court of California articulated a somewhat different version of the evolving rationale in *People v. Brown*.⁵⁰ In *Brown*, a twelve-year-old girl testified that her mother's boyfriend had been sexually abusing her for five years, but that she had not told anyone of the abuse until five years later when the defendant moved out of her house.⁵¹ The Supreme Court of California held that the complainant's confidences to her girlfriend and a family friend made five years after the abuse started were admissible because:

In the absence of evidence of the circumstances under which the victim ultimately reported the commission of an alleged offense, the jury in many instances may be left with an incomplete or inaccurate view of all the pertinent facts. Admission of evidence of the circumstances surrounding a delayed complaint, including those that might shed light upon the reasons for the delay, will reduce the risk that the jury, perhaps influenced by outmoded myths regarding the "usual" or "natural" response of victims of sexual offenses, will arrive at an erroneous conclusion with regard to whether the offense occurred.⁵²

The *Brown* court reasoned that the prior complaint evidence was relevant because the alleged victim had "testified to a series of sexual offenses occurring over a period of several years during which she remained silent," thereby contributing to the likelihood that jurors would draw an erroneous conclusion about the existence of prior complaints.⁵³

The evolving rationale for the fresh complaint rule evidences an important change in judicial thinking about sexual assault. Because courts following the evolving rationale openly and firmly reject the timing myth and acknowledge that sexual assault complainants have historically and continue to be unfairly burdened by the timing myth and other rape myths, the rationale is an important step in the eradication of rape myths.

B. *The Eroding Freshness Requirement*

The rationale for the fresh complaint rule is not the only aspect of the rule that is changing. Traditionally a strict immediacy requirement that barred complaints made as soon as one day after the alleged

⁵⁰ 883 P.2d 949 (Cal. 1994).

⁵¹ *Id.* at 951-52.

⁵² *Id.* at 958.

⁵³ *Id.* at 960.

assault,⁵⁴ the freshness requirement has begun to break down in many cases, especially those involving youthful victims and threats of violence.⁵⁵

One version of the rule, still retained in Texas, imposes a strict statutory time limit for rape complaints.⁵⁶ In most jurisdictions, however, courts have eschewed rigid time requirements in favor of more flexible "totality of the circumstances" tests that examine whether the complaint was made at the first "suitable" opportunity, within a reasonable time, or whether there was an explanation for the delay.⁵⁷ Factors bearing on the reasonableness of the delay include the age of the complainant, whether the complainant is related to the defendant, whether complainant lived with the defendant, and whether defendant threatened the complainant with violence.⁵⁸ Notwithstanding the ap-

⁵⁴ WIGMORE, *supra* note 5, § 1135(c), (d) at 301-2; *see also, e.g.*, *State v. Wernèr*, 489 A.2d 1119, 1126 (Md. Ct. Spec. App. 1985) (to be admissible, complaint must be made at the time of the attack or relatively soon thereafter); *People v. Harris*, 480 N.E.2d 1189, 1196 (Ill. App. Ct. 1985) (complaint made one day after alleged attack not admissible); *McDonald v. State*, 578 So. 2d 371, 374 (Fla. Dist. Ct. App. 1991) (suggesting that one-hour delay was significant and might be too long).

⁵⁵ *See, e.g.*, *Hunt v. State*, 213 So. 2d 664 (Ala. Ct. App.) (complaint made after nine-month delay admissible), *cert. denied*, 213 So. 2d 666 (Ala. 1968); *Battle v. United States*, 630 A.2d 211, 222 (D.C. 1993) (six-week delay did not render complaint inadmissible under fresh complaint rule because defendant, complainant's mother's boyfriend, threatened to beat complainant if she complained); *State v. Twyford*, 186 N.W.2d 545, 548-49 (S.D. 1971) (complaint admissible after two- to three-month delay because complainant was a minor).

⁵⁶ *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 1993) (requiring a rape victim to report the offense within one year for a conviction on uncorroborated testimony); *see also* 18 PA. CONS. STAT. ANN. § 3105 (1973) (amended 1976) (requiring rape victims over the age of 16 to inform authorities within three months of alleged offense).

⁵⁷ *See Twyford*, 186 N.W.2d at 548. The *Twyford* court stated:

The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of the evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case.

Id.; *see also Nitz v. State*, 720 P.2d 55, 63 (Alaska Ct. App. 1986) (court requires complaint to be "recent" but refuses to set "artificial limits" and will admit delayed complaints if delay is explained); *Battle*, 630 A.2d at 222 (delay does not render complaint inadmissible if there is an explanation for it); *Harris*, 480 N.E.2d at 1196 (complaint must be prompt, but there is no "fixed" time and delayed complaints admissible if explained by fear, hysteria and emotion); *State v. Hill*, 578 A.2d 370, 377 (N.J. 1990) (complaint must be made within reasonable time); *People v. O'Sullivan*, 10 N.E. 880, 881 (N.Y. 1887) (complaint is admissible if made at the first suitable opportunity or if there is an explanation for delaying); *State v. Stettina*, 635 P.2d 75, 77 (Utah 1981) (complaint admissible if complainant makes it while still under the emotional stress occasioned by the incident).

⁵⁸ *See, e.g.*, *Greenway v. State*, 626 P.2d 1060, 1061 (Alaska 1980) (delay excused in light of defendant's threats against victim and victim's young age); *State v. Baker*, 610 P.2d 840, 842 (Or. Ct. App. 1980) (delay excused because defendant was an acquaintance of victim and had threat-

parent flexibility of the freshness standard, however, many courts applying the standard considered delays of relatively short duration—a few hours or days—unreasonable enough to require an explanation.⁵⁹ Complaints made several days or months after the incident were rarely excused, even in cases involving minors violated by trusted adults.⁶⁰

In *People v. O'Sullivan*, for example, the seventeen-year-old complainant lived with the defendant, a Roman Catholic priest, as his domestic servant.⁶¹ Before she lived with the defendant, the complainant had, since childhood, regularly attended services at the defendant's church with her foster parents.⁶² The complainant testified that the defendant came into her room at night and raped her when his housekeeper, the only other woman living in the house, was away.⁶³ The complainant testified that she continued to go to confession with the defendant, and that defendant had told her that she would go to hell if she told anyone about the assault.⁶⁴ The complainant did not tell anyone, including her foster parents, about the assault until eleven months later, when she confessed to another priest for the first time.⁶⁵ Ignoring the evidence that the defendant was not only a religious authority figure, but also a physically abusive employer,⁶⁶ and the effect this may have had on a young woman who was raised Catholic in his church, the New York Court of Appeals stated that the eleven-month-old confession was "too remote" to admit into evidence because "[t]here was nothing whatever to justify the delay."⁶⁷

The tests to determine "freshness" have not changed significantly since *O'Sullivan*, but the understanding of what is a reasonable time to complain or a proper justification for delay has changed. With increas-

ened the victim with a gun); *State v. Lewis*, 803 S.W.2d 260, 264 (Tenn. Crim. App. 1990) (length of delay justified due to defendant's threats of violence and his demonstration of capability for acting on threats).

⁵⁹ See *State v. Denny*, 608 N.E.2d 1313, 1325 n.8 (Ill. App. Ct. 1993) (delay of 24 hours was both unexplained and too long where complainant went through day at work before telling police of rape at knifepoint).

⁶⁰ *O'Sullivan*, 10 N.E. at 882 ("absolutely nothing" justified 11-month delay by a 17-year-old girl raped by her parish Catholic priest with whom she lived as domestic servant); *Curtis v. State*, 70 S.W.2d 364, 366 (Tenn. 1934) (complaint made by 11-year-old daughter 10 months after alleged rape by father inadmissible because of "unexcused" delay).

⁶¹ 10 N.E. at 880, 881. The court stated that there was other "more reliable" evidence that the complainant was 20 years old, but does not elaborate. *Id.* at 880-81.

⁶² *Id.* at 881.

⁶³ *Id.* at 880.

⁶⁴ *Id.* at 882.

⁶⁵ 10 N.E. at 882.

⁶⁶ *Id.* at 881.

⁶⁷ *Id.* at 882.

ing frequency, courts are admitting complaints made after lengthy delays for reasons that formerly may not have justified such a delay.⁶⁸ The erosion of the freshness requirement is exemplified by the trend of cases in Massachusetts, where, prior to 1979, the outer limit for admission of prior rape complaints was one day.⁶⁹ Between 1979 and 1989, however, Massachusetts courts began to uphold the admission of complaints made after longer delays, but the longest delay permitted was an eighteen-month delay in a case the court described as "exceptional."⁷⁰ Between 1992 and 1994, however, the Massachusetts Court of Appeals upheld the admission of two three-year-old complaints and one twenty-one-month-old complaint.⁷¹ Most cases in which delayed complaints are admitted are those involving young complainants abused by authority figures or complainants threatened with further violence if they complain.⁷²

Following this trend to its logical end, California has abolished the freshness requirement entirely.⁷³ In *People v. Brown*, the Supreme Court of California held that prior complaint evidence may be essential to the jury's understanding of the case, regardless of its promptness.⁷⁴ The court held that as long as an alleged victim's disclosure of the offense is relevant and is not unduly prejudicial, it may be admitted for non-hearsay purposes under general evidentiary principles, regardless of when it was made.⁷⁵

⁶⁸ See, e.g., *Greenway v. State*, 626 P.2d 1060, 1061 (Alaska 1980) (complaint made by 13-year-old one month after rape admissible because defendant, her stepfather, threatened to kill her if she complained); *Commonwealth v. McKinnon*, 630 N.E.2d 792, 795 (Mass. App. Ct. 1993) (complaint made after 34-month delay by 13-year-old girl admissible because evidence showed defendant stepfather created "environment of fear and violence."); *Commonwealth v. Lanning*, 589 N.E.2d 318, 323 (Mass. App. Ct. 1992) (complaint made after three-year delay admissible where defendant punched complainant and threatened to abuse her younger sister).

⁶⁹ See *Commonwealth v. Dion*, 568 N.E.2d 1172, 1177-78 (Mass. App. Ct. 1991); *McKinnon*, 630 N.E.2d at 793.

⁷⁰ *Dion*, 568 N.E.2d at 1177 (involving four-year-old victim of rape by operator of day care center who threatened to kill victim's family if she told anyone).

⁷¹ *Commonwealth v. Fleury*, 632 N.E.2d 1230 (Mass. 1994) (21-month delay); *McKinnon*, 630 N.E.2d at 795 (34-month delay); *Lanning*, 589 N.E.2d at 323 (three-year delay).

⁷² See, e.g., *Greenway*, 624 P.2d at 1061 (delay excused in light of defendant's threats against victim and victim's young age); *State v. Baker*, 610 P.2d 840, 842 (Or. Ct. App. 1980) (delay excused because defendant was an acquaintance of victim and had threatened the victim with a gun); *State v. Lewis*, 803 S.W.2d 260, 264 (Tenn. Crim. App. 1990) (length of delay justified due to defendant's threats of violence and demonstration of capability for acting on his threats).

⁷³ *People v. Brown*, 883 P.2d 949, 958-59 (Cal. 1994).

⁷⁴ *Id.*

⁷⁵ *Id.* at 959.

C. *The Standards for Applying the Fresh Complaint Rule*

The singular purpose of the fresh complaint rule—rebutting the inference raised by the alleged silence of or delay by the complainant—led to the development of a set of corollaries unique to fresh complaint evidence.⁷⁶ Although the corollaries were designed to ensure fair and proper application of the rule, their complexity and frequent misapplication has led to confusion about the rule. To guard against any unfairness caused by misapplication of the corollaries, some jurisdictions have cautioned trial courts to review fresh complaint evidence in every case for relevance, probative value, and prejudice.⁷⁷

First, to avoid hearsay and fairness problems, fresh complaint evidence is not admitted as “substantive” evidence that a rape occurred; rather, courts generally instruct juries that fresh complaint evidence is relevant only to the complainant’s credibility.⁷⁸ Because the evidence is relevant only to the complainant’s credibility, the rule applies only if the complainant testifies at trial and puts her credibility at issue.⁷⁹

Moreover, to avoid the danger that juries will misuse fresh complaint evidence as evidence that the assault occurred, most courts admit only the fact that a complaint was made and the timing of the complaint, but prohibit admission of the details of the complaint.⁸⁰

⁷⁶ See *Commonwealth v. Licata*, 591 N.E.2d 672, 675 (Mass. 1992) (court should instruct jury that fresh complaint evidence is admitted only to rebut the inference raised by the complainant’s silence, not as substantive evidence); *State v. Devall*, 489 N.W.2d 371, 375–76 (S.D. 1992) (to avoid hearsay problems, no evidence other than the fact that the complaint was made, the timing and the identity of the attacker are admissible).

⁷⁷ *Brown*, 883 P.2d at 959; *State v. Hill*, 578 A.2d 370, 380 (N.J. 1990).

⁷⁸ See *Battle v. United States*, 630 A.2d 211, 224 (D.C. 1993); *Licata*, 591 N.E.2d at 675. *But see* *State v. Bethune*, 578 A.2d 364, 369 (N.J. 1990) (fresh complaint evidence admissible only to negate inference that no complaint made *not* to bolster complainant’s credibility). The distinction between “substantive” evidence and “credibility” evidence has been rejected by some states and by the Federal Rules of Evidence. Under the Federal Rules of Evidence, prior consistent statements offered for rehabilitation after impeachment are admitted as substantive evidence for the truth. FED. R. EVID. 801(d)(1)(B). The Advisory Committee offered two reasons for this rule. First, if the adverse party opens the door for the statement’s admission into evidence, “no sound reason is apparent why it should not be received generally.” FED. R. EVID. 801(d)(1)(B) advisory committee’s note. Second, the jury, practically speaking, would most likely not understand or ignore a limiting instruction, and thus there is no strong reason for giving one. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S EVIDENCE*, Rule 801(d)(1)(B)[01] (1995).

⁷⁹ WIGMORE, *supra* note 5, § 1136, at 307–11.

⁸⁰ See, e.g., *Commonwealth v. Lavalley*, 574 N.E.2d 1000, 1003 n.4 (Mass. 1991) (noting that majority of jurisdictions do not permit details of evidence); *Devall*, 489 N.W.2d at 375–76; WIGMORE, *supra* note 5, § 1136, at 307–11.

Although most courts state that only the fact that the complaint was made is admissible, but not the details, some courts explicitly permit some details of the complaint to be admitted,⁸¹ and other courts deny that details are admissible, but admit them anyway.⁸² In addition, there is some disagreement about what evidence constitutes inadmissible "details" and what parts of the prior statement are admissible.⁸³ In *People v. Brown*, the Supreme Court of California attempted to define the boundaries of admissible testimony by limiting prior complaint evidence to the fact and circumstances of the complaint.⁸⁴ The court explained the "circumstances" of the complaint to mean, for example, whether the complainant was responding to questions or spoke spontaneously, the timing of the complaint, and the complainant's mental and emotional state at the time.⁸⁵

Similarly, although courts may acknowledge the evidentiary policy against cumulative evidence, which prohibits the introduction of evidence that is repetitive or unnecessary,⁸⁶ they frequently permit a number of witnesses, in addition to the complainant, to testify about fresh complaints.⁸⁷ In *State v. Hill*, the Supreme Court of New Jersey elaborated on this corollary by instructing the trial courts to assess whether duplicative fresh complaint testimony was irrelevant or prejudicial to the defense, especially "in close cases in which the victim's complaint has already been once established and it appears that repeated fresh-complaint testimony would leave the jury with the impres-

⁸¹ See *Licata*, 591 N.E.2d at 674-75 (Massachusetts permits the admissibility of the details of a fresh complaint to give the jury the maximum amount of information with which to assess credibility); *State v. Lewis*, 803 S.W.2d 260, 264 (Tenn. Crim. App. 1990) (permitting admissibility of details of victim's complaint when made within a reasonable time).

⁸² See *Licata*, 591 N.E.2d at 675 n.8 (listing jurisdictions that prohibit details but frequently admit them); see also *Bethune*, 578 A.2d at 368-69 (permitting details of fresh complaint testimony because testifying witness was cross-examined vigorously and testimony would have been admissible under tender-years exception to hearsay rule); *State v. Campbell*, 705 P.2d 694 (Or. 1985).

⁸³ For example, controversy exists as to the admissibility of the complainant's identification of the attacker in the statement. Compare *D.G. v. State*, 754 P.2d 1128, 1129 (Alaska Ct. App. 1988) (victim's identification of the assailant was not admissible) with *Commonwealth v. Stohr*, 522 A.2d 589, 593 (Pa. Super. Ct. 1987) (identification of defendant properly admitted as part of the evidence to identify the occurrence complained of with the offense charged).

⁸⁴ 883 P.2d 949, 959-60 (Cal. 1994).

⁸⁵ *Id.* at 950-51.

⁸⁶ See FED. R. EVID. 403 (relevant evidence may be excluded by considerations of undue delay, waste of time, or needless presentation of cumulative evidence); WIGMORE, *supra* note 5, § 1124, at 255 (statements not made more trustworthy by any number of repetitions of it).

⁸⁷ See, e.g., *Commonwealth v. Lavalley*, 574 N.E.2d 1000, 1002 (Mass. 1991) (five witnesses); *State v. Hill*, 578 A.2d 370, 373 (N.J. 1990) (three witnesses).

sion that the State has gathered a greater number of witnesses than the defense."⁸⁸

Finally, in addition to the freshness requirement for admissibility, in most jurisdictions fresh complaint evidence is permitted only if the complainant spoke "voluntarily" and not in response to questions. In an attempt to clarify the meaning of "voluntariness," the Supreme Court of New Jersey in *Hill* underscored the difference between statements made in response to noncoercive questioning, which are admissible, and those "procured by pointed, inquisitive, coercive interrogation," which are not.⁸⁹ Although the court left the trial courts to determine the coerciveness of the questioning,⁹⁰ it listed several factors relevant to the determination: the victim's age, the circumstances of the interrogation, the victim's relationship with the interrogator, and the type and specificity of the questions.⁹¹ In *People v. Brown*, the Supreme Court of California eliminated the voluntariness requirement, reasoning that voluntariness, like freshness, should not be an essential prerequisite to admissibility.⁹² The court stated that the admissibility of fresh complaint evidence should not

turn invariably upon whether the victim's complaint was made immediately following the alleged assault or was preceded by some delay, nor upon whether the complaint was volunteered spontaneously. Rather, these factors simply are to be considered among the circumstances of the victim's report or disclosure that are relevant in assisting the trier of fact in assessing the significance of the victim's statements in conjunction with all of the other evidence presented.⁹³

To ensure that the jury understands and uses fresh complaint evidence properly, most courts give an instruction that outlines for the jury the purpose and proper use of the evidence.⁹⁴ In those jurisdic-

⁸⁸ 578 A.2d at 380.

⁸⁹ *Id.* at 379.

⁹⁰ The court noted that the "line . . . between noncoercive questioning and coercive questioning depends on the circumstances of the interrogation" and left to the trial courts to determine, on a case by case basis, "when that line is crossed." *Id.*

⁹¹ *Id.* at 379. The court also recognized that a different standard should apply to cases involving children. *State v. Bethune*, 578 A.2d 364, 367-68 (N.J. 1990).

⁹² 883 P.2d 949, 951 (Cal. 1994).

⁹³ *Id.* at 959.

⁹⁴ See NEW JERSEY INST. OF LEGAL EDUC. & NEW JERSEY BAR ASS'N, NEW JERSEY CRIMINAL JURY INSTRUCTIONS ON FRESH COMPLAINT (approved Mar. 19, 1990) [hereinafter N.J. JURY INSTRUCTIONS] (fresh complaint evidence is admitted "to prevent you from making a false

tions with the evolving rationale, however, the jury is often given an instruction that does not reflect the evolving rationale. In New Jersey, for example, the instructions on fresh complaint read:

The law recognizes that it would be natural for you to assume that a person subjected to unlawful sexual act(s) would complain within a reasonable time

As a result, . . . the State is permitted to introduce evidence that some complaint was made . . . to prevent you from making a false assumption about whether or not the complaint was made.⁹⁵

Thus, even in jurisdictions following the evolving rationale, the jury may remain ignorant of the true purpose of the evidence, which is to prevent unfairness to the complainant because of the timing myth.⁹⁶

In some respects, the fresh complaint rule has evolved considerably from its early history. Nevertheless, the corollaries to the rule have remained largely the same. The uneven evolution of the rule has complicated the paradox of the rule by eradicating some of the problematic parts of the rule without entirely curing its myth-reinforcing effects.

III. THE ROLE OF FRESH COMPLAINT EVIDENCE IN SEXUAL ASSAULT CASES

The paradox of the fresh complaint rule arises in part because the rule plays a pivotal role in sexual assault trials by restoring the credibility of sexual assault complainants damaged by the timing myth. There is a real need for fresh complaint evidence because although there is no empirical support for the timing myth, and there is evidence that contradicts it, it remains widely believed. Fresh complaint

assumption about whether or not the complaint was made. Such evidence is not proof that the sexual act occurred and is not proof that the witness is telling the truth."); MASSACHUSETTS MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT (1988), Instruction 4.13 ("Testimony reporting statements made by the victim of a (rape) (sexual offense) shortly after the incident is admitted to corroborate that the victim did promptly complain [sic]. . . . Such testimony is not admitted to prove that the (rape) (sexual offense) occurred."); see also *Battle v. United States*, 630 A.2d 211, 224 (D.C. 1993) (trial court should instruct jury on limited purpose of evidence); *Bethune*, 578 A.2d at 369 (trial court should make clear to jury that fresh complaint does not bolster victim's credibility or prove truth of underlying charges, but merely dispels inference of silence).

⁹⁵ N.J. JURY INSTRUCTIONS, *supra* note 94, at 1-2.

⁹⁶ See *supra* notes 34-53 and accompanying text (describing the evolving rationale for rule).

evidence effectively deals with the timing myth by rebutting the factual premise underlying the myth. Moreover, the role of fresh complaint evidence can be pivotal in cases where the timing myth is especially damaging, such as cases where the complainant has additional credibility problems stemming from stereotypes other than the timing myth. In these cases, fresh complaint evidence restores part of the complainant's unfairly damaged credibility.

A. *The Need for Fresh Complaint Evidence*

Despite the absence of evidence linking timing with veracity and ample evidence demonstrating that delay in formal reporting is caused by factors other than veracity,⁹⁷ belief in the timing myth remains prevalent and the absence of a prior complaint is likely to affect adversely the complainant's credibility.⁹⁸ Fresh complaint evidence counteracts the effects of the timing myth.

1. The Falsity of the Timing Myth

There is no empirical evidence supporting the presumption underlying the timing myth, and there is evidence that contradicts it. Studies show that anywhere from twelve percent to twenty-five percent of sexual assault complainants delay reporting to the authorities, a percentage that is significantly lower than the percentage of false sexual assault reports, which is estimated at about two percent.⁹⁹ Moreover, delay has been linked to a number of factors that have nothing to do with veracity. For example, adult sexual assault complainants delay because they fear no one will believe them, or because they feel

⁹⁷ Delay is associated with, among other things, the effect of rape myths on adult reporting and fear and conflicting emotions in minor victims. *See infra* notes 99–116 and accompanying text.

⁹⁸ Thus, the concerns articulated by courts in the evolving justification for the fresh complaint rule are valid. *See State v. Hill*, 578 A.2d 370, 376–78 (N.J. 1990).

⁹⁹ In a 1992 report, for example, the National Victim Center and Crime Victims Research and Treatment Center stated that of the 16% of rape victims who report, 25% wait 24 hours or longer to complain. NATIONAL VICTIM CTR. & CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 5, 6 tbl. 7 (1992) [hereinafter RAPE IN AMERICA]. Another study found that of those women who reported to police, 72% reported within 30 minutes, 8% within one hour, 7% within three hours and 12% more than three hours. MARTIN GREENBERG & R. BARRY RUBACK, AFTER THE CRIME: VICTIM DECISION MAKING 145–46 (1992). By contrast, social scientists estimate false rape reporting at about 2%. SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 208–09 (1979) (citing C.J. Hursch & J. Selkin, *Rape Prevention Research Project*, Annual Report of the Violence Research Unit, Division of Psychiatric Service, Department of Health and Hospitals, Denver (1974)).

embarrassed or guilty about the sexual assault. For minor victims, delay is associated with, among other things, fear of the perpetrator, love and respect for a family or friend perpetrator, and fear that they will not be believed.¹⁰⁰

Delay in adult victims is a reflection of rape mythology, not veracity.¹⁰¹ Complainants who perceive themselves to have a weak or unconvincing case, for example, delay in their complaints of sexual assault and are likely not to make a formal complaint at all.¹⁰² What complainants consider a "weak" sexual assault case is fueled by rape myths.¹⁰³ Victims are more likely to report "classic rapes"¹⁰⁴—sudden, violent attacks by a stranger that result in serious physical injury.¹⁰⁵ Sexual assault victims hesitate to report nonstranger sexual assault because they are more likely to feel responsible for it.¹⁰⁶ Feelings of responsibility for the sexual assault are rooted in the rape myth that victims provoke sexual assault and could prevent sexual assault if they really wanted to.¹⁰⁷

Complainants also wait longer to report when they have not employed verbal strategies, such as talking, screaming or crying, during

¹⁰⁰ See Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 159–61 (1988) (discussing that common emotional reactions to sexual abuse includes fear for safety, fear of future sexual abuse and fear of family's response to learning of the abuse, all leading to significant delays in disclosure). Delay has never, however, been correlated to mendacity.

¹⁰¹ See Torrey, *supra* note 3, at 1025. Professor Torrey lists four "classic" rape myths: (1) only women with "bad" reputations are raped; (2) women are prone to sexual fantasies about rape; (3) women precipitate rape by their appearance and behavior; and (4) women, motivated by revenge, blackmail, jealousy, guilt, or embarrassment falsely claim rape after consenting to sexual relations. *Id.* All of these myths are false. See *id.* at 1025–31.

¹⁰² See *infra* notes 103–14 and accompanying text.

¹⁰³ See Torrey, *supra* note 3, at 1025–31; see also Mary P. Koss et al., *Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience?*, 12 PSYCHOL. WOMEN Q. 1, 2–3 (1988).

¹⁰⁴ Linda S. Williams, *The Classic Rape: When Do Victims Report?*, 31 SOC. PROBS. 459, 461–62, 464 (1984). This study was an analysis of 246 rape complaints reported to a trained intake volunteer of Seattle Rape Relief and the data collected on the organization's Contact Sheet.

¹⁰⁵ *Id.* at 460, 464–65. The difference in reporting rates between stranger and nonstranger rape is directly related to the acceptance of rape mythology by both women and men. The "classic rape" is a myth to the extent that it suggests that most rapes are perpetrated by a stranger, rather than by someone the victim knows and trusts. RAPE IN AMERICA, *supra* note 99, at 4 (only 22% of all rapes are stranger rapes). Nevertheless, victims of stranger rape are more likely to report than other victims because they are better able to convince themselves and others that they are truly crime victims. Alan J. Lizotte, *The Uniqueness of Rape: Reporting Assaultive Violence to the Police*, 31 CRIME & DELINQ. 169, 173 (1985); Williams, *supra* note 104, at 464.

¹⁰⁶ See Koss et al., *supra* note 103, at 2–3; Williams, *supra* note 104, at 461 (women less likely to see themselves as rape victims if they were well-acquainted with their attackers).

¹⁰⁷ See Torrey, *supra* note 3, at 1025–26, 1039–40 (documenting social belief in myth that women provoke rape and are raped only if they do not resist strongly enough).

the sexual assault.¹⁰⁸ In another study, complainants who felt guilt based on their perception that they complied in or otherwise invited the sexual assault or seduced the rapist, waited several days or weeks to report, whereas women who felt no guilt made immediate reports.¹⁰⁹ This correlates to the rape myth that victims provoke sexual assault by their behavior, such as flirting or getting a man sexually excited and then refusing to have intercourse,¹¹⁰ that only "bad girls" are sexually assaulted, and that they deserve it.¹¹¹ Race also is a factor that can affect timing.¹¹² One study showed that complainants report to the police more promptly when the alleged attacker is black.¹¹³ This correlation calls to mind the rape myth that most sexual assaults are committed by black men against white women.¹¹⁴

Delay by victims who are minors is similarly correlated with factors other than veracity. A very young victim may not understand what happened or have the vocabulary to describe it or may be threatened or otherwise within the control of the perpetrator, who may be a relative or other trusted authority figure.¹¹⁵ Minor vic-

¹⁰⁸ GREENBERG & RUBACK, *supra* note 99, at 146.

¹⁰⁹ Sandra Sutherland & Donald Scherl, *Patterns of Response Among Victims of Rape*, 40 AM. J. ORTHOPSYCHIATRY 503, 505 (1970). In this study, the response patterns of 13 white, female victims, aged 18–24 years, were studied by a mental health team. *Id.*

¹¹⁰ Torrey, *supra* note 3, at 1024–25.

¹¹¹ *Id.* at 1025.

¹¹² GREENBERG & RUBACK, *supra* note 99, at 140, 146.

¹¹³ *Id.* at 146. Moreover, of those allegedly raped by black men, white women report more promptly than black women. *Id.*

¹¹⁴ See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1087 (1986) (describing her encounter with police after her rape, where police expressed relief and seemed to find her more believable when she told them her assailant was black—or as they put it, a "crow"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599–601 (1990) (rape signifies terrorism of black men by white men, aided and abetted by white women "crying rape").

¹¹⁵ See *State v. Bethune*, 578 A.2d 364, 366–68 (N.J. 1990) (recognizing need for flexibility in sexual assault cases involving children who may be frightened and embarrassed or may have no clear understanding of what happened); see also Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2033 (explaining that a child's cognitive and verbal abilities may not enable her to give consistent and detailed reports of her sexual abuse). Furthermore, Dr. Roland Summitt has classified the reactions of the sexually abused child into various categories: stage one consists of secrecy, when the defendant makes it clear to the child that it would be bad or dangerous for the child to tell anyone about the sexual abuse. *Id.* at 2036–37 (citing Roland Summitt, *The Child Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983)). Stage two is helplessness, when the child fears that no one will be able to protect him or her from retaliation by the abuser or fears being blamed for the incident. *Id.* In addition, sexual abusers are often a parent or relative, people in positions of trust and authority of the child's world. Susan M. Basham, Note, *Forging the Causal Link: Reasonable Delay in Commencing Action for Childhood Sexual Abuse*, 27 SUFFOLK U. L. REV. 749, 750 (1993). It has been estimated that 24–50% of sexual abuse offenders are family members. Joy Lazo, Comment, *True or False: Expert Testimony on Repressed Memory*, 28

tims may also remain silent because of fear that no one will believe them.¹¹⁶

2. Belief in the Timing Myth

Notwithstanding the empirical data, belief in the timing myth continues to be prevalent and affects society's view of the credibility of sexual assault complainants. In a study on attitudes toward rape, forty-one percent of the persons studied agreed with the assertion that "[a] charge of rape two days after the act has occurred is probably not rape."¹¹⁷ Similarly, belief in the timing myth is evident from judicial decisions,¹¹⁸ scholarly legal writings,¹¹⁹ re-

LOY. L.A. L. REV. 1345, 1349 (1995) (citing Rayline A. Devine, *Sexual Abuse of Children: An Overview of the Problem*, in U.S. DEP'T OF HEALTH & HUMAN SERVS., SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 3, 5 (Barbara M. Jones et al. eds., 1980)).

¹¹⁶ See Sertato, *supra* note 100, at 192 n.24 (citing Roland Summitt, *The Child Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 181-82 (1983)) (majority of victims never tell anyone about the abuse as children out of fear and a sense of blame); see also JOHN E.B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT 134-39 (1992) (stating that many victims of child sexual abuse never disclose their abuse).

¹¹⁷ HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 50-51, Table 3-1 (1980).

¹¹⁸ See, e.g., *People v. Lawler*, 568 N.E.2d 895, 901 (Ill. 1991); *State v. Werner*, 489 A.2d 1119, 1126 (Md. Ct. Spec. App. 1985) (failure of sex offense victim to complain at the time of the crime or shortly thereafter "would weigh heavily against the state"); *State v. Devall*, 489 N.W.2d 371, 375 (S.D. 1992) ("Since it is natural for a woman or child to complain to someone responsible for her welfare of an outrage of this character, the failure to complain could be urged by the defense to contradict or discredit her testimony.").

¹¹⁹ See Russell M. Coombs, *Reforming New Jersey Evidence Law on Fresh Complaint of Rape*, 25 RUTGERS L.J. 699, 712 & n.70 (1994) [hereinafter Coombs, *Reforming N.J. Evidence Law*]; *Fresh Complaint Hearing*, *supra* note 1 (written submission of Russell M. Coombs, Associate Professor, Rutgers University School of Law-Camden). Despite Professor Coombs's knowledge of the empirical data on rape reporting (and the lack of data linking timing and veracity), his "logic," "common sense" and "lay knowledge of human behavior" lead him to the conclusion that delay evidence is relevant both to show that the complainant is lying *and* that the rape did not occur. Coombs, *Reforming N.J. Evidence Law*, *supra*, at 720. Professor Coombs rejects the empirical studies of rape complainant behavior because most (if not all) of the data is obtained by victim self-reports—and therefore assumes that the polled complainant is telling the truth about the rape. See *id.* at 720 n.103. Because there is no empirical data linking timing of a rape complaint with veracity, however, the issue becomes what the better standard is for a rule of evidence: the data we do have or Professor Coombs's "lay knowledge of human behavior." See Sherry F. Colb, *Assuming Facts Not in Evidence: A Response to Russell M. Coombs, Reforming New Jersey Evidence Law on Fresh Complaint of Rape*, 25 RUTGERS L.J. 745, 748-50 (1994) (arguing that one must have a hypothesis about how an actual rape victim would respond to rape in order to interpret the relevance of delay). Professor Coombs's "lay knowledge" about the significance of the timing of rape complaints seems a poor substitute for empirical evidence when: (1) reasonable minds may and do differ on the meaning of timing in rape cases (that is, the "lay knowledge" varies widely between people); (2) in the area of sexual assault, "lay knowledge" may reflect stereotypes about rape victims and women's nature, see *infra* note 132 and accompanying text; and (3) the

ports in the media,¹²⁰ and the history of the fresh complaint rule itself.¹²¹

The perseverance of the timing myth and other rape myths in the face of evidence to the contrary can be attributed to what psychologists call "cognitive inflexibility."¹²² Cognitive inflexibility means that although individuals can learn new information, they will interpret that information through the filter of their personal beliefs and biases.¹²³ Sometimes this means that new information will be disregarded because it conflicts with a strongly held belief.¹²⁴ The basis of the timing myth is the cognitive structure or intuitive assumption, strongly rooted in the law, that people wronged will seek justice.¹²⁵ The empirical evidence about the timing and reasons for sexual assault reports contradicts the intuitive notion of human nature that forms the basis for the traditional fresh complaint rule.¹²⁶ This contradiction might explain the tenacity of the timing myth.

Although intuitive notions of human behavior form the basis of many rules of evidence other than the fresh complaint rule,¹²⁷ using such assumptions to make rules of evidence for a crime such as sexual assault is problematic. First, grafting onto sexual assault jurispru-

empirical evidence we do have contradicts Professor Coombs's "lay knowledge." That Professor Coombs chooses to reject the empirical data wholesale rather than re-examine the validity of his logic in light of the empirical data testifies to the tenacity of the timing myth. See Colb, *supra*, at 754; see also *supra* notes 99–116 and accompanying text.

¹²⁰ Failure to complain is often equated with consent. In 1992, the Miami Herald reported that prosecutors decided not to file rape charges against three New York Mets largely because of the complainant's 11-month delay in making a formal complaint. Christine Evans & Peter Slevin, *State Drops Rape Case Against Three N.Y. Mets Prosecutors Cite Shortage of Evidence*, MIAMI HERALD, Apr. 10, 1992, at 1A (quoting prosecutor Bruce Colton characterizing the situation as a "date rape situation"). Similarly, Anita Hill was widely disbelieved for her failure to come forward promptly. See Richard L. Berke, *The Thomas Nomination: Thomas's Accuser Assails Handling of Her Complaint*, N.Y. TIMES, Oct. 8, 1991, at A1 (comments of Sen. Strom Thurmond); see also Kim Lane Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 128–33 (1992) (explaining that the senators' emphasis on Anita Hill's delay in complaining about sexual harassment reflected the common bias of the public that a woman who delays complaining is likely to be a liar).

¹²¹ See *supra* notes 19–53 and accompanying text.

¹²² See Torrey, *supra* note 3, at 1050.

¹²³ *Id.* at 1050. Those personal beliefs are called cognitive structures.

¹²⁴ *Id.*

¹²⁵ See *supra* notes 20–31 and accompanying text; see also Colb, *supra* note 119, at 751 (explaining erroneous belief in timing myth by acknowledging common belief that when something upsetting happens, we expect that the natural human response is to complain).

¹²⁶ See *State v. Werner*, 489 A.2d 1119, 1126 (Md. Ct. Spec. App. 1985) (stating that fresh complaint rule is "founded upon the laws of human nature, which induces a female thus outraged [by rape] to complain at the first opportunity") (quoting *Legore v. State*, 41 A. 60 (Md. 1898)).

¹²⁷ See FED. R. EVID. 803(2) (excited utterance exception to the hearsay rule); FED. R. EVID. 804(b)(3) (statement against interest exception to the hearsay rule).

dence the general assumption that the natural reaction of true victims is to complain immediately does not consider that the unique qualities of sexual assault might warrant a different assumption.¹²⁸ Second, what I have been calling an intuitive assumption about human nature began as a reflection of how men believed men should respond to violence, without considering that women might behave differently,¹²⁹ and turned into an assumption that reflected how men believed women¹³⁰ should act.¹³¹ Because intuitive assumptions about human behavior, especially female behavior, are likely to be biased by ignorance or stereotypes in the context of sexual assault, they are not an appropriate basis for a rule of evidence applicable only to sexual assault cases, such as the fresh complaint rule.¹³²

¹²⁸ See Colb, *supra* note 119, at 752 (expectation that sexual assault victims will complain immediately underestimates countervailing forces that operate on rape victims to suppress otherwise common inclination to talk about one's pain). Sexual assault, especially by an acquaintance of the victim, is one of the most difficult crimes to prosecute successfully in large part because of the myths that surround sexual assault and its victims. See Torrey, *supra* note 3, at 1057-62. These myths make rape different from other violent crimes because they cause jurors unfairly to regard rape complainants with skepticism and cause rape victims to avoid or hesitate telling someone of the rape. See *id.*; *supra* notes 101-14; see also Deborah W. Denno, *Panel Discussion: Men, Women, and Rape*, 63 *FORDHAM L. REV.* 125, 127-33 (1994) (explaining that rape is unique due to the shame, stigma, and resulting psychological harm, as well as myths that plague it, in addition to the fact that rape involves an overwhelming number of male perpetrators on female victims); Estrich, *supra* note 114, at 1090-93 (explaining the many ways rape is different from other crimes, such as the courts' focus almost entirely on the victim, a male standard is used to judge the conduct of women victims, and it is the only crime where the victim must physically resist to show nonconsent); Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 *COLUM. L. REV.* 1442, 1448-49 (1993) (describing rape as *sui generis*, a primal experience that cannot be reduced to other painful experiences, such as theft).

¹²⁹ Women got left out of the equation; to the extent women were considered at all, they were assumed to behave like men. See WIGMORE, *supra* note 5, § 1129, at 270-71 (root of fresh complaint rule is general evidentiary policy that people will cry out in response to crime).

¹³⁰ Although both men and women can be sexually assaulted, cases following the traditional justification specifically make assumptions about women's nature. See *People v. Damen*, 193 N.E.2d 25, 30 (Ill. 1963) (it is natural for a woman to speak out regarding a forcible rape); *State v. Devall*, 489 N.W.2d 371, 375 (S.D. 1992) (stating that it is natural for a woman to complain). The assumption is probably flawed as applied to male rape victims as well, however, because they are likely to be susceptible to similar feelings of guilt and stigmatization that women victims are. See, e.g., *Commonwealth v. Gonsalves*, 499 N.E.2d 1229, 1231 (Mass. App. Ct. 1986) (male victim of rape by another male delayed almost one month before complaining); *Commonwealth v. Bailey*, 510 A.2d 367, 367-68 (Pa. 1986) (two-day delay of victim's complaint after father raped his son); Denno, *supra* note 128, at 127 n.10 (noting that there is compelling evidence that men suffer as much psychological and physical harm as a result of sexual harassment as do women); Estrich, *supra* note 114, at 1089 n.1 (noting that apparent invisibility of male rape may reflect the intensity of the stigma attached to the crime and the homophobic reactions against its victims).

¹³¹ See *supra* notes 19-24 and accompanying text (discussing evolution of hue and cry from rule applicable to all criminal cases to rule applicable only to sexual assault cases).

¹³² Thus, one commentator's suggestion that "logic, common sense and lay knowledge of

B. *The Role of Fresh Complaint Evidence:
Filling the Void for Sexual Assault Complainants*

Because of the falsity and prevalence of the timing myth, there is a real need for evidence that deals with the damaging effects of the myth. Fresh complaint evidence fulfills this need. It effectively counteracts the timing myth because it demonstrates that the factual premise upon which the timing myth is based does not exist in a particular case. Moreover, fresh complaint evidence plays an especially important role in cases where the complainant's credibility is both central to the case and susceptible to unfair skepticism because of rape myths.

1. Counteracting the Timing Myth

Fresh complaint evidence attacks the underlying factual component of the timing myth: the inference that no sexual assault occurred because the complainant did not complain promptly or within a reasonable time after the claimed sexual assault. The rationale of the fresh complaint rule is that if no evidence of fresh complaint is admitted, jurors will assume that no complaint was made and will conclude that the complainant is lying.¹³³ By showing the assumption that no com-

human behavior" provides a better basis for an evidentiary rule than the empirical data on rape reporting must be rejected. See Coombs, *Reforming N.J. Evidence Law*, *supra* note 119, at 720. The result of a subjective, "common sense" relevance standard, as illustrated by the justification for the traditional fresh complaint rule, is that women who fail to behave the way men expect men to behave or the way men expect women to behave are presumed to be lying. Although the rule would disproportionately impact women, women (as opposed to men's view of women) are not considered in the determination of the rule, nor does it consider that women's behavior might differ from men's expectations. Moreover, when the question posed is how would we (men) expect women to respond to the crime of rape, the result is distorted by the stereotypes and myths that surround both women's "nature" and sexual assault. See *id.*; see also Torrey, *supra* note 3, at 1041-45; *supra* notes 117-26 (discussing tenacity of timing myth in face of empirical data).

¹³³ See *State v. Hill*, 578 A.2d 370, 376-78 (N.J. 1990) (explaining rationale for fresh complaint rule). Another rationale for admission of fresh complaint evidence is that the jury is likely to hear about the timing of the formal complaint from police witnesses or will otherwise draw inferences from the sequence of events. See *Fresh Complaint Hearing*, *supra* note 1, Tr. at 49-50 (testimony of Julia L. McClure, Assistant Prosecutor, Middlesex County). The likelihood that jurors will draw a negative inference based on the *absence* of fresh complaint evidence is substantial. One study of juror decision-making posits that jurors take the evidence presented to them at trial and construct a story with it. Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242, 243 (1986). If a story constructed by a juror is missing a component, the juror will infer that component, based on, among other things, the juror's beliefs regarding "general truths about what generally happens in the world." *Id.* at 247, 252. Thus, if no fresh complaint evidence is admitted, jurors are likely to make an inference about the circumstances of the complaint based on their personal beliefs. See *id.* These personal beliefs are likely to be influenced by rape myths, including the timing myth. See *supra* notes 117-32 and accompanying text.

plaint was made to be untrue, fresh complaint evidence prevents the jury from inferring that the complainant is lying.

The eroding freshness requirement has some impact on the rule's effectiveness because it permits admission of delayed complaints, which may give the jury additional reasons to disbelieve the complainant. Nevertheless, evidence of a delayed complaint may be of value because it prevents the jury from assuming that the complainant made no prior complaint or from wondering about the circumstances of prior complaints.¹³⁴ Moreover, admitting the circumstances of the complaint in addition to the timing of it permits the complainant to explain the reasons for the delay, which not only derails the assumption that the complainant is lying but also educates the jurors about the reasons sexual assault complainants may hesitate to report.

2. Dealing with Credibility Damage in "Hard" Cases

Although fresh complaint evidence is necessary in all sexual assault trials because of the pervasive timing myth and the history of the "hue and cry," the role of the fresh complaint rule can be critical in cases where the complainant's credibility is both central to the case and susceptible to unfair skepticism because of the timing myth and other rape stereotypes. A significant number of these cases involved complainants who were minors or adolescents,¹³⁵ complainants who were romantically involved with the alleged attacker, or complainants who did not behave consistently with societal expectations.¹³⁶ Rebuttal of the timing myth is essential in these cases because these types of complainants are (i) more likely to delay for reasons unrelated to veracity and (ii) more likely to be harmed by the absence of fresh complaint evidence due to their other credibility problems. Moreover, in child sexual abuse cases, the minor complainant will often testify to a series of sexual assaults occurring over a period of time during which the complainant did not complain.¹³⁷ In these cases, jurors are likely

¹³⁴ See *supra* note 133 and accompanying text.

¹³⁵ See, e.g., *D.G. v. State*, 754 P.2d 1128, 1128 (Alaska Ct. App. 1988) (nine-year-old victim); *Battle v. United States*, 730 A.2d 211, 213 (D.C. 1993) (14-year-old victim); *People v. Duplessis*, 618 N.E.2d 1092, 1094 (Ill. App. Ct. 1993) (14-year-old victim); *Commonwealth v. Fleury*, 632 N.E.2d 1230, 1231 (Mass. 1994) (eight-year-old victim); *State v. Bethune*, 578 A.2d 364, 365 (N.J. 1990) (five-year-old victim); *People v. McDaniel*, 611 N.E.2d 265, 267 (N.Y. 1993) (11-year-old victim); *Bailey*, 510 A.2d at 367 (nine-year-old victim).

¹³⁶ The characteristics of complainants in fresh complaint cases bear striking resemblance to the characteristics of complainants who delay complaining. See *supra* notes 99-116 and accompanying text.

¹³⁷ See *People v. Brown*, 883 P.2d 949, 958 (Cal. 1994) (seven-year-old testified that mother's

to hear about a delay in complaining or are likely to notice the absence of a prior complaint because of the testimony or the complainant's other credibility problems. Fresh complaint evidence is necessary in these cases to restore the part of the complainant's credibility unfairly damaged by the timing myth.

For example, in *State v. Devall*, T.L., a college student, and Devall met after midnight at a bar during a homecoming celebration.¹³⁸ T.L. and Devall talked for about twenty minutes and kissed and held hands.¹³⁹ They then left the bar, stopped at another bar, and began to walk to a fraternity party.¹⁴⁰ During the walk, T.L. and Devall kissed.¹⁴¹ Devall then unbuttoned T.L.'s pants, but she said "no" and refastened them.¹⁴² Devall then yanked her pants to the ground, pinned her arms behind her back, and raped her.¹⁴³ After raping her, Devall told her to put her pants on and pulled her toward his friend's apartment.¹⁴⁴ The court noted that T.L. did not scream for help during the rape or on the way to the friend's apartment.¹⁴⁵ When they reached the apartment, T.L. lay down in one of the bedrooms.¹⁴⁶ Although two people she knew were at the apartment, T.L. did not tell them about the rape.¹⁴⁷ After thirty minutes, Devall came in, told T.L. to leave, grabbed her arm and pulled her to the door.¹⁴⁸ She left, met a friend and told her about the rape.¹⁴⁹ Approximately twenty-four hours later, upon her friends' urging, T.L. reported the rape to the police.¹⁵⁰

In this case, evidence of T.L.'s discussions with her friends served to counteract some of the credibility damage caused by T.L.'s story, especially because the jury might have perceived her failure to com-

live-in boyfriend sexually abused her for five years but that she did not tell anyone until boyfriend moved out).

¹³⁸ *State v. Devall*, 489 N.W.2d 371, 373 (S.D. 1992).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*; see *supra* notes 110–11 and accompanying text (describing rape myth that women who flirt or begin sexual activity and then refuse to have sex have not been raped or asked for it).

¹⁴³ *Devall*, 489 N.W.2d at 373.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see *supra* notes 28–31 and accompanying text (describing rape myth that rape victims who did not scream or otherwise resist were not raped).

¹⁴⁶ *Devall*, 489 N.W.2d at 373.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 374. T.L. testified that she did not go to the police earlier because she did not believe that they would treat her fairly. *Id.*

plain on the way or at Devall's friend's apartment as evidence that she was not really raped.¹⁵¹ Other fresh complaint cases show that fresh complaint evidence plays a similarly important role.¹⁵²

3. The Educational Role of the Evolving Rationale

In addition to performing a critical function in sexual assault trials, the evolving justification for the fresh complaint rule serves an educational purpose by openly acknowledging and giving judicial voice to the powerful negative impact the timing myth and other rape myths have on sexual assault trials.¹⁵³ The open discussion of the timing myth and other rape myths in judicial opinions is important because of the educational effect it has on the legal community—especially other judges and attorneys.¹⁵⁴ That the timing myth has persevered after twenty years of contrary empirical data testifies to the need for deprogramming in the legal arena.¹⁵⁵

¹⁵¹T.L.'s failure to scream or complain about the rape despite opportunities to do so is mentioned twice in the majority opinion in *Devall*. *Id.* at 373. The prominence of these facts suggests that the Supreme Court of South Dakota, and perhaps the courts below, believed that T.L.'s failure to complain reflected negatively on her credibility. *See id.* Jurors may make a similar assumption. *See* Pennington & Hastie, *supra* note 133, at 243, 254 (positing that jurors fill in gaps in evidence by making inferences based on "scripts" that incorporate their world view); Kathryn M. Ryan, *Rape and Seduction Scripts*, 12 *PSYCHOL. OF WOMEN Q.* 237, 240-43 (1988) (documenting rape "scripts" that describe women as more responsible for non-"classic" rapes).

¹⁵²*See* *People v. Brown*, 883 P.2d 949, 958-59 (Cal. 1994) (explaining that fresh complaint evidence is particularly important in this case where victim testifies to a series of alleged sexual offenses over a considerable period of time, during which time she had opportunity to disclose the offense but failed to do so, leaving the jury with an incomplete understanding of the victim's behavior); *State v. Hill*, 578 A.2d 370, 376 (N.J. 1990). In *Hill*, the complainant, M.K., was a 16-year-old resident of the Collier Group Home ("Collier") in Red Bank, a group residence for "[y]oung women who could not live with their families" run by New Jersey's Division of Youth and Family Services. *Hill*, 578 A.2d at 371. The day of the assault, M.K. went to a party with the defendant, where she drank beer, and others drank beer and smoked marijuana. *Id.* at 372. During the evening when M.K. tried to find a bathroom, the defendant cornered her and raped her. *Id.* M.K. did not tell anyone about the rape until approximately one month after the incident, when another resident of Collier confided to M.K. that defendant had raped her. *Id.* Both girls waited another week to go to the police. *Id.* at 373. Fresh complaint evidence admitted in *Hill* demonstrated that M.K. did not simply wait to go to the police; like many rape complainants she "tested the waters" in a confidential conversation with a girlfriend before going to the police. *See id.*; *see also* *Fitzgerald v. United States*, 443 A.2d 1295, 1298 (D.C. 1982) (victim told friend before reporting to police); *Commonwealth v. Lanning*, 589 N.E.2d 318, 321 (Mass. App. Ct. 1992) (victim told aunt before reporting to police).

¹⁵³*See supra* notes 30-39 and accompanying text.

¹⁵⁴Torrey, *supra* note 3, at 1050-51 n.185 (rigid beliefs can be altered by directly attacking the beliefs in question).

¹⁵⁵*See* Lynn Hecht Schafraan, *Writing and Reading About Rape: A Primer*, 66 *ST. JOHN'S L. REV.* 979, 1013; *supra* notes 99-126 and accompanying text.

IV. THE HARMFUL EFFECTS OF FRESH COMPLAINT EVIDENCE

Although the fresh complaint rule plays an important role in sexual assault trials, it has significant detrimental effects. Despite the evolving rationale and eroding freshness requirement, some harmful effects remain.

The most profound negative aspect of the rule is that it may reinforce the timing myth, both in individual rape trials and in the legal community generally. Because the rule uses prompt complaints to counteract the presumption underlying the timing myth, it validates the bias of jurors who assume that promptness means veracity.¹⁵⁶ For jurors who would not ordinarily have noticed the absence of a prompt complaint, the admission of fresh complaint evidence may emphasize the collateral issue of the timing of the complaint to the jury.¹⁵⁷ Moreover, because the rule is a special exception for sexual assault cases¹⁵⁸ and permits admission of fresh complaint evidence before impeachment, the rule suggests to jurors and to society as a whole that sexual assault complainants are inherently unbelievable and in need of a special rule to raise their credibility to a level attained by other crime victims.¹⁵⁹ Indeed, the historical basis for the fresh complaint rule is that female sexual assault victims are inherently untrustworthy.¹⁶⁰ The "hue and cry"-based rationale for the rule gives the law's endorsement to the negative stereotypes of the rule and ensures that the stereotypes will endure.¹⁶¹ Terms such as "fresh complaint" and

¹⁵⁶ See *Fresh Complaint Hearing*, *supra* note 1, *Bienen Submission*, at 3, 7; DuBois, *supra* note 3, at 1097-1109.

¹⁵⁷ *Fresh Complaint Hearing*, *supra* note 1, *Bienen Submission*, at 4 (explaining that the assumption jurors think or expect a rape victim to complain within a reasonable time may be analogous to telling the boy not to put beans in his ear, when he never thought of doing so until his mother told him not to).

¹⁵⁸ In *People v. Brown*, the California Supreme Court found that in cases involving crimes other than sex offenses, "it is common for evidence to be admitted describing how and when the crime was reported by the victim, on the ground that such evidence is relevant to the determination of whether the offense occurred." 883 P.2d 949, 957 (Cal. 1994). The *Brown* court, however, cited only three cases in which such evidence was admitted. *Id.* at 957-58.

¹⁵⁹ This harmful byproduct of special treatment rules for a particular group has been a controversy for feminist legal theorists. Compare Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196-97 (1982) (rejecting special treatment model in favor of equality model because giving special legal treatment to women reinforces sexual stereotypes) with Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1285 (1987) (law should recognize reality of women's difference and make it "costless" by treating it like similar male characteristics).

¹⁶⁰ See *Fresh Complaint Hearing*, *supra* note 1, *Bienen Submission*, at 3, 5; Torrey, *supra* note 3, at 1042.

¹⁶¹ See *supra* notes 19-33 and accompanying text.

the freshness requirement contribute to the rule's myth reinforcement.¹⁶²

The evolving rationale for the rule and the eroding freshness requirement eradicate some of the more troublesome parts of the rule, but do not entirely cure its myth-reinforcing effects. Moreover, these new elements of the rule make the rule doctrinally inconsistent. First, although the evolving rationale performs the important function of educating judges and attorneys about the powerful negative effect of rape myths on sexual assault trials, the instruction to the jury does not reflect this rationale. By telling the jury that "it would be natural for you to assume that a person subjected to unlawful sexual act(s) would complain within a reasonable time" and that "[i]f you heard no evidence that [victim] made such a complaint, you might conclude that no unlawful sexual act occurred,"¹⁶³ the instruction directly reinforces the timing myth—the very myth it seeks to correct. The instruction does not refer to judicial concern over juror bias or belief in the timing myth or other rape myths, which is the actual rationale for the rule. Thus, the educational value of the rule is diminished significantly because those who the evolving rationale presumes to be biased, the jurors, are never educated about their bias.

Moreover, use of fresh complaint evidence by courts espousing the evolving rationale is disingenuous. Use of fresh complaint evidence to deal with the timing myth, instead of attacking the myth itself, reinforces the timing myth by linking freshness to veracity. In addition, courts following the evolving rationale explicitly reject the notion that freshness is relevant to veracity, yet require complaints to be fresh.¹⁶⁴ Thus, the courts not only admit evidence they believe to be irrelevant, but also do so in a way that reinforces the very stereotype they seek to correct.¹⁶⁵ In fact, although the erosion of the freshness requirement deemphasizes the relevance of freshness to veracity, the myth-reinforcement of the rule endures because most courts continue to declare that freshness is a prerequisite to admissibility and continue to use terms like "fresh complaint."¹⁶⁶ Keeping the freshness requirement as part of the legal rule gives the law's endorsement to the timing myth, even if,

¹⁶² *Fresh Complaint Hearing*, *supra* note 1, *Bienen Submission*, at 3, 5 (term "fresh complaint" should be discarded as not only offensive and sexist, but also confusing and contradictory).

¹⁶³ N.J. JURY INSTRUCTIONS, *supra* note 94, at 1.

¹⁶⁴ One commentator describes the fresh complaint rule as "admitting irrelevant evidence to rebut unfounded inferences that are premised upon unsupported assumptions." Colb, *supra* note 119, at 755 n.32.

¹⁶⁵ *Fresh Complaint Hearing*, *supra* note 1, *Bienen Submission*, at 7.

¹⁶⁶ *See id.* at 3, 5; Torrey, *supra* note 3, at 1015.

as a practical matter, freshness is not a real prerequisite of admissibility. Substitution of a “reasonableness” requirement for freshness is also problematic because it incorrectly presumes that there is a “reasonable” reaction to sexual assault and that judges and jurors can recognize it.¹⁶⁷ Finally, because the theory of admissibility is that fresh complaint evidence is necessary because of the widespread belief in the timing myth, permitting admission of a significantly delayed prior complaint may be more harmful than helpful.

V. SOLUTIONS TO THE PARADOX: TOWARD ACKNOWLEDGING AND REMEDYING THE IMPACT OF RAPE MYTHS ON THE CREDIBILITY OF SEXUAL ASSAULT COMPLAINANTS

The need exists for a rule that effectively deals with the timing issue, especially in cases involving minors and complainants with rape-myth based credibility problems. Fresh complaint evidence restores credibility damage caused by the timing myth, and does so in cases where timing may be a pivotal issue because of unfair skepticism about the complainant’s credibility stemming from rape stereotypes.¹⁶⁸ The rule, however, notwithstanding its evolution, has damaging side effects that make it an imperfect solution.¹⁶⁹ If we eliminate all versions of the fresh complaint rule, however, how do we deal with the timing myth and other rape myth-based credibility problems in individual sexual assault trials?

A. Proposed Solutions

Because of the negative effects of the fresh complaint rule, many commentators have urged abrogation of the rule.¹⁷⁰ Recognizing the need for evidence to counteract the timing myth, however, these com-

¹⁶⁷ See *State v. Hill*, 578 A.2d 370, 377 (N.J. 1990) (to be admissible, complaint must be made within “reasonable” time). Far from showing a reasonable reaction to rape, the empirical data supports the notion that there is no “normal” (i.e. reasonable) victim response to rape in terms of the timing of the complaint. See *supra* note 99 and accompanying text. Moreover, presumptions about what is a “reasonable” response to rape gave us the traditional fresh complaint rule.

¹⁶⁸ See *supra* notes 135–46 and accompanying text.

¹⁶⁹ See *supra* notes 150–62 and accompanying text.

¹⁷⁰ See, e.g., Torrey, *supra* note 3, at 1042–45 (urging abolition of the rule because of its sexist history and because courts’ misapplication of it has fostered stereotypical, false beliefs about rape complainants); DuBois, *supra* note 3, at 1107 (arguing that the rule’s method of dealing with the timing myth—by showing that a particular victim did complain promptly—actually promotes the myth by giving the impression that the law considers prompt complaints more believable); Kenmore, *supra* note 3, at 237–40 (arguing that “[d]isparate treatment of victims in rape and assault cases is analytically unjustifiable” and recommending admission of prompt complaint evidence only when it satisfies a modified spontaneous utterance theory).

mentators have proposed substitutes to the fresh complaint rule. The proposed substitutes fall into four categories: (i) admission of fresh complaint evidence under rules of evidence other than the fresh complaint rule, such as narrative testimony, spontaneous utterance or as a prior consistent statement after defense impeachment on timing;¹⁷¹ (ii) a jury instruction directing the jury not to take timing into account in assessing the credibility of the complainant;¹⁷² (iii) removing the issue of timing from the case by prohibiting any testimony about when the assault occurred and any complaints made;¹⁷³ and (iv) expert testimony on rape trauma syndrome.¹⁷⁴ All of these methods are either impractical or less effective than fresh complaint evidence.

The first category of proposed substitutes, the "back door" admission of fresh complaint evidence, eliminates the opportunity to educate the legal community about rape myths using the evolving rationale.¹⁷⁵ Any opportunity to educate the legal community and jurors about the timing myth and other rape myths is lost when evidence of prior complaints is admitted without reference to these myths.¹⁷⁶ In addition, because it does not acknowledge that the prevalence of the timing myth is the real reason fresh complaint evidence is necessary, "back door" admission ignores and obscures the reality that sexual assault complainants face unique obstacles to just adjudication of their cases.¹⁷⁷

¹⁷¹ I call these the "back door" methods of admitting fresh complaint evidence, because although the commentators who suggest them seem to want to preserve admissibility of fresh complaint evidence because of its effect on the timing myth, under these methods that is not the articulated rationale for admission of the evidence. See DuBois, *supra* note 3, at 1109-13 (suggesting that fresh complaint evidence come in through narrative testimony, rehabilitation through prior consistent statement, or spontaneous utterance); *Fresh Complaint Hearings*, *supra* note 1, *Bienen Submission*, at 7 (agreeing with DuBois).

¹⁷² Among the suggestions proposed by the Joint Subcommittee of the New Jersey Supreme Court Committee on Criminal Practice and Rules of Evidence after the hearing on the utility of fresh complaint evidence was an instruction directing the jury not to take timing into account in assessing the credibility of the complainant. *Fresh Complaint Hearing*, *supra* note 1, at 49 (testimony of Julia L. McClure, Assistant Prosecutor, Middlesex County).

¹⁷³ The New Jersey Joint Subcommittee also suggested removing the issue of timing from the case by prohibiting any testimony about when the assault occurred and when any complaints were made. *Id.*

¹⁷⁴ See *State v. Hill*, 578 A.2d 370, 377 (N.J. 1990) (fresh complaint rule responds to jurors with subtle biases or prejudices on their own terms).

¹⁷⁵ See *supra* notes 35-53 and accompanying text.

¹⁷⁶ See DuBois, *supra* note 3, at 1110-11.

¹⁷⁷ Cf. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 412 (1984) (commenting that changing statutory rape laws to criminalize exploitation of male and female minors by adults avoids sexual stereotyping, but obscures issue of male sexual aggression that is societal reality).

Moreover, two of the back door substitutes, admission of fresh complaint evidence through the spontaneous utterance or prior consistent statement exceptions to the hearsay rule, do not respond to the timing myth as effectively as the fresh complaint rule. Limiting admissibility of fresh complaint evidence to spontaneous utterances would effectively gut the rule—leaving the benefit of the rule to those who need it least, those who complain immediately. Admitting fresh complaint evidence only after defense impeachment ignores the possibility that the credibility of sexual assault complainants may be damaged before defense impeachment because of the circumstances of a given case and rape mythology and its impact on timing.¹⁷⁸

The second category, giving the jury an instruction to disregard timing, is ineffective and may be counterproductive. First, an instruction directing the jury not to consider the timing of the complaint or the absence of fresh complaint in assessing the credibility of the complainant is less effective than permitting the jury to hear information about the complainant's behavior.¹⁷⁹ Evidence of a prior complaint and the circumstances under which the complainant made it will almost always be far more compelling than a dry instruction, especially one that instructs the jury to disregard evidence it may be predisposed to consider.¹⁸⁰ An instruction may also have the counterproductive effect of piquing the jury's curiosity about prior complaints without satisfying that curiosity.

The third category, removing timing evidence entirely from sexual assault cases, is impractical and ignores the problem of jurors' drawing inferences about the absence of fresh complaint evidence.¹⁸¹ In many cases, attempts to sanitize the record of all evidence of timing will not only give a curious picture of events to the jury, who might be further inclined to wonder about timing if that evidence is withheld, but also may be impossible because of the sequence of events in a case. For example, in *State v. Devall*, T.L. walked with Devall to a friend's apartment after the alleged rape without screaming or crying out, lay down in the friend's bedroom, and left only when Devall told her to leave.¹⁸²

¹⁷⁸ See *supra* notes 99–116 and accompanying text.

¹⁷⁹ *Fresh Complaint Hearing*, *supra* note 1, Tr. at 50 (testimony of Judge Sylvia Pressler) (noting that prosecution would almost always prefer a live witness to an instruction).

¹⁸⁰ See *supra* notes 122–26 and accompanying text (explaining that cognitive inflexibility causes people to cling to their beliefs even in face of contrary evidence). An instruction may cause jurors to wonder why the evidence is being kept from them.

¹⁸¹ *Fresh Complaint Hearing*, *supra* note 1, Tr. at 50 (testimony of Julia L. McClure, Assistant Prosecutor, Middlesex County) (arguing with the Committee over whether an instruction is inadequate because people have preconceptions of the relevance of timing).

¹⁸² *State v. Devall*, 489 N.W.2d 371, 373 (S.D. 1992).

These facts are not really evidence of the timing of T.L.'s complaint, but nevertheless reveal a sequence of events that demonstrate to the jury that T.L. did not complain at the first opportunity.¹⁸³

The fourth category, admission of expert testimony on rape trauma syndrome and the falsity of rape myths, although undoubtedly the most effective way to counteract juror belief in rape myths, is simply too expensive to be practical in every sexual assault trial where it is necessary.¹⁸⁴ In addition, controversy remains about the proper scope of expert testimony.¹⁸⁵ Expert testimony should certainly be used where possible, but where it is not feasible, a need remains for evidence that can counteract the timing myth for all sexual assault complainants.

B. *A Modified Prior Complaint Rule*

The most effective rule would include the analytical and practical advantages of the fresh complaint rule and discard the doctrinally troublesome parts of the rule. The goal of a modified rule would be to continue the credibility-restoring function of fresh complaint while expanding the myth-rejecting educational function of the evolving rationale. In this way, the modified rule would ease the transition from a point where fresh complaint evidence is vital to sexual assault prosecution to a point where it is unnecessary because society has been educated about the danger of the timing myth and other rape myths.

First, following the lead of the Supreme Court of California, the modified rule should explicitly eliminate the freshness requirement and admit evidence of a sexual assault complainant's prior complaint without a prerequisite of freshness or voluntariness. Without a prerequisite of freshness, the terms "fresh complaint" or "prompt complaint" no longer apply and should be replaced with a more neutral term such as prior complaint or prior statement.¹⁸⁶ There is no doctrinal reason

¹⁸³ See *id.*; see also *People v. Brown*, 883 P.2d 949, 960 (Cal. 1994) (complainant testified to a series of sexual offenses over a period of several years during which she did not disclose the incidents).

¹⁸⁴ See *Fresh Complaint Hearing*, *supra* note 1, Tr. at 5 (testimony of Carol Henderson, Deputy Attorney General, Division of Criminal Justice and the Appellate Bureau).

¹⁸⁵ See *id.* at 51-52 (testimony of Julia L. McClure, Assistant Prosecutor, Middlesex County) (arguing with the Joint Subcommittee about the scope of expert testimony). See generally Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 693-94 (explaining the controversy over where to draw the line to delineate the appropriate uses and scope of expert testimony); Patrick A. Frazier & Eugene Borgida, *Rape Trauma Syndrome: A Review of Case Law and Psychological Research*, 16 LAW & HUM. BEHAV. 293, 293 (1992) (noting that courts remain divided on the admissibility of expert testimony); Serrato, *supra* note 100, at 156-57 (explaining expert testimony can both help and hinder child sexual abuse prosecutions).

¹⁸⁶ The Supreme Court of California uses the term "extrajudicial-complaint evidence." *Brown*, 883 P.2d at 959.

for the freshness or voluntariness of a prior complaint to be a prerequisite for admissibility, and there are affirmative reasons to eliminate these requirements.¹⁸⁷ Eliminating the freshness requirement is essential to eradicating the myth-reinforcing effects of the fresh complaint rule because it ensures that the veracity of the complainant would no longer be correlated to freshness and it diminishes the appearance that the law accepts the truth of the timing myth.¹⁸⁸

Although admission of delayed complaints may be harmful to the prosecution because of the timing myth, the decision whether to use the evidence should be made by the prosecutor on a case by case basis. In some cases admission of a delayed complaint may be essential to show both that the complainant was not silent and the circumstances of her complaint. Without the evidence, the jury may be left with an incomplete or erroneous understanding of the victim's behavior.¹⁸⁹ Evidence of prior complaints will be available in every sexual assault case that proceeds to trial because complainants will have necessarily made formal complaints and will likely have made other statements prior to their formal complaints.¹⁹⁰

To further reduce the appearance that the law embraces rape myths and to ensure education of the legal community about the harm done by rape myths, courts should reject the "hue and cry" basis for the rule and adopt the evolving rationale as the basis for the prior complaint rule. In addition to educating the legal community, courts should use the evolving rationale to instruct jurors about the purpose of the prior complaint evidence to ensure that jurors are educated about rape myths and shown that the law rejects rape myths. For example, instead of instructing the jury "that the law recognizes that it is natural for you to assume that a person subjected to unlawful sexual act(s) would complain within a reasonable time,"¹⁹¹ the court should tell the jurors that "the law recognizes that stereotypes about

¹⁸⁷ *Id.*; WIGMORE, *supra* note 5, § 1135, at 302-03 (noting that because the purpose of the evidence is merely to negate the presumption of the complainant's silence, the fact of complaint at any time should be received).

¹⁸⁸ See *supra* notes 99-116 and accompanying text.

¹⁸⁹ *Brown*, 883 P.2d at 958-59.

¹⁹⁰ Although many complainants delay going to the police, one study found that 41% of complainants who eventually reported to the police discussed the rape with someone else first. GREENBERG & RUBACK, *supra* note 99, at 138-40. In that study of rape victims in Atlanta, 92% of victims who did not immediately report to the police, but eventually reported, confided in someone else, such as a friend, spouse or family member, first. *Id.* at 140. In another study in Pittsburgh, 78% of victims who eventually reported confided in someone else first. *Id.* at 154; see also Mary Kay Biaggio et al., *Reporting and Seeking Support by Victims of Sexual Offenses*, 17(1/2) J. OFFENDER REHABILITATION 33, 34 (1991) (stating that research indicates from one-half to two-thirds of sexually assaulted adults discuss their experiences with someone else).

¹⁹¹ See N.J. JURY INSTRUCTIONS, *supra* note 94 and accompanying text.

sexual assault and sexual assault complainants may lead some of you to question or focus on whether the complainant made a prior complaint. To ensure that you do not unfairly judge the complainant's credibility because you believe that he/she did not make a prior complaint, the State is permitted to offer evidence that the complainant did make a prior complaint."

In light of the purpose of the prior complaint evidence and its admission before defense impeachment, fairness requires that the evidence continue to be admitted for a narrow credibility purpose and not as substantive evidence that the sexual assault occurred.¹⁹² Although the distinction between substantive and credibility evidence is a difficult one, the rationale for admitting prior consistent statements after impeachment on cross-examination does not exist for prior complaint evidence because at the time of admission of prior complaint evidence, the adverse party has not yet "opened the door."¹⁹³ Moreover, courts should continue to restrict the number of witnesses permitted to testify about prior complaints and should give a limiting instruction that clearly explains the proper use of the evidence.¹⁹⁴ These safeguards should minimize the risk that the jury will rely on the evidence for an improper purpose.¹⁹⁵

Additionally, courts should conduct a rigorous case by case review of fresh complaint evidence for undue prejudice, confusion and repetition.¹⁹⁶ Courts should be especially cautious about the number of witnesses permitted to testify about a complainant's prior statements. In only the exceptional case will more than one witness be necessary. To ensure fairness to the defense, the complainant should be available for cross-examination on prior statements.

The modified rule is not a perfect solution. It continues some of the negative aspects of the fresh complaint rule, such as the treatment of the testimony of sexual assault complainants as inherently suspect. Nevertheless, it is an appropriate interim rule that helps restore the credibility of sexual assault complainants while moving toward elimination of the rule by educating judges, attorneys and jurors about rape myths.

¹⁹² See *Brown*, 883 P.2d at 959.

¹⁹³ See FED. R. EVID. 801(d)(1)(A) advisory committee's note.

¹⁹⁴ For an example of such an instruction, see *supra* note 95 and accompanying text.

¹⁹⁵ See *Brown*, 883 P.2d at 959.

¹⁹⁶ *Id.*

VI. CONCLUSION

The prevalence and power of rape myths in sexual assault trials make sexual assault unique among crimes. Its victims have historically suffered from unfair judgment and distrust, resulting in widespread hesitance to report the crime. A special rule that restores the credibility of sexual assault complainants is not only practical and analytically justifiable, but also necessary. The modified prior complaint rule will help sexual assault complainants as it educates jurors, judges and attorneys about the power and prevalence of rape myths with the ultimate goal of abrogation of the rule. When society becomes educated about the danger and falsity of rape myths, the rule will no longer be necessary. Abrogation of the fresh complaint rule before then, however, would ignore the reality that sexual assault complainants face unique societal obstacles that impede just adjudication of their cases. Until the credibility of sexual assault complainants is judged fairly and without bias, complete abrogation of a rule that serves a distinct and necessary purpose in sexual assault litigation is premature.'

