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THE THEORY OF "UNCONSCIOUS TRANSFERENCE": THE LATEST THREAT TO THE SHIELD LAWS PROTECTING THE PRIVACY OF VICTIMS OF SEX OFFENSES

FRANCIS A. GILLIGAN,* EDWARD J. IMWINKELRIED** and ELIZABETH F. LOFTUS***

We can all recall situations where we remembered having seen an individual at, for example, a cocktail party, only to subsequently discover that he was never there and that what we had remembered was an earlier party at which the individual was present. This is an example of the commonly encountered phenomenon of "unconscious transference."

—Professor Lawrence Taylor¹

There are unfortunately numerous, well-documented examples of misidentification by percipient witnesses in criminal cases.² In many cases, the misidentification led to a wrongful conviction.³ In the words of a distinguished jurist, Judge Carl McGowan, "[T]he vagaries of . . . identification [have] been thought by many experts to present . . . the greatest threat to the achievement of our ideal that no innocent man shall be punished."⁴ The United States Supreme Court has asserted that "the annals of criminal law are rife with instances of mistaken identification," causing a "high incidence of miscarriage of justice."⁵ In mid-1996, the Justice Department furnished new evidence to support

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¹ LAWRENCE TAYLOR, EYEWITNESS IDENTIFICATION § 2-4.3, at 39 (1982).
³ See id. at 1082; see generally Eugene B. Block, The Vindications (1963); Edwin M. Borghard, Convicting the Innocent (1952); Hon. Jerome Frank & Barbara Frank, Not Guilty (1957); Erle S. Gardner, The Court of Last Resort (1952); A.C. Ronald Huff et al., Convicted but Innocent: Wrongful Conviction and Public Policy (1988); Edward J. Imwinkelried et al., Courtroom Criminal Evidence § 2801, 927–28 (2d ed. 1993); Edward D. Radin, The Innocents (1964).
⁴ See Levine & Tapp, supra note 2, at 1081 n.11.
the Court's assertion. In June of that year, the Department's National Institute of Justice released *Convicted by Juries, Exonerated by Science*—case studies of twenty-eight accused individuals, many of whom were initially convicted on the basis of inaccurate eyewitness testimony but who were later exonerated by DNA testing.6

At one time, it was assumed that deliberate perjury by witnesses was the most common cause of inaccurate courtroom testimony.7 Today, however, the prevailing view is that deliberate insincerity by witnesses plays a minor role in causing testimonial error.8 In truth, perjury appears to be relatively rare.9 As the late Dean Mason Ladd remarked, "[W]itneses are more often . . . mistaken than committing perjury."10 In general, most testimonial errors are unintentional.11

In particular, many testimonial errors are caused by misrecollection, errors in the witness's memory process.12 A person's memory is "one of [his or her] most fallible instruments."13 Some claim that honest errors in memory are "the most important source of testimonial conflict" at trial.14

In several recent criminal cases, the defense counsel have argued that the star prosecution witnesses committed a specific type of memory error, namely, "unconscious transference."15 Some of the cases fit a common pattern. In each case, the accused was charged with a sex offense. Each accused denied guilt. The accused did not allege that the complainant was committing perjury. Rather, the accused's position was that the complainant was mistaken. Each accused conceded that he had some contact with the complainant. However, in each case, the accused proffered evidence that the complainant had a sexual

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9 See id.
10 Mason Ladd, The Hearsay We Admit, 5 Okla. L. Rev. 271, 286 (1952).
12 See Imwinkelried, supra note 7, at 224-28.
13 See Kubie, supra note 8, at 60.
encounter with a third party and argued that in her mind, the complainant had confused the accused and the real perpetrator. *United States v. Gober* is a case in point. In *Gober*, the accused stood charged with committing an indecent act upon a child. The accused was the child's stepfather. The defense proffered an expert who opined that although the complainant perhaps correctly recollected that she had been subjected to sexual abuse, she was erroneously transferring the detail of the accused's identity to that recollection. As a basis for the opinion, the expert described the child's earlier alleged sexual abuse by her biological father.

These cases raise several significant evidentiary issues. One issue is the admissibility of purportedly scientific testimony about the psychological phenomenon of "unconscious transference." Even without the benefit of expert testimony, in closing argument an attorney may call the jurors' attention to matters of common knowledge. Thus, a defense attorney might refer to the common experience mentioned by Professor Taylor—mistakenly thinking that an acquaintance was at an event because at the event, the witness noticed someone similar in appearance to the acquaintance. However, in some of the recent cases, the defense counsel have not been content to invoke everyday experience to support their argument. Instead, they have proffered expert testimony about a general scientific theory of "unconscious transference." Does that testimony pass muster under the standards governing the admissibility of scientific evidence?

Those standards are not the only potential barrier to the introduction of defense testimony about "unconscious transference." As previously stated, in a number of cases, to support its position, the defense has endeavored to introduce testimony about the complainant's sexual encounters with third parties. In many jurisdictions, the introduction of that type of evidence would fly in the face of the rape shield statutes protecting the privacy of victims of sexual offenses.
Those statutes severely restrict the defense's ability to introduce evidence of the victim's sexual history. Does the defense have a viable argument for surmounting such statutes? For the most part, the rape shield laws have weathered the constitutional attacks mounted by the defense bar.\textsuperscript{27} However, in rare cases, the courts have ruled that exculpatory defense testimony had such compelling probative value that it trumped a statutory or common-law exclusionary rule of evidence.\textsuperscript{28} Is this new threat, testimony about "unconscious transference," one of the exceptional types of exculpatory evidence which can override a rape shield law? A constitutional case can be constructed to mandate the admission of unconscious transference evidence. In one laboratory experiment, transference subjects—subjects with prior exposure to an innocent person—proved to be three times more likely than control subjects to misidentify the innocent person as the perpetrator.\textsuperscript{29}

The first section of this article describes the state of the psychological research into the phenomenon of "unconscious transference." This section points out that it is critical to differentiate among three different concepts: the narrow psychological theory of unconscious transference, the broader umbrella of source monitoring errors and the clinical notion of transference.

In that light, the second section addresses the question of whether testimony about the narrow phenomenon of unconscious transference satisfies the contemporary tests for the admissibility of scientific evidence. This section initially demonstrates that the testimony is arguably objectionable under the empirical validation standard announced in the Supreme Court's 1993 \textit{Daubert} decision.\textsuperscript{30} However, the section also explains why the testimony might prove admissible in a jurisdiction committed to the traditional, general acceptance test.

The third section shifts to the broader theory of source monitoring errors. This sort of expert testimony can sometimes collide with the rape shield laws. This section examines the question of whether, given the state of the scientific research, testimony about source monitoring errors has such powerful probative worth that the rape shield statutes must yield. After surveying the jurisprudence defining the


\textsuperscript{29} See David J. Ross et al., \textit{Unconscious Transference and Lineup Identification: Toward a Memory Blending Approach}, in \textit{Adult Eyewitness Testimony: Current Trends and Developments} 80, 96 (David F. Ross et al. eds., 1994).

quantum of probative value needed to trigger the accused's implied Sixth Amendment right to present exculpatory evidence, this section finds that, in most cases, the source monitoring error theory will fall short. Further research might well change the scientific record; but given the current record, the article concludes that the rape shield laws will ordinarily bar the admission of an opinion about a source monitoring error when the opinion is explicitly based on the victim's sexual history.

I. A Description of the Unconscious Transference Theory

A. The Theory Proper

In Section II, we shall critically evaluate the research data supporting the unconscious transference theory. However, the limited purpose of this section is to describe—rather than critique—the theory. The paradigm of the theory is the classic case of the ticket agent. The agent worked at a railroad station. He was the victim of an armed robbery. After the crime, the agent attended a lineup arranged by the police. At the lineup, the agent picked out a sailor as the robber. However, further police investigation revealed that the sailor had an ironclad alibi. An investigator later asked the agent why he had picked the sailor out of the lineup. The agent responded that the sailor's "face looked familiar." It turned out that on three prior occasions, the agent had sold the sailor train tickets.

To explain the misidentification by the ticket agent, Glanville Williams coined the expression "unconscious transference." The theory posits that the agent's recollection of the sailor as the robber was an erroneous composite memory. In his memory, the agent had confused or mixed the recollections of his encounters with the sailor and the robber. For some reason, although the agent correctly recalled the fact of the robbery event, he had a weak memory of the

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51 See infra notes 141-62 and accompanying text.
52 See MARSHALL HOUTS, FROM EVIDENCE TO PROOF 18 (1956); PATRICE M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 119-20 (1965); Ross et al., supra note 29, at 80.
53 See HOUTS, supra note 32, at 119.
54 See id.
55 See id.
57 See Ross et al., supra note 29, at 93, 96.
robb... appearance. Perhaps during the robbery the agent had selectively 39 focused his attention on the robber's gun 40 and neglected to concentrate 41 on the robber's face. At the lineup, the agent felt social pressure to make an identification. After all, why would the police ask the agent to attend the lineup unless they had good reason to believe that the lineup included the robber? The sailor and robber were presumably somewhat similar in appearance, and the agent filled in 42 his memory of the robbery by borrowing the detail of the sailor's identity. 43 The event of the robbery and his encounters with the sailor became an undifferentiated whole in the agent's mind. 44 When the agent attempted to recall the robbery, he visualized the sailor's face.

As Section II will underscore, even the adherents to the theory of unconscious transference disagree over the fundamental cause of the phenomenon. 45 However, most adherents to the theory agree that a concurrence of certain conditions maximizes the probability that transference will occur.

To begin with, the witness must have a relatively weak memory of a detail of the event he or she is attempting to recall. 46 In effect, there is a gap 47 or hole 48 in the witness's memory of the event. That gap makes the witness's memory susceptible to confabulation. 49 Confabulation consists of filling in the gap. 50 There are several possible causes for the weakness of a memory; at the time of the event, 51 the witness might have had a limited opportunity for observation, or post-event, the memory might decay 52 with the passage of time. 53 However, it is important to remember that the unconscious transference theory does not posit that the witness's recollection of the

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40 See id. § 2.15, 51-52.
41 See id.
42 See Levine & Tapp, supra note 2, at 1093.
43 See McGough, supra note 38, at 38.
44 See Taylor, supra note 1, § 2-4.3, at 39.
45 See, e.g., Ross et al., supra note 29, at 86.
46 See id. at 84-85.
47 See McGough, supra note 38, at 34.
50 See McGough, supra note 38, at 35-36.
51 See Cole & Loftus, supra note 49, at 206; see also Levine & Tapp, supra note 2, at 1088 ("fleeting glimpse").
52 See Yarmey, supra note 11, at 61.
53 See Loftus & Doyle, supra note 39, § 3.07, at 81; Taylor, supra note 1, § 3.2, at 50-51;
litigated event is generally poor; rather, the hypothesis is that the witness has a weak memory of a certain detail such as the perpetrator's identity. Research indicates that during stressful events, a person's attention focuses or narrows. A person tends to fixate on aspects of the event which are important or salient to that person, selectively concentrating on those central aspects and neglecting peripheral details. In a life-threatening event such as a robbery, the victim might focus on the robber's weapon and possible means of escape. So engrossed, the victim-witness might pay less attention to the robber's face.

If the phenomenon of unconscious transference is to occur, there must not only be a gap in the witness's memory of the event, there must also be a detail from another event with which to fill the gap. In the ticket agent case, the later police investigation revealed that the agent had encountered the sailor on three prior occasions. The agent's memory of the sailor's face was strong enough "to support subsequent retrieval" when the agent saw the sailor in the lineup. According to the unconscious transference theory, if the agent's memory of the sailor was too weak, the agent would not have recalled the sailor's appearance when the agent tried to identify the robber. Even a witness's weak memory of the perpetrator's identity and solid memory of encounters with the sailor do not suffice to trigger unconscious transference. The theory suggests that the risk of transference is greatest when a third factor is present, namely, the witness's

Cole & Loftus, supra note 49, at 191, 196; Levine & Tapp, supra note 2, at 1100-01 (curve of forgetting).

54 See Cole & Loftus, supra note 49, at 206.
55 See id.
56 See Loftus & Doyle, supra note 39, § 2.14, at 50.
57 See id.
58 See Cole & Loftus, supra note 49, at 196; Yarmey, supra note 11, at 79.
59 See Yarmey, supra note 11, at 58.
60 See Cole & Loftus, supra note 49, at 196; Perry & Wrightsman, supra note 48, at 129.
62 See Loftus & Doyle, supra note 39, § 2.15, at 51.
63 See Levine & Tapp, supra note 2, at 1096.
64 See id.; Cole & Loftus, supra note 49, at 200.
65 See Ross et al., supra note 29, at 80.
66 See id. at 84.
67 See id.
68 See id. It would be an overstatement to describe this factor as a "condition." In at least one case, transference seemingly occurred when the victim knew the accused well. Rene Lynch & Dexter Filkins, Green's Ex-Wife Insists He Beat Her; But Dianna D'Aiello Concedes She Can't Be Sure He Caused the Death of Her Unborn Baby. She Says She Is 'In Shock' Over His Vindication, L.A. Times, June 26, 1996, at A1; Judge Apologizes, Ends '16-Year Nightmare,' Man Wrongly Convicted
memory of the sailor is neither too weak nor too strong. The proponents of unconscious transference use various terms to describe the degree of acquaintance with the innocent person, such as the sailor, that is the ideal condition for transference: limited, moderate, or passing familiarity. If the witness has had a lengthy exposure to the innocent person, the witness probably knows the innocent person too well for transference to occur. In that event, the witness would usually remember the original context of his or her encounter with the innocent person, and there would likely be no misidentification; the witness would remember the innocent person too well and eliminate him as the perpetrator. The witness is unlikely to succumb to unconscious transference when the witness had an extended, direct interaction with the innocent person. Consider, for example, the patent unfairness of a lineup which included only the suspect and three people whom the witness already knew well from weekly church attendance.

The fourth and final factor enhancing the risk of transference is a similarity between events—the event the witness supposedly confuses with the legally relevant event the witness is attempting to recall. A basic "similarity of occasions" is said to be a prerequisite for transference. When two incidents are physically similar and close in point of time, the similarity can operate as a retrieval cue. Likewise, if two persons resemble each other, the witness might confuse the two.

See Ross et al., supra note 29, at 84.
See WALL, supra note 32, at 121.
See Ross et al., supra note 29, at 85.
See id. at 80.
See Ross et al., supra note 32, at 119-20.
See WALL, supra note 29, at 84, 99.
See WALL, supra note 32, at 121.
See Ross et al., supra note 29, at 85.
See id.
See id. at 87, 99; McGOUGH, supra note 38, at 37.
See TAYLOR, supra note 1, § 2-4.3, at 39.
See Ross et al., supra note 29, at 97.
See id. at 87.
See id. at 93.
See id. at 88.
See YARMEY, supra note 11, at 58.
See McGOUGH, supra note 38, at 35.
One school of psychologists believes that people cluster similar memories by storing them in groups. If the stimuli are similar, as when two persons share several physical attributes, an attempt to recall one person might result in a blending of the two memories. The two memories could be so similar and closely connected that, at the time of attempted retrieval, the witness cannot distinguish between them.

B. The Related Theories of Clinical Transference and Source Monitoring Errors

While the previous section explains one sense of "unconscious transference," the term "transference" also crops up in literature on psychoanalytic therapy. In this context, the term denotes the process by which the patient sometimes transfers his or her feelings toward a third party to the mental health professional. Suppose that the patient harbored feelings of anger toward a particular individual. The anger causes behavioral problems which impel the patient to seek therapy. In the course of therapy, the patient occasionally transfers the feeling of anger or hostility to the therapist. This sense of "transference" differs radically from the theory described in the previous section. Although the defense is ordinarily the proponent of evidence of unconscious transference, the prosecution is more likely to attempt to introduce evidence about transference in the clinical sense. Thus, if the accused is charged with an offense against the therapist, the prose-
cution might offer evidence of clinical transference in order to establish a motive for the crime.

The defense, however, would be more likely to offer evidence about a third concept, source monitoring errors. Under the unconscious transference theory proper, the defense might concede that the prosecution witness is correct in testifying that at a particular time and place, he or she was victimized. However, the defense would argue that the victim has a weak memory of the perpetrator's identity, that the victim is passingly familiar with the accused and that the victim is unconsciously transferring a memory of the accused's identity to the recollection of the offense. In effect, the victim is inserting a memory of the accused's face into a recollection of the victimization. Suppose that the defense admits that the victim had contact with the accused at the time and place specified in the pleading. The defense contends, however, that the contact was licit and innocent. The defense argues that the victim had confused his or her contact with the accused with an illicit encounter with a third party. In this situation, the defense sometimes uses the expression, "unconscious transference." However, in these situations it would be more accurate to use the terminology "source monitoring error." That concept is the broader, umbrella notion that a person may err in identifying the real source of a part of a purported memory. The unconscious transference theory relates to a particular type of source monitoring error, and proponents of the theory claim that an error is especially likely when the four ideal conditions for transference occur.

As discussed in Section II, there has been little empirical research into the narrow theory of unconscious transference. In contrast, there is a good deal of literature on the umbrella concept of source monitoring errors. In particular, it is well documented that a source monitoring error can be triggered by external suggestions. There is a mild, implicit suggestion whenever the police invite a crime victim or eyewitness to a corporeal or photographic lineup. Again, why would the police bother to do so unless they believed that the lineup included the perpetrator? Any suggestion, explicit or implicit, from an external source brings social pressure to bear on the witness. The pressure can

95 See generally Marcia K. Johnson et al., Source Monitoring, 114 PSYCHOL. BULL. 3 (July 1993).
96 See id. (collecting published literature).
97 See Levine & Tapp, supra note 2, at 1087.
98 See Ross et al., supra note 29, at 85, 98.
99 See Maria S. Zaragoza, Memory, Suggestibility, and Eyewitness Testimony in Children and Adults, in CHILDREN'S EYEWITNESS MEMORY 53, 56, 61 (Stephen J. Ceci et al. eds., 1987).
be enormous\textsuperscript{100} when the external suggestive source is a credible\textsuperscript{101} authority figure such as a police officer.\textsuperscript{102}

II. APPLICATION OF THE STANDARDS FOR ADMITTING SCIENTIFIC EVIDENCE TO THE UNCONSCIOUS TRANSFERENCE THEORY PROPER

There are two situations in which the defense might invoke the unconscious transference theory. In the first situation, the victim testifies that at the place and time specified in the accusatory pleading, the accused attacked him or her. The defense asserts an alibi and claims that even if the victim was attacked, the accused was not the attacker; the accused was elsewhere at the time of the assault. The defense appeals to the unconscious transference theory to explain away the victim's identification of the accused; the defense contends that the victim's testimony is a composite memory, blending the general recollection of the attack with a memory of the accused's face—a face the victim is familiar with due to other, innocent contacts. To support its contention, the defense offers expert testimony about unconscious transference. Is the testimony admissible? To be admissible either at common law or under the Federal Rules, the testimony must be "relevant" in three respects.

A. "Facial" Logical Relevance Under Federal Rule of Evidence 401

Federal Rule of Evidence 402 states: "Evidence which is not relevant is not admissible."\textsuperscript{103} In turn, Rule 401 defines "relevance" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."\textsuperscript{104} This species of relevance is sometimes termed "facial" relevance.\textsuperscript{105} To determine whether an item of evidence satisfies Rule 401, the judge considers the terms of the proponent's proffer of evidence—the "face" of the proffered evidence—and decides whether the evidence is relevant under Rule 401. The judge takes the proffer at face value and considers what the proponent claims the evidence to be; the judge then decides

\textsuperscript{100} See Levine & Tapp, supra note 2, at 1110.
\textsuperscript{101} See Zaragoza, supra note 99, at 51.
\textsuperscript{102} See Levine & Tapp, supra note 2, at 1109, 1113.
\textsuperscript{103} Fed. R. Evid. 402.
\textsuperscript{104} Fed. R. Evid. 401.
whether, given that claim, the item of evidence is relevant to the material facts. 

Testimony about a possible unconscious transference by the alleged victim certainly possesses facial logical relevance. On the one hand, the testimony is not directly relevant to the historical merits of the case; the expert is not claiming to have either witnessed the alleged assault or seen the accused elsewhere at the time of the assault. Nor does the testimony tend to prove that the victim is committing perjury.

On the other hand, the testimony is pertinent to the quality of the witness’s memory. The witness’s credibility is one of the facts of consequence at issue in the case. It is well-settled that the opponent may impeach a witness’s credibility by establishing a deficiency in an element of his or her competency. One of those elements is the witness’s memory. Testimony need not be relevant, much less directly relevant, to the historical merits of a case to satisfy Rule 401 and be presumptively admissible. Hence, the trial judge would be obliged to overrule a facial logical relevance objection to defense expert testimony about unconscious transference.

B. "Underlying" Logical Relevance Under Frye and Daubert

The facial logical relevance of an item of evidence does not guarantee its admissibility. Anglo-American evidence law “is imbued with a spirit of skepticism.” The proffered evidence might be facially relevant, but evidence law refuses to accept evidence at face value. The proponent must not only persuade the judge that the item is relevant under Rule 401 if the item is what it is claimed to be (facial relevance), the proponent must also prove that the item of evidence is what the proponent claims it to be (underlying relevance). The requirement for proof of underlying logical relevance is a means of ensuring the reliability of the evidence.

In a broad sense, the requirement applies to proffered scientific testimony. Federal Rule of Evidence 901 codifies the requirement. Subdivision 901(b)(9) mandates a showing of underlying relevance when the proponent offers “[e]vidence describing a process or system

106 See id.
107 See IMWINKELRIED ET AL., supra note 3, § 304, at 75.
108 See id. § 710, at 198.
109 See id.
110 See CARLSON ET AL., supra note 105, at 203.
111 See id.
112 See id. at 203-04.
113 See id. at 204, 207.
used to produce a result."\textsuperscript{114} The Advisory Committee Note makes it clear that the statutory language of the subdivision contemplates scientific processes or systems; as examples of the intended scope of the subdivision, the Note cites x-rays and computers.\textsuperscript{115} The text of the subdivision requires that the proponent make a "showing that the process or system produces an accurate result."\textsuperscript{116}

Modernly, the courts are divided over the precise content of the showing necessary to establish the reliability of proffered scientific evidence. In federal court, the controlling precedent is the Supreme Court's 1993 decision in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\textsuperscript{117} In that decision, the Court announced that Federal Rule of Evidence 702 governs the question of whether a particular scientific theory or technique may serve as a basis for expert opinion testimony.\textsuperscript{118} Rule 702 refers to "scientific . . . knowledge."\textsuperscript{119} In the majority opinion in \textit{Daubert}, Justice Blackmun opted for a methodological definition of "scientific knowledge."\textsuperscript{120} The Justice defined science as a methodology—the procedure of formulating hypotheses about phenomena and then engaging in experimentation and observation to falsify or validate the hypotheses. The extent and quality of the empirical validation of the hypotheses control the trial judge's decision as to whether the proffered expert testimony qualifies as admissible scientific knowledge.

Although the showing of the underlying relevance of purportedly scientific testimony must take the form of proof of empirical validation in federal court, in the courts of twenty-two states the content of the requisite showing differs. Those jurisdictions still subscribe to the traditional \textit{Frye} test.\textsuperscript{121} The United States Court of Appeals for the District of Columbia decided \textit{Frye v. United States} in 1923.\textsuperscript{122} The \textit{Frye} court held that the proponent must demonstrate that the underlying scientific theory or technique has "gained general acceptance in the particular field in which it belongs."\textsuperscript{123} Under \textit{Frye}, the proponent must establish

\begin{itemize}
\item \textsuperscript{114} \textit{Fed. R. Evid.} 901(b)(9).
\item \textsuperscript{115} \textit{Fed. R. Evid.} 901 advisory committee's note.
\item \textsuperscript{116} \textit{Fed. R. Evid.} 901(b)(9).
\item \textsuperscript{117} 509 U.S. 579, 590 (1993).
\item \textsuperscript{118} See generally Edward J. Imwinkelried, \textit{The Daubert Decision: Frye Is Dead, Long Live the Federal Rules of Evidence, 20 Trial, Sept. 1993, at 60.}
\item \textsuperscript{119} \textit{Fed. R. Evid.} 702.
\item \textsuperscript{120} \textit{Daubert}, 509 U.S. at 590.
\item \textsuperscript{121} See Joseph R. Meaney, \textit{From Frye to Daubert: Is a Pattern Unfolding?}, \textit{35 Jurimetrics J.} 191, 193 (1995) (22 states remain committed to \textit{Frye} test).
\item \textsuperscript{122} 293 F. 1013, 1014 (D.C. Cir. 1923).
\item \textsuperscript{123} Id.
that as a matter of historical fact, the theory has attained a certain
degree of popularity and acceptance in the pertinent specialty field.\textsuperscript{124}

1. Admissibility in \textit{Frye} Jurisdictions

The proponent of the unconscious transference theory could be
either the prosecutor or the accused. However, the theory is rarely
utilized by the prosecution.\textsuperscript{125} Assume, for instance, that the defense
calls an alibi witness. The witness testifies that at the time of the crime,
she saw the accused far from the crime scene. The prosecutor could
conceivably invoke the unconscious transference theory to attack the
alibi testimony. A government psychologist might opine that the wit-
tness is passingly familiar with the accused and confused the accused
with the person the witness actually saw at the time of the offense.
However, in all the published opinions dealing with transference, the
defense has been the proponent of the evidence of transference. Sup-
pose that a prosecutor objects to the admission of testimony about the
unconscious transference theory on the ground that the theory does
not qualify under \textit{Frye}. It is arguable that the trial judge should over-
rule the objection.

The defense attorney would initially argue that the theory satisfies
\textit{Frye} because the theory enjoys the necessary degree of popularity in
psychological circles. Admittedly, in a recent unconscious transference
case, the Kentucky Supreme Court remarked that "the defense did not
establish that . . . transference was a condition generally recognized in
the medical or scientific community."\textsuperscript{126} Although the defense did not

\textsuperscript{124} See \textsc{Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence} § 1-5(B)(2), at 15–16 (2d ed. 1993).

\textsuperscript{125} See \textit{State v. Banes}, No. 94-CF-185 (Winnebago County, Wis. Mar. 31, 1995) (unpublished opinion) (interview with prosecuting attorney by Imwinkelried providing all information not provided by Loftus). In \textit{Banes}, Professor Loftus testified on behalf of the prosecution. \textit{Id.} According to Loftus, in that case, the accused was charged with murdering his wife. \textit{Id.} She drove a car with the vanity license plate "HB2ME" (Happy Birthday to Me). \textit{See id.} When the wife was discovered missing, the media broadcast her license plate. \textit{See id.} Several defense witnesses testified that they saw a woman driving a car with that license plate on dates after the accused had allegedly murdered his wife. \textit{See id.} Dr. Loftus explained to the jury that having been exposed to the media broadcast of the license number, the witnesses could have unconsciously confused that number with the license of the vehicles they had seen. \textit{Id.} In a Colorado trial, the prosecution had occasion to proffer expert psychological testimony that "it was quite plausible that a victim of a violent crime that got a good look at one attacker's face, but not the second attacker's face, would later be able to make a clear identification of the first attacker, but would interchange his role with that of the second attacker." \textit{See} \textsc{Loftus & Doyle, supra} note 39, § 4.10, at 100–01; \textit{see also State v. Davis}, 666 N.E.2d 1099, 1106–07 (Ohio 1996); \textsc{Imwinkelried et al., supra} note 3, § 2816, at 945 n.104.

\textsuperscript{126} \textsc{Mack v. Commonwealth}, 860 S.W.2d 275, 278 (Ky. 1993).
make the required showing in that case, there are indications that the showing can be made. In one survey of psychological experts, 84.5% responded that testimony about the transference phenomenon is sufficiently reliable to be admissible in court.\textsuperscript{127} To qualify under \textit{Frye}, a theory need not have attained universal or unanimous support in the specialty field.\textsuperscript{128} It suffices if a clear majority of the members of the pertinent specialty subscribe to the theory.\textsuperscript{129}

Alternatively, the defense attorney can argue that this species of expert testimony is exempt from the requirement of a showing of general acceptance. Over the years, the California Supreme Court has been one of the most vocal proponents of the \textit{Frye} standard.\textsuperscript{130} Even after the United States Supreme Court handed down its decision in \textit{Daubert}, the California Supreme Court affirmed its adherence to \textit{Frye}.\textsuperscript{131} Yet the same court had carved out a large exception from the scope of the \textit{Frye} rule for "soft" scientific evidence—testimony which does not rely on instrumental analysis and "hard," quantitative interpretive standards.\textsuperscript{132} In doing so, the court reasoned that the rationale for the \textit{Frye} rule is inapplicable to "soft" scientific evidence. The court asserted that the rationale applies only to purportedly scientific testimony "produced by a machine"—the proverbial Black Box.\textsuperscript{133} In a case involving psychological testimony about the unreliability of eyewitness testimony, the court noted that psychologists employ "no such [instrumental] methods."\textsuperscript{134} In the court's judgment, it is safe to exempt such testimony from \textit{Frye} because there is less risk that the jurors will "ascribe an inordinately high degree of certainty to" the testimony.\textsuperscript{135} Many courts have followed California's lead in exempting psychological testimony from the \textit{Frye} rule.\textsuperscript{136} The author of the most comprehensive study of this issue has proclaimed that the exemption is "[t]he majority view" in \textit{Frye} states.\textsuperscript{137} Testimony about unconscious transference would probably fall within the ambit of the exemption.

\textsuperscript{127} \textit{See} Ross et al., \textit{supra} note 29, at 97 ("in a recent survey . . . approximately 84.5 percent of a sample of experts in the psycholegal field indicated that there was sufficient evidence to testify in court as to the reliability of the unconscious transference phenomenon").

\textsuperscript{128} \textit{See} Giannelli & Imwinkelried, \textit{supra} note 124, § 1–5(B)(2), at 15.

\textsuperscript{129} \textit{See id.} § 1–5(B)(2), at 16.

\textsuperscript{130} \textit{See, e.g.,} People v. Kelly, 549 P.2d 1240, 1244–45 (Cal. 1976).

\textsuperscript{131} People v. Leahy, 882 P.2d 321, 327 (Cal. 1994).

\textsuperscript{132} People v. McDonald, 690 P.2d 700, 723–24 (Cal. 1984).

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.} at 724.

\textsuperscript{135} \textit{Id.}


\textsuperscript{137} \textit{See} Roger S. Hanson, \textit{James Alphonzo Frye Is Sixty-Five Years Old; Should He Retire?}, 16 W.
2. Admissibility in Daubert Jurisdictions

Although testimony about transference would likely be admissible over a Frye objection, its admissibility in a jurisdiction following Daubert is much more problematic.

Under Daubert, there does not appear to be any exemption for "soft" science. In Daubert, Justice Blackmun adopted a broad definition of science—one expansive enough to include "soft" as well as "hard" science. For instance, the lower courts have tended to extend the new validation standard to proposed testimony about syndromes. As discussed previously, the California Supreme Court chose to exempt psychological testimony about eyewitness identification from Frye scrutiny. In contrast, the lower federal courts have ruled that psychological testimony must be subjected to Daubert scrutiny.

Can the unconscious transference theory withstand Daubert scrutiny? Research, including a notable study by Dr. Loftus, has definitely established that suggestion can distort a witness's memory. Suggestion can both supplement and transform a memory. However, the transference theory is quite another matter. Is there adequate empirical validation of that theory? There are some studies tending to verify the theory of unconscious transference. One is a study by Read. That laboratory study compared a group of "transference" subjects with a
group of "control" subjects.\textsuperscript{145} All subjects were asked to identify an assailant from a photographic lineup.\textsuperscript{146} The lineup included an innocent person whose appearance was similar to that of the assailant.\textsuperscript{147} The "transference" subjects had previously been exposed to the innocent person while the "control" subjects had not.\textsuperscript{148} At the photographic lineup, "[t]wenty-five percent of the transference subjects misidentified the [innocent person], as compared with only 12 percent of the control subjects."\textsuperscript{149}

Notwithstanding the impressive results in the Read study, it has been difficult to produce the unconscious transference phenomenon in empirical studies, either laboratory or field. Quantitatively, there have been few studies of transference.\textsuperscript{150} In the words of one commentator, there is "only a handful" of empirical investigations into the phenomenon.\textsuperscript{151} Moreover, there are qualitative concerns about the methodology of some studies; for instance, some lacked a control group.\textsuperscript{152} Further, while a number of studies, such as Read's, point to the validity of the theory, other studies reach a contrary conclusion; "the findings are mixed, providing [only] weak and inconsistent support for the existence of unconscious transference."\textsuperscript{153} The extant research has not resolved the fundamental question of the cause of transference.\textsuperscript{154} Finally, most of the investigations to date have been laboratory studies.\textsuperscript{155} Those studies may lack ecological validity.\textsuperscript{156} Laboratory experiments "do not capture the level of stress or personal involvement experienced by witnesses to real crimes."\textsuperscript{157} We must be cautious in extrapolating from laboratory experiments although the transference phenomenon has seemingly occurred in some notable real world incidents.\textsuperscript{158} A sober, but intellectually honest, assessment

\textsuperscript{145} See Ross et al., supra note 29, at 82.
\textsuperscript{146} See id.
\textsuperscript{147} See id.
\textsuperscript{148} See id.
\textsuperscript{149} See id.
\textsuperscript{150} See Ross et al., supra note 29, at 81–82, 97, 99.
\textsuperscript{151} Id. at 81.
\textsuperscript{152} See id. (study conducted by Dr. Buckhout).
\textsuperscript{153} See id.; see also id. at 85 ("mixed support").
\textsuperscript{154} See id. at 85–86.
\textsuperscript{155} See Ross et al., supra note 29, at 85, 98.
\textsuperscript{156} See id. at 85.
\textsuperscript{157} See id. at 98–99.
\textsuperscript{158} Transference fairly clearly occurred in the Thomson case. See supra note 89. It also seems to have occurred in the Green case. See supra note 68. Transference may have occurred in some of the cases documented in the study done by the National Institute of Justice. See National Inst. of Justice, supra note 6.
would be that there is a great deal more to learn about the phenomenon, especially the factors which maximize the probability of its occurrence. Although we are still far from reaching any definitive conclusions as to the merit of the transference theory. Although the psychological community has launched its study of the theory, at present, we have only the beginning of the empirical research needed to ultimately validate the theory. Thus, based on the current state of the scientific record, transference testimony would be more readily challengeable in a Daubert jurisdiction than in a Frye court.

C. "Legal" Relevance Under Federal Rule of Evidence 403

Even a demonstration of both facial and underlying logical relevance does not impel the trial judge to admit an item of evidence. The opponent can still object on the ground that the item is not "legally" relevant. The term "legal" relevance has been much criticized; the usage, however, persists. The term is used as a shorthand expression to describe the trial judge's discretionary power to exclude logically relevant evidence when she believes that the incidental probative dangers such as prejudice and time consumption outweigh the probative value of the evidence.

Federal Rule of Evidence 403 embodies a version of the "legal" irrelevance doctrine. The rule reads: "Although [logically] relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403 "cut[s] across the entire body of the Rules," applying to virtually all types of

159 See Ross et al., supra note 29, at 99.
160 See id.
161 See id.
162 Based on her work as a memory scientist and her experience as a trial witness in courts following Daubert, Loftus believes that the theory has sufficient empirical support to be admitted over objection. Based on their reading of the published appellate opinions, Gilligan and Imwinkelried believe that the objection is likely to be sustained. In part, the disagreement among the authors reflects the fact that the courts, both trial and appellate, are still struggling to plumb the meaning of Daubert. See generally G. Michael Fenner, The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny, 29 Creigh ton L. Rev. 939 (1996).
163 See Carlson et al., supra note 105, at 312.
164 See id.
165 See id. at 311-12.
166 Fed. R. Evid. 403.
Scientific evidence is no exception. Indeed, the Daubert Court indicated that Rule 403 is especially applicable to scientific testimony. The Court approvingly quoted District Court Judge Jack Weinstein's assertion that the trial judge is entitled to "exercise[] more control over experts than over lay witnesses" because expert evidence can be "both powerful and quite misleading."

Of course, Rule 403 does not allow the trial judge to indiscriminately exclude probative evidence. On its face, Rule 403 does not even state that the proponent of an item of evidence has the burden of persuading the judge that the probative value of the evidence outstrips any attendant probative risks. The rule is biased in favor of the admission of logically relevant evidence. The chair of the drafting committee, Albert Jenner, testified in Congress that "the overall philosophy and thrust" of the rule is to "place [the burden] upon he who seeks the exclusion of relevant evidence." Once the proponent of an item of evidence demonstrates its logical relevance, Rule 403 assigns the opponent the burden of convincing the trial judge that the incidental probative dangers substantially outweigh the probative worth of the evidence.

Despite its bias in favor of admissibility, Rule 403 is often invoked to exclude logically relevant evidence. Courts are most inclined to do so when the probative value of the evidence in question is marginal or weak. In gauging the probative value of an item of evidence, the trial judge considers numerous factors, including the facial definiteness of the testimony. That factor has often played a role in judicial decisions to exclude expert testimony. In particular, there are numer-

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168 But see Fed. R. Evid. 609(a)(2). Convictions falling within that narrow provision are exempt from balancing under Rule 403. See Imwinkelried et al., supra note 3, § 708, at 193–95.
169 See Gianelli & Imwinkelried, supra note 124, § 1–6(B), at 28.
170 Daubert, 509 U.S. at 594.
174 See Imwinkelried, supra note 172, § 8:28, ch. 8, at 57–58.
175 See id. § 8:27.
176 See id.
ous cases invoking Rule 403 "to exclude [expert] opinions which fall short of expressing a probability or certainty." 178

If those cases are a benchmark, testimony about unconscious transference is vulnerable to a Rule 403 objection. Assume that a case includes all the factors maximizing the probability of unconscious transference: a weak memory of the detail of the litigated event, a memory of a similar detail from another event and a merely passing familiarity with the detail in the second event. Even on that favorable set of assumptions, the most that the expert can truthfully say is that an unconscious transference "may have taken place." 179 In many cases, an investigator can verify whether there was a suggestive influence on a witness. 180 The witness might recall being asked a question phrased in a particular fashion, or a third party might have overheard a statement made to the witness. In contrast, by its very nature, unconscious transference defies that type of verification. 181 At most, the expert can offer the jury educated speculation. 182 None of the available transference studies would permit the expert to testify that transference "certainly" or even "probably" occurred. An honest expert would have to couch his or her opinions to include such terms as "could," "might," or "possibly." The trial judge might well decide that the opinion possesses such minimal probative value that it does not warrant the time needed to call the expert and allow the expert to educate the jury on as debatable a theory as transference. In short, even if the proponent of transference testimony defeats a \textit{Frye} or \textit{Daubert} objection, a Rule 403 objection might be sustained.

The operative verb in the above statement, though, is "might." Rule 403 would not invariably bar the admission of testimony about unconscious transference. The rule does not grant either trial or appellate courts authority to formulate general exclusionary rules of evidence; rather, the rule confers on the trial bench a limited discretion to balance in an ad hoc, case-specific manner. 183 To gain an acquittal, an accused need merely raise a reasonable doubt as to guilt.

179 See \textit{Wall. supra} note 32, at 120-21.
180 See \textit{id.} at 120.
181 See \textit{id.}
182 See \textit{id.}
Many judges equate proof beyond a reasonable doubt with a very high probability of guilt, a probability of 85% or higher.\textsuperscript{184} In a given case, the pivotal issue might be the reliability of an eyewitness identification. If all four conditions for transference were present, a judge might find that the probative worth of testimony about transference could suffice to generate a reasonable doubt in the jury’s mind.

As previously stated, under Rule 403 the judge balances the probative worth of the proffered evidence against any incidental probative dangers, such as the risk that the jury will overvalue the evidence. Numerous courts have asserted that lay jurors are inclined to overestimate the probative value of expert testimony.\textsuperscript{185} However, the findings in the empirical studies conducted to date are at odds with that assertion.\textsuperscript{186} After canvassing the studies, two leading commentators concluded that “the image of a spellbound jury mesmerized by . . . a[n] expert is more likely to reflect . . . [judicial] fantasies than the . . . realities of courtroom testimony.”\textsuperscript{187} If so, there is little potential prejudice to countervail against the probative worth of the transference testimony. Consequently, the judge could easily strike the Rule 403 balance in favor of admitting the testimony. Assuming the judge applied the \textit{Frye} test, the testimony might surmount all the evidentiary barriers to admission.

III. THE CONSTITUTIONALITY OF APPLYING RAPE SHIELD LAWS TO EXCLUDE EVIDENCE OF UNCONSCIOUS TRANSFERENCE IN THE SENSE OF A SOURCE MONITORING ERROR

The outset of Section II of this article noted that there are two situations in which the defense might attempt to invoke the transference theory. Section II addressed the first situation in which the accused invokes the transference theory proper and relies on an alibi defense. In that situation, the defense transference theory is that the victim became acquainted with the accused on other, innocent occasions. The defense argues that while the victim’s general memory of a sexual assault at a particular time and place is accurate, the victim has


\textsuperscript{186} See id. at 566–70.

mistakenly integrated into that memory a recollection of the detail of the accused's face. In that situation, the admissibility of transference evidence turns on the logical and legal relevance standards governing expert testimony. As Section II explained, in some circumstances, that evidence would be admissible.

In the second situation, the thrust of the defense differs. In this situation, the accused admits that he or she had contact with the complainant at the specified time and place, but the accused denies committing the alleged actus reus. Again, the defense might appeal to a transference theory. However, in this situation, the defense theory is that on other occasions, the victim had sexual contacts with a third party or parties. The defense argues that while the victim's memory of an encounter with the accused at a particular time and place is accurate, the victim has mistakenly incorporated into that memory a recollection of the nature of the sexual contacts with the third party. As previously stated, on these facts it would be more appropriate to refer to a "source monitoring error." In this fact pattern, to lay the foundation for the expert testimony about a source monitoring error, the defense might attempt to introduce evidence of the complainant's sexual encounters with third parties.

As in the first situation, to justify introducing the expert testimony, the defense must comply with the logical and legal relevance standards set out in Section II. However, here the defense faces an additional hurdle: the exclusionary rules such as rape shield laws, which protect the privacy of crime victims. In the second situation, the defense attorney might invite the expert to explicitly refer to the complainant's sexual encounters with third parties as part of the foundation for the expert testimony. Those encounters supply the detail, the nature of the sexual contact, that the accused claims the complainant is unconsciously transferring to his or her memory of the innocent encounter with the accused. The rub is that in most jurisdictions, the rape shield

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168 See Loftus & Doyle, supra note 99, § 3.05, at 76.
189 See Taylor, supra note 1, § 3-2, at 48.
190 See Johnson et al., supra note 95, at 3.
191 Expert testimony is often presented in syllogistic fashion. See generally Edward J. Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 N.C. L. REV. 1, 2 (1988); Edward J. Imwinkelried, The Educational Significance of the Syllogistic Structure of Expert Testimony, 87 Nw. U. L. Rev. 1148 (1993). The transference theory in effect functions as the expert's major premise. The case-specific information about the complainant's sexual contact with third parties would serve as the minor premise. The expert's conclusion would be the final opinion that, as a result of transference, the complainant has confused his or her contact with the accused and their encounters with the third parties.
law would preclude the defense from proving those sexual contacts with third parties.\textsuperscript{192}

A. The Rape Shield Statutes

At one time, in sex offense prosecutions, American courts routinely admitted evidence of the complainant's other sexual conduct.\textsuperscript{193} The courts permitted the defense to use the evidence as circumstantial proof of the complainant's consent to the sexual conduct alleged in the accusatory pleading.\textsuperscript{194} The defense argued that the conduct evidenced the complainant's promiscuous disposition and that, in turn, that disposition increased the probability that the complainant had voluntarily consented to the sexual encounter with the accused. Evidence of the complainant's sexual history was liberally admissible to prove consent.\textsuperscript{195}

The norm of liberal admissibility faced sharp criticism.\textsuperscript{196} The criticism had two prongs. One prong rested on the legal relevance doctrine: evidence of the complainant's prior sexual history has minimal probative value on the question of whether, on a specific occasion, he or she consented to sexual contact.\textsuperscript{197} A person's willingness to engage in sexual contact with A may give us little or no insight into

\textsuperscript{192}The defense might argue that the rape shield law applies only when the defense offers substantive evidence that the alleged victim has engaged in other sexual conduct. The defense could contend that the law is inapplicable when the defense offers the evidence on another theory for the limited purpose of establishing the basis for an expert's opinion. Concededly, the text of the statute lends some plausibility to this contention. For example, Federal Rule of Evidence 412(a)(1) bars "evidence offered to prove any alleged victim engaged in other sexual behavior." Id. (emphasis added). That construction of the statute, however, would be illiberal; it would frustrate the policy inspiring the statute. As we shall see in the following subsection, the statute is intended to prevent unwarranted "public intrusion" into the victim's privacy. See 124 Conc. Rec. H34,912 (1978). A public intrusion would occur whether the defense explicitly mentioned the victim's sexual history to prove certain conduct on the victim's part or to lay the foundation for an opinion about a source monitoring error. Although the defense counsel might attempt to characterize the latter use of the evidence as a "limited" purpose, the nature of the use would not limit the intrusion into the victim's privacy.


\textsuperscript{194}See Carlson et al., supra note 105, at 465–66.

\textsuperscript{195}See id.


\textsuperscript{197}See, e.g., Doe v. United States, 666 F.2d 43, 47 (4th Cir. 1981).
the question of whether they would be willing to engage in similar conduct with B.198

The second prong was based on extrinsic social policy: the liberal admissibility of a complainant's sexual history frustrates the public interest in the enforcement of penal statutes criminalizing sexual misconduct. Sexual conduct tends to be private, and there will rarely be a third party witness to the complainant's sexual encounters. Hence, if the penal statutes are to be vigorously enforced, victims must feel free to report the offenses. However, given the liberal admissibility of evidence of sexual history, the victim could anticipate "embarrassment" and "public intrusion into her privacy."199 The victim might fear that at the public trial of her complaint, her sexual history will be paraded before the world.200 That fear could serve as a significant disincentive to reporting a rape offense. According to this line of argument, excluding the evidence of the complainant's sexual history would not only shield the victim's privacy rights, the exclusion would also vindicate the public interest in enforcing criminal statutes such as rape prohibitions. That interest is a weighty one. Sexual crimes, notably rape, are serious offenses against the person. Moreover, "[i]f one regards rape as a society-defining crime, part of a system of oppression that promotes male supremacy,"201 there is a vital social interest in ensuring the effective enforcement of these criminal proscriptions.

These criticisms have led the vast majority of jurisdictions to adopt rape shield laws.202 Federal Rule of Evidence 412 is illustrative. By its terms, Rule 412 applies "in any . . . criminal proceeding involving alleged sexual misconduct."203 When the rule applies, it generally operates to bar "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior."204 This statutory language is broad enough to include evidence of the complainant's other sexual encounters, at least when explicitly mentioned as part of the foundation for expert testimony about unconscious transference. The domino effect is that if the rape shield law bars that evidence, the expert opinion itself could be rendered inadmissible because it would lack the neces-

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198 The courts became especially skeptical of the probative value of the evidence when there was a substantial time lapse between the two sexual encounters. See, e.g., State v. Jones, 710 S.W.2d 799, 800-01 (Mo. 1986) (incidents were not "reasonably contemporaneous").
200 See, e.g., Harris v. State, 362 S.E.2d 211, 213 (Ga. 1987).
202 See Doe, 666 F.2d at 48 n.9 (45 states have adopted such laws).
203 Fed. R. Evid. 412(a).
204 Fed. R. Evid. 412(a)(1).
sary foundation. In short, even if the expert testimony could run the gauntlet of Frye or Daubert, the rape shield law might preclude its admission.

B. The Constitutional Theory for Overriding Statutory Exclusionary Rules of Evidence

Although Rule 412 purports to generally exclude evidence of the complainant's sexual history, the statute is subject to several exceptions. However, only one express exception is applicable here. The exception comes into play—and the bar of the statute is lifted—when

206 The defense attorney might attempt to "finesse" this problem by refraining from asking the expert witness to refer explicitly to the victim's other sexual conduct. The problem is that while this tactic would reduce the strain the evidence placed on the rape shield laws, the tactic would make the evidence even more vulnerable to a Rule 403 objection. Without a full explanation of the underlying reasoning, the evidence would have less facial probative value. Moreover, the vagueness of the description of the opinion's basis might prompt the jurors to engage in speculation about the basis. It should be remembered, however, that under Rule 403, the trial judge does not announce categorical exclusionary rules. Rather, the judge engages in ad hoc, case-specific balancing.

207 Federal Rule of Evidence 412(b)(1)(B) carves out an exception for "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct." This exception applies only to evidence of the alleged victim's other sexual contact with the accused. That exception is inapplicable here; our hypothesis is that the accused is attempting to introduce evidence of the alleged victim's sexual contact with a third party or parties. Rule 412(b)(1)(A) recognizes another exception for "evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence." This statutory language was intended to apply only in "clearly and narrowly defined circumstances." 124 CONG. REC. H34,913 (1978). This exception has been dubbed the "Scottsboro rebuttal provision." See 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5388, at 590-91 (1980). The provision "takes its name from the Depression era cause célèbre in which a group of black men were charged with raping two white women on a freight train." Id. In that case, the prosecution offered medical testimony that semen had been found in the women's vaginas, but the trial judge excluded defense rebuttal evidence that the women had engaged in intercourse with other men the night before. See McLean v. United States, 377 A.2d 74, 78 n.6 (D.C. 1977). This exception is also inapplicable. The exception comes into play when the prosecution offers expert testimony to corroborate the alleged victim's testimony. Thus, after the alleged victim testifies that there was intercourse, the prosecution might offer evidence of semen found in vaginal swabs to corroborate the testimony. Rule 412(b)(1)(A) would entitle the accused to introduce evidence of the alleged victim's intercourse with a third party to explain away the seemingly corroborative testimony; if the victim had intercourse with her boyfriend in approximately the same time frame as the alleged rape, that intercourse would furnish an innocent explanation for the finding of semen. The same analysis would apply if the prosecution offered either an emergency room physician's testimony about the victim's injuries to corroborate her testimony that intercourse was forcible or a DNA expert's testimony to corroborate the victim's identification of the accused as the rapist. In the fact situations discussed in this article, however, the accused is not offering evidence of the alleged victim's sexual contact with third parties to rebut any corroborative testimony introduced by the prosecution.
the exclusion of the evidence "would violate the constitutional rights of the defendant." The exception is a concession to a United States Supreme Court line of authority dating back to 1967.

In that year, the Supreme Court decided the seminal case of Washington v. Texas. There the Court passed on the constitutionality of two Texas statutes providing that an accused could not call as a defense witness any person who had been charged or previously convicted as a principal, accomplice, or accessory in the same crime. These statutes had the effect of rendering such persons altogether incompetent as defense witnesses. In Washington, the accused was charged with murder. At trial, the accused attempted to call Charles Fuller as a defense witness. The defense offer of proof indicated that Fuller would have testified that he, Fuller, was the shooter and that the accused had attempted to prevent him from shooting. The difficulty was that Fuller had already been convicted of the murder. Consequently, under the Texas statutes, Fuller was incompetent as a defense witness. The trial judge applied the statutes, and the state appellate courts upheld the constitutionality of the statutes.

Washington's conviction reached the Supreme Court while Earl Warren was Chief Justice. Chief Justice Warren himself authored the opinion. First, the Chief Justice held that the Fourteenth Amendment Due Process Clause incorporates the Sixth Amendment compulsory process guarantee. Consequently, the guarantee is directly enforceable at state trial.

Second, Chief Justice Warren concluded that the state statutes in question violated the guarantee. Texas had argued that it had not denied Washington compulsory process; in fact, it had given him a subpoena for Fuller. Texas contended that it "merely" prevented him

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209 See generally 388 U.S. 14 (1967).
210 Id. at 15.
211 See id. at 16.
212 Id. at 15.
213 See id. at 16-17.
214 See Washington, 388 U.S. at 16.
215 See id.
216 See id.
217 See id. at 14.
219 Id. at 18-19.
220 See id.
221 Id. at 23.
222 See id.
from calling Fuller as a trial witness.\textsuperscript{224} Chief Justice Warren responded that the “Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he has no right to use.”\textsuperscript{225} The Chief Justice specifically stated that as a necessary corollary, the express compulsory guarantee implies the accused’s “right to present his own witnesses to establish a defense.”\textsuperscript{226} At the very least, the accused has a “right to put on the stand a witness who [is] physically and mentally capable of testifying to events that he [has] personally observed, and whose testimony . . . [is] relevant and material to the defense.”\textsuperscript{227}

\textit{Washington} was a landmark case. Its potential implications were breathtaking. Once the Court posited the existence of a constitutional right to present exculpatory evidence, conceivably the defense could attack any common-law or statutory exclusionary rule of evidence which seemed to foreclose the introduction of relevant defense evidence. However, the lower courts tended to read \textit{Washington} narrowly.\textsuperscript{228} In \textit{Washington}, the Supreme Court was confronted with a sweeping incompetency rule which kept a potential defense witness off the stand. The issue was whether this new implied constitutional right was limited to broad incompetency rules.\textsuperscript{229} Did the right spend its force by invalidating such rules? After the defense witness took the stand, could the state still apply any exclusionary rules it wanted to regulate the content of the witness’s testimony? Most lower courts answered that question in the affirmative. For example, in an Illinois case, the Supreme Court of Illinois declared that “there is no suggestion in \textit{Washington} that the admission of otherwise inadmissible hearsay is constitutionally required.”\textsuperscript{229}

In 1973, though, the Supreme Court proved the lower courts wrong. In that year the Supreme Court rendered its decision in \textit{Chambers v. Mississippi}.\textsuperscript{231} Like \textit{Washington}, \textit{Chambers} was a homicide prosecution.\textsuperscript{232} Chambers was accused of shooting a police officer.\textsuperscript{233} His defense was that another person, Gable McDonald, was the real killer.\textsuperscript{234} McDonald had not only given a sworn statement to that ef-

\begin{itemize}
\item \textsuperscript{224} See \textit{Washington}, 388 U.S. at 23.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id. at 19.
\item \textsuperscript{227} Id. at 23.
\item \textsuperscript{228} See, e.g., \textit{People v. Scott}, 288 N.E.2d 478, 482 (Ill. 1972).
\item \textsuperscript{229} See \textit{Imwinkelried}, supra note 28, § 1–2.a, at 6.
\item \textsuperscript{230} \textit{Scott}, 288 N.E.2d at 482.
\item \textsuperscript{231} \textit{Chambers v. Mississippi}, 410 U.S. 284, 302 (1973).
\item \textsuperscript{232} Id. at 285.
\item \textsuperscript{233} See id.
\item \textsuperscript{234} See id. at 289.
\end{itemize}
fect, on three occasions, he had also told acquaintances that he was
the killer.\textsuperscript{235} At trial, the defense called McDonald as a witness.\textsuperscript{236} On
direct examination by the defense attorney, McDonald conceded that
he had made the sworn statement.\textsuperscript{237} During cross examination by the
prosecution, McDonald repudiated that statement.\textsuperscript{238} Later the defense
attorney attempted to elicit McDonald's statements from three of
McDonald's friends.\textsuperscript{239}

When the defense attempted to do so, the prosecutor initially
objected on hearsay grounds.\textsuperscript{240} The defense attorney responded that
although McDonald's out-of-court statements were hearsay, they fell
within the exception for declarations against interest.\textsuperscript{241} At that point,
the prosecutor noted that Mississippi hearsay law followed the early,
common-law view restricting the scope of that exception to declara-
tions against proprietary or pecuniary interest.\textsuperscript{242} The statements in
question were contrary to penal interest.\textsuperscript{243} On that basis, the trial judge
excluded the hearsay statements, and the state appellate courts affir-
med.\textsuperscript{244}

Like Washington's conviction, Chambers's conviction reached the
Supreme Court.\textsuperscript{245} On this occasion, Justice Powell penned the lead
opinion.\textsuperscript{246} The Justice was impressed that the excluded hearsay state-
ments carried "considerable assurance of . . . reliability."\textsuperscript{247} He listed
several indicia of reliability: McDonald made the statements shortly
after the killing; he made the statements spontaneously to close ac-
quaintances; there was corroboration of his guilt, because he had
previously owned a gun of the caliber used in the shooting; he had
made three separate admissions to friends; and "in a very real sense,
the statements were disserving to his penal interest.\textsuperscript{248} Justice Powell
conceded that the hearsay rule sometimes serves the legitimate pur-
pose of blocking the admission of unreliable evidence,\textsuperscript{249} but on the

\textsuperscript{235} See id.
\textsuperscript{236} See Chambers, 410 U.S. at 291.
\textsuperscript{237} See id.
\textsuperscript{238} See id.
\textsuperscript{239} See id. at 292.
\textsuperscript{240} See id.
\textsuperscript{241} See Chambers, 410 U.S. at 299.
\textsuperscript{242} See id.
\textsuperscript{243} See id.
\textsuperscript{244} See id. at 293.
\textsuperscript{245} See id. at 284.
\textsuperscript{246} Chambers, 410 U.S. at 285.
\textsuperscript{247} Id. at 300.
\textsuperscript{248} Id. at 300-01.
\textsuperscript{249} Id. at 298.
facts of the case sub judice the hearsay was demonstrably reliable. Citing Washington, Justice Powell wrote that the trial judge had applied the hearsay rule in a mechanistic, unconstitutional manner. 250

Chambers thus expanded the scope of the implied constitutional right to present exculpatory evidence. Justice Powell made it clear that the right is not confined to broad incompetency rules; its reach also extends to exclusionary rules governing the content of defense witnesses' testimony. Although the hearsay doctrine in question in Chambers is an exclusionary rule inspired by doubts about the trustworthiness of a certain type of evidence, the lower courts have extended the Washington-Chambers line of authority to rules resting on extrinsic social policy. In many cases, the courts have invoked the implied constitutional right to override privilege claims. 251 When the defense has made a foundational showing that the evidence in question is both necessary and demonstrably reliable, the courts have invalidated the application of such privileges involving marriage counselors, 252 physicians, 253 psychotherapists, 254 spouses, 255 and even attorneys. 256 The courts have weighed the public policy underlying the privilege against the accused's constitutional right and struck the balance in the accused's favor.

Notwithstanding those decisions, the Supreme Court's most recent pronouncement on the subject may signal that the Court's support for the accused's constitutional right is weakening. That pronouncement came in the Supreme Court's 1996 decision in Montana v. Egelhoff. 257 In Egelhoff, the Court considered a Montana statute which declared that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense." 258 The accused claimed that the statute was unconstitutional.

A five-Justice majority voted to uphold the statute. One of the five, Justice Ginsburg, conceptualized the statute as a substantive rule of criminal law and underscored that states have wide latitude in defin-

250 Id. at 302.
252 See IMWINKELRIED, supra note 28, § 10-5.b, at 257.
253 See id. § 10-5.c, at 257-59.
254 See id. § 10-5.d, at 259-61.
255 See id. § 10-5.f, at 266-69.
256 See id. § 10-5.a, at 254-56.
258 Id. at 2016 (considering Mont. Code Ann. § 45-2-203 (1995)).
ing the elements of their crimes. However, the four-Justice plurality conceived of the statute as a restriction on the accused's ability to introduce evidence of intoxication. The plurality emphasized that the accused has the burden of showing the unconstitutionality of an evidentiary restriction. The plurality acknowledged Chambers but seemed to limit its precedential value, characterizing Chambers as a "highly case-specific error correction" based on "a fact-intensive" analysis of the precise facts of the case. Although the Egelhoff opinion is signed by only four Justices, Egelhoff may be an indication that, in the future, it will be more difficult for defendants to convince the Court to apply the Washington-Chambers line of authority to override otherwise valid limitations on the admissibility of exculpatory evidence.

C. The Constitutionality of Applying a Rape Shield Statute to Bar Exculpatory Unconscious Transference Evidence

Like the testimonial privileges, the rape shield laws rest on extrinsic social policy. The policy justification for privileges is that they encourage certain desirable, out-of-court behavior between persons standing in close family or professional relationships. 259 For example, society wants clients to feel free to confide in their attorneys, and without the assurance of an evidentiary privilege, people might be unwilling to disclose sensitive information to their attorneys. 260 Likewise, the rape shield law is designed to affect out-of-court behavior. Society wants rape victims to come forward and report the crimes perpetrated against them. In this setting, the fear is that victims will balk at doing so if they know that at the subsequent trial, their entire sexual history will be spread on the public record.

However, if testimonial privileges can be attacked under the implied constitutional right, a fortiori rape shield laws should be assailable on the identical theory. Initially, academic commentators raised this possibility. 261 Later, the courts acknowledged that given the right facts, an accused could rely on the implied right to invalidate the application of a rape shield law blocking the admission of exculpatory evidence. 262

259 See Carlson et al., supra note 105, at 731–32.
260 See id. at 771.
In most cases, though, the courts have balanced these considerations in favor of the rape shield law.\(^{263}\) When a rape shield law and the accused's implied right have collided, the rape shield statute has ordinarily emerged the victor. The Supreme Court has remarked that "rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."\(^{264}\) However, the statutes have yielded to the accused's constitutional right in a minority of cases in which the exculpatory evidence has extraordinary probative value. These cases tend to fall into two lines of authority.

In one line of authority, defense arguments have succeeded because, on the specific facts of the case, the defense could construct a tenable argument that the complainant's sexual history was relevant to show the complainant's intense bias against the accused.\(^{265}\) In one case, the accused claimed that he had discovered that the complainant had attempted to seduce his son.\(^{266}\) He was prepared to testify that he had confronted the complainant with his discovery and threatened to disclose her misconduct to her parents.\(^{267}\) The accused's theory was that this confrontation supplied a powerful motivation for her to fabricate a rape charge against him.\(^{268}\)

Traditionally, American evidence law has assumed that evidence of bias has special probative value. Bias impeachment has a "high position . . . in the hierarchy of impeachment techniques . . . .\(^{269}\) In the minds of many courts, it is the most probative impeachment technique.\(^{270}\) On cross-examination, courts permit "an especially broad scope of inquiry" about bias.\(^{271}\) Although courts confine some impeachment techniques to cross-examination and bar extrinsic evidence of the impeaching fact,\(^{272}\) as a matter of course they countenance the introduction of extrinsic evidence establishing a witness's bias.\(^{273}\)

\(^{263}\) See id. § 9-4.a, at 222 n.106 (collecting cases); Smith, supra note 27, at 287.


\(^{266}\) See id.

\(^{267}\) See id.

\(^{268}\) See id.


\(^{270}\) Carlson et al., supra note 105, at 351.

\(^{271}\) Id.

\(^{272}\) See id. at 377-81 (collateral fact rule).

\(^{273}\) See id. at 351.
The Supreme Court evidently shares the assumption that evidence of bias is highly probative. In *Davis v. Alaska*, the accused was charged with a burglary. The accused wanted to introduce evidence of the bias of the star prosecution witness. At the time of trial, the witness was on probation for a juvenile theft offense. There was a forceful inference of bias on the witness's part. As a probationer, the witness understandably had a motivation to curry the prosecution's favor. Furthermore, the witness had previously been found guilty of a theft offense similar to the charge the accused was facing; if the accused was not convicted, the finger of guilt might point toward the witness. However, a state statute and court rule cloaked juvenile proceedings with confidentiality. On the basis of the statute and rule, the prosecution obtained a pre-trial order precluding the defense from questioning the witness about his probationary status. The Supreme Court held that the excluded evidence had such substantial probative value that the exclusion was unconstitutional.

Can the defense attorney proffering testimony about a source monitoring error analogize to *Davis*? Does that testimony possess the same probative value as the bias evidence in *Davis*? Most psychologists would probably vouch that the general concept of source monitoring errors is even more widely accepted than the narrow theory of unconscious transference. There is also more empirical support for the former concept although none of the experiments involves victims of sexual assault. Nevertheless, *Davis* is distinguishable. To be specific, when the accused merely denies committing the actus reus and invokes the source monitoring concept to justify introducing evidence of the complainant's sexual conduct with third parties, the evidence has markedly less probative value than the facts creating the irresistible inference of bias in *Davis*.

As Section II demonstrated, even when the conditions for unconscious transference proper are ideal, the expert can testify only to the possibility that transference occurred. Likewise, when the thrust of the

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275 See id. at 311.
276 See id.
277 See id.
278 See id.
279 See *Davis*, 415 U.S. at 311.
280 See id.
281 See id.
282 Id. at 318.
283 See Johnson et al., *supra* note 95, at 3.
284 See id. (collecting the studies).
defense is a denial of the actus reus and the defense is invoking the concept of source monitoring errors, all the expert can attest to is a possibility that an error occurred.

As we have seen, one of the conditions for transference proper is the witness's weak memory of a detail of the event he or she is now attempting to recall.\textsuperscript{285} The same condition is relevant in assessing the probability that a source monitoring error has occurred.\textsuperscript{286} Absent special facts, there is no reason to believe that the complainant's memory of the nature of his or her contact with the accused is likely to be weak. It is true that witnesses often experience difficulty remembering the details of traumatic events.\textsuperscript{287} However, in this situation, the defense theory is that the accused's encounter with the complainant was innocent and licit. There is nothing about that type of encounter which would make it especially hard for the complainant to remember the character of the encounter. According to the defense's theory, the encounter with the accused should not have been "mentally shocking."\textsuperscript{288}

Another factor enhancing the likelihood of transference proper is similarity between the weakly remembered detail of the litigated event and the supposedly confused detail from another event.\textsuperscript{289} As we shall see, that factor is also a determinant of the probability that the witness has committed a source monitoring error.\textsuperscript{290} This factor is absent here. If the accused had an innocent encounter with the complainant but the complainant was raped or assaulted by a third party, there are obvious differences between the encounter and the assault. When the two events in memory are dissimilar, the conditions are less than ideal for a monitoring error.\textsuperscript{291} The similarity between the events serves as a retrieval cue.\textsuperscript{292} That cue is missing here. If similarity of context is highly relevant in assessing the probability of an error,\textsuperscript{293} error seems improbable.\textsuperscript{294} Even if one accepts arguendo the validity

\textsuperscript{285} See supra notes 46–55 and accompanying text.

\textsuperscript{286} See Johnson et al., supra note 95, at 6–8.

\textsuperscript{287} See Yarney, supra note 11, at 71–72. Freud proposed a repression theory, and clinicians tend to accept the theory. See id. at 71. Experimental psychologists, however, remain dubious. See id. “Laboratory experiments testing the ... [theory] ... have in most cases failed to support the theory ... .” Id. at 71–72; see also Levine & Tapp, supra note 2, at 1097, 1100.

\textsuperscript{288} See Loftus & Doyle, supra note 39, § 2.12, at 44–47.

\textsuperscript{289} See supra notes 79–92 and accompanying text.

\textsuperscript{290} See Johnson et al., supra note 95, at 6–8.

\textsuperscript{291} See McGough, supra note 38, at 43.

\textsuperscript{292} See Ross et al., supra note 29, at 88.

\textsuperscript{293} See id. at 97.

\textsuperscript{294} Some students of transference assert that "it is very unlikely that unconscious transference will occur in actual criminal trials." Id. at 84.
of the source monitoring theory, the conditions are not ripe for an error to occur. Thus, testimony about the theory would possess less probative worth than the evidence of intense bias, which has been held to trigger the accused's constitutional right and override the rape shield laws. The first line of authority would therefore be distinguishable.

There is a second line of authority to which the accused might analogize in an attempt to defeat the rape shield laws. In these cases, the defense offered evidence of a youthful complainant's other sexual activity to explain the complainant's knowledge of sexual matters—knowledge that the jurors might otherwise treat as corroboration of the allegation that there was sexual contact on the charged occasion. There are numerous cases upholding the admission of evidence on this theory. The courts in these cases reasoned that jurors tend to assume that a young child is ignorant of sexual matters. On that assumption, the jurors might regard the child's ability to recount a sexual encounter as some evidence that the encounter occurred. The courts permitted the accused to prove the child's encounters with third parties in which the child might have learned the sexual facts that the child attributes to his or her contact with the accused.

At present, the lower courts are split over the question of whether this theory of logical relevance is potent enough to surmount a rape shield law. Maine, Nevada and New Hampshire courts have embraced this theory. According to one commentator, these liberal decisions represent the trend in the case law. However, there are conservative decisions from Iowa and Michigan rejecting the theory. Furthermore, there is a third, compromise view, followed in such states as Arizona, Massachusetts, and Wisconsin. The courts in these jurisdictions carefully scrutinize the quantum of the probative value of the evidence. Hence, they might grant the accused a right to introduce evidence of the complainant child's sexual contact with a third party.

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296 See id. (collecting cases decided prior to 1990); NORMAN M. GARLAND & EDWARD J. IMWINKELRIED, EXCULPATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE § 9-4.b, at 56–57 (1996 Stipp.) (collecting most recent cases).
298 See id.
299 See id.
301 See id. at 842–44.
302 See id. at 831–92.
303 See id. at 845–46.
304 See id. at 847–48.
if the sexual conduct in question was not only unusual but also strikingly similar to the alleged contact with the accused.\footnote{See Reid, supra note 300, at 847–48.}

There are several parallels between this line of authority and a proffer of evidence of a source monitoring error. In both situations, the defense is attempting to introduce evidence of the complainant’s other sexual conduct—evidence seemingly barred by the rape shield law. Further, in both situations, the theory of logical relevance is plausible. Just as the child’s encounter with a third party could explain the child’s sexual knowledge, the adult victim might be unconsciously transferring part of the memory of a sexual contact with a third party to the recollection of a meeting with the accused. Finally, in both situations, typically the evidence permits the jury to infer at most that the complainant’s testimony might be mistaken; an encounter with a third party could be the source of the child’s sexual knowledge and, similarly, an adult’s sexual encounter with a third party might trigger a source monitoring error. The most liberal cases in this line of authority hold that the probative value of the child’s encounter is enough to override the rape shield law. The accused can argue that a fortiori, the theory of source monitoring errors possesses enough probative worth to surmount a rape shield statute.

On the merits, the compromise view taken by the courts in Arizona, Massachusetts, and Wisconsin is the soundest.\footnote{See id.} Those courts direct the trial judge to carefully evaluate the quantum of the probative value of the proffered evidence. At a fundamental level, the liberal and conservative views misconceive the nature of the Washington-Chambers doctrine. Under Washington and Chambers, the trial judge must engage in as-applied analysis.\footnote{See IMWINKELRIED, supra note 28, § 2–3,a, at 34.} The judge should conduct a case-specific, fact-intensive assessment of both the probative value of the proffered evidence and the countervailing considerations. Given the as-applied nature of the analysis, it is a mistake for the courts to either blanketly endorse or sweepingly reject a theory of admissibility which conflicts with the rape shield laws.

As a properly enacted statute, a rape shield law enjoys a presumption of constitutionality, and it is incumbent on the accused to rebut that presumption.\footnote{See Egelhoff, 116 S. Ct. at 2017.} In Egelhoff, the plurality described the accused’s burden as a “heavy” one.\footnote{Id.} If there are only generic similarities between her description of the charged rape and the complainant’s...
sexual encounter with the third party, the rape shield law should probably trump the accused’s right to introduce testimony about a possible source monitoring error. In the exceptional case, though, when the complainant describes an aberrant sexual assault and the encounter with the third party is strikingly similar to the described assault, the accused’s right should be paramount.

IV. CONCLUSION

As previously stated, prosecutors as well as defense counsel can have occasion to proffer testimony about unconscious transference. Moreover, a civil litigant might find it useful to introduce such testimony. Like a criminal accused, a civil defendant could take the position that the plaintiff is mistakenly transferring a detail of a tortious encounter with a third party to the recollection of a contact with the defendant. Thus, the proponent of transference evidence could be the prosecution, the accused or a civil party.

When the proponent begins to research the admissibility of the evidence, the proponent will discover that there is general agreement in psychological circles that the phenomenon of unconscious transference does occur. In particular, when an accused relies on unconscious transference proper (conceding that the complainant was victimized but claiming that complainant has mistakenly transferred a memory of the accused’s face to the recollection of the victimization), the only hurdles are the standards for admitting scientific testimony and the balancing test of Rule 403. As we have seen, in many jurisdictions, “soft” scientific evidence testimony about unconscious transference would be exempt from Frye scrutiny. Moreover, Rule 403 has a pronounced bias in favor of admitting logically relevant evidence. Rule 403 sends trial judges the message that whenever they are in doubt as to whether the probative value of an item of evidence outstrips the incidental probative dangers, they should resolve the doubt in favor of accepting the evidence.310 Thus, in the fact situation discussed in Section II, at least in Frye jurisdictions, the trial judge might well decide to admit the testimony about transference proper.

In the fact pattern described in Section III, however, the analysis can be fundamentally different. Here the introduction of the proffered evidence about source monitoring errors can conflict with the rape shield laws. Of course, even here a conflict is not inevitable. The expert might be basing his or her opinion on a foundation other than the

victim's prior sexual conduct. Suppose, for example, that the independent basis for the expert's opinion is a suggestive police interview of the victim or the victim's exposure to suggestive statements in a group therapy session. Here the expert could elaborate on the basis for the opinion without referring to any conduct covered by a rape shield statute. Furthermore, even if such conduct was part of the basis of the expert's opinion, the defense might be content to invite the expert to give only a very general description of the basis of the opinion. By doing so, the defense could largely moot the collision between the evidence and the rape shield law. The downside, however, is that doing so would render the evidence more vulnerable to a Rule 403 objection. The very vagueness of the description of the opinion's basis would both diminish the facial relevance of the evidence and magnify the risk of jury speculation—considerations the trial judge may factor into the Rule 403 balancing test.

The starkest conflict arises, though, when the defense wants to elicit the witness's explicit description of the victim's other sexual conduct as the basis for an opinion about a source monitoring error. Unless the accused can persuade the judge that the proffered evidence fits within one of the exceptions carved out on the face of the rape shield statute, the statute purports to absolutely bar the admission of the evidence. While Rule 403 encourages the trial judge to admit any logically relevant evidence, most rape shield statutes direct the judge to exclude evidence of the alleged victim's other sexual experiences in this fact pattern.

The accused can sometimes rely on an implied constitutional right to surmount exclusionary rules of evidence such as rape shield laws. When the victim describes an unusual sexual encounter and the victim's contact with a third party is strikingly similar to the described encounter, the accused has an effective analogy to justify invoking the constitutional right. Many courts have held the accused's right paramount in the analogous cases involving child complainants.

However, in the typical case, it is unlikely that the accused can persuade a judge that his or her constitutional right mandates the introduction of exculpatory testimony about a source monitoring error based on evidence of the alleged victim's other sexual conduct. In Egelhoff, the plurality made it more difficult for an accused to successfully invoke the constitutional right fashioned in Washington and Chambers. Moreover, in recent years, society's commitment to the poli-

cies inspiring the rape shield laws has intensified. In 1991, the Supreme Court expressed its sympathy with those policies. In 1994, Congress enlisted in the national campaign against sexual assault by selectively abolishing the character evidence prohibition in rape prosecutions. In that year, Congress approved Federal Rule of Evidence 413 allowing prosecutors to introduce evidence of an accused’s uncharged sexual misconduct to prove the accused’s propensity to commit rape. The simultaneous depreciation of the accused’s Sixth Amendment right and the intensification of the national campaign against sexual assault will make the defense’s constitutional attack on the rape shield laws an uphill battle. Until the Court decides to attach greater weight to the accused’s constitutional right or new scientific research yields a reliable method of determining when source monitoring errors are probable rather than merely possible, the defense seems destined to lose that battle.