LANDAU, J., concurring.[1] Although I believe that the trial court abused its discretion in admitting the testimony of the six constancy of accusation witnesses, I agree with the majority that the testimony was harmless for the reasons I discuss herein. I write separately, however, because I am of the opinion that the facts of this case provide this court with an opportunity to limit further the constancy of accusation doctrine.[2]

This court set forth the parameters for determining whether evidence is cumulative in *State* v. *Parris*, 219 Conn. 283, 592 A.2d 943 (1991). ''A trial court's broad discretion to exclude evidence more prejudicially cumulative than probative certainly encompasses the power to limit the number of witnesses who may be called for a particular purpose. See *State* v. *DeMatteo*, 186 Conn. 696, 702–703, 443 A.2d 915 (1982). 'In excluding evidence on the ground that it would be only ''cumulative,'' care must be taken *not* to exclude merely because of an *overlap* with evidence previously received. To the extent that evidence presents new matter, it is obviously not cumulative with evidence previously received.' . . . 2 D. Louisell & C. Mueller, Federal Evidence [1985] § 128.'' (Emphasis in original.) *State* v. *Parris*, supra, 293. In *Parris*, ''each item of the

state's constancy evidence, while overlapping in the sense that it related to the same incident, *pertained to a different statement that the victim had made to a different person at a different point in time.*'' (Emphasis added.) Id., 293–94. In *State* v. *Troupe,* 237 Conn. 284, 303, 677 A.2d 917 (1996), this court did not alter this rule, but did limit the scope of constancy of accusation testimony.

Here, the state called six constancy of accusation witnesses,[3] all of whom testified as to the same facts. As such, their testimony was cumulative and should not have been admitted under our rule in *State* v. *Parris*, supra, 219 Conn. 293–94. Their testimony overlapped and did not present new material. In fact, their testimony was not necessary to associate the complaint with the pending charge as to the time, place and identity of the defendant; *State* v. *Troupe*, supra, 237 Conn. 304;[4] as the testimony of the victim's sister and the victim's gynecologist was sufficient. Furthermore, two pairs of constancy of accusation witnesses heard the victim's complaint simultaneously and, therefore, the victim's complaint was not made ''to a different person at a different point in time.'' *State* v. *Parris*, supra, 294.

The majority in the present case dismisses the defendant's claim of prejudice, concluding that the testimony was not prejudicial although it was cumulative. In its analysis, the majority notes that our Appellate Court has upheld the admission of as many as eight constancy of accusation witnesses and cites those cases in footnote 13 of its opinion. The facts of those cases are distinguishable from the facts here. In *State* v. *Zoravali*, 34 Conn. App. 428, 440, 641 A.2d 796, cert. denied, 230 Conn. 906, 644 A.2d 921 (1994), and *State* v. *Parsons*, 28 Conn. App. 91, 105–106, 612 A.2d 73, cert. denied, 223 Conn. 920, 614 A.2d 829 (1992), both of which predate *Troupe*, the Appellate Court concluded that the testimony of various constancy witnesses was not overlapping and was properly admitted pursuant to the rule in *Parris*. With respect to its reliance on *Parsons*, the majority's position is further weakened by the fact that of the eight constancy of accusation witnesses in that case, one was a nurse and another a physician who treated the victim at the hospital, and two others were social workers. *State* v. *Parsons*, supra, 105. Although the Appellate Court did not address whether the testimony of the nurse and the physician, and perhaps that of the social workers, may have been admitted properly under an exception to the hearsay rule, in light of this court's decision today, the testimony of those four witnesses probably was not constancy testimony.

I agree with the majority that the state built its case around the testimony of the victim and her gynecologist. The victim's testimony alone was sufficient to convict the defendant. The testimony of the victim's gynecologist was equally, if not more, damaging to the defendant.

I believe that this court should seize the opportunity presented by the facts of this case to do more than merely caution the trial court about the admission of cumulative constancy testimony, by providing firm guidance for the future.

In this case, aside from the victim's testimony, the gynecologist's testimony was the most relevant and material to the prosecution's case because it had a tendency to prove the use of force. See General Statutes (Rev. to 1985) § 53a-70.[5] To the extent that the medical evidence tended to prove the use of force, it precluded the need to rebut presumptively any defense of consent. See note, ''The New Face of Connecticut's Constancy of Accusation Doctrine: *State v. Troupe*,'' 29 Conn. L. Rev. 1713, 1735–36 (1997). I suggest, therefore, that in cases where the victim provides convincing testimony and the testimony of the victim's treating physician, based on a physical examination and medical evidence, supports the claim of the sexual assault, constancy of accusation testimony should not be admitted, unless the testimony is clearly ''necessary to associate the victim's complaint with the pending charge . . . .'' *State* v. *Troupe*, supra, 237 Conn. 304.

With the exception noted, I otherwise concur with the majority opinion.

[1] In writing a concurrence, I recognize that I am not a full member of our Supreme Court and that I sat on this appeal by designation, pursuant to General Statutes § 51-207 (b). In its wisdom, the legislature has cloaked those judges who sit by designation with the same authority and responsibility as justices of our Supreme Court. I believe that I am duty bound to exercise the responsibility that accompanies that designation in all respects, including disagreeing with the majority.

[2] In a more perfect world, I would urge that Connecticut abolish the constancy of accusation doctrine with respect to the prosecution of sexual assault crimes against competent adults. I leave until another day the special concerns related to children and adults who may be under some form of disability.

The history of the constancy of accusation doctrine has been addressed in some detail. See *State* v. *Troupe*, 237 Conn. 284, 677 A.2d 917 (1996); see also note, ''The New Face of Connecticut's Constancy of Accusation Doctrine: *State v. Troupe*,'' 29 Conn. L. Rev. 1713, 1714–22 (1997). These sources agree that the doctrine is based in a public policy that evolved over the centuries from the English common law and first found voice in Connecticut in a nineteenth century case, *State* v. *De Wolf*, 8 Conn. 93 (1830). As an aside, I am not as convinced as those sources that *De Wolf* unequivocally supports the premise for which the case is often cited. ''It is believed, that the decisions on the circuit do not perfectly harmonize on this subject, and it may be proper hereafter to settle it definitively; but as there is not a coincidence or opinion on this point, and as a majority of the Court concur in the opinion that the testimony was properly admitted, a discussion and decision of the general question, is waived.'' Id., 100. I am further convinced that the facts of that case greatly influenced the court. The victim, who was identified by name in the opinion, was deaf and mute and resided at the ''American Asylum for the education of the deaf and dumb . . . .'' Id., 94. The victim communicated the attempted rape in writing to one of her female teachers some time after the incident. Id. An instructor at the American Asylum testified that the deaf-mute ''generally, have a sense of inferiority to other people, and, as a class, are easily intimidated; are credulous, sincere and submissive; and that this was [the victim's] character.'' Id., 101. (We note that in various reprints of volume 8 of the Connecticut Reports, the word ''sincere'' inadvertently was omitted from this quoted sentence. We quote the language here as cited in the original 1833 Connecticut Reports.)

Nonetheless, the public policy notion that a woman who has been raped or against whom a rape has been attempted will communicate the fact to a female friend evolved into the constancy of accusation doctrine. See *State* v. *Kinney*, 44 Conn. 153 (1876). That notion, however, was not held universally. ''We are aware that the decision in this case goes farther than the courts have gone in England, and in most of the states in this country, but still we think the rule adopted in this case is more conducive to the ascertainment of truth than the rule elsewhere established.'' Id., 156.

Connecticut adhered to the constancy of accusation doctrine until a mere five years ago when this court modified it in *Troupe*. In refusing to abrogate the doctrine entirely, the court rationalized that our society still harbors vestiges of a male dominated world in that it is natural for a woman to complain to someone that she had been raped. *State* v. *Troupe*, supra, 237 Conn. 301–304. I use the word ''rationalized'' because the court did not base its reasoning on empirical evidence of the prevalence of that earlier belief in today's society but, rather, adopted the opinions of other state courts. Id., 301–302. This rationalization, however, flies in the face of all that social and medical science tells us about women's response to being raped. See *State* v. *Kelley*, 229 Conn. 557, 578, 643 A.2d 854 (1994) (*Berdon, J.*, dissenting), citing S. Estrich, ''Rape,'' 95 Yale L.J. 1087, 1088–89 (1986). There is still shame associated with having been raped, a phenomena that this court's own opinions substantiates by adhering to a policy of not identifying victims of sexual assault. See footnote 3 of the majority opinion.

The doctrine is duplicitous as it stands for and perpetuates the notion that women are not to be trusted with respect to their sexuality and sexual behavior but society must then protect women from the infirmity it places on them. Although our courts apply the doctrine in a gender neutral fashion, the doctrine is borne of disparate treatment of men and women by our society in general. See note, supra, 29 Conn. L. Rev. 1733. If the social, political and judicial leaders in this country had taken the position that society was not yet ready to enforce the equal protection clause of the United States constitution with respect to minorities in our society, the civil rights movement of the second half of the twentieth century would not have secured any of the gains it did secure. Courts have helped shape public policy since the beginning of the common law. The time has come, I believe, that this court must lead the way for social change by holding that the testimony of a competent adult victim of a sexual assault is to be weighed in the same manner as that of any other crime victim.

The rule of law in this jurisdiction is that the trier of fact is the judge of a witness' credibility. See, e.g., *State* v. *Jarzbek*, 204 Conn. 683, 706, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988). The justification for keeping the constancy of accusation doctrine because it is difficult for a jury to determine who is credible in a ''she said/he said'' situation is contrary to reality. Everyday juries are asked to decide who is telling the truth in matters as mundane as who had the green light to more exceptional circumstances as to whether a physician explained the risks of a procedure to a patient. The trial court instructs the jury on the law and how to evaluate credibility. In the absence of a clear indication to the contrary, we presume that a jury follows the instructions with which it is charged. See, e.g., *State* v. *Raguseo*, 225 Conn. 114, 131, 622 A.2d 519 (1993). Our system of determining the truth includes a procedure to address a jury gone awry. See Practice Book § 42-43.

I respectfully assert that as we begin the twenty-first century, we should abandon a doctrine that is unfair to both men and women and follow the rules of evidence that apply in any other criminal matter.

[3] I agree with the majority that the victim's sister and the victim's treating gynecologist were not constancy of accusation witnesses. Their testimony was admitted properly under the excited utterance and treating physician exceptions to the hearsay rule, respectively.

[4] I agree with the position taken by Justice Berdon in his concurrence in *Troupe* that testimony concerning the identity of the perpetrator is prejudicial. *State* v. *Troupe*, supra, 237 Conn. 318–19. The purpose of the constancy of accusation doctrine is to corroborate the victim's testimony that she had in fact complained and nothing more.

[5] To be consistent with the majority opinion, we refer to the revision of the statute in effect at the time of the commission of the offenses in this case. See footnote 1 of the majority opinion.