RAPE VICTIM SHIELD LAWS AND THE SIXTH AMENDMENT

J. ALEXANDER TANFORD † AND ANTHONY J. BOCCHINO ††

I. INTRODUCTION

In the last few years, forty-six jurisdictions have made efforts to protect rape victims from the humiliation of public disclosure of the details of their prior sexual activities. In most states the legislatures have passed shield laws restricting a criminal defendant's ability to present to the jury evidence of past sexual history.¹ In one instance, the same result has been reached by an appellate court ruling.² Late in 1978, the United States Congress followed this trend and enacted rule 412 of the Federal Rules of Evidence.³ While these laws vary in scope and procedural details, they share the features of declaring an end to the presumptive admissibility of such evidence and of restricting the situations in which a defendant will be allowed to bring the victim's sexual history to the attention of the jury. Almost unanimously, the literature of the last few years has encouraged these laws and attempted to justify any adverse consequences to the defendant by claiming that the state's interest in protecting rape victims is sufficiently important to overcome any constitutional objections.⁴ The changing moral climate in

† Assistant Professor of Law, Indiana University. A.B. 1972, Princeton University; J.D. 1976, LL.M. 1979, Duke University.

†† Associate Professor of Law and Director of Clinical Studies, Duke University; Visiting Associate Professor of Law, Temple University. B.A. 1969, Bucknell University; J.D. 1972, University of Connecticut.

The authors are deeply indebted to Ginny Young, former secretary and administrative assistant to Duke's clinical program (now a law student herself), for her tireless work in the preparation of this manuscript. We also wish to recognize the research assistance of Paula Jamell and Russell Fox at Duke University and the preliminary research done by Al Faustino and Ron Jarvis, former Duke students.

¹ Rape victim shield laws are "aimed at eliminating a common defense strategy of trying the complaining witness rather than the defendant. The result of this strategy was harassment and further humiliation of the victim as well as discouraging victims of rape from reporting the crimes to law enforcement authorities." *State v. Williams*, 224 Kan. 468, 470, 580 P.2d 1341, 1343 (1978).

See Appendix, *infra*, for a list of state statutes as they existed in the fall of 1979. Forty-five states had some sort of statute relating to the admissibility of evidence concerning the sexual conduct of rape complainants.

² In *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976), the state supreme court declared that evidence of a rape victim's character for chastity would, subject to limited exceptions, be inadmissible.

³ The Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978), was passed on October 28, 1978 and, as Fed. R. Evid. 412, became effective 30 days later.

⁴ See sources collected in note 22 *infra*.

this country and the increasing leniency about sexual relationships outside of marriage, it is usually argued, have discredited the old rationale that the unchastity of a woman has a material bearing on whether she has really been raped.⁵

The new laws do not, however, merely end an antiquated rule of evidence; they establish a new rule in some cases as extreme as the old one. Statutes such as rule 412 create a presumption that the sexual history of a rape victim will never be admissible, except when compelled by due process because of overwhelming probative value. It is, of course, difficult to argue with the position that the old rule of automatic admissibility should have been eliminated. It is not as easy to say that it is wise or consistent with the rights of a criminal defendant automatically to prevent introduction of evidence of a rape victim's sexual history.

The premise of the first part of this Article is that evidence of a rape victim's sexual history may be probative of an issue material to determining the guilt of a defendant charged with rape. Later sections of the Article will discuss particular circumstances in which such evidence is relevant and necessary to the effective presentation of the accused's defense. Initially, this Article will evaluate the new rules in light of the sixth amendment rights of a defendant to confront the witnesses against him and to produce witnesses in his favor. An analysis of laws affecting criminal defendants must be approached not from the standpoint of the victim, but from the standpoint of the accused. Whatever indignities are suffered by the complaining witness in any criminal trial, they do not compare with those a convicted defendant must suffer. There is no more serious undertaking of the state than accusing a person of a crime, with the concomitant threat of loss of liberty or life.

We reluctantly conclude that some rape victim shield laws violate the sixth amendment right to defend oneself. In the attempt to protect the sensibilities of rape victims, the defendant's right to present evidence to the jury is infringed. Surely the rights of defendants charged with rape are no less important or protected than the rights of defendants accused of other crimes. To the extent that a defendant in a rape case is categorically prevented from offering types of evidence that other criminal defendants may offer, his sixth amendment rights are violated.

⁵ See Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 15-22 (1977); Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 97-102 (1977).

II. HISTORICAL PERSPECTIVES

At common law, the rules governing the use of a rape complainant's sexual history provided that such evidence was always admissible.⁶ Three elements combined to create the rule of admissibility. The first was the fear of false charges brought by vindictive women. Sir Matthew Hale, Lord Chief Justice of the King's Bench, stated that rape "is an accusation easily to be made . . . and harder to be defended by the party accused, tho never so innocent."⁷ Second was the concept that chastity was a character trait. If a woman could be shown to be unchaste by nature, then it could be inferred that she had consented to sex with the defendant. Third was the belief that premarital sex was immoral. Acts of previous illicit sexual relations, like other acts of moral turpitude, could thus be used to impeach the credibility of the complaining witness in a rape case.⁸

The fear expressed by Sir Matthew Hale, that it is difficult to defend against fabricated rape charges, pervaded the early writings justifying the need for sexual history evidence.

The unchaste (let us call it) mentality finds . . . expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however . . . is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.⁹

To protect these innocent men, juries were usually instructed to scrutinize closely the testimony of a rape complainant: "Where the complaining witness and the defendant are the only witnesses, a

⁶ It has been argued that the early laws about rape and rape evidence reflected a prevailing moral climate in which women were expected to be chaste until marriage. The laws developed not as much from a chivalrous need to protect women, however, as from a male need to protect his own property. A woman was damaged if not a virgin—hence the severe penalties for a man who caused such damage. This historical view explains the dichotomy between the high value placed on virginity and the extreme difficulty a woman faced in proving a rape charge. See Gold & Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH. U. L. REV. 695, 696-705 (1978). See also sources collected in Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 COLO. L. REV. 185, 185 n.1 (1978). Cf. Griffith, *Rape: The All-American Crime*, RAMPARTS, Sept., 1971, at 26, 30 (chivalry meant protecting only the virtuous woman; once defiled she no longer deserved protection).

⁷ 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 634 (1st American ed. Philadelphia 1847) (1st ed. London 1736). See Berger, *supra* note 5, at 21.

⁸ E.g., *Seals v. State*, 114 Ga. 518, 520, 40 S.E. 731, 732 (1902).

⁹ 3A J. WIGMORE, *EVIDENCE* § 924a (Chadbourn rev. 1970).

charge of rape is one which, generally speaking, is easily made, and once made, difficult to disprove. Therefore, I charge you that the law requires that you examine the testimony of the prosecuting witness with caution."¹⁰ Dean Wigmore went so far as to urge that all women who brought rape charges undergo psychiatric examination before being allowed to testify in order to weed out charges stemming from sexual fantasy, rather than fact.¹¹

Whatever the situation may have been in times past, it is difficult to argue today that the danger of false charges is greater for rape than for any other kind of crime.¹² If anything, the statistics show just the opposite. Rape is one of the most underreported crimes.¹³ In addition, rape allegations are carefully screened in most instances to assure that only legitimate cases go to trial. For no other category of crime is the scrutiny by the police and prosecutor closer.¹⁴

Most states today do *not* have a rule automatically allowing the use in rape trials of testimony about a woman's "character" for chastity.¹⁵ Not long ago, however, courts reasoned that most women

¹⁰ D. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 4.32 (1975). See BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 101 (1966); V. HEMPHILL, ILLINOIS JURY INSTRUCTIONS § 4535 (1951).

¹¹ "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." 3A J. WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1970) (emphasis in original) (footnote omitted). Although Wigmore's position is untenable as a general rule in rape prosecutions, psychiatric testimony should be allowed when there is an actual indication that the charges stem from fantasy. Berger, *supra* note 5, at 68-69. See *People v. Mandel*, 61 App. Div. 2d 563, 403 N.Y.S.2d 63 (1978) (mental condition of complainant found relevant); N.C. GEN. STAT. § 8-58.6 (1977) (amended 1979) (expressly allowing such psychiatric testimony, the only state to so provide).

¹² Cf. Comment, *Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277, 280-81 (1968) [hereinafter cited as *Police Discretion*] (observing that in Philadelphia approximately one out of every five rape reports was determined to be unfounded upon police investigation).

¹³ It has been estimated that the actual number of rapes is 3½ times greater than the number reported, a larger disparity than for any other crime. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 21-22 (1967). Others have suggested that the number of rapes is actually ten times the number reported. Berger, *supra* note 5, at 5; Griffin, *supra* note 5, at 27. Cf. Wittels, *What Can We Do About Sex Crimes?*, SAT. EVENING POST, Dec. 11, 1948, at 30, 31 (according to some psychiatrists, only one out of twenty rapes is reported).

¹⁴ See Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1, 27 n.109 (1976). Cf. *Police Discretion*, *supra* note 12, at 317-21 (suggesting that police investigative procedures are, in some respects, inadequate).

¹⁵ E.g., KY. REV. STAT. ANN. § 510.145 (Baldwin 1976); LA. REV. STAT. ANN. § 15:498 (West 1975); MD. ANN. CODE art. 27, § 461A (1977); MO. ANN. STAT. § 491.015 (Vernon 1977); VT. STAT. ANN. tit. 13, § 3255 (1977). See Appendix,

were virtuous by nature and that an unchaste woman must therefore have an unusual character flaw. This character trait had caused her to consent in the past (when, obviously, a "normal" woman would never have consented) and made it likely that she would consent repeatedly. Because consent was a defense to rape, evidence that was thought to show a propensity towards sexual relations was always admissible to suggest consent in the particular instance.¹⁶ Courts and legislatures have adapted to the times and have realized that a woman who is unchaste—or in modern parlance, who has had extramarital sexual relationships—is no more likely to consent indiscriminately than is a chaste woman.

Another problem that led to dissatisfaction with viewing sexual history as evidence of character was the manner of proof. Character is usually proved by testimony about a person's reputation and less often by opinion testimony or by evidence of specific acts.¹⁷ Thus, in rape cases, the defendant was entitled to introduce testimony about the sexual reputation of the victim and could often have a witness testify to his opinion of the woman's chastity. Even if there is some probative value in showing that a rape victim is casual in her selection of sexual partners, the least accurate way of doing so is by evidence of her reputation or the opinion of one witness perhaps lacking any personal knowledge.¹⁸

infra. Cf. *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 26-27, 545 P.2d 946, 950 (1976) (majority of states allows character evidence, but limits its scope when defense of consent is raised). But see, e.g., *Wright v. State*, 527 S.W.2d 859, 862-63 (Tex. Crim. App. 1975) (accused in cases in which consent is asserted as defense may show the prior unchaste character of the complainant).

¹⁶ "The previous conduct of the prosecutrix, as to whether or not she had connection with other men, is a proper subject of inquiry, as tending to show a want of chastity, and therefore that she would be more likely to consent than a virtuous woman . . ." S. MAXWELL, CRIMINAL PROCEDURE 248 (1896).

This practice conflicted with the general rule that proof of character was not permitted to show that someone acted in conformity with it on a particular occasion. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 188 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]. That rule had exceptions other than sexual history evidence: proof by an accused of his good character; witness impeachment by showing bad character for truthfulness; and character for aggression of deceased in a homicide. *Id.* §§ 188, 191-194.

¹⁷ See 3A J. WIGMORE, EVIDENCE § 920 (Chadbourn rev. 1970). In rape cases, the victim's moral character was proven almost exclusively by evidence of her reputation, 7 J. WIGMORE, EVIDENCE § 1985 (1940), although opinion testimony of her unchaste character was at least theoretically permissible in a few states. See, e.g., *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969 (1907) (permitting opinion testimony to prove the accused's character). Cf. FED. R. EVID. 405(a): "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." The rule allowing opinion testimony was a marked departure from the common American rule.

¹⁸ See *People v. Benson*, 6 Cal. 221, 223 (1856) ("I cannot understand why, upon any sound rule, general reputation should be preferred to particular facts.").

Sensing the inherent weaknesses of relying on the character-evidence rationale for admitting sexual history evidence, some courts attempted to justify it on the ground that it impeached the complainant's credibility.¹⁹ This reasoning assumes that promiscuity is a form of dishonesty, and that, as in the case of other acts affecting honesty, promiscuity lessens the witness's credibility. This effort to justify admitting evidence of sexual history is seriously flawed. First, the cases offering this explanation limited the inference to women. Promiscuous men could not be similarly impeached.²⁰ Second, only women who brought rape charges were open to this kind of impeachment. Female prosecuting witnesses who charged defendants with other types of crimes, such as robbery, could never be impeached by their prior sexual history.²¹

In recent years, many law review articles and notes have attacked the old rule allowing evidence of the victim's previous sexual conduct in a rape trial.²² They argue that this system is manifestly

¹⁹ E.g., *Seals v. State*, 114 Ga. 518, 40 S.E. 731 (1902); *Anderson v. State*, 104 Ind. 467, 471, 4 N.E. 63, 65 (1885); *Frank v. State*, 150 Neb. 745, 753, 35 N.W.2d 816, 822 (1949); CAL. EVID. CODE § 782 (West 1974); DEL. CODE ANN. tit. 11, § 3508 (1975). But see 2 J. BISHOP, CRIMINAL PROCEDURE § 965 (1880) ("The evidence is sometimes regarded as properly impairing her credibility—a doubtful proposition . . .").

²⁰ E.g., *State v. Sibley*, 131 Mo. 519, 531, 33 S.W. 167, 171 (1895):

[S]uch evidence is inadmissible in any case for the purpose of impeaching the character of a male witness It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman.

Contra, *People v. Blagg*, 267 Cal. App. 2d 598, 73 Cal. Rptr. 93 (1968) (conviction in homosexual rape case reversed because the trial judge refused to allow the defendant to cross-examine the victim about his prior sexual conduct); *Lucado v. State*, 40 Md. App. 25, 339 A.2d 398 (1975) (state allowed to prove sexual history of male homosexual rape victim).

²¹ E.g., *People v. Johnson*, 106 Cal. 289, 294, 39 P. 622, 623 (1895). See also *Milenkovic v. State*, 86 Wis. 2d 272, 272 N.W.2d 320, 324-25 (Ct. App. 1978). But cf. *State v. Coella*, 3 Wash. 99, 28 P. 28 (1891) (allowing impeachment of a witness to a murder on the ground that she was a prostitute).

²² *Berger*, *supra* note 5; *Gold & Wyatt*, *supra* note 6; *Hibey*, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character*, 11 AM. CRIM. L. REV. 309 (1973); *Ordover*, *supra* note 5; *Washburn*, *Rape Law: The Need for Reform*, 5 N.M. L. REV. 279 (1975); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973); Note, *Rape Reform Legislation: Is It the Solution?*, 24 CLEV. ST. L. REV. 463 (1975); Note, *California Rape Evidence Reform*, 26 HASTINGS L.J. 1551 (1975); Note, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity*, 7 LOY. CHI. L.J. 118 (1976); Note, *The Admissibility of a Rape Complainant's Previous Sexual Conduct: The Need for Reform*, 11 NEW ENG. L. REV. 497 (1976); Comment, *Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims*, 22 ST. LOUIS U. L.J. 367 (1978); Note, *If She Consented Once, She Consented Again: A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U. L. REV. 127 (1975); Note, *Criminal Law Reform in Vermont: The Proposal to Exclude Evidence of the*

unfair to women and a reflection of outmoded morality and an unenlightened male-dominated legal system. The growing awareness of the equality of women, and no doubt the published criticism, have caused most jurisdictions in this country to change the old laws and eliminate the automatic admissibility of this kind of evidence.²³ Yet even as the old laws were premised on the myths of a male-dominated society, the vituperative attacks and much of the resulting legislation are themselves based on an emotional premise: that the rape victim is unfairly subject to a "second rape" by the criminal justice system.²⁴ Uniformly, the cry for revision of the rape evidence laws calls for special protections for the rape victim not available to most prosecuting witnesses. Writers have gone so far as to advocate considering a rape victim as a "defendant," entitled to the same protections as defendants charged with crimes.²⁵

These authors are undoubtedly correct that the old laws that singled out rape cases for special evidentiary rules were unwar-

Victim's Character in Forcible Rape Cases, 1 VT. L. REV. 215 (1976); Note, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36 (1975); 27 BAYLOR L. REV. 362 (1975); 15 DUQ. L. REV. 155 (1976); 52 WASH. L. REV. 1011 (1977).

²³ See Appendix, *infra*, for list of states with rape victim shield laws. The recent enactment of these statutes is an indication of the trend in contemporary law to treat rape cases the same as other criminal trials. Special rules requiring corroboration of a rape complainant's testimony are being eliminated. *E.g.*, CONN. GEN. STAT. ANN. § 53a-68 (West 1972), *repealed by* 1974 Conn. Pub. Acts 74-131; DEL. CODE ANN. tit. 11, § 772(c) (1975), *repealed by* 59 Del. Laws ch. 547 (1974); IOWA CODE ANN. § 782.4 (West 1973), *repealed by* 1974 Iowa Acts ch. 1271, § 2; N.M. STAT. ANN. § 30-9-15 (1978); N.Y. PENAL LAW § 130.15 (McKinney 1973), *repealed by* 1974 N.Y. Laws ch. 14, § 1; 18 PA. CONS. STAT. ANN. § 3106 (Purdon Supp. 1979-1980); WASH. REV. CODE ANN. § 9.79.150(1) (West 1975). Jury instructions singling out prosecuting witnesses in rape trials for special scrutiny are also falling into disuse. *See, e.g.*, *People v. Ricon-Pineda*, 14 Cal. 3d 864, 877, 538 P.2d 247, 256, 123 Cal. Rptr. 119, 128 (1975) (Striking down jury instruction that required the jury to view a prosecutrix's testimony with caution, the court noted that they were "of the opinion that the instruction . . . has outworn its usefulness and in modern circumstances is no longer to be given mandatory application."); *Lopez v. State*, 544 P.2d 855, 865 (Wyo. 1976) (cautionary instruction "unnecessary"); MINN. STAT. ANN. § 609.347(5) (West 1975); NEV. REV. STAT. § 175.186 (1975). *Cf.* 18 PA. CONS. STAT. ANN. § 3106 (Purdon 1973) (requiring such an instruction), *repealed by* 1973 Pa. Laws No. 115, § 2. Similarly, many states are completely rewriting their laws of sexual crimes to eliminate the disparaging treatment women have suffered. *E.g.*, IND. STAT. ANN. §§ 35-42-4-1 to 4 (1978); MICH. COMP. LAWS §§ 750.520a-5201 (1975); NEB. REV. STAT. §§ 28.317-.321 (1977) (making sex offense law sex-neutral).

²⁴ Gold & Wyatt, *supra* note 6, at 695; Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 343-51 (1973); Note, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity*, 7 LOY. CHI. L.J. 118, 120 n.10 (1976).

²⁵ See Gold & Wyatt, *supra* note 6, at 695-96. *Cf.* Ordovery, *supra* note 5, at 108-09 (emphasizing confusion and prejudice to women inherent in present scheme of rape prosecutions). This position is constitutionally ludicrous, *see* notes 98-102 *infra* & accompanying text.

ranted. This thesis, however, cuts both ways: just as testimony should not automatically be admissible in rape cases, it should not automatically be inadmissible solely because a trial involves rape instead of some other crime affecting the same people. A basic premise of evidentiary rules is that they focus on issues common to all trials and do not develop differently for each substantive crime and civil cause of action.²⁶

III. THE MODERN RESPONSE

The response of legislatures to criticism of rape evidence laws has been enormous. In recent years, forty-five states have rewritten their rules of evidence concerning the admissibility of testimony about a rape victim's prior sexual history.²⁷ A majority of the new evidentiary laws tend to the opposite extreme of the old rule of automatic admissibility: presumptive inadmissibility.²⁸ There is great variation from jurisdiction to jurisdiction in the extent to which sexual history evidence is allowed. Louisiana has barred all uses of prior sexual activity evidence, except evidence of a prior relationship with the defendant,²⁹ while the Texas legislature has rewritten its law simply to allow judicial discretion over all uses of sexual history evidence.³⁰ Other states cover the range between these two.

Rule 412 of the Federal Rules of Evidence, the most recent such enactment, states as a general rule that reputation or opinion

²⁶ See 1 J. WIGMORE, EVIDENCE xiii-xix (1940). Cf. S.D. COMPILED LAWS ANN. § 23-44-16.2 (1978) ("The testimony of the complaining witness in a trial for a charge of rape shall not . . . be treated in any different manner than the testimony of a complaining witness in any other criminal case.").

²⁷ See Appendix, *infra*.

²⁸ E.g., FED. R. EVID. 412 ("[E]vidence . . . is . . . not admissible, unless . . ."); CAL. EVID. CODE § 1103(2)(a) (West 1974) ("is not admissible"); COLO. REV. STAT. § 18-3-407(1) (1975) ("shall be presumed to be irrelevant"); LA. REV. STAT. ANN. § 15:498 (West 1975) ("shall not be admissible"); S.C. CODE § 16-3-659.1 (1977) ("shall not be admitted . . . provided, however . . ."). Berger proposes that the judge be given additional discretion to exclude evidence even in those few areas in which her model statute allows the presumption to be overcome. Berger, *supra* note 5, at 72. But see S.D. COMPILED LAWS ANN. § 23-44-16.2 (1978), quoted in note 26 *supra*.

²⁹ LA. REV. STAT. ANN. § 15:498 (West 1975): "Evidence of prior sexual conduct and reputation for chastity . . . shall not be admissible except for incidents arising out of the victim's relationship with the accused."

³⁰ TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon 1975): "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may be admitted . . . only if, and to the extent that, the judge finds that the evidence is material to a fact at issue in the case and that its . . . prejudicial nature does not outweigh its probative value."

evidence of the past sexual behavior of an alleged rape victim is never admissible, and that "evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible."³¹ The rule then follows the most common pattern, setting forth a few specific instances in which the defendant's obvious need to introduce such evidence is so great that preventing it would violate due process. Congress chose two situations in which to allow this evidence:

(A) [P]ast sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was . . . the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented . . .³²

Rule 412 is typical in a number of ways. First declaring a general rule that evidence of a rape victim's prior sexual activities is inadmissible, it creates a presumption that the defendant should not be allowed to introduce testimony on this point. The rule recognizes, however, that in certain limited situations the defendant may put such evidence before the jury; in some cases it would be manifestly unfair to prevent introduction of evidence with particular probative value. As with most similar statutes, rule 412 is restricted in its operation to criminal cases.³³ It follows the majority in allowing evidence of specific sexual acts only in very limited situations,³⁴ but it is more restrictive than most state rules by prohibiting reputation and opinion evidence altogether, no matter what the probative value.

Two instances of special admissibility appear most commonly in state statutes: (1) prior sexual relations with the defendant offered

³¹ FED. R. EVID. 412(b).

³² *Id.* 412(b)(2).

³³ *Id.* 412(a). See ARK. STAT. ANN. § 41-1810.1 (1977); CAL. EVID. CODE § 1103 (West 1975). This peculiar limitation, having nothing to do with the need to protect rape victims, could lead to the anomalous result of sexual history evidence being admissible in a civil suit for assault but inadmissible in the criminal prosecution for the same act, thus giving a civil litigant greater rights to present a defense than a criminal defendant.

In many states, shield laws apply only in rape cases. *E.g.*, IND. CODE ANN. § 35-1-32.5-1 (Burns 1976) (amended 1979); MO. ANN. STAT. § 491.015 (Vernon 1977). In at least one case, a court has therefore admitted sexual history evidence, despite a shield law, in a case in which the defendant was charged with breaking and entering with *intent* to commit rape. *People v. Walker*, 81 Mich. App. 202, 265 N.W.2d 82 (1978).

³⁴ FED. R. EVID. 412(b)(2).

to show consent; and (2) a specific sexual act with another man to provide an alternative explanation for the physical indications of rape. The rape evidence laws universally allow the defendant who claims consent as a defense to show that he and the complainant had a prior consensual sexual relationship.³⁵ Most statutes also permit the defendant to rebut evidence offered by the state to corroborate the sex act itself—presence of semen, resulting pregnancy or venereal disease, or the force inflicted—by showing that such evidence may have been the result of a sexual act with another man at about the same time.³⁶ Less common exceptions allow such testimony to impeach the victim's credibility³⁷ or to show a motive for fabrication.³⁸ Finally, the sexual behavior of the prosecuting witness may be admissible if it indicates an unusual pattern of consensual sexual activity that is closely related to the defendant's version of the events leading to his claim of consent.³⁹ There are a few other miscellaneous exceptions.⁴⁰

Much of the debate about rape victim shield laws has centered on the attempt to define precisely those situations in which fairness and due process demand that the defendant be allowed to introduce sexual history evidence. Professor Berger has written a comprehensive article defining seven particular types of evidence that, subject to judicial findings of relevance and fairness, the defendant ought

³⁵ See Appendix, *infra*. Missouri requires that the conduct be reasonably contemporaneous. MO. ANN. STAT. § 491.015(1)(1) (Vernon 1977). Some states permit only testimony concerning specific instances of conduct, e.g., MASS. ANN. LAWS ch. 233, § 21B (Michie/Law. Co-op 1978); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1975). For some reason, only evidence of *prior* sexual relations with the defendant is usually admissible. Only one state specifically allows evidence of subsequent consensual relations. COLO. REV. STAT. § 18.3-407(1)(a) (1975).

³⁶ See Appendix, *infra*. FED. R. EVID. 412 allows testimony of sexual activities to rebut evidence that defendant is the source of semen or injury, but not to rebut evidence that he is the source of pregnancy or disease. The distinction is arbitrary. No other jurisdiction uses it. Some states allow testimony related to the origin of semen, pregnancy, or disease, but not physical injury. E.g., MICH. COMP. LAWS § 750.520j (1975); VT. STAT. ANN. tit. 13, § 3255 (1977).

³⁷ E.g., CAL. EVID. CODE § 782 (West 1974); MISS. CODE ANN. § 97-3-68 (1977). But see *Johnson v. State*, 146 Ga. App. 277, 246 S.E.2d 363 (1978).

³⁸ Two states allow sexual history evidence to show bias or motive. MD. ANN. CODE art. 27, § 461A (1977); OR. REV. STAT. § 163.475 (1975). Two other states allow evidence that the victim has previously filed false rape charges. VT. STAT. ANN. tit. 13, § 3255 (1977); WIS. STAT. ANN. § 972.11 (West 1975). In addition, Colorado allows such evidence subject to a specific judicial finding of relevance. COLO. REV. STAT. § 18-3-407 (1975). See *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976).

³⁹ E.g., FLA. STAT. ANN. § 794.022(2) (West 1976); MINN. STAT. ANN. § 609.347(3) (West 1975); N.C. GEN. STAT. § 8-58.6 (1977) (amended 1979).

⁴⁰ N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1975) (may prove that victim was a prostitute); N.C. GEN. STAT. § 8-58.6 (1977) (amended 1979) (allows testimony that victim fantasized the event).

to be allowed to introduce.⁴¹ Other writers have argued that a man accused of rape may delve into the victim's sexual history in far fewer instances.⁴²

It is not the purpose of this Article to become involved in the debate over which of these various situations brings the due process clause into play and compels the admissibility of sexual behavior evidence. Such an approach rests on the assumption that the state has the constitutional authority to limit the defendant's introduction of evidence of the victim's sexual history. Berger, for example, states as an axiom that legislatures have the power to bar certain evidence as irrelevant and inadmissible in a trial and therefore can completely exclude evidence of sexual behavior by declaring it irrelevant. In marvelously circular reasoning, she cites the rape shield statutes themselves as the only support for this proposition.⁴³ She, like most other authors, then discusses how this power of the state can be limited by the due process clause: in certain compelling situations a court must allow the defendant to present testimony excluded by statute.⁴⁴

The power of the state to legislate is limited, however, by more than due process concepts of fairness. Criminal defendants have

⁴¹ (1) Evidence of the complainant's sexual conduct with the defendant; (2) evidence of specific instances of conduct to show that someone other than the accused caused the physical condition (semen, pregnancy, disease) allegedly arising from the act; (3) evidence of a distinctive pattern of conduct closely resembling the defendant's version of the encounter, to prove consent; (4) evidence of prior sexual conduct known to the defendant (presumably by reputation) tending to prove that he believed complainant was consenting; (5) evidence showing a motive to fabricate the charge; (6) evidence that rebuts proof offered by the state on victim's sexual conduct; and (7) evidence as the basis for expert testimony that the complainant fantasized the act. Berger, *supra* note 5, at 98-99.

⁴² E.g., Ordovery, *supra* note 5, at 110-18 (distinctive patterns of behavior under similar circumstances); Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L.J. 1551, 1572 (1975) (only when victim's testimony is sole incriminating evidence); 52 WASH. L. REV. 1011, 1023, 1027-33 (1977) (bias and relations with the defendant only).

⁴³ "Clearly, too, legislatures as well as courts may decide to bar some kinds of proof, as indeed they have done in the area of rape by passing various shield statutes designed to limit use of highly prejudicial material." Berger, *supra* note 5, at 56-57.

Another writer has come up with the bizarre suggestion that a state can avoid constitutional challenges by rewriting its laws of evidence. Washburn, *supra* note 22, at 302. But see notes 62-70 *infra* & accompanying text.

⁴⁴ Berger states that banning entire categories of evidence offered by the accused "poses issues of possible denial of due process." Berger, *supra* note 5, at 39. See WASH. REV. CODE ANN. § 9.79.150 (1976), which permits sexual conduct evidence only when "its exclusion would result in denial of substantial justice to the defendant." See also Rudstein, *supra* note 14, at 18-19; Comment, *Ohio's New Rape Law: Does It Protect Complainant at the Expense of the Rights of the Accused?*, 9 AKRON L. REV. 337 (1975).

been guaranteed numerous rights by the fourth, fifth, and sixth amendments, and states may not infringe upon them regardless of general legislative power. A state may decide in general that the statements of a party to a lawsuit are admissible, but, because of the protections of the fifth amendment, this determination cannot extend to statements coerced from a criminal defendant.⁴⁵ Although the state may have the power to create a small claims court in which civil disputes are settled without attorneys, that court cannot try misdemeanor cases because of the sixth amendment guarantee of counsel.⁴⁶ The power to determine the admissibility of evidence does not give the states the ability to permit introduction of evidence seized in warrantless searches in violation of the fourth amendment.⁴⁷

The sixth amendment guarantees a criminal defendant the right to confront witnesses against him and the right to obtain witnesses in his own behalf. On its face a restrictive rape victim shield law denies the defendant the ability to pursue certain questions on cross-examination and to elicit testimony from his own witnesses. For this reason, the analysis of such laws cannot start from the assumption that a state may define this evidence as irrelevant. Clearly the state could not constitutionally define all cross-examination as irrelevant without running afoul of the sixth amendment.⁴⁸ The question, then, is whether sexual history evidence may be singled out and made inadmissible. To resolve this issue, the scope of a criminal defendant's sixth amendment rights to introduce evidence must be defined and that definition applied to sexual history evidence. If this analysis indicates that a defendant's right to present evidence includes asking questions about the prior sexual experiences of a rape victim, then the states will have a difficult time defending their shield laws.

⁴⁵ See *New Jersey v. Portash*, 440 U.S. 450 (1979); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Malloy v. Hogan*, 378 U.S. 1 (1964). Cf. *Counsellman v. Hitchcock*, 142 U.S. 547, 585 (1892) ("[L]egislation cannot abridge a constitutional privilege . . .").

⁴⁶ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972). But cf. *Scott v. Illinois*, 440 U.S. 367 (1979) (sixth amendment requires provision of counsel only if indigent is to be sentenced to prison).

⁴⁷ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). See *Cupp v. Murphy*, 412 U.S. 291 (1973) (federal constitutional standard for what constitutes a "seizure" overrode the looser state definition of arrest).

⁴⁸ "[I]t could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law." *Washington v. Texas*, 388 U.S. 14, 22 (1967). See *Davis v. Alaska*, 415 U.S. 308 (1974); *Pointer v. Texas*, 380 U.S. 400 (1965).

IV. THE SIXTH AMENDMENT RIGHT TO PRESENT EVIDENCE

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."⁴⁹ If a criminal defendant is to find a constitutionally based right to present evidence of the prior sexual behavior of a rape complainant, he must find it in this provision. Such evidence can take two forms: the cross-examination of the complaining witness and the introduction of testimony from independent witnesses called by the defendant. The confrontation clause controls the extent to which a defendant has the right to cross-examine a witness who testifies against him, and the compulsory process clause is the basis for the right to present his own witnesses.

It is axiomatic that the right of a defendant to confront the witnesses against him includes the right of cross-examination. "The substance of the [sixth amendment] constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . ."⁵⁰ Cross-examination must be understood to include the opportunities of "testing the recollection and sifting the conscience of the witness" and also of giving the jury the chance to view his demeanor.⁵¹ It is not merely limited to the right to assure that the witness testifies to complete, rather than partial, facts, nor is it limited to the substantive issues in controversy.⁵²

The compulsory process clause assures a defendant the ability to call witnesses in his own behalf. The right guaranteed is the presentation of defense testimony, not merely access to the subpoena power. It would be a hollow right indeed if a defendant could

⁴⁹ U.S. CONST. amend. VI.

⁵⁰ *Mattox v. United States*, 156 U.S. 237, 244 (1895). The Court stated in *Pointer v. Texas*, 380 U.S. 400, 404 (1965), that "[i]t cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." See *Douglas v. Alabama*, 380 U.S. 415 (1965); *Cameron v. State*, 561 P.2d 118, 121 (Okla. Crim. 1977) ("scope of cross-examination should not be limited when testimony sought . . . is germane to and has probative value in the matter on trial"). See generally 5 J. WIGMORE, EVIDENCE § 1395 (Chadbourn rev. 1974); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 579-81 (1978).

⁵¹ *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

⁵² See McCORMICK, *supra* note 16, at § 22 ("One of the main functions of cross-examination is to afford an opportunity to elicit answers which will impeach the [witness's] veracity, capacity to observe, impartiality, and consistency . . .").

subpoena a witness to the trial, but then had no right to elicit his testimony.⁵³

By considering these two clauses together, a unitary theory of evidence for criminal cases emerges. This formulation, first propounded by Professor Westen,⁵⁴ sees the two clauses as opposite sides of the same coin—both give the defendant the right to present testimony. The difference between them is that the confrontation clause assures those rights during cross-examination of witnesses whose testimony incriminates the defendant, and the compulsory process clause guarantees the discovery and presentation of witnesses who can establish a defense.⁵⁵ According to Westen, the accused should have the same right to have his evidence heard during cross-examination as he has during direct.⁵⁶ Indeed, the sixth amendment as a whole may be read as guaranteeing the defendant the right to present this defense effectively: by cross-examining witnesses against him, by presenting his own witnesses, by having an impartial jury hear the evidence, by being told of the charges against him so that he can prepare a defense, and by having the assistance of competent counsel.⁵⁷

Even accepting that the defendant has the right to present and elicit testimony he hopes will exculpate him, the scope of that right must still be defined. Surely it must be limited to issues involved in the case. The sixth amendment speaks in terms of witnesses

⁵³ Westen, *supra* note 50, at 591. In *Washington v. Texas*, 388 U.S. 14, 23 (1967), the Court made clear that this right included the ability to present testimony: "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 had no right to use." *But cf.* *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974) (compulsory process rights mean only that the witness must be made available in court). For a detailed historical account of the development of the meaning of the compulsory process right, see Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 75-107 (1974).

⁵⁴ Westen, *supra* note 50.

⁵⁵ The difference between the two clauses does not depend on whether the witness was called by the prosecution or the defense. *Chambers v. Mississippi*, 410 U.S. 284, 297-98 (1973). Rather, a defendant has the right to confront and cross-examine any witnesses whose testimony is adverse and the right to present and examine any who can provide helpful testimony. See Westen, *supra* note 50, at 601-06.

⁵⁶ Westen, *supra* note 50, at 592-93 (comparing confrontation clause and compulsory process clause cases).

⁵⁷ See, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973) (confrontation and compulsory process); *Ham v. South Carolina*, 409 U.S. 524 (1973) (impartial jury); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *In re Oliver*, 333 U.S. 257 (1948) (notice of charges against him). *Cf.* *Lakeside v. Oregon*, 435 U.S. 333 (1978) (sixth amendment does not guarantee that counsel will be allowed to employ whatever strategy he wants); *Chambers v. Maroney*, 399 U.S. 42 (1970) (appointment of counsel only a few minutes before trial did not violate the sixth amendment when record showed counsel did an adequate job).

"against" the defendant and those "in his favor," and the Supreme Court has never read either provision to mean that the defendant has the right to introduce whatever he wants. Rather, his right is limited to evidence having some probative value.⁵⁸

This is not meant to imply that there can be no limits to the exercise of this right.⁵⁹ Not all evidence with probative value is admissible; under common law, otherwise relevant evidence may be excluded if the probative value is outweighed by a prejudicial effect.⁶⁰

Neither logic nor the case law indicates that the defendant's right extends beyond this.⁶¹ The sixth amendment does not give a criminal defendant any greater ability to introduce evidence than other litigants, nor does it redefine the rules of relevance in criminal cases. The issue with respect to rape victim shield laws, however, is whether the defendant is entitled to introduce *less* than all relevant evidence. May the defendant be prevented from offering evidence that, properly or not, has traditionally been admissible? In answering this question, it is unnecessary to go beyond the defendant's right to introduce relevant, nonprejudicial evidence and to argue that he can introduce all probative evidence.

Positing that the accused has the constitutional right to introduce on direct and cross-examination relevant evidence not outweighed by prejudicial effect does not answer the issue. One question remains: Who defines whether testimony is relevant and ad-

⁵⁸ In *Davis v. Alaska*, 415 U.S. 308 (1974), the defendant sought to ask questions that would show possible bias of a state's witness, which the Court held was "always relevant." *Id.* 316. In *Washington v. Texas*, 388 U.S. 14 (1967), the Court held that the defendant had the right to establish a defense by presenting a witness whose testimony "would have been relevant." *Id.* 16. See generally Westen, *Compulsory Process II*, 74 MICH. L. REV. 191, 205 (1975).

See *Jenkins v. Moore*, 395 F. Supp. 1336, 1338 (E.D. Tenn.), *aff'd*, 513 F.2d 613 (6th Cir. 1975) (finding no violation of compulsory process rights when defendant was denied the ability to introduce irrelevant documents). See also *United States v. Spivey*, 508 F.2d 146, 151 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975); *United States v. Honneus*, 508 F.2d 566, 573 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *State v. Davis*, 269 N.W.2d 434 (Iowa 1978).

Professor Westen suggests that this may be a final formulation of the rule, rather than an interim one. The distinction turns on Westen's use of the word "relevant" to mean "admissible." See note 116 *infra* & accompanying text.

⁵⁹ Other sixth amendment guarantees are limited. For example, a defendant is assured appointment of counsel, but only if he is sentenced to prison. *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The accused's right to confront witnesses does not prevent use of prior testimony when the witness is genuinely unavailable and there was prior opportunity for full cross-examination. *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

⁶⁰ See FED. R. EVID. 403; *McCORMICK*, *supra* note 16, at § 185, 6 J. WIGMORE, EVIDENCE § 1864 (Chadbourn rev. 1976).

⁶¹ See note 58 *supra*.

missible? If the Constitution assures no more than the right of a defendant to present evidence that the state has determined to be relevant, then the defendant cannot complain of a state law changing the rules to restrict certain types of evidence.⁶² The issue has been put to rest by the Supreme Court. Because the ability of the accused to present testimony is grounded in a constitutional right, a federal constitutional standard applies.⁶³ In *Smith v. Illinois*,⁶⁴ a confrontation clause case, the Court held that a defendant could elicit on cross-examination testimony that was relevant under traditional rules, notwithstanding a state evidentiary law to the contrary.⁶⁵ Similarly, under the compulsory process clause, *Washington v. Texas*⁶⁶ held that the sixth amendment rights of the accused overrode a state rule preventing a codefendant from testifying in favor of the defendant.⁶⁷ In these cases interpreting sixth amendment provisions, the Court turned to the "federal common law" for its evidentiary standards. State rules prohibiting testimony that would have been admissible under "traditional" evidence law could not act to prevent a criminal defendant from introducing such testimony. In *Davis v. Alaska*,⁶⁸ the Court stated that a witness probably would have given a different answer to a question propounded on cross-examination had he not believed he was "shielded [by state law] from traditional cross-examination."⁶⁹ Included in the Court's phrasing of the right to cross-examine was the statement

⁶² Wigmore took this position with respect to the related issue of witness competence. He argued that the compulsory process clause meant only that a defendant could call such witnesses as were permitted under the local rules. J. WIGMORE, EVIDENCE § 2191 (McNaughten rev. 1961).

⁶³ "The standard of relevance applied to the testimony of defense witnesses, therefore, ultimately presents a federal question to be resolved by federal constitutional standards." Westen, *supra* note 58, at 206. See *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967) (whether fifth amendment privilege has been waived is a "federal question for us [the Court] to decide"); *Pointer v. Texas*, 380 U.S. 400, 407-08 (1965) (denial of the right to cross-examine measured by federal standard); *Counselman v. Hitchcock*, 142 U.S. 547, 585 (1892) (state legislation "cannot abridge a constitutional privilege").

⁶⁴ 390 U.S. 129 (1968).

⁶⁵ The Court followed *Pointer v. Texas*, 380 U.S. 400 (1965), in applying a federal standard. The Court held that the same standard had to apply under the confrontation clause in both state and federal proceedings. *Smith v. Illinois*, 390 U.S. 129, 133 (1968). See Westen, *supra* note 50, at 579-80.

⁶⁶ 388 U.S. 14 (1967).

⁶⁷ In *Washington*, two state statutes prevented a defense witness from testifying because he was a coparticipant in the crime. The Court held that the right to compulsory process had been denied because the witness was otherwise competent to testify. *Id.* 23.

⁶⁸ 415 U.S. 308 (1974).

⁶⁹ *Id.* 314. State law prohibited cross-examination regarding the witness's juvenile record and probationary status.

that the cross-examiner "has traditionally been allowed to impeach, i.e., discredit, the witness."⁷⁰ To say that a state has changed the traditional law and declared evidence irrelevant thus does not answer the constitutional question. Rather, the validity of such a state statute must be tested against the traditional standard of admissibility: the sixth amendment guarantees that a criminal defendant will be able to introduce any evidence probative of a material issue, unless the probative value is outweighed by the prejudicial effect of the testimony.

V. THE APPROPRIATE STANDARD OF REVIEW

Having demonstrated that the accused has a constitutional right to present relevant, nonprejudicial evidence, we now attempt to set out the appropriate standard for reviewing a state statute alleged to restrict the exercise of that right. From the numerous criminal procedure cases decided by the Supreme Court appear two general choices. In some cases, the Court has employed a totality of the circumstances test, in which the legitimate interests of the state are weighed against the constitutional rights of the defendant.⁷¹ This standard allows the state reasonably to regulate the trial process as long as the defendant is not denied a fair trial. In other cases, the Court has utilized a strict standard of review, under which even minor restrictions on the defendant's rights are struck down.⁷²

Many commentators who support rape victim shield laws have assumed the balancing test to be appropriate.⁷³ The importance of the state's interest must then be taken into account and weighed against the defendant's right to introduce the evidence. For example, cases involving eyewitness identification are reviewed under

⁷⁰ *Id.* 316 (citing 3A J. WIGMORE, EVIDENCE § 940 (Chadbourn rev. 1970)).

⁷¹ *E.g.*, *Neil v. Biggers*, 409 U.S. 188 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). See also *Rochin v. California*, 342 U.S. 165 (1952).

⁷² *E.g.*, *New Jersey v. Portash*, 440 U.S. 450 (1979); *Mincey v. Arizona*, 437 U.S. 385 (1978); *Moore v. Illinois*, 434 U.S. 220 (1977); *Peters v. Kiff*, 407 U.S. 493 (1972); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Brookhart v. Janis*, 384 U.S. 1 (1966).

⁷³ *Berger*, *supra* note 5, at 57; *Ordovery*, *supra* note 5, at 126; *Washburn*, *supra* note 22, at 301; Note, *Indiana's Rape Shield Law: Conflict With the Confrontation Clause?*, 9 IND. L. REV. 418, 421 (1976); Note, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity*, 7 LOX. CHI. L.J. 118, 131 (1976); Note, *Relevancy of Evidence of Prior Sexual Conduct Under the Kentucky Revised Statute Section 510.145*, 4 N. KY. L. REV. 345, 371 (1977); 8 CA. L. REV. 973, 980 (1974); 52 WASH. L. REV. 1011, 1034 (1977). See *People v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976) (testing California's rape shield law against the defendant's right to a fair trial); WASH. REV. CODE ANN. § 9.79.150 (1978) (sexual history evidence allowed if its exclusion "would result in a denial of substantial justice to the defendant").

this standard.⁷⁴ The Court has conceded that "show-ups" are inherently suggestive; yet they do not per se violate the defendant's right to a fair trial.⁷⁵ Instead, this type of procedure is recognized as important to the state in quickly assuring the accuracy of an arrest. For the procedure to violate the Constitution, it must have been unnecessarily suggestive, and it must have created a substantial likelihood of misidentification.⁷⁶ The Court has directed that the totality of the circumstances be examined in making this determination. Under this line of cases there is no constitutional violation even with a possibility of misidentification.⁷⁷ The Constitution will apparently tolerate placing the accused at a disadvantage in some situations in order to further the state's important interest in effective detection and prosecution of crime.

There is some support for the observation that the Court applies this minimal standard of review in cases under the confrontation and compulsory process clauses. In recent decisions, the Court has frequently stressed the particular importance of the interests asserted by the defendant and thereby implied that it was engaging in a balancing test. In *Davis v. Alaska*,⁷⁸ state law prohibited cross-examination of a prosecution witness regarding his juvenile record and probationary status. The Court noted that "it would be difficult to conceive of a situation more clearly illustrating the need for cross-examination"⁷⁹ and that the credibility of the witness involved was a "key element"⁸⁰ in the state's case. The Court concluded that "[s]erious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender."⁸¹ In *Washington v. Texas*,⁸² decided under the compulsory process clause, language again appears

⁷⁴ See *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *Foster v. California*, 394 U.S. 440 (1969); *Stovall v. Denno*, 388 U.S. 293 (1967).

⁷⁵ *Neil v. Biggers*, 409 U.S. 188 (1972); *Stovall v. Denno*, 388 U.S. 293 (1967).

⁷⁶ *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

⁷⁷ "What is less clear from our cases is whether . . . unnecessary suggestiveness alone requires the exclusion of evidence Weighing all the factors, we find no *substantial* likelihood of misidentification." *Id.* 201 (emphasis added).

⁷⁸ 415 U.S. 308 (1974).

⁷⁹ *Id.* 314. .

⁸⁰ *Id.* 317.

⁸¹ *Id.* 319.

⁸² 388 U.S. 14 (1967).

that stresses the particular importance to the defendant of the excluded evidence. The testimony was described as "vital"⁸³ to his defense and the rule under which it was excluded referred to as "arbitrary."⁸⁴

Notwithstanding such language, analysis of the facts of these cases suggests that the Court was not applying this minimal standard of review. Despite some indication to the contrary in the opinion, the excluded testimony in *Davis* was not very important. An inquiry into a major prosecution witness's juvenile status is traditionally relevant: a witness arguably might try to help the police by fabricating testimony because he feared that his juvenile probationary status was in jeopardy.⁸⁵ Although this examination of possible interest is relevant, it is hardly of so compelling a nature that a manifestly unfair trial would result from its exclusion.⁸⁶ The infringement of the defendant's constitutional rights in *Davis* was thus of a different degree altogether from the other situations that have been found to violate this minimal standard, such as the suppression of exculpatory evidence⁸⁷ or the use of perjured testimony against a defendant.⁸⁸ The comparative unimportance of the infringement suffered by the defendant in *Davis* indicates that the Court is in fact testing apparent violations of the sixth amendment very harshly.⁸⁹

⁸³ *Id.* 16.

⁸⁴ *Id.* 23. *Washington* is complicated by the fact that it is the case that holds that compulsory process is obligatory upon the states through the fourteenth amendment. The opinion is therefore full of due process references.

⁸⁵ *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

⁸⁶ *Id.* 312. Other testimony that suggested that the witness might be lying to avoid trouble with the police did come into evidence. Defense counsel elicited testimony that the stolen safe was found on the witness's property and that the thought had crossed the witness's mind that the police might suspect him. *Id.* 312-13. See *Lagenour v. State*, 376 N.E.2d 475, 478 (Ind. 1978) (the state's interest in *Davis* was "extraneous"). But see *Finney v. State*, 385 N.E.2d 477 (Ind. Ct. App. 1979) (impeachment may be curtailed if other, independent lines of impeachment had been pursued, regardless of relevance of the excluded testimony). The result in *Finney* cannot be squared with the contrary holding in *Davis*.

⁸⁷ *Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of a coparticipant's statement that he, not the defendant, did the actual killing).

⁸⁸ *Napue v. Illinois*, 360 U.S. 264 (1959) (prosecutor obtained testimony from the chief witness that he had not received a promise of leniency in return for testimony, when the prosecutor knew that he had); *Alcorta v. Texas*, 355 U.S. 28 (1957) (prosecutor elicited testimony that he knew was false and that, if believed, would have reduced the degree of homicide).

⁸⁹ The other indication that a strict standard of review is appropriate is that confrontation and compulsory process are rights specifically contained in the sixth amendment. In reviewing other specific guarantees of that amendment, the Court has employed a strict standard—once the Court has defined the extent of such a right, it has allowed no leeway for argument that the right should not be provided

Whether applying this strict standard overtly or in the guise of a balancing test, the Court must first decide if a case implicates a particular right or prohibition contained in the Constitution. At this stage, the Court engages in a process akin to a balancing test. As a defendant seeks to avoid more than the basic evil the amendment was designed to eliminate, the Court will consider the competing interests of the state.⁹⁰ When the state demonstrates a compelling interest, the scope of the defendant's right will be more limited than in those situations in which the state has no real interest.⁹¹ Likewise, as the right's importance to the defendant increases, it becomes harder for the state to justify the limitation on its exercise.⁹² With this procedure for choosing among protected inter-

in a specific case. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335, 344 (1963). *See also* Moore v. Illinois, 434 U.S. 220 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). Similarly, once the Court decided that the fifth amendment required certain warnings to defendants, *Miranda v. Arizona*, 384 U.S. 436 (1966), convictions were overturned in the absence of such warnings, regardless of the seriousness of the crime or the defendant's awareness of his rights. *See, e.g.,* State v. Stein, 70 N.J. 369, 360 A.2d 347 (1976) (that defendant was himself a lawyer did not mean he had a lesser right to counsel). *See also* Brewer v. Williams, 430 U.S. 387 (1977).

The minimal standard of review has been applied, on the other hand, to procedural rights that must be read into the due process clause. Constitutional violations are found only after application of a "totality of the circumstances" test. *See, e.g.,* Foster v. California, 394 U.S. 440, 443 (1969) (identification procedure "so undermined the reliability of the eyewitness identification as to violate due process."); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.").

⁹⁰ "[C]onstitutional line drawing becomes more difficult as the reach of the Constitution is extended further, and as efforts are made to transpose lines from one area of Sixth Amendment jurisprudence to another." *Scott v. Illinois*, 440 U.S. 367, 372 (1979).

⁹¹ *See* Westen, *supra* note 50, at 580-81. *See, e.g.,* *Scott v. Illinois*, 440 U.S. 367 (1979) (cost and confusion in district courts of giving right to counsel in cases in which no imprisonment occurs outweighs interest of defendant); *Chambers v. Maroney*, 399 U.S. 42 (1970) (exigent circumstances permit warrantless searches of automobiles); *Terry v. Ohio*, 392 U.S. 1 (1968) (necessities of police work permit limited stops and frisks on less than probable cause).

But cf. Rudstein, *supra* note 14, at 18 ("[A] state . . . cannot exclude trustworthy evidence critical to the defense . . . unless the defendant's interest is outweighed by a legitimate competing state interest . . ." (emphasis added)); Note, *Indiana's Rape Shield Law: Conflict With the Confrontation Clause?*, 9 IND. L. REV. 418, 423 (1976) (also refers to "legitimate" state interest as the appropriate test).

⁹² *See* *Brookhart v. Janis*, 384 U.S. 1, 3 (1966) (Respondent had properly conceded that "a denial of cross-examination . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."); Westen, *supra* note 53, at 161 ("No interest protected by a privilege is sufficiently important to outweigh the defendant's right to establish his innocence through the presentation of clearly exculpatory evidence." (emphasis added)). *See also* *Gardner v. Florida*, 430 U.S. 349 (1977) (right to counsel at sentencing hearing); *Connally v. Georgia*, 429 U.S. 245 (1977) (warrant issued by magistrate paid according to number of warrants he issued was void); *Geders v. United States*,

ests, the Court has carved out exceptions to the warrant requirement in the face of exigent circumstances.⁹³ Similarly, in limiting the right to counsel to cases in which imprisonment results, the Court has balanced the costs and confusion imposed on the states against the burden imposed on the defendant.⁹⁴

Once the process of constitutional line drawing is completed, a decision that a particular practice is central to an interest protected by an amendment will be strictly enforced.⁹⁵ This analysis more easily explains the result in *Davis*. The Court decided that a defendant has a general right under the confrontation clause to expose the bias and interest of prosecution witnesses.⁹⁶ The state thus may not constitutionally impede that effort, even in a case in which the needs of the particular defendant may be slight and the interest of the state important.⁹⁷

In one remaining situation, the strict standard of review may not be employed—when there are competing constitutional rights. For example, a defendant is specifically guaranteed an impartial jury and the general due process right to a fair trial;⁹⁸ when these rights conflict with freedom of the press, however, the dispute must be resolved by a balancing of rights. In such a case the defendant

425 U.S. 80 (1976) (right to counsel prevented court from prohibiting defendant from consulting with attorney on night between defendant's direct and cross-examination, despite fear of improper coaching); *Coleman v. Alabama*, 399 U.S. 1 (1970) (right to counsel at preliminary hearing at which failure to assert a defense might bar its use at trial); *Miranda v. Arizona*, 384 U.S. 436 (1966). Under *Miranda* and subsequent cases, confessions may not be offered against a defendant who elects to remain silent at trial unless specific warnings were given and waived, regardless of any showing of special circumstances by the state. This line of cases, however, is now perceived by many to be under attack. See *North Carolina v. Butler*, 99 S. Ct. 1755 (1979).

⁹³ *E.g.*, *Cady v. Dombrowski*, 413 U.S. 433 (1973) (inventory searches); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (border searches); *Chambers v. Maroney*, 399 U.S. 42 (1970) (search of vehicles); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit).

⁹⁴ *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁹⁵ See, *e.g.*, *Brookhart v. Janis*, 384 U.S. 1, 3 (1966).

⁹⁶ "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices or ulterior motives of the witness" *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

⁹⁷ The Court noted that the state had an "important" interest; yet that interest was easily outweighed by the right of "effective cross-examination." *Id.* 319, 318. See note 86 *supra* & accompanying text.

⁹⁸ See, *e.g.*, *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Estelle v. Williams*, 425 U.S. 501 (1976); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

does not automatically prevail.⁹⁹ Important government interests may justify shielding rape victims from harassment by defense attorneys,¹⁰⁰ but no constitutional right protects the victim. The closest thing to a constitutional right that can be asserted is the right of privacy. This penumbral protection, though recognized in other contexts, has a very limited application. It only defines a zone of personal autonomy that must be left free from governmental intrusion.¹⁰¹ Even most advocates of rape victim shield laws concede that the rights of privacy may not be applied to shield a woman who wishes to testify against an accused rapist from embarrassment that might be caused by inquiry into her prior sexual activities.¹⁰² The interests of the victim, not rising to the level of constitutional concerns, thus do not militate against applying a strict standard to rape victim shield laws that limit defendants' sixth amendment rights.

VI. APPLICATION OF THE STANDARD OF REVIEW TO RAPE VICTIM SHIELD LAWS

We turn now to the application of the strict standard of review to rape victim shield laws. If the sixth amendment rights of confrontation and compulsory process properly include the right to present evidence of the complainant's sexual history, then many of the statutes that limit the accused's ability to do so are unconstitutional. The assumption underlying the following discussion is that the sixth amendment guarantees that a defendant will be allowed to introduce all probative evidence unless it has an outweighing prejudicial effect. Within the concept of admissibility is a balancing between probative value and prejudicial effect, and it is in this area

⁹⁹ E.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301 (Powell, Circuit Justice, 1974).

The Court has had similar problems when a witness asserts a testimonial privilege based upon the fifth amendment, and the privilege prevents the defendant from cross-examining. See *Frazier v. Cupp*, 394 U.S. 731 (1969); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Alford v. United States*, 282 U.S. 687 (1931); Note, *Indiana's Rape Shield Law: Conflict With the Confrontation Clause?*, 9 IND. L. REV. 418, 420 (1976). Cf. *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978) (newsman's shield law, legitimately based upon first amendment rights, fell to the defendant's need for compulsory process, following the court's application of the balancing test of *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

¹⁰⁰ See notes 105-06 *infra* & accompanying text.

¹⁰¹ *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). See Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

¹⁰² See Berger, *supra* note 5, at 40 ("the prospects of such a right being recognized are realistically very dim").

that the constitutional line drawing must occur. The first issue is whether the state has a special interest in rape cases, sufficiently greater than that in other criminal cases, to justify heavier restrictions on sixth amendment rights. If not, the next question is whether the right to introduce relevant evidence includes the presentation of sexual history evidence. We will thus attempt to balance the probative value of such testimony against its prejudicial effect. If the prejudicial effect is substantial or the probative value unusually insignificant, then evidence of a rape victim's prior sexual activities may be declared inadmissible and the accused prevented from introducing it.

A. *The State Interests in Rape Cases*

Assuming for the moment that evidence of the victim's prior sexual activities is relevant in rape prosecutions,¹⁰³ a state could justify a shield statute only if its interests were sufficiently compelling¹⁰⁴ and the probative value of the evidence slight. Redrawing the constitutional line could conceivably be justified under such circumstances. Our purpose here is only to ascertain whether there is any possible reason to redefine the general sixth amendment standard from one that guarantees defendants the right to introduce relevant evidence to one that excludes otherwise relevant evidence in rape cases. Because we answer that question in the negative, it is unnecessary to rebalance the probative value of sexual history evidence against the interests the state is asserting in order to define a new constitutional standard.

Proponents of rape victim shield laws most often cite as the interests to be protected sheltering the victim from humiliation and psychological damage, and encouraging the reporting and prosecu-

¹⁰³ The probative value of sexual history evidence will be discussed at text accompanying notes 116-63 *infra*, its possible prejudicial effect at text accompanying notes 164-220 *infra*.

¹⁰⁴ A reading of *Davis v. Alaska*, 415 U.S. 308 (1974), and *Washington v. Texas*, 388 U.S. 14 (1967), indicates that rational and important state interests are not enough. "Thus, *Davis* appears to stand for the proposition that the defendant's right of cross-examination—like his right to be present at trial—can be overcome, if at all, only for *compelling* reasons." Westen, *supra* note 50, at 580-81 (emphasis added); see Westen, *supra* note 53, at 115-16. Cf. *People v. Khan*, 80 Mich. App. 605, 264 N.W.2d 360 (1978) (eschewing a balancing of interests test absent demonstrably relevant sexual history evidence); Note, *Relevancy of Evidence of Prior Sexual Conduct Under the Kentucky Revised Statute Section 510.145*, 4 N. Ky. L. Rev. 345, 364 (1977) (advocating a balancing between protection of the victim and protection of the accused). But see Rudstein, *supra* note 14, at 18 (reading *Davis*, together with *Chambers v. Mississippi*, 410 U.S. 284 (1973), as allowing legitimate state interest to outweigh the defendant's needs).

tion of rape.¹⁰⁵ Both are legitimate and worthwhile interests for the state to pursue, and unquestionably both are furthered by shield laws.¹⁰⁶ In order to begin to argue that the constitutional standard should be changed for rape cases, however, a special and particularly compelling reason must be shown.

The Supreme Court has considered restricting the defendant's right to introduce relevant evidence in a situation in which the state's interests are at least as great and has declined to vary the general standard. In cases concerning disclosure of the identity of a police informer,¹⁰⁷ the Court has clearly stated that the defendant's right to introduce relevant evidence, whatever its probative value, prevents the state from withholding the identity of an informer. The state's interest in protecting witnesses is greater in informer cases than in rape cases because identifying an informer creates a possibility of physical harm, not merely humiliation.¹⁰⁸ The state's interest in the effective prosecution of crime is great as well because informers and undercover agents are frequently the only way of gathering evidence of organized crime.¹⁰⁹ In rape cases the number of prosecutions may well be fewer because some victims do not report rapes out of, among other things, fear of the court process,¹¹⁰ but it seems unlikely that the state interest in effective crime control is more substantially harmed in rape cases than in informer situations.

Despite the state's great interest in protecting informers, even that practice has been limited. The Court in *Smith v. Illinois*¹¹¹ held that the right of confrontation had been denied when the de-

¹⁰⁵ See, e.g., *Johnson v. State*, 146 Ga. App. 277, 280, 246 S.E.2d 363, 365 (1978); Washburn, *supra* note 22, at 281; Note, *Indiana's Rape Shield Law: Conflict With the Confrontation Clause?*, 9 IND. L. REV. 418, 435 (1976).

¹⁰⁶ See *Roberts v. State*, 373 N.E.2d 1103 (Ind. 1978) (shield law is a "rational" attempt to protect the victim); *People v. Thompson*, 76 Mich. App. 705, 257 N.W.2d 268 (1977) (state's interest is "legitimate"); *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (1978) (statute is "reasonable"). But see Rudstein, *supra* note 14, at 27 ("a rape shield law . . . may only marginally achieve [the] goal [of encouraging the reporting of rapes]"). Cf. Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L.J. 1551, 1554 (1976) (extent to which laws will increase reporting depends on how often defense is able to evade restrictions imposed).

¹⁰⁷ See *Smith v. Illinois*, 390 U.S. 129 (1968); *McCray v. Illinois*, 386 U.S. 300 (1967); *Roviaro v. United States*, 353 U.S. 53 (1957).

¹⁰⁸ See Comment, *The Informer Privilege: What's in a Name?*, 64 J. CRIM. L.C. & P.S. 56, 61 (1973); Note, *Extent of the Government's Informer Privilege in Federal and Florida Criminal Cases*, 21 U. FLA. L. REV. 218, 219 (1968).

¹⁰⁹ See *Roviaro v. United States*, 353 U.S. 53, 66 (1957) (Clark, J., dissenting).

¹¹⁰ LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, CRIMES AND VICTIMS 12 (1974): "More so than for any other crime, there are strong pressures on the victim not to report the incident . . ." See note 13 *supra*.

¹¹¹ 390 U.S. 129 (1968).

defendant was prevented from ascertaining the name and address of an informer. The result in *Smith* cannot be explained on the ground that the name and address of the witness were particularly important in that case. The informer had admitted on cross-examination that he was using a fictitious name, and the jury was therefore aware of it. In addition, the defense attorney had formerly represented the informer and thus knew that the name given the court was false. There was no suggestion that any actual prejudice was involved or that the defense had been less than effective because of the absence on the record of the true name and address of the witness.¹¹²

In a related case, *Roviaro v. United States*,¹¹³ the Court reached a similar result when the failure to disclose the identity of an informer who did *not* testify possibly prevented the defendant from calling that witness in his own defense. The case was decided pursuant to the Court's supervisory powers and does not rest on the sixth amendment.¹¹⁴ Nonetheless, the Court's reasoning was the same. It conceded that preservation of the anonymity of informants encouraged the reporting and prosecution of crimes, but decided that the ability of the accused to defend himself had to take precedence. The Court noted that the informer was a witness to the alleged crime. His testimony was, therefore, possibly relevant; it might have established an entrapment defense or cast doubt on the state's case.¹¹⁵ The mere possibility was enough to outweigh the interests of the government. In light of these informant cases—involving a greater state interest in witness protection, at least as substantial an interest in effective prosecution, and often very little probative value—it is not likely a rape victim will be afforded greater personal protection at the expense of the defendant's right to present relevant evidence.

B. Prejudicial Impact of Sexual History Evidence

The determination of relevance is a two-step process. The evidence must have a logical tendency to make a material fact more

¹¹² Because both the jury and the defense knew that the name used by the informant was false, the case turned on the single fact that the name had not been given on cross-examination. For this reason, Justice Harlan, in his dissent, thought it a harmless error case. *Id.* 134 (Harlan, J., dissenting).

¹¹³ 353 U.S. 53 (1957).

¹¹⁴ *McCray v. Illinois*, 386 U.S. 300, 312 (1967) (*Roviaro* based on Court's power to formulate evidence rules for federal criminal trials). *But see* Westen, *supra* note 58, at 210 (*Roviaro* implicitly decided on sixth amendment grounds). The basis for the decision was not made clear in the opinion.

¹¹⁵ *Roviaro v. United States*, 353 U.S. 53, 64 (1957).

or less likely, and this probative value must not be outweighed by the evidence's prejudicial effect.¹¹⁶ We will examine whether sexual history evidence has any probative value in the concluding section of this Article. Our purpose now is to determine whether this testimony has a prejudicial effect that justifies its exclusion.¹¹⁷

Traditional evidence law recognizes that otherwise relevant evidence may be inadmissible because it would have the effect of disrupting the trial or sidetracking the search for truth. This "prejudicial" effect of testimony has been defined by McCormick to encompass four reasons for excluding otherwise probative evidence:

First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it.¹¹⁸

If evidence of the sexual history of a rape victim always falls within one of these four categories, a blanket shield law would be constitutionally unobjectionable.

The ground most frequently put forth in support of a blanket rule excluding sexual history evidence is the first, that such evidence is "prejudicial" and that this effect outweighs its slight probative value.¹¹⁹ The issue is not whether evidence is prejudicial in the sense that it is detrimental to someone involved in the

¹¹⁶ Professor Westen argues that the defendant has a right to present any evidence with probative value and that the exceptions based upon prejudicial effect raise serious constitutional problems. Westen, *supra* note 58, at 207-13. Westen's argument is that, under *Washington v. Texas*, 388 U.S. 14 (1967), courts cannot exclude potentially relevant evidence if less drastic alternatives such as cautionary instructions are available. Westen, *supra* note 58, at 212-13. Because the Court in *Washington* indicated that traditional rules of privilege do not violate the guarantee of compulsory process, traditional exceptions for prejudicial effect will not likely offend that provision either.

¹¹⁷ To say that sexual history evidence is irrelevant is to beg the question. The analysis must instead be whether such evidence is relevant in some instances, whether shield laws prevent a defendant from introducing such evidence, and whether that exclusion is constitutional. The authors follow this format and therefore phrase the issue in the latter way, which assumes that evidence of the victim's sexual conduct will at times be relevant.

¹¹⁸ MCCORMICK, *supra* note 16, at § 185, at 439-40 (footnotes omitted).

¹¹⁹ See, e.g., *People v. McKenna*, 585 P.2d 275 (Colo. 1978).

trial.¹²⁰ Rather, the question is whether the evidence will arouse the jury's emotions of prejudice, hostility, or sympathy.¹²¹ Arguments that sexual history evidence is inadmissible because of its prejudicial impact on the rape victim¹²² miss the point. Adverse psychological effects suffered by crime victims, although regrettable, are not grounds for excluding probative evidence. Professor Berger concedes as much by adding to her model statute a fifth ground, "unwarranted invasion of the complainant's privacy," to the usual four reasons for excluding sexual history evidence.¹²³

In one sense, proponents of rape shield law themselves concede that no absolute rule can apply. All such laws carry some exceptions—certain instances in which the legislators thought sexual history more probative than prejudicial. In fact, almost every conceivable use of sexual history evidence is excepted and admissible under at least one rape victim shield law.¹²⁴ In contrast, for other areas of evidence the common law has determined that the possibility of prejudice always outweighs probative value. Settlement

¹²⁰ As McCormick points out, "[a] party's case is always damaged by evidence that the facts are contrary to his contentions; but that cannot be ground for exclusion." MCCORMICK, *supra* note 16, at § 185, at 439 n.31.

¹²¹ MCCORMICK, *supra* note 16, at § 185, at 439. See FED. R. EVID. 403.

¹²² See, e.g., Berger, *supra* note 5, at 71-72; Note, *California Evidence Rape Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L. REV. 1551, 1565 (1975); 8 CAL. L. REV. 973, 980 (1974); 52 WASH. L. REV. 1011, 1027-28 (1977). Some of this confusion may stem from reading Wigmore too literally when he says that, as a general theory, evidence may be excluded if it "tends . . . to produce . . . an unfair prejudice to the opponent." 6 J. WIGMORE, EVIDENCE § 1864, at 643 (Chadbourn rev. 1976). See note 154 *infra* & accompanying text.

¹²³ Berger, *supra* note 5, at 97-99. This provision can also be found in ALASKA STAT. § 12.45.045 (Supp. 1979); N.J. STAT. ANN. § 2A:84A-32.1 (West Supp. 1979-1980). See also MASS. ANN. LAWS ch. 233, § 21B (Michie/Law. Co-op Supp. 1978) (relevance must outweigh prejudice to the victim).

¹²⁴ See Appendix, *infra*. Statutes have specifically provided for the admissibility of sexual history evidence relevant to the complainant's credibility, e.g., CAL. EVID. CODE § 782 (West Supp. 1979); alternative sources of semen, injury, pregnancy, or disease, e.g., FED. R. EVID. 412(b)(2)(a); evidence "directly pertaining to the act upon which the prosecution is based," e.g., ARK. STAT. ANN. § 41-1810.2 (1977); prior sexual relations with the accused, e.g., IND. CODE ANN. § 35-1-32.5-2 (Burns Supp. 1978) (amended 1979); subsequent sexual relations with the accused, e.g., COLO. REV. STAT. § 18-3-407(1)(a) (1978); similar patterns of sexual conduct with persons other than the defendant if relevant to consent, e.g., FLA. STAT. ANN. § 794.022(2) (West 1976); an ulterior motive in accusing the defendant, e.g., MD. ANN. CODE art. 27, § 461A(a)(3) (Supp. 1978); the bias of the complainant, e.g., OR. REV. STAT. § 163.475(5)(a) (1977); the complainant's record as a prostitute, e.g., N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney Supp. 1979-1980); sexual behavior offered as the basis of expert psychological testimony that the complainant fantasized the act, e.g., N.C. GEN. STAT. § 8-58.6(b)(4) (Supp. 1977) (amended 1979); and a history of false rape charges, e.g., VT. STAT. ANN. tit. 13, § 3255(a)(3)(C) (Supp. 1979).

offers,¹²⁵ subsequent repairs,¹²⁶ and the existence of liability insurance¹²⁷ are all inadmissible on the issue of liability. They may be admitted only for other purposes—repairs may be offered, for example, as proof of ownership,¹²⁸ and a witness's connection to the insurer may be offered to show testimonial bias.¹²⁹

In the case of a rape victim's sexual history, exceptions to the rule may relate to the essential question of the accused's criminal liability. The statutes and commentators alike recognize that a pattern of consensual sexual activity between the victim and the accused is relevant to establish consent, a fundamental issue in determining guilt.¹³⁰ There is, on the other hand, serious disagreement whether infrequent prior consensual sex with the defendant, or regular prior sexual relations with persons other than the defendant, should be admissible on exactly the same issue—consent. The statutes themselves engage in balancing between probative value and prejudicial impact. In effect, they are the products of the traditional process of determining admissibility, performed by the legislature rather than the judge.¹³¹ Legislatures are not, however, in nearly as good a position to make such decisions. The trial judge can view the unique circumstances in each case and apply the test with the benefit of full knowledge of the context in which evidence is offered. He can make the fine decisions about admitting similar evidence in similar trials based on the individual witnesses and juries and the nuances of the factual development. A legislature cannot conceivably envision all circumstances that may arise, and its determination of relevance will thus undoubtedly be flawed in some unforeseen situations.¹³²

A number of commentators argue that any evidence of prior sexual activity creates a substantial prejudicial effect—a likelihood

¹²⁵ FED. R. EVID. 408; MCCORMICK, *supra* note 16, at § 274.

¹²⁶ *Columbia & P.S.R.R. v. Hawthorne*, 144 U.S. 202 (1892); FED. R. EVID. 407; MCCORMICK, *supra* note 16, at § 275.

¹²⁷ FED. R. EVID. 411; MCCORMICK, *supra* note 16, at § 201.

¹²⁸ MCCORMICK, *supra* note 16, at § 275, at 667-78 & nn.20-25 and cases cited therein.

¹²⁹ *Id.* § 201, at 480 n.10.

¹³⁰ Even jurisdictions with exclusionary rape victim shield laws usually allow testimony about sexual relations between the victim and the accused. See Appendix, *infra*.

¹³¹ "This balancing of intangibles—probative values against probative dangers—is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized." MCCORMICK, *supra* note 16, at § 185, at 440.

¹³² For a very unusual factual allegation, see *People v. Mandel*, 61 App. Div. 2d 563, 403 N.Y.S.2d 63 (1978).

that a jury exposed to such evidence will try the character of the victim rather than the guilt of the accused.¹³³ Only a very high probative value could outweigh this effect. The supposed danger of a jury decision based on the character of the victim rather than the case against the defendant is equally applicable to any trial in which the guilt of the accused depends primarily on the testimony of the victim. Juries in every case must decide whether to believe the witnesses who testify against a defendant. They are routinely instructed to consider such factors as demeanor and attitude in deciding whether to give credence to testimony.¹³⁴

The available statistics do not support the argument that it is sexual history evidence that results in acquittals. According to the F.B.I. uniform crime statistics, the acquittal rate has been fairly constant before and after the advent of rape victim shield laws.¹³⁵ The only major social science study of the trial process was made in the 1950s by Kalven and Zeisel.¹³⁶ Although inconclusive on this point, it has been cited (out of context) in many articles as documenting "manifestly unfair jury verdicts resulting from unduly influential evidence of the victim's sexual history."¹³⁷ Most often

¹³³ E.g., Berger, *supra* note 5, at 30-31; 8 CA. L. REV. 973, 981 (1974). Cf. Note, *People v. Rincon-Pineda: Rape Trials Depart the Seventeenth Century—Farewell to Lord Hale*, 11 TULSA L.J. 279, 283 (1975) (unlikely that defendant will be unfairly convicted by jury).

¹³⁴ See, e.g., COMMITTEE ON STANDARD JURY INSTRUCTIONS, CRIMINAL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA JURY INSTRUCTIONS: CRIMINAL No. 2.20 (3d ed. 1970); 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 12.01 (2d ed. 1970).

¹³⁵ According to the FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, the percentage of acquittals and/or dismissals in rape cases has been as follows:

1965: 43%	1972: 49%
1966: 42%	1973: 47%
1967: 44%	1974: 49%
1968: 44%	1975: 46%
1969: 49%	1976: 49%
1970: 46%	1977: 40%
1971: 48%	1978: no rate reported

The figures indicate a slight rise in acquittal rate as rape victim shield laws became effective, followed by a slight drop in 1977. Although it is tempting to associate the drop in acquittal rate with the rise of rape shield laws, there is no justification for doing so. First, the number of rape cases affected by shield laws may be quite small. See note 146 *infra* & accompanying text. Second, the acquittal rate in 1976 was as high as it has ever been, despite shield laws in effect in 24 states and another seven put into effect for part of that year. The states that had shield laws, which included California, New York, and Texas, account for approximately two-thirds of all reported rapes. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (1976).

¹³⁶ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

¹³⁷ 52 WASH. L. REV. 1011, 1017 (1977). See Berger, *supra* note 5, at 30; Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 309, 341 (1973); Note, *The Admissibility of a Rape-Complainant's Previous Sexual*

mentioned is the now famous table showing that in thirty-seven of forty-two rape cases examined, the jury acquitted the defendant of the rape charge.¹³⁸ Even making the assumption others have made—that because this study took place in the 1950s when evidence of sexual history was admissible, it was actually introduced—the statistics do not support the contention that there is a legally cognizable prejudicial effect. If anything, the study refutes it. Only the results in a particular category of nonaggravated rape trials are reported in the table. The table indicates only that in cases in which defendants were charged with forcible rape *and* the evidence showed no injury to the victim *and* the accused and the victim knew each other, juries tended to acquit *or* find the defendant guilty of a lesser charge.¹³⁹ Excluded from the table are all rape cases in which the victim was injured, in which the victim was raped by more than one person, and in which the victim was raped by a man she did not know.¹⁴⁰ When all rape cases are considered together, rape falls within the statistical profile for all crimes. The basic verdict pattern shows that juries acquitted in thirty-three percent of all cases and that they were more lenient than the presiding judge would have been in twenty percent of all cases.¹⁴¹ Juries acquitted in forty-three percent of forcible rape trials, more often than in trials for other crimes, but they were more lenient than judges only eighteen percent of the time.¹⁴² In cases of aggravated rape, juries acquitted

Conduct: The Need for Legislative Reform, 11 NEW ENG. L. REV. 497, 502 (1976); Note, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U. L. REV. 127, 157 (1975); Note, *Criminal Law Reform in Vermont: The Proposal to Exclude Evidence of the Victim's Character in Forcible Rape Cases*, 1 VT. L. REV. 215, 218-20 (1976). Cf. Note, *People v. Rincon-Pineda: Rape Trials Depart the Seventeenth Century—Farewell to Lord Hale*, 11 TULSA L.J. 279, 283 (1975) (study cited for proposition that juries are lenient in rape trials when they find "contributory behavior" on the part of the victim). *Contra*, Rudstein, *supra* note 14, at 27-29. See also Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L.J. 1551, 1572 (1975).

¹³⁸ H. KALVEN & H. ZEISEL, *supra* note 136, at 254 (Table 73).

¹³⁹ *Id.* 254. "Acquittal here means acquittal from the major charge of rape, even if convicted of a lesser charge."

¹⁴⁰ *Id.* 252.

¹⁴¹ *Id.* 68 (Table 18).

¹⁴² *Id.* 70 (Table 19). The leniency figure represents those cases in which the jury acquitted and the judge thought the evidence strong enough for conviction. Juries were more lenient than they were in rape cases in cases involving murder, manslaughter, negligent homicide, aggravated assault, statutory rape, molestation of a minor, indecent exposure, drunken driving, burglary, petit larceny, receiving stolen goods, fraud, gambling, violation of game law, and some liquor offenses. *Id.* 69-75 (Table 19). In statutory rape cases, however, the study found a leniency rate of 32%, higher than that for all crimes except indecent exposure and gambling. *Id.*

In another study of 21 rape trials involving 22 defendants, the jury acquitted eight (36%) of the defendants. Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 VA. L. REV. 357, 360-61 (1978).

only twenty-five percent of the time, significantly less than in cases of other crimes.¹⁴³

There is a severe problem with trying to make any use of the Kalven and Zeisel study for our purposes. The authors do not indicate what percentage of the cases studied, if any, involved testimony about the victim's prior sexual history. In another study, Professor Weninger examined the prosecution of rape cases in Travis County, Texas, from 1970 to 1976.¹⁴⁴ During that time, prior sexual history evidence was admissible in that state.¹⁴⁵ Nonetheless, the study reports: "In no case did the defense present evidence of specific acts of intercourse with persons other than the accused or of a reputation for unchastity, and in only one trial was there testimony concerning prior sexual activity with the defendant."¹⁴⁶ Without knowing whether prior sexual history evidence was even used in any of the trials studied by Kalven and Zeisel, it is impossible to establish any connection between such testimony and the acquittal rate.

Despite the absence of conclusive evidence, one may nevertheless intuitively sense a danger that juries will decide cases on the basis of victims' sexual pasts and will ignore other evidence. This fear is certainly no greater, however, than the fear that a jury, upon hearing that a defendant has a long criminal record, will convict him because he is a "criminal," even though evidence in the case on trial might be weak.¹⁴⁷ Although certain types of previous crimes

But cf. Note, *People v. Rincon-Pineda: Rape Trials Depart the Seventeenth Century—Farewell to Lord Hale*, 11 *TULSA L.J.* 279, 283 (1975) (of the four violent crimes, rape has the highest rate of acquittals or dismissals).

¹⁴³ In 64 aggravated rape cases—that is, cases involving evidence of violence, several assailants, or an accused and victim who were strangers—the jury acquitted only 16 times. H. KALVEN & H. ZEISEL, *supra* note 136, at 252-53. Juries acquitted a higher percentage of defendants charged with manslaughter, negligent homicide, aggravated assault, simple assault, weapons offenses, statutory rape, incest, molestation of a minor, indecent exposure, commercial vice, other sex offenses, drunken driving, traffic offenses, public disorder, malicious mischief, non-support, burglary, auto theft, mail theft, grand larceny, petit larceny, receiving stolen goods, embezzlement, fraud, arson, gambling, game law violations, liquor offenses, regulatory offenses, perjury, escape, and bribery. *Id.* 69-75 (Table 19).

¹⁴⁴ Weninger, *supra* note 142, at 358.

¹⁴⁵ Texas passed a weak rape victim shield law which took effect on September 1, 1975, and would thus have affected only the final year of the six-year study. All that TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1978-1979) does, however, is provide for an in camera relevancy hearing. The statute does not prohibit sexual history evidence.

¹⁴⁶ Weninger, *supra* note 142, at 363-64. Of the 22 rape trials examined by the study, seven involved the issue of consent.

¹⁴⁷ [T]here is an obvious danger that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought

may not be introduced, and a prior record is admissible only for very limited purposes, such evidence is universally admitted against a testifying defendant despite the possibility of prejudice.¹⁴⁸ To argue that a rape victim is entitled to greater protection against prejudicial testimony than is the accused is ludicrous. Rape victim shield laws cannot be justified, therefore, on the ground that the prejudicial effect of sexual history evidence outweighs its probative value in every case.

A line of inquiry that has probative value may be excluded, secondly, upon proof that raising the issue will unduly distract the jury. This limitation is not merely a repetition of the first rule concerning prejudicial effect, the possibility that sexual history evidence may cause the jury to find guilt based on the moral character of the complainant and their feelings about premarital sex. Rather, evidence is excluded on this ground because of both the remoteness of the issue sought to be raised and the likelihood that the testimony will be accorded undue weight by a jury. According to Wigmore, this limitation is given effect only when the evidence is minor and cumulative and is not the sole mode of proof for the matter at issue.¹⁴⁹ Once a rape complainant admits the facts of her sexual history, the rule could operate to prevent the defendant from calling a number of witnesses in his case in chief to testify to the same facts. This limitation cannot be applied, however, to exclude all evidence probative of a material issue.

The rules of evidence give a judge discretion to exclude otherwise probative evidence thirdly when the proof and counterproof will consume an undue amount of time.¹⁵⁰ A statute absolutely barring the use of sexual history evidence cannot be justified on this ground. Cross-examining a rape complainant will not create undue delay in every instance. Discretion is recognized in the rule itself, which allows exclusion of probative evidence only when it will cause an "undue" delay. Mere length of time is not sufficient. Time be-

to be put away without too much concern with present guilt, than they will to the legitimate bearing of the past convictions on credibility.

McCormick, *supra* note 16, at § 43, at 89 (footnote omitted). See F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 244 (1971).

¹⁴⁸ See, e.g., FED. R. EVID. 609, limiting admissible evidence to crimes punishable by death or imprisonment for more than one year and crimes involving dishonesty that were committed within ten years. See generally McCormick, *supra* note 16, at § 43. *Contra*, UNIFORM RULE OF EVIDENCE 21. See generally McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 LAW & SOC. ORDER 1.

¹⁴⁹ 6 J. WIGMORE, *EVIDENCE* §§ 1864, 1865, 1908 (Chadbourn rev. 1976).

¹⁵⁰ McCormick, *supra* note 16, at § 185, at 439-40; 6 J. WIGMORE, *EVIDENCE* § 1904 (Chadbourn rev. 1976).

comes important only when it affords an opportunity for confusion of the issues—when the overall effect of the additional proof obscures rather than clarifies the search for truth. Thus, the rule is directed at preventing needless cumulative evidence and multiple witnesses on relatively unprofitable lines of testimony, not at excluding an issue altogether.¹⁵¹

A fourth possible justification for rape victim shield laws is that otherwise probative evidence may be excluded because of unfair surprise to the opponent.¹⁵² Some proponents of shield laws argue that the probative value of sexual history evidence must be weighed against the surprise to the victim, who does not come to court prepared to defend her actions in prior sexual encounters.¹⁵³ This reasoning misconceives the rule of evidence relating to surprise, which considers only surprise to the opposing party. The victim is not the opponent, the state is.¹⁵⁴ The victim is only a witness.

Still, the victim might not tell the prosecutor, the state's representative, about her prior sexual activities, so that he would be surprised. This argument also fails to justify exclusion of sexual history evidence for two reasons. First, the law of evidence requires not only that the state have been surprised, but also that the testi-

¹⁵¹ Each witness adds new items of detail in his examination and cross-examination; each witness may be impeached by the calling of additional witnesses on the other side; each of these new ones adds his quota of details; and each may in turn lead to the calling of new impeaching witnesses on the first side, with each of these last the same round of possibility begins again; until amid the interminable entanglements of scores of witnesses and their statements it might become practically impossible for the jurymen to follow the thread of the substantial issue in controversy and to detect the true effect of the evidence. The . . . decision would probably turn upon the chance effect of fragments of evidence making casual impressions, rather than upon an orderly consideration of all the salient facts.

6 J. WIGMORE, EVIDENCE § 1907 (Chadbourn rev. 1976). See *id.* §§ 1865, 1904.

¹⁵² McCORMICK, *supra* note 16, at § 185, at 440. There is some doubt whether unfair surprise standing alone may ever be sufficient ground for excluding relevant evidence. Wigmore was of the opinion that, at common law, surprise was not sufficient for exclusion, but only justified a rule requiring disclosure in advance of trial in some cases. 6 J. WIGMORE, EVIDENCE §§ 1845, 1849 (Chadbourn rev. 1976). FED. R. EVID. 403 also does not list surprise as a ground for excluding relevant evidence. The prevailing view, as noted in the Advisory Committee's note to rule 403, is that a continuance, not exclusion, is the proper remedy for surprise.

¹⁵³ See Berger, *supra* note 5, at 18. Cf. Note, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36, 40 (1975) ("[A rape victim] cannot be expected to be able to disprove charges of specific acts of intercourse made by men whom the accused has enlisted to testify against her.").

¹⁵⁴ The hearsay rules concerning admissions by a party-opponent, *e.g.*, FED. R. EVID. 801(d)(2), provide that out-of-court statements by the opposing party and his or her agents are admissible, yet statements by a complaining witness are not. See, *e.g.*, State v. Dawson, 293 S.C. 167, 26 S.E.2d 506, 507-08 (1943).

mony have been unforeseeable.¹⁵⁵ It is difficult to argue that attacking the rape victim's testimony by whatever means available or presenting evidence of consent is not foreseeable, and the prosecutor cannot very well claim surprise when the defense employs such tactics. Second, most rape shield laws require a pretrial hearing on the admissibility of sexual history evidence.¹⁵⁶ This procedure eliminates any possibility of surprise and is much less restrictive than the blanket exclusion of all such testimony on the ground that it might, in some cases, be a surprise. Notice to the prosecution has been used effectively in other areas of criminal law in which surprise is a possibility, such as a defendant's evidence of insanity or alibi.¹⁵⁷

One final consideration is necessary to our discussion of whether the defendant may be denied the right to introduce probative evidence because of its prejudicial effect. Arguably, a statute that prohibits such evidence altogether, when less restrictive means are available, is unconstitutional. Professor Westen has postulated that the defendant's rights under the sixth amendment go beyond the traditional law of relevance, that the defendant has the right to introduce any probative evidence regardless of its prejudicial effect.¹⁵⁸ The state may, of course, implement other means to negate the prejudicial effect. Most rape victim shield laws require notice and a pretrial hearing before the defense may elicit sexual history testimony at trial.¹⁵⁹ These precautions eliminate the possibility of surprise. Cautionary instructions are available to cure prejudicial effect and to assure that the jury decides the case on its merits and not on a moral tangent. Although a jury instruction may never completely accomplish its intended purpose¹⁶⁰ and a jury may be unable to consider sexual history evidence only for a limited purpose, juries are constitutionally presumed able to follow

¹⁵⁵ McCORMICK, *supra* note 16, at § 185, at 440.

¹⁵⁶ Thirty jurisdictions have some provision for pretrial or in camera hearings on admissibility that must precede introduction of sexual history evidence. Ten other jurisdictions require a hearing in certain circumstances. See Appendix, *infra*.

¹⁵⁷ E.g., N.C. GEN. STAT. § 15A-959 (1978) (requiring notice and allowing pretrial hearing if defendant intends to raise an insanity defense); FED. R. CRIM. P. 12.1 (notice of alibi defense). A statute requiring pretrial disclosure of intent to raise an alibi defense was upheld in *Williams v. Florida*, 399 U.S. 78 (1970).

¹⁵⁸ See note 116 *supra*.

¹⁵⁹ See Appendix, *infra*.

¹⁶⁰ See Berger, *supra* note 5, at 97. Professor Berger argues that rape victims should not be singled out, even for special curative instructions. *Id.* 97. See note 147 *supra*.

their instructions.¹⁶¹ The entire jury system would be unworkable if it were based on the assumption that juries could not follow judicial instructions on the law. Only in a few cases has the Supreme Court thought it necessary to exclude testimony on the basis that a jury would not be able to follow an instruction to disregard it. All of those were situations in which important fundamental rights of the defendant were jeopardized.¹⁶² If courts allow testimony about the defendant's prior criminal record and protect him with a cautionary instruction limiting its use,¹⁶³ then testimony about the sexual history of a rape victim may be entitled to no greater protection.

C. Relevance

Our final consideration is whether evidence of a rape victim's sexual history can ever be relevant. Can it be probative of any issue material to determining guilt on a rape charge?¹⁶⁴ Intuitively, the answer seems to be that sometimes it is, but often it is not. The same may be said for any types of evidence, however; the relevance of sexual history evidence should therefore be determined, as with other evidence, by the judge as he sees the issues develop at trial. Even if such evidence is generally irrelevant, a statute that precludes a particular inquiry that is relevant in one case has infringed the rights of the accused to present evidence. In this final section, we will analyze the relevance of types of sexual history evidence and the situations in which such evidence has been declared inadmissible by statute.

1. Reputation and Opinion Testimony

Five state statutes and the Federal Rules of Evidence absolutely prohibit the use of reputation and opinion testimony and thus limit sexual history evidence to testimony about specific instances

¹⁶¹ *Bruton v. United States*, 391 U.S. 123, 135 (1968); see also *Westen, supra* note 58, at 212.

¹⁶² *Westen, supra* note 58, at 212 & n.68. See *Bruton v. United States*, 391 U.S. 123, 128-37 (1968) (disregarding incriminating statements in codefendant's confession); *Jackson v. Denno*, 378 U.S. 368, 388-89 (1964) (disregarding an involuntary confession).

¹⁶³ See *Spencer v. Texas*, 385 U.S. 554, 562-63 (1967) (no error in an instruction to consider evidence of defendant's prior crimes only for a limited purpose). See notes 147-48 *supra* & accompanying text.

¹⁶⁴ To be relevant, the evidence need not by itself prove the issue. The test is whether, taken in conjunction with other evidence, it has a tendency to make a fact or issue more or less likely. See 1 J. WIGMORE, EVIDENCE § 12(2) (1940). Sexual history evidence that is irrelevant may constitutionally be excluded. See *State v. Davis*, 269 N.W.2d 434 (Iowa 1978); *People v. Thompson*, 76 Mich. App. 705, 257 N.W.2d 268 (1977); note 58 *supra* & accompanying text.

of conduct.¹⁶⁵ Evidence of a witness's reputation is traditionally admissible in three situations: (1) as substantive evidence when reputation is itself at issue, as in libel and slander cases;¹⁶⁶ (2) as impeachment, to indicate the witness's poor reputation for truth and veracity;¹⁶⁷ and (3) as a method of proving character.¹⁶⁸ Only the last of these is of concern here.¹⁶⁹ If the character of a witness is at issue, then "[m]odern common law doctrine makes the neutral and unexciting reputation evidence the *preferred* type" of proof.¹⁷⁰ In some states opinion testimony may also be used to prove character.¹⁷¹

Proof of a person's character may be offered either when character is ultimately at issue or as circumstantial evidence of what the person's actions probably were.¹⁷² A persuasive argument can hardly be made that all rape charges place the victim's chastity or

¹⁶⁵ FED. R. EVID. 412; MD. ANN. CODE art. 27, § 461A (Supp. 1978); MASS. ANN. LAWS ch. 233, § 21B (Michie/Law. Co-op Supp. 1978); MO. ANN. STAT. § 491.015 (Vernon Supp. 1978); OR. REV. STAT. § 163.475 (1977); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1979).

¹⁶⁶ *E.g.*, *Collins v. Retail Credit Co.*, 410 F. Supp. 924 (E.D. Mich. 1976) (inquiry into character by reputation evidence in common law libel case).

¹⁶⁷ See McCORMICK, *supra* note 16, at § 44; 3A J. WIGMORE, EVIDENCE §§ 920-930 (Chadbourn rev. 1970).

¹⁶⁸ See McCORMICK, *supra* note 16, at § 186; 5 J. WIGMORE, EVIDENCE §§ 1608-1621 (Chadbourn rev. 1974).

¹⁶⁹ As a general matter, it is easy to see why a reputation for chastity is inadmissible on the issue of credibility—only character for veracity has any logical bearing on whether one is telling the truth on the witness stand. See McCORMICK, *supra* note 16, at § 44.

¹⁷⁰ McCORMICK, *supra* note 16, at § 186, at 443 (emphasis added); see *State v. Kirkpatrick*, 428 S.W.2d 513, 517 (Mo. 1968); 5 J. WIGMORE, EVIDENCE § 1610, at 582 (Chadbourn rev. 1974). See also FED. R. EVID. 405.

In *People v. Fink*, 59 Ill. App. 3d 51, 374 N.E.2d 1311 (1978), the court noted that only evidence of the rape complainant's reputation before the incident was permitted because, once a woman claimed that she had been raped, she could easily become the subject of rumors that would lead to a false reputation.

¹⁷¹ Opinion testimony has been said to be another way of proving character. According to Dean Wigmore, the earliest common law rules permitted opinion testimony about the character of a witness, but the departure from that view has been almost complete. He cites early English cases that allow opinion testimony. The rule in this country, however, was always that character could be proved only by testimony of reputation. Only Ohio seems to have had a line of cases allowing opinion testimony, see *State v. Dickerson*, 77 Ohio 34, 82 N.E. 969 (1907), which died out in the mid-1900s. Wigmore argues that opinion testimony is more reliable than evidence of reputation and should be permitted. 7 J. WIGMORE, EVIDENCE §§ 1985-1986 (3d ed. 1940). Only in the last few years, with the advent of the Federal Rules of Evidence, see FED. R. EVID. 405, have some states started admitting opinion testimony of character. See, *e.g.*, ME. R. EVID. 405. Because opinion testimony was generally not allowed, there is probably no constitutional objection to continuing that ban.

¹⁷² McCORMICK, *supra* note 16, at § 186.

sexual character directly in issue.¹⁷³ The issues in a trial are defined both by the pleadings and by the proof, however, and the state may itself bring the victim's sexual character into issue by raising the matter without objection during the case in chief.¹⁷⁴ Yet jurisdictions that completely bar reputation and opinion testimony would prevent the defendant from proving a bad reputation for chastity, even if such testimony was the only rebuttal evidence available. In all other types of cases, at least reputation testimony is admissible when character becomes an issue.

A rape victim's sexual character is more likely to be relevant when offered for the second reason—as circumstantial evidence that the person acted on a particular occasion in conformity with that character trait. Generally character evidence is not permitted.¹⁷⁵ When proof of a character trait has a logical tendency to make an issue more or less likely, however, it will be allowed. For example, a homicide victim's character for violence is admissible on the issue of self-defense.¹⁷⁶ Once a self-defense issue has legitimately been raised, proof of the deceased's reputation is permitted. The same rule applies in rape cases when consent is claimed as the defense—traditionally testimony about the victim's reputation for chastity has been admissible. It is not the traditional rule to allow evidence of character for chastity in all cases. In fact, character for chastity is a misnomer—what is at issue is character for promiscuity or for indiscriminate consensual sexual activity. In cases legitimately asserting consent as a defense,¹⁷⁷ the laws of evidence must allow proof of a pertinent character trait: not mere unchastity, but a tendency to consent to sex indiscriminately. To prohibit a defendant from offering testimony to prove this trait—by reputation or opinion evidence—is to deny him the right to present evidence that would be admissible in a trial for any other criminal offense. The Advisory Committee's note to rule 404 of the Federal Rules of Evidence states that the rule providing for use of character evidence

¹⁷³ But consider statutory rape offenses such as N.C. GEN. STAT. § 14-26 (1969), making it a crime to "carnally know . . . any female child, over twelve and under sixteen years of age, who has never had sexual intercourse with any person." Cf. Mo. ANN. STAT. § 491.015 (Vernon Supp. 1978) (permitting testimony of specific instances of sexual conduct only when chastity is a statutorily prescribed element of a rape offense).

¹⁷⁴ See notes 191-94 *infra* & accompanying text.

¹⁷⁵ FED. R. EVID. 404(a); McCORMICK, *supra* note 16, at § 188.

¹⁷⁶ FED. R. EVID. 404(a)(2); McCORMICK, *supra* note 16, at § 193.

¹⁷⁷ Although the state bears the burden of proof on lack of consent, as it does on absence of self-defense in a homicide case, and although the lack of consent is an element of most rape laws, it is not necessarily an issue in every rape trial.

in such situations "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportion."¹⁷⁸

To illustrate permissible uses of evidence of the victim's character, consider the following hypothetical. The defendant is an exterminator who goes on a service call to the home of the complaining witness. The defendant claims that he arrived late in the afternoon and that the woman consented to—in fact, initiated—sexual relations. The defendant's version of the events is that they fell asleep until late evening, at which time the woman panicked because the company truck was parked in front of the house in full view of the neighbors. She started screaming at him to get out, and he later found himself arrested for rape. There is no evidence of injury or weapons. The complaining witness says that she consented because the defendant threatened to kill her and that he stayed until late evening. She was able to call the police finally after he left. Upon investigation, the defense attorney discovers the complainant's reputation among delivery men for initiating sexual activity with those who make deliveries to her house. No one will testify that he personally has had sexual relations with her, although the attorney is told privately that some have.

The first use of character evidence will be possible if the complainant testifies on direct examination that she is a "good Christian woman who does not go around committing adultery." Or, a neighbor, called by the state to testify that the truck was in front of the house, testifies that the complainant is "an honest woman who everybody knows is faithful to her husband." When the state is thus able to put before the jury a picture of the complainant's character, the defendant must be allowed to rebut it with evidence that she is promiscuous. The second use of character evidence shows a trait that makes the consent defense more likely than not. Her reputation for indiscriminate consensual sex with deliverymen certainly makes the defendant's consent defense more likely and thus meets the test of relevance. An absolute ban on this type of evidence cannot be reconciled with the defendant's constitutional right to introduce relevant evidence.

2. Credibility

One state absolutely prohibits use of sexual conduct evidence to impeach the credibility of the complaining witness.¹⁷⁹ This lim-

¹⁷⁸ FED. R. EVID. 404(a) (Advisory Committee's note).

¹⁷⁹ WASH. REV. CODE ANN. § 9.79.150 (1977). See also *Johnson v. State*, 146 Ga. App. 277, 246 S.E.2d 363 (1978); LA. REV. STAT. ANN. § 15:498 (West Supp.

itation conflicts with the common law rules of impeachment and, more clearly than any other prohibition, cannot be squared with the accused's right of confrontation.¹⁸⁰ It is one thing to say that sexual history evidence will no longer be admissible automatically under the guise of impeaching credibility and quite another to legislate that it will never be admissible. One need only examine a few hypotheticals to understand the imprudence of this prohibition. The simplest involves a complaining witness who falsely claims during direct examination that she is chaste. The defendant is entitled to attack her veracity as a witness by exposing false testimony even if that testimony does not bear directly on a material issue.¹⁸¹ Shedding light on a witness's credibility is one of the main functions of cross-examination—the test of relevance is not whether a question relates to a main issue, but whether it will aid the jury in appraising the witness's credibility.¹⁸²

The other common method of attacking a witness's credibility is by exposing bias or motive to testify falsely. The law recognizes that a witness's self-interest or feelings towards the defendant can slant testimony.¹⁸³ Two states have incorporated this aspect of the law into their rape shield statutes,¹⁸⁴ and a few others have separated credibility issues out of generally prohibitory statutes and have left determination of their relevance to the judge.¹⁸⁵ A reading of many

1979); N.H. REV. STAT. ANN. § 632-A:6 (Supp. 1977), all of which effectively bar this use of sexual history evidence, except as it may relate to a previous relationship with the accused.

¹⁸⁰ This is similar to the issue involved in *Davis v. Alaska*, 415 U.S. 308 (1974). See notes 78-81 & 85-89 *supra* & accompanying text.

¹⁸¹ *But see Johnson v. State*, 146 Ga. App. 277, 246 S.E.2d 363 (1978) (denying the accused the right to rebut the victim's false statement that she was a virgin because the shield statute did not specifically provide that such testimony was allowable).

¹⁸² McCORMICK, *supra* note 16, at § 29.

¹⁸³ *Id.* § 40; see 3A J. WIGMORE, EVIDENCE §§ 948-953 (Chadbourn rev. 1970). The usual rule is that if the matter goes to bias, then extrinsic evidence is permitted and the defense may call its own witnesses; if only to interest, then extrinsic evidence is not permitted and the defense must rely only on cross-examination. The rule is only haphazardly enforced, however, because of the difficulty of distinguishing between bias and interest.

¹⁸⁴ MD. ANN. CODE art. 27, § 461A (Supp. 1978) (victim's ulterior motive in bringing charges); OR. REV. STAT. § 163.475 (1977) (bias). See *People v. Mandel*, 61 App. Div. 2d 563, 403 N.Y.S.2d 63 (1978) (testimony of other men who had had sexual intercourse with the complainant and psychiatric testimony relevant to show bias); *State v. Jalo*, 27 Or. App. 845, 557 P.2d 1359 (1976) (holding an early version of the Oregon shield law unconstitutional as applied to the extent that it barred testimony offered to show the complainant's bias).

¹⁸⁵ See, e.g., CAL. EVID. CODE § 782 (West Supp. 1978); DEL. CODE ANN. tit. 11, § 3508 (Michie Supp. 1978); N.D. CENT. CODE § 12.1-20-15 (1976).

other shield laws suggests, however, that evidence of bias that also happens to be evidence of the victim's sexual conduct is not admissible. One of the clearest examples of proof of bias would be a pattern of sexual activity with the defendant, recently ended by the defendant. Surprisingly, one state would not allow even this testimony as proof of the possibility of the complainant's retaliatory motive.¹⁸⁶ Other states require an absence of prejudice to the victim before this evidence is admissible.¹⁸⁷ Neither restriction may be justified in light of the common law right to expose bias.

Consider further a case in which the victim's self-interest indicates a motive to testify falsely—for example, a married woman who had an extramarital relationship a few years before and whose husband told her he would divorce her if she had future affairs. The defendant claims consent and an ongoing affair, and that the complainant only pressed rape charges after discovery by her husband. To lend support to this defense, the defendant wants to disclose the prior adultery and the husband's threat. In most jurisdictions, he would not be permitted to do so,¹⁸⁸ in some because sexual conduct occurring more than a year before the crime is inadmissible.¹⁸⁹ Yet the impeaching effect of this testimony, surely the equivalent of that of the juvenile probationary status of the witness in *Davis v. Alaska*,¹⁹⁰ sets up an argument to the jury that the witness believed she had to fabricate testimony to save herself.

3. Testimony to Rebut State's Evidence

In another obvious situation, sexual history evidence is relevant and must be admitted—when the issue is first raised by the state. Conceivably the prosecutor, intentionally or not, will elicit from

¹⁸⁶ WASH. REV. CODE ANN. § 9.79.150 (1977). That state allows testimony about a relationship with the defendant if offered to show consent, but not to attack credibility.

¹⁸⁷ *E.g.*, MASS. ANN LAWS ch. 233, § 21B (Michie/Law. Co-op Supp. 1978); VT. STAT. ANN. tit. 13, § 3255 (1977).

¹⁸⁸ See Appendix, *infra*. Compare *State v. DeLawder*, 28 Md. App. 212, 344 A.2d 446 (1975) (evidence that complainant brought rape charge to protect herself from mother's anger admissible) with *Milenkovic v. State*, 86 Wis. 2d 272, 272 N.W.2d 320 (Ct. App. 1978) (evidence that complainant brought rape charge to protect herself from boyfriend's anger inadmissible) and *People v. Fritts*, 72 Cal. App. 3d 319, 140 Cal. Rptr. 94 (1977) (sexual history evidence offered on theory that complainant in child molestation and incest case had become pregnant and accused defendant to divert attention from her pregnancy inadmissible). But see S.C. CODE § 16-3-659.1 (Supp. 1978) (allowing evidence of sexual history that amounts to adultery to impeach a witness).

¹⁸⁹ *E.g.*, IOWA CODE ANN. § 813.2, R. 20 (West Supp. 1979).

¹⁹⁰ 415 U.S. 308 (1974). See notes 85-89 *supra* & accompanying text.

the complainant favorable testimony about her sexual history.¹⁹¹ The accused must be able to rebut this evidence. The question is not only one of credibility,¹⁹² but has become substantive as well. If, for example, the state offers evidence of the victim's chastity to show the improbability that she would have consented to sexual intercourse with the accused, it has placed that matter in issue. Once in issue, the defense should be allowed to refute it. A few states provide specifically for this possibility,¹⁹³ but in most states the counterevidence would be excluded.¹⁹⁴

4. Origin of Physical Evidence

A rape complainant's testimony is usually corroborated by physical evidence—the presence of semen, resulting disease, or pregnancy.¹⁹⁵ Often forcible rape cases also include testimony about the infliction and extent of physical injury to the victim. Proof that another man engaged in sexual intercourse with the complainant at or near the time of the alleged rape provides an alternative source of the physical evidence and is therefore obviously relevant. For this reason, many states permit the defendant to introduce evidence that someone other than himself was responsible.¹⁹⁶ If, for example,

¹⁹¹ See, e.g., *Johnson v. State*, 146 Ga. App. 277, 246 S.E.2d 363 (1978) (rape complainant testified to her chastity on direct examination); *People v. Mandel*, 61 App. Div. 2d 563, 403 N.Y.S.2d 63 (1978) (same, at preliminary hearing).

A more difficult case is one in which the complainant gives the impression of chastity without testifying to it directly. She might dress conservatively, act embarrassed when describing the rape, or talk about her family, P.T.A. membership, or church activities. Because most jurisdictions require the jury to consider the demeanor of witnesses in judging their credibility, see E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 12.01 (2d ed. 1970) (illustrative instructions), one can argue persuasively that the accused should be allowed to offer evidence that demonstrates the inaccuracy of such demeanor.

¹⁹² See text accompanying note 182 *supra*.

¹⁹³ CAL. EVID. CODE § 1103(2)(c) (West Supp. 1979); DEL. CODE tit. 11, § 3509(c) (Supp. 1978); MINN. STAT. ANN. § 609.347(3)(d) (West Supp. 1979); MISS. CODE ANN. §§ 97-3-70(3) to 70(4) (Supp. 1978); NEV. REV. STAT. § 50.090 (1977); N.Y. CRIM. PROC. LAW §§ 60.42(3) to 42(4) (McKinney Supp. 1978-1979); N.D. CENT. CODE § 12.1-20-14(2) (1976); OKLA. STAT. ANN. tit. 22, § 750(B) (West Supp. 1978-1979); S.C. CODE § 16-3-659.1(1) (Supp. 1978); W. VA. CODE § 61-8B-12(b) (1977). See MD. ANN. CODE art. 27, § 461A(a) (Supp. 1978); WASH. REV. CODE ANN. § 9.79.150(4) (1977) (cross-examination only).

¹⁹⁴ See Appendix, *infra*.

¹⁹⁵ See Rudstein, *supra* note 14, at 7-8, 37.

¹⁹⁶ E.g., *State v. Cosden*, 18 Wash. App. 213, 568 P.2d 802 (1977) (dictum) (alternative source of semen); COLO. REV. STAT. § 18-3-407(1)(b) (1978); IND. CODE ANN. § 35-1-32.5-2 (Burns Supp. 1978) (amended 1979); MONT. CODE ANN. § 45-5-503(5)(b) (1978). See *People v. Mikula*, 84 Mich. App. 108, 269 N.W.2d 195 (1978) (per curiam) (proof of previous sexual experience allowed to explain victim's broken hymen).

the government offers as corroborating evidence the victim's testimony that she is pregnant as a result of the rape, the defendant should be allowed to rebut with testimony that she had intercourse with another man at about the same time. If the defendant is denying any sexual intercourse with the victim, this testimony could help cast doubt on the state's contention that the act took place—especially if coupled with an argument that the victim needed an explanation for her pregnancy so that her parents or husband would not discover her sexual relations with the other man.¹⁹⁷ Yet at least four jurisdictions would not permit this testimony.¹⁹⁸ The Federal Rules of Evidence adopt the bizarre rule that only the presence of semen or resulting injury—not pregnancy or disease—may be explained by the defendant.¹⁹⁹ Only a few jurisdictions specifically allow evidence that an injury may have occurred during sexual activity with someone other than the defendant.²⁰⁰

5. Testimony That Another Committed the Act

Closely related is evidence that someone other than the defendant committed the act for which he is charged. An accused who claims he did not commit the crime should be permitted to produce evidence that another did. In *Washington v. Texas*, the Court held that a defendant had the right to call a witness to testify that he, not the defendant, committed the crime, despite state evidentiary rules to the contrary.²⁰¹ For crimes of rape, such testimony will of necessity involve evidence of sexual activity between the victim and someone other than the accused. Shield statutes in some states, however, appear to preclude this proof. Four states prohibit *any* evidence of the sexual conduct of the victim with anyone other than the defendant,²⁰² and many others limit the situations in which

¹⁹⁷ See notes 188-90 *supra* & accompanying text.

¹⁹⁸ FED. R. EVID. 412; GA. CODE ANN. § 38-202.1 (Supp. 1979); LA. REV. STAT. ANN. § 15:498 (West Supp. 1979); N.H. REV. STAT. ANN. § 632-A:6 (Supp. 1977). See also *State v. Ryan*, 157 N.J. Super. 121, 384 A.2d 570 (1978) (disallowing evidence of recent intercourse with man other than defendant when offered to show consent rather than alternative source of semen).

¹⁹⁹ See FED. R. EVID. 412(b)(2)(A).

²⁰⁰ FED. R. EVID. 412. See also *People v. Mandel*, 61 App. Div. 2d 563, 403 N.Y.S.2d 63 (1978).

²⁰¹ 388 U.S. 14 (1967); see notes 66-67 *supra* & accompanying text.

²⁰² ALA. CODE tit. 12, § 12-21-203(b)-(c) (Supp. 1978); ILL. ANN. STAT. ch. 38, § 115-7(a) (Smith-Hurd Supp. 1979); LA. REV. STAT. ANN. § 15:498 (West Supp. 1979); N.H. REV. STAT. ANN. § 632-A:6 (Supp. 1977).

sexual history evidence may be admitted to a short list, not including this category.²⁰³

6. Other Evidence of Consent

In order to bolster his claim of consent a defendant will want to offer evidence corroborating his own testimony and, if available, the complainant's consent in the past under similar circumstances.²⁰⁴ For example, suppose the victim and defendant met at a singles bar²⁰⁵ and after a few drinks returned to the complainant's apartment, where they engaged in sexual intercourse. The defendant claims that the woman consented, but that they later had a fight and she threw him out. He admits hitting her during that fight. The complainant says that she invited the defendant to her home for coffee and that he hit and raped her. The defense has evidence that the complainant has met other men in the same bar and voluntarily had sexual relations with them. Is this evidence relevant?

It may be relevant; if it amounts to proof of "habit," it is unquestionably relevant.²⁰⁶ "Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt. Every day's experience and reasoning make it clear enough."²⁰⁷ A habit is a person's regular response to a particular situation. The difficult issues are how invariable the action must

²⁰³ FED. R. EVID. 412; GA. CODE ANN. § 38-202.1 (Supp. 1979); MD. ANN. CODE art. 27, § 461A (Supp. 1979); MICH. COMP. LAWS ANN. § 750.520j (Supp. 1979-80); MONT. CODE ANN. § 45-5-503 (1978); NEB. REV. STAT. § 28-321 (Supp. 1978); OHIO REV. CODE ANN. § 2907.02 (Page Supp. 1978); 18 PA. CONS. STAT. ANN. § 3104 (Purdon Supp. 1979-1980); S.C. CODE § 16-3-659.1 (Supp. 1978); TENN. CODE ANN. § 40-2445 (Supp. 1978); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1979); WIS. STAT. ANN. § 972.11 (West Supp. 1979-1980).

Many other states specifically provide for the admission of this type of evidence, e.g., ARK. STAT. ANN. § 41-1810.2 (1977); KY. REV. STAT. ANN. § 510.145 (Baldwin Supp. 1978); MO. ANN. STAT. § 419.015 (Vernon Supp. 1979).

²⁰⁴ See *State v. Tiff*, 199 Neb. 519, 260 N.W.2d 296 (1977) (prior sexual conduct of complainant relevant to issue of consent).

²⁰⁵ This setting has been used before, but, like other commentators, we have added our own modifications. See Annburg & Rehtin, *Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims*, 22 ST. LOUIS U. L.J. 367, 387 (1978); Rudstein, *supra* note 14, at 22-23; Note, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflections of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403, 404 (1975).

²⁰⁶ FED. R. EVID. 406; McCORMICK, *supra* note 16, at § 195. Some courts consider evidence of habit to be generally inadmissible, or admissible only in the absence of eyewitnesses, probably because of their failure to distinguish habit evidence from character evidence, which is admissible only under exceptional circumstances. *Id.* See also 1 J. WIGMORE, EVIDENCE § 93 (3d ed. 1940).

²⁰⁷ 1 J. WIGMORE, EVIDENCE § 92 (3d ed. 1940).

be and how often it must occur to qualify as habit. The number of times the activity must have been repeated cannot be reduced to a set formula and will depend on the circumstances of the particular case.²⁰⁸ If the situation is an unusual one, only a few responses may be sufficient to establish a habit.²⁰⁹ If the situation is one that occurs frequently, a larger number of responses is necessary.²¹⁰ An activity deemed regular enough to constitute habit may be proved either by opinion or by evidence of specific acts.²¹¹ For the latter, a sufficient number of such acts must have occurred reasonably near the time in question under similar—though not necessarily identical—circumstances.²¹²

Evidence of a sexual habit is allowed in only a few jurisdictions with prohibitory shield laws.²¹³ Most would exclude it.²¹⁴ An admission by the complainant that she goes to a bar almost every weekend, meets a stranger, and returns to her apartment and has sexual intercourse with him would be inadmissible, despite the similarity of that behavior to the claim of the defendant. Similarly, the testimony of other men regarding her regular practice would not be allowed.

Closely related to habit evidence is evidence of a common scheme or plan. Evidence of other criminal activity, of which the crime charged is a part, is admissible against the defendant as evidence of a common plan.²¹⁵ Despite prejudicial effect, similar crimes may be introduced to prove that the one for which the defendant is now charged was deliberate.²¹⁶ If the state may use evidence of similar acts to help show that the defendant's act was criminal, and thereby to help convict him, it is unconstitutional to

²⁰⁸ *Id.*

²⁰⁹ See *Whittemore v. Lockheed Aircraft Corp.*, 65 Cal. App. 2d 737, 151 P.2d 670 (1944) (evidence that on all four previous occasions one who piloted plane upon takeoff did so for whole of flight admissible to show likelihood of same behavior on fifth occasion).

²¹⁰ See, e.g., *Howard v. Capital Transit Co.*, 97 F. Supp. 578 (D.D.C. 1951) (habit of always riding the bus home from work). See Lewan, *The Rationale of Habit Evidence*, 16 SYRACUSE L. REV. 39 (1964).

²¹¹ In a business setting, opinion is the more common, for example, regarding the regular practice of mailing letters. See *McCORMICK*, *supra* note 16, at § 195, at 463-65 & nn.11, 17, & 19.

²¹² *Id.* § 190, at 465. See *Milenkovic v. State*, 86 Wis. 2d 272, 272 N.W.2d 320 (Ct. App. 1978) (one prior similar sex act excluded).

²¹³ FLA. STAT. ANN. § 794.022(2) (West 1976); NEB. REV. STAT. § 28-323 (Supp. 1978); N.C. GEN. STAT. § 8-58.6(b)(3) (Supp. 1977) (amended 1979).

²¹⁴ See Appendix, *infra*.

²¹⁵ *McCORMICK*, *supra* note 16, at § 190.

²¹⁶ See *United States v. Ross*, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963); *People v. Williams*, 6 Cal. 2d 500, 58 P.2d 917 (1936).

deny the accused the same right to produce evidence of the complainant's pattern of similar activity to show that intercourse was consensual.²¹⁷

To illustrate the operation of this evidentiary rule, consider the following hypothetical situation. A woman alleges that she was raped. The man she has accused of the act claims that she is a prostitute who agreed to sexual relations for a fee of twenty dollars, and afterwards, threatening to accuse him of rape, she demanded an additional one hundred dollars. The man refused to pay the extra amount. She had him arrested for rape, and he had her arrested for extortion. In the extortion trial, the state would be permitted to introduce evidence of the woman's previous sexual conduct—the testimony of other men that, using the same method, she had extorted money from them. When the woman is the complaining witness in the rape prosecution, however, evidence of this *modus operandi* would be excluded in most states.²¹⁸ The facts are the same in both cases, as is the essential issue whether the woman is a rape victim or a would-be extortionist. Surely the relevance of the testimony should also be identical. If the woman's sexual history is relevant enough to be admitted against her when she is a defendant, entitled to the protections of the Constitution, then certainly it is relevant enough to be admitted in a trial at which she is merely a witness, entitled to no constitutional protection.²¹⁹ Relevance depends on the issues that must be resolved at trial, not on the particular crime charged.²²⁰

²¹⁷ There is some indication that the Supreme Court considers this kind of evidence so exculpatory that preventing the accused access to it violates due process. See *Giles v. Maryland*, 386 U.S. 66 (1967) (involving the withholding from the defense of evidence that the complainant regularly consented to sexual intercourse with boys similarly situated to the defendants).

Obviously, the pattern of a complainant's sexual conduct must be similar to the facts of the particular case. Evidence that the complainant regularly meets men in a bar and returns with them to her apartment for sexual relations would not be relevant if she was abducted from a supermarket and raped in the woods.

²¹⁸ But see *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976) (dictum) (evidence that complainant is a prostitute admissible); MINN. STAT. ANN. § 609.347(3)(a) (West Supp. 1979) (evidence of sexual conduct within the previous year admissible if tending to show common scheme or plan); N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney Supp. 1978-1979) (evidence that complainant is a prostitute admissible).

²¹⁹ Cf. *People v. Fritts*, 72 Cal. App. 3d 319, 140 Cal. Rptr. 94 (1977) (prosecution allowed to introduce evidence of defendant's prior sexual conduct, but defense not permitted to introduce similar evidence regarding complainant).

²²⁰ To carry the illustration one step further, suppose that the woman, alleging that she was raped, instead files a civil suit for assault and battery. Because this is not a criminal case, most shield laws would not apply. The man could, therefore, offer evidence of the plaintiff's prior sexual conduct and the extortion scheme, though he could not do so as a criminal defendant. Strict enforcement of shield

Undoubtedly, evidence of the complainant's sexual conduct will prove relevant in other situations. Each case has its own unique facts, any one of which might raise an issue never contemplated by the legislature. The above list of illustrations is not intended to be exclusive. Instead, it is designed to point out the fallacy of rape victim shield laws that prohibit the introduction of sexual conduct evidence without giving the trial judge discretion to rule on its relevance based on the facts of the case before him.

VII. CONCLUSION

A state is constitutionally prohibited from enacting a rape victim shield law that limits a defendant's ability to introduce otherwise admissible evidence. The sixth amendment rights of confrontation and compulsory process guarantee exactly this: no person accused of a crime may be denied the right to introduce evidence when the probative value outweighs the prejudicial effect. The state and federal governments may not legislate to alter the rules of evidence so as to place unusual and new burdens on the accused's ability to defend himself. Testing rape victim shield laws against this federal constitutional standard finds many of them defective.

Because sexual history evidence is potentially relevant in some rape cases, those statutes that contain absolute prohibitions, whether against all such evidence or only certain classes or uses of evidence, certainly cannot be reconciled with the sixth amendment. Shield laws also run afoul of the Constitution when they alter the traditional standard for the admissibility of evidence. The sixth amendment guarantees incorporate a federal constitutional standard for the admission and exclusion of evidence offered by the accused, and the states cannot, therefore, require the evidence offered by rape defendants to satisfy a stricter standard.

There is, however, nothing wrong with requiring that the relevance of sexual history evidence be determined before trial, by employing the traditional standard of probative value weighed against prejudicial effect. To the extent that shield statutes limit the accused from unfairly attacking the morality of a rape victim, they are unobjectionable. To the extent that such statutes require that rape victims be treated no differently from other witnesses and that sexual conduct testimony be treated the same as any other evi-

laws, then, could produce the anomalous result of a defendant's being found guilty beyond a reasonable doubt in a criminal case, yet winning a civil case under a weaker preponderance of the evidence standard.

dence, they are certainly valid. A statute that seeks to correct past abuses and to change the old rule automatically admitting evidence of the rape victim's morality is laudatory. No valid constitutional reason justifies singling out rape complainants for different treatment. But fairness to rape victims and control over potentially prejudicial testimony can also be accomplished by a pretrial determination of the relevance of sexual history evidence. A valid shield law should thus read:

Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may be admitted . . . only if, and only to the extent that, the judge finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

If the defendant proposes to ask any question concerning [such evidence], either by direct examination or cross-examination of any witness, the defendant must inform the court out of the hearing of the jury prior to asking any such question. After this notice, the court shall conduct an in camera hearing . . . to determine whether the proposed evidence is admissible.²²¹

Times change, and the prevailing morality changes with them. The move for equality of women has made us aware of the abuse of rape victims in the criminal justice system. Although steps have appropriately been taken towards protecting them, they have in many instances come at the expense of rights guaranteed the accused. While a rape defendant should have no greater right to present evidence than other defendants and should not be allowed to sidetrack the search for truth by introducing irrelevant testimony about the sexual mores of the complainant, the sixth amendment guarantees that he will not be prevented from eliciting testimony relevant to his defense. Shield laws must be tested against his established rights to confront his accusers and to present his own defense. If these laws are found wanting, they must be struck down and rewritten to assure that the desire to protect rape victims does not unconstitutionally hinder the ability of the accused to defend himself.

²²¹ TEX. CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1978). Substantially similar shield laws are HAW. REV. STAT. § 707-742 (Supp. 1978); IDAHO CODE § 18-6105 (Supp. 1979); KAN. STAT. ANN. § 60-447a (Vernon Supp. 1977); N.M. STAT. ANN. § 30-9-16 (1978); R.I. R. CRIM. P. 26.3. See also COLO. REV. STAT. § 18-3-407 (1978); FLA. STAT. ANN. § 794.022 (West Supp. 1978).

APPENDIX

COMPARATIVE TABLES OF RAPE VICTIM SHIELD STATUTES

The following tables compare the forty-six rape victim shield statutes according to their general approach and specific provisions. Some degree of precision has been sacrificed in order to reduce often lengthy statutes into tabular form.

Tables 1 to 3 include those statutes that generally allow sexual history evidence. The statutes in Table 1 admit sexual history testimony on the same basis as other evidence, though some require hearings. Those in Table 2 require hearings for some specified types or uses of sexual history evidence. Table 3 lists statutes that follow the pattern of admitting such evidence after a hearing and on a finding of relevance, but they specify a few situations in which the evidence may not be admitted or may not be found to be relevant.

Tables 4 and 5 include the most restrictive statutes, which set up a general rule that sexual history evidence may not be admitted. Table 4 covers those statutes allowing the trial judge no discretion—the statute declares sexual conduct evidence inadmissible, except for a few situations in which it will be admissible. Table 5 includes the most restrictive statutes, those that prohibit sexual history evidence except in a few limited situations; even for those exceptions, the judge may exclude the evidence after a hearing.

LIST OF JURISDICTIONS

Alabama	Table 4	Missouri	Table 5
Alaska	Table 3	Montana	Table 5
Arizona	No statute	Nebraska	Table 5
Arkansas	Table 5	Nevada	Tables 3, 4
California	Tables 3, 4	New Hampshire	Table 4
Colorado	Table 2	New Jersey	Table 3
Connecticut	No statute	New Mexico	Table 1
Delaware	Tables 3, 4	New York	Table 2
District of Columbia	See Federal	North Carolina	Table 5
Federal	Table 5	North Dakota	Tables 3, 4
Florida	Table 2	Ohio	Table 5
Georgia	Table 5	Oklahoma	Table 4
Hawaii	Table 1	Oregon	Table 5
Idaho	Table 1	Pennsylvania	Table 5
Illinois	Table 4	Rhode Island	Table 1
Indiana	Table 5	South Carolina	Table 5
Iowa	Table 3	South Dakota	Table 1
Kansas	Table 1	Tennessee	Table 5
Kentucky	Table 5	Texas	Table 1
Louisiana	Table 4	Utah	No statute
Maine	No statute	Vermont	Table 5
Maryland	Table 5	Virginia	No statute
Massachusetts	Table 5	Washington	Table 5
Michigan	Table 5	West Virginia	Table 5
Minnesota	Table 5	Wisconsin	Table 5
Mississippi	Table 2	Wyoming	Table 1

TABLE 1

Statutes that admit sexual history evidence merely on a showing of relevance and admissibility under traditional evidence rules requiring that relevance outweigh prejudicial effect.

Statute	Hearing	Test for Admissibility
Hawaii Rev. Stat. § 707-742 (Supp. 1978).	Before introduction of evidence attacking the complainant's credibility.	Relevant and not otherwise inadmissible.
Idaho Code § 18-6105 (1979).	Before or during trial.	Relevancy. ^a
Kan. Stat. Ann. § 60-447a (1976).	Before trial (motion due seven days before trial). ^b	Relevant and not otherwise inadmissible.
N.M. Stat. Ann. § 30-9-16 (1978).	Before trial, except newly discovered evidence.	Relevance outweighs prejudice.
R.I. R. Crim. Pro. 26.3.	Before introduction of evidence of sexual conduct with others than the defendant.	None specified.
S.D. Compiled Laws Ann. § 23-44-16.2 (Supp. 1978).	None required.	The same as for any other testimony.
Tex. Penal Code Ann. tit. 5, § 21.13 (Vernon Supp. 1978-1979).	Before introduction.	Relevance outweighs prejudice.
Wyo. Stat. Ann. § 6-4-312 (Supp. 1979).	Before trial (motion due ten days before trial).	Relevance substantially outweighs prejudice.

^a Although the statute does not specify that relevance must outweigh prejudice, judges probably interpret it that way.

^b Specifically gives the *state* the right to introduce evidence of sexual conduct without a hearing.

TABLE 2

Statutes that generally allow sexual history evidence but require a hearing on admissibility for some uses of this evidence. The evidence admissible without a hearing must satisfy the traditional requirement that relevance outweigh prejudice.

Statute	Evidence Admissible Without a Hearing	Evidence Admissible Only After a Hearing	Test for Admissibility
Colo. Rev. Stat. § 18-3-407 (1978).	Prior or subsequent conduct with accused; evidence that another committed the act.	Any other evidence, when consent is at issue.	Relevant. ^a
Fla. Stat. Ann. § 794.022 (West 1976 & Supp. 1979).	Past conduct with the accused.	Pattern of behavior or conduct indicating consent.	Relevant. ^a
Miss. Code Ann. §§ 97-3-68 to 97-3-70 (Supp. 1979).	Conduct with the accused; rebuttal of state's evidence of victim's conduct or of source of semen, pregnancy, or disease.	Any other evidence to impeach credibility or to prove consent.	Relevance not outweighed by prejudice. If offered to show consent, evidence must be admissible in the interests of justice.
N.Y. Crim. Proc. Law § 60.42 (McKinney Supp. 1978-1979).	Specific instances of past conduct with accused; complainant's prostitution convictions within past three years; rebuttal of state's evidence of complainant's conduct or of source of semen, pregnancy, or disease.	Any other evidence.	Relevant and admissible in the interests of justice.

^a Although the statute does not specify that relevance must outweigh prejudicial effect, judges probably interpret it that way.

TABLE 3

Statutes that give the trial judge general discretion to admit sexual history evidence after a hearing, but limit that discretion in a few situations.

Statute	Hearing	Test for Admissibility	Situations When Evidence Is Inadmissible
Alaska Stat. § 12.45.045 (Supp. 1979).	Any time before or during trial.	Relevance not outweighed by prejudice or unwarranted invasion of victim's privacy.	Sexual conduct occurring more than one year before crime (rebuttable presumption).
Cal. Evid. Code § 782 (West Supp. 1979). ^a	Before introduction.	Relevance not outweighed by prejudice.	Some types of conduct offered to show consent, <i>see</i> Table 4 <i>infra</i> .
Del. Code Ann. tit. 11, § 3508 (Supp. 1978). ^a	Before introduction.	Relevance not outweighed by prejudice.	Some types of conduct offered to show consent, <i>see</i> Table 4 <i>infra</i> .
Iowa Code Ann. § 813.2, R. 20(5) (West 1979-1980).	Before introduction (motion due five days before trial).	Relevance not outweighed by prejudice.	Conduct with persons other than the accused occurring more than one year before crime, except otherwise admissible prior felony convictions.
Nev. Rev. Stat. § 48.069 (1977). ^b	Before introduction.	Relevance not substantially outweighed by prejudice.	Some types of conduct offered to impeach credibility, <i>see</i> Table 4 <i>infra</i> .
N.J. Stat. Ann. § 2A:84A-32.1 to 2 (West Supp. 1979-1980).	Before introduction.	Relevance not outweighed by prejudice or unwarranted invasion of victim's privacy.	Conduct occurring more than one year before crime (rebuttable presumption).
N.D. Cent. Code § 12.1-20-15 (1976). ^a	Before introduction.	Relevance not outweighed by prejudice.	Some types of conduct offered to show consent, <i>see</i> Table 4 <i>infra</i> .

^a This statute applies only to evidence offered to impeach the complainant's credibility. A companion statute covers evidence offered on the consent issue, *see* Table 4 *infra*.

^b This statute applies only to evidence offered to show consent. A companion statute covers evidence offered to impeach the complainant's credibility, *see* Table 4 *infra*.

TABLE 4

Statutes that generally prohibit the introduction of sexual history evidence except in a few narrowly defined circumstances. These statutes involve no discretion: sexual history evidence is either admissible or prohibited. None of these statutes draws any distinction between reputation evidence, opinion evidence, and evidence of specific acts.

Statute	Situations in Which Sexual Conduct Is Admissible		
	Conduct With Accused	As Rebuttal, if State Raises Issue of Victim's Conduct	Other
Ala. Code tit. 12, § 21-203 (Supp. 1978).	Admissible	Inadmissible	None.
Cal. Evid. Code § 1103 (West Supp. 1979). ^a	Admissible	Admissible	Evidence may be admissible to impeach credibility, <i>see</i> Table 3 <i>supra</i> .
Del. Code Ann. tit. 11, § 3509 (Supp. 1978). ^a	Admissible	Admissible	Evidence may be admissible to impeach credibility, <i>see</i> Table 3 <i>supra</i> .
Ill. Ann. Stat. ch. 38, § 115-7 (Smith-Hurd Supp. 1979).	Admissible	Inadmissible	None.
La. Rev. Stat. Ann. § 15:498 (West Supp. 1979).	Admissible	Inadmissible	None.
Nev. Rev. Stat. § 50.090 (1977). ^b	Inadmissible	Admissible	Evidence may be admissible to show consent, <i>see</i> Table 3 <i>supra</i> .
N.H. Rev. Stat. Ann. § 632-A:6 (Supp. 1977).	Admissible	Inadmissible	None.
N.D. Cent. Code § 12.1-20-14 (1976). ^a	Admissible	Admissible	Evidence may be admissible to impeach credibility, <i>see</i> Table 3 <i>supra</i> .
Okla. Stat. Ann. tit. 22, § 750 (West Supp. 1979-1980).	Admissible	Admissible	Sexual conduct of the victim in the presence of the accused.

^a This statute applies only to evidence offered to show consent. A companion statute covers evidence offered to impeach the complainant's credibility, *see* Table 3 *supra*.

^b This statute applies only to evidence offered to impeach the complainant's credibility. A companion statute covers evidence offered to show consent, *see* Table 3 *supra*.

TABLE 5

Statutes that generally prohibit sexual history evidence except in a few specifically defined situations and even then only after a hearing to determine admissibility.

Statute	Hearing	Test for Admissibility	Absolute Prohibitions	Admissible Evidence: Specific Provisions			
				Conduct With Accused	Source of Semen, Disease, Pregnancy	Evidence Relating to Act for Which Accused	Other
Ark. Stat. Ann. §§ 41-1810.1 to 2 (1977).	Three days before trial, unless good cause shown.	Relevance outweighs prejudice.	None	Yes (past only)	No	Yes	Prior conduct with persons other than defendant.
Fed. R. Evid. 412.	Motion due 15 days before trial, unless new evidence.	Relevance outweighs prejudice.	Opinion and reputation evidence	Yes (past only)	Yes (semen and injury only)	No	
Ca. Code Ann. § 38-202.1 (Supp. 1979).	At time of introduction.	None specified.	None	Yes (past only)	No	No	Evidence that shows defendant reasonably believed victim consented.
Ind. Code Ann. §§ 35-1-32.5-1 to 3 (Burns Supp. 1978) (amended 1979).	Motion due ten days before trial, unless good cause shown.	Relevance outweighs prejudice.	None	Yes (past only)	Specific instances of conduct that show another committed act.		

Admissible Evidence: Specific Provisions						
Statute	Hearing	Test for Admissibility	Absolute Prohibitions	Conduct With	Source of Semen, Disease, Pregnancy	Evidence Relating to Act for Which Accused
						Other
Ky. Rev. Stat. Ann. § 510.145 (Baldwin Supp. 1978).	Motion due two days before trial, unless good cause shown.	Relevance outweighs prejudice.	None	Yes (past only)	No	Yes
Md. Ann. Code art. 27, § 461A (Supp. 1979).	Before trial, unless good cause shown.	Relevance outweighs prejudice.	Opinion and reputation evidence	Yes (past only)	Yes	No Evidence that shows victim's ulterior motive in accusing defendant; to impeach, if state puts complainant's conduct in issue.
Mass. Ann. Laws ch. 233, § 21B (Michie/Law. Co-op Supp. 1978).	Before introduction.	Relevance outweighs prejudice to victim.	Reputation evidence	Yes	Yes	No Recent conduct alleged to be cause of victim's physical condition or characteristic.
Mich. Comp. Laws Ann. § 750.5201 (Supp. 1979-1980).	Motion due ten days after arraignment, except newly discovered evidence.	Relevance outweighs prejudice.	None	Yes (past only)	Yes	No

Statute	Hearing	Test for Admissibility	Absolute Prohibitions	Admissible Evidence: Specific Provisions			
				Conduct With Accused	Source of Semen, Disease, Pregnancy	Evidence Relating to Act for Which Accused	Other
Minn. Stat. Ann. § 609.347 (West Supp. 1979).	Before trial, unless good cause shown.	Relevance outweighs prejudice.	None	Yes (past only)	Yes	No	Conduct within past year that shows common scheme or plan, when consent or fabrication is at issue; rebuttal of specific testimony of victim.
Mo. Ann. Stat. § 491.015 (Vernon Supp. 1979).	Before introduction.	Relevant.	Opinion and reputation evidence	Yes (contemporaneous with crime)	Yes	Yes	When, by statute, state must prove victim's chastity.
Mont. Code Ann. § 45-5-503(5) (1978).	Before introduction.	None specified.	None	Yes (past only)	Yes	No	
Neb. Rev. Stat. §§ 28-321 to 323 (Supp. 1978).	Before introduction.	Relevant.	None	Yes (past only)	No	No	Pattern of sexual conduct that tends to show consent.

Statute	Hearing	Test for Admissibility	Absolute Prohibitions	Admissible Evidence: Specific Provisions			
				Conduct With Accused	Source of Semen, Disease, Pregnancy	Evidence Relating to Act for Which Accused	Other
N.C. Gen. Stat. § 8-58.6 (Supp. 1977) (amended 1979).	Either before or during trial.	Relevant.	None	Yes	No	Yes	Pattern of distinctive sexual conduct to show consent or defendant's reasonable belief of consent; evidence offered as basis of expert psychiatric opinion that victim fantasized act.
Ohio Rev. Code Ann. § 2907.02(D), .02(F) (Page Supp. 1978).	At least three days before trial, unless good cause shown.	Relevance outweighs prejudice.	None	Yes (past only)	Yes	No	
Or. Rev. Stat. § 163.475 (1977).	Before trial, unless good cause shown.	Relevant and not otherwise inadmissible.	Reputation evidence	No	No	No	Any specific instance of conduct that the court finds relevant.

Statute	Hearing	Test for Admissibility	Absolute Prohibitions	Admissible Evidence: Specific Provisions			
				Conduct With	Source of Semen, Disease, Pregnancy	Evidence Relating to Act for Which Accused	Other
18 Pa. Cons. Stat. Ann. § 3104 (Purdon Supp. 1979-1980).	At trial.	Relevant and otherwise admissible.	None	Yes (past only)	No	No	
S.C. Code § 16-3-659.1 (Supp. 1978).	Before introduction.	Relevance outweighs prejudice.	None	Yes	Yes (as rebuttal only)	No	Conduct that amounts to adultery used to impeach complainant.
Tenn. Code Ann. § 40-2445 (Supp. 1978).	Before introduction.	Relevant to issue of consent.	None	Yes (past only)	No	No	
Vt. Stat. Ann. tit. 13, § 3255 (Supp. 1979).	Before introduction.	Relevance outweighs private character or evidence bears on credibility.	Opinion and reputation evidence	Yes (past only)	Yes	No	Past false rape allegations.

Statute	Hearing	Test for Admissibility	Absolute Prohibitions	Admissible Evidence: Specific Provisions			
				Conduct With Accused	Source of Semen, Disease, Pregnancy	Evidence Relating to Act for Which Accused	Other
Wash. Rev. Code Ann. § 9.79.150 (1978).	Before trial (optional for rebuttal evidence).	Relevant to consent, relevance outweighs prejudice, exclusion would result in denial of substantial justice.	To impeach credibility	Yes (past only)	No	No	To rebut state evidence of victim's conduct.
W. Va. Code § 61-8B-12 (1977).	Before introduction.	Relevance.	None	Yes (past only)	No	No	To rebut state's evidence of victim's conduct.
Wis. Stat. Ann. §§ 971.31, 972.11 (West Supp. 1979-1980).	Before trial.	Relevance outweighs prejudice.	None	Yes (past only)	Yes (also injury)	No	Past false rape charges.