RAPE SHIELD LAWS: SOME CONSTITUTIONAL PROBLEMS

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INTRODUCTION

Traditional laws pertaining to the crime of rape have come under increasing criticism recently as part of a larger movement to redefine the role of women in American society and to eliminate sex-based discrimination.¹ The manner in which society in general, and the criminal justice system in particular, treat alleged female victims of sexual assaults has been criticized for protecting male interests rather than protecting women from sexual assault.² Specifically, the requirement that a rape complainant's testimony be corroborated by other testimony or circumstantial evidence in order to convict the defendant³ has been attacked as being based on outmoded assumptions and unfounded fears,⁴ as have the rules of evidence that often permit a defense attorney to delve into the private life of the complaining witness.⁵ In addition, police officers who

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⁴ E.g., BROWNMILLER, supra note 2, at 369-72; Note, The Victim in A Forcible Rape Case: A Feminist View, 11 AM. CRIM. L. REV. 335 (1973) [hereinafter cited as A Feminist View]; Repeal Not Reform, supra note 3.
⁵ E.g., BROWNMILLER, supra note 2, at 371, 386; Bohmer & Blumberg, Twice Traumatized: The Rape Victim and the Court, 58 JUDICATURE 391, 396, 399 (1975); A Feminist View, supra note 4, at 343-45, 351; Rape & Rape Laws, supra note 2, at 935-36, 939; Comment, The Rape
investigate sex offenses have been criticized as being insensitive to
the emotional needs of the complainant when questioning her about
the alleged assault and for sometimes having a lascivious interest
in the details of the alleged crime. Hospitals have been criticized
for either refusing to treat alleged rape victims at all or for making
them wait long periods of time before rendering medical aid. Prosecut-
ing attorneys also have been criticized for failing to keep the
complainant informed of the progress of the case and for being indif-
ferent toward her and insensitive to her emotional needs.

Apparently in response to this criticism many state legislatures
recently have enacted statutes designed to grant better treatment
to women who allegedly have been sexually assaulted. Some juris-
dictions have repealed statutes that required the testimony of a rape
complainant to be corroborated by other evidence, some have en-
acted statutes requiring hospitals to provide emergency treatment
to alleged rape victims, one jurisdiction has enacted a statute re-

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6. E.g., Boston Women's Health Book Collective, Our Bodies, Ourselves 93 (1973); Brownmiller, supra note 2, at 364-67; Meyer, supra note 2 at 39-40, 43-44; Feminist View, supra note 4, at 348; Rape Victim, supra note 5, at 43-45. The author of the latter article stated that certain rape complainants reported that the police made remarks such as "I know why you got raped," and asked questions such as "How many orgasms did you have?" "How big was he?", and "What were you thinking about while he was doing it?" She also reported that "[o]ne woman said that although the rape was really bad, the police interrogation was six times as horrible." But see Bohmer & Blumberg, supra note 5, at 396-97.
7. E.g., A Feminist View, supra note 4, at 350.
8. E.g., Bohmer & Blumberg, supra note 5, at 394, 397; Meyer, supra note 2, at 43; A Feminist View, supra note 4, at 350.

Several jurisdictions have enacted statutes that prohibit a hospital or other emergency medical facility from charging the victim of a sexual assault for a medical examination if the examination is performed for the purpose of gathering evidence for possible prosecution. Such costs generally are to be charged to a specified local governmental agency. Cal. Gov't Code § 13961.5 (West Supp. 1976); Me. Rev. Stat. Ann. tit. 30, § 507 (Supp. 1976); Minn. Stat. Ann. § 609.35 (Supp. 1976); Nev. Rev. Stat. § 449.244 (1975); Ohio Rev. Code Ann. § 2907.28 (Page Supp. 1975). The Illinois General Assembly has provided further that when any hospital provides emergency services under the Rape Victims Emergency Treatment Act, Ill. Rev. Stat. ch. 111 1/2, §§ 87-1 to -9 (1975), to any rape victim or alleged rape victim who is neither eligible to receive such services under the welfare code nor covered as to such services by insurance, "the hospital shall furnish such service to that person without charge and shall be entitled to be reimbursed for its costs in providing such services by the [Illinois] Department of Public Health . . . ." Ill. Rev. Stat. ch. 111 1/2, § 87-7 (1975). See also Nev. Rev. Stat. § 449.244 (1975) (initial emergency medical care of victim charged to county).
inquiring health education institutions to give instruction in treating rape victims to provide for their physical and emotional well-being, and another jurisdiction has enacted a statute directing the development of community-based programs to aid victims of sexual attacks and encouraging sensitivity training for police officers, prosecuting attorneys, and hospital personnel. The most prevalent reform, however, is the enactment of statutes altering in some manner the traditional rules of evidence in rape cases to limit the defendant's inquiry into the past sex life of the alleged victim. Although these statutes have a meritorious goal, they appear to raise serious constitutional questions in light of a criminal defendant's sixth

addition, the Illinois legislature enacted a statute to prohibit the exclusion of coverage for the treatment of injuries resulting from rape in hospital service plans. Ill. Rev. Stat. ch. 32, § 562a.8 (1975).


In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), a civil action for damages against a television reporter and a broadcasting company for publishing the name of a rape victim in violation of a state criminal statute, the United States Supreme Court held that because the reporter had obtained the information from the indictment of the alleged rapist, which had been made available for his inspection by the court clerk, the freedom of the press provided by the first and fourteenth amendments barred the state of Georgia from imposing sanctions upon him or his employer for broadcasting the rape victim's name. The Court was careful to point out, however, that it meant "to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various official records . . . . " Id. at 496 n.26.


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amendment right to confront the witnesses against him and his right to a fair trial guaranteed by the due process clause of the fourteenth amendment. This Article will examine these constitutional problems.

**THE TRADITIONAL RULES OF EVIDENCE**

Rape traditionally has been defined as sexual intercourse between a male and a female, who is not his wife, forcibly and against her will. Under this definition lack of consent is a material element of the offense, and because the courts traditionally have concluded that "it is more probable that an unchaste woman would assent to . . . an act [of intercourse] than a virtuous woman," it has been

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14. U.S. Const. amend. VI provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The sixth amendment right of confrontation was held applicable to the states through the due process clause of the fourteenth amendment in Pointer v. Texas, 380 U.S. 400 (1965).

15. U.S. Const. amend. XIV provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

16. These statutes might raise other constitutional problems, such as vagueness, see e.g., People v. Blackburn, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976), but this Article is limited to a discussion of the confrontation and fair trial issues.


Intercourse with a female who is not the wife of the perpetrator and who is unconscious or so intoxicated, drugged, or mentally deranged or deficient that she cannot give effective consent generally is considered either "by force and against the will of the female" or is defined specifically as rape. *E.g.*, CAL. PENAL CODE §§ 261(1),(3),(4) (West Supp. 1976); ILL. REV. STAT. ch. 38, § 11-1(a)(1),(2) (1975); TEX. PENAL CODE ANN. §§ 21.02(b)(3),(4),(7) (Supp. 1975).

In some jurisdictions the exclusion from criminal liability for acts committed by a husband against his wife extends to the situation in which a man and woman are living together as husband and wife. *E.g.*, ME. REV. STAT. ANN. tit. 17-A, § 252(2) (1975); PA. STAT. ANN. tit. 18, § 3103 (Spec. Pamphlet 1973); TEX. PENAL CODE ANN. § 21.12 (1974).

Many jurisdictions recently have repealed their statutes dealing with forcible rape and have replaced them with statutes that create a new offense encompassing sexual acts committed by one person against another person, regardless of the sex of the parties, and that make gradations in the offense, based on the presence or absence of aggravating circumstances. *E.g.*, COLO. REV. STAT. ANN. §§ 18-3-401 et seq. (Cum. Supp. 1975) ("sexual assault"); FLA. STAT. ANN. § 794.011 (Supp. 1976) ("sexual battery"); MICH. COMP. LAWS ANN. §§ 750.520a-g (Supp. 1976) Laws Ann. §§ 750.520a-("criminal sexual conduct"). For the sake of convenience, however, this Article will use the term "rape".

held almost unanimously that a defendant accused of forcible rape may attempt to prove, either on cross-examination or during the presentation of his defense, the complainant's bad character\textsuperscript{9} for chastity\textsuperscript{9} as tending to show that the act of intercourse took place with her consent.\textsuperscript{21} Nevertheless, most courts allow the defendant to attempt to prove the complainant's bad character for chastity only by evidence of her reputation in the community; they do not allow him to attempt to prove the complainant's bad character for chastity by opinion evidence or by evidence of particular acts of intercourse with men other than the defendant.\textsuperscript{22} These restrictions on the method of proof are justified on the basis of the opinion rule\textsuperscript{3} and on the ground that the slight probative value of evidence of specific acts of intercourse with other men is outweighed by the likelihood that collateral questions relating to the specific acts would unduly distract the jury from the main issues in the case, consume an undue amount of time, and create the danger of unfair surprise to the complaining witness and the prosecution.\textsuperscript{24}

Not all authorities agree, however, that the collateral consequences of admitting evidence of specific acts of intercourse be-
tween the complainant and men other than the defendant outweigh
the probative value of such evidence. Dean Wigmore and Justice
Cardozo argued that the better rule is to admit such evidence. Jus-
tice Cardozo stated:

A man is prosecuted for rape. His defense is that the woman
consented. He may show that her reputation for chastity is bad.
He may not show specific, even though repeated, acts of unchast-
ity with another man or other men. The one thing that any sensi-
ble trier of the facts would wish to know above all others in
estimating the truth of his defense, is held by an inflexible rule,
to be something that must be excluded from the consideration of
the jury. . . . Undoubtedly a judge should exercise a certain dis-
cretion in the admission of such evidence, should exclude it if too
remote, and should be prompt by granting a continuance or oth-
erwise obviate any hardship resulting from surprise.25

A few courts have accepted this view and have permitted the defen-
dant to attempt to prove the complainant's bad character for chast-
ity by evidence of particular acts of intercourse with other men.26

Most courts also allow the defendant in a rape case to introduce
evidence of specific acts of sexual intercourse between himself and
the complainant.27 Although the courts generally justify the admis-
sion of this evidence on the ground that it is being used to prove the
complainant's character for chastity, Wigmore has pointed out that
in truth it is not admitted to show a general disposition to commit
acts of unchastity, but rather to show "an emotion towards the
particular defendant tending to allow him to repeat the liberty.
. . ."28 For this purpose, according to Wigmore, the evidence is "not
only more cogent as evidence, but is not open to the objections
advanced against evidence of intercourse with third persons. . . ."29

Not all prosecutions for forcible rape, however, raise the issue of
consent. Consent is not in issue when the defendant denies that he
engaged in the act of sexual intercourse with the complainant. In
such cases it is uniformly held that the accused cannot introduce
evidence of the complainant's bad character for chastity as tending

see note 114 infra & accompanying text.
26. E.g., People v. Shea, 125 Cal. 151, 57 P. 885 (1899); State v. Wulff, 194 Minn. 271, 260
N.W. 515 (1935); Burton v. State, 471 S.W.2d 817 (Tex. Crim. App. 1971); State v. Johnson,
28 Vt. 512 (1856) (only on cross-examination, not by extrinsic evidence).
27. See note 21 supra.
28. 1 Wigmore, supra note 21, at § 200. See also 2 id. §§ 399, 402.
29. 1 id. § 200.
to prove consent. Extending this principle, several courts have applied it when the evidence in the case clearly shows that force was used to compel the complainant to engage in the act of intercourse with the defendant. Similarly, evidence of the complainant’s bad character for chastity to prove consent generally is excluded in prosecutions for sexual intercourse with a girl under the statutory age of consent, because in statutory rape cases consent on the part of the victim usually does not constitute a defense, and therefore evidence tending to prove consent is immaterial.

Nevertheless, when consent is not in issue, evidence of the complainant’s prior lack of chastity might be admissible for some purpose other than to show consent. For example, in statutory rape cases if the previous unchastity of the victim constitutes a complete defense to the charge or reduces the severity of the crime to a lesser offense, such unchastity is material, and evidence of specific acts of sexual intercourse engaged in by the victim prior to the time of the alleged offense is admissible.


Wigmore argued that reputation evidence should be admitted in rape cases if the woman is under the age of consent, "not because it is logically relevant where consent is not in issue, but because a certain type of feminine character predisposes to imaginary or false charges of this sort and is psychologically inseparable from a tendency to make advances, and its admissibility to discredit credibility . . . cannot in practice be distinguished from its [use to show consent]." 1 WIGMORE, supra note 21, at § 62. See notes 161-66 infra & accompanying text.


35. E.g., Hickman v. State, 97 So. 2d 37 (Fla. App. 1957); State v. Weber, 272 Mo. 475, 199 S.W. 147 (1917).
cases, if the prosecution attempts to substantiate the complainant’s story as to the fact of intercourse by showing that she had become pregnant, given birth to a child, become afflicted with venereal disease, or had a ruptured hymen, the defendant may usually rebut this by introducing evidence of the complainant’s acts of sexual intercourse with other men as tending to show that another person might have been the father of the child or responsible for the condition of the complainant.\textsuperscript{36}

In addition, the credibility of a witness is always in issue. In all rape cases in which the alleged victim testifies, evidence of specific instances of sexual relations between her and the defendant or other men generally is admissible to impeach her credibility or the credibility of her partner or other prosecution witnesses who testify against the defendant if the evidence tends to show the possibility of bias or ill-will on her part toward the accused or a motive for her to testify falsely.\textsuperscript{37} Although the majority of courts limit impeachment of a witness to evidence of bias, defects in sensory capacity, prior inconsistent statements, conviction of a crime, or poor reputation for truth and veracity,\textsuperscript{38} some courts allow the impeachment of a rape complainant by evidence of her bad reputation for chastity.\textsuperscript{39} A few of these courts also allow impeachment by evidence of particular acts of sexual intercourse engaged in by the complainant.\textsuperscript{40}


Of course, only evidence of acts of intercourse that could have caused the condition relied upon to substantiate the complainant’s story is admissible for this purpose.


\textsuperscript{38} McCormick, \textit{supra} note 24, at §§ 33-48. See also 3A Wigmore, \textit{supra} note 21, at §§ 924-26 (Chadbourn rev. 1970).


\textsuperscript{40} E.g., Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955); Frank v. State, 150 Neb. 745, 35 N.W.2d 816 (1949); State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975) (only on cross-examination of complaining witness).
THE RAPE SHIELD LAWS

Critics of the traditional rules of evidence have pointed out that evidence of a rape complainant's bad reputation for chastity, opinion evidence of her bad character for chastity, or evidence of previous acts of sexual intercourse with the accused or with other men can be highly embarrassing to the complainant and can have a deep psychological effect on her when introduced at a public trial along with the barbs and insinuations often made by the defense attorney. In fact, the authors of one article concluded from their study of several rape trials that the ordeal faced by the complaining witness often was so harrowing that it seemed as if the alleged victim were on trial. Many critics of the traditional rules of evidence have suggested that this traumatic experience is one of the reasons rape is such an under-reported crime. Critics also have maintained that the traditional rules of evidence are obstacles to convictions of rapists because juries presented with evidence concerning a complainant's past sexual history make use of such information to form a moral judgment of her character and then are likely to be sympathetic to the assailant. This, too, has been cited as a reason many rape victims fail to report the crime to the police.

Apparently in response to this criticism of traditional evidentiary rules admitting evidence of the alleged victim's previous sexual conduct, at least twenty-three states have enacted rape shield laws that

41. E.g., Bohmer & Blumberg, supra note 5, at 395; A Feminist View, supra note 4, at 350-51; Repeal Not Reform, supra note 3, at 1374.
43. Bohmer & Blumberg, supra note 5, at 398.
44. E.g., A Feminist View, supra note 4, at 350-51; Rape & Rape Laws, supra note 2, at 920-22; Note, California Rape Evidence Reform: An Analysis of Senate Bill 1678, 26 HASTINGS L.J. 1551, 1554 (1975) [hereinafter cited as California Rape Evidence Reform]; Rape Victim, supra note 5, at 43.

According to the Uniform Crime Reports, forcible rape is "probably one of the most under-reported crimes . . ." of all the Crime Index offenses. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 22 (1975). In 1967 the President's Commission on Law Enforcement and Administration of Justice estimated that the actual number of forcible rapes exceeded the reported number by more than 350 percent. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 21 (1967). Other estimates of the percentage of rapes actually reported run as low as five percent. See A Feminist View, supra note 4, at 347; Rape & Rape Laws, supra note 2, at 920-22; Repeal Not Reform, supra note 3, at 1374-75.
45. E.g., Brownmiller, supra note 2, at 385-86; Bohmer & Blumberg, supra note 5, at 394; A Feminist View, supra note 4, at 343-44; Rape & Rape Laws, supra note 2, at 935-36.
46. E.g., A Feminist View, supra note 4, at 347.
place some restrictions on the evidence that can be introduced by a defendant charged with rape.\textsuperscript{47} The major restriction concerns the use of such evidence on the issue of consent. Ten statutes absolutely prohibit the defendant from introducing for this purpose evidence of the complaining witness's bad reputation for chastity, opinion evidence of the complainant's past sexual conduct, or evidence of specific acts of sexual intercourse between the complainant and men other than the defendant.\textsuperscript{48} Eight other statutes prohibit the introduction of such evidence on the issue of consent unless the trial judge determines, after a hearing either in camera or merely outside the presence of the jury,\textsuperscript{49} that the evidence is relevant, and under most of the statutes, that the probative value of the evidence is not outweighed by its prejudicial nature or, under a few of the statutes, by some other enumerated collateral policy.\textsuperscript{50} Two other statutes

\textsuperscript{47} See note 13 supra.


\textsuperscript{49} If the hearing is held merely outside the presence of the jury, rather than in camera, members of the public may be present in the courtroom as spectators.

\textsuperscript{50} Alaska Stat. \textsection{} 12.45.045 (Supp. 1975) (court must find, after an in camera hearing that the evidence is relevant and that its probative value "is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness"; evidence of complainant's sexual conduct occurring more than one year before date of offense charged is presumed to be inadmissible); Colo. Rev. Stat. Ann. \textsection{} 18-3-407 (Supp. 1975) (court must find, after an in camera hearing, that the evidence "is relevant to a material issue in the case"); Iowa Code Ann. \textsection{} 782.4 (Supp. 1976) (court must conduct an in camera hearing "as to the relevancy of such evidence"; previous sexual conduct of the complainant with men other than the accused is not admissible if it occurred more than one year prior to the date of the alleged crime); Nev. Rev. Stat. \textsection{} 48.069 (1975) (court must find, after a hearing outside the presence of the jury, that the evidence is "relevant to the issue of consent," and that its probative value is not outweighed by the danger of undue prejudice, of confusion of issues, or of misleading the jury, or by the amount of time that would be consumed); N.M. Stat. Ann. \textsection{} 40A-9-26 (Supp. 1975) (court must find, after an in camera hearing, that "evidence of the victim's past sexual conduct is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value"); N.Y. Crim. Proc. \textsection{} 60.42 (McKinney Supp. 1975) (court must find, after an offer of proof outside the hearing of the jury or "such hearing as the court may require," that the evidence is "relevant and admissible in the interests of justice"); Tex. Penal Code Ann. \textsection{} 21.13 (Supp. 1975) (court must find, after an in camera hearing, 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"); Wash. Rev. Code Ann. \textsection{} 9.79.150 (Supp. 1975) (court must find, after a closed hearing outside the presence of the jury, that the evidence is "relevant to the issue of the victim's consent; is not inadmissible because its probative value is
apparently prohibit only the use of evidence of specific instances of sexual intercourse between the complainant and men other than the defendant on the issue of consent unless the trial judge first conducts a hearing and finds the evidence admissible.\footnote{51} Still another apparently absolutely excludes evidence of a rape complainant's bad reputation for chastity and opinion evidence of her past sexual conduct. It also prohibits the defendant from introducing evidence of specific instances of sexual intercourse between the complaining witness and men other than the defendant unless the acts occurred within one year of the date of the alleged offense and tend to establish "a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue on the part of the complainant." The court, after a hearing outside the presence of the jury, must find that the evidence is "relevant and material to the fact of consent, and is not so prejudicial as to" outweigh its probative value.\footnote{52}

Evidence of previous acts of sexual intercourse between the complaining witness and the defendant is prohibited in thirteen states on the issue of consent unless the court, after a hearing held either in camera or merely outside the presence of the jury, finds the evidence admissible. One of these statutes merely requires the court to determine that the evidence is of prior acts of the complaining witness with the defendant.\footnote{53} Under the remaining twelve statutes the court must determine that the evidence is relevant to the issue of consent. In addition, under most of the statutes, the court must find that the probative value of the evidence is not outweighed by its prejudicial nature or by some other enumerated collateral pol-

\footnote{51. FLA. STAT. ANN. § 794.022(2) (Supp. 1976) (court must find, after a hearing outside the presence of the jury, that the previous sexual activity "shows such a relation to the conduct involved in the case that it tends to establish a pattern of conduct or behavior on the part of the victim which is relevant to the issue of consent"); S.D. COMPILED LAWS ANN. § 23-44-16.1 (Supp. 1976) (court must "conduct a hearing in the absence of the jury and the public to consider and rule upon the relevancy and materiality of the evidence. Evidence of the victim's sexual conduct with persons other than the accused is not admissible unless relevant to a fact at issue").}

\footnote{52. MINN. STAT. ANN. § 609.347 (Supp. 1976). The statutes of the remaining two jurisdictions, Hawaii and Louisiana, do not deal with the question of evidence of the prior sexual conduct of the complaining witness on the issue of consent.}

\footnote{53. MONT. REV. CODES ANN. § 94-5-503(5) (interim Supp. 1975).}
The statutes in the remaining ten jurisdictions either expressly exclude such evidence from the requirements or prohibitions of the statute or do not cover this type of evidence when used for the purpose of showing consent.

Fourteen statutes also contain restrictions on the introduction of evidence of specific acts of sexual conduct by the complaining witness with men other than the defendant when offered to rebut evidence introduced by the prosecution to substantiate the complainant’s story as to the fact of intercourse. Three of these statutes

54. ALASKA STAT. § 12.45.045 (Supp. 1975) (court must find, after an in camera hearing, that the evidence is relevant and that its probative value "is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness"; evidence of the complainant's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible); IND. STAT. ANN. § 35-1-32.5-2 (Burns 1976) (court must find, after a hearing outside the presence of the jury, 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); IOWA CODE ANN. § 782.4 (Supp. 1976) (court must conduct an in camera hearing "as to the relevancy of such evidence"); MICH. COMP. LAWS ANN. § 750.720j (Supp. 1976) (court must find, after an in camera hearing, 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"); MINN. STAT. ANN. 609.347 (Supp. 1976) (court must find, after a hearing outside the presence of the jury, that the evidence is "relevant and material to the fact of consent and is not so prejudicial as to be inadmissible"); NEV. REV. STAT. § 48.069 (1975) (court must find, after a hearing outside the presence of the jury, that the evidence is "relevant to the issue of consent," and that its probative value is not outweighed by the danger of undue prejudice, of confusion of issues, or of misleading the jury, or by the amount of time that would be consumed); N.M. STAT. ANN. § 40A-9-26 (Supp. 1975) (court must find, after an in camera hearing, that the evidence is "material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value"); OHIO REV. CODE ANN. §§ 2907.02(D),(E) (Page Supp. 1975) (court must find, after an in camera hearing, 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"); ORE. REV. STAT. § 163.475 (1975) (court must find, after a hearing outside the presence of the jury, that the evidence is "relevant for the purpose offered and is not otherwise inadmissible"); S.D. COMPILED LAWS ANN. § 23-44-16.1 (Supp. 1976) (court must “conduct a hearing in the absence of the jury and the public to consider and rule upon the relevancy and materiality of the evidence”); TEX. PENAL CODE ANN. § 21.13 (Supp. 1975) (court must find, after an in camera hearing, 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"); Wis. STAT. ANN. §§ 971.31(11), 972.11, Wis. Leg. Ser. ch. 184 (1975) (court must find, upon a pretrial motion, that the evidence is "material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature").


57. See note 36 supra & accompanying text.
apparently absolutely exclude such evidence, and the remaining eleven apparently require that the evidence first be submitted to the trial judge to determine its relevance at a hearing conducted either in camera or merely outside the presence of the jury. Under most of the statutes, the court also must find that the probative value of the evidence is not outweighed by its prejudicial nature or by some other enumerated collateral policy.

Most rape shield statutes also apply to the use of evidence of a rape complainant's previous sexual conduct to impeach her credibility as a witness. Under five of the statutes a defendant in a rape case apparently is absolutely prohibited from using such evidence for impeachment purposes, and another four make only minor exceptions. Four of the statutes can be read to prohibit all such


59. ALASKA STAT. § 12.45.045 (Supp. 1975); IND. ANN. STAT. §§ 35-1-32-5.2, 35-1-32-5.3 (Burns 1976); IOWA CODE ANN. § 782.4 (Supp. 1976); MICH. COMP. LAWS ANN. § 750.520j (Supp. 1976) (only "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease" admissible); MINN. STAT. ANN. § 609.347 (Supp. 1976) (only "[e]vidence of specific instances of sexual activity showing the source of semen, pregnancy, or disease at the time of the incident or, in the case of pregnancy, before the time of the incident and trial" admissible); MONT. REV. CODES ANN. § 94-5-503(5) (interim Supp. 1975) (only "[e]vidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution" admissible); N.M. STAT. ANN. § 40A-9-26 (Supp. 1975); N.Y. CRIM. PRO. § 60.42 (McKinney Supp. 1975) (evidence that "rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim" or that "rebuts evidence introduced by the people of the victim's failure to engage in sexual intercourse, deviate sexual intercourse or sexual contact during a given period of time" is admissible without a hearing); OHIO REV. CODE ANN. §§ 2907.02(D),(E) (Page Supp. 1975) (only "evidence of the origin of semen, pregnancy, or disease" admissible); S.D. COMPILLED LAWS ANN. § 23-44-16.1 (Supp. 1976); TEX. PENAL CODE ANN. § 21.13 (Supp. 1975).

60. IND. ANN. STAT. §§ 35-1-32-5.1, 35-1-32-5.2 (Supp. 1975); MICH. COMP. LAWS ANN. § 750.520j (Supp. 1976); OHIO REV. CODE ANN. § 2907.02(D) (Page Supp. 1975); ORE. REV. STAT. § 163.475 (1975); TEX. PENAL CODE ANN. § 21.13 (Supp. 1975). Each of these statutes, except Oregon's, in effect bars all evidence of the complainant's sexual conduct that is not "material to a fact at issue." The author has interpreted this phrase to have been intended to exclude from its scope the credibility of the complainant or any other witness, because credibility, though an issue in the case, is not technically a "fact at issue."

61. MINN. STAT. ANN. § 609.347 (Supp. 1976) (evidence "offered to rebut specific testimony of the complainant" is admissible if, after a hearing held outside the presence of the jury, the court finds that the evidence is material and that its "inflammatory or prejudicial nature does not outweigh its probative value"); NEV. REV. STAT. § 50.090 (1975) (evidence of complainant's previous sexual conduct is admissible if "the prosecutor has presented evidence or the victim has testified concerning such conduct, or absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal shall be limited to the evidence presented by the prosecutor or victim"); WASH. REV. CODE ANN. § 9.79.150 (Supp. 1975) (complainant can be cross-examined "on the issue of past sexual behavior when the
evidence for impeachment purposes except evidence of specific instances of sexual conduct between the complainant and the accused, \(^2\) and another nine can be read to prohibit all evidence of previous sexual conduct of the complainant for impeachment purposes unless the trial judge first conducts a hearing as to its admissibility. \(^3\) Most of these statutes also apply when evidence of the previous sexual conduct of the complainant is offered by the defendant to impeach the credibility of a witness other than the complainant. \(^4\)

**Constitutional Problems**

*C. Chambers and Davis: Defendants' Rights To Present Evidence and To Cross-Examine Witnesses*

Rape shield statutes preclude many defendants charged with forcible rape from introducing certain evidence in their defense and curtail their cross-examination of the complaining witness, and perhaps also cross-examination of other prosecution witnesses. As indicated by the United States Supreme Court in *Chambers v.*

\(^62\) prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior," though the court first may require an in camera hearing; Wis. Stat. Ann. §§ 971.31(11), 972.11(2)(b)(3), Wis. Leg. Ser. ch. 184 (1975) ("[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness" apparently is admissible if the court finds that its probative value outweighs its inflammatory and prejudicial nature).


Mississippi and in Davis v. Alaska, this effect of the rape shield laws may raise serious constitutional problems.

In Chambers the Court held that the application of two state evidentiary rules precluding the accused from introducing evidence in his defense and from impeaching his own witness had rendered his trial fundamentally unfair and denied him due process of law. Chambers, charged with murdering a police officer, attempted to show at trial that another man, McDonald, had fired the fatal shot. After the shooting McDonald confessed to Chambers’s attorneys that he, not Chambers, had killed the policeman, and on three occasions he made similar confessions to friends. When called as a defense witness at the trial, however, McDonald denied committing the murder and recanted the prior confession he had made to Chambers’s attorneys. Because of the state’s “voucher” rule, which prohibits a party from impeaching his own witness, Chambers could not attack McDonald’s credibility, and because Mississippi did not recognize an exception to the hearsay rule for declarations against penal interest, Chambers was unable to introduce evidence of the alleged out-of-court confessions made by McDonald to his friends. The jury convicted Chambers of murder and sentenced him to life imprisonment. The Mississippi Supreme Court upheld his conviction.

On certiorari the United States Supreme Court reversed Chambers’s conviction. The Court prefaced its decision by enunciating the following general principles:

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process. Mr. Justice Black . . . identified these rights as among the minimum essentials of a fair trial: ‘A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.’

In applying these principles to the case before it, the Court first examined the effect of the state's "voucher" rule. Stating that the rule denied Chambers an opportunity to subject McDonald's "damning repudiation" and alibi to cross-examination, the Court explained that "[t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'"  

Although recognizing that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," the Court nevertheless stated that "its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." The Court concluded that the "voucher" rule, as applied in Chambers, "plainly interfered with Chambers' right to defend against the State's charges.

The Court then considered Mississippi's hearsay rule, which did not recognize an exception for declarations against penal interest. The Court noted that the accused, in presenting witnesses in his own behalf, must comply with the state's established rules of procedure and evidence, but because it found that the evidence of the alleged out-of-court confessions made by McDonald to his friends bore "persuasive assurances of trustworthiness" and that the evidence was critical to Chambers' defense, it held that the effect of the rule was to deprive the accused of his right to present witnesses in his own defense. The Court concluded by stating that "[i]n these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."

In Davis v. Alaska the defendant alleged that the application of a state statute and a court rule aimed at preserving the confidentiality of juvenile adjudications of delinquency violated his right of

69. 410 U.S. at 295.
70. Id.
71. Id.
72. Id. at 298.
73. Id. at 302.
74. Id.
75. Id.
77. Alaska Rule of Children's Procedure 23 provides:

No adjudication, order, or disposition of a juvenile case shall be admissible
confrontation. The statute and rule prevented the defendant from impeaching the credibility of a prosecution witness by cross-examination designed to establish possible bias because of the witness's probationary status as a juvenile delinquent. Davis was charged with breaking into a tavern and stealing a safe containing cash and checks. The primary evidence introduced against him at trial was the testimony of Green, a youth who was then on probation by order of a juvenile court after having been adjudicated a delinquent for committing two acts of burglary. Green identified Davis as the man he had seen with a crowbar on the day of the burglary near where the empty safe was subsequently discovered. On cross-examination Davis’s attorney was precluded from impeaching Green by showing that, in reporting the incident to the police and identifying Davis, Green might have been acting out of fear of possible probation revocation. Davis was convicted and his conviction was affirmed by the Alaska Supreme Court.  

The United States Supreme Court reversed Davis's conviction and held that the limitation placed on the cross-examination of Green violated the confrontation clause of the Constitution. The Court stated that “[t]he accuracy and truthfulness of Green’s testimony were key elements in the State’s case against petitioner,” and found that in order to effectively cross-examine Green, Davis had to be able to show the jury why Green might have been biased. In reaching its result the Court rejected the State's argument that its interest in protecting the anonymity of juvenile offenders outweighed any interest Davis might have had in cross-examining Green about his probationary status. The court stated:

We do not and need not challenge the State’s interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. . . . Here, however, petitioner sought to introduce evidence of Green’s probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed

in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.  

Alaska Stat. § 47.10.080(g) provides, in part: “The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court. . . .”

79. 415 U.S. at 317.
in his identification of petitioner or at least very carefully considered in that light. Serious 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. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness.

We conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.80

Together, Chambers and Davis appear to stand for the proposition that a state, through the mechanistic application of its rules of evidence, cannot exclude trustworthy evidence critical to the defense of an accused without violating his right to due process of law, or deny or significantly curtail his cross-examination of a crucial witness without violating his right of confrontation unless the defendant's interest is outweighed by a legitimate competing state interest in excluding the evidence or curtailing the cross-examination. Further, the cases indicate that a state's policy interest in protecting a witness from embarrassment does not outweigh a criminal defendant's right to present evidence or confront witnesses.81

81. Chambers has been applied by lower courts not only to require the admission of hearsay statements that were against the penal interest of the declarant and that exculpated the defendant from the crime charged, United States v. Goodlow, 500 F.2d 954 (8th Cir. 1974); Commonwealth v. Hackett, 225 Pa. Super. Ct. 22, 307 A.2d 334 (1973), but also to require, so that the defendant could attempt to establish his defense of entrapment, the admission of hearsay statements made by a government informer who allegedly arranged the sale of hashish for which the defendant was being tried, Kreisher v. State, 303 A.2d 651 (Del. 1973). Chambers also has been applied to require the admission of opinion evidence concerning the results of a polygraph test administered to the defendant, State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (Ct. App.), aff'd, 88 N.M. 184, 539 P.2d 204 (1975). One concurring judge viewed Chambers as requiring the admission of privileged communications between a client, deceased at the time of the defendant's trial, and his attorney when the communications would
cause the statutes that modify traditional rules of evidence in rape cases can have the effect of prohibiting a defendant from introducing evidence in his defense and of limiting his cross-examination of the complaining witness, the constitutionality of these statutes is questionable.

**Restrictions on Using Evidence of Complainant's Prior Sexual Conduct To Show Consent**

**Absolute Prohibition on Evidence of Complainant’s Bad Character for Chastity**

In light of Chambers and Davis, those statutes that absolutely prohibit a defendant from introducing evidence of a rape complainant’s bad reputation for chastity, opinion evidence of her bad character for chastity, and evidence of specific acts of sexual intercourse between the complainant and men other than the defendant on the issue of consent may unconstitutionally deprive the defendant of his rights to a fair trial and to confront the witnesses against him. Evidence of the complainant’s bad reputation for chastity, though hearsay, is no less trustworthy as a class than any other type of reputation evidence used to prove character, and under the traditional evidentiary rules reputation evidence used to prove character is recognized as an exception to the hearsay rule because of its trustworthiness. Evidence of prior acts of intercourse between the

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For a discussion of the application of Davis by lower courts see notes 101-02 infra & accompanying text.

82. E.g., Fed. R. Evid. 803(21). As Wigmore explained:

That there is, in the community's reputation, a circumstantial probability of trustworthiness, fulfilling another fundamental requisite for hearsay exceptions . . . is found in the same considerations already mentioned as justifying the use of reputation on matters of general interest . . . . Those considerations are that, where the subject matter is one in which all or many of the members of the community have an opportunity of acquiring information and have also an interest or motive to obtain such knowledge, there is likely to be such constant, active, and intelligent discussion and comparison that the resulting opinion, if a definite opinion does result, is likely to be fairly trustworthy. That these considerations apply to a reputation of personal character cannot be doubted. No fact is more open to general observation, no fact is of more legitimate interest to the community as an object of knowledge, and consequently no fact is more
complainant and men other than the defendant usually will take the form of testimony by the complainant on cross-examination or by her alleged partner during the defendant’s presentation of his defense. As long as this evidence violates no evidentiary rule designed to protect against the use of unreliable evidence, such as the hearsay rule, it is no less trustworthy as a class than any other evidence now admissible. Opinion evidence of the character of the complaining witness for chastity, as a class, also appears to be trustworthy. Although the use of opinion evidence to prove character from which conduct can be inferred traditionally has been excluded, this position has been criticized vigorously. The modern trend, evidenced by the recently enacted Federal Rules of Evidence, is to admit such evidence on the strength of its trustworthiness.

Not only is evidence of the complaining witness’s bad character for chastity considered trustworthy, but in many rape cases it will be critical to the accused’s defense because of its relevance to the issue of consent and because of the nature of the evidence available in prosecutions for rape. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In the present context, evidence of the complaining witness’s bad character for chastity is relevant to the issue of consent if it has any tendency to make it more probable than not that she consented.

As previously indicated, the great majority of courts has viewed such evidence as relevant. The older cases reaching this conclu-
sion, which provide the basis for the traditional view, tended to incorporate then-existing moral standards in their reasoning. For example, in *People v. Abbot*, the court stated:

[Are we to be told that . . . triers should be advised to make no distinction in their minds between the virgin and a tenant of the stew? between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex? And will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia? . . . [T]here is not so much probability that a common prostitute or the prisoner's concubine would withhold her assent, as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of another, and the coy and modest female, severely chaste and instinctively shuddering at the thought of impurity?

The more recent cases, on the other hand, tend not only to avoid any outward indication of reliance on moral concepts, but also seem content merely to state the rule that such evidence is admissible, or at most, that "it is more probable that an unchaste woman would assent to . . . an act [of intercourse] than a virtuous woman."

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89. *Id.* at 195-96. See also *People v. Benson*, 6 Cal. 221, 223 (1856) ("[I]t must be obvious to all that there would be less probability of resistance upon the part of one already debauched in mind and body, than there would be in the case of a pure and chaste female."); *Camp v. State*, 3 Ga. 417, 422 (1847) ("[W]ho is more likely to consent to the approaches of a man, the unsullied virgin and the revered, loved and virtuous mother of a family, or the lewd and loose prostitute, whose arms are open to the embraces of every coarse brute who has money enough to pay for the privilege? . . . [N]o evil habitude of humanity so depraves the nature, so deadens the moral sense, and obliterates the distinction between right and wrong, as common, licentious indulgence. Particularly is this true of women, the citadel of whose character is virtue; when that is lost, all is gone: her love of justice, sense of character, and regard for truth. She esteems herself as put to the ban of society, and as incapable of deeper degradation."); *Titus v. State*, 66 Tenn. 132, 133-34 (1874) ("It would be absurd, and shock our sense of truth, for any man to affirm that there was not a much greater probability in favor of the proposition that a common prostitute had yielded her assent to sexual intercourse than in the case of the virgin of uncontaminated purity."); *Lee v. State*, 132 Tenn. 655, 179 S.W.145 (1915) ("[N]o impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure.").
90. See, e.g., cases cited note 21 *supra*.
91. See note 18 *supra*.
Critics of the traditional evidentiary rules, however, point to the change that has occurred in sexual mores since those rules originally were fashioned. They argue that although a woman is more likely to engage in premarital or extramarital sexual activity today, she is not likely to do so indiscriminately; her decision to consent or not to consent to sexual relations on a particular occasion is discrete and unaffected by her past behavior, so that what she has done in the past has no bearing whatsoever on her future conduct. This argument, however, is specious. An item of evidence, to be relevant, need not establish conclusively the desired inference; it need only make that inference more probable or less probable than it would be without the offered item of evidence. Regardless of the prevailing sexual mores of society, it is still reasonable to conclude that a woman who never has engaged in sexual intercourse will be less likely to consent to intercourse on a particular occasion than a woman who is not a virgin. To state it another way, a woman who previously has engaged in consensual sexual intercourse will be more likely to consent to intercourse than one who has not. Therefore, it must be concluded that the fact of previous consensual sexual intercourse does have some probative value on the issue of consent.

Probative value depends upon the degree of similarity between the circumstances of the previous acts of sexual intercourse and the circumstances of the case in question. Various factors such as the time the previous acts occurred, the places they occurred, the persons involved, and the circumstances leading up to the acts will be of importance. For example, the fact that an unmarried complainant engaged in consensual sexual relations in her home with her boyfriend is not highly probative of the issue of consent in a case involving sexual intercourse with a stranger in his automobile. But the fact that an unmarried complainant engaged in consensual sexual relations in her home with a man she had met in a singles bar earlier the same evening may be highly probative of the issue of consent in a case involving sexual intercourse with a defendant.

92. BROWNMILLER, supra note 2, at 386; Rape & Rape Laws, supra note 2, at 939; Reflection of Reality, supra note 87, at 414; Note, Indiana's Rape Shield Law: Conflict with the Confrontation Clause?, 9 IND. L. REV. 418, 429-30 (1976) [hereinafter cited as Indiana's Rape Shield Law]; Note, Indicia of Consent? a Proposal for Change to the Common Law Rule Admitting Evidence of A Rape Victim's Character for Chastity, 7 LOYOLA L.J. 118, 125 (1976) [hereinafter cited as Indicia of Consent?]; Rape Victim, supra note 5, at 51.

93. California Rape Evidence Reform, supra note 44, at 1570; Reflection of Reality, supra note 87, at 415; Indicia of Consent?, supra note 92, at 123.
whom she had met earlier the same evening at a singles bar.44

This is not to say that prevailing societal attitudes about sex have no effect on the relevance of evidence of previous sexual conduct on the issue of consent. For example, it can be argued persuasively that a woman with a “bad character for chastity” is one who has a tendency or disposition to engage in indiscriminate sexual intercourse rather than one who at some previous time merely has engaged in either premarital or extramarital sex. The unmarried woman who has engaged in sexual intercourse only with her boyfriend would not have a “bad character for chastity.” If this is true, the probative value on the issue of consent of a woman who indeed does have a “bad character for chastity” under prevailing moral standards would appear to be quite high, because a woman who is willing to engage in indiscriminate sexual activity is more likely to consent on a given occasion than one who does not have such a character. It follows from this analysis that under today’s sexual mores, although there may be cases in which the previous sexual conduct of a rape complainant will not be highly relevant on the issue of consent, there also will be many cases in which a woman’s bad character for chastity will be probative and thus relevant on that issue.

The type of evidence generally available in prosecutions for rape often will make evidence of the complainant’s bad character for chastity critical to the accused’s defense. Assume that in a prosecution for rape the complaining witness, who has a bad character for chastity under the prevailing sexual mores, testifies falsely that her act of sexual intercourse with the defendant was without her consent. Because “[t]he nature of the crime is such . . . that eyewitnesses seldom are available,”95 the trial probably will be reduced to a swearing contest between the complainant and the defendant on the issue of consent. If the trier of fact has before it only the complainant’s word against the defendant’s on this issue, the chances of a wrongful conviction are probably high.96 On the other hand, if

94. Reflection of Reality, supra note 87, at 415-16; Indiana’s Rape Shield Law, supra note 92, at 430.


Professors Kalven and Zeisel, in their study of American juries, reported that the prosecution presented eyewitness testimony other than the complainant in only four percent of the rape cases contained in their sample, and the defendant presented such eyewitness testimony, other than his own testimony, in only 16 percent of the rape cases in the sample. H. Kalven & H. Zeisel, The American Jury 142-43 (1966).

96. It has been stated often that the natural instinct of the jury in a sex offense case is to
the trier is allowed to learn that this complainant has a tendency to engage in indiscriminate sexual intercourse, 97 the chances of a wrongful conviction are probably greatly reduced because the trier is more fully informed of the relevant facts. 98 This is not to say, however, that it is unconstitutional under the traditional rules of evidence to exclude opinion evidence of the complainant's bad character for chastity or evidence of particular acts of sexual intercourse between the complainant and men other than the defendant. If such evidence is prohibited, the defendant still can introduce evidence of the complainant's bad reputation for chastity in order to prove her bad character for chastity. Therefore, it might be said that evidence of specific acts with other men or opinion evidence is not "critical" to the defense of the accused because alternative evidence can be introduced to prove the same point. 99

From this analysis it follows that those statutes absolutely prohibiting a defendant in a rape case from introducing evidence of the complainant's bad character for chastity on the issue of consent will, in many cases, mechanistically exclude trustworthy evidence that is both highly relevant and critical to his defense and will curtail significantly the defendant's cross-examination of the complainant, the most crucial witness against him, on the most important issue in the case. Several justifications for this statutory exclusion of evidence and curtailment of cross-examination have been

sympathize with the victim. E.g., People v. Murphy, 59 Cal. 2d 818, 831, 382 P.2d 346, 31 Cal. Rptr. 306, 314 (1963). One commentator has stated:

[T]oo often in rape cases the adversary proceeding will offer the jury the opportunity to choose between the account of a woman who alleges that she has been grievously wronged and that of a man accused of both violence and indecency. In such situations, outrage at the attacker and sympathy for the attacked mean that the jury will seldom be able to make a dispassionate evaluation of the prosecutrix's credibility. The result of this almost inevitable jury bias is to override the presumption of innocence; the defendant in effect must disprove the accusation.


98. In many cases decided under the traditional rules of evidence, courts have held that the defendant suffered prejudice to his defense when the trial court erroneously excluded admissible evidence tending to prove the complainant's bad character for chastity. E.g., People v. Fryman, 4 Ill. 2d 224, 122 N.E.2d 573 (1954).

99. This argument partially explains why, in the typical situation, the exclusion of relevant hearsay evidence offered by a criminal defendant does not violate his right to a fair trial. Of course, the main reason for excluding hearsay is that it deprives the opposing party of an opportunity to cross-examine the hearsay declarant in court and under oath, and consequently, as a class, is not trustworthy.
advanced. The most obvious one is that it protects the complainant, and perhaps also her family, from the embarrassment that might arise if her prior sex life were disclosed in court. But Davis held that sometimes a witness’s desire to testify free from embarrassment with her reputation unblemished is outweighed by a criminal defendant’s right to seek out the truth in defending himself. Indeed, in State v. DeLawder, the Maryland Court of Special Appeals held that it was error under Davis to preclude, merely to protect the witness from embarrassment, a defendant charged with statutory rape from cross-examining the complainant about her previous sexual activities in an attempt to show the possible existence of bias or an ulterior motive. Thus it would seem that on the authority of Davis, the state interest underlying the rape shield statutes must yield whenever trustworthy evidence offered by the defendant is critical to his defense. This will be the case in many rape prosecutions when the accused offers evidence to prove the complainant’s bad character for chastity as tending to show consent.

A second, closely related justification for rape shield laws is that they will aid in crime prevention because victims, knowing that the statutes protect them from the embarrassment of introduction of evidence of previous sexual activity, will be encouraged to report offenses. Davis, which dealt with a shield statute designed solely

100. 415 U.S. at 320.
102. DeLawder did not involve a rape shield statute, but the reasoning of the court is equally applicable to a situation in which the evidence is excluded because of such a statute. The court in DeLawder stated:

We conclude, as the Court concluded in Davis, . . . that the desirability that the prosecutrix fulfill her public duty to testify free from embarrassment and with her reputation unblemished must fall before the right of an accused to seek out the truth in the process of defending himself.


Davis also has been relied upon by lower courts to conclude that a criminal defendant’s right to confront and cross-examine the witnesses against him outweighed, under the circumstances of the particular case, the state’s interest in protecting confidential communications between a patient and a physician, State v. Hembd, Minn. 232 N.W.2d 872 (1975); in protecting a witness from the risk of personal harm, Commonwealth v. Johnson, Mass. 313 N.E.2d 571 (1974); and in protecting the secrecy of grand jury proceedings, Chesney v. Robinson, 403 F. Supp. 306 (D. Conn. 1975). And, in Commonwealth v. Michel, Mass. 327 N.E.2d 720 (1975), the court indicated that the attorney-client privilege, under some circumstances, might have to yield to a defendant’s right of confrontation.

to protect the witness’s privacy, did not address the state’s interest in crime prevention. Consequently, a separate analysis of this asserted state interest must be conducted.

In determining the weight to be given the state interest in encouraging the reporting of rapes, it first must be pointed out that the fear of embarrassment from the introduction at trial of evidence of her previous sexual activity is not the only reason a rape victim might fail to report the crime to the authorities. She might not want to go through the emotional ordeal of reliving the crime while making her report to the police and while testifying on the witness stand. She may experience shame, or she may not want her husband or parents to know of the rape. She may fear being accused of provocation or irresponsibility, or may fear retaliation by the offender. Parents may want to prevent publicity and emotional injury to a young victim. Thus it is by no means certain that by merely prohibiting the introduction of evidence of the complainant’s previous sexual conduct at trial these rape shield laws will substantially achieve the goal of increasing the percentage of rapes reported to the police.

Even if these laws did substantially increase the percentage of rapes reported, this state interest might not outweigh the defendant’s rights to present evidence and cross-examine the complainant. In *Roviaro v. United States*, the United States Supreme Court faced a similar problem of balancing the defendant’s right to a fair trial against the governmental interest of encouraging the reporting of crime by granting the government a privilege to refuse to disclose to the defendant the name of an informant. The Court recognized that the purpose of the privilege was to aid in effective law enforcement, but concluded:

104. In *Commonwealth v. Johnson*, Mass., 313 N.E.2d 571 (1974), the court, relying on *Chambers* and *Davis*, held that curtailed cross-examination of a prosecution witness in a murder case because of a fear of personal harm to the witness was error. The court stated:

In the present case . . . the trial judge apparently believed that the right [of cross-examination] was lost where a witness balked at answering because an answer might create a risk of harm to himself. . . .

There are no clogs or limitations on the right to testimony such as the judge might have imagined to exist. . . . Fear of harm to the witness [cannot] generally be offered as an excuse for declining testimony. Relief of witnesses on this ground would encourage intimidation of those in possession of information and proclaim a sorry confession of weakness of the rule of law.

Id. at __, 313 N.E.2d at 577.


A . . . limitation on the applicability of the privilege arises from the fundamental requirement of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.\(^{107}\)

Thus a state interest in encouraging the reporting of rapes through the adoption of a rape shield law, which at best may only marginally achieve that goal, apparently must yield whenever a rape defendant offers trustworthy evidence, critical to his defense of consent, of a complainant's bad character for chastity.

Another justification advanced in support of rape shield laws is that they enhance the fact-finding process by eliminating the possibility that the jury will be prejudiced against the complainant if it hears evidence concerning her previous sexual conduct and hence will acquit the defendant solely on that basis.\(^{108}\) There is some empirical data to support the proposition that juries sometimes acquit rape defendants, or convict them of a lesser offense, because of the jurors' moral judgment of the complainant's sex life. Although rape cases arguably go through a more stringent preliminary screening process to eliminate false accusations and weak cases than do other crimes,\(^{109}\) Professors Kalven and Zeisel, in their study of American

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107. Id. at 60-61 (emphasis supplied). The Court held that the so-called informer's privilege must yield when the evidence sought is merely "helpful" to the defense of the accused, rather than when it is "critical" to that defense.


109. The Uniform Crime Reports states that "[a]s a national average, 15 percent of all forcible rapes reported to police were determined by investigation to be unfounded. In other words, the police established that no forcible rape offense or attempt occurred." Federal Bureau of Investigation, Uniform Crime Reports for the United States 24 (1975). A study of the Philadelphia Police Department during the latter half of 1966 revealed that approximately 20 percent of the rape complaints received were unfounded. Comment, Police Discretion and the Judgment that A Crime Has Been Committed—Rape in Philadelphia, 117 U. Pa. L. Rev. 277, 281 (1968). The authors of the Philadelphia study believe that both the figure they obtained and the figures reported by the F.B.I. are misleadingly low because they are based on the number of offenses investigated as rapes, whereas not all rape complaints are investigated as rape offenses. They conclude that "[p]robably, at least 50% of the reported rapes are unfounded by the police." Id. at 279 n.8. The President's Crime Commission reported that "[i]n the case of forcible rape some police departments regularly conclude that as many as 50 percent of the complaints received were not offenses," whereas "[u]nfounding' rates for other crimes are generally lower, about 10 percent for auto theft and less than 1 percent for other [Uniform Crime Reports] Index offenses." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact—An Assessment 25 (1967).

It is also commonly known that prosecutors pursue only those rape cases in which there is
juries, reported that the acquittal rate for persons accused of forcible rape was higher than the overall average acquittal rate for all crimes. They also reported that in cases of what they termed simple rape, in which there was no evidence of extreme violence or several assailants, or in which the defendant and the victim were not total strangers at the time of the event, the jury convicted in only three of 42 cases, whereas the judge who presided at the trial would have convicted in 21 of the cases. Further analysis of this data, however, does not strongly support the conclusion that the jury was prejudiced against the complainant because of evidence of her unchastity per se. In all but one of the cases discussed by the authors, the evidence that arguably produced the jury prejudice was not evidence of the complaining witness’s bad reputation for chastity, opinion evidence of her bad character for chastity, or evidence of specific acts of sexual intercourse with men other than the defendant, but rather was evidence of either the circumstances leading up to the event or of her prior sexual activity with the defendant. In fact, Kalven and Zeisel concluded:

The law recognizes only one issue in rape cases other than the fact of intercourse: whether there was consent at the moment of intercourse. The jury, as we come to see it, does not limit itself to this one issue; it goes on to weigh the woman’s conduct in the prior history of the affair. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.

This study thus does not appear to support strongly the proposition that excluding evidence of the complainant’s bad character for

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a strong probability of conviction and that they are willing to accept a plea of guilty to a lesser offense, such as battery, when the chances of a conviction for rape are small.

110. Kalven & Zeisel, supra note 95, at 56, 69-75. The authors reported that the acquittal rate for all crimes in the sample was 30.3 percent, whereas the acquittal rate in cases of forcible rape was 43 percent. Acquittal rates for other major crimes were:

- murder ..................... 20%
- manslaughter ............. 46%
- negligent homicide ....... 46%
- aggravated assault ...... 36%
- kidnapping ............... 8%
- robbery .................... 25%
- burglary .................. 26%
- other grand larceny ...... 38%
- arson ...................... 37%
- narcotics ................ 12%

111. Id. at 253-54.
112. Id. at 249-51.
113. Id. at 249 (emphasis supplied).
chastity will enhance the fact-finding process. Even if it could be shown that there are cases in which the jury does acquit a guilty defendant because of its moral judgment of the complainant, it does not follow that the state's interest in preventing such acquittals outweighs a defendant's interest in presenting evidence or in cross-examining the complainant. Wigmore, in a slightly different context, stated:

Between the evil of putting an innocent or perhaps an erring woman's security at the mercy of a villain, and the evil of putting an innocent man's liberty at the mercy of an unscrupulous and revengeful mistress, it is hard to strike a balance. But, with regard to the intensity of injustice involved in an erroneous verdict, and the practical frequency of either danger, the admission of the evidence seems preferable. . . . [T]he real question is, which state of fact is the commoner and the one most needing our protection? The answer to this must depend more or less on the experience and the sentiments of each community."

Our society has long accepted the fundamental value determination that "it is far worse to convict an innocent man than to let a guilty man go free." Although under the traditional rules of evidence there is a chance that some juries might acquit a guilty defendant in a rape prosecution because the jurors were prejudiced against the complaining witness by evidence of her prior sexual conduct, this result seems preferable to convicting innocent men merely because the juries hearing their cases were not informed fully of the relevant facts. It would seem therefore that the state's desire to eliminate the possibility of jury bias against the complainant must yield whenever necessary to assure the defendant's rights to a fair trial and confrontation.

Although the above analysis demonstrates the serious constitutional problems raised by rape shield laws, in People v. Blackburn116 the only appellate court to consider the validity of such a statute rejected the defendant's contention that he had been denied a fair trial and his right of confrontation by the statute's mandatory exclusion of evidence of the complainant's bad reputation for chastity,

114. 1 Wigmore, supra note 21, at § 200.
Blackstone stated: "[T]he law holds it better that ten guilty persons escape than that one innocent party suffer." 4 W. Blackstone, Commentaries 358.
opinion evidence of her bad character for chastity, and evidence of specific acts of sexual intercourse between the complainant and men other than the defendant on the issue of consent. The court stated:

The [statute] does not deny to the defendant the due process rights to a fair trial or confrontation of witnesses against him. Unlike the situation where evidence establishing the bias of a prosecution witness or his motive to testify falsely is excluded . . . the evidence barred by [the statute] does not concern the credibility of a witness so as to affect the right of confrontation. [The statute] excludes evidence of the victim's sexual conduct only when it is offered to prove consent. That limited exclusion no more deprives a defendant of a fair trial than do the rules of evidence barring hearsay, opinion evidence, and privileged communications. Hearsay evidence tending to exonerate a defendant may be highly relevant to his innocence but is excluded from consideration by the jury. So also is testimony from a highly respected citizen that he believes the defendant did not commit the crime or, absent a waiver of privilege, testimony of a clergyman that another person has confessed the crime in a manner exonerating the defendant. In those situations, policy considerations dictate that the evidence be excluded, and those policy considerations are deemed within the definition of a fair trial.117

Examination of the court's opinion, however, reveals faulty reasoning. First, the right of confrontation is not restricted to attempts to impeach the credibility of a witness, but also includes the right to cross-examine. One of the goals of cross-examination, insofar as allowed by the applicable rule concerning its permissible scope,118 is to contribute independently to the favorable development of the cross-examiner's case through the testimony of an adverse witness.119 Secondly, the court's analogy to the hearsay rule, the opinion rule, and the rules concerning privileged communications is drawn poorly. Each of those rules merely precludes a method of proof; none of them completely forecloses all proof in a relevant area, as the statute challenged in Blackburn and similar rape shield statutes do. For example, whenever relevant evidence offered by a criminal defendant is excluded by the hearsay rule, the defendant has the op-

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117. Id. at 690, 128 Cal. Rptr. at 866.
118. See, e.g., McCormick, supra note 24, at §§ 21-25, 29.
119. E.g., Keeton, Trial Tactics and Methods 88 (1954); 5 Wigmore, supra note 21, at § 1368 (Chadbourn rev. 1974); McCormick, supra note 24, at § 29.
portunity to prove precisely the same fact by non-hearsay evidence.\textsuperscript{120} Under the statute at issue in \textit{Blackburn} and similar rape shield statutes, however, \textit{all} evidence of the complainant’s bad character for chastity is excluded on the issue of consent.\textsuperscript{121} There is no other evidence to which the defendant can resort to prove the complainant’s tendency or disposition to engage in sexual intercourse.\textsuperscript{122}

This analysis demonstrates that there will be many rape prosecutions in which the absolute exclusion of all evidence of the complaining witness’s bad reputation for chastity, opinion evidence of her bad character for chastity, and evidence of specific instances of sexual intercourse between the complaining witness and men other than the defendant will result in denial of the defendant’s constitutional rights to a fair trial and to confront the witnesses against him. It therefore would seem unwise for a state to enact a rape shield law that absolutely excludes such evidence.

\textit{Requirement of A Hearing Before Admitting Evidence of Complainant’s Bad Character for Chastity}

Short of absolutely prohibiting a rape defendant from introducing evidence of the complainant’s bad character for chastity, other means are available to protect rape complainants from disclosure of their prior sexual conduct in court and to prevent in many cases any possible jury bias against the complainant caused by the jury’s knowledge of her sex life. Several states have enacted statutes requiring the trial judge in a rape case to conduct a hearing, either in camera or merely outside the presence of the jury, on the admissibility of evidence of the complaining witness’s bad character for chastity offered by the defendant on the issue of consent.\textsuperscript{123} The standards for a finding of admissibility differ, but at a minimum, each statute

\begin{itemize}
\item \textsuperscript{120} This assumes, of course, that this alternative evidence is not precluded by some other evidentiary rule such as the opinion rule or a rule concerning privileges.
\item \textsuperscript{121} Although evidence of previous specific acts of sexual intercourse between the complainant and the defendant is admissible under the California statute, this evidence is not used to prove the complainant’s bad character for chastity from which consent can be inferred, but rather is used to show an emotion toward the particular defendant. See notes 27-29 supra & accompanying text.
\item \textsuperscript{122} The court in \textit{Blackburn} also can be criticized for its statement that the exclusion of evidence mandated by the statute “no more deprives a defendant of a fair trial than [does] the [rule] of evidence barring hearsay . . . . Hearsay evidence tending to exonerate a defendant may be highly relevant to his innocence but is excluded from consideration by the jury.” 56 Cal. App. 3d at 690; 128 Cal. Rptr. at 866. This statement flies directly in the face of the Supreme Court’s decision in \textit{Chambers}. See notes 67-75 supra & accompanying text.
\item \textsuperscript{123} See notes 50-52 supra & accompanying text.
\end{itemize}
requires that the judge determine whether the evidence offered by
the defendant is relevant to the issue of consent. The majority also
expressly require the judge to balance the probative value of the
evidence against its prejudicial or inflammatory nature, and a few
also expressly require the judge to consider other factors such as
the danger that the evidence will lead to a confusion of issues or
will mislead the jury, the amount of time that will be consumed
by the introduction of the evidence, the privacy interest of the
complainant, and the interests of the defendant in introducing the
evidence. It is submitted that each of these statutes can be inter-
preted to achieve the state’s goal of eliminating possible jury bias
against the complainant in many cases. Additionally, some of the
statutes can operate to protect the complainant from embarrass-
ment and to encourage the reporting of rapes. Yet these laws also
can safeguard the defendant’s due process and confrontation rights
in all cases.

Those statutes merely requiring the judge to determine the rele-
vancy of the evidence of the complainant’s previous sexual conduct
are likely to cause few constitutional problems if judges conscien-
tiously consider the defendant’s due process and confrontation
rights and the holdings of Chambers, Davis, and Roviaro. These
statutes clearly allow a trial judge to admit the evidence of the
complainant’s previous sexual conduct on the issue of consent if,
under the facts of the particular case, he finds the evidence relevant
to that issue and critical to the defense of the accused or necessary
for an adequate cross-examination of a crucial witness. On the other
hand, these statutes require the trial judge to exclude the evidence
if, under the facts of the particular case, he determines that it is not
significantly probative of the issue of consent because the evidence
is remote, because it does not tend to show a disposition to engage
in indiscriminate sexual intercourse, or because the circumstances
of the previous sexual activity were dissimilar to those in the case
before him. Such evidence thus would not be critical to the de-

124. ALASKA STAT. § 12.45.045 (Supp. 1975); MINN. STAT. ANN. § 609, 347 (Supp. 1976);
NEV. REV. STAT. § 48.069 (1975); N.M. STAT. ANN. § 40A-9-26 (Supp. 1975); TEX. PENAL CODE
127. Id.
129. N.Y. CRIM. PRO. § 60.42 (McKinney Supp. 1975); WASH. REV. CODE ANN. § 9.79.150
(Supp. 1975).
130. See notes 93 & 94 supra & accompanying text.
fense of the accused or necessary for an adequate cross-examination of a crucial adverse witness. By excluding the evidence, the state's goals of eliminating the possibility of jury prejudice against the complainant and, if the hearing is held in camera, of avoiding embarrassment to the complainant are achieved, while the rights of the defendant also are safeguarded.

Those statutes requiring the judge to consider, in addition to the relevancy of the evidence of the complainant's previous sexual conduct, certain collateral policies other than the interests of the defendant are apt to cause constitutional problems. They can be interpreted to require the trial judge to exclude evidence relevant to the issue of consent and critical to the defense of the accused or necessary for an adequate cross-examination of a crucial witness if he determines that one or more of the collateral policy considerations outweighs the probative value of the offered evidence. Under most circumstances such a result will conflict with the holdings in *Chambers* and *Davis* and will violate either the defendant's right to a fair trial, or his right of confrontation, or both. However, it is possible to interpret these statutes so that they do not conflict with *Chambers* and *Davis* if they are read to require the trial judge to strike the balance in favor of the accused. If the judge admits the evidence whenever it is of significant probative value and excludes it only when the weight given to the collateral policy consideration is heavy and the probative value is slight, few defendants will be denied their due process and confrontation rights and the state's goals will be achieved in the maximum number of cases.

131. If the hearing is held merely outside the presence of the jury so that spectators in the courtroom can hear the evidence of the complainant's previous sexual activity when an offer of proof is made by the defendant, the complaining witness will suffer the same amount of embarrassment as if the evidence actually were introduced at trial. A rape shield law that is truly concerned with the privacy of the complaining witness therefore will require an in camera hearing.

132. See notes 124-28 supra & accompanying text.

133. There might be some problem with the Minnesota statute, Minn. Stat. Ann. § 609.347 (Supp. 1976), because it apparently absolutely prohibits a rape defendant from introducing reputation evidence and opinion evidence on the issue of consent as well as evidence of specific instances of sexual activity between the complainant and men other than the defendant that occurred more than one year prior to the date of the alleged offense. It is conceivable that a rape defendant might offer evidence of specific instances of sexual activity between the complainant and other men that occurred more than one year prior to the date of the alleged offense which is highly probative of the issue of consent and which, partly because reputation and opinion evidence is barred, is critical to his defense or necessary for an adequate cross-examination of the complainant. The exclusion of such evidence under these assumed facts would appear to violate the defendant's right to a fair trial, and possibly also his right of confrontation. See notes 82-122 supra & accompanying text.
Restrictions on Using Evidence of Prior Specific Acts of Intercourse between Complainant and Defendant

As stated earlier, evidence of prior specific instances of sexual intercourse between a rape complainant and the defendant, when offered by the defendant on the issue of consent, is not used to prove that the complaining witness has a general disposition to engage in acts of sexual intercourse from which consent on the occasion in question can be inferred. Rather, it is used to show "an inclination on her part to consent to [the] embraces [of the defendant], thus negating an essential element in the crime charged." A separate analysis therefore is necessary for those statutes placing restrictions on the admissibility of this type of evidence.

None of the rape shield statutes enacted thus far absolutely prohibits a defendant charged with rape from introducing evidence of prior acts of intercourse between himself and the complainant. Such an absolute prohibition would raise constitutional problems in far more cases than the absolute prohibition of evidence of the complainant's bad character for chastity on the issue of consent. Evidence of prior sexual activity between the complainant and the defendant is trustworthy. It usually takes the form of testimony by the defendant during the presentation of his case or an admission by the complainant on cross-examination. As a class, neither form of testimony is any less trustworthy than any other evidence currently admissible. In addition, this evidence is relevant to the issue of consent. Regardless of the prevailing sexual mores of society, the complainant is more likely to have consented to the sexual intercourse for which the defendant is being tried if she previously had engaged in consensual intercourse with him. More importantly, the probative value of this evidence is generally much greater than that of the complainant's bad character for chastity, and often will be as critical to the defense of the accused.

The justifications for any limitation on the defendant's right to present evidence of previous sexual activity between the complain-

134. See notes 27-29 supra & accompanying text.
135. 2 WIGMORE, supra note 21, at § 402.
136. See note 53-56 supra & accompanying text.
137. 1 WIGMORE, supra note 21, at § 200.
138. See notes 95-98 supra & accompanying text.

Even Susan Brownmiller, a feminist who has been quite critical of the traditional evidentiary rules in rape cases, agrees that the probative value of this evidence on the issue of consent is greater than evidence of the complainant's bad character for chastity, and therefore "probably should not be barred." BROWNMILLER, supra note 2, at 386.
tant and himself and to cross-examine the complainant as to such activity are the same as those discussed in connection with the validity of an absolute prohibition on the introduction by a defendant of evidence of the complainant's bad character for chastity. The first two justifications, to avoid embarrassment of the complainant and to encourage the reporting of crime, can be accorded no more weight in the present context than they were in the former, and under Davis and Roviaro, must yield whenever necessary to insure the defendant's rights to a fair trial and confrontation.

The justification of eliminating possible jury bias against the complainant, however, requires a deeper analysis in the present context because of the results of the study conducted by Professors Kalven and Zeisel. Their study showed that a rape complainant's prior sexual activity with the defendant apparently has some effect on the jury's verdict. For example, they report:

In one . . . case the judge tells us: "This was a savage case of rape. Jaw of complaining witness fractured in two places." Nevertheless the jury acquits when it learns that there may have been intercourse with the complainant on prior occasions. The judge adds: "The parties knew each other and went out together on several occasions and on evening in question had been drinking. . . . Defendant claimed he had been having intercourse with complainant prior to occurrence."

Even though jury bias is more likely in cases involving evidence of previous sexual activity between the complainant and the accused than in cases involving evidence of bad character for chastity, the probative value of this type of evidence on the issue of consent is generally greater. Thus there would be more cases in which the absolute exclusion of this type of evidence under a rape shield law would result in the denial of the defendant's constitutional rights than there would be from the exclusion of evidence of the complainant's bad character for chastity. This is probably why none of the rape shield statutes now in effect absolutely exclude this evidence.

This is not to say, however, that the criminal justice system must accept the possibility of jury bias against the complainant in all rape trials in which the accused attempts to show consent through the presentation of evidence of previous instances of sexual activity.

139. See notes 100-15 supra & accompanying text.
140. Kalven & Zeisel, supra note 95, at 249-54.
141. Id. at 251.
between himself and the complainant. Several states have enacted statutes requiring the trial judge to conduct a hearing, either in camera or merely outside the presence of the jury, on the admissibility of evidence of previous instances of sexual activity between the complainant and the accused offered by the accused to show consent. All but one of these statutes require that the judge find that the evidence is relevant to the issue of consent before holding it admissible, and the majority also direct the judge to weigh the probative value of the evidence against its prejudicial or inflammatory nature. It is submitted that each of these statutes can be interpreted to achieve in a great many cases the state's goal of eliminating the possibility of jury bias against the complainant caused by its knowledge of her previous consensual sexual relations with the accused. If the hearing is held in camera the state's goals both of protecting the complainant from embarrassment and of encouraging the reporting of rapes can be achieved, while at the same time safeguarding the defendant's right to a fair trial and his right of confrontation in all cases.

Those statutes merely requiring the judge to determine the relevancy of the evidence of previous sexual conduct between the complainant and the accused on the issue of consent do not create constitutional problems. They clearly allow a trial judge to admit the evidence if, under the facts of the particular case, he finds that the evidence is relevant to the issue of consent and critical to the defense of the accused or necessary for an adequate cross-examination of a crucial witness against him, thus meeting the requirements of Chambers and Davis. Those statutes that additionally require the trial judge to weigh the prejudicial or inflammatory nature of the evidence against its probative value can be read to

142. See notes 53 & 54 supra.
143. Mont. Rev. Codes Ann. § 94-5-503(5) (interim Supp. 1975) merely requires that the judge find that the evidence is of prior sexual activity between the complainant and the defendant.

A few of the statutes also expressly require the judge to consider such additional factors as the danger that the evidence will create confusion of the issues, Alaska Stat. § 12.45.045 (Supp. 1975); Nev. Rev. Stat. § 48.069 (1975); the danger that the evidence will mislead the jury or consume an undue amount of time, Nev. Rev. Stat. § 48.069 (1975); and the privacy interests of the complaining witness, Alaska Stat. § 12.45.045 (Supp. 1975).
require the judge to strike the balance in favor of the accused. By this reading, the judge would admit the evidence whenever he makes a finding that it is significantly probative and critical to the defense or necessary for an adequate cross-examination of a crucial adverse witness, thereby safeguarding the defendant's constitutional rights. Such an interpretation, for instance, might allow a trial judge to exclude the evidence in cases similar to that discussed by Kalven and Zeisel on the ground that under the facts of the particular case, when the complaining witness suffered a fractured jaw, the evidence of previous sexual activity between the defendant and the complainant has little probative value on the issue of consent, and in addition, that the slight probative value of the evidence is outweighed by the danger of jury bias against the complainant. This interpretation of these rape shield laws thus would achieve the state's goal of eliminating the possibility of jury prejudice. Additionally, if the hearing is held in camera, the complaining witness will be protected from embarrassment and the reporting of rapes will be encouraged in many cases. On the other hand, because there is no blanket exclusion of this type of evidence, it can be admitted if required by the holdings in *Chambers* and *Davis* to safeguard the rights of the accused.

**Restrictions on Using Evidence of Complainant's Prior Sexual Conduct to Rebut Evidence Introduced by the Prosecution**

More than one-half of the rape shield laws now in effect place some restrictions on a rape defendant's traditional right to introduce evidence of specific acts of sexual intercourse between the complaining witness and men other than himself to rebut certain evidence introduced by the prosecution to substantiate the complainant's story as to the fact of intercourse. Such prosecution evidence might be that the complainant became pregnant, gave birth to a child, became afflicted with a venereal disease, or had a ruptured hymen. A few of these statutes absolutely prohibit a defendant from introducing for this purpose evidence of specific acts of

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145. A similar interpretation can be given to those statutes requiring the trial judge to consider those other collateral policies discussed in note 144 supra.
146. See note 141 supra & accompanying text.
147. The evidence also might be excluded on the ground that under the facts of the particular case consent is not a genuine issue. See note 31 supra & accompanying text.
148. See note 36 supra & accompanying text.
sexual intercourse. Others exclude all such evidence unless the trial judge finds the evidence admissible after an in camera hearing at which he considers its relevance and, under all but one of these statutes, also its prejudicial or inflammatory nature. Such evidence is admitted by one statute without a hearing if it is offered to rebut evidence "which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim," but the statute requires a hearing before admitting this evidence to rebut other evidence introduced by the prosecution. Still others absolutely exclude all such evidence except evidence showing the source or origin of semen, pregnancy, or disease. Such evidence is admitted only if the judge, after a hearing held either in camera or merely outside the presence of the jury, finds that the evidence is relevant and, under all but one of these statutes, that its probative value is not outweighed by its prejudicial or inflammatory nature. When these statutes are ana-

149. FLA. STAT. ANN. § 794.022(2) (Supp. 1976); ORE. REV. STAT. § 163. 475 (1975); WIS. STAT. ANN. § 972.11, Wis. Leg. Ser. ch. 184 (1975).

150. ALASKA STAT. § 12.45.045 (Supp. 1975) (court must find that the evidence is relevant and that its probative value "is not outweighed by the probability that its admission will create undue prejudice"); IOWA CODE ANN. § 782.4 (Supp. 1976) (court must consider the "relevancy" of the evidence); N.M. STAT. ANN. § 40A-9-26 (Supp. 1975) (court must find that the evidence is "material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value"); S.D. COMPILED LAWS ANN. § 23-44-16.1 (Supp. 1976) (court must "consider and rule upon the relevancy and materiality of the evidence"); TEX. PENAL CODE ANN. § 21.13 (Supp. 1975) (court must find 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").

Under the Alaska statute the court also must find that the probative value of the evidence "is not outweighed by the probability that its admission will create . . . confusion of the issues, or unwarranted invasion of the privacy of the complaining witness. . . ."

151. N.Y. CRIM. PRO. § 60.42(4) (McKinney Supp. 1975). Evidence that "rebuts evidence introduced by the people if the victim's failure to engage in sexual intercourse, deviate sexual intercourse or sexual contact during a given period of time" is also admissible without a hearing. When a hearing is required, it shall be one "outside the hearing of the jury, or . . . as the court may require," and to admit the evidence the court must find that it is "relevant and admissible in the interests of justice". Id. at § 60.42(3), (4).

152. MICH. COMP. LAWS ANN. § 750.520j (Supp. 1976) (court must find, after an in camera hearing, 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"); MICH. STAT. ANN. § 609.347 (Supp. 1976) (court must find, after a hearing outside the presence of the jury, that the evidence is "material to the fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value"); MONT. REV. CODES ANN. § 94-5-503(5) (interim Supp. 1975) (court must find, after a hearing outside the presence of the jury, that the evidence is "at issue in the prosecution"); OHIo REV. CODE ANN. § 2907. 02(D), (E) (Page Supp. 1975) (court must find, after an in camera hearing, 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").
lyzed under the holdings of *Chambers* and *Davis*, it appears that many of them will deny certain rape defendants their constitutional rights to a fair trial and to confront the witnesses against them.

Although the use of evidence of previous sexual activity between the complainant and other men to rebut evidence introduced by the state is not as common as the use of evidence of the complainant's previous sexual conduct to prove consent, it is offered in some cases. The probative value of the evidence when used for this purpose is quite high. For example, if the prosecution has introduced evidence showing that semen was found in the complaining witness shortly after the time of the alleged rape by the accused, it is less probable that the defendant would be convicted if evidence were introduced to show that at about the time of the alleged offense the complainant had engaged in a consensual act of sexual intercourse with someone other than the defendant. The evidence introduced by the defendant provides an alternative explanation for the presence of the semen and is thus critical to his defense. The state's evidence will make it clear to the jury that *someone* engaged in intercourse with the complainant at the time in question, and if the complainant testifies falsely that it was the defendant, the chances of a wrongful conviction are probably quite high. But if the jury is allowed to hear evidence that at the relevant time the complainant had engaged in a consensual act of sexual intercourse with someone other than the defendant, thus explaining the presence of the semen, the chances of a wrongful conviction will be greatly reduced.\textsuperscript{153} Not only will the evidence usually be relevant and critical to the defense of the accused, but also because it usually will take the form of testimony by the complaining witness on cross-examination or by her alleged partner during the presentation of the defendant's case, such evidence, as a class, will be no less trustworthy than any other evidence now admissible.\textsuperscript{154}

Thus there will be cases in which the absolute prohibition of such evidence to rebut that introduced by the state to help prove the fact of intercourse on the occasion in question will prevent the defendant from introducing trustworthy evidence that is critical to his defense or necessary for an adequate cross-examination of the complainant, a crucial witness against him. The justifications for this absolute prohibition are the same as those found insufficient in other con-

\textsuperscript{153} See notes 95-98 *supra* & accompanying text.
\textsuperscript{154} See notes 83-85 *supra* & accompanying text.
texts to outweigh the defendant's interest in presenting the evidence or cross-examining the witness. It follows that those statutes absolutely prohibiting a rape defendant from introducing evidence of sexual intercourse between the complainant and men other than the defendant will deprive some rape defendants of their right to a fair trial and their right of confrontation.155

In contrast, those statutes merely excluding such evidence for this purpose unless the trial judge, after a hearing, finds that the evidence is admissible, can be interpreted to meet the requirements of Chambers and Davis. There is no problem with the statutes that merely require the judge to consider the relevancy of the evidence, because if he finds that it is relevant and critical to the defense of the accused or necessary for an adequate cross-examination of a crucial adverse witness, he can admit the evidence. Those statutes requiring the judge to weigh the probative value of the evidence against its prejudicial or inflammatory nature can be interpreted to require the judge to strike the balance in favor of the accused and admit the evidence if it is necessary to insure the defendant a fair trial or his right of confrontation. This interpretation of these statutes will safeguard the defendant's constitutional rights in all cases and, at the same time, will achieve in as many cases as possible the state's goal of eliminating the possibility of jury bias against the complainant. Under those statutes requiring an in camera hearing, the state's goals of protecting the complaining witness from embarrassment and of encouraging the reporting of rapes also will be achieved.

Restrictions on Using Evidence of Complainant's Previous Sexual Conduct to Impeach the Credibility of a Witness

All but one of the rape shield laws now in effect apparently restrict using evidence of a rape complainant's previous sexual conduct to impeach the credibility of a witness for the prosecution.156 The most restrictive of these statutes absolutely prohibit a rape defendant from using any such evidence for impeachment purposes.157 Application of the holding in Davis to these statutes leads to the conclusion that they are likely to deprive some rape defendants of their constitutional right to confront the witnesses against them.

155. See notes 130-33 supra & accompanying text.
156. See notes 60-64 supra.
157. See notes 60 & 61 supra.
Evidence of the complainant's previous sexual conduct is allowed for impeachment purposes in two basic ways: by introduction of evidence of bad character for chastity, and by introduction of evidence of specific instances of sexual intercourse. Although the majority of courts have held that there is not a sufficient relationship between the character for chastity of a female witness, including a rape complainant, and her credibility to allow her to be impeached by evidence of her bad character for chastity, some courts have held to the contrary and, at a minimum, have allowed the complainant in a rape case to be impeached by evidence of her bad reputation for chastity. Some of these courts also have allowed the complainant to be impeached by evidence of specific instances of sexual intercourse.

Wigmore took the position that, in general, the probative value of a female witness's bad character for chastity on the issue of her credibility is weak and impeachment by such evidence should not be allowed. Nevertheless, he strongly advocated the creation of an exception when the witness is a complainant in a sex offense case. He stated:

There is, however, at least one situation in which chastity may have a direct connection with veracity, viz, when a woman or young girl testifies as complainant against a man charged with a sexual crime—rape, rape under age, seduction, assault. Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but


160. E.g., Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955); Frank v. State, 150 Neb. 745, 35 N.W.2d 816 (1949); State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975) (only on cross-examination of complaining witness).

161. 3A WIGMORE, supra note 21, at §§ 922, 924 (Chadbourn rev. 1970).
direct 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, too often in such cases 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.

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.¹⁶²

This view, however, recently has come under severe attack.¹⁶³ One commentator points out that Wigmore, in reaching his conclusion, relied upon five case histories of mentally ill girls who made false sexual accusations against men but in which the men accused were not convicted of sexual crimes, and that he failed to cite even one illustration of a man falsely convicted of rape.¹⁶⁴ This commentator recognized that it would be foolish to assert that fabricated charges of rape are never made, but concluded that “there is no reason to conclude that juries are less able to deal with fabrication in rape than they are in any other types of cases.”¹⁶⁵ This conclusion appears to be valid. It would seem, especially in light of today’s sexual mores and the traditional majority view of the courts, that the probative value of a female witness’s bad character for chastity on the issue of her credibility is weak even when the witness is a complainant in a rape case. As a matter of human nature, a disposition to engage in sexual intercourse does not commonly involve a lack of veracity. As one court recently explained:

If the witness’ reputation for chastity is so bad that it has in some way affected his or her reputation for truth and veracity, then the direct question can be asked as to reputation for truth and veracity. If the witness’ reputation for chastity has not produced this result, then the jury should not be invited to make this deduction.¹⁶⁶

¹⁶². Id. at § 924a (emphasis in original).
¹⁶³. E.g., A Feminist View, supra note 4, at 335-38; Rape & Rape Laws, supra note 2, at 931, 933-34; Repeal Not Reform, supra note 3, at 1376-78. But see Hibey, supra note 42, at 328.
¹⁶⁴. A Feminist View, supra note 4, at 336-37. See also Rape Victim, supra note 5, at 39 n.21.
¹⁶⁵. A Feminist View, supra note 4, at 337-38.
Exclusion of such evidence for impeachment purposes therefore will not curtail significantly the defendant's cross-examination of a crucial witness against him and will not deny him his constitutional right of confrontation.

Evidence of specific instances of sexual activity between the complainant and the defendant or between the complainant and other men has been allowed to impeach the credibility of the complainant, or her partner if he testifies against the accused, if it tends to show the possibility of bias or ill-will on the part of the witness toward the defendant or a motive for her to testify falsely. For example, in *State v. Elijah,* a witness testified for the state that the defendant had admitted to him that he had engaged in sexual intercourse with the complainant. The trial judge prohibited the defendant from impeaching this witness by showing that the witness previously had engaged in acts of sexual intercourse with the complainant. In holding that this was error, the Minnesota Supreme Court stated that such evidence would have shown the witness "as having a strong interest in the prosecution and the outcome of the prosecution and that he was the suitor, wronged to his face, harboring resentment, hostility, [and] injured feelings. . ." When used for this purpose it would seem that this evidence is necessary for an adequate cross-examination of the witness. In *Davis v. Alaska,* which involved an attempt to impeach a key prosecution witness by showing that his status as a juvenile probationer gave rise to the possibility of bias or a motive to testify falsely, the United States Supreme Court stated: "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" The Court concluded that despite the state's important goal of protecting the anonymity of juvenile offenders, the restriction on the defendant's cross-examination of the witness denied him his constitutional right of confrontation.

Applying the holding and rationale of *Davis* to those rape shield statutes absolutely prohibiting the use of evidence of the complainant's previous sexual activity to impeach the credibility of a witness

168. 206 Minn. 619, 289 N.W. 575 (1940).
169. Id. at 622, 289 N.W. at 577.
171. Id. at 316, quoting 3A Wigmore, supra note 21, at § 940 (Chadbourn rev. 1970).
leads to the conclusion that those statutes will deny some rape defendants their constitutional right to confront the witnesses against them. Evidence offered to show the possibility of bias or ulterior motive on the part of the complaining witness or any other crucial witness for the state is necessary for an adequate cross-examination of the witness. The only justifications for its exclusion are protection of the complainant's privacy, which was expressly rejected by the Court in *Davis*, and encouragement of the reporting of rapes and prevention of the possibility of jury bias against the complainant, both of which have been found insufficient to outweigh the interests of a criminal defendant. Although using evidence of the complainant's previous sexual conduct to show bias or motive to testify falsely is not common, there will be cases in which a rape defendant will offer such evidence to impeach the credibility of the complainant or another crucial witness against him. If this evidence is excluded, it is likely that he will be denied his right of confrontation.

Those rape shield laws providing an exception for evidence of the complainant's previous sexual conduct with the accused are likely to create problems in fewer cases than those absolutely prohibiting the use of all evidence of the complainant's previous sexual conduct for impeachment purposes, but they will still exclude evidence in cases such as *Elijah*. Consequently, the operation of these statutes will deny some rape defendants their constitutional right of confrontation. On the other hand, those rape shield statutes requiring the trial judge to determine the admissibility of the evidence for impeachment purposes are likely to create few constitutional problems if judges conscientiously consider the defendant's rights and the holding and rationale of *Davis*. Under all of these statutes the judge must find that the evidence is relevant to the issue of credibility of the witness, and under two of them he must find that the probative value of the evidence is not outweighed by its prejudicial or inflammatory nature. It is submitted that the statutes that expressly require the judge to engage in a balancing process can be

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172. See notes 103-15, 140-41 supra & accompanying text.
173. See note 62 supra.
174. See note 63 supra.
175. ALASKA STAT. § 12.45.045 (Supp. 1975) (also requires the trial judge to consider the probability that admission of the evidence will create confusion of the issues or unwarranted invasion of the privacy of the complaining witness); N.M. STAT. ANN. § 40A-9-26 (Supp. 1975).
interpreted to require striking the balance in favor of the accused and admitting the evidence tending to show bias or motive to falsify, if necessary for an adequate cross-examination of a crucial witness. So interpreted, all of these rape shield laws will allow the trial judge to admit evidence of the complainant's previous sexual conduct when necessary for an adequate cross-examination of a crucial adverse witness, thus safeguarding the rights of the defendant in all cases. In addition, the judge can exclude such evidence if it is not necessary to insure the accused his right of confrontation, thus achieving the state's goal of eliminating the possibility of jury bias against the complainant. If the hearing is in camera, this procedure also achieves the state's goals of protecting the privacy of the complainant and encouraging the reporting of rapes in as many cases as possible.

CONCLUSION

Undeniably statutes limiting the admissibility of evidence of a rape complainant's prior sexual activity seek to achieve worthy goals. Nevertheless, rape shield statutes that create a blanket exclusion of such evidence, whether on the issue of consent, or to rebut prosecution evidence, or to impeach the credibility of a witness for the state, sometimes will deprive the defendant of his constitutional right to a fair trial, or his right of confrontation, or both. A possible solution to the dilemma created by these conflicting public policies is a rape shield statute providing for a pretrial hearing to determine the admissibility of evidence pertaining to the prior sex life of the complainant. In order to protect the privacy of the complaining witness, such a statute should require that the hearing be conducted in camera. To protect the defendant's right to a fair trial and his right of confrontation, the statute, at a minimum, should allow the defendant to introduce evidence of the complainant's bad reputation for chastity and of prior acts of sexual intercourse with him if such evidence is relevant to the case and critical to his defense or necessary for an adequate cross-examination of a crucial adverse

176. Some problems might arise under the Iowa statute, Iowa Code Ann. § 782.4 (Supp. 1976), because it prohibits the use of evidence of the complainant's previous sexual conduct with men other than the defendant if it occurred more than one year prior to the date of the alleged offense.

witness. Such a statute would afford some protection from embar-
rassment for a complainant in a rape case and would eliminate any
possible jury bias against her caused by the disclosure in court of
evidence of her previous sexual conduct by preventing inadmissible
evidence from reaching the jury before its relevancy has been deter-
mined and by excluding such evidence when not critical to the
defense of the accused or necessary for an adequate cross-
examination of a crucial adverse witness. Although this procedure
does not provide complete protection to a rape complainant and
does not eliminate completely the possibility of jury bias against
her, such a procedure provides the maximum possible protection for
the victim consistent with a criminal defendant's constitutional
rights to a fair trial and to confront the witnesses against him.