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IF SHE CONSENTED ONCE, SHE CONSENTED AGAIN—A LEGAL FALLACY IN FORCIBLE RAPE CASES

INTRODUCTION

The defense lawyer [in a forcible rape case], viewing the jury . . . as an ally, plays his advantage to the hilt. He cross-examines the victim mercilessly—in one case a woman was on the stand for nine hours—asking all the outrageous questions about her sex life he can get away with. For example: “Isn’t it true that you’ve gone to bed with 12 men in the past year?”

With such courtroom inquiries into the complainant’s past sexual misconduct, the defense attorney often manages to discredit all of the victim’s testimony.² Through the utilization of this line of questioning or by the production of extrinsic evidence concerning the complainant’s prior unchastity,³ the defense presents a substantial obstruction—if not an insurmountable barrier—to the prosecution’s attempt to prove the guilt of the alleged rapist. It is the validity or, perhaps, the invalidity of such an inquiry that is the main concern of this note.

Rape is the unlawful carnal knowledge of a woman by a man forcibly and against her will.⁴ It is said to be one of the easiest crimes to allege and one of the most difficult to prove.⁵ The prosecution’s evidentiary burden in the rape proceeding is heavier than in other criminal cases. The prosecutor must prove not only that an act of sexual intercourse took place, but also that the alleged victim was an unwilling participant to that act. Since rape is seldom witnessed by third parties, the prosecutrix is often the sole witness available to the prosecution. Only through her

1. A. Lake, *What Women Are Doing About the Ugliest Crime*, GOOD HOUSEKEEPING, Aug., 1974, at 134.

2. *Revolt Against Rape*, TIME, July 21, 1974, at 85.

3. Unchastity is defined generally as the willing participation of an unmarried female in one or more acts of sexual intercourse with a man, or the consensual involvement of a married woman in extra-marital sexual intercourse with a man other than her husband. See *State v. Brionez*, 188 Neb. 488, 197 N.W.2d 639 (1972); *Marshall v. Territory*, 2 Okla. Crim. 136, 101 P. 139 (1904).

4. BLACK’S LAW DICTIONARY 1427 (4th ed. 1968). See *Gore v. State*, 119 Ga. 418, 46 S.E. 671 (1904).

5. *The Merely Accused: THE HISTORY OF THE PLEAS OF THE CROWN* 635 (1778).

testimony and physical evidence can the prosecution meet the formidable burden of evidence necessary to obtain a conviction of the defendant. If the complainant's testimony is improperly discredited, a strong possibility exists that the rapist might be wrongfully acquitted.

Presently, many jurisdictions permit the defense to discredit the testimony of the complainant with proof of her prior consensual sexual activities.⁶ Some courts admit the evidence as relevant to the issue of her consent to the alleged act;⁷ others permit it only to impeach the complainant's credibility as a witness.⁸ Regardless of the reason for its admission, "[t]he effect in the courtroom will be that *prior sexual activity of any kind will continue as an issue in an unknown number of trials, with the victim put on trial for being human.*"⁹

Should the practice of admitting the complainant's sexual history continue to be permitted in the rape trial? It is clear that the defendant must be proffered every fair opportunity to defend against a false accusation and a possible erroneous conviction.

6. See notes 11-48 *infra* and accompanying text. Evidence concerning the sexual history of the rape complainant is usually admitted at the discretion of the trial court judge. See generally *United States v. Craft*, 407 F.2d 1065, 1070 (6th Cir. 1969); C. McCORMICK, *McCORMICK ON EVIDENCE* § 185 (2d ed. 1972) [hereinafter cited as *McCORMICK*]. However, the rape statutes of some states require proof of the rape complainant's chastity as a condition precedent to any possible conviction of the defendant. These statutes provide that rape can be perpetrated only upon a female of previous chaste character. See B. OLIVER JR., *SEXUAL DEVIATION IN AMERICAN SOCIETY* 57 (1967) [hereinafter cited as *OLIVER*]. An example of such a statute is *TENN. CODE ANN. § 39-3706* (Supp. 1974), which provides that "a bawd, lewd or kept female" may not charge rape against a male. The present discussion, although applicable to such a statutory situation, is concerned primarily with that evidence which is admissible at the court's discretion.

7. *E.g.*, *McQuirk v. State*, 84 Ala. 435, 4 So. 775 (1887); *Teague v. State*, 208 Ga. 459, 67 S.E.2d 467 (1951); *People v. Collins*, 25 Ill. 2d 605, 186 N.E.2d 30 (1962); *Esquivel v. State*, 506 S.W.2d 613 (Tex. Crim. App. 1974); *Haynes v. State*, 498 S.W.2d 950 (Tex. Crim. App. 1973).

8. *E.g.*, *Brown v. State*, 291 Ala. 789, 280 So. 2d 177 (1973); *Williams v. State*, 51 Ala. App. 1, 282 So. 2d 399 (1973); *Camp v. State*, 3 Ga. 417 (1847); *Humphreys v. State*, 227 Md. 115, 175 A.2d 777 (1961); *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948).

9. MICHIGAN WOMEN'S TASK FORCE ON RAPE, *Position Statement #2, Proposed Amend. to Mich. H.B. 5802, Introduced by Representatives O'Neil, Divey, Zigler and Nelson* (1974). See also *Coakley, The Joan Little Trial Is Over But the Issues Remain*, *Chicago Tribune*, August 24, 1975, § 2, at 8, col. 1. "[R]ape victims . . . have to take the witness stand and become the

However, it is equally clear that the prosecution, in its endeavor to protect society from the criminal act, must not be unjustly obstructed in proving the defendant's guilt.

In rendering the ultimate decision concerning the admissibility of such evidence, this note first considers whether proof of the complainant's prior sexual behavior is relevant to the issues of consent and credibility. That evidence which is relevant is then subjected to a second test. This latter test determines whether it is so inflammatory, prejudicial or confusing as to outweigh its probative value—thus necessitating its exclusion from the trial.¹⁰ If the offered evidence passes each of these tests, then, and only then, should it be admitted in the rape proceeding. However, it shall be revealed that much of the evidence currently deemed admissible does not, in fact, meet these necessary qualifications. Consequently, it is concluded that much of that evidence should be excluded from the rape trials.

Finally, the current legislation concerning the evidence of the alleged rape victim's sexual history will be examined. This evaluation covers the content, the scope and the probable effect of these newly-enacted statutes, as well as identifying the remaining problems not remedied with such legislation.

It is hoped that this discussion will better acquaint one with both the present status and the inherent problems concerning evidence of the rape complainant's prior sexual activity. Affirmative action taken upon these suggestions may alleviate some of the present inequities of the rape trial. Before determining which evidence should be admissible, it is perhaps best to begin with an analysis of the type of evidence presently admitted concerning the sexual history of the rape complainant.

THE ADMISSIBILITY OF EVIDENCE CONCERNING THE COMPLAINANT'S PRIOR SEXUAL ACTIVITY

The admissibility in a rape trial of evidence of the complainant's character for chastity or unchastity has long been conceded.¹¹ Many authorities have concluded that such character evidence is competent as bearing on the probability of her consent to the alleged act with the defendant.¹² As stated by Pro-

10. See notes 96-99 *infra* and accompanying text.

11. See *McQuirk v. State*, 84 Ala. 435, 4 So. 775 (1887); *Pleasant v. State*, 15 Ark. 624 (1855).

12. See *McQuirk v. State*, 84 Ala. 435, 4 So. 775 (1887).

fessor Wigmore, "The non-consent of the complainant is here a material element, and the character of the woman as to chastity is of considerable probative value in judging the likelihood of that consent."¹³ An example of how the jury is instructed to consider such evidence is illustrated in *People v. Crego*:¹⁴

I should say this, however: that if the girl had followed a dissolute life, and been guilty of having sexual intercourse with boys as often as the opportunity offered, here and there, you would have a right to take that into consideration in coming to your conclusion as to whether the connection in this case was had against her will or not.¹⁵

Although evidence of the prosecutrix's unchastity has been admitted with little opposition, the permitted form of such evidence has been more vehemently contested. There is strong dispute whether the evidence should be presented in the form of one's opinion of the complainant's unchaste character, her reputation in the community for unchastity, or her specific acts of sexual misconduct.¹⁶ Upon scrutiny of the case law concerning such character evidence, it becomes clear that the complainant's previous want of chastity is most often demonstrated by proof of her reputation for unchastity.¹⁷

Evidence Concerning Her Reputation for Unchastity

The Supreme Court,¹⁸ many lower federal tribunals,¹⁹ and numerous state courts²⁰ have approved the admission of evidence

13. 'J. WIGMORE, WIGMORE ON EVIDENCE 279, § 62 (2d ed. 1923) [hereinafter cited as WIGMORE].

14. 70 Mich. 319, 38 N.W. 281 (1888). This instruction was given to the jury despite the defendant's testimony that he had to strike the victim to make her lie still.

15. *Id.* at 320, 38 N.W. at 282.

16. MCCORMICK, *supra* note 6, § 186, at 443.

17. See notes 11-17 *supra* and accompanying text.

18. *Giles v. Maryland*, 386 U.S. 66 (1967). Here, after the conviction of the defendant, the district court ordered a new trial. The court of appeals reversed that order; and the Supreme Court vacated the judgment of the court of appeals, holding that the defendant had been denied due process when the prosecution suppressed certain evidence favorable to the defendant, concerning the complainant's sexual habits. Such reputation evidence was considered necessary for the defendant despite the fact that the rape was rather apparent. As mentioned in the dissent:

"Consent" is of course the conventional defense in rape cases. In light of the possible entry into the car occupied by the victim, the

concerning the rape complainant's reputation for unchastity. There are two basic rationales for allowing the introduction of such evidence. First, the evidence is admitted substantively to demonstrate the probability of the complainant's consent to the act in question. This admission is founded on the underlying premise that it is more probable that an unchaste woman would assent to sexual intercourse than would a virtuous woman.²¹ In one example, evidence of the complainant's reputation for lewdness was admitted for the purpose of illustrating the probability of her consent despite the undisputed fact that the prosecutrix was forcibly pushed into the car of the four alleged rapists and that her physical examination disclosed very strong manifestations of a forcible rape.²² The court noted that "in practically all jurisdictions it is permissible to show her general character for lewdness [as proved by her reputation], as evidence seeking to disprove . . . that the act was forcible and against her consent."²³ However, as a general rule in prosecutions for forcible rape, evi-

assault upon her companion, and her flight into the woods, it would have been extraordinary for the jury to have believed that this girl freely invited these youths to have sexual relations with her.

Id. at 103 n.1. Yet, since the defendants claimed that the complainant had disrobed herself and had invited all three to have sexual relations with her, the court held that there was ample evidence to indicate consent as to justify the admission of her sexual history into evidence.

19. *E.g.*, *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968); *Packineau v. United States*, 202 F.2d 681 (8th Cir. 1953); *Lovely v. United States*, 175 F.2d 312 (4th Cir. 1949); *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944).

20. *E.g.*, *Brown v. State*, 291 Ala. 789, 280 So. 2d 177 (1973); *Williams v. State*, 51 Ala. App. 1, 282 So. 2d 349 (1973); *Nickels v. State*, 90 Fla. 659, 106 So. 479 (1925); *Black v. State*, 119 Ga. 746, 47 S.E. 370 (1904); *People v. Collins*, 25 Ill. 2d 605, 186 N.E.2d 30 (1962); *Shirwin v. People*, 69 Ill. 56 (1873); *People v. Eilers*, 18 Ill. App. 3d 198, 309 N.E.2d 627 (1974); *State v. Jack*, 285 So. 2d 204 (La. 1973); *Humphreys v. State*, 227 Md. 115, 175 A.2d 777 (1961); *Commonwealth v. McKay*, 294 N.E.2d 213 (Mass. 1973); *State v. Wulff*, 194 Minn. 271, 260 N.W. 515 (1935); *Wilson v. State*, 264 So. 2d 828 (Miss. 1972); *State v. Kain*, 330 S.W.2d 842 (Mo. 1960); *People v. Tashman*, 233 N.Y.S.2d 744 (1962); *Woods v. People*, 55 N.Y. 515 (1874); *People v. Abbot*, 19 Wend. 192 (1838); *State v. Cole*, 20 N.C. App. 137, 201 S.E.2d 100 (1973); *State v. Apley*, 25 N.D. 298, 141 N.W. 740 (1913); *McDermott v. State*, 13 Ohio St. 331 (1862); *State v. McManus*, 267 Ore. 238, 517 P.2d 250 (1973); *Esquivel v. State*, 506 S.W.2d 613 (Tex. Crim. App. 1974); *State v. Reed*, 39 Vt. 417 (1867).

21. *People v. Collins*, 25 Ill. 2d 605, 186 N.E.2d 30, 33 (1962). *See also* Comment, *Rape and Rape Laws: Sexism in Society*, 61 CALIF. L. REV. 919, 935 (1973).

22. *Teague v. State*, 208 Ga. 459, 67 S.E.2d 467 (1951).

23. *Id.* at 463, 67 S.E.2d at 471.

dence of the prior unchastity of the prosecutrix is inadmissible as a substantive defense.²⁴ Such evidence is considered competent only after the defendant asserts that the complainant consented to the alleged act.²⁵

In addition to the issue of consent, evidence of the complainant's reputation for unchastity is admitted in many courts to demonstrate her lack of credibility as a witness.²⁶ This admission is based upon the theory that a person of questionable moral character is less likely to speak the truth than one of good moral character.²⁷ Many courts have predicated their holdings on the logic of *State v. Coella*:²⁸

She [the prosecution witness] could not have ruthlessly destroyed that quality [chastity] upon which most other good qualities are dependent, and for which, above all others, a woman is revered and respected, and yet retain her credit for truthfulness unsmirched. . . .²⁹

24. *State v. Ballamah*, 28 N.M. 212, 210 P. 391 (1922), Annot., 26 A.L.R. 769 (1923); *Esquivel v. State*, 506 S.W.2d 613 (Tex. Crim. App. 1974); *Haynes v. State*, 498 S.W.2d 950 (Tex. Crim. App. 1973).

25. C. Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303, 304 (1974). To the accusation of rape, the defendant responds with one of three basic defenses: (1) that the alleged offense never took place; (2) that sexual intercourse between the defendant and the complainant did take place, but it was consensual; or (3) that the rape occurred, but the defendant is not the rapist. It is the second of these which this note is primarily concerned.

26. *E.g.*, *Brown v. State*, 291 Ala. 789, 280 So. 2d 177 (1973); *Williams v. State*, 51 Ala. App. 1, 282 So. 2d 349 (1973); *Camp v. State*, 3 Ga. 417 (1847); *Jones v. Commonwealth*, 154 Ky. 648, 157 S.W. 1079 (1913); *Humphreys v. State*, 227 Md. 115, 175 A.2d 777 (1961); *State v. Kain*, 330 S.W.2d 842 (Mo. 1960); *State v. Sibley*, 132 Mo. 102, 33 S.W. 167 (1895); *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948); *State v. Cole*, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

27. *See Brown v. State*, 291 Ala. 789, 280 So. 2d 177 (1973). In *Camp v. State*, 3 Ga. 417, 422 (1847), the Georgia Supreme Court observed:

[N]o evil habitude of humanity so deprives the nature, so deadens the moral sense, and obliterates the distinctions between right and wrong as common licentious indulgence. Particularly is this true of women, the citadel whose character is virtue; when that is lost, all is gone: her love of justice, sense of character, and regard for truth.

Jones v. Commonwealth, 154 Ky. 648, 157 S.W. 1079 (1913); *Redmond v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948). *See also* 3 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 203, § 214 (14th ed. 1883).

28. 3 Wash. St. 99, 28 P. 28 (1891). In *Coella*, it was held that to exclude cross-examination of the prosecuting witness as to whether she was a prostitute constituted reversible error in a murder trial.

29. *Id.* at 106, 28 P. at 29.

From this analysis of the case law, it is obvious that the complainant's prior sexual reputation is admitted in many rape cases, as bearing on the issues of consent and credibility. However, there is yet another form of such evidence that is often deemed admissible—evidence of the complainant's specific acts of sexual misconduct.

Evidence Concerning Her Specific Acts of Unchastity

It is generally accepted that the unchaste character of the complainant is admissible to show the probability of her consent to the intercourse at issue.³⁰ The question arises whether particular acts of the woman's unchastity can be admitted, as showing her to be a person more prone than another to have consented. Professor Wigmore once wrote that "no question of evidence has been more controverted."³¹ It is Wigmore's opinion that such proof should be permitted.³²

The better view seems to be that which admits the evidence. Between the evil of putting an innocent or perhaps 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.³³

Evidence concerning the complainant's specific acts of unchastity and immorality is excluded in the greater number of jurisdictions.³⁴ Nevertheless, there are many cases where such evidence has been allowed—based primarily on the Wigmore rationale.³⁵ The classic opinion in favor of its admissibility is expressed in *People v. Abbott*:³⁶

30. See notes 7 and 21 *supra* and accompanying text.

31. WIGMORE, *supra* note 13, § 200 at 435.

32. *Id.* at 436.

33. *Id.*

34. *Id.* at 437. See also 3 UNDERHILL, UNDERHILL'S CRIMINAL EVIDENCE 1766, § 766 (5th ed. 1957).

35. See WIGMORE, *supra* note 13, § 200 at 437-38. An example of such a case is *State v. Wulff*, 194 Minn. 271, 260 N.W. 515 (1935), where the court adopted the general rule that evidence of particular acts of immorality unconnected with the crime charged as well as evidence of one's general reputation for sexual misconduct is admissible to prove want of chastity on the part of the prosecutrix.

The prosecutrix is usually, as here, the sole witness to the principal facts, and the accused is put to rely for his defense on circumstantial evidence. Any fact tending to the inference that there was not the utmost resistance is always received [T]he connection must be absolutely against the will; and are we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? 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 readily infer assent in the practiced Messalina in loose attire, than in the reserved and virtuous Lucretia? . . . It has been repeatedly adjudged that in the same view you may also show a previous voluntary connection between the prosecutrix and the prisoner. Why is this? Because there 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 instinctfully shuddering at the thought of impurity? Shall I be answered that both are equally under the protection of the law? That I admit, and so are the common prostitute and the concubine. If either have in truth been feloniously ravished, the punishment is the same, but the proof is quite different. It requires that the stronger evidence be added to the oath of the prosecutrix in one case than in the other.³⁷

The federal courts have also allowed evidence concerning the

The crime of rape is so abhorrent that, to some minds to charge a person with it raises a presumption of guilt. . . . It is human nature to incline to the story of the female. . . . Hence all the authorities agree that this is a crime requiring special scrutiny by the jury, and a careful weighing of all the evidence and all remote and near circumstances and probabilities.

260 N.W. at 576.

36. 19 Wend. 192 (1838).

37. 74 at 194-96.

prosecutrix's specific acts of immorality.³⁸ In one of these cases,³⁹ it was proven that the complainant's clothes had been badly torn and that she had suffered physical injury as a result of the sexual attack. Nevertheless, the court of appeals reversed the defendant's conviction, holding that the exclusion of evidence concerning the prosecutrix's previous acts of unchastity with a man other than the defendant was tantamount to prejudicial error.⁴⁰ It was hypothesized that the complainant's story of having been raped would be more readily believed by a person who was ignorant of any former unchaste conduct on her part than it would be by a person cognizant of her unchaste activity. The court concluded:

To exclude the tendered proof of her concupiscence of her having sexual lust and unlawfully indulging in it, is simply to remove actual and real fairness from the trial and to reach judgment from mere appearances.⁴¹

Until now, the discussion about the specific acts of sexual misconduct has concerned those activities of the prosecutrix with persons other than the defendant. It should also be noted that when the particular act of prior unchastity is with the defendant, courts are much more likely to admit such evidence. It is generally accepted that the defendant may demonstrate that the prosecutrix had previously indulged in sexual intercourse with him for the purpose of raising an implication of her consent to the intercourse in dispute.⁴² Such evidence bears directly on the question whether, having yielded once to sexual intercourse with the defendant, she would not be likely to yield again to the same person.⁴³

38. *E.g.*, *Packineau v. United States*, 202 F.2d 681 (8th Cir. 1953). *Accord*, *Lovely v. United States*, 175 F.2d 312 (4th Cir. 1949); *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944).

39. *Packineau v. United States*, 202 F.2d 681 (8th Cir. 1953).

40. The excluded evidence concerned the time some months prior to the night in question: while picking potatoes in North Dakota, the prosecutrix had cohabited for five days and nights with a young man, holding herself out to be married to him. Although reversed by the appellate court, the trial court had sustained the prosecution's objection that such evidence was incompetent, irrelevant and immaterial.

41. *Packineau v. United States*, 202 F.2d 681, 686 (8th Cir. 1953).

42. *State v. Wood*, 59 Ariz. 48, 122 P.2d 416 (1942), *Annot.*, 140 A.L.R. 361 (1942); *Lewis v. State*, 217 Miss. 488, 64 So. 2d 634 (1953); *Brown v. State*, 72 Miss. 997, 17 So. 2d 278 (1895).

43. *State v. Wood*, 59 Ariz. 48, 122 P.2d 416 (1942); *Moffett v. State*, 223 Miss. 276, 78 So. 2d 142 (1955); *Lewis v. State*, 217 Miss. 488, 64 So. 2d 634 (1953); *Brown v. State*, 72 Miss. 997, 17 So. 2d 278 (1895).

Some courts have also admitted evidence which was offered to prove only that the prosecutrix had sexual passion for the defendant.⁴⁴ Wigmore was convinced that a sexual desire of A for B is relevant to indicate the probability of A's doing that which will realize this desire.⁴⁵ Professor Wigmore concluded that the conduct receivable to prove this desire is whatever would naturally be interpreted as the expression of sexual passion: the typical sort of such conduct would be sexual intercourse, but indecent or otherwise improper familiarities would be equally significant.⁴⁶ Thus, it is maintained that proof of former acts of intimacy (short of intercourse) between the defendant and the complainant furnishes a predicate for the inference of consent to the intercourse in question. This underlying rationale was further elaborated in *Bass v. State*,⁴⁷ where the court observed:

Proof of such lascivious conduct between the parties . . . in accordance with observations of human conduct, shows a tendency or disposition in each party towards the commission of the sexual act with the other; it shows that modesty and self-respect—strong safeguards to virtue—had been previously broken down, and that the parties were already of such terms of lascivious intimacy as to render it probable that, given the opportunity, they would indulge in sexual intercourse with each other.⁴⁸

This analysis has been confined to the admissibility of evidence concerning the prior sexual activity of the rape complainant (as proved by her reputation for unchastity and her specific acts of sexual misconduct) and the grounds upon which such admissibility is predicated. At this point it becomes necessary to consider whether or not the practice of admitting this evidence should be permitted to continue in light of present statistics, opinions and case law concerning rape, its victims and its trials.

44. *Lewis v. State*, 217 Miss. 488, 64 So. 2d 634 (1953); *State v. Northern*, 472 S.W.2d 409 (Mo. 1971); *State v. Pruitt*, 202 Mo. 49, 100 S.W. 431 (1907); *French v. State*, 47 Tex. Cr. R. 571, 85 S.W. 4 (1905); *State v. Neel*, 23 Utah 541, 65 P. 494 (1901); *State v. Hilberg*, 22 Utah 27, 61 P. 215 (1900).

45. WIGMORE, *supra* note 13, § 399(a), at 738.

46. *Id.*, § 399(c), at 739.

47. 103 Ga. 227, 29 S.E. 966 (1897).

48. *Id.* at 229, 29 S.E. at 967.

THE RELEVANCY OF EVIDENCE CONCERNING
THE COMPLAINANT'S PRIOR SEXUAL ACTIVITY

Evidence, to be admissible in criminal trials, must be strictly relevant to the particular offense charged.⁴⁹ The determination of relevancy is neither automatic nor mechanical. Courts cannot employ a precise and technical test for relevancy; instead they must apply logical standards applicable in everyday life.⁵⁰ Relevancy has been variously defined, but, reduced to its essentials, it describes the relationship between a proffered item of evidence and a proposition which is provable or material in a given case.⁵¹ To be relevant in a criminal proceeding, the evidence must logically, naturally and by reasonable inference establish that material fact for which it is being offered.⁵² Evidence should be excluded as irrelevant for either of two distinct reasons: because it is not probative of the proposition at which it is directed or because that proposition is not provable in the case.⁵³ With this brief explanation of relevancy serving as a guideline, it is now appropriate to examine whether or not evidence concerning the prior sexual activities of the complainant is relevant in the rape trial.

*Sexual Activity with Third Persons Is Irrelevant
To the Issue of Consent*

Courts have consistently treated evidence relative to a complainant's sexual contacts with others as relevant in a rape trial.

49. *Williams v. New York*, 337 U.S. 241, 247 (1949).

50. *United States v. Allison*, 474 F.2d 286 (5th Cir. 1973). Relevancy may be measured by experience or by common sense. See *United States v. Craft*, 407 F.2d 1065, 1069 (6th Cir. 1969); WIGMORE, *supra* note 13, § 27, at 231-32. *Accord*, *Marut v. Costello*, 39 Ill. 2d 125, 214 N.E.2d 768 (1965).

51. *United States v. Allison*, 474 F.2d 286, 289 (5th Cir. 1973).

52. *People v. Warner*, 270 Cal. App. 2d 900, 76 Cal. Rptr. 160 (1969). "In legal usage, relevancy means the logical relationship between proposed evidence and a fact to be established, the tendency to establish a material proposition." *State v. Wilson*, 173 N.W.2d 563, 565 (Iowa 1970). A Texas court has stated:

Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis—a pertinent hypothesis being one which, if sustained, would logically influence the issue. Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less probable.

Richardson v. State, 127 Tex. Crim. 479, 480, 77 S.W.2d 215, 217 (1935).

"Relevancy . . . is the tendency of the evidence to establish a material proposition." MCCORMICK, *supra* note 6, § 185, at 435.

53. See G. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 691 (1941).

The theory traditionally employed is that if she consented once to illicit sexual intercourse, it is more probable that she consented again on the occasion in issue.⁵⁴ This initial assumption, however, is ultimately invalid. Evidence concerning the complainant's past sexual conduct with third persons is really irrelevant to the issue of whether or not she consented to the act of intercourse in question.⁵⁵

There is no convincing argument nor authoritative evidence which suggests that a woman who engaged in unchaste sexual activity with one man is incapable of refusing this same activity with another. Additionally, there is nothing to indicate that consent on one occasion produces a propensity to consent whenever the opportunity arises. The female complainant has the ability and the right to make an individual decision with respect to each person on each occasion.⁵⁶ Consent with one man does not imply consent with another. Consequently, the victim's lack of chastity has little, if any, probative value on the issue of consent.⁵⁷

There has been some support for the proposition that proof of the complainant's sexual unchastity is irrelevant whether it reveals a single act of sexual misconduct or frequent participation in such behavior with myriad partners.⁵⁸ Even evidence to the effect that the prosecutrix was a nymphomaniac or a prostitute

54. See notes 7 and 21 *supra* and accompanying text.

55. Letter from Camille LeGrand, Associate in Law, University of California's School of Law (Berkeley), to California Legislators, Mar. 14, 1974, at 1-2. See also M. Coakley, *The Joan Little Trial Is Over But the Issues Remain*, Chicago Tribune, § 2, at 1, col. 1, where Mrs. Kathryn Ellison (a psychologist and rape expert) said, "Actually, giving away sex has no more in common with rape than giving away money has in common with armed robbery."

56. Letter from Camille LeGrand, *supra* note 55, at 4.

57. See *Lynn v. State*, 231 Ga. 559, 203 S.E.2d 221 (1974); *Commonwealth v. McKay*, 294 N.E.2d 213 (Mass. 1973). See also UNDERHILL, UNDERHILL'S CRIMINAL EVIDENCE, *supra* note 34, § 621. The Kentucky court stated that:

Many courts have expressed the opinion that no inference can be logically drawn that the prosecutrix voluntarily yielded to the defendant upon the particular occasion from the fact that she had previously submitted to the embraces of other men, hence that it is incompetent to prove any of them.

Grigsby v. Commonwealth, 299 Ky. 721, 725, 187 S.W.2d 259, 263 (1945).

58. See generally *Giles v. Maryland*, 386 U.S. 66 (1967); *Haynes v. State*, 498 S.W.2d 950 (Tex. Crim. App. 1973).

has been held irrelevant, since it has no tendency to prove her consent to the act in issue.⁵⁹

Better-reasoned case authority indicates the falsity of the assumption underlying the admissibility of such evidence. Despite the convincing argument disclosed in these cases, the irrelevancy of such evidence becomes still more apparent in the light of present statistics concerning the probable sexual history of the rape victim.

The probable sexual history of the rape victim is difficult to ascertain. Statistical information on this subject is greatly lacking in the available research relative to rape and its victims. In order to reveal the average sexual history of this victim, an analogy must be drawn from the sexual backgrounds of all American women within those categories most likely to be raped.⁶⁰

59. Despite the fact that the victim is afflicted with nymphomania, "there is nothing to show that this made her incompetent as a witness or that she consented to the acts for which the appellees were convicted." *Giles v. Maryland*, 386 U.S. 66, 84 (1967) (White, J., concurring). A Texas criminal court stated that:

Even if it had been shown that the prosecutrix was a prostitute, this would not have proved consent, or made her any the less a subject of rape by force. A prostitute does not lose the right of choice, and may consent or not consent according to her own will.

Haynes v. State, 498 S.W.2d 950, 952 (Tex. Crim. App. 1973).

60. The majority of rape victims were both young and single. Over 80% of these victims were thirty-five years of age and younger, with over 50% between the ages of fifteen and twenty-four. The median age was twenty-one. Furthermore, 75% of the victims were unmarried. J. MACDONALD, *RAPE: OFFENDERS AND THEIR VICTIMS* 76-77 (1971) [hereinafter cited as MACDONALD].

That category of women most frequently victimized was the 15-19 year olds. The percentage of all rapes perpetrated on victims of each age grouping is as follows: 0-10 (7.9%), 10-14 (19.9%), 15-19 (24.9%), 20-24 (13.5%), 25-29 (10.5%), 30-34 (7.7%), 35-39 (6.8%), 40-44 (3.3%), 45-49 (2.8%), 50-54 (1.4%), 55-59 (0.2%), 60 and over (2.0%). M. AMIR, *PATTERNS IN FORCIBLE RAPE* (1971) [hereinafter cited as AMIR].

Other research projects detected similar findings. See F. Ludwig, *The Case For Repeal of the Sex Corroboration Requirement in New York*, 36 *BROOKLYN L. REV.* 378 (1969), (the largest number of forcible rape victims fall within the seventeen-year-old group); Svalastoga, *Rape and Social Structures*, 5 *PACIFIC SOCIOLOGICAL REV.* 48-53 (1969) (77% of the victims were within the ages of ten to twenty-four, while 50% were between fifteen and nineteen). *CAL. SEXUAL DEVIATION RESEARCH*, ch. 5 (1954) (46% of the victims were within the ages of fourteen to seventeen).

Cf. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *CRIME IN A FREE SOCIETY* 14 (2d ed. 1973), Table 4. This study shows the average rape victim to be slightly older than the other studies:

However, that research which has been undertaken suggests that the relationship between the sexual history of the victim and the sexual history of the average woman is not as tenuous as it may seem.⁶¹ In the vast majority of cases, rapists were unaware of the sexual histories of their victims. The victim was not attacked because she was promiscuous or because she had a reputation for unchastity, but only because she was a woman. The vast majority of these victims had no prior sexual reputation.⁶² Consequently, the majority of all rape complainants are merely average individuals, having average sexual histories.

Upon examination of the sexual histories of both the promiscuous and the non-promiscuous women, it becomes clear that proof of such activities is irrelevant in the rape trial. In discussing the minority of all rapes—those perpetrated upon females of ill repute—one author has written:

Some men seek out such women with the expectation of easy sexual gratification. These men overlook the fact that promiscuous women may yet exercise some choice in their selection of sexual partners. Furthermore, the reputation for promiscuity may be based upon false claims of sexual conquest made by boastful yet frustrated acquaintances of the victim. . . . When the man's advances are eventually resisted, he may resort to the use of force.⁶³

Thus, even in cases where the defendant raped the victim whom he thought to be promiscuous, evidence of her reputation does not indicate her consent to the intercourse in question. Therefore, the evidence is irrelevant.

victim ages/rape rates per 100,000 in the population: 10-19 (91), 20-29 (238), 30-39 (104), 40-49 (48).

61. See AMIR, *supra* note 60, Table 44, at 118. This information was gathered through police interrogation of each offender, offender's witnesses, and others about the victim's bad reputation or promiscuity (without defining either term). Every victim was asked if she had had sexual relations with the offender before the rape; and each victim under the age of eighteen was asked if she had had any sexual experiences before the rape. The answers indicated that 80.2% of the victims had no bad reputation. Of the 19.8% of the victims with a prior reputation, 47.6% were known as promiscuous or having a bad reputation, 19.5% had had sexual relations with the offender prior to the rape, 24.2% of the victims under eighteen years of age had had sexual relations before, and 8.7% had been raped before but did not prosecute.

62. *Id.*

63. MacDONALD, *supra* note 60, at 81.

As previously established, the vast majority of the rape victims are merely average females with typical sexual histories. Upon examination of these sexual histories it becomes clear that evidence of such backgrounds is also irrelevant to the issues of a rape trial.

In recent research relating to the sexual habits of the female, it has been determined that nearly half of all women have had premarital intercourse before the age of twenty.⁶⁴ With further analysis of these statistics, it becomes apparent that from 14 to 25 percent of all females have had sexual intercourse before they are sixteen years of age. The percentage of those engaging in such unchaste activity increases with age.⁶⁵ Thus, a significant proportion of the females within the ages of most frequent rape victimization⁶⁶ have non-marital sexual histories.

However, some of the rape victims are married.⁶⁷ The defense may desire to introduce into evidence the married victim's extra-marital sexual history in order to prove her propensity to consent to illicit sexual intercourse. Almost one-fourth of all married women have had extra-marital sexual relations.⁶⁸ Of those

64. See R. SORENSEN, *ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA* (1973) [hereinafter cited as SORENSEN]. This study determined that 45% of all females are non-virgins before the age of twenty. The age at first intercourse of these non-virgin adolescents is as follows: twelve or under (7%), thirteen (12%), fourteen (11%), fifteen (26%), sixteen (21%), seventeen (6%), and ages eighteen and nineteen (17%).

See also E. HANKS, A. TARLOCK, & J. HANKS, *ENVIRONMENTAL LAW AND POLICY* 156 (1974), taken from a study by Zelnik and Kantner, *Sex and Contraception Among Unmarried Teenagers*, in *TOWARD THE END OF GROWTH* 7-18 (C. Westoff ed. 1973). In this study, it was determined that 13.8% of the females were non-virgins at the age of fifteen, 21.2% at the age of sixteen, 26.6% at the age of seventeen, 37.1% at the age of eighteen, and 46.1% were non-virgins at the age of nineteen. Cf. KINSEY, POMEROY, MARLIN & GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953) [hereinafter cited as KINSEY]. Kinsey found much lower percentages of adolescent female involvement in sexual intercourse than did the earlier-mentioned studies: 3% of all women had had coital experience by the age of fifteen, and only 20% had engaged in such an activity between sixteen and twenty years of age. This difference may be explained by the fact that Kinsey's research was conducted at a much earlier date.

65. See note 64 *supra*.

66. See note 60 *supra*.

67. AMIR, *supra* note 60, Table 15, at 64. The marital status of the victims is as follows: unmarried (69.2%), married (24.5%), separated (2.6%), divorced (0.5%), widowed (1.5%), no information (1.7%). See MACDONALD, *supra* note 61.

68. See KINSEY, *supra* note 64, at 416, where it was reported that 26% of all married females committed adultery. In OLIVER, *supra* note 6, at 186. G.

married women within the average ages of rape victims, 7 to 10 percent were having relations with men other than their husbands.⁶⁹ Consequently, many married victims are also likely to have illicit sexual histories.

Upon delineation and scrutiny of some aspects of these sexual statistics, it becomes evident that proof of one's prior acts of unchastity does not prove a propensity to consent to every suggested sexual intercourse; and, therefore, it does not prove or tend to prove that she consented to the act in question. Despite her personal involvement in such sexual activities, the average female does not consent indiscriminately. Most women who have had illicit sexual intercourse have submitted to the sexual embraces of a very limited number of partners.⁷⁰ Of all potential unmarried victims with a history of sexual intercourse, over one-third (35%) have engaged in this form of premarital sex with only one partner. An additional 22 percent have had two or three partners. Less than one-fourth of all single, non-virgin women have had more than six partners.⁷¹ There is equally no inference of indiscriminate sex in the illicit histories of the married women: 41 percent restrict extra-marital affairs to a single partner and 40 percent have only two to five partners.⁷²

In further illustrating that such prior sexual activity is far from indiscriminate, it is noted that there is often an emotional tie between the female and her sex partner. Of those unchaste females within the ages of thirteen to nineteen, 57 percent were going steady with or planning to marry their partners. Another 25 percent "liked their partner a lot."⁷³ Other studies indicate that much, if not most, of premarital intercourse occurs only with those whom the female loves and eventually marries.⁷⁴

Hamilton reported similar findings—24% of all married women consent to extra-marital intercourse.

69. KINSEY, *supra* note 64, at 416.

70. SORENSEN, *supra* note 64, at 219. See also KINSEY, *supra* note 64, where the average number of male coital partners was found to be even more limited: a single partner (53%), two to five partners (34%), and six or more partners (13%); Schoffield, *The Sexual Behavior of Young People*, in *SEXUAL DEVELOPMENTS AND BEHAVIOR* 163 (Juhasz ed. 1973), which determined that of all the American women who consented to premarital intercourse, nearly half of them reported only one partner and only one-third indicated several or many partners.

71. SORENSEN, *supra* note 64, at 219.

72. KINSEY, *supra* note 64, at 444.

73. SORENSEN, *supra* note 64, at 198.

74. See *THE INDIVIDUAL, SEX, AND SOCIETY* 35 (Broderick & Bernard ed. 1969), where it was disclosed that the majority of all American women

From these statistics relating to the sexual habits of those women most likely to be raped, it seems evident that proof of the female's illicit sexual intercourse with one other than the defendant should be inadmissible in a rape trial for it fails to evidence a character predisposed to consenting to intercourse whenever the occasion arises. Although the female very possibly consented to sexual intercourse with another or others before, she probably has consented only to a limited number of partners and, even then, only to those with whom she had strong emotional attachments. The fact that a woman may have engaged in illicit intercourse with one man is much too slight and uncertain an indication to warrant a conclusion that she would consent to any man who sought her favors.⁷⁵ It takes only common sense to realize that a female has the right in every circumstance to choose whether or not she will consent to sexual intercourse. Therefore, whether measured by experience or by common sense, evidence of the complainant's former unchastity does not logically, naturally or by reasonable inference establish the fact of her consent to the intercourse in question—the material fact for which the evidence is being offered. Since the evidence is not probative of the proposition at which it is directed, it should be excluded as irrelevant.

Sexual Acts (Short of Intercourse) with the Defendant Are Irrelevant to the Issue of Consent

In some courts, the defendant is permitted to prove acts of intimacy short of coitus between himself and the prosecutrix as bearing on the issue of consent.⁷⁶ However, recent statistical compilations indicate that proof of any sexual activity short of intercourse does not logically imply that intercourse will later occur. Evidence that the prosecutrix voluntarily submitted to the passionate embraces, kisses, and sexual caresses of the defendant does not make more probable the fact that she consented to sexual intercourse with him. Females consent to kissing and petting much more frequently and with a predominantly greater number of men than that which they experience in their coital relation-

have premarital intercourse only with their future husbands; KINSEY, *supra* note 64, at 292, reported that 46% of the non-virgin females engaged in premarital sex only with their then fiancé.

75. See *Rice v. State*, 35 Fla. 236, 17 So. 286 (1895); Comment, *Rape and Rape Laws: Sexism in Society*, *supra* note 21, at 939, "The relationship between a woman's chastity and whether or not she has been raped is simply too attenuated to warrant consideration as relevant evidence."

76. See notes 44-48 *supra* and accompanying text.

ships. Almost every woman, at an early age, passionately kisses a man other than her husband.⁷⁷ Also, 98 percent of all adolescent girls have consented to premarital sexual petting, while only 45 percent have engaged in illicit sexual intercourse.⁷⁸

Proof of the number of male partners with whom petting has been allowed by the female further suggests that the female's consent to sexual petting is much more indiscriminate than her assent to sexual intercourse. Kinsey's research revealed that only 10 percent of the females participating in petting confined themselves to a single partner before marriage, while about 58 percent had engaged in such sexual activity with at least six males.⁷⁹ As Kinsey reported, "Nothing approaching this promiscuity in petting ever enters the female's history of premarital coitus."⁸⁰

In comparing the statistics of the female's involvement in petting with the statistical data about her participation in sexual intercourse,⁸¹ it becomes apparent that her willingness to engage in acts of sexual passion other than intercourse is much less limited and far more indiscriminate. Consequently, evidence which the defendant might offer concerning the complainant's sexual passion for him—through proof that she voluntarily submitted to his kisses and caresses—is not probative of the material fact of her consent to the intercourse in question. Since the correlation between petting and coitus is questionable, and since the complainant could still refuse intercourse despite her consensual petting, proof of her sexual passion for the defendant does not logically, naturally or by reasonable inference establish the fact of her consent to sexual intercourse with him. It is irrelevant and should be excluded from the trial.

77. J. McCARY, HUMAN SEXUALITY 216 (1967) [hereinafter cited at McCARY].

78. SORENSEN, *supra* note 64, at 171. The 98% petting figure is based on the number of females who have allowed breast contact with males. About 50% of the females have permitted such contact before the age of sixteen, compared to only 25% (*see* note 64 *supra*) who had allowed intercourse by that age.

79. Of these females engaging in sexual activity with at least six partners 23% had six to ten partners, 16% had eleven to twenty partners, and 19% had twenty-one or more partners. KINSEY, *supra* note 64, at 239. It should be mentioned, however, that the more recent studies of sexual behavior, although not revealing the number of petting partners, have revealed more sexual permissiveness than in the days of Kinsey's sampling. It is then likely that the female has even more petting partners today than when Kinsey's study was made.

80. *Id.*

81. *See* note 64 *supra*.

*Prior Sexual Intercourse with the Defendant Is Relevant
To the Issue of Consent*

As earlier discussed, evidence of the complainant's previous sexual intercourse with the defendant is admitted for the purpose of raising an implication of her consent to the intercourse in question.⁸² It is said that having yielded once to sexual intercourse with the defendant, she would be more likely to yield again to the same person. However, unlike the rationale underpinning the admission of evidence concerning the complainant's intercourse with one other than the defendant, the reasoning behind admitting evidence of her previous intercourse with the defendant appears to be well founded in the statistical analysis of the average female's sexual activities.

Statistics intimate that if a female consented once to a man, she might very likely consent to that same man on subsequent occasions. Almost one-fifth (18%) of the non-virgin females under the age of twenty had consented to their first intercourse partners on ninety-nine or more subsequent occasions, and about 46 percent had repeated intercourse with that partner at least seven times.⁸³ Although no figures were available specifically indicating the number of times coitus occurred with each succeeding partner, statistics do indicate a propensity of the female to participate in sexual conduct rather frequently with a few well-selected partners.⁸⁴ It seems fair to conclude that since the average unchaste female engages in many acts of sexual intercourse with a limited number of partners, she probably consents to each partner on more than one occasion.

82. See notes 42-43 *supra* and accompanying text.

83. SORENSEN, *supra* note 64, Table 436, at 211.

84. See generally KINSEY, *supra* note 64, Tables 76 & 78, at 289-91. Here it was revealed that over 74% of these females consenting to prior non-marital intercourse had confined such activity to three years or less. Other figures indicate that the female was having coitus at an average frequency of about once in five or ten weeks if she was under twenty years of age, and about once every three weeks if she was over twenty. Considering, then, that the female will have consented to the sexual act from thirty to fifty times in her three year history of sexual intercourse to five or less partners (see notes 70-72 *supra* and accompanying text), on an average, she will consent to each at least six times. Figures propounded in SORENSEN, *supra* note 64, at 225, indicate that 58% of those non-virgin females who had had sex in the previous month, had it four or more times in that month. From the limited number of coital partners that the female has and the number of times she engages in coitus, the inference seems to be that she has had sex with each partner more

If the defense can prove that the complainant willingly participated in an act of prior sexual intercourse with the defendant, it has established that the defendant is one of a very select number of men with whom the complainant consented to such sexual activity.⁸⁵ Furthermore, the evidence fairly implies that the complainant would probably have engaged in sexual relations with the defendant on more than one occasion (particularly if the defendant was her first coital partner⁸⁶). Evidence of prior sexual intercourse between the defendant and the complainant, then, would be probative of the proposition at which it is directed—to prove her consent to the act in question. Her prior intercourse with the defendant, though quite rare,⁸⁷ is usually the only evidence of the complainant's sexual history that is relevant as bearing on the issue of consent.

Unchastity Is Irrelevant to the Issue of Credibility

The general rule in a criminal case is that the credibility of any witness may not be impeached by showing that the witness has a general reputation for immorality; such an attack must be addressed directly to the reputation of the witness for truth and veracity.⁸⁸ However, in the prosecutions of men for sexual crimes against women, courts have found an exception to this rule and admit proof of the complainant's unchastity for impeachment purposes.⁸⁹ It is thought by some that the exception is necessary to protect the male defendant against "the sinister possibilities of injustice that lurk in believing such a witness. . . ."⁹⁰ Yet, in reality, there is no assurance that permitting that witness' credibility to be attacked by proof of her ill repute for chastity would

85. See notes 70-74 *supra* and accompanying text.

86. See note 83 *supra* and accompanying text.

87. Evidence indicating prior consensual sexual intercourse between the defendant and the complainant will be very rare in rape trials. It has been revealed that less than four percent of all rape complainants had consented to previous coital relations with the men they have accused of rape. AMIR, *supra* note 60, Table 44, at 118.

88. *State v. Kain*, 330 S.W.2d 842 (Mo. 1960); *State v. Williams*, 337 Mo. 884, 87 S.W.2d 175 (1935). Even an offer of proof of a reputation of the prosecuting witness with regard to a propensity or an inclination to be accusatory against others is not admissible to impeach the credibility of a witness. Evidence of traits of the witness' character other than honesty and veracity or their opposites is inadmissible. *State v. Mondrosch*, 108 N.J. Super. 1, 259 A.2d 725 (1969).

89. See note 8, 26 and 27, *supra* and accompanying text.

90. 3 WIGMORE, WIGMORE ON EVIDENCE 460, § 924(a) (3d ed. 1940).

remedy that situation. In fact, allowing such evidence might open the door for other and greater abuses.⁹¹

Whether or not the complainant in a rape trial is chaste is hardly relevant to the issue of credibility. If the defense has proof that the prosecutrix has a habit of telling lies or has made prior inconsistent statements, it should be permitted to introduce such, as it is this form of evidence that has a tendency to prove her untruthfulness. The evidence concerning one's sexual behavior does not in any manner tend to prove that person's lack of trustworthiness. There is relatively little, if any, convincing authority that even intimates that because a woman is immoral, she is untruthful. There is equally no logic behind such an hypothesis. The evidence merely degrades the witness before the jury; and it is evident that "[a] witness may not be degraded by accusing him of improprieties not directly relevant to his veracity."⁹²

Perhaps one of the clearest judicial opinions in support of this irrelevancy argument was stated by the Washington Supreme Court in *State v. Wolf*:⁹³

If the reputation of the prosecuting witness for chastity were to be held admissible as going to general credibility, then logically such testimony would be equally admissible as to the credibility of any female who might be called to give evidence in any case. The court properly excluded the evidence as to the reputation of the prosecuting witness for unchastity.

* * *

If . . . the trait of chastity has no such definite correlation with that of veracity as to justify courts in using the former as a criterion of the latter, then it is as difficult to see where there is any room for judicial

91. The court in *State v. Kain*, 330 S.W.2d 842, 845 (Mo. 1960) held, "There appears to be no logical justification for excepting forcible rape from the operation of the general rule."

92. *Lyda v. United States*, 321 F.2d 788, 793 (9th Cir. 1963). In a trial for armed robbery, the question was propounded on cross-examination of the defendant's witness whether he had registered at a motel with a certain young lady. This questioning was ruled improper since it suggested he had spent the night with a woman not his wife, and it did not affect the witness' truthfulness.

93. 40 Wash. 2d 648, 245 P.2d 1009 (1952). This court expressly rejected the underlying theory upon which many courts admitted evidence of chastity to prove a witness' credibility—the theory set forth in *State v. Coella*, 2 Wash. St. 99, 28 P. 28 (1891). See notes 28-29 *supra* and accompanying text.

discretion. As long as such discretion is lodged with the trial courts, questions as to reputation for immoral conduct will be asked. It is the asking of such questions in front of the jury which does the principal damage. . . . 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.⁹⁴

Furthermore, such evidence need not be admitted in order to assure the defendant a fair trial. The defense in a rape trial may impeach the credibility of the prosecuting witness with the same means available to defendants in other criminal proceedings: with contradictory evidence, with proof that she made statements inconsistent from her present testimony, with evidence of her general reputation for untruthfulness, with proof of her bias toward the defendant, or with evidence of records of judgment or felony convictions.⁹⁵ With these numerous and alternative methods of impeachment available, there is no compelling reason to grant the defense an opportunity to impeach the prosecutrix with evidence of her prior unchastity.

Impeachment evidence is allowed only to undermine the credibility of the witness. Since the evidence concerning the complainant's unchastity in no way indicates her lack of truth and veracity, the evidence simply has no evidentiary bearing on the issue of credibility. Accusations of other improprieties are clearly not relevant. Consequently, since evidence of the rape victim's unchastity is not probative of the proposition for which it was offered, it must be excluded from the rape trial.

It has been demonstrated that much of that evidence presently accepted is not relevant. It should, therefore, be disallowed.

94. *State v. Wolf*, 40 Wash. 2d 648, 650, 245 P.2d 1009, 1111-12 (1952).

95. *See Echert v. United States*, 188 F.2d 336 (8th Cir. 1951). *Accord*, *Crawford v. State*, 254 Ark. 263, 492 S.W.2d 900 (1973); *Lynn v. State*, 231 Ga. 559, 203 S.E.2d 221 (1974); *McHargue v. Perkins*, 295 S.W.2d 301 (Ky. 1956); *Rau v State*, 133 Md. 613, 105 A. 867 (1919); *State v. Kain*, 330 S.W. 2d 842 (Mo. 1960). *See also* McCORMICK, *supra* note 6, § 33, at 66.

To demonstrate her bias toward the defendant, the complainant may be cross-examined as to the illicit sexual intercourse with the accused. However, the details of that illicit relationship can not be inquired into. *See Motley v. State*, 207 Ala. 640, 93 So. 508 (1922); *Moffett v. State*, 233 Miss. 276, 78 So. 2d 142 (1955).

However, even if such evidence was determined to be relevant, it still must pass a second examination before it is admitted. It must now be determined whether the evidence is so inflammatory, prejudicial or confusing as to outweigh any probative value which it may have had.

THE IMPROPER EFFECTS OF EVIDENCE CONCERNING
THE COMPLAINANT'S PRIOR SEXUAL ACTIVITY

The mere fact that the complainant's sexual history is determined to be relevant does not indicate that the evidence should be admitted. There are several counterbalancing factors which may outweigh its probative value and move a court to exclude it.⁹⁶ Otherwise relevant evidence may be excluded if (1) it would create a substantial danger of unduly arousing the jury's emotions of prejudice and hostility; (2) it would unduly confuse the issues or mislead the jury; (3) it would necessitate an undue consumption of time; or (4) it would unfairly and injuriously surprise a party that had not had a reasonable opportunity to anticipate such evidence.⁹⁷ Consequently, the competence of the evidence ultimately depends upon whether it is likely, all things considered, to advance or facilitate the search for the truth.⁹⁸ Such competence does not inexorably follow from the fact that the evidence is rationally relevant.⁹⁹

Evidence Is Unduly Prejudicial and Inflammatory

In deciding whether the probative value of the evidence concerning the rape complainant's sexual history is outweighed by other considerations, it must first be determined whether the evidence has a tendency to unduly inflame the jury's emotions. The fear is that such evidence will create an atmosphere of hostility toward the complainant, thereby interfering with the jury's discovery of the truth. To ascertain whether such evidence does so prejudice the jury, the composition of the jury must be closely scrutinized, as well as its attitudes, its susceptibility to prejudice from the proffered evidence, and its ultimate verdicts.

While the primary justification for the use of lay juries is that they can reflect the conscience and the mores of the commu-

96 McCORMICK, *supra* note 6, § 185, at 438-39.

97. See *Michelson v. United States*, 335 U.S. 469 (1948); *United States v. Craft*, 407 F.2d 1065 (6th Cir. 1969); *State v. Flett*, 234 Ore. 124, 380 P.2d 634 (1963); *FED. R. EVID.* 403 (1975).

98. *Lyda v. United States*, 321 F.2d 788, 795-96 (9th Cir. 1963).

99. *Daniels v. Dillinger*, 445 S.W.2d 410 (Mo. 1969).

nity, it should be recognized that the "community" is composed of a number of heterogeneous sub-communities. Under present systems of jury selection, however, lay juries tend to represent only one of these numerous sub-communities—that of the Anglo-Saxon middle class.¹⁰⁰ Consequently, the American jury reflects only the conscience and mores of this middle class. The result is an inherent prejudice against the culturally different.

Since the jury is composed primarily of persons from the white, middle class, it becomes necessary to examine this particular group's attitude concerning the non-marital sexual activities of females. Only after this examination will it be possible to determine how the average jury reacts to evidence of the rape complainant's sexual history.

It has been observed that the American society, as a whole, limits its women to a very rigid standard of sexual chastity.¹⁰¹

100. The American jury is composed primarily of people from the white, middle-class. The upper-class (professionals and business executives) are noticeably absent from such juries. The body of law governing the selection of jurors exempts professional people from jury duty in almost every American jurisdiction. The typical exemption statute exempts many of the following: state officials, judges, lawyers, doctors, policemen, firemen, ministers, pharmacists, teachers, mail carriers, clerks, undertakers, veterinarians, etc. Furthermore, the unattractive economic sacrifices incident to jury service eliminates many executives and businessmen.

Persons actively engaged in production who might be expected to possess superior character-gauging and intellectual qualities are the very persons who have an economic stake in inventing excuses sufficient to secure relief from jury duty.

D. Broeder, *The Functions of the Jury: Facts or Fictions?* 21 U. CHI. L. REV. 390, 391 (1954). See also G. WILLIAMS, *THE PROOF OF GUILT* 271-72 (3d ed. 1963).

A large proportion of the lower-class, the poor and many blacks, is likewise excluded from jury service. In some jurisdictions, the jurors are chosen from voting lists. As a result, the lower-class cultural minorities of migrant farm workers and southern blacks who have recently immigrated to northern cities fail to meet the necessary residency requirements and are excluded from voting lists, and hence, juries. Also, since the lower-class has a tendency to be more apathetic to voting than the other classes, members of this lower-class are less likely to register to vote, thus lessening their number from the jury rolls. Other juror standards, such as the requirements of average intelligence or literacy, also limits the lower-class from jury membership. The excusing of a juror for financial hardship results in a further exclusion of a disproportionate number of poor people and racial minorities. J. Rhine, *The Jury, A Reflection of the Prejudices of the Community*, at 192-95, in J. SILVA, *AN INTRODUCTION TO CRIME AND JUSTICE* 190-91 (1973).

101. See OLIVER, *supra* note 6, at 34. See also McCARY, *supra* note 77, at 205.

It is believed that women are not to engage in either premarital or extra-marital sexual affairs. Religious and societal taboos against non-marital sex have continued vitality.¹⁰² In fact, almost all sexual activity between consenting adults, except sexual intercourse between husband and wife, has been deemed illicit in our society.¹⁰³ That class of Americans seemingly most opposed to the female's non-marital sexual conduct is the predominantly white, middle class.¹⁰⁴

Condemnation of women's premarital sexual activities still permeates this culture.¹⁰⁵ Four major premarital sexual standards exist: (1) abstinence, which forbids intercourse to both sexes; (2) the double standard, which allows bachelors to have coitus, but not unmarried females; (3) permissiveness with affection, which accepts coitus for both sexes when a stable affectionate relationship is present; and (4) permissiveness without affection, which accepts premarital intercourse for both sexes on a voluntary basis regardless of affection.¹⁰⁶ Of these four standards the latter two are considered too radical for most Americans and are not expected to ever become the dominant standard.¹⁰⁷ Of these remaining choices, the middle class still holds abstinence as the dominant code for the unmarried females.¹⁰⁸

In analyzing the attitudes of certain types of people instead of particular classes, one reaches the same result: the people most

102. See R. BELL, *PREMARITAL SEX IN A CHANGING SOCIETY* 44 (1966). These societal mores are reflected in the state statutes; e.g., fornication has been made a crime in forty states, while adultery is a crime in forty-five states.

103. OLIVER, *supra* note 6, at 207-10.

104. C. Chilman, *Some Social and Psychological Aspects of Sex Education*, in *THE INDIVIDUAL, SEX, AND SOCIETY*, *supra* note 74, at 70.

105. KINSEY, *supra* note 64, at 285.

106. I. Reiss, *Premarital Sexual Standards* in *THE INDIVIDUAL, SEX, AND SOCIETY*, *supra* note 74, at 111-13.

107. *Id.*

108. *Id.* See also Kaats & Davis, *The Dynamics of Sexual Behavior of College Students*, in *SEXUAL DEVELOPMENTS AND BEHAVIOR*, *supra* note 70, at 214-29. This article demonstrated that the double standard is quite pronounced on the college campus in the attitudes of both males and females alike. Although 60% of the males and over 40% of the females had engaged in premarital sex, both sexes believed virginity was much more important for females than for males. Also, both sexes strongly agreed that having sexual intercourse is much more injurious to a female's reputation than to a male's—the difference between the campus tramp and the campus cassanova. The merging picture for females was one of disapproval of non-marital coitus both by close friends and relatives, even when the female was in love with

likely to be jurors strongly disfavor female participation in premarital sex. Those categories of Americans which best accept premarital sex are professional men and black men;¹⁰⁹ and, as noted earlier, these are among the people least likely to serve on the jury. Conversely, some of those people which least tolerate premarital sex—the white females¹¹⁰ and the middle-aged married persons¹¹¹—are very likely to be predominantly represented on the jury.

As previously indicated, many rape complainants are likely to be married women with extra-marital sexual histories.¹¹² As might be expected, this type of sexual activity is also discounted by the majority of the middle class.

Such behavior is condemned in practically all Western cultures because of the threat it poses to the family unit. Adultery, furthermore, is unequivocally condemned in Judaic-Christian moral theology. Nevertheless, at no time in the history of any culture has man's extramarital coition been consistently controlled or severely punished, whereas women have universally been subjected to a much more stringent code of sexual ethics.¹¹³

It is evident from the foregoing that the average jury carries an inherent prejudice against those females who are sexually active outside of the marriage confines. It is with this basic attitude against such female sexuality that the jury hears the evidence and deliberates its verdict.

109. I. Reiss, *How and Why America's Sex Standards Are Changing*, in *SEXUAL DEVELOPMENTS AND BEHAVIOR*, *supra* note 70, at 144.

110. *Id.*

111. *Id.* at 142. This study concerned married couples of the same ages, varying only in the fact that some were childless and the others had children of courting ages. Only 23% of the childless couples were willing to accept premarital intercourse, while only 13% of the couples with children would tolerate coitus before marriage. Since the children of the married couples were of dating age (probably fifteen years of age and over), this would make the couples of the research about thirty-five years of age and older. Since over 85% of all persons thirty-five and older are married (*see* 1 1970 CENSUS OF POPULATION, pt. 1, Table 203, at 1-640-41), this study represents a sampling of the attitudes of the majority of the middle-aged persons. *See also* Bell & Buerkle, *Mother and Daughter Attitudes to Premarital Sexual Behavior*, *MARRIAGE AND FAMILY LIVING*, Nov., 1961, at 391: 88% of the mothers thought it wrong for a girl not to be a virgin when she marries, and 12% thought it generally wrong. Less than 1% thought it right in many situations.

112. *See* notes 67-69 *supra* and accompanying text.

113. MCCARY, *supra* note 77, at 233.

Next, it must be decided whether the jury's attitude against female sexuality is improperly inflamed in the rape trial with proof of the complainant's prior sexual activities. Since jurors are dealing with lives and freedom and not merely money damages, the emotional pressures operative in civil proceedings are magnified many-fold in criminal cases.¹¹⁴ The result is that the juror's native prejudices are more easily aroused in the criminal proceeding. Furthermore, sexual offenses are the type of criminal cases in which juries may be affected by an unusual degree of emotional prejudice.¹¹⁵ Thus, the juror's prejudice against the unchaste female will be very susceptible to agitation in the rape trial.

The defense attorney, taking advantage of this situation, often attempts to inflame these prejudices of the average juror. To do this, he presents evidence of the complainant's prior sexual activities and he asks the prosecutrix such questions as, "How many men have you gone to bed with?" Despite this prevalent practice, the courts have done very little to restrain counsel from such an inflammatory activity.¹¹⁶ In fact, the legal profession often encourages this arousing of the passions of the jurymen.¹¹⁷

The lawyer's professional duty to make the best use of the juror's emotions is urged in countless treatises on trial techniques. . . . The advocate who can successfully appeal to prejudice, arouse the juror's passions, and cloud the issues, instead of being pilloried by his associates, is canonized.¹¹⁸

The judicial system is well aware that the juror in the criminal trial is quite susceptible to inflammatory evidence, and might very well decide a case based on his own emotions rather than on the particular facts.¹¹⁹ For this reason, the tribunals exclude such

114. *The Functions of the Jury: Facts or Fictions?*, *supra* note 100, at 416.

115. See W. CORNISH, *THE JURY* 196 (1968).

116. See generally *The Functions of the Jury: Facts or Fictions?*, *supra* note 100, at 394.

117. *Id.*

118. *Id.*

119.

Many of the doctrines governing the admission of evidence amply reflect the low esteem in which court's have traditionally held the average juror's fact-finding abilities. Particularly is this true in such areas as relevance and materiality, where evidence, if admitted, is likely to create an unjustifiable prejudice or confuse the issues.

Id. at 397.

evidence as pertaining to the defendant.¹²⁰ The Supreme Court ruled that evidence of the defendant's specific illicit acts (other than his prior felony convictions) or ill name among his neighbors weighed too heavily upon the jury.¹²¹ The admission of such evidence often results in the jury's prejudgment against the one with the bad record, creating undue prejudice and interfering with a fair trial.¹²² The simple fact is that the jury cannot wisely interpret such evidence:

The majority of men and women of average intelligence—the class from which most jurors are selected—are untrained in logical thinking, and are prone to draw illogical conclusions. They quite naturally believe that a person who is guilty of an offense of a heinous character is guilty of the crime for which he is being tried.¹²³

In one particular example, a defendant had been convicted for taking indecent liberties with a child. The appellate court, in reversing the conviction, ruled that the evidence of the defendant's indecent liberties with another child, although restricted in the trial court to its bearing on his credibility, could not but prejudice the jury and unconsciously lead them to the conclusion that the defendant was in the habit of taking such liberties with little girls.¹²⁴

Thus, courts have concluded that intimations of past acts of misconduct, especially those similar to the act in question, are extremely damaging to the accused. Also recognized is the fact that merely putting the question to the defense witness creates in the minds of jurors the impression that the events occurred.¹²⁵ Courts have further determined that cautionary and limiting instructions, copiously provided by the trial judge, do not give the defendant adequate protection, as they do not prevent the jury from con-

120. See *Awkard v. United States*, 352 F.2d 641 (D.C. Cir. 1965); *Grigsby v. Commonwealth*, 299 Ky. 721, 187 S.W.2d 259 (1945); *State v. Moore*, 278 So. 2d 781 (La. 1972); *People v. Luce*, 210 Mich. 621, 178 N.W. 54 (1920). This discussion refers to prior illicit acts for which the defendant was not convicted. However, evidence concerning the defendant's prior convictions is admissible for impeachment purposes.

121. *Michelson v. United States*, 335 U.S. 469 (1948).

122. *Id.*

123. *Grigsby v. Commonwealth*, 299 Ky. 721, 724, 187 S.W.2d 259, 263 (1945).

124. *People v. Luce*, 210 Mich. 621, 622, 178 N.W. 54, 55 (1920).

125. See *Jackson v. Dunne*, 378 U.S. 368 (1964); *Awkard v. United States*, 352 F.2d 641, 645-46 (D.C. Cir. 1965).

sidering prior actions in deciding whether the defendant has committed the crime charged. It is a false assumption that juries can compartmentalize their minds and hear things for one purpose and not the other.¹²⁶

This same logic which prohibits inflammatory evidence as against the defendant is equally applicable when the evidence is offered against the complainant. If the jury is likely to reach illogical conclusions about the defendant from such evidence, it will probably reach similar illogical conclusions about the complainant. Since evidence of the indecent liberties with one child might lead a jury to erroneously believe that the defendant was in the habit of doing this act, it can equally be said that proof of the complainant's illicit sexual intercourse with one man might lead the jury to erroneously conclude that she was in the habit of consenting. The mere question whether the complainant had engaged in sexual activities with a man other than her husband is likely to leave the impression in the mind of the juror that the event occurred; and the juror (with his views on such illicit sexuality by women) might very possibly develop an unconscious hostility toward the prosecutrix, and, hence, the prosecution's case. If no limiting instruction can assure the defendant adequate protection against a wrongful use of the evidence by the jury, it is similarly true that no limiting instruction can adequately safeguard the prosecution and its interest from a wrongful use of the evidence by the jury. Consequently, the introduction of such inflammatory evidence is as wrongful against the complainant as it is against the defendant. Such an improper evidentiary assault against the prosecuting witness can only result in injustice.¹²⁷ It is clear that justice, though due the accused, is due the accuser also.¹²⁸

In light of the juror's prejudice against female unchastity and his susceptibility to overweigh prior misconduct evidence, the

126. See note 125 *supra*.

127. See generally *United States v. Kearney*, 420 F.2d 170, 174 (D.C. Cir. 1969). *Kearney* involved a prosecution for murder. The defense counsel was prevented from cross-examining the prosecuting witness concerning whether or not he was using narcotics at the time of his statement to the police. The evidence was excluded to prevent undue prejudice and jury confusion. "Drug addiction which involves social transgression and the possibility of illegal conduct . . . has potential for prejudice of the jury." *Id.* at 174. It is easy to see how proof of one's illicit sexual activity could lead to the same result.

128. *Snyder v. Massachusetts*, 291 U.S. 97 (1933).

admission of evidence concerning the complainant's prior sexual involvement creates a substantial danger of unduly arousing the jury's emotions of prejudice and hostility; the evidence can only obstruct rather than facilitate the process of ascertaining the truth. For this reason, any probative value of such evidence is outweighed by other considerations and requires the evidence's exclusion.

There is an even more compelling argument for disallowing such evidence. This evidence not only creates a substantial danger of undue prejudice, but it also so weighs upon the minds of the jurors that it actually results in erroneous decisions—decisions contrary to the facts of the cases.¹²⁹

Many of these alleged rapes have strong substantiating evidence, as violence has often been exerted against the victim.¹³⁰ Nevertheless, the number of rape trials resulting in acquittals is exceedingly high. Among a list of twenty-five crimes, including all major felonies, forcible rape trials resulted in one of the highest rates (33%) of acquittals and dismissals.¹³¹ Only negligent manslaughter and simple assaults had higher acquittal rates. Furthermore, less than one-third (32%) of all forcible rape charges actually resulted in guilty verdicts on the offense charged. Only four other crimes, including theft and vandalism, had a lower percentage of guilty verdicts. With the comparatively good chance of acquittal, the defendant charged with forcible rape will waive his right to trial by jury or plead guilty much less frequently than in most other criminal trials.¹³²

This high acquittal-low jury waiver ratio can be partially attributed to the admission into evidence of the complainant's prior sexual activities. Because of the admission of her sexual history, the jury does not limit itself to the issue of consent at the moment of the intercourse in question, but goes on to weigh the woman's conduct in the history of her sexual affairs.¹³³

129. *Testimony before the Michigan Women's Commission*, May 15, 1974, at 6-7. "[T]his sort of evidence is so inflammatory and prejudicial that it often results in jury acquittals, even in cases where the victim has been seriously beaten."

130. AMIR, *supra* note 60, at 155. The study reports that over 85% of all rapes are accompanied by violence. The particular types of violence are as follows: roughness (28.5%), non-brutal beatings (24.7%), brutal beatings (20.4%) and choking (11.5%).

131. R. KNUDTEN, *CRIME IN A COMPLEX SOCIETY* 723 (1970).

132. See KALVEN & ZEISEL, *THE AMERICAN JURY* 26 (1966).

133. *Id.* at 249.

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.¹³⁴

*The American Jury*¹³⁵ cites several examples of juries reaching probably erroneous verdicts as a result of the prejudicial effect of the evidence of the complainant's sexual history. In one case, the jaw of the complaining witness was fractured in two places. Despite the savage sexual assault, the jury acquitted the defendant when it learned that the couple had previously dated, and therefore, the complainant may have consented to the sexual intercourse in issue.¹³⁶ In another case, the jury's reaction was equally disturbing. Three men kidnapped a girl from the street and took her to an apartment where they brutally attacked her. It developed during the course of the trial that the young unmarried girl had two illegitimate children. In addition, the defendant claimed that she was a prostitute without offering any substantiating evidence. Nevertheless, the verdict was "not guilty," and as observed by the judge, a "travesty of justice" resulted.¹³⁷

When the rape cases are further divided into aggravated and simple rape classifications,¹³⁸ the erroneous verdicts of the jury become even more apparent. As revealed in one particular study,¹³⁹ the percentage of jury disagreement with the judge (where the jury acquits the defendant when the judge would have convicted him) is 12 percent in the aggravated rape trials. However, in simple rape cases, this jury disagreement with the presiding judge soars to 60 percent. In over one-half of these sample trials involving simple rape, the jury acquitted the defendant when the judge would have convicted him. This analysis can be taken an important step further. In the ten sample cases of simple rape where the judge and jury agreed to convict, the jury exercised its option of convicting the defendant on a lesser charge nine out of ten times, whereas the judge would have convicted on the lesser charge in only four of the cases. The result of the sample is

134. *Id.*

135. *Id.*

136. *Id.* at 251.

137. *Id.*

138. Aggravated rape is defined in *THE AMERICAN JURY* as the rape where there is extrinsic evidence of violence, or where several assailants were involved, or when the defendant and victim are complete strangers. Simple rape involves all non-aggravated rapes. See note 132 *supra*, at 252.

139. *THE AMERICAN JURY*, *supra* note 132, at 253.

startling. Of the forty-two simple rape cases tried, the jury convicted the defendant of rape in only three of them. The jury either acquitted or found the defendant guilty on a lesser charge in twenty of the twenty-one times when the judge would have convicted the defendant for rape. This indicates quite conclusively that the jury often disregards the facts in reaching its verdicts.¹⁴⁰ The jury frequently redefines the crime of rape on the basis of its attitudes against an unchaste woman—not saying the defendant did no wrong, but that the complainant was at fault.

In considering this problem of erroneous jury acquittals, one must also consider the doctrine of jury-nullification—that which protects the jury's general verdict of "not guilty" in a criminal case from being reversed by the court.¹⁴¹ Although juries in civil cases are subject to the control of courts with the possibility of the judge ordering a new trial or setting aside the verdict, no comparable control evolved for acquittals in criminal cases. As Justice Holmes acknowledged, "the jury has the power to bring in a verdict in the teeth of both law and fact."¹⁴² Thus, the jury is free to disregard the facts of the rape case and render its verdict based on its own attitudes and emotions. The result is unjustly devastating to the prosecution's attempt to protect society from the criminal act of rape.

The nullification doctrine need not be abolished to solve the problem. In *United States v. Dougherty*,¹⁴³ Chief Judge Bazelon suggested an alternative solution:

In any case, the real problem in this situation is not the nullification doctrine, but the values and prejudice that prompt the acquittal. And the solution is not to condemn the nullification power, but to spotlight the prejudice and parochial values that underlie the verdict in the hope that the public outcry will force re-examination of those

140. *Id.* at 253-54.

141. In *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972), Chief Judge Bazelon stated:

The juror motivated by prejudice seems to me more likely to make spontaneous use of the power to nullify, and more likely to disregard the judge's exposition of the normally controlling legal standards.

Id. at 1141 (concurring in part and dissenting in part opinion).

See also M.R. Kadish, *Freedom and Obligations of the Criminal Jury*, 59 CALIF. L. REV. 905 (1971); A. Schefflin, *Jury Nullification—Right To Say "No"*, 45 S. CAL. L. REV. 168 (1972).

142. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

143. 473 F.2d 1113, 1143 (D.C. Cir. 1972) (concurring opinion).

values and deter their implementation in subsequent cases.¹⁴⁴

The values and prejudices that underlie the erroneous acquittals of many rape defendants have been demonstrated. To prevent those prejudices from unduly interfering with subsequent jury verdicts, the highly inflammatory evidence of the complainant's illicit sexual activities must be excluded from the trial. Such evidence, whether offered under the guise of proving either her consent or her lack of credibility, should no longer be permitted to inflame the passions and prejudice the minds of the jurors. The unjust prejudicial effect of the evidence outweighs any of its probative value. Therefore, the exclusion of this evidence is necessary to reach justice in the forcible rape trial.

Evidence Is Unduly Confusing and Time Consuming

It must also be determined whether proof of the complainant's prior sexual activity creates a side issue that will unduly distract the jury from the main issues and cause an unwarranted consumption of time. If such confusion or delay does result, this would sufficiently outweigh the probative value of the evidence and require its exclusion.

The feats of memory required of jurors are prodigious. Inasmuch as the legally crucial and legally unimportant aspects of evidence are not distinguished until the trial is concluded, the jurors during the trial possess no means of knowing which aspects of the testimony they should particularly concern themselves with. The ultimate outcome of many trials must often depend on evidence which a jury considers insignificant until otherwise informed by the court. Instead of remembering the details of that which finally proves crucial, the average juror will probably recall emotional and dramatic incidents which are legally insignificant.¹⁴⁵

If the juror is more likely to remember the emotional incidents of the trial, with his attitude proscribing female sexuality outside of the marriage confines,¹⁴⁶ he quite possibly will best remember and, thus overemphasize evidence of the complainant's prior unchaste activities—distracting the juror from other issues.

144. *Id.*

145. *The Functions of the Jury: Facts or Fictions?*, *supra* note 100, at 892.

146. See notes 100-13 *supra* and accompanying text.

As mentioned earlier, the end result of admitting such evidence will be to put the victim on trial along with the defendant.¹⁴⁷ The jury must determine not only whether the defendant raped the complainant, but also whether the complainant was of such moral turpitude that she could not help but to consent to the sexual intercourse in question. By trying the victim, the central focus is removed from the defendant's actions.¹⁴⁸ The difficulty for the juror in trying two cases simultaneously (such a problem being unique in the rape trial¹⁴⁹) is apparent, and could only tend to confuse the jury rather than help it ascertain the truth.

Evidence of the complainant's sexual history, when admitted to prove her consent to the alleged act, distracts the jury from the other facts of the case. However, the evidence is even more confusing to the jury when it is admitted to impeach the prosecutrix's credibility. When used in that capacity, the evidence is offered only for the limited purpose of proving her unreliability as a witness. Yet, as ascertained earlier, cautionary instructions so confuse the jury that they have little protective value.¹⁵⁰ The jury often ignores the limitations and uses such proof substantively to prove the complainant's consent to the act in issue. The prosecution, all the while, is powerless to prevent its cause from being irretrievably obscured and confused.¹⁵¹

To properly affect the credibility of the witness, past misconduct must indicate a lack of veracity.¹⁵² Even if the jury uses the evidence for its proper purpose, the impeachment by a method so loose and inconclusive merely exposes witnesses to undeserved obloquy.¹⁵³ Proof of unchastity does not appropriately reveal this lack of veracity. The evidence only distracts the jury without purpose.¹⁵⁴

If proof of unchastity should be held admissible, rebutting evidence would also be allowable. Thus, there would be one or

147. See note 9 *supra* and accompanying text.

148. C. Sitemer, *New State Laws Rushed to Aid Rape Victims*, *The Christian Science Monitor*, Oct. 8, 1974, at 5, col. 1.

149. See MICHIGAN WOMEN'S TASK FORCE ON RAPE, *Background Material For Criminal Code Reform To Respond To Michigan's Rape Crisis*, (J. BenDor, Coordinator), at 6.

150. See notes 125-26 *supra* and accompanying text.

151. *Cf.* *Michelson v. United States*, 335 U.S. 469 (1948).

152. *State v. Williams*, 337 Mo. 884, 892, 87 S.W.2d 175, 183 (1935).

153. *Robinson v. Atterbury*, 135 Conn. 517, 66 A.2d 593 (1949).

154. *State v. Schutte*, 97 Conn. 462, 117 A. 508 (1922).

more collateral issues to occupy the time and divert the attention of the jury.¹⁵⁵

Such would be the evils if the prosecution could require previous and timely notice of the particulars of the intended attack upon the conduct of the complainant, but as no such notice can be exacted, there would be no means of meeting the evidence, often of the dissolute companions of the accused, however mistaken or corrupt it might be, and thus the character of the innocent and greatly abused female might be sacrificed and the ends of public justice be defeated.¹⁵⁶

Case authority further supports the proposition that evidence of specific acts of immorality and unchastity can only serve to prolong the trial and divert the attention of the trier of fact from the issues.¹⁵⁷ One court even maintained that to permit such proof would open the gates of circumstantial evidence as to every act and statement of the female in her past life; and any such conduct could be implied as an admission to consensual sexual intercourse with the defendant at the time in question.¹⁵⁸

Since proof of the complainant's acts of unchastity could only create collateral and unduly distracting and confusing issues, the introduction of such evidence tends merely to frustrate the jury's attempt to ascertain the truth. Consequently, even if the evidence has some probative value, its resulting confusion and delay, combined with its prejudicial effect, clearly outweighs its relevancy—requiring its exclusion from the rape trial.

RECENT LEGISLATION

A few states (California, Florida, Indiana, Iowa and Michigan) have recently passed legislation concerning the admissibility in the rape trial of evidence of the complainant's prior consensual sexual activity. Several other states are considering similar legislation, including among others, Arizona, Illinois, Kansas, Nevada, New York, Ohio, Pennsylvania and Washington.¹⁵⁹

The new laws that are most restrictive of such evidence are

155. *People v. Jackson*, 3 Park Cr. 398 (1857).

156. *Id.*

157. *See Rice v. State*, 35 Fla. 236, 17 So. 286 (1895); *Black v. State*, 119 Ga. 746, 47 S.E. 370 (1904); *Commonwealth v. McKay*, 294 N.E.2d 213 (Mass. 1973); *Moffett v. State*, 233 Miss. 276, 78 So. 2d 142 (1955).

158. *Black v. State*, 119 Ga. 746, 47 S.E. 370 (1904).

159. *See Letter from C. Living, Adm. Asst. to Mich. State Senator G. Cyber to Ricky Alcorn, Sept. 30, 1974* (on file at Valparaiso University

those of Indiana,¹⁶⁰ Michigan¹⁶¹ and California.¹⁶² Indiana's "rape-shield" law provides:

In a prosecution for the crime of rape . . . evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct, and reputation evidence of the victim's past sexual conduct may not be admitted, nor may reference be made thereto in the presence of the jury, except as provided in this chapter.¹⁶³

This Indiana statute permits two narrow exceptions to the otherwise absolute rule of non-admission of such sexual history evidence. The first exception, in accord with the overwhelming weight of authority,¹⁶⁴ allows the introduction of evidence concerning the victim's past sexual conduct with the defendant.¹⁶⁵ The second exception permits evidence which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded.¹⁶⁶ This category allows evidence concerning sexual activity of the alleged victim with third persons if that evidence would better demonstrate the source or origin of semen, pregnancy, disease, etc.¹⁶⁷

Before the defense can introduce any of this exceptional evidence, the judge must find that such evidence "is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value"¹⁶⁸ Furthermore, the statute imposes additional safeguards to protect against the admission of improper evidence. The defense must file at least ten days before trial a written motion, accompanied by an affidavit, stating its offer to prove such evidence and its relevancy to the case.¹⁶⁹ If the court determines that the offer of proof is sufficient, the victim shall be questioned regarding the offer of proof at a hearing out of the presence of the jury.¹⁷⁰ If

School of Law); Chicago Tribune, May 19, 1974, § 1, at 12; The Christian Science Monitor, *supra* note 148.

160. IND. CODE § 35-1-32.5 (1975), *amending* IND. CODE § 35-1 (1971).

161. Mich. S.B. 1207 (1974).

162. Calif. S.B. 1678 (1974).

163. IND. CODE § 35-1-32.5(1) (1975).

164. *See* notes 42-48 *supra* and accompanying text.

165. IND. CODE § 35-1-32.5(2) (a) (1975).

166. IND. CODE § 35-1-32.5(2) (b) (1975).

167. *See* Mich. S.B. 1207 (1974).

168. IND. CODE § 35-1-32.5(2) (1975).

169. IND. CODE § 35-1-32.5(3) (a) & (b) (1975).

170. IND. CODE § 35-1-32.5(3) (c) (1975).

the court finds from this hearing that such sexual conduct evidence is admissible, the court is required to make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted.¹⁷¹ The defendant then may offer evidence pursuant to the order of the court. This Indiana legislation provides for a similar hearing if new information is discovered during the course of the trial.¹⁷² It is also specifically mentioned that the above provisions do not limit the right of the accused to impeach the credibility of the prosecutrix by showing her prior convictions for such sexual-related behavior.¹⁷³

The recent rape legislation in Michigan and California is closely analogous to that of Indiana. These new laws also prohibit the admission of most evidence concerning the complainant's prior sexual activity with third parties. Michigan essentially allows only evidence of the prosecutrix's sexual relations with the defendant after such evidence is determined both relevant and non-prejudicial.¹⁷⁴ California only permits proof of the complainant's previous sexual conduct with the accused rapist after a relevancy hearing with the judge.¹⁷⁵ The exclusion of evidence concerning the alleged victim's sexual activity with third persons reflects a policy decision that all women, not just virgins, are to be protected by the law.¹⁷⁶ The laws were passed to shield the autonomy of the woman—maintaining her ability to make an individual decision in respect to each person.¹⁷⁷ The legislators of these states determined that the jury should no longer be able to presume that because a woman consented to sexual intercourse with others, it is more likely that she consented to the defendant at the time in question.¹⁷⁸ These legislatures concluded that such collateral evidence is so confusing, inflammatory and prejudicial that its use greatly outweighs its probative value.¹⁷⁹

171. IND. CODE § 35-1-32.5(3) (1975).

172. *Id.*

173. IND. CODE § 35-1-32.5(4) (1975).

174. Mich. S.B. 1207 (1974).

175. The Christian Science Monitor, *supra* note 148.

176. *Testimony Before the Michigan Women's Commission, supra* note 129, at 7; V. Nordby, *Legal Effects of Proposed Rape Reform Bills, Mich. S.B. 1207, Mich. H.B. 5802*, at ii.

177. Letter from Camille LeGrand, Associate in Law, University of California School of Law (Berkeley), to California Legislators, Mar. 14, 1974, at 10-11.

178. *Id.*

179. *Testimony Before the Michigan Women's Commission, supra* note

The legislation of these three states prevents many of the inequities of present rape proceedings. First, it prohibits the introduction of the irrelevant and unduly prejudicial evidence concerning the complainant's sexual activities with third parties, except that which shows that a person other than the defendant is responsible for the act upon which the defendant is accused. Secondly, these statutes prevent the defense from conducting "fishing expeditions"—asking the prosecutrix unfounded sexual-related questions in front of the jury. This type of questioning is prohibited by the required hearings in the judge's chambers. Indiana's statute is particularly effective because it requires a court order which limits in scope the questions that may be asked as well as the references that may be made before the jury. It should also be noted that these hearings alleviate much undue surprise, which was once a major problem faced by prosecutors.¹⁸⁰

Despite the exclusion of evidence relating to her sexual conduct with a third person, these newly-enacted statutes still permit the admission of evidence concerning the prior sexual activity between the complainant and the defendant. It has already been established that the prior intercourse of the complainant with the defendant is properly admissible evidence.¹⁸¹ However, there may remain a problem with admitting that evidence concerning the complainant's prior sexual intimacy short of intercourse with the defendant. As previously mentioned, it is very possible that such evidence may not be relevant,¹⁸² and it is much more likely that its undue prejudicial effect will require its exclusion. Fortunately, the statutes of Indiana and Michigan still require this evidence to be proven relevant and non-prejudicial before it is admitted. By subjecting it to this dual test, it is less probable that the irrelevant and unduly prejudicial sexual-intimacy evidence will be admitted. However, California's legislation is much more problematic, since it only requires that such evidence be determined relevant before its admission. The California law does not demand that the evidence be adjudged non-prejudicial. Since the prejudicial test is not applied to this offered evidence, California permits the admission of the unduly prejudicial evidence concerning the complainant's sexual intimacy short of intercourse with the defendant. This, perhaps, is the major flaw with what is otherwise very sound legislation.

180. See generally *People v. Jackson*, 3 Park Cr. 398 (1857).

181. See notes 82-87 *supra* and accompanying text.

182. See notes 176-81 *supra* and accompanying text.

The laws of Florida and Iowa are not nearly as restrictive as are those statutes in Indiana, Michigan and California. The Florida and Iowa legislation permits testimony regarding the victim's sexual history if the judge in a closed hearing determines that such is pertinent to the case.¹⁸³ Hopefully, "pertinent" means relevant, but even then, the statutes are deficient. Before such evidence is admitted, it should be both relevant *and* non-prejudicial. However, there is no mention by these latter statutes that the second test will be applied. There is no indication that if such evidence is unduly prejudicial or inflammatory, it will be excluded. This legislation is clearly insufficient to meet the inherent problems of such evidence. Although the effect of this legislation may exclude from the presence of the jury some sexual-related questions, the judge, in his discretion, could admit all sexual misconduct evidence. Without the statutory exclusion, much evidence which should be excluded for its irrelevancy or its prejudicial effect will continue to be admitted in at least some circumstances. Consequently, such statutes are not sufficient to prevent inappropriate evidence from being presented to the jury. The result is that the jury will hear the evidence, which may lead to a wrongful acquittal of some defendants. This type of legislation, therefore, does not really remedy the chief problems currently presented in the prosecutions for rape. Although the legislation is a step in the right direction, it clearly stops short of the most necessary and desirous resolution.

CONCLUSION

Every woman, regardless of her private sexual activities, should be protected from violence and should have the right to live both peaceably and safely.

It seems quite evident that women who have active sex lives deserve as full protection of the law as "chaste" women. The act of rape is as wrong against a prostitute as a virgin. The key to the prosecution should be the facts of the alleged incident, not the sexual habits of the complainant.¹⁸⁴

Rape laws were not designed to protect only virgins and faithful wives. Even the unchaste and promiscuous woman deserves the

183. The Christian Science Monitor, *supra* note 148.

184. May 1, 1974, Memorandum from D. LeDuc, the Office of Criminal Justice Programs, State of Michigan, to Governor W. Milliken, analyzing Mich. S.B. 1907 (1974).

right to be protected from unlawful invasion of her body. No longer should the rapist have an opportunity to escape punishment by the stratagem of smearing the victim's sexual reputation and making her personal life the major and perhaps controlling issue in the case.¹⁸⁵

Evidence of the complainant's prior sexual misconduct except as pertaining to proof of her consensual sexual intercourse with the defendant is irrelevant, as it proves neither her consent to the disputed sexual act nor her lack of credibility as a witness. In addition, the highly prejudicial, inflammatory and confusing nature of the evidence clearly outweighs any probative value the evidence may have. The admission of such evidence can only cloud the issues and frustrate the jury's attempts to ascertain the truth of the case. Because of the admission of such evidence, the jury is more likely to, and often does, reach erroneous verdicts. On many occasions a defendant is acquitted despite sometimes clear factual evidence of his criminal involvement in that rape.

A criminal defendant is not deprived of his constitutional rights by the exclusion of evidence concerning the prosecutrix's sexual history. The accused in the rape proceeding reserves the right to impeach the prosecutrix in the same manner as in every other type of criminal trial. Likewise, the alleged rapist retains the constitutional safeguards assured a defendant in other criminal trials: the presumption of innocence and the right to have his involvement in the criminal act proven beyond a reasonable doubt before he is found guilty. Thus, the exclusion of evidence concerning the complainant's sexual history will not result in a denial of a fair trial to the defendant.

The recent legislation is a step in the right direction, but much of it is clearly insufficient to overcome the inherent problems with such evidence. Just the legislation in Indiana, Michigan and California, which allows only the evidence of the complainant's past sexual conduct with the alleged rapist, is appropriately comprehensive to sufficiently meet the present inequities of the rape trial. Still, even this might not be enough. It may be appropriate only to allow evidence of her prior consensual sexual intercourse with the defendant and prohibit proof of other intimacies with him. Nevertheless, the newly-enacted statutes of these three states are a good indication of what must be done.

185. *Legal Effects of Proposed Rape Reform Bills, Mich. S.B. 1207, Mich.*

H.B. 5802, supra note 176.

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With the above exception, evidence concerning the prior sexual activity of the prosecutrix must be excluded. The exclusion of this irrelevant and unduly prejudicial evidence is the only way to prevent the travesty of justice presently experienced in many rape trials.

