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Toward a Consistent Recognition of the Forbidden Inference: The Illinois Rape Shield Statute

David Ellis

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COMMENT

TOWARD A CONSISTENT RECOGNITION OF THE FORBIDDEN INFERENCE: THE ILLINOIS RAPE SHIELD STATUTE

I. INTRODUCTION

> Since want of consent on the part of the complainant is of the essence of the crime of forcible rape . . . , it is permissible, in order to show the probability of consent by the prosecutrix, that her general reputation for immorality and unchastity be shown. The underlying thought here is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman. . . .[1]

This view reflected the prevailing attitude of many courts toward complainants[2] in sexual offense[3] trials prior to the reform movement in the 1970s to protect these alleged sexual assault victims.[4] The theory that disclosure of a woman's sexual past was necessary to determine whether she was victimized by the defendant was empowered by two stereotypes. First, the stereotypically un-

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[1] People v. Collins, 186 N.E.2d 30, 33 (Ill. 1962).

[2] This comment will refer to the alleged victim of sexual assault as the "complainant" or "alleged victim" in order to make no assumptions as to whether a sexual offense was indeed perpetrated. However, in cases where the defendant has been convicted, or in references to statistical data concerning sexual assaults, the term "victim" may be used.

[3] As the term "rape" is no longer found in Illinois sexual offense statutes, this comment will refer to a case of sexual assault or sexual abuse as either a sexual offense or sexual assault. However, reference to the statutes prohibiting disclosure of the sexual history of the complainant will still be referred to as "rape shield" laws, due to the almost universal adoption of this phrase.

[4] For a discussion of the reform movement concerning sexual assault complainants in the United States, *see, inter alia*, Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 791-802 (1986); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 22-39 (1977); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 551-56 (1980); Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 95-102 (1977).

chaste complainant, by nature of her "promiscuity," lacked credibility. Both judges and jurors were likely to consider such an alleged victim as either unworthy of belief in general[5] or, more specifically, likely to fabricate charges of sexual assault.[6] The second stereotype regarding complainants was that a woman who has consented to sexual activity on one occasion will always consent: "if she did it once, she'd do it again."[7]

As a result of these views on women and sexual assault,[8] defense counsel often subjected the sexual offense complainant to a detailed disclosure of her[9] sexual history.[10] Defense counsel sought to portray the alleged victim as a promiscuous woman who, by nature of her previous sexual activity, likely consented to sexual conduct on the occasion in question.[11] This examination focused the inquiry onto the actions of the alleged victim, rather than those of the defendant.[12] As a result of this manipulation by defense counsel, the proceeding shamed and humiliated the complainant and increased the likelihood of the defendant's acquittal.[13] Further, the fear of disclosure of their sexual history often discouraged sexual assault victims from even reporting these attacks to the police.[14]

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5 Galvin, *supra* note 4, at 787. Professor Galvin notes that the link between promiscuity and veracity was applicable only to women. *Id.*

6 Ordover, *supra* note 4, at 120-23; 3A J.WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 736 (Chadbourn rev. 1970). Dean Wigmore went so far as to suggest that "[n]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." *Id.* at 737.

7 Berger, *supra* note 4, at 55.

8 Generalizations about women and sexual assault are by no means limited to the issue of the woman's sexual history to prove consent. For a particularly compelling depiction of the stereotypical victim of sexual assault, *see* Sharon Maloney, *Rape in Illinois: A Denial of Equal Protection*, 8 JOHN MARSHALL J. PRAC. & PROC. 457, 469 (1975).

9 In this comment, for the sake of simplicity, the feminine gender will be used to refer to the sexual offense complainant, and the male gender will be used to refer to the sexual offense defendant. In some cases involving prior sexual history of the complainant, only this male-female relationship would apply, *e.g.*, evidence of the complainant's pregnancy; in most instances, however, the discussion of the alleged victim's past sexual conduct would apply equally to a male complainant.

10 Tanford & Bocchino, *supra* note 4, at 546-51; Richard A. Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309 (1973); Berger, *supra* note 4, at 15-22.

11 Tanford & Bocchino, *supra* note 4, at 548. *See* S. MAXWELL, CRIMINAL PROCEDURE 248 (1896) (complainant's want of chastity increases likelihood of consent on particular occasion).

12 James J. Wesoloski, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Complainant's Character for Chastity*, 7 LOY. U. CHI. L.J. 118, 120 n.10 (1976) (complainant is victimized once again when trial begins); Ordover, *supra* note 4, at 93 n.7 (1977).

13 Galvin, *supra* note 4, at 767 (1986); Berger, *supra* note 4, at 12-15.

14 A recent national study indicated that only 16%, or approximately one out of

The Illinois General Assembly responded to these courtroom attacks on alleged sexual assault victims in two ways. First, it reformed Illinois' sexual offense laws[15] to detract attention from the complainant's actions and focus on the defendant's conduct.[16] More significantly, however, the legislature limited the admissibility of a complainant's past sexual conduct by enacting a rape shield law in 1978.[17]

The Illinois rape shield statute presumes that any evidence of the complainant's past sexual behavior is inadmissible, except where that activity is with the accused.[18] This statute embraces three fundamental goals. First, the statute protects the complainant from being harassed or humiliated with unreliable evidence of her reputation for chastity or with specific prior sexual conduct with third persons.[19] Second, the statute seeks to promote effective law enforcement by encouraging women to report sexual offenses with the knowledge that their prior sexual activity will not be divulged to the public.[20] Finally, the statute keeps the sexual offense trial focused only on issues relevant to the controversy at hand.[21]

While these purposes behind the rape shield statute are laudable, each must be tested for its validity in the context of a case where

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every six, sexual assaults are ever reported to the police. National Victim Center, *Rape in America: A Report to the Nation*, at 5 (hereinafter *Rape in America*). The primary reasons underlying the victim's reluctance were that her family would discover that she had been assaulted, and people would blame her for the attack. *Id.* at 4.

15 In 1984, Illinois reformed its sexual offense laws with two gradations of "rape," criminal sexual assault and aggravated criminal sexual assault. *See* ILL. REV. STAT. ch. 38, para. 12-13, 12-14 (1984). The Illinois legislature also enacted two gradations for sexual offenses not involving penetration, criminal sexual abuse and aggravated criminal sexual abuse. *See* ILL. REV. STAT. ch. 38, para. 12-15, 12-16 (1984).

16 Galvin, *supra* note 4, at 768-69 (citing ROLLIN M. PERKINS & RONALD M. BOYCE, CRIMINAL LAW 197-200 (3d ed. 1982)). An advantage of codification was the gradation of sexual offenses, which served two important functions. First, as stated, gradations focused the inquiry on the conduct of the defendant. Galvin, *supra* note 4, at 769 n.18. Second, gradations increased the likelihood of conviction. Many states had imposed severe prison terms or capital punishment for the crime of forcible sexual assault, and juries, accordingly, were often reluctant to convict without forceful evidence. By grading the offenses, the penalty structure could more equitably match the crime, leading to less jury reluctance and more convictions. *Id.*, n.19.

17 ILL. REV. STAT. ch. 38, para. 115-7 (1989).

18 ILL. REV. STAT. ch. 38, para. 115-7 (1989). The statute now reads, in pertinent part:

(a) In prosecutions for aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse or criminal sexual abuse, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.

19 People v. Ellison, 463 N.E.2d 175, 183 (Ill. App. 1984).

20 *Id.*

21 *Id.* at 184.

the criminal defendant attempts to offer evidence of the complainant's past sexual conduct that is highly relevant to his defense. One purpose of the statute—sparing the alleged victim from humiliation—cannot justify depriving the defendant of his constitutional rights to present relevant evidence and confront adverse witnesses.[22] Such protection of the complainant's privacy cannot prevail in a system which presumes the criminal defendant's innocence prior to trial[23] and places heightened value on protection of the accused.[24]

Another purpose behind the rape shield statute—the incentive to report sexual assaults—is even less justifiable in this context. It is paradoxical to encourage reporting by a rule which impairs the factfinder's ability to determine the truth of that report.[25] Reporting should be viewed as the first step in the judicial process, not an end in itself.[26] Moreover, the mere fact that an increase in the reporting of sexual assaults will inevitably lead to an increased number of convictions is an insufficient justification for abridging a defendant's constitutional rights. To justify categorical exclusion of relevant defense evidence in order to increase convictions is to either assume the defendant's guilt or allow the defendant to be hampered in his defense so that actual rapists can be convicted.[27]

However, the third purpose of the rape shield statute—preventing a woman's past sexual activity from suggesting her likelihood to consent on a subsequent occasion—remains valid when weighed against the defendant's attempt to introduce sexual conduct evidence. This purpose reflects the legislative judgment that a complainant's past sexual activity is irrelevant for determining her likelihood to consent to sex on a subsequent occasion. Thus, any evidence proffered by the defendant is by definition "irrelevant" if it

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22 *See* People v. Triplett, 485 N.E.2d 9 (Ill. 1985) (holding that the defendant's right to confront adverse witnesses trumps policy of protecting witnesses from exposure of juvenile criminal records). *See also* Davis v. Alaska, 415 U.S. 308, 320 (1974) ("[T]he State's desire that [the victim] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of [the accused] to seek out the truth in the process of defending himself.").

23 *See In Re Winship*, 397 U.S. 358, 364 (1970).

24 *See* Mullaney v. Wilbur, 421 U.S. 684, 706 (1975) ("[I]t is far worse to convict an innocent man than to let a guilty man go free.") (quoting *Winship*, 397 U.S. at 372 (Harlan, J., concurring)).

25 David H. Doherty, *"Sparing" the Complainant "Spoils" the Trial*, 40 C.R. 55, 65 (3d ed. 1984).

26 *Id.*

27 D.W. Elliot, *Rape Complainants' Sexual Experience with Third Parties*, CRIM. L. REV. 4, 14 (1984); *see also* Seaboyer v. The Queen, File No. 20666, at 82 (Can. Supreme Court 1991).

relies on the inference that the complainant consented to sexual conduct with the defendant because she had been sexually active in the past. Because no defendant has a constitutional right to present irrelevant evidence,[28] evidence of the alleged victim's sexual background is automatically inadmissible if offered to show her likelihood to consent.

This comment will address the validity of the purposes for which evidence of the alleged victim's sexual history may be used in Illinois, basing the evidence's admissibility on whether it relies on the propensity inference—the controversial stereotype that a woman who has previously engaged in consensual sexual activity will more likely consent to sexual activity on another occasion.[29] In addition, this comment will argue that the propensity inference attaches to the use of a complainant's sexual history to suggest that she did *not* consent to sexual activity with the accused. Accordingly, this comment will assert that evidence of the complainant's past sexual conduct that relies on the propensity inference should be excluded, and that such evidence, if it is relevant for any reason other than propensity to consent, should be admitted.

Part II of this comment will analyze two problematic features of the Illinois rape shield statute: the lack of judicial discretion in applying the statute and the statute's failure to address other potentially relevant uses of past sexual conduct evidence. In addition, this section will examine a recent holding by the Supreme Court of Illinois that strictly construed the application of the Illinois rape shield law, thereby mitigating some of the potentially troublesome effects of the law's failure to allow judicial discretion in implementing the statute. Part III of this comment will review the various purposes for which evidence of the complainant's past sexual conduct may be offered, the validity of each purpose under current Illinois law, and whether or not different uses of the evidence deserve statutory protection through an amendment to the Illinois rape shield statute. Part IV will outline the proposed amendments to the statute, which address the potentially valid uses of such evidence discussed in Part III of this comment. This comment concludes that the courts and legislatures must consistently reject evidence of the complainant's prior sexual conduct regardless of its purpose, if such evidence relies on the propensity inference. Further, this comment suggests

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28 *See* State v. Campos, 507 N.E.2d 1342, 1348 (Ill. App. 1987).

29 This discussion will not address the stereotype that equates promiscuity with lack of credibility; nearly every state has rejected this notion as outdated. *But see* S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985) (admitting evidence of adultery to impeach the complainant's credibility).

that sexual conduct evidence that does not rely on the propensity inference deserves statutory and judicial protection in concert with the fundamental principles of criminal due process.

II. The Illinois Rape Shield Statute

In 1978, the Illinois legislature enacted the Illinois rape shield statute.[30] This statute prohibits the introduction of any evidence of the alleged victim's past sexual behavior, except where that activity is between the alleged victim and the accused.[31] This statute affords the defendant an *in camera* hearing to present evidence of past sexual behavior between the complainant and the defendant.[32] The judge then decides whether the evidence proffered by the defense is sufficiently probative to be used at trial to impeach the alleged victim's testimony on the issue of her consent.[33]

This section will discuss two characteristics of the Illinois rape shield statute that raise questions about the law's effect on sexual assault trials. First, the law affords no discretion to the court in determining whether to prohibit evidence of the complainant's past sexual conduct. Second, the statute fails to acknowledge several legitimate purposes for which evidence of past sexual behavior could be used. Each of these characteristics suggests that application of the Illinois rape shield statute may impair the defendant's ability to receive a fair trial in sexual assault cases.

A. THE ABSENCE OF JUDICIAL DISCRETION

The Illinois rape shield statute is one of a minority of such laws that does not allow for judicial discretion in determining the propriety of the law's application at trial.[34] Under the statute, the judge may not balance the probative value of the evidence against its prej-

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30 Ill. Rev. Stat. ch. 38, para. 115-7 (1989).

31 Ill. Rev. Stat. ch. 38, para. 115-7(b) (1989). For a reading of the text, *see supra* note 18. In its presumptive exclusion of evidence of the complainant's past sexual behavior, the Illinois rape shield statute is similar to the majority of state rape shield laws, which Professor Galvin labels the "Michigan" model of rape shield statutes. *See* Galvin, *supra* note 4, at 812-76.

32 Ill. Rev. Stat. ch. 38, para. 115-7(b) (1989).

33 *Id.* The judge must find that the evidence is reasonably specific as to the date, time and/or place of the defendant's alleged previous sexual encounter with the complainant.

34 Eight other states have enacted rape shield laws depriving trial judges of discretion. *See, e.g.*, Ala. Code § 12-21-203(d) (Supp. 1985); Ga. Code Ann. § 24-2-3(C) (1982). The majority of state rape shield statutes require a balancing test of probative value and prejudicial effect, either explicitly or implicitly. *Compare* Mich. Comp. Laws Ann. § 750.520j (West Supp. 1985) (explicitly requiring the court to balance probative value of evidence with its prejudicial effect) *with* Wis. Stat. Ann. § 971.31(11) (West 1985) (merely providing that court must determine admissibility of evidence on pretrial

udicial effect.[35] Rather, if the evidence involves past sexual conduct between the complainant and the accused and is reasonably specific, the judge must admit the evidence, regardless of the reason proffered for its admission.[36] Similarly, if the evidence involves past sexual conduct between the complainant and someone other than the accused, the judge must exclude it.[37]

The results of the application of this mechanical rule may be startling. Consider a situation in which the complainant testifies that she has only engaged in consensual intercourse with her husband. The defendant seeks to impeach the complainant's testimony by introducing evidence that she has had sexual intercourse with others. Although the evidence is offered not to show her propensity to consent to intercourse, but rather to impeach the veracity of the complainant's testimony, the defendant would nonetheless be prohibited from introducing such evidence simply because the alleged partner is someone other than the accused. Regardless of the rape shield statute's purpose, a constitutionally based legal system should not countenance such an impairment of the defendant's right to confront a witness.[38]

The Illinois Supreme Court has resolved this dilemma, however, by applying the rape shield statute's prohibition to the prosecution as well as the defense. In *People v. Sandoval*,[39] the complainant testified that she had never previously engaged in anal intercourse with anyone other than the defendant.[40] To impeach

motion). For a summary of the features of each state's rape shield laws as of 1980, *see* Tanford & Bocchino, *supra* note 4, at 592-602.

35 *See* Galvin, *supra* note 4, at 813; Colleen M. Loftus, Comment, *The Illinois Rape Shield Statute: Privacy at Any Cost?*, 15 J. MARSHALL L. REV. 157, 174 (1982).

36 The automatic admissibility of evidence of prior sexual conduct with the accused is suspect in that it implies the same sexual propensity stereotypes discussed earlier in this comment. *See* note 29, *supra*, and accompanying text. The discretion a woman exercises in her sexual choices should not be confined to encounters with those with whom she has not previously had sexual contact. Simply put, the complainant could just as likely have withheld her consent to sexual activity with a former partner as she might with a "new" person. However, this discussion is outside the scope of this comment, which simply deals with the potential lack of protection to the criminal defendant due to the statute's overbroad prohibition of sexual conduct evidence.

37 ILL. REV. STAT. ch. 38, para. 115-7 (1989).

38 *See* ILL. CONST. 1970, art. I, § 8 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face. . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

39 552 N.E.2d 726 (Ill. 1990). For a concise discussion of *Sandoval*, *see* People v. Bell, 577 N.E.2d 1228 (Ill. App. 1991).

40 During the complainant's direct examination at trial, the following exchange occurred between the State's Attorney and the complainant:

"Q. Now, you had had anal sex with him before?

this testimony, the defense sought to introduce evidence that the complainant had consented to anal sex with third persons on several occasions in the past.[41] At trial, the court excluded this evidence on the grounds that it was barred by the Illinois rape shield statute.[42]

The Illinois Appellate Court reversed, holding that the defense's evidence should have been allowed to rebut claims made by the victim. The court reasoned that the rape shield statute should not be read to preclude evidence of the complainant's past sexual history when used as rebuttal evidence:

> Where the evidence is relevant and is introduced, not to harass the witness but only in a defensive response to the alleged victim's own initiative, the statute does not preclude an exception to the general protective umbrella it places over victims of sexual assault.[43]

The Illinois Supreme Court reversed the appellate court, reasoning that the appellate court's holding was inconsistent with the exclusionary nature of the rape shield statute.[44] The high court refrained from deciding whether a victim "opens the door" to evidence of past sexual conduct by testifying to such conduct. Instead, the court attacked the appellate court's creation of an exception to the rape shield statute, given the plain language of the law.[45] The court found that the language of the Illinois rape shield law does not distinguish between evidence of the victim's past sexual behavior brought by the prosecution and similar evidence brought by the defense.[46] Thus, the Illinois rape shield statute precludes the prosecu-

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A. Yes.
Q. And on how many occasions had he had anal sex with you?
A. Twice.
Q. And do you recall at whose request that occurred?
A. [Sandoval's].
Q. Had you ever had anal sex in the past?
A. With others?
Q. Yes, with other people.
A. No."

Sandoval, 552 N.E.2d at 728.

41 *Id.*

42 *Id.*

43 People v. Sandoval, 533 N.E.2d 980, 984-85 (Ill. App. 1989) (Nash, J.), *rev'd*, 552 N.E.2d 726 (Ill. 1990).

44 *Sandoval*, 552 N.E.2d at 730-31.

45 *Id.* The court reasoned that:

> [t]he language of the statute . . . is concise and precise. Resort to legislative history—the factors which prompted the rule—is necessary only when the statute is vague or ambiguous and clarification of the underlying intent is needed to assist interpretation of the language. . . .The rape shield statute is neither vague nor ambiguous.

46 *Id.* at 731 (Clark, J.) ("We note that the statute does not limit its proscription to a defendant's attempts to introduce evidence of the victim's prior sexual encounters. . . ."). *See* ILL. REV. STAT. ch. 38, para. 115-7(a) (1989) (". . .the prior sexual

tion, as well as the defense, from introducing evidence of the victim's past sexual behavior, or lack thereof.[47]

Sandoval's interpretation of the Illinois rape shield statute is consistent with the rejection of the propensity inference.[48] If evidence of the complainant's past sexual behavior is not generally relevant to whether she consented to sexual relations on any particular occasion, the prosecution should also be prohibited from introducing the evidence to prove that the alleged victim did *not* consent to sex.[49]

Thus, *Sandoval* mitigates the troubling effects of the absence of a judicial-discretion provision in the Illinois rape shield statute by denying use of past sexual conduct evidence to both sides. Notwithstanding the conclusion reached in *Sandoval*, the need for a more flexible rape shield statute will become apparent in the following section of this discussion.

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activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.").

47 *Sandoval*, 552 N.E. 2d at 731.

48 *See supra* note 29 and accompanying text. It has been suggested that a complainant should be permitted to waive the rape shield law's protection for two reasons. First, most complainants would not agree to a disclosure of their sexual past except to show a lack of sexual activity, similar to the complainant's claim in *Sandoval*, thereby avoiding the traditional propensity inferences surrounding alleged sexual assault victims. Second, the defendant would be entitled to admit rebuttal evidence, thereby providing another barrier to prejudice. *See* Galvin, *supra* note 4, at 857.

However, such an analysis assumes that the evil to be eradicated is limited to the inference that a woman will consent on a particular occasion because she consented in the past. As previously set forth, this comment has adopted a broader definition of the inference to include any evidence of past sexual conduct that attempts to predict the complainant's future sexual decisions. Thus, evidence of the complainant's lack of prior sexual conduct would violate this principle in that it implies that the complainant did not consent based on her non-consent in the past. *See infra* notes 151-81 and accompanying text.

49 The prosecution's use of past sexual behavior may be more suspect than the defense's use. The prosecution's use of the evidence would almost invariably be employed to show non-consent, while the defense would often only attempt to introduce such evidence to rebut what it alleges to be perjured testimony by the alleged victim. Thus, in order to remain faithful to the rejection of the outdated inference of propensity, the decision in *Sandoval* to forbid the prosecution from "opening the door" is a necessary one.

Another advantage of the *Sandoval* holding is that the defendant may not use the "open door" rebuttal to attempt to introduce evidence of the alleged victim's sexual history to suggest propensity. *See* 23 CHARLES A. WRIGHT & KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5386, at 562 (1980) (citing Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 17 (1976)):

> The remedy of the defense is to object when the complainant [makes a statement about her past sexual behavior]; [he] may not use the prosecution's violation of [the rape shield statute] as an excuse for further inquiry into the complainant's past sexual behavior.

B. LACK OF EXCEPTIONS

Aside from evidence of the alleged victim's sexual history with the accused, the Illinois rape shield statute does not provide any exceptions where evidence of the complainant's past sexual conduct is admissible in sexual assault trials.[50] Such exceptions might include evidence of the complainant's past sexual behavior that suggests alternative sources of certain physical consequences ascribed to an alleged attack;[51] evidence which demonstrates that the complainant had a motive to lie;[52] evidence which explains how a very young complainant might otherwise have knowledge of sexual behavior;[53] or evidence that shows the complainant consented to the sexual activity at issue.[54]

By creating a general prohibition against evidence of past sexual activity between the complainant and third persons, the Illinois rape shield statute fails to recognize that sexual conduct evidence may derive its relevancy from a source other than the propensity inference.[55] The statute proscribes the use of sexual history evidence without exception, when it should limit its prohibition to the *misuse* of this evidence to suggest that the complainant's general sexual background is predictive of her likelihood to consent on a future occasion.[56] As a result, the rape shield statute betrays the very policy which imbues the legislation: finding the truth and arriving at the correct verdict.[57]

Evidence of the complainant's past sexual behavior that does not derive its relevance from the propensity inference should be admissible. This principle will be applied throughout the remainder of this discussion, which studies the various purposes for introducing the complainant's sexual history in a sexual assault trial.

III. PURPOSES OF SEXUAL CONDUCT EVIDENCE IN ILLINOIS LAW

Evidence of the complainant's past sexual behavior with some-

50 *See* ILL. REV. STAT. ch. 38, para. 115-7 (1989). *See supra* note 18, for a reading of the relevant text.

51 *See infra* notes 58-95 and accompanying text.

52 *See infra* notes 96-118 and accompanying text.

53 *See infra* notes 119-41 and accompanying text.

54 *See infra* notes 142-222 and accompanying text.

55 *See* Seaboyer v. The Queen, File No. 20666 (Can. Supreme Ct. 1991), where the Supreme Court of Canada recently invalidated a rape shield statute similar to the one in Illinois, holding that the statute violated the defendant's right to a fair trial and his right to liberty "in accordance with the principles of fundamental justice." *See* CAN. CONST. pt. I (Canadian Charter of Rights and Freedoms), §§ 7, 11(d).

56 *See Seaboyer*, File No. 20666, at 84; Galvin, *supra* note 4, at 812.

57 *See Seaboyer*, File No. 20666, at 85.

one other than the accused may be relevant for several purposes other than to imply propensity to consent. This section will discuss how current Illinois law affects the admissibility of sexual conduct evidence when offered for these various purposes and will determine whether each of the uses of the evidence deserves exemption from the Illinois rape shield statute.

A. PROOF OF ALTERNATIVE SOURCE OF PHYSICAL CONDITION

A defendant in a sexual assault trial may attempt to offer evidence of the alleged victim's past sexual conduct with third persons to counter evidence of the complainant's physical condition, suggesting that the defendant had intercourse with the complainant.[58] For example, the prosecution may offer evidence of the enlargement of the complainant's hymen as proof of intercourse.[59] When offered, such evidence carries with it the presumption that the defendant caused the enlargement of the hymen through the alleged sexual assault.[60] This presumption would be especially strong with a very

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58 Several states have created exceptions in their rape shield statutes for evidence of the complainant's past sexual behavior when offered to provide an alternative reason for the complainant's physical condition. *See* FLA. STAT. ANN. § 794.022(2) (West Supp. 1985) (admissible to show source of semen, pregnancy, injury, disease); IND. CODE ANN. § 35-37-4-4(b)(2) (Burns 1985) (admissible to prove someone other than defendant committed sexual offense); ME. R. EVID. 412(b)(1) (admissible to show source of semen, injury); MD. CRIM. LAW CODE ANN. § 461(A) (1991) (admissible to show source of semen, pregnancy, disease, trauma); MASS. ANN. LAWS ch. 233, § 21B (Law. Co-op. 1985) (admissible to show conduct of the complainant is the cause of any physical feature, characteristic or condition of complainant); MICH. COMP. LAWS ANN. § 750.520j(1)(b) (West Supp. 1985) (admissible to show source of semen, pregnancy, disease); MINN. R. EVID. 404(c)(1)(B) (admissible to show source of semen, pregnancy, disease); MO. ANN. STAT. § 491.015(1)(2) (Vernon Supp. 1986) (admissible to show source of semen, pregnancy, disease); MONT. CODE ANN. § 45-5-511(4)(b) (1985) (admissible to show source of semen, pregnancy, disease); NEB. REV. STAT. § 28-321(2)(a) (Supp. 1984) (admissible to show source of any physical evidence including, but not limited to, semen, injury, blood, saliva and hair); N.C.R. EVID. 412 (admissible to show that act charged not committed by defendant); OHIO REV. CODE ANN. § 2907.02(D) (Baldwin 1986) (admissible to show source of semen, pregnanacy, disease); S.C. CODE ANN. § 16-3-659.1(1) (Law. Co-op. 1985) (admissible to show source of semen, pregnancy, disease); VT. STAT. ANN. tit. 13, § 3255(a)(3)(B) (Supp. 1985) (admissible to show source of semen, pregnancy, disease); VA. CODE ANN. § 18.2-67.7(A)(1) (Michie 1992) (admissible to show source of semen, pregnancy, disease, injury to complaining witness's intimate parts).

59 *See, e.g.*, United States v. Shaw, 824 F.2d 601 (8th Cir. 1987). This highly criticized case held that the complainant's enlarged hymen did not fall within the "injury" exception to the federal rape shield statute, *see* FED. R. EVID. 412, and therefore the defense was properly precluded from admitting evidence that other sexual partners were indeed the cause of the enlarged hymen.

60 Of course, evidence such as an enlarged hymen, which merely proves intercourse, would be probative only when the defense was non-occurrence, as opposed to a defense of consent.

young complainant who is far less likely to be sexually active.[61]

Illinois courts have recently recognized the need for evidence of past sexual conduct to explain certain physical conditions of the complainant. In *People v. Mason*,[62] the defendant was convicted of two counts of aggravated criminal sexual assault of a seven-year-old girl.[63] At trial, the prosecution admitted evidence of irregularities in the complainant's hymenal ring.[64] When the defendant sought to explain the source of the irregularity through testimony that the complainant inserted crayons and other items in her vagina, the trial court ruled the evidence inadmissible under the Illinois rape shield statute.[65]

The Illinois Appellate Court reversed, holding that the exclusion of the proffered evidence denied the defendant his constitutional right to confront an adverse witness.[66] The court reasoned that the purposes of the rape shield statute—preventing humiliation of the complainant and encouraging the reporting of sexual offenses—could not justify denying the defendant his right to present critical evidence.[67]

Evidence of an enlarged hymen is by no means the only physical condition for which evidence of past sexual conduct may be relevant in sexual offense trials. Other evidence which bears on the outcome of these trials includes the presence of semen in the complainant's vagina[68] and the existence of a sexually transmitted disease.[69] To date, no Illinois court has decided whether these types of evidence deserve exemption from the Illinois rape shield statute's proscription.

A closely related example of physical consequence evidence is that of the complainant's pregnancy. This evidence merits separate

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61 For example, the complainant in *Shaw* was 11 years old. *Shaw*, 824 F.2d at 602.

62 578 N.E.2d 1351 (Ill. App. 1991).

63 ILL. REV. STAT. ch. 38, para. 12-14(b)(1) (1989).

64 *Mason*, 578 N.E.2d at 1353.

65 *Id.* *Mason* presents a more difficult issue of admissibility than some cases might because it is unclear whether evidence of masturbation with a foreign instrument falls within the proscriptive scope of the Illinois rape shield statute. To be sure, one's self is "someone other than the accused," but is masturbation considered "sexual activity" within the meaning of the statute? Fortunately, this question need not be resolved, because admitting this evidence is nonetheless necessary to explain the source of the complainant's physical condition.

66 *Id.* (citing Chambers v. Mississippi, 410 U.S. 284 (1973)).

67 *Id.* The court, while acknowledging the commendable purposes behind the statute, wrote that "[t]he rape shield statute should be construed and applied so as to uphold the constitutional rights of the defendant." *Id.* at 1354 (citing Summitt v. Nevada, 697 P.2d 1374, 1376 (Nev. 1985)).

68 *See* State v. LaClair, 433 A.2d 1326 (N.H. 1981).

69 *See* Brown v. State, 327 S.E.2d 515 (Ga. App. 1985).

discussion because it is rarely offered as "evidence"[70] but may often be plainly visible to the jury.[71] Similar to other evidence of physical condition, the complainant's pregnancy may carry with it an inference that the defendant is responsible. In a case where the defendant denies that he engaged in intercourse with the complainant,[72] and where the timing of the sexual offense trial and the alleged attack are such that the complainant could be carrying the defendant's child at the time of trial, it could be reasonable for the jury to infer that the defendant is the father of the unborn child.

The Illinois courts have yet to address the question of whether the defense may introduce evidence of the complainant's past sexual behavior to rebut an inference that the defendant is responsible for the complainant's pregnancy.[73] However, the United States Court of Appeals for the Seventh Circuit addressed the issue[74] while interpreting the Indiana rape shield statute.[75] In *Moore v. Duckworth*, the defendant was convicted of a sexual offense under Indiana law.[76] At

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70 *But see* United States v. Duran, 886 F.2d 167, 168 (8th Cir. 1989) (prosecutor asked the complainant on the witness stand, "Did there come a time in February of '87 that you had your baby. . .?").

71 *See* Moore v. Duckworth, 687 F.2d 1063 (7th Cir. 1982) (trial court attempted to conceal complainant's pregnancy from the jury by removing jury every time complainant stood up).

72 In many cases, the defendant does not deny intercourse but instead claims that it was consensual. Conceivably, the complainant's pregnancy could also be used by the accused, if the accused admitted to fathering the child, to imply consent. The defendant could posit that if the complainant did not consent to sexual relations, she would have aborted the child that resulted from the intercourse. This reasoning would rely on three assumptions: first, that it was the intercourse at issue that resulted in conception (if the defendant claimed that he had engaged in intercourse with the complainant at times other than the occasion at issue, a claim which could be supported with evidence under the current Illinois rape shield statute); second, that the woman does not plan in the future to abort the fetus; and third, that the woman's refusal to abort is based on her consent to the intercourse that conceived the fetus. Even if such a case arose, however, this use of the evidence would not involve the rape shield statute, as the defendant's claim of consent would be based on the woman's pregnancy, not on her prior sexual history with other partners.

73 This is not to say that the issue of pregnancy in a trial for sexual assault has never arisen, but rather it did not arise as an inference that the defendant was responsible for the pregnancy. *See* People v. Gray, 568 N.E.2d 219 (Ill. App. 1991) (evidence of complainant's alleged fear of pregnancy by third party offered as motive for complainant to fabricate charge of sexual assault).

74 *See* Moore v. Duckworth, 687 F.2d 1063 (7th Cir. 1982).

75 IND. CODE § 35-1-32.5-1 (1978). Under the then-existing Indiana rape shield statute, evidence of the complainant's past sexual conduct, through specific acts, reputation or opinion, was generally not admissible. A separate provision created two exceptions: evidence of past sexual conduct with the accused or evidence that someone else committed the crime. IND. CODE § 35-1-32.5-2 (1978).

76 *Duckworth*, 687 F.2d at 1063. The defendant was convicted under IND. CODE ANN. § 35-42-4-1 (Burns 1979).

the time of trial, the complainant was about six months pregnant with a child fathered by her boyfriend.[77] Acting on the prosecution's motion, the trial court prohibited any reference to the pregnancy or prior sexual conduct between the complainant and her boyfriend.[78] The court took great strides to keep the fact of the complainant's pregnancy from the jury.[79]

The Indiana Supreme Court affirmed the conviction, holding that "(a)ny evidence of the victim's past sexual conduct, including the fact of this victim's pregnancy," was precluded by the rape shield statute, and therefore the trial court properly granted the state's motion *in limine*.[80] The court noted that the defendant could have simply opposed the motion and moved for a continuance until the complainant gave birth.[81] More importantly, the court found that, notwithstanding the defendant's protests on appeal, there was no conclusive evidence that any jurors knew of the complainant's pregnancy.[82]

The United States Court of Appeals for the Seventh Circuit, hearing the case on a petition of *habeus corpus*, reluctantly affirmed, criticizing the Indiana Supreme Court's refusal to create an excep-

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77 *Duckworth*, 687 F.2d at 1063.

78 Moore v. State, 393 N.E.2d 175, 177 (Ind. 1979). This case is the Indiana Supreme Court case, which was later appealed on a writ of *habeus corpus* to federal court and ultimately reached the Seventh Circuit as Moore v. Duckworth, 687 F.2d 1063 (7th Cir. 1982).

79 [The complainant] was seated close to the prosecutor's counsel table with a coat over her lap at one point in the trial. She never stood up in the presence of the jury. The jury was excused whenever [the complainant] had to leave or enter the courtroom—at least five different occasions during the trial. The court did not allude in any way to the reason why the jury was being excused. When she took the stand, [the complainant] was sworn in, then the jury was brought into the courtroom and the judge told them that she had already taken the oath. The first time the judge excused the jury for the purpose of [the complainant]'s exit, he said:

'Now, there will be a number of questions in your mind about what is going on. That occurs in every trial. We can't give you an explanation now. Keep these in the back of your mind and at the end of jury service, all your questions will be answered. . . . I see some questions on some of your faces. Don't worry about it until—I will tell you what happened after it is all over and the reasons why it is being done the way it is. All right.'

Duckworth, 687 F.2d at 1063.

80 Moore v. State, 393 N.E.2d 175, 177 (Ind. 1979).

81 *Id.* at 176.

82 *Id.* The court stated:

Defendant's allegation of error demands an assumption that the jurors were aware of [the complainant's] pregnancy. There is no evidence in the record showing what the jury thought. There never is. However, we would be speculating to say that the jury became aware of the victim's pregnancy. . . . If defendant had established direct evidence that one or more jurors became aware of the victim's pregnant condition, we would reach a different result here.

Id. at 177 (Hunter, J.). The court made this finding despite the fact that one of the jurors asked to see the complainant stand at one point during the trial, a request which the trial court denied. *Id.*

tion to the Indiana rape shield statute.[83] The court wrote:

> To us, a stipulation or judicial instruction that [the complainant's] pregnancy was due to someone other than [the defendant] would hardly seem to be "evidence of the victim's past sexual conduct" of the sort that the [Indiana] Rape Shield Law was designed to make inadmissible. In any event, a narrow judge-made exception from the rape shield law for cases like this would seem appropriate. . . .[84]

The Seventh Circuit also criticized the Indiana Supreme Court's suggestion that the defendant could have moved for a continuance, given that the defendant remained imprisoned pending trial.[85] Nevertheless, the circuit court, bound both by the state supreme court's reading of its rape shield statute and by the trial court's finding that the jury did not know the complainant was pregnant, held that the defendant had not proved prejudice.[86]

Duckworth and the other cases discussed above illustrate the types of physical evidence that may be necessary to the prosecution's case as corroboration of the complainant's testimony.[87] Yet this evidence may also imply that the defendant is to blame for the physical consequence. Given the possibility of this inference, the defendant should be permitted to rebut such evidence by showing that someone or something[88] else was responsible for the physical condition.[89]

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83 Moore v. Duckworth, 687 F.2d 1063, 1065 (7th Cir. 1982).

84 *Id.* (Cummings, J.).

85 Given that [the complainant] was approximately six months pregnant at the time of trial and allowing another month after birth for [the complainant's] recovery and rescheduling of the trial, [the defendant] would have had to wait in jail an extra four months until he could be tried. . . . Four months in jail is a high premium to pay for the right of avoiding the prejudice of [the complainant's] pregnancy compared to what would seem to be the simple and immediate way of dispelling the potential prejudice by telling the jury the truth.

Duckworth, 687 F.2d at 1065 (Cummings, J.).

86 *Id.* This comment does not address the efficacy of attempting to conceal a sexual assault complainant's pregnancy from the jury. While the purpose behind the concealment is admirable, the efficacy of such an attempt, as *Duckworth* illustrates, is dubious.

87 As stated earlier, pregnancy is sometimes not offered as evidence or discussed in testimony. However, evidence of semen, injury, disease or any other physical consequence of an alleged sexual assault is usually quite helpful to the prosecution.

88 *See* People v. Mason, 578 N.E.2d 1351 (Ill. App. 1991) (enlarged hymen allegedly caused by penetration of crayon).

89 Another alternative is available: all evidence of the complainant's physical condition could be banned. While this possibility would ensure a fair trial to the defendant, it would have the effect of prohibiting a broad category of highly relevant evidence from the prosecution's use. Considering that prosecutions for sexual assault often rest almost solely on the testimony of the complainant, *see, e.g.*, In Interest of C.K.M., 481 N.E.2d 883 (Ill. App. 1985), such corroborating evidence may be essential to effective prosecution (though not *legally* necessary, as a sexual assault complainant's testimony need not be substantially corroborated. People v. Judge, 582 N.E.2d 1211 (Ill. App. 1991)). Any resulting prejudice to the defendant could then be mitigated, as this comment will advo-

The Seventh Circuit's suggestion in *Duckworth*, that a court employ a simple judicial instruction explaining that the defendant is not responsible for the pregnancy to remove the taint of "pregnancy" evidence, fairly resolves this problem[90] when the acknowledged father of the fetus is someone other than the defendant.[91] This judicial instruction would not rely on the impermissible inference that the complainant is sexually promiscuous and therefore consented to sexual conduct with the defendant. Instead, the instruction would serve only to dispel an unfair presumption against the defendant raised by the prosecution's evidence.[92]

Unfortunately, the defendant's attempts to disprove his responsibility for physical conditions of the complainant—such as increased vaginal size, the presence of semen or the contraction of a sexually transmitted disease[93]—is likely to incite prejudice among

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cate, by the defense's introduction of the complainant's past sexual behavior to provide an alternative source for the physical condition.

90 Indeed, in 1983, shortly after the decision in *Duckworth*, the Indiana legislature amended the state's rape shield statute to include, *inter alia*, evidence that the defendant was not the cause of the complainant's pregnancy. *See* IND. CODE ANN. § 35-37-4-4(b)(3) (Burns 1985).

91 If the sexual assault trial was sufficiently removed from the time of the alleged attack so that the defendant could not have fathered the fetus, the court may wish to conceal the complainant's pregnancy to remove the propensity inference that the obviously sexually active complainant consented to the sexual activity at issue. While the efficacy of such a concealment is dubious, *see* Moore v. State, 393 N.E.2d at 177, the attempt is admirable and does not implicate the defendant's constitutional rights.

92 In cases where the prosecution refuses to stipulate that a third party was responsible for the pregnancy, the defense undoubtedly will want to introduce substantive examples of the complainant's past sexual conduct to rebut the inference that the defendant is the father. *See* Shockley v. State, 585 S.W.2d 645 (Tenn. Crim. App. 1978). The resulting explanatory evidence, however, could be more susceptible to the propensity inference than the mere stipulation of the father's identity. Therefore, assuming the defendant proffers sexual conduct evidence, the prosecution will have an incentive to agree to the stipulation when the defendant is clearly not the father. Where it is unclear who is responsible for the pregnancy, the inference that the defendant is responsible is not necessarily an unreasonable one, for he may indeed be responsible. In such cases, the defendant must be permitted to address the inference.

93 Of course, it is possible that the complainant would have contracted a sexually transmitted disease prior to the alleged attack, in which case a stipulation explaining this fact would suffice. Moreover, in that scenario, it is unlikely that evidence of this disease would even be relevant to the case. Conceivably, evidence of a sexually transmitted disease could be offered on the issue of consent; the prosecution could theorize that the complainant would be less likely to consent to sexual intercourse given her disease, and the defendant could argue that the "spiteful" complainant engaged in sexual acts to spread her disease (the latter proposition would clearly require additional evidence of the complainant's state of mind and behavior following her contraction of the disease). It is unlikely, however, that evidence of a sexually transmitted disease, admittedly transferred to the complainant by someone other than the defendant, would be admissible under the Illinois rape shield statute, given the Illinois courts' liberal reading of the phrase "past sexual behavior." *See* People v. Kemblowski, 559 N.E.2d 247, 250 (Ill.

the jurors.[94] If the prosecution introduces such physical evidence, however, the defense must have an opportunity to rebut any prejudicial inferences that this evidence may suggest to the jury. Where the relevancy of rebuttal evidence does not rest on the propensity inference, the Illinois rape shield statute should not preclude the evidence's admission.[95]

B. PROOF OF MOTIVE TO FABRICATE

The defendant may also offer evidence of the complainant's prior sexual activity with third parties to show the complainant's motive to fabricate a sexual assault charge.[96] Both the Illinois and United States Supreme Courts have held that the defendant's right to expose an adverse witness's bias or motive to testify falsely must supersede the policies underlying statutory or common law rules aimed at protecting these witnesses at trial.[97] Recently, the Illinois Appellate Court addressed the use of past sexual conduct evidence

App. 1990) (holding that evidence that complainant is a lesbian, although characterized by prosecution as evidence of "sexual status" rather than sexual activity, nonetheless refers by definition to the complainant's sexual activities and is inadmissible under the Illinois rape shield statute).

94 "Such evidence allows stereotype and myth to enter into the equation and sidetracks the search for the truth." Seaboyer v. The Queen, File No. 20666, at 225 (Can. Supreme Ct. 1991) (L'Heureux-Dubé, J., dissenting).

95 *But see* Brown v. State, 327 S.E.2d 515, 516-17 (Ga. App. 1985) (excluding evidence that complainant's vaginal infection was caused by a third party); State v. Peyatt, 315 S.E.2d 574, 576 (W. Va. 1983) (excluding evidence to explain why complainant's vagina was "obliterated" and "look[ed] like that of a married woman."), *cited in* Galvin, *supra* note 4, at 824 n.300. *See also* United States v. Shaw, 824 F.2d 601 (8th Cir. 1987) (precluding defendant from explaining alternate source for complainant's enlarged hymen).

96 Two states have created exceptions to rape shield statutes for evidence of past sexual behavior to show motive to falsify charges of sexual assault. *See* MD. ANN. CODE art. 27, § 461A(a)(3) (1982); VA. CODE ANN. § 18.2-67.7(B) (Michie 1982). Professor Galvin notes that a third state, North Carolina, provides an exception for "specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant. . . ." N.C.R. EVID. 412. This provision appears to be broad enough to encompass evidence offered to show motive to fabricate testimony. Galvin, *supra* note 4, at 826 n.316.

Other courts have carved out an exception to their respective rape shield laws to admit past sexual conduct evidence to show a complainant's bias. *See* Commonwealth v. Black, 487 A.2d 396 (Pa. Super. 1985); State v. LaClair, 433 A.2d 1326 (N.H. 1981); Marion v. State, 590 S.W.2d 288 (Ark. 1979); State v. Jalo, 557 P.2d 1359 (Or. App. 1976) (*en banc*); Maryland v. Delawder, 344 A.2d 446 (Md. App. 1975).

97 *See* People v. Triplett, 485 N.E.2d 9 (Ill. 1985) (holding that, notwithstanding policy of precluding juvenile crimes as impeachment evidence, defendant's right to confrontation prevails when juvenile criminal charges could still be reinstated against witness, thereby exposing witness's bias to testify favorably for prosecution); Davis v. Alaska, 415 U.S. 308, 316 (1974) (defendant is entitled to confront his witnesses concerning possible motive to fabricate testimony to protect his probationary status, notwithstanding state policy against use of juvenile records for impeachment).

with third parties to expose a witness's bias.[98] In *People v. Gray*,[99] the defendant was convicted of aggravated criminal sexual assault.[100] At trial, the defense sought to introduce evidence that the complainant filed the sexual offense charges because she feared she had become pregnant by her boyfriend—of whom her mother disapproved—and wanted an excuse for the pregnancy.[101]

At *in camera* hearings, defense counsel elicited evidence from both the complainant and other witnesses that the complainant had expressed to her friend the fear that she was pregnant and that her mother would disapprove of her pregnancy.[102] The complainant further testified, however, that she had several menstrual periods between the time she expressed her fear of being pregnant and the alleged sexual assault.[103] The trial court, accepting the complainant's testimony, excluded the *in camera* testimony for failure to show a motive to fabricate, reasoning that the menstrual periods removed any fear of pregnancy.[104]

The Illinois Appellate Court reversed, holding that the trial court's exclusion of the motive evidence was "manifestly prejudicial" to the defendant.[105] The court reasoned that the proffered evidence was critical to the defense's theory that the complainant was fabricating the sexual assault charges.[106] Therefore, the trial court's refusal to allow the motive evidence violated the defendant's right to confront adverse witnesses under the Illinois[107] and United States Constitutions.[108]

Thus, Illinois courts recognize the admissibility of evidence concerning a complainant's past sexual behavior when offered to prove her motive to fabricate sexual offense charges. However, the use of sexual conduct evidence to establish a motive to fabricate is not free from attack. Justice L'Heureux-Dubé of the Canadian Supreme Court argues that the relevancy of past sexual conduct of-

98 *See* People v. Gray, 568 N.E.2d 219 (Ill. App. 1991).

99 *Id.*

100 *Id. See* ILL. REV. STAT., ch. 38, para. 115-7 (1989).

101 *Gray*, 568 N.E.2d at 219.

102 *Id.* at 221-23.

103 *Id.* at 222.

104 *Id.* The court did not base its ruling on the application of the rape shield statute. Rather, the court held that the defense had failed to lay a proper foundation for a prior inconsistent statement during the complainant's cross-examination.

105 *Id.* at 223.

106 *Id.*

107 ILL. CONST. 1970, art. I, § 8 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face. . . .").

108 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

fered to prove a motive to fabricate merely promotes a different stereotype of women: "that they lie about sexual assault and that women who allege sexual assault often do so in order to get back in the good graces of those who may have her sexual conduct under scrutiny."[109] If, indeed, this stereotype drives motive evidence, then acceptance of the evidence would seemingly turn back the clock to the days where society viewed sexual assault complainants with skepticism, fearing that these women might falsely accuse men of a sexual offense to conceal their promiscuity or as a tool of spite.[110]

Motive evidence, however, does not derive its strength from the notion that women usually, or even often, lie about sexual assault. Rather, motive evidence merely permits an inference of fabrication by providing specific facts to support the context of that suggestion. Indeed, the argument that such evidence must be precluded to avoid another female stereotype is itself overbroad. The suggestion that sexual conduct evidence would *never* be relevant to the complainant's motive to fabricate sexual assault charges necessarily relies on the presumption that women would *never* lie about sexual assault to conceal sexual activity, notwithstanding specific evidence suggesting fabrication.[111] Consider again *People v. Gray*:[112] Justice L'Heureux-Dubé could not entirely rule out the possibility that the alleged victim fabricated the complaint in order to conceal the fact that she was sleeping with her boyfriend, given her statements to friends expressing fear of her mother's disapproval.[113] Nor could the jurist maintain that the only evidentiary weight this motive evidence holds is a general stereotype about women, in light of the defendant's specific evidence relating to fabrication.

Moreover, the fact that motive evidence is comprised of a complainant's past sexual activity is simply incidental. The sexual conduct evidence is relevant only insofar as it is part of a theory detailing how the complainant formed the motive to lie about the alleged sexual assault. However, to say that the existence of sexual activity is not the focus of the explanation is *not* to say that the theory could be just as effective *without* the sexual activity.[114] If this motive evidence were admissible only to the extent that it did not

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109 Seaboyer v. The Queen, File No. 20666, at 219 (Can. Supreme Ct. 1991) (L'Heureux-Dubé, J., dissenting).

110 *See supra* note 6 and accompanying text.

111 *See, e.g., Gray*, 568 N.E.2d at 221-23.

112 568 N.E.2d 219; *see supra* note 98 and accompanying text.

113 *See Gray*, 568 N.E.2d at 221-23.

114 In some cases, the complainant's bias may be demonstrated without introducing the past sexual conduct that is part of the defense's theory. *See* People v. Newman, 462 N.E.2d 731 (Ill. App. 1984) (holding that evidence that the defendant kicked complain-

include sexual conduct, the probative value of the evidence would be greatly diminished. In *People v. Gray*, the defendant would be reduced to saying, in effect, "The complainant had a reason to fabricate this sexual assault charge, but I can't say why or produce any corroborating evidence."[115] Obviously, this empty argument would not convince most juries that the complainant had a motive to lie. The preclusion of the past sexual conduct evidence would deny the defendant his right to expose the witness's bias or motive to fabricate;[116] to deny him a convincing and integral part of the defense, by omitting any reference to sexual conduct, would be to effectively deny him the defense altogether.[117]

Therefore, the Illinois rape shield statute should be amended to incorporate an exception already recognized by the state's courts: the admission of evidence of past sexual behavior to show the complainant's motive to fabricate sexual offense charges.[118] While such evidence would reflect upon the credibility of the complainant, it would not rely on the propensity inference or other manipulative sexual stereotypes. Instead, this challenge to a complainant's veracity would draw its evidentiary weight from specific facts which show that the complainant has a motive to fabricate the charges of sexual assault.

C. PROOF OF ALTERNATIVE SOURCE OF EXPERIENTIAL KNOWLEDGE OF SEXUAL CONDUCT

When a defendant is charged with sexual misconduct with a minor,[119] he may wish to offer evidence of the complainant's past sexual conduct to explain the minor's ability to describe sexual acts.

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ant out of his home is sufficient to establish bias, without additional evidence that defendant kicked complainant out because she was a prostitute).

115 *See* Seaboyer v. The Queen, File No. 20666, at 77 (Can. Supreme Ct. 1991).

116 *See* People v. Triplett, 485 N.E.2d 9 (Ill. 1985) (when defendant attempts to expose witness's bias to testify favorably for prosecution, defendant's right to confront his witnesses trumps policy of state to exclude evidence of juvenile crimes.). *See also* Davis v. Alaska, 415 U.S. 308, 316 (1974) (defendant is entitled to confront his witnesses concerning possible motive to fabricate testimony to protect his probationary status, notwithstanding state policy against use of juvenile records for impeachment).

117 Doherty, *supra* note 25, at 67 ("If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.").

118 Evidence of past sexual behavior offered to prove motive could consist of past sexual conduct between the complainant and the accused, which Illinois's rape shield statute already allows.

119 According to a recent study, the majority of sexual assaults occur during childhood and adolescence. On average, 29% of all forcible sexual assaults occur when the victim is less than 11 years old, while another 32% occur between the ages of 11 and 17. *Rape in America*, *supra* note 14, at 3.

Where the complainant possesses detailed knowledge of sexual conduct at a very young age, the jury could infer that this knowledge emanated from the defendant's alleged sexual activity with the minor. This proposition was perhaps best articulated by the Supreme Court of New Hampshire: "[T]he average juror would perceive the average twelve-year-old as a sexual innocent. Therefore, it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it."[120]

Illinois courts recognize the relevancy of evidence offered to explain a complainant's independent knowledge of sexual activity.[121] However, unlike a case where this knowledge emanates from viewing pornographic videos,[122] the Illinois courts are not willing to admit such evidence when the knowledge is derived from previous sexual experience. For example, the defendant in *People v. Campos*[123] attempted to introduce evidence that the eleven-year-old complainant, through previous sexual conduct, had gained knowledge of sex prior to the alleged encounter with the defendant.[124] The trial court excluded the evidence of such past sexual conduct under the Illinois rape shield statute, and the defendant was ultimately convicted.[125] An Illinois appellate court affirmed, rejecting the defendant's contention that evidence of the complainant's past sexual conduct should be admissible to prove the complainant's independent knowledge of sex.[126] The court dismissed this evidence as an "irrelevant [matter] with little or no probative value."[127]

The holding in *Campos* is inconsistent with the thesis of this comment, that evidence of the complainant's prior sexual conduct should be admissible where it does not rely on the propensity inference for its relevancy.[128] The inference of propensity to consent

120 State v. Howard, 426 A.2d 457, 462 (N.H. 1981) (Brock, J.).

121 *See* People v. Mason, 578 N.E.2d 1351 (Ill. App. 1991). In *Mason*, a defendant on trial for criminal sexual assault of a seven-year-old girl attempted to explain the complainant's knowledge of sexual activity by introducing evidence that the complainant had watched pornographic videos. The trial court excluded the evidence, and the defendant was convicted of two counts of criminal sexual assault. An appellate court of Illinois reversed, holding that such evidence was critical to the defense's theory that sexual conduct between the complainant and the defendant never took place.

122 *See id.*

123 507 N.E.2d 1342 (Ill. App. 1987).

124 *Id.* at 1348.

125 *Id.*

126 *Id.*

127 *Id.*

128 *See supra* note 29 and accompanying text. The appellate court in *Campos* deferred to the findings of the trial court regarding the weight of the sexual conduct evidence. However, without addressing the content of the proffered knowledge evidence, the ap-

does not arise when evidence of a minor's past sexual conduct is introduced in Illinois because state law does not acknowledge a minor's capacity to consent to sexual conduct.[129] A defendant[130] is

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pellate court continually characterized the evidence as "irrelevant," implying that the evidence could under no circumstances be relevant. This insensitivity to the defendant's rights is especially shocking considering that the court, rather than simply deferring to the statute, recognized its power to create an exception to the rape shield statute when necessary to ensure "the integrity of the fact-finding process." People v. Campos, 507 N.E.2d 1342, 1348 (Ill. App. 1987) (*quoting* Berger v. California, 393 U.S. 314, 315 (1969)). Despite this recognition, the court nonetheless failed to recognize an exception that did not fall within the traditionally-protected evidentiary areas of interest, bias or motive to testify falsely. *Id.* at 1349.

[129] People v. Barfield, 543 N.E.2d 157, 161 (Ill. App. 1989) (consent of minor victim is not a valid defense to a charge of criminal sexual assault of complainant under 13 years of age); In Interest of C.K.M., 481 N.E.2d 883, 888 (Ill. App. 1985) (six-year-old girl is conclusively presumed to be unable to legally consent to an act of carnal knowledge).

Where each of the four Illinois Criminal Code sections on sexual offenses addresses sexual activity with minors, none requires that the sexual act take place "by the use of force or threat of force," thereby precluding the consent defense:

> Criminal Sexual Assault. [a] The accused commits criminal sexual assault if he or she: . . . [3] commits an act of sexual penetration with a complainant who was under 18 years of age when the act was committed and the accused was a family member; or [4] commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim . . . ;

ILL. REV. STAT. ch. 38, para. 12-13(a)(3), (4) (1988)

> Aggravated Criminal Sexual Assault . . . [b] The accused commits aggravated criminal sexual assault if: [1] the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed; or [2] the accused was under 17 years of age and [i] commits an act of sexual penetration with a victim who was under 9 years of age when the act was committed . . . ;

ILL. REV. STAT. ch. 38, para. 12-14(b)(1), (2) (1988)

> Criminal Sexual Abuse . . . [b] The accused commits criminal sexual abuse if the accused was under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who was at least 9 years of age but under 17 years of age when the act was committed. [c] The accused commits criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was less than 5 years older than the victim . . . ;

ILL. REV. STAT. ch. 38, para. 12-15(b), (c) (1988)

> Aggravated Criminal Sexual Abuse . . . [b] The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a complainant who was under 18 years of age when the act was committed and the accused was a family member. [c] The accused commits aggravated criminal sexual abuse if: [1] the accused was 17 years of age or over and [i] commits an act of sexual conduct with a victim who was under 13 years of age when the act was committed . . . ; [2] the accused was under 17 years of age and [i] commits an act of sexual conduct with a victim who was under 9 years of age when the act was committed . . . ; [d] The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim . . . ; [f] The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or

guilty of a sexual offense if he engages in sexual activity with a minor, regardless of the minor's willingness to participate.[131] Thus, the propensity inference is inapplicable, and the admission of evidence of the complainant's past sexual behavior to explain her independent knowledge of sex is consistent with the spirit of the Illinois rape shield statute.[132]

In opposition to the use of knowledge evidence, one jurist has suggested that the relevancy of this evidence is rooted in the myth that females of any age lie about sexual assault.[133] This argument is misplaced, for two reasons. First, a very young complainant could easily be confused about the occurrence of sexual abuse, in contrast to a child who attempts to manipulate her sexual activity against the accused.[134] Because of a child's potential misunderstanding of events, the evidence of past sexual activity is not necessarily offered to prove that the complainant is lying.[135] Second, rather than an attempt to "sling mud" at the complainant, the introduction of prior sexual experience evidence is a defensive response to the almost in-

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over and held a position of trust, authority or supervision in relation to the victim. . . .

ILL. REV. STAT. ch. 38, para. 12-16(b), (c), (d), (f) (1988).

130 This comment assumes for these purposes that the defendant, in a case involving sexual conduct with a minor, is himself of the requisite age to be charged with the crime. For a description of the age requirements of the defendant in sexual offense crimes, *see supra* note 129.

131 *See* ILL. REV. STAT. ch. 38, para. 12-17 (consent may be raised as defense only to those offenses where force or threat of force is an element). The one defense available to the defendant, in limited cases, would be that he reasonably believed that the complainant was of age to legally consent. *See* ILL. REV. STAT. ch. 38, para. 12-17(b).

132 This discussion is concerned solely with the inference of propensity in sexual conduct evidence; it does not address the compelling concern of children who may be subjected to potentially devastating probes into memories of sexual abuse. *See* People v. Arenda, 330 N.W.2d 814, 818 (Mich. 1982) (quoted in Galvin, *supra* note 4, at 867 n.491) Such trauma is particularly exacting when past sexual conduct evidence is offered to show knowledge of sex: when the defense attempts to explain that the complainant has independent means for her ability to vividly describe the alleged sexual encounter, the details of the proffered sexual conduct evidence must be sufficiently specific to correspond to the details of the complainant's testimony. Despite the inevitable trauma to the child, courts have acknowledged that the defendant's right to confront witnesses with highly probative evidence must not be curtailed. *See* State v Howard, 426 A.2d 457, 460 (N.H. 1981). Further, the defense will attempt to admit knowledge evidence, in most cases, only after the child has testified to the alleged sexual encounter with the defendant. Consequently, the harm caused by this line of inquiry, while disturbing to the child, would merely be incremental.

133 Seaboyer v. The Queen, File No. 20666, at 219 (Can. Supreme Ct. 1991) (L'Heureux-Dubé, J., dissenting).

134 For a case involving a "spiteful" complainant, *see* State v. Jalo, 557 P.2d 1359 (Or. App. 1976) (en banc) (complainant was ten years old).

135 If the defense offered this knowledge evidence to argue that the complainant was lying, it should be required, as a prerequisite to admissibility, to offer evidence of a motive to lie. See *infra* notes 141-42 and accompanying text for discussion of this point.

escapable inference that arises from the complainant's testimony: the belief that the only reason the young complainant can describe these sexual acts is because the defendant engaged in these acts with the complainant.

Once the decision is made that a minor's prior experiential knowledge of sex should be admissible as evidence, however, there remains the vital question of the age at which a complainant achieves the intellectual maturity to provide a detailed description of a sexual encounter without having engaged in one herself. After the complainant has reached such an age, the presumption that the knowledge is attributable to the defendant's misconduct should not be present because the complainant would simply be aware of sexual activity from the outside world. For example, one might expect that a twenty-year-old woman in modern society could be able to provide a fairly detailed description of a sexual encounter, even if this woman has never engaged in the act herself. But what of a twelve-year-old? An eight-year-old?

The Illinois sexual offense statutes provide some guidance on this issue. The age ceilings these statutes impose upon a child's ability to legally consent to sexual acts are either eighteen,[136] seventeen,[137] thirteen[138] or nine,[139] depending on the age of the accused and the relationship of the accused to the complainant. The admissibility of past sexual conduct evidence to explain the complainant's knowledge of sex should mirror these age requirements. By following the same age requirement as that for the sexual offense, sexual conduct evidence will *only* be admitted where the complainant is legally incapable of giving consent. In this way, evidence of a minor's past sexual experience could not rely on the invidious inference of propensity to consent.

However, this limit on the use of knowledge evidence should act only as the outer boundary of admissibility; that is, although the evidence would be admissible *only* in cases where the complainant is legally incapable of giving consent, the evidence should not be admissible in *every* such case. The court should have discretion to ad-

136 *See* ILL. REV. STAT. ch. 38, para. 12-13(a)(3), (4) (1988); ILL. REV. STAT. ch. 38, para. 12-16(b), (f) (1988). For a reading of these portions of the statutes, *see supra* note 129.

137 *See* ILL. REV. STAT. ch. 38, para. 12-15(b), (c) (1988); ILL. REV. STAT. ch. 38, para. 12-16(c)(1)(ii), (c)(2)(ii) (d), (f) (1988). For a reading of these portions of the statutes, *see supra* note 129.

138 *See* ILL. REV. STAT. ch. 38, para. 12-14(b)(1) (1988); ILL. REV. STAT. ch. 38, para. 12-16(c)(1)(i) (1988). For a reading of these portions of the statutes, *see supra* note 129.

139 *See* ILL. REV. STAT. ch. 38, para. 12-14(b)(2)(i) (1988); ILL. REV. STAT. ch. 38, para. 12-16(c)(2)(i) (1988). For a reading of these portions of the statutes, *see supra* note 129.

mit or bar such evidence because a minor's ability to understand and relate sexual encounters will vary from one complainant to another. If the court finds that the jury could infer that the complainant would not otherwise be knowledgeable about sex absent conduct with the accused, the court could allow the evidence to rebut this inference. If, however, the court considered the jury aware that the complainant could otherwise have knowledge of sexual activity, the court could exclude the evidence as unnecessary.[140]

In order to justify introducing evidence of a complainant's prior sexual knowledge, the defendant should be required to explain its necessity at an *in camera* offer of proof. The defendant should first inform the court that he wishes to introduce evidence of the complainant's past sexual conduct to explain her prior knowledge of sexual acts. Second, the defendant should specify whether he is claiming that the complainant deliberately fabricated the story, or that she simply is confused about whether the incident occurred or with whom it occurred. If the defendant is offering the evidence to show that the complainant is lying, he must be able to offer corroborating evidence, in the form of past sexual conduct or any other evidence, that the complainant has a bias or motive to lie. In framing these requirements for admissibility, the court will preserve the defendant's constitutional right to present relevant evidence while preventing a defendant from merely seizing an opportunity to intimidate the complainant with highly sensitive evidence.

Notwithstanding the Illinois Appellate Court's holding in *People v. Campos*,[141] Illinois law should allow evidence of a minor's prior

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140 To illustrate, contrast a case involving a 16-year-old complainant alleging vaginal intercourse with a 5-year-old complainant alleging anal intercourse. The court might determine it is reasonable that a 16-year-old girl is capable of describing an act of vaginal intercourse without having engaged in sexual activity previously. In such a case, the court would find no inference that the defendant must be responsible for the complainant's knowledge, and in its discretion the court would not allow knowledge evidence. On the other hand, in the case of the 5-year-old describing an act of anal intercourse, the court would undoubtedly find that evidence of the complainant's prior experiential knowledge, if offered, would be necessary to rebut a very real inference that the defendant must have committed the alleged act on the complainant.

Because each child's environment is unique, it would be nearly impossible to predict exactly which factors a court would consider in determining whether the inference necessitating knowledge evidence exists. Such factors might include whether the complainant's peers are sexually active, whether the complainant has seen sexually explicit images in films or periodicals, and whether the complainant has learned about sexual intercourse through conversation or formal education.

141 507 N.E.2d 1342 (Ill. App. 1987) (holding that evidence of 11-year-old complainant's sexual experience prior to sexual assault, offered to show source of complainant's ability to describe sexual conduct, properly excluded by trial court). *See supra* note 123 and accompanying text.

sexual activity when offered to explain the child's independent knowledge of sexual activity. Such evidence could only be offered to rebut a judicially recognized inference that the defendant's sexual abuse is responsible for the complainant's sexual knowledge. The admissibility of evidence of the complainant's prior experiential knowledge of sexual activity is consistent with the spirit of the Illinois rape shield statute, as it does not rely for its relevancy on the propensity inference.

D. PROOF OF CONSENT

When there is no dispute concerning the occurrence of the intercourse at issue, the defense may attempt to introduce evidence of the complainant's past sexual conduct to show her consent on this occasion. Under Illinois law, the defense of consent[142] can be raised[143] for any sexual offense charge in which the use or threat of force is an element of the crime.[144]

Either side in a sexual assault trial may raise the issue of consent. For example, the prosecution may elicit testimony that the complainant was a virgin prior to the alleged attack or that she is a homosexual, both of which imply that the complainant did not consent to sexual activity with the accused. The defendant could then attempt to rebut this inference with conflicting evidence of the complainant's past sexual conduct.

The defense may attempt to introduce evidence that the complainant is a prostitute to show either that the complainant is promiscuous and likely consented or that the alleged attack was itself an act of prostitution. In other cases, the defense may wish to offer evidence of a pattern of the complainant's sexual activity that, when

142 In Illinois, "consent" to sexual activity is defined as "a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent." ILL. REV. STAT. ch. 38, para. 12-17(a) (1989).

143 *See supra* note 129, for a list of provisions in the Illinois statutes where consent is *not* available as a defense. Aside from those provisions, the issue of consent is present in sexual offenses.

144 *See* ILL. REV. STAT. ch. 38, para. 12-17(a) (1989) ("It shall be a defense to any offense under Section 12-13 through 12-16 of this Code *where force or threat of force is an element of the offense* that the complainant consented.") (emphasis added). Under these sections of the law, the prosecution carries the burden at trial of demonstrating that the sexual act was committed by the defendant with the use of force or threat of force. *See, e.g.*, People v. Coleman, 520 N.E.2d 55 (Ill. App. 1987) (reversing conviction under aggravated criminal sexual assault statute for court's failure to instruct jury on state's burden to prove lack of consent).

considered in relation to the sexual act at issue, implies that the complainant consented to sexual activity with the defendant.

Unlike the uses of sexual conduct evidence previously discussed—evidence offered to explain the complainant's physical condition,[145] establish a complainant's motive to fabricate the sexual assault charges[146] and provide an alternative source for the complainant's sexual knowledge[147]—evidence relating to consent will rely for its relevancy on an inference closely related to, if not indistinguishable from, the propensity inference. In order to consistently recognize the propensity inference when considering consent evidence, rather subtle nuances between various inferences must be solidified.

For example, this comment will distinguish between evidence of conscious and unconscious decisionmaking in sexual choices, arguing that evidence of prior conscious sexual choices relies on the unreliable propensity inference, as opposed to evidence of prior unconscious decisionmaking. Accordingly, this comment will argue against the admissibility of evidence of a complainant's virginity prior to the alleged sexual assault,[148] as abstinence is a conscious choice; likewise, this comment will advocate the admissibility of evidence of a complainant's homosexuality,[149] which is widely believed to be an unconscious choice.

This comment will also discuss a proposed distinction between evidence focusing on the mere existence of a complainant's sexual background from evidence relating to the specific and unique circumstances surrounding that sexual conduct which amount to a pattern of sexual behavior. This comment will argue against the admission of evidence of a complainant's sexual background to prove consent, notwithstanding the specificity of the surrounding circumstances, as it nonetheless attempts to predict a complainant's sexual behavior based on prior action.[150]

1. Proof of Virginity

Evidence of the complainant's virginity may be offered by the prosecution[151] to imply that the complainant did not consent to sex-

145 *See supra* notes 58-95 and accompanying text.
146 *See supra* notes 96-118 and accompanying text.
147 *See supra* notes 119-41 and accompanying text.
148 *See infra* notes 151-67 and accompanying text.
149 *See infra* notes 168-81 and accompanying text.
150 *See infra* notes 201-22 and accompanying text.
151 This testimony would usually come from the complainant or a doctor. *See, e.g.*, People v. Sales, 502 N.E.2d 1221 (Ill. App. 1986) (testimony of complainant); People v. Stephens, 310 N.E.2d 824 (Ill. App. 1974) (medical testimony).

ual relations with the defendant.[152] This comment will conclude that evidence of a lack of prior of sexual activity offered to prove non-consent relies on the propensity inference and is properly excluded by the Illinois rape shield statute.

An Illinois appellate court has held that evidence of a complainant's virginity prior to the alleged sexual assault is inadmissible under the Illinois rape shield statute.[153] The Illinois Supreme Court reinforced this conclusion by implication four years later.[154] The complainant in *People v. Sandoval*[155] testified that she had never engaged in anal sex with anyone other than the defendant prior to the alleged sexual assault.[156] The defense sought to rebut this testimony with evidence that the complainant had, in fact, engaged in anal sex with others in the past.[157] The Illinois Supreme Court held that the rape shield statute barred both the complainant's testimony and the defense's rebuttal evidence, reasoning that evidence of a lack of past sexual activity fell within the rape shield's prohibition against "prior sexual activity . . . of the alleged victim."[158]

Subsequently, an Illinois appellate court interpreted *Sandoval* to prohibit evidence that the complainant never consummated her marriage.[159] Thus, although no Illinois court has directly addressed evidence regarding the virginity of a sexual assault complainant, appellate court holdings indicate that the rape shield statute would bar such evidence. Evidence of the complainant's abstinence with regard to a particular form of sexual activity—for example, that the complainant never had anal sex with third persons[160]—or with re-

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152 *See* Galvin, *supra* note 4, at 854 ("Arguably, evidence of virginity. . . may be relevant to the issue of consent."). In some cases, a complainant's virginity could be raised indirectly through the use of physical evidence. For example, the prosecution may introduce evidence of the complainant's torn hymenal membrane, an injury suggesting that the complainant was previously a virgin. However, if such a case arises, rebuttal evidence of the complainant's past sexual behavior should be allowed to explain the source of physical consequence. Assuming this evidence took the form of past sexual intercourse, the inference of virginity would be rebutted. Therefore, the need to specifically address the issue of virginity would be avoided.

153 *See Sales*, 502 N.E.2d 1221 (holding that testimony of the complainant's virginity was prohibited by the Illinois rape shield statute).

154 *See* People v. Sandoval, 552 N.E.2d 726 (Ill. 1990). For a more complete discussion of *Sandoval*, *see supra* note 39 and accompanying text.

155 552 N.E.2d 726 (Ill. 1990).

156 *Id.* at 728.

157 *Id.* at 728.

158 *Id.* at 731; *see* ILL. REV. STAT. ch. 38, para. 115-7(a) (1989).

159 People v. Kemblowski, 559 N.E.2d 247, 250 (Ill. App. 1990). The court quoted language in *Sandoval* that the Illinois rape shield law "leaves no room for introduction of reputation or specific act evidence from any party in the action." *Id.* (quoting *Sandoval*, 552 N.E.2d at 731).

160 *See Sandoval*, 552 N.E.2d at 726.

gard to a specific individual—for example, that she never had sex with her husband[161]—is simply an abbreviated form of virginity evidence, which speaks to the entirety of the complainant's life with regard to all forms of sexual activity.

The Illinois courts' prohibition of virginity evidence[162] is consistent with the rejection of the propensity inference. By implying that the complainant did not consent to sexual relations with the defendant because she had not yet *ever* consented to sex, virginity evidence relies on a propensity-not-to-consent inference, a close relative of the traditional propensity theory. While this inference may not harm the complainant at trial,[163] such a generalization nonetheless offends the modern recognition of a woman's autonomy in choosing whether to engage in sexual activity. If society is to acknowledge a woman's autonomy in sexual activity,[164] its laws must reject the inference that a chaste woman would *not* consent to sex as forcefully as current laws reject the notion that an unchaste woman *would* consent.[165] With the mandate to exclude evidence of a complainant's virginity,[166] Illinois courts have replaced an unjust propensity inference with a neutral proposition: the belief that whether or not the complainant has been sexually active in the past is irrelevant to the issue of her consent in the present case.[167]

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161 *See Kemblowski*, 559 N.E.2d 247.

162 This comment will assume hereinafter that, in light of its previous holdings relating to evidence of abstinence, Illinois courts reject virginity evidence as violative of the state rape shield statute.

163 The same may not be true of the defendant, however. *See* Berger, *supra* note 4, at 67 ("A vision of ravaged innocence may inflame the jurors against the defendant as much as an image of tarnished experience sets them against the complaining witness.").

164 This comment argues for legal recognition of a woman's autonomy in making decisions regarding her sexual conduct.

165 *But see Commonwealth v. McKay*, 294 N.E.2d 213, 218 (Mass. 1973) (reasoning that evidence of virginity is far more probative of non-consent than is lack of virginity probative of consent), *cited in* Galvin, *supra* note 4, at 854.

166 Professor Galvin, in her thoughtful article on rape shield law reform, argues that the use of virginity evidence does *not* rely on the "invidious inferences" that rape shield legislation has sought to avoid. Galvin, *supra* note 4, at 858. Galvin correctly notes that such evidence does not imply a "likelihood that the complainant consented;" if anything, this evidence implies exactly the opposite. However, this comment argues for a broader definition of the "invidious inference" of propensity, one which includes *any* attempt to determine, from a woman's past discretionary decisions and subjectivity, whether she consents or does not consent to sex in general. Because evidence of virginity relies on this modified inference, such evidence must be rejected.

167 A more practical reason for excluding evidence of a complainant's virginity is that such evidence inevitably and necessarily invites rebuttal in the form of potentially prejudicial past sexual conduct evidence. Because the complainant's virginity should not be relevant anyway, there is no reason to provide the defense with an excuse to bring in highly prejudicial sexual conduct evidence as rebuttal. It is preferable to simply exclude the evidence altogether.

2. *Proof of Sexual Orientation*

In a sexual assault trial where the defense argues that the sexual activity was consensual, the state may attempt to introduce evidence that the complainant's sexual orientation conflicts with a finding that the complainant consented to sexual relations. For example, if the complainant were a lesbian and the accused were male, the prosecution would try to show that the complainant's sexual orientation proves that she did not consent to sex with the defendant.[168]

Because evidence of the complainant's sexual orientation is suggestive of her prior sexual choices, such evidence arguably falls within the definition of "prior sexual activity" under the rape shield statute.[169] This comment will conclude, however, that evidence of the complainant's sexual orientation[170] does not rely on the propensity inference, as the sexual activity is guided by an inherent trait, rather than conscious discretionary choices. In reaching this conclusion, this comment will rely on current medical research that suggests that a person's sexual orientation is beyond a person's conscious control.

An Illinois appellate court, in considering the propriety of evidence of the complainant's sexual orientation, held that the admission of such evidence violated the Illinois rape shield statute.[171] In *People v. Kemblowski*,[172] the trial court admitted the complainant's testimony on direct examination that she was a lesbian,[173] and the defendant was convicted of aggravated criminal sexual assault.[174] An Illinois appellate court reversed, holding that the Illinois rape shield statute barred evidence of the complainant's sexual orientation.[175]

In determining the propriety of the holding in *Kemblowski*, that

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168 *See, e.g.*, People v. Kemblowski, 559 N.E.2d 247 (Ill. App. 1990). In maintaining consistency with the male-defendant, female-complainant scenario assumed throughout this comment, the lesbian complainant and male defendant will be considered in this discussion. Clearly, any combination of accused and complainants could exist. In cases of homosexual sexual assault, the sexual orientation evidence would consist of the complainant's heterosexuality.

169 *See* ILL. REV. STAT., ch. 38, para. 115-7 (1989); *see also Kemblowski*, 559 N.E.2d 247 (evidence that complainant is lesbian is prohibited under Illinois rape shield statute).

170 The conclusion this comment reaches would not apply to bisexuals, whose attractions are not firmly attached to one gender.

171 *See Kemblowski*, 559 N.E.2d 247.

172 *Id.*

173 *Id.* at 249-50. The prosecution argued that evidence of the complainant's lesbianism did not violate the rape shield statute because it referred to the complainant's sexual *status*, rather than her sexual behavior. *Id.* at 250.

174 *Id.* at 249; *see* ILL. REV. STAT. ch. 38, para. 12-14(a) (1985).

175 *Kemblowski*, 559 N.E.2d at 250. In so holding, the appellate court reasoned that admission of homosexuality, "by definition, pertains to the witness' sexual activities with another of the same gender." *Id.*

evidence of the complainant's sexual orientation is inadmissible under the Illinois rape shield statute, this comment will next consider whether evidence of a complainant's sexual orientation relies on the propensity inference. In this analysis, this comment will compare sexual orientation evidence to evidence of the complainant's virginity prior to the alleged sexual assault,[176] as each form of evidence ultimately reaches the inference of non-consent. However, this comment will conclude that, while evidence of a complainant's virginity should be prohibited, sexual orientation evidence should be admitted. This comment will base its conclusion that sexual orientation evidence does not rely on the propensity inference on two assumptions: that sexual orientation is an inherent trait that an individual does not consciously choose,[177] and that an individual cannot control or change one's sexual orientation.[178] These assumptions are consistent with current medical research on these issues.

Evidence of sexual orientation is analogous to virginity evidence in that both suggest non-consent. However, although the inferences reach the same conclusion, the *source* of the suggestion and the route the evidence takes in reaching the inference differ between the two forms of evidence.

Evidence of a complainant's virginity relies on the theory that a woman who has abstained from sex prior to the alleged sexual assault probably did not consent to the sexual activity with the accused.[179] The source of this suggestion is the belief that a review of a woman's prior conscious decisions regarding sexual activity is predictive of the decision she will make on a subsequent occasion.

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176 *See supra* notes 151-67 and accompanying text.

177 While there is not yet a clear consensus on the origin of the development of sexual proclivities in a person, it is widely believed that such a sexual preference is an unconscious choice made by the person. The conflict among researchers today centers around whether homosexuality begins in the chromosomes or during the person's adolescence, the so-called "nature versus nurture" argument. However, either of these possibilities leads to a conclusion that the person does not make a conscious choice about his sexual orientation. *See* Marion H. Lewis, *Unacceptable Risk or Unacceptable Rhetoric? An Argument for a Quasi-Suspect Classification for Gays Based on Current Government Security Clearance Procedures*, 7 J. L. & POL. 133, 165 (1990) ("Even absent a consensus that individuals are born gay, most research has found that the choice that determines one's sexual orientation is made very early in life, usually by a person's fifth birthday."); *see also* David Gelman et al., *Born or Bred?*, NEWSWEEK, Feb. 24, 1992, at 46-53.

178 *See* HARRIS M. MILLER II, NOTE, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 817-18 (1984) (research indicates that a person's sexual orientation is virtually impervious to change); Dr. T. Sarbin & Dr. K. Karols, Defense Personnel Security Research and Education Center, *Nonconforming Sexual Orientations and Military Suitability*, at 1 (1988) ("[The] desired gender of the sex partner is fixed or at least firmly conditioned by biological preparation and habits laid down early in life.").

179 *See supra* notes 151-67 and accompanying text.

Clearly, the propensity inference empowers this evidence.[180]

Evidence of sexual orientation, on the other hand, relies on the reasoning that a lesbian did not consent to sexual activity with the accused because she is not sexually attracted to men. The source of this belief is the view that a lesbian does not consciously choose her sexual attractions insofar as they concern with which gender she will desire sexual intimacy. This inference does not rely on propensity, for it does not base its conclusion on prior *discretionary* actions. Instead, evidence of sexual orientation predicts a individual's lack of consent based on an inherent characteristic of that individual.

Unlike virginity evidence, evidence of sexual orientation is consistent with the recognition of female sexual autonomy. The fact that a woman was a virgin prior to the sexual encounter with the defendant should *not* preclude the possibility that she might have *chosen* to engage in sexual intercourse with the defendant; to draw this conclusion would be to take away a woman's autonomy to make important personal choices, such as the decision to engage in her first act of sexual intercourse. On the other hand, a woman's homosexuality, while it does not predict with *whom* she will have sex, dictates the *gender* of the persons with whom she will be sexually active. This conclusion does not offend female autonomy, but rather relies on medical findings to merely suggest that the individuals with whom a woman will exercise her sexual autonomy are women, not men.[181]

This distinction between virginity evidence and sexual orientation evidence is necessary. If society is to recognize the subjectivity of a woman's sexual choices by banning suggestive past conduct, it should do so consistently by excluding evidence of the complainant's virginity. At the same time, however, probative evidence such as a complainant's sexual orientation that does not depend on propensity for its relevancy should be admitted in Illinois sexual offense cases.

3. Evidence of Prostitution

A defendant on trial for a sexual offense may also attempt to introduce evidence that the complainant is or has been a prostitute.[182] A defendant may use this evidence to imply that the com-

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180 *See supra* notes 162-65 and accompanying text.

181 *See supra* notes 177-78.

182 *See, e.g.*, State v. Ivory, 487 N.E.2d 1035 (Ill. App. 1985); People v. Newman, 462 N.E.2d 731 (Ill. App. 1984); People v. Hughes, 460 N.E.2d 485 (Ill. App. 1984); People v. Buford, 441 N.E.2d 1235 (Ill. App. 1982).

plainant is not a credible witness,[183] to establish the witness's bias[184] or to show that the complainant likely consented to the sexual activity with the defendant.[185] The use of the complainant's prostitution to impeach the credibility of the complainant is unreliable and outdated,[186] as prostitution is not a crime that connotes dishonesty.[187] Evidence of the complainant's prostitution offered to show bias or motive to lie would fall under the proposed exception of past sexual conduct evidence probative of motive to fabricate, discussed earlier in this comment.[188] Therefore, this discussion will limit itself to evidence of the complainant's prostitution that is offered to prove consent.

The use of prostitution evidence to prove consent may be employed in one of two ways. First, the defense may offer the evidence to show that the victim is promiscuous by profession and, therefore, more likely to have consented to the sexual activity with the defendant.[189] However, this evidence might also suggest that the complainant did *not* consent to free sexual conduct: the complainant would be less likely to consent to *gratis* sexual activity given her practice of exchanging sexual acts for compensation.[190] Whether or not the evidence is damaging to the complainant, however, is not the critical question. In order to remain faithful to the Illinois rape shield statute, the proffered evidence must not depend for its relevance upon the propensity inference. If such evidence is offered to show that the complainant consented to sexual relations with the defendant simply because she is promiscuous,[191] it should be excluded.

Evidence of prostitution may also serve to prove that the sexual encounter in question was itself an act of prostitution.[192] The trial court in *People v. Buford*,[193] relying on the Illinois rape shield statute, forbade the defendant from introducing evidence that the sexual ac-

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183 *See Newman*, 462 N.E.2d 731.

184 *See Hughes*, 460 N.E.2d 485.

185 *See* People v. Dixon, 513 N.E.2d 134 (Ill. App. 1987) (rejecting appellant's argument that he received ineffective assistance of counsel in part because counsel failed to probe into complainant's history of prostitution for purposes of proving consent).

186 *See supra* note 5 and accompanying text.

187 *See* People v. Montgomery, 268 N.E.2d 695 (Ill. 1971) (rejecting evidence of previous prostitution conviction as basis for impeaching credibility).

188 *See supra* notes 96-118 and accompanying text.

189 *See* People v. Williams, 330 N.W.2d 823, 830 (Mich. 1982).

190 *See id.*

191 *See* Galvin, *supra* note 4, at 840 (arguing that prostitution evidence is "indistinguishable" from evidence offered for propensity).

192 *See* People v. Buford, 441 N.E.2d 1235 (Ill. App. 1982).

193 *Id.*

tivity with the complainant was actually an act of prostitution.[194] An Illinois appellate court affirmed, reasoning that the rape shield statute barred a probe into the complainant's sexual background.[195]

Evidence of consent by prostitution is consistent with the rejection of the propensity inference typically associated with sexual assault complainants.[196] The theory is not that a woman who is sexually active probably consented to sex, but rather that a woman who charges money for consensual sex probably charged the defendant for consensual sexual services. Thus, the admission of prostitution evidence is consistent with the thesis of this discussion.

While such an inference is not typically attributed to sexual assault victims, this inference nonetheless relies on propensity for its relevance: evidence of the complainant's prior acts of prostitution are offered to show her likelihood to prostitute herself on a subsequent occasion. In Illinois, evidence of other crimes, wrongs or acts is not admissible to show propensity to act in conformity therewith on a specific occasion;[197] proof must be limited to evidence of the witness's general reputation for undertaking such action.[198] Thus, evidence of a complainant's prior acts of prostitution would not be admissible to suggest that she acted as a prostitute on the occasion in question, as such evidence relies on the use of prior acts to show propensity.[199] However, the complainant's general reputation as a prostitute *may* be admissible to establish the complainant's propensity to prostitute herself.

Evidence of the complainant's reputation for prostitution, when offered to prove that the sexual encounter at issue was an act of

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194 *Id.* at 1235-36.

195 *Id.*

196 *See supra* note 7 and accompanying text. *See also* State v. Gardner, 391 N.E.2d 337, 341 (Ohio 1979) (holding that complainant's reputation as prostitute would be probative where defendant claimed sexual encounter at issue was itself act of prostitution).

197 *See* People v. Whiters, 562 N.E.2d 325, 330 (Ill. App. 1990) (holding that trial court committed reversible error by introducing character evidence of defendant's prior acts of violence); People v. Mikyska, 534 N.E.2d 1348, 1354 (Ill. App. 1989) (holding that evidence of witness's frequent use of drugs was not admissible to prove propensity to use drugs on occasion in question); People v. Corder, 414 N.E.2d 904 (Ill. App. 1980) (holding that trial court erred in allowing the prosecution to explore a defense witness's particular acts of misconduct).

198 *See Corder*, 414 N.E.2d at 907 (" 'The reputation of a person cannot be impeached by proof of particular acts. It must be by proving his general character for the particular matter of misconduct in question. . . .' " (quoting People v. Page, 6 N.E.2d 845, 847 (Ill. 1937)).

199 This prohibition of "prior acts" evidence extends to evidence of the complainant's prior convictions for prostitution, as evidence that a witness committed other crimes is inadmissible to show that the witness had a propensity to commit crime. People v. Lawler, 568 N.E.2d 895, 901 (Ill. 1991).

prostitution, does not rely on the inference that a woman's prior sexual activity is predictive of her likelihood to consent on a subsequent occasion. Accordingly, where a defendant argues that the sexual activity at issue was an act of prostitution, the Illinois rape shield statute should include an exception for evidence of the complainant's reputation as a prostitute.[200]

4. Proof of a Pattern of Complainant's Sexual Behavior

A defendant standing trial for a sexual offense may attempt to show consent by claiming that the sexual encounter at issue was simply another incident in a consistent pattern of sexual activity by the complainant. This use of past sexual behavior has engendered the most controversy, as it arguably relies on the propensity theory of consent for its relevancy.[201] If society is to recognize that women will exercise discretion in choosing sexual partners, it is, at best, a dangerous proposition to admit evidence of the complainant's sexual past to prove her propensity to consent based on subjective factors that cannot easily be categorized.[202]

This comment will conclude that evidence of a pattern of the complainant's prior sexual activity should not be admissible in Illinois law. In reaching this conclusion, this comment will reject the argument that pattern evidence should be admissible because it focuses on the nature, rather than the existence, of prior sexual activity. Although this argument may be accurate, the resulting inference nonetheless predicts consent based on prior consent, notwithstanding the specificity of the surrounding circumstances.

This comment will additionally note the incongruity of Illinois law regarding the use of prior acts to predict a complainant's consent. Evidence of a *defendant's* prior acts of sexual violence amounting to a pattern of activity may be offered on the issue of a complainant's consent, while a *complainant's* prior sexual acts are inadmissible for a similar purpose. Given the constitutional protection that the defendant enjoys in criminal trials, the courts' admission of pattern evidence against the defendant but not the complainant raises serious due process concerns. In remaining con-

200 Thus, under the Illinois rape shield statute, the exception for evidence to show consent by prostitution would extend to the "reputation," but not the "prior sexual activity," of the alleged victim. *See* ILL. REV. STAT. ch. 38, para. 115-7 (1989). However, if the past acts of prostitution involved the accused, such evidence would be admissible under the existing exception for "past sexual conduct . . . with the accused." *See* ILL. REV. STAT. ch. 38, para. 115-7 (1989).

201 Seaboyer v. The Queen, File No. 20666, at 211 (Can. Supreme Ct. 1991) (L'Heureux-Dubé, J., dissenting).

202 *See* Berger, *supra* note 4, at 32.

sistent with the thesis, however, this comment will argue against the admissibility of pattern evidence, as it relies on the propensity inference.

The call for the admissibility of specifically defined pattern evidence in sexual assault cases has grown stronger in the past decade and a half.[203] The strongest argument for its admissibility is that, while propensity suggestions may attach to the evidence,[204] evidence of a sexual pattern is not *based* on the propensity inference.[205] Rather, scholars argue, the inference is that the complainant consented to sex with the accused because she consented to sexual activity several times prior to the alleged sexual assault under circumstances highly similar to the conduct at issue.[206] Thus, pattern evidence focuses on the *nature* of the past sexual activity, rather than the mere existence of "promiscuity."[207]

The view that pattern evidence relies on propensity was recently articulated by Justice L'Heureux-Dubé of the Canadian Supreme Court:

> [Arguments favoring pattern evidence] depend for their vitality on the notion that women consent to sex based upon such extraneous considerations as the location of the act, the race, age or profession of the alleged assaulter and/or considerations of the nature of the sexual act engaged in . . . . [C]onsent is to a person and not to a circumstance. The use of the words "pattern" and "similar fact" deny this reality. Such arguments are implicitly based upon the notion that women will, in the right circumstances, consent to anyone. . . .[208]

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203 *See* Galvin, *supra* note 4, at 831-48; Berger, *supra* note 4, at 59-61; Ordover, *supra* note 4, at 110-19.

At least three states have enacted exceptions to their rape shield laws for "pattern" evidence. *See* FLA. STAT. ANN. § 794.022(2) (West Supp. 1985) (pattern of complainant's past sexual history admissible if so similar to encounter at issue that it is relevant to consent); MINN. R. EVID. 404(c)(1)(A)(i) (evidence establishing common scheme of sexual behavior similar to instant case is relevant to complainant's consent); N.C.R. EVID. 412 (distinctive pattern of complainant's past sexual behavior is admissible as to consent if pattern closely resembles encounter at issue).

204 *See, e.g.*, Galvin, *supra* note 4, at 833.

205 Ordover, *supra* note 4, at 93, 110-19; *see also* Galvin, *supra* note 4, at 833.

206 Advocates of pattern evidence have differed in their definition of this pattern, with sometimes wide disparity in the scope of admissible evidence. For example, while Professor Ordover calls for evidence of the complainant's sexual conduct that is highly analogous to the conduct in dispute, *see* Ordover, *supra* note 4, at 110, 114, Ordover would also admit evidence of the complainant's sexual activity that constitutes "merely one more episode in a long history of promiscuity." Galvin, *supra* note 4, at 833 (quoting Ordover, *supra* note 4, at 118). Professor Galvin, on the other hand, would limit this evidence to instances of sexual conduct whose features closely resemble those surrounding the alleged sexual assault. *See* Galvin, *supra* note 4, at 834.

207 *See* Ordover, *supra* note 4, at 93; *see also* Galvin, *supra* note 4, at 833.

208 Seaboyer v. The Queen, File No. 20666, at 210-11 (Can. Supreme Ct. 1991) (L'Heureux-Dubé, J., dissenting).

This comment has argued that the propensity inference is inconsistent with the recognition of female sexual autonomy. Thus, the mere existence of a complainant's prior sexual activity should not suggest her consent on a subsequent occasion.[209] By shifting the focus of the evidence to the specific circumstances surrounding the complainant's sexual activity, however, pattern evidence does not suggest that sexual activity *in general* is indicative of consent. Nonetheless, pattern evidence still relies on propensity for its relevance; it simply modifies the scope of the admissible evidence. Once the evidence defines the specific circumstances surrounding the sexual conduct, the evidence implies that the complainant consented because she consented in the past. This inference, while admittedly more reliable than the propensity inference attaching to evidence of general sexual activity,[210] is nonetheless inconsistent with the thesis of this comment.

Scholars have argued, however, that evidence of the complainant's pattern of sexual activity could be admissible as evidence of the complainant's *modus operandi*,[211] if the conduct is sufficiently distinct to amount to a "signature" of the complainant's sexual behavior.[212] The traditional function of *modus operandi* evidence is to show iden-

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209 *See supra* note 29 and accompanying text.

210 *See* Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 886 (1982) (arguing for the admissibility of character evidence of specific instances of prior conduct which "by [their] unusual nature or. . . regular occurrence, can be fairly said to demonstrate a characterological predisposition to behave in a similar fashion under similar circumstances.") (*quoted in* Galvin, *supra* note 4, at 838 n.372).

211 "*Modus operandi* means, literally, 'method of working,' and refers to a pattern of criminal behavior so distinctive that separate crimes are recongnizable as the handiwork of the same wrongdoer." People v. Barbour, 436 N.E.2d 667 (Ill. App. 1982), *quoted in* MICHAEL H. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 404.5, at 194 (5th ed. 1990).

Illinois courts have allowed evidence of other crimes for many purposes other than *modus operandi*, such as motive, *see* People v. McRae, 361 N.E.2d 685, 692 (Ill. App. 1977); knowledge, *see* People v. Riley, 419 N.E.2d 106, 108 (Ill. App. 1981); intent, *see* People v. Bartall, 456 N.E.2d 59, 66 (Ill. 1983); absence of mistake or accident, *see* People v. Lehman, 125 N.E.2d 506, 509 (Ill. 1955); defendant's state of mind, *see* People v. Hoddenbach, 452 N.E.2d 32, 36 (Ill. App. 1983); absence of an innocent frame of mind or the presence of criminal intent, *see* People v. McKibbins, 449 N.E.2d 821, 825 (Ill. App. 1983); circumstances or context of defendant's arrest, *see* Bartall, 456 N.E.2d at 66-67; placement of defendant in proximity of the time and place of the crime, *see* People v. Lewis, 450 N.E.2d 886, 894 (Ill. App. 1983); identification of the weapon used in the crime, *see* People v. Carter, 232 N.E.2d 692, 697 (Ill. 1967); consciousness of guilt, *see* People v. Baptist, 389 N.E.2d 1200, 1204 (Ill. 1979); that the crime charged was part of a common design, scheme or plan of the defendant, *see* People v. Lehman, 125 N.E.2d at 129; circumstances of the crime charged that would otherwise be unclear, *see* People v. Cole, 194 N.E.2d 269, 271 (Ill. 1963); and opportunity or preparation, *see* Wernowsky v. Economy Fire & Gas Co., 477 N.E.2d 231, 233 (Ill. 1985), *citing* FED. R. EVID. § 404(b).

212 *See* Ordover, *supra* note 4, at 113; Berger, *supra* note 4, at 60.

tity—that is, to place the defendant at the scene of the crime when he denies having been present.[213] By presenting evidence of similar acts of sexual violence committed by the defendant in the past,[214] the prosecution seeks to establish that the defendant was indeed the perpetrator of the sexual assault in question.[215] This evidence is *not* admissible, however, for the purpose of implying that the defendant committed the alleged crime because he has committed similar sexual assaults in the past.[216]

The use of *modus operandi* evidence with regard to a complainant's prior sexual conduct is highly suspect. In a sexual assault case where consent is the disputed issue, the defense has no need to establish the complainant's identity; the complainant certainly admits to being present during the alleged sexual assault. Similarly, in a case where the defense alleged that the complainant consented to sex, the prosecution would have no need to introduce *modus operandi* evidence to establish the defendant's presence.

Unfortunately, the Illinois courts have distorted the use of *modus operandi* evidence in sexual assault cases. Besides its use to establish identity, Illinois courts have held that "evidence of a defendant's *modus operandi* may be relevant . . . also to the issue of *whether a crime was committed at all.*"[217] An Illinois appellate court ex-

213 Galvin, *supra* note 4, at 834; *see* People v. Taylor, 506 N.E.2d 321 (Ill. App. 1987).

214 Evidence of a defendant's *modus operandi* is by no means a rare issue in sexual assault cases, for a great number or rapists are recidivists. One study conducted on unincarcerated sex offenders found that the 126 offenders had committed a total of 907 sexual assaults, involving 882 different victims. The average number of different victims per sex offender was seven. *See* Gene Abel, et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, J. INTERPERSONAL VIOLENCE, 2 at 3-25, *cited in Rape in America*, *supra* note 14, at 6.

215 *See* Galvin, *supra* note 4, at 834. For cases of sex crimes where evidence of the defendant's *modus operandi* was admitted, *see* People v. Velasco, 575 N.E.2d 954 (Ill. App. 1991); People v. Clauson, 537 N.E.2d 1048 (Ill. App. 1989); People v. Partin, 509 N.E.2d 662 (Ill. App. 1987); People v. Taylor, 506 N.E.2d 321 (Ill. App. 1987); People v. Kimbrough, 485 N.E.2d 1292 (Ill. App. 1985); People v. Fuller, 454 N.E.2d 334 (Ill. App. 1983); People v. Osborn, 368 N.E.2d 608 (Ill. App. 1977).

216 *See Velasco*, 575 N.E.2d 954, 962 ("[t]he law distrusts the inference that because a person committed other crimes, he is more likely to have committed the crime charged.").

217 People v. Middleton, 350 N.E.2d 223, 228 (Ill. App. 1978) (emphasis added). For other cases of sex crimes where evidence of the defendant's *modus operandi* was admissible, *see, e.g.*, People v. Brown, 574 Ill. N.E.2d 190 (Ill. App. 1991) (defendant's pattern of accosting women on street, offering them an interview for job and sexually assaulting them at the meeting, admissible as evidence of defendant's *modus operandi*); *Taylor*, 506 N.E.2d 321 (defendant teacher's similar acts of sexual abuse against students admissible to show *modus operandi*); People v. Kimbrough, 485 N.E.2d 1292 (defendant's pattern of asking victims at college to accompany him to basement to enroll for purported gymnastics class in order to sexually assault them admissible as evidence of *modus operandi*); *Fuller*, 454 N.E.2d at 342 (defendants' practice of advertising in newspaper for fictitious

plained that *modus operandi* evidence to show whether a crime was committed at all is probative in sexual assault cases against the defendant "where defendant contends that as between himself and the victim, 'the question was did they meet *by mutual consent or only by threat of force*.' "[218] Thus, despite dicta to the contrary,[219] Illinois courts admit *modus operandi* evidence in sexual assault cases, where consent is the disputed issue, to establish the defendant's propensity to commit sexual assault. By examining the defendant's prior acts of sexual violence, the fact finder will determine whether the complainant consented to sexual relations with the defendant—that is, "whether a crime was committed at all."[220]

This use of the propensity inference is consistent with the thesis of this comment, as it does not rely on inferences relating to a complainant's consent based on the *complainant's* prior activity; rather, it bases the likelihood of consent on the *defendant's* past acts. Despite its consistency with this comment's thesis, however, this use of *modus operandi* evidence violates the prohibition of propensity evidence in Illinois law[221] and should be excluded.

It is outside the scope of this comment to argue for legislative action to correct this improper use of *modus operandi* evidence. Nor will this comment address the argument, put forth by one scholar, that if the use of prior acts may be offered to establish a defendant's pattern of committing sexual assault, then fairness mandates that the constitutionally protected defendant be permitted to similarly introduce evidence of a complainant's pattern of consent.[222] This

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job and sexually assaulting victims who responded by going to defendants' home admissible to show *modus operandi*); *Middleton*, 350 N.E.2d at 228 (defendant physician's pattern of sexually assaulting patients admissible as defendant's *modus operandi*).

For examples of cases where *modus operandi* evidence was excluded, *see* Velasco, 575 N.E.2d 954 (where defendant was charged with molesting his 31-year-old stepdaughter, afflicted with Down's Syndrome, evidence that defendant had previously molested 10- and 13-year-old girls did not establish a *modus operandi*); People v. Barbour, 436 N.E.2d 667 (Ill. App. 1982) (where defendant was alleged to have sexually assaulted complainant in his car, evidence that defendant had previously sexually attacked two women in apartments was insufficient to establish a *modus operandi*).

218 *Kimbrough*, 485 N.E.2d at 1298 (emphasis added).

219 *See, e.g.*, *Velasco*, 575 N.E.2d at 962 ("[t]he law distrusts the inference that because a person committed other crimes, he is more likely to have committed the crime charged"); *Kimbrough*, 485 N.E.2d at 1295 ("Evidence of other crimes or wrongful conduct is not admissible to show the defendant's character or propensity to commit crime or wrongful acts. Where evidence has no value beyond the inference that the defendant has a propensity for the crime charged, the evidence is excluded. . . .").

220 *Kimbrough*, 485 N.E.2d at 1298.

221 *See* People v. Romero, 362 N.E.2d 288, 290 (Ill. 1977); People v. Velasco, 575 N.E.2d 954, 962 (Ill. App. 1991). *See also supra* notes 197-99 and accompanying text.

222 Galvin, *supra* note 4, at 835; *see* People v. Dawsey, 257 N.W.2d 236, 246 (Mich. App. 1977) (Kaufman, J., dissenting) ("[i]t is difficult to conceive of a reason why a de-

comment limits itself to rejecting any evidence of a complainant's sexual history that relies on propensity.

Evidence of a complainant's prior sexual conduct, when offered to demonstrate a pattern of sexual activity that is consistent with consent to the alleged sexual assault, relies on the propensity inference. Thus, the Illinois rape shield statute's prohibition of this evidence is warranted.

IV. PROPOSED STATUTE

The Illinois legislature should amend the Illinois rape shield statute to reflect the modifications advocated in this comment. The proposed rape shield statute would read as follows:

Ill. Rev. Stat. ch. 38, para. 115-7 (1991)

115-7. *Prior sexual activity or reputation as evidence*

§ 115-7. (a) In prosecutions for aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse or criminal sexual abuse, the prior sexual activity or the reputation of the alleged victim's sexual history is inadmissible as evidence. The following exceptions to this rule will apply, subject to the limitations discussed in part (b) of this statute:

(1) The court must admit evidence concerning the past sexual conduct of the alleged victim with the accused.

(2) The court must admit evidence concerning the past sexual conduct of the alleged victim to prove that the accused did not cause the complainant's physical conditions allegedly resulting from the sexual assault. Alternatively, the court could admit a stipulation, if offered by the prosecution and defense, that the accused did not cause the complainant's physical condition. Such conditions may include, but are not limited to,

a) the presence of semen, blood, saliva or hair in the complainant's vagina following the alleged sexual assault;
b) the alleged victim's pregnancy, if the alleged victim is pregnant at the time of trial;
c) the alleged victim's sexually transmitted disease, contracted following the alleged sexual assault.

(3) The court must admit evidence concerning the past sexual conduct of the alleged victim to show the alleged victim's bias or motive to falsely accuse the defendant.

(4) The court may, in its discretion, admit evidence concern-

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fendant's sexual history should be treated differently than that of complainant's."), *quoted in* Galvin, *supra* note 4, at 838-39.

ing the past sexual conduct of the alleged victim to explain the source of the complainant's knowledge of sexual acts in cases where the alleged victim is legally incapable of giving consent. If the accused seeks to introduce this evidence to prove that the complainant is deliberately fabricating sexual offense charges, the accused must also offer proof of the complainant's motive to lie.

(5) The court must admit evidence, in the form of past sexual conduct of the alleged victim or otherwise, to demonstrate that the alleged victim's sexual orientation is inconsistent with consent to the alleged sexual assault.

(6) The court must admit evidence concerning the past sexual conduct of the alleged victim to rebut evidence put forth by the prosecution of the alleged victim's sexual orientation under section (5).

(7) The court must admit evidence concerning the alleged victim's general reputation for committing prostitution to show that the encounter that is the basis for the charge at issue was, itself, an act of prostitution.

(b) No evidence admissible under this Section shall be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing to be held *in camera*. Such offer of proof shall include reasonably specific information as to the date, time and place of the past sexual conduct. Unless the court finds that reasonably specific information as to date, time or place, or some combination thereof, has been offered as to the alleged victim's prior sexual activity, the moving party shall be ordered to refrain from inquiring into the prior sexual activity.

V. Conclusion

Rape shield legislation has significantly curbed the often-brutal treatment complainants received at the hands of zealous defense counsel. Nevertheless, as the Illinois rape shield statute enters its fourteenth year in existence, it has become clear that several purposes exist that require evidence of the alleged victim's past sexual behavior. Other "purposes," however, represent nothing more than thinly veiled attempts to sneak propensity evidence back into the courtroom.

In order to distinguish between valid and invalid uses of past sexual conduct evidence, the legal system must acknowledge the evil sought to be eradicated by the general prohibition of this evidence. The law must invalidate the theory that a woman's past sexual be-

havior is indicative of her likelihood to consent to sexual activity with the defendant. The only way the law can reject the propensity inference is to deny it whenever it arises, whether offered to suggest the complainant's consent or non-consent. Anything less than a consistent application of this principle will distort the truth-finding process and continue to propagate unreliable myths about women.

DAVID ELLIS