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# Ohio's New Rape Law: Does It Protect Complainant At the Expense of the Rights of the Accused?

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# OHIO'S NEW RAPE LAW: DOES IT PROTECT COMPLAINANT AT THE EXPENSE OF THE RIGHTS OF THE ACCUSED?

## I. INTRODUCTION

WITH THE ENACTMENT of Am. Sub. S.B. 144,[1] Ohio has now joined the small group of states[2] that are revising their rape laws in measures significant enough to indicate that a trend may be underway. Ohio's new law is designed to protect victims of sex offenses: it contains major provisions affecting (1) the definition of rape itself; (2) new services for victims; (3) record suppression; (4) evidence rules; and (5) sentencing for certain offenders. The new law attempts to secure complainants' rights to privacy and equal protection together with defendants' rights to a fair trial and due process; however, the law may after all satisfy no one completely, and some of it is almost certain to undergo vigorous constitutional attacks.

## II. BACKGROUND

To understand both how the new law came to be enacted and why it may invite attack, it is necessary to understand the theories on which the old law was based and which have brought it under recent scrutiny.

### A. *Traditional Theories*

One of the most often quoted comments about rape is that of Sir Matthew Hale: "It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished... but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[3] Suggesting on the one hand that few crimes are more heinous than the violation of a virtuous woman, but on the other hand that many non-virtuous women falsely claim to have been raped, Hale's comment has invited legal theory to rely on psychiatric theory for support.[4] The psychiatrists' explanations for false rape claims have in turn affected

[1] 111th Gen. Assembly, Reg. Sess., *amending* §§ 2907.01, 2907.02, 2907.05, and 2951.02, and *enacting* §§ 2907.10, 2907.11, 2907.12, 2907.28, and 2907.29 (1975). Governor James Rhodes signed the emergency act August 27, 1975; it became effective immediately.

[2] California and Michigan have the most extensive revisions. They will be compared *passim*.

[3] 1 M. HALE, PLEAS OF THE CROWN 634 (1847).

[4] *See, e.g.*, M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 375 (1952). *See also* M. AMIR, PATTERNS IN FORCIBLE RAPE 253-54 (1971) [hereinafter cited as Amir]. Amir discusses the problems of women who falsely claim to have been raped as a result of fantasies and others who invite sexual aggression and then later rationalize it as rape or who rid themselves of the fear of rape by yielding "to get it over with." See J. MACDONALD, PSYCHIATRY AND THE CRIMINAL 238 (2d ed. 1969), for a variation of the "riddance" theory to the effect that many women who are raped bear some of the responsibility for attack because of the provocative situations in which they place themselves. Amir calls rapes in such situations "victim-precipitated." Amir, *supra*, at 253-54.

judicial attitudes,[5] in part at least, because of reinforcement from such leading legal authorities as Professor Wigmore: "No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."[6] Although the definitive treatise has been recently updated, its position has not changed on this crucial matter.[7] In practice then, it is common for the psychiatrist to be called in, either actually to examine the complainant in person or at least theoretically to test her case; in the process she must rebut strong presumptions about her character.[8] Nineteenth century judicial theories[9] echo in the opinions of the 1970's.[10]

B. *Effect of Theories on Rape Prosecution*

Given the persistence of the old theories, it should not be surprising to discover how few rapes are reported in the first place,[11] and how few convictions result from those that are reported.[12] Both judges and juries have

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[5] Bohmer, *Judicial Attitudes Towards Rape Victims*, 57 JUDICATURE 303, 305 (1974) [hereinafter cited as Bohmer] (terms such as "felonious gallantry," "assault with failure to please," and "breach of contract" used by interviewed judges to describe cases they did not regard as "genuine" rapes).

[6] 3 J. WIGMORE, EVIDENCE § 924(a) (3d ed. 1940) [hereinafter cited as WIGMORE (1940)].

[7] 3A J. WIGMORE, EVIDENCE § 924(a), at 736 (Chadbourne rev. 1970) [hereinafter cited as WIGMORE (1970)]; the literature reinforcing this view is abundant. *See, e.g.*, W. OVERHOLSER, THE PSYCHIATRIST AND THE LAW 50-56 (1953).

[8] Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967). If the complainant in a rape case is sexually active at all outside of marriage or if she has been attacked by someone she has met before, the presumptions are even more difficult to rebut. Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in SEXUAL BEHAVIOR AND THE LAW 51 (R. Slovenko ed. 1965); Comment, *Rape and Rape Laws: Sexism in Society and the Law*, 61 CAL. L. REV. 919, 938 (1973).

[9] "It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman." State v. Sibley, 131 Mo. 519, 531-32, 33 S.W. 167, 171 (1895).

[10] *E.g.*, Brown v. State, 50 Ala. App. 471, 280 So. 2d 177, 179 (1973); Wilson v. State, 264 So. 2d 828 (Miss. 1972).

[11] FEDERAL BUREAU OF INVESTIGATION, 1972 UNIFORM CRIME REPORTS 12 (1973) [hereinafter cited as UNIFORM CRIME REPORTS] (acknowledging that forcible rape "is probably one of the most under-reported crimes"). One explanation is "the traumatic experience which a victim must go through in order to attempt to secure the attacker's successful prosecution." Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 335 (1973) [hereinafter cited as *Feminist View*] Another view is that women declare themselves responsible because "if [a rape] happened entirely without provocation, then it could happen again." A. MEDEA & K. THOMPSON, AGAINST RAPE 105-06 (1974) [hereinafter cited as MEDEA & THOMPSON]. The FBI says simply that women do not report rape because they are afraid or embarrassed. UNIFORM CRIME REPORTS, *supra*, at 12. Whatever the accuracy of the FBI's estimates (total number of forcible rapes in the United States in 1972 estimated at 46,430), there are clearly many more cases of rape in this country every year (estimated increase since 1967 of 70% in number of offenses and of 62% in rate per 100,000 inhabitants). *Id.*

[12] UNIFORM CRIME REPORTS, *supra* note 11, at 14. Even the facts are illusive. The FBI's statistics are the most widely consulted, but they are based on data collected by local police agencies, not all of whom subscribe to the same definitions of rape and not all of whom even report. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES

 

been found to bear some responsibility for the low conviction rate.[13] If there is a jury and if the judge admits evidence of any flaw in the complainant's character, the jury may sympathize with the defendant rather than with the complainant.[14] This tendency has been attributed to "a bootlegging of the tort concepts of contributory negligence and assumption of the risk into the criminal law."[15] Ultimately, judges may be more inclined to convict than juries because judges better understand the distinction between tort and criminal law.[16]

C. *The Reform Movement*

The old theories have lately come under new scrutiny. Golda Meir is said to have responded to an Israeli Cabinet minister's suggestion of a curfew for women during an outbreak of assaults: "But it's the men who are attacking the women. If there's to be a curfew, let the men stay home, not the women."[17] In the wake of such partially facetious stories has come concerted action to change rape laws. Since nineteenth century presumptions "[place] a significant number of women beyond the protection of the law,"[18] feminists have urged: "Rape laws must be reformed to reflect today's social and moral values as well as to protect the right of a woman to physical integrity and freedom of movement without fear of sexual attack regardless of her past sexual activities."[19]

The reforms are coming more rapidly by statute than by case law. The doctrine of stare decisis works against judicial change, putting a heavy burden of proof on reformers.[20] Lobbyists are not admitted to the judge's chambers or the jury room, but they are admitted and have begun to appear before legislatures. Women's groups have been notably active in lobbying for reform in rape laws;[21] it was a woman, a member of the Law Student Division, who

AND REMEDIES 822-23 n. 7 (1975) [hereinafter cited as BABCOCK]. *See generally* Zeisel, The FBI's Biased Sampling, 29 BULL. ATOMIC SCIENTISTS 38 (1973). According to UNIFORM CRIME REPORTS, *supra* note 11, at 14, in 1972, 57% of rapes reported resulted in arrests; of the adults arrested, 73% were prosecuted, with 23% of persons "processed" referred to juvenile authorities. Of the cases that do go to trial, 49% result in acquittals or dismissals, with 32% of the prosecuted adults found guilty of forcible rape and 19% convicted of some lesser offense. *Id.*

[13] Bohmer, *supra* note 5, at 305.

[14] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 249 (1966).

[15] *Id.* at 243. If a jury has evidence from which to infer that the victim in any way assumed the risk of attack, it will find the accused guilty of a lesser offense if that option is open to it; if not, it will be inclined to acquit. *Id.* at 250-51.

[16] *Id.* at 252-53.

[17] *As cited* in MEDEA & THOMPSON, *supra* note 11, at 59.

[18] Comment, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36, 51 (1974).

[19] *Id.*

[20] Comment, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflections of Reality or Denial of Due Process*, 3 HOFSTRA L. REV. 403, 407 n. 19 (1975) [hereinafter cited as *Limitations*].

[21] Instrumental in the passage of Ohio's new rape law were the arguments and supporting evidence provided by the American Civil Liberties Union of Ohio, the ACLUO Women's

brought before the American Bar Association the original form of its resolution urging reform in rape laws.[22]

## III. OHIO'S NEW RAPE LAW

Ohio's Am. Sub. S.B. No. 144 is not the first wholesale revision of a state's statutes on rape. Both California and Michigan preceded Ohio in enacting major revisions,[23] and comparison of the similar statutes is useful to assess how Ohio coped with various problem areas.

### A. *Defining the Crime*

Ohio has significantly broadened the coverage of its rape law in two ways. First, although not accepting the radical feminists' position that one can be raped by a spouse while living in the same household, Ohio has redefined "spouse" as used in the sexual offense statutes to exclude parties who have legally separated or who have an action pending for annulment, divorce, dissolution of marriage, or alimony (after the alimony judgment is effective).[24] Ohio's statute is more liberal than Michigan's comparable redefinition section[25] in that the former makes rape charges available to a broader class of persons usually excluded by the typical requirement that the parties not be spouses.

Ohio's new statutes, like Michigan's,[26] also broaden the coverage by

Project, Governor's Task Force on Women, National Organization of Women, and Women Against Rape. [The author wishes to acknowledge the helpfulness of numerous unpublished position papers and memoranda provided by these organizations, especially the testimony of Eileen Roberts, ACLUO Women's Project, before the Ohio House of Rep. Judiciary Committee, June 17, 1975, and that of Benson A. Wolman, ACLUO Exec. Dir., before the same committee, June 24, 1975.]

[22] *House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments*, 61 A.B.A.J. 463, 465 (1975). The resolution reads:

> Be it resolved, That the American Bar Association authorizes the president of the Association or his designee to urge re-definition of rape and related crimes in terms of "persons" instead of "women" and revision of rules of evidence in order to protect the prosecuting witness from unnecessary invasion of privacy and psychological and emotional harm by: (1) elimination of corroboration requirements which exceed those applicable to other assaults, (2) revision of the rules of evidence relating to cross-examination of the complaining witness, (3) re-evaluation of rape penalties, (4) development of new procedures for police and prosecutors in processing rape cases, (5) establishment of rape treatment and study centers.

Except for the last provision, Ohio's rape law now includes all of these recommendations. Even before the 1975 revisions, the Ohio law defined sexual offenses in terms of "persons," as was required by the passage of the equal rights amendment in Ohio, and did not require corroboration in excess of that necessary for other types of assault.

[23] As each section in Ohio's revision is discussed, specific analogous provisions in these two states' statutes, as well as some comparable but less extensive changes in the statutes of New York and Iowa, will be cited along with any applicable sections from the American Law Institute's MODEL PENAL CODE (Proposed Official Draft, 1962) [hereinafter cited as MODEL PENAL CODE].

[24] OHIO REV. CODE § 2907.01(L) (Baldwins Legis. Serv. Aug. 1975).

[25] MICH. COMP. LAWS ANN. § 750.520*l* (Supp. 1975) (requiring that the parties be living apart and that one have filed for separate maintenance or divorce); *cf.* MODEL PENAL CODE, *supra* note 23, § 213.1(1) (retaining the exclusion of spouses).

[26] MICH. COMP. LAWS ANN. § 750.520a(h) (Supp. 1975).

expanding the offenses included. There is a new section which adds the first degree felony of "sexual penetration."[27] Under the same stated conditions as apply to the other major sexual offenses, any person who "without privilege to do so shall insert any instrument, apparatus, or other object into the vaginal or anal cavity of another"[28] is subject to the same penalties as one guilty of first degree rape.[29] In this provision there is no compromise whatsoever. Its inclusion is significant also in that it provides long needed legal protection against typical forms of homosexual attack as well as heterosexual rape. In so providing, the statute increases the equal protection of the laws guaranteed by the fourteenth amendment.

B. *New Services for Victims*

Once a person has become a victim of a sexual offense, Ohio law now provides for a variety of new services in the interest of the victim's well being as well as in the interest of successful prosecution of the offender. First, new section 2907.29 requires a physician on call 24 hours a day in every state hospital offering emergency services, expressly for the purpose of examining victims to gather physical evidence. Second, the section requires that victims be informed of other medical and psychiatric services they may need. There is no compromise here either in the rights of victims or in the rights of the accused offenders.

The same section goes on to provide for medical examination of minors without parental consent. In its final form, however, the section includes a House amendment which significantly weakens it in the same way that abortion laws' guarantees can be jeopardized for minors.[30] By requiring that the hospital notify the parent or guardian of the examination, the law (like proposed consultation rather than consent in some abortion laws[31]) can deter minors from seeking the medical attention they need.[32]

In addition to medical services, the new law provides financial services for victims by requiring that appropriate local governments pay for the medical examination for evidence-gathering purposes.[33] Such a provision is not typical in the lists of reforms feminists have urged. It may be for that reason that attacks on it have not yet been heard. However, since proponents of reform often draw analogies between the way the law treats rape victims and the

[27] OHIO REV. CODE § 2907.12 (Baldwins Legis. Serv. Aug. 1975).

[28] OHIO REV. CODE § 2907.12(A) (Baldwins Legis. Serv. Aug. 1975).

[29] OHIO REV. CODE § 2907.12(B) (Baldwins Legis. Serv. Aug. 1975).

[30] OHIO REV. CODE § 2907.29 (Baldwins Legis. Serv. Aug. 1975).

[31] *See* Coe v. Gerstein, 376 F. Supp. 695, 699 (S.D. Fla. 1973), *appeal dismissed*, 417 U.S. 279 (1974).

[32] *See generally* Pilpel, *Minors' Rights to Medical Care*, 36 ALBANY L. REV. 462 (1972).

[33] OHIO REV. CODE § 2907.28 (Baldwins Legis. Serv. Aug. 1975).

way it treats victims of non-sexual assaults and robberies, it is possible that the medical services provision may be attacked as a violation of equal protection.

Even more likely to come under such attack are the new sections that make possible cost-free legal services for indigent victims in the form of court-appointed counsel to assist in proceedings regarding admissibility of evidence.[34] This is the first provision of its kind in the country.[35]

C. *Suppression of Records*

One of the most significant measures in the new law—and one of the most fraught with constitutional problems—is section 2907.11 on suppression of records. The final version is the result of a three-way compromise among the victim's right to privacy, the defendant's right to prepare a defense, and the public's right to a free press. Feminists have argued that publication of rape victims' names and addresses invades their privacy and subjects them to harassment and additional danger of recriminatory attack from the offender and his associates—dangers threatening enough to inhibit victims from reporting attacks at all. Michigan responded to such arguments by authorizing, upon request by either complaining witness or defendant, the suppression of the names of both as well as the details of the alleged offense until arraignment, dismissal, or other conclusion of the case.[36] While Michigan's new statute was available for the Ohio legislature to study, so also was the even more recent United States Supreme Court case of *Cox Broadcasting Corp. v. Cohn*,[37] in which the Court held that a Georgia statute[38] making publication of a rape victim's name a misdemeanor, was violative of the first and fourteenth amendments.[39]

It is important to note that the defendant in the *Cox* tort case was not the defendant in the criminal trial but the broadcasting corporation that publicized the victim's name in television coverage of the trial. Therefore, the *Cox* holding does not focus on the rights of the accused but instead "will not allow exposing the press to liability for truthfully publishing information released to the public in official court records."[40]

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[34] OHIO REV. CODE §§ 2907.02(F), 2907.05(F) (Baldwins Legis. Serv. Aug. 1975).

[35] Innovative as these sections may be, they are still in their final form softened by the House of Representatives. The original Senate version had *required* appointment of counsel under appropriate circumstances, rather than simply making it possible. For a defense of appointment of counsel for rape victims, see BABCOCK, *supra* note 12, at 840, where analogies are drawn to other situations in which a witness appears to be on the verge of self-incrimination.

[36] MICH. COMP. LAWS ANN. § 750.520k (Supp. 1975).

[37] 95 S. Ct. 1029 (1975).

[38] GA. CODE ANN. § 26-9901 (1972).

[39] 95 S. Ct. at 1046.

[40] *Id.*

Unlike the Georgia statute ruled unconstitutional in *Cox*, the new Ohio statute specifies no penalty for disobeying a judge's order to suppress. Because there is not even explicit reference to publication as a misdemeanor, the media will probably not see any need to attack the law under *Cox* or otherwise. Technically, premature publication could possibly lead to a contempt citation, but since the law authorizes full publication as early as the preliminary hearing, the media may well decide they have little cause for complaint.

The new law does attend, however, more explicitly to the rights of the accused than to the first amendment rights of the press and the public. Section 2907.11 provides for suppression, upon request by either party, of names and details only until the preliminary hearing, assuming it precedes arraignment or conclusion of the case by dismissal or otherwise. Further, the section concludes: "nothing herein shall be construed to deny to either party . . . the name and address of the other party or the details of the alleged offense." Thus the law will not interfere with the need of the accused to prepare early for defense. However, in spite of attempted amelioration, the victim may still be subject to harrassment and recrimination even well before trial.

D. *New Evidence Rules*

The most sweeping changes in Ohio's new law are those regarding rules of evidence. Perhaps the only new evidence sections mild enough to escape attack are those that relieve victims of the burden of proving physical resistance.[41] Like Michigan's comparable statute,[42] these provisions respond to victims' arguments against not only having to prove resistance but also having to resist in the first place before successfully prosecuting a rapist who threatens serious bodily injury or death if the victim attempts to resist. While thus adding significant legal protection for victims, the non-resistance provisions in no way interfere with the rights of the accused.

The most complex and controversial new rules apply to the admissibility of evidence, not about the defendant but about the prosecuting witness.[43] There are two basic tests for the admission of evidence: relevancy and materiality. "Relevant" evidence is that which tends to establish some issue in a case,[44] and "material" evidence is that which is probative of some established issue.[45] There is a strong policy favoring the admission of any evidence probative of any basic issue in a case.[46] Given that in a rape case the credibility

[41] OHIO REVISED CODE §§ 2907.02(C), 2907.05(C) (Baldwins Legis. Serv. Aug. 1975).

[42] MICH. COMP LAWS ANN. § 750.520 i (Supp. 1975).

[43] OHIO REVISED CODE §§ 2907.02(D), 2907.02(E) 2907.02(F), 2907.05(D), 2907.05(E), 2907.05(F) (Baldwins Legis. Serv. Aug. 1975).

[44] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 185, at 435 (2d ed. 1972).

[45] *Id.* at 434.

[46] WIGMORE, *supra* note 6, § 10 (1940).

of the prosecuting witness is a critical factor to be considered by the jury in deciding the issues, and that it is also revelant whether or not this witness consented to the sexual activity under litigation, two central questions emerge: (1) What evidence is probative of the credibility of the witness? and (2) What evidence is probative of whether the witness consented?

With considerable overlapping and contradiction, various jurisdictions have admitted evidence of the complainant's reputation for chastity as probative of consent[47] and of a female victim's veracity,[48] as well as evidence of the complainant's specific prior sexual acts with the defendant and/or with others.[49] From this maze of inconsistent holdings several principles do appear.

First, on the issue of credibility the rules in cases of rape have traditionally been treated as an exception to the otherwise strict rule that admits only evidence of general reputation—not reputation regarding specific moral traits because the latter evidence bears too tenuous a connection with veracity.[50] However, in rape cases evidence about chastity, a moral trait, is admitted as probative of the complainant's veracity.[51] The majority of recent cases, on the other hand, have excluded evidence of a rape victim's reputation for chastity to impeach credibility.[52] The modern majority also excludes evidence of the complainant's prior sexual activity with persons other than the defendant.[53]

However, quite different principles have governed admitting evidence probative of consent. The general rule has long been that consent is not a defense to a physical assault, particularly not to a violent one.[54] Technically then, lack of chastity as evidence of consent would not be a defense to forcible rape. "[R]ape may be committed upon a woman previously unchaste as well as upon any other female."[55] The courts that have admitted the evidence of unchastity have done so on the theory that an "unchaste" woman will more

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[47] *E.g.*, People v. Eilers, 18 Ill. App. 3d 197, 309 N.E.2d 627 (1974).

[48] *E.g.*, Packineau v. United States, 202 F.2d 681 (8th Cir. 1953).

[49] *E.g.*, Guy v. State, 1 Tenn. Cr. 366, 443 S.W.2d 520 (1969).

[50] WIGMORE, *supra* note 7, § 922, at 728 (1970).

[51] *Id.* § 924a, at 736.

[52] *E.g.*, Brown v. State, 291 Ala. 789, 280 So. 2d 177 (Crim. App. 1973); Crawford v. State, 254 Ark. 253, 492 S.W.2d 900 (1973); State v. Bird, 302 So. 2d 589 (La. 1974); Wilson v. State, 264 So. 2d 828 (Miss. 1972); State v. Yowell, 513 S.W.2d 397 (Mo. 1974); State v. Sims, 30 Utah 357, 517 P.2d 1315 (1974), *cert. denied*, 417 U.S. 970 (1974), *reh. denied*, 419 U.S. 897 (1975).

[53] *E.g.*, United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973); Williams v. State, 51 Ala. App. 1, 282 So. 2d 349 (1973); Crawford v. State, 254 Ark. 253, 492 S.W.2d 900 (1973); Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974).

[54] S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 15 (2d ed. 1969). *See generally* Beale, *Consent in the Criminal Law*, 8 HARV. L. REV. 317 (1895).

[55] Nickels v. State, 90 Fla. 659, 687, 106 So. 479, 489 (1925).

probably consent to sexual intercourse than a previously "chaste" one.[56]

Courts have viewed differently evidence of prior specific acts; a majority have been inclined to exclude it if the acts in question were not with the defendant.[57] There is also recent precedent for excluding all evidence of past acts, even with the defendant, if consent is not seriously at issue.[58] Excluding the evidence can be supported as analogous to excluding evidence of defendant's prior criminal history as not material to his propensity to commit the crime in question.[59] It is true that the complainant's past sexual activity is not technically the same as past conviction, but it may be viewed as both equally irrelevant and equally prejudicial regarding consent, if not credibility as well. On the other hand, the exclusionary rule applicable to evidence of the defendant's past criminal offenses has developed an exception allowing evidence of prior sexual attacks on the prosecutrix.[60] It would be consistent then to develop an exception allowing evidence of her prior consenting sexual activity with the defendant.

For several policy reasons,[61] courts have long preferred to rely on evidence of the prosecutrix' reputation for chastity rather than to admit evidence of prior sexual acts with persons other than the defendant.[62] First, the witness should expect to come to court prepared to answer questions about any prior relationship with the defendant,[63] but cannot prepare for surprise questions from the defendant's (possibly suborned) friends.[64] Second, admission of such evidence is likely to introduce collateral matters that only serve to take up unwarranted time and result in confusion.[65] Most important, evidence of

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[56] Brown v. State, 50 Ala. App. 471, 474, 280 So. 2d 177, 179 (1973); People v. Eilers, 18 Ill. App. 3d 197, 309 N.E.2d 627, 630 (1974); State v. Broussard, 217 La. 90, 46 So. 2d 48 (1950); Shapard v. State, 437 P.2d 565 (Okla. Crim. App. 1968), *cert. denied,* 393 U.S. 826 (1968).

[57] *E.g.,* Smiloff v. State, 439 P.2d 772 (Alas. 1968); Crawford v. State, 254 Ark. 253, 492 S.W.2d 900 (1973); Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974); State v. Bird, 302 So. 2d 589 (La. 1974); State v. Yowell, 513 S.W.2d 397 (Mo. 1974).

[58] State v. Warford, 293 Minn. 507, 200 N.W.2d 301 (1972), *cert. denied,* 410 U.S. 935 (1973). *But see* Teague v. State, 208 Ga. 459, 67 S.E.2d 467 (1951) (allowing reputation evidence even when consent not directly at issue on theory that it might become an issue if the jury did not believe the alibi defense).

[59] Michelson v. United States, 335 U.S. 469, 475-76 (1948); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 190, at 447 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[60] MCCORMICK, *supra* note 59, at 448-51. OHIO REV. CODE ANN. § 2945.59 (Page 1969) provides for admitting, *inter alia,* any criminal defendant's prior acts that are probative of his motive or plan "notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

[61] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 44, at 319 (1954).

[62] *See, e.g.,* McCombs v. State, 8 Ohio St. 643 (1858).

[63] Radke v. State, 107 Ohio St. 399, 140 N.E. 586 (1923).

[64] State v. Ogden, 39 Ore. 195, 65 P. 449 (Ore. 1901).

[65] State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959).

prior consent with one person does not signify subsequent consent with another but does serve to prejudice the prosecutrix' case.[66]

Respected legal authorities on evidence have nonetheless favored admitting evidence of prior specific acts. For instance, Judge Cardozo once said:

> A man is prosecuted for rape. His defense is that the woman consented. He may show that her *reputation* for chastity is bad. He may not show specific, even though repeated, acts of unchastity with another man or other men. The one thing that a sensible trier of facts would wish to know above all others in estimating the truth of the defense, is held by an inflexible rule, to be something that must be excluded from the consideration of the jury. . . .[67]

Professor Wigmore concurred:

> The better view is that which admits the evidence. Between the evil of putting an innocent or perhaps erring woman's security at the mercy of a villain, and the evil of putting an innocent man's liberty at the mercy of an unscrupulous and revengeful mistress, it is hard to strike a balance. But, with regard to the intensity of injustice involved in an erroneous verdict, and the practical frequency of either danger, the admission of the evidence seems preferable.[68]

Even proponents of rape law reform acknowledge that cases do exist in which the past history of the prosecutrix is entirely material. In *Giles v. Maryland*,[69] a case often cited for this proposition, two black defendants had been convicted of raping a white woman who was a stranger to them. The jury had not learned of her extensive promiscuity or the many prior occasions on which she had consented to strangers. The Supreme Court vacated the convictions and did not question that her prior sexual history was material or that defense counsel was entitled to evidence of it during discovery.[70]

If a defense attorney's failure to investigate prosecutrix' character can constitute ineffective assistance of counsel,[71] then an attorney could also be found not to have fulfilled his duty to his client if he did not attempt to present any evidence of unchastity that he found.[72] Some attorneys and legal scholars have concluded that the prejudicial effects outweigh probative value of the

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[66] Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974).

[67] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 156-57 (1921).

[68] WIGMORE, *supra* note 6, § 200 (1940).

[69] 386 U.S. 66 (1967).

[70] J. MACDONALD, RAPE OFFENDERS AND THEIR VICTIMS 260-65 (1971); *see* Amir, *Victim-Precipitated Forcible Rape*, 58 J. CRIM. L.C. & P.S. 493 (1967) (finding significant association between victim's bad reputation and defendant's inference that she consented to intercourse with him).

[71] Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968).

[72] BABCOCK, *supra* note 12, at 838.

evidence of reputation and prior acts of intercourse.[73] Consequently, they have urged changing the evidentiary rules.

Ohio has previously had no evidence rules in its Code concerning sexual assaults, but the 1975 revision has added detailed exclusionary rules:

> Evidence of specific instances of the victim's [or the defendant's] sexual activity, opinion evidence of the victim's [or the defendant's] sexual activity, and reputation evidence of the victim's [or the defendant's] sexual activity shall not be admitted . . . unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.[74]

With the same provisos, evidence is also admissible against the defendant as provided in the section on proof of defendant's motive.[75]

Such a comprehensive statute puts some restraints on the trial judge's discretion, chiefly regarding evidence of consent. The House Judiciary Committee had amended the bill to include an express guarantee of the right of either party to impeach the credibility of the other's witnesses, but the House ultimately removed that provision, so that the evidence section may still be construed to allow judicial discretion on evidence to impeach credibility.

In contrast to Ohio's revision, California's 1974 revision is quite explicit in preserving the admissibility of evidence to impeach credibility.[76] That the Ohio legislature had considered the California provisions is clear, given Ohio's adoption of some of California's language in the provisions on consent, which are nearly identical in substance.[77] Furthermore, California's amended section on consent contains almost verbatim the credibility challenge guarantee that the Ohio House Judiciary Committee added only to have it removed on the House floor.

Less than a month after California's Robbins Rape Evidence Law was approved, that state added two related evidence sections to its Penal Code, one prohibiting the use of the term "unchaste character" in any jury instructions in a criminal trial of a sexual offense,[78] and the other prohibiting jury instructions that would allow a jury to infer from prosecutrix' previous consent

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[73] *Id.* at 839.

[74] OHIO REV. CODE §§ 2907.02(D), 2907.05(D) (Baldwins Legis. Serv. 1975).

[75] OHIO REV. CODE ANN. § 2945.59 (Page 1969).

[76] CAL. EVID. CODE § 782 (West Supp. 1974).

[77] *See* CAL. EVID. CODE § 1103 (West Supp. 1974) (making opinion and reputation evidence and evidence of prosecuting witness' prior sexual conduct, except with the defendant, inadmissible to prove consent).

[78] CAL. PENAL CODE § 1127e (West Supp. 1974).

to sexual intercourse with others that she would thus be more likely to consent again.[79] However, the latter section also tends to narrow the earlier express guarantee of the right of both parties to impeach the other's credibility. It prohibits instructions to the effect that sexual conduct itself may be considered in judging the prosecuting witness' credibility.[80] This section may have entered into the Ohio House's removing the guarantee of unlimited challenge.

Michigan's new statute on evidence[81] is quite similar to California's, with one noteworthy difference. Michigan makes no provision at all for evidence of prior sexual acts with anyone other than the defendant. Such evidence is thus impliedly not admissible for any purpose.[82] Otherwise Michigan makes no distinction based on the purpose of offering the evidence but only requires that it be found "material to a fact at issue" and not more inflammatory or prejudicial than probative. In crucial respects then, Ohio's statute is patterned more after Michigan's than after California's.

At the same time Ohio was refining its new statutes, New York was also adding a new evidence section to its criminal procedure law.[83] The New York statute also makes no distinction between consent and credibility. It too makes provision for evidence of the victim's prior sexual conduct with the defendant only, but also with the same exceptions as Ohio's statute for rebuttal evidence about cause of pregnancy or disease or source of semen. The New York statute adds some atypical exceptions, admitting evidence of the *victim's* past conviction records and the victim's sexual activity during a given period of time.[84]

### E. *Constitutional Problems in the Evidence Rules*

The core of the difficulties with the evidence rules is, of course, the conflict between the constitutional rights of both the victim of sexual attack and the individual accused of the crime. In a sense, the law itself is a mirror of the internal struggle civil libertarians had to endure as they decided what provisions to propose.[85] There is little doubt that the final form of the law will

[79] CAL. PENAL CODE § 1127d(a) (West Supp. 1974).

[80] CAL. PENAL CODE § 1127d(b) (West Supp. 1974). *But see* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion) ("[T]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . .").

[81] MICH. COMP. LAWS ANN. § 750.520j (Supp. 1975).

[82] *But cf.* CAL. EVID. CODE §§ 1103(2)(a), 1103(2)(b), 1103(2)(d) (West Supp. 1974) (not admitting past history with anyone other than defendant to prove consent but making explicit provision for admitting all material past history, both reputation and acts, to impeach credibility).

[83] N.Y. PENAL LAW § 60.42 (McKinney's Sess. L. News ch. 230 1975).

[84] *But see* MODEL PENAL CODE, *supra* note 23, § 213.1(1) (fostering virtually unlimited admissibility of evidence about the prosecuting witness' past sexual activity).

[85] It is indicative of Ohio's struggle that lobbying was done by both the ACLU and the ACLU Women's Project. They did not take contrary positions, but each did modify the other.

 

do much to ease the conviction of sexual offenders, and in the process aid victims and possibly reduce their number in the first place. Feminists will have grounds to criticize some of the compromises, but those criticisms will be minor in comparison to those of the supporters of the rights of the accused. It is largely for this reason that the comparisons with other states' recent legislation have been detailed. Michigan's evidence law in particular has already been subjected to strong criticism on constitutional grounds.[86] The ultimate question about Ohio's law must also be whether it can survive constitutional attack. If substantial parts cannot, then the long-term effect may be to reinforce previously well-founded assumptions that rapists are in little danger of successful prosecution.[87]

The constitutionality of the other states' recent rape evidence statutes has not yet been tested in the United States Supreme Court; however, there are recent rulings on analogous attempts at exclusion. In *Chambers v. Mississippi*,[88] the Court reversed a murder conviction in part because the defendant had been unable to present witnesses in his behalf under Mississippi's "voucher rule," which prohibited impeaching one's own witness. Other testimony that would have been helpful to Chambers was excluded as hearsay. The Supreme Court granted certiorari with the express purpose of testing petitioner's trial for possible violations of due process which would render the trial fundamentally unfair.[89]

Although the facts in the *Chambers* murder case differ in most respects from those in a rape case, the rationale for the Court's decision in *Chambers* is worth tracing because the defendant's claim there was that the various evidentiary rulings at his trial had frustrated his effort to develop his defense.[90] The *Chambers* majority is emphatic in its position that, not only can evidentiary rules be of constitutional magnitude, but also that the Mississippi rules in question, taken together, were violative of fourteenth amendment due process and deprived the defendant of his right to a fair trial.[91]

Justice Powell's opinion is careful to state explicitly that the Court is establishing no new constitutional principles[92] and to trace the prior decisions on which *Chambers* rests. Noting that the Mississippi rules prevented Chambers from cross-examining a major witness against him and presenting witnesses in his own behalf who would have discredited that witness'

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86 *Limitations, supra* note 20, at 407-08, 418, 426.

87 *See* notes 11 and 12 and accompanying text *supra*.

88 410 U.S. 284 (1973).

89 *Id.* at 289-90.

90 *Id.* at 290 n.3.

91 *Id.* at 302-03.

92 *Id.* at 302.

reputation,[93] the Court states: "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."[94] The Court acknowledges that the right to confront is subject to limitation, but only if competing state interests, found legitimate after close examination,[95] justify the limitation.[96]

The immediate competing interest in a rape case is the prosecuting witness' right to privacy; the wider state interest is deterring future sexual attacks by securing present conviction. The former is one of the least settled constitutional rights; the latter is a policy concern of the criminal justice system in the interest of social welfare. The *Chambers* test puts these interests in competition with "traditional and fundamental standards of due process,"[97] and with the sixth amendment right to confront and compel witnesses, hardly an even match. If rape evidence rules are to survive the competition and pass the *Chambers* test, they must not violate the defendant's right to confront the prosecuting witness and to attack that witness' credibility.

The case of *Davis v. Alaska*[98] demonstrates the weakness of the prosecution witness' privacy rights when put into competition with confrontation rights. Here the State had a policy designed to protect a juvenile and his family from the embarrassment that would result if his juvenile court record and probation status were disclosed. The Supreme Court, finding that the right of confrontation superseded the policy, ruled that the confidentiality of the record had to yield to "so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[99] The Court's language could easily be found applicable in a rape trial: "[T]he State's desire that [the prosecution witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself."[100]

It is possible to give *Davis v. Alaska* a narrow interpretation as applying onto to juvenile offenders' records and then only on an issue of bias.[101] It is

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[93] *Id.* at 294. Exclusionary rules in a rape trial can have the same effect.

[94] *Id.* at 294-95, *citing* Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972); Jenkins v. McKeethen, 395 U.S. 411, 428-29 (1969); Specht v. Patterson, 386 U.S. 605, 610 (1967); *In re* Oliver, 333 U.S. 257, 273 (1948).

[95] Berger v. California, 393 U.S. 314, 315 (1969).

[96] 410 U.S. at 295, *citing* Mancusi v. Stubbs, 408 U.S. 204 (1972).

[97] *Id.* at 302.

[98] 415 U.S. 308 (1974).

[99] *Id.* at 320.

[100] *Id.*

[101] State v. Burr, 525 P.2d 1067, 1068 (Ore. Ct. App. 1974) (where records were sought to impeach credibility).

worth noting, however, that the Ohio Supreme Court has relied on *Davis* in the case of *State v. Cox*.[102] Although this was another juvenile records case, the Ohio Supreme Court required that the records be admitted to impeach the credibility of a prosecution witness. In so holding, the court refused to be bound by a state law[103] designed "to effectuate [a] policy of protecting...confidentiality."[104]

Another pair of recent cases shows the possibility of sixth amendment challenge as well as fifth and fourteenth. In *United States v. Nixon*[105] the Supreme Court reaffirmed the constitutional right to have produced all relevant and admissible evidence at trial to guarantee the right to confront and compel witnesses as well as the fifth amendment right to due process. More recently, in *Herring v. New York*,[106] the Court reiterated that the fundamental sixth amendment rights are extended to state prosecutions by way of the fourteenth amendment.[107] *United States v. Nixon* and *Herring v. New York* are linked by a very solid chain to *Kirby v. United States*,[108] which nearly a century ago referred to the right of confrontation as "[o]ne of the fundamental guaranties of life and liberty" and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution. . . ."[109]

In *Dutton v. Evans*,[110] Justice Stewart explained that "the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials. . . ."[111] In *California v. Green*,[112] Justice White set forth in more detail what the clause is supposed to accomplish:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[113]

Controversies over possible violation of the confrontation clause have

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[102] 42 Ohio St. 2d 200, 327 N.E.2d 639 (1974).
[103] OHIO REV. CODE ANN. § 2151.358 (Page 1969).
[104] 42 Ohio St. 2d at 204, 327 N.E.2d at 642.
[105] 418 U.S. 904 (1974).
[106] 95 S. Ct. 2550 (1975).
[107] *Id.* at 2553.
[108] 174 U.S. 47 (1899).
[109] *Id.* at 55, 56.
[110] 400 U.S. 74 (1970).
[111] *Id.* at 89.
[112] 399 U.S. 149 (1970).
[113] *Id.* at 158.

centered on its second purpose, that of insuring the right of cross-examination. Two cases decided the same day, *Pointer v. Texas*[114] and *Douglas v. Alabama*,[115] demonstrate most clearly how insufficient opportunity for cross-examination constitutes a violation of the sixth amendment. In *Pointer*, the State introduced at trial a transcript of the crucial witness' testimony taken at preliminary hearing. The witness had left the jurisdiction and did not appear at the trial.[116] What was essential to the Court's decision was not so much the witness' absence at trial as the fact that the defendant had been unrepresented by counsel at the preliminary hearing. His having attempted himself to cross-examine the witness was inadequate exercise of the right of confrontation.[117]

The crucial witness in *Douglas* was not physically absent; however, he could not be adequately cross-examined because of his reliance on his fifth amendment privilege not to answer. Reversing the defendant's conviction, the Court held that his inability to cross-examine the witness denied "the right of cross-examination secured by the Confrontation Clause."[118]

If *Pointer* and *Douglas* stood alone, one might well conclude that anything short of complete cross-examination violates the confrontation clause. However, they do not stand alone. They must be read in light of both *Dutton v. Evans*, which described the *Pointer* and *Douglas* violations as "flagrant,"[119] and more particularly in light of *California v. Green*, decided the same year as *Dutton*.

While reaffirming the sixth amendment right to confront as being obligatory on the States by way of the fourteenth amendment,[120] the Supreme Court in *Dutton* let a conviction stand even though it was based in part on the evidence of a principal witness, an alleged accomplice, who had been granted immunity, and also based on hearsay. What saved the hearsay evidence was that the defendant cross-examined fully the witness who provided it.[121]

*California v. Green* is even more instructive. The California Supreme Court had excluded evidence of the prior statement made at preliminary hearing by a "turncoat" witness. Because the statement had been made under oath and was subject to cross-examination by a defendant represented by counsel, the Supreme Court reversed, holding that testimony from a preliminary hearing where there was cross-examination "provides substantial

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[114] 380 U.S. 400 (1965).
[115] 380 U.S. 415 (1965).
[116] 380 U.S. at 401.
[117] *Id.* at 400.
[118] 380 U.S. at 419.
[119] 400 U.S. at 84.
[120] *Id.* at 79.
[121] *Id.* at 87-89.

compliance with the purposes behind the confrontation requirement. . . ."[122]

There has long been a recognized exception to the hearsay exclusion allowing prior testimony of a witness who is unavailable at trial because he is dead.[123] In *Green,* the Supreme Court acknowledged a far wider range of permissible exceptions, allowing prior testimony of both the witness who has had a lapse of memory and the one who claims his fifth amendment privilege to remain silent.[124] The expansion may be criticized on the grounds that the turncoat witness and the silent one are suspect while the dead person is not responsible for his unavailability.

The *Green* majority answers the criticism this way:

> [A]s a constitutional matter, it is untenable to construe the Confrontation Clause to permit the use of prior testimony to prove the State's case where the declarant never appears, but to bar that testimony where the declarant is present at the trial, exposed to the defendant and the trier of fact, and subject to cross-examination.[125]

The Supreme Court's contrary construction looks to "the particular vice that gave impetus to the confrontation claim . . . , the practice of trying defendants on . . . *ex parte* affidavits or depositions . . . , thus denying the defendant the opportunity to challenge his accuser. . . ."[126] This vice is not present when the witness is present, when the witness makes a statement under oath, when the trier of fact has full opportunity to assess the witness' demeanor, and when the defendant has the opportunity to cross-examine.

In full light of both *Dutton* and *Green,* then, Ohio's new rape evidence law should stand firm under scrutiny for sixth amendment violation, test after test: (1) The law in no way authorizes the prosecuting witness to be absent or to refuse to testify under oath; (2) The law in no way interferes with the opportunity of the trier of fact to observe the demeanor of the witness; and (3) The law does not even authorize introduction of prior inconsistent testimony or hearsay evidence—the types of evidence that normally cause cross-examination controversies.

In fact, Ohio's new rape law attends carefully to insuring the opportunity for cross-examination. It does so by adding the requirement of an in camera hearing for the judge to resolve admissibility of proffered evidence about sexual reputation and conduct.[127] The hearing applies equally to evidence

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[122] 399 U.S. at 166.

[123] Mattox v. United States, 156 U.S. 237 (1895).

[124] 399 U.S. at 168 n. 17, *citing* 5 WIGMORE, *supra* note 6, §§ 1408, 1409.

[125] *Id.* at 166-67.

[126] *Id.* at 156.

[127] Ohio Rev. Code §§ 2907.02(E), 2907.05(E) (Baldwins Legis. Serv. Aug. 1975).

offered by both complainant and defendant; it must be held prior to taking the testimony in question or receiving the evidence in open court.

The hearing has much in common with a preliminary hearing and, according to the statute, may even be held as part of a preliminary hearing, which since *Coleman v. Alabama*[128] is unquestionably a "critical stage" at which a defendant has the right to counsel.[129] Thus even though the judge's rulings at the in camera evidence hearing may result in exclusion of some evidence about the prosecuting witness, there is nothing to prevent the defendant from presenting such evidence at the hearing or to prevent the defendant from fully cross-examining the prosecuting witness there.

Understanding Ohio's hearing provisions fully requires reading them in conjunction with the other evidence sections. Together they spell out carefully how the judge is to resolve admissibility questions. He cannot admit any evidence of either party's prior sexual activity unless it pertains to the origin of semen, pregnancy, or disease, or past sexual activity with the other party. Under this preliminary test, evidence of the prosecuting witness' prior sexual activity with the defendant is entirely admissible.

Evidence that meets the preliminary test must then meet two more tests as well: (1) the judge must find it material to a fact at issue; and (2) he must also find its potential probative value of greater weight than its potential inflammatory or prejudicial value. Requiring that evidence be material to a fact at issue presents no hardship for the defendant. If the question of the prosecuting witness' consent to the sexual activity under litigation is at issue, the defendant will be permitted under this test to introduce evidence tending to prove it. The test is entirely conventional.

The second test is not. It leaves wide discretion for the judge to speculate about the potential values of admitting or excluding evidence that he has already ruled material. The guiding language of the statute is important in two ways. First, it does not ask him expressly to consider competing rights of privacy and confrontation or due process; it asks him only to consider competing prejudicial and probative values. In short, the statute focuses his attention on the procedural effects of his evidentiary rulings, not on the United States Constitution. Second, the language is the same as that in the new Federal Rules of Evidence stating the general rule admitting evidence of a witness' prior criminal conviction to impeach his credibility under certain conditions including the court's determination "that the probative value . . .

[128] 399 U.S. 1 (1970).

[129] In Ohio, a defendant in a felony case is entitled to a preliminary hearing with full right to cross-examine. OHIO R. CRIM. P. 5(B)(1),(2). The rule specifies that the preliminary "hearing shall be conducted under the rules of evidence prevailing in criminal trials generally."

outweighs its prejudicial effect to the defendant. . . ."[130] By applying such language to evidence offered about the prosecuting witness, Ohio's legislature has openly acknowledged that in crucial respects the prosecuting witness in a rape trial is treated like a defendant and so deserves the same evidentiary protection as the defendant. The victim's past sexual activities with persons other than the defendant are thus afforded by the statute the same status as the defendant's past criminal activities not involving the victim.

Furthermore, potential prejudice alone will not exclude the evidence. If potential probative value outweighs prejudicial value, the evidence will be admitted. Thus the final test circles back to the previous one, insuring admission of material evidence of the witness' prior sexual activities with the defendant or even with others if the evidence pertains to the origin of semen, pregnancy, or disease—matters of evidence that could help prove the defendant innocent of the crime. Thus all of the related provisions, taken together, do not interfere with the defendant's right to defend himself either on the ground that he had no sexual activity with the witness or on the ground that the sexual activity that occurred was consensual.

The only way the provisions specially serve the prosecuting witness is to make it more difficult for the trier of fact to indulge even the unconscious presumption that prior consensual activity with another automatically indicates present consensual activity with the accused, or that lack of chastity automatically indicates lack of veracity. Such presumptions of course do not advance any mission designed to seek the truth. Even if they could do so, they would still falter under Justice Brennan's warning in *Bruton v. United States:*[131] "Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice."[132]

For this reason it is of no great significance that the final wording of Ohio's hearing provisions dropped the explicit reference to preserving the right to impeach credibility. Since the law says nothing to deny the right, it remains impliedly intact. Also, since credibility is not actually an issue of fact, reference to it in the hearing provision might be considered out of place. In any case, during the presentation of evidence and cross-examination on the fact issues, including consent, the trier of fact will have ample opportunity to judge whether the witness is telling the truth.

A useful conclusion to the analysis of Ohio's hearing provisions is comparison with those recently adopted in other states. California's law

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[130] FED. R. EV. 609.

[131] 391 U.S. 123 (1968).

[132] *Id.* at 134.

is considerably more detailed in setting forth the provisions for its required in camera hearing; however, the provision applies only to evidence about the complainant, not about the defendant.[133] Michigan also now provides for the hearing, but it is up to the discretion of the judge,[134] which is surprising because the new Michigan law otherwise leaves almost nothing to the judge's discretion. New York's new evidence section also mentions the in camera hearing as a judge's option, one that need be considered only if no other stated grounds for admitting the controverted evidence about the victim are available.[135] Thus New York's hearing provision seems almost an afterthought, not at all central to the substance of the law.

Iowa is another state with an in camera hearing provision.[136] Its 1974 amendment is fairly restrictive, admitting evidence of the prosecuting witness' previous sexual conduct only after such hearing and then only if the conduct in question occurred no more than one year before the alleged crime, unless with defendant. The section makes no distinction between purposes of showing consent or impeaching credibility except to preserve expressly the credibility challenge of both parties, but only in regard to prior felony convictions.

What these comparisons underscore is how much more completely Ohio's hearing was designed to buttress the accompanying evidence laws against attack. Ohio's hearing is mandatory. It applies equally to evidence about defendant and complainant. Finally, it forces the judge to address head-on a number of important questions about admissibility that before the new law he might have passed over rapidly. In attending to them now, he is after all less likely than before to exclude probative evidence, just as he is less likely to admit prejudicial evidence. The rules arbitrarily exclude nothing. The accused in Ohio may soon discover that the rules benefit him as much, if not more, than complainant.

F. *Mandatory Sentences*

The final stage of a rape case on which Ohio has revised its law is the sentencing of convicted offenders. Many people favor heavy penalties for rapists on the supposition that such penalties offer added protection to victims by deterring would-be attackers.[137] However, knowledgeable analysts

[133] CAL. EVID. CODE § 782(a) (West Supp. 1974). The detail may be in part attributable to lobbying from the ACLU. *See* Amsterdam & Babcock, *Proposed Position on Issues Raised by the Administration of Laws Against Rape* (Memorandum for the ACLU of Northern California, April 1974), *quoted in* BABCOCK, *supra* note 12, at 840 (listing in precise detail appropriate reasons for a judge to admit controverted evidence after closed voir dire proceedings).

[134] MICH. COMP. LAWS ANN. § 750.520j(2) (Supp. 1975).

[135] N.Y. PENAL LAWS § 60.42(5) (McKinney's Sess. L. News ch. 230 1975).

[136] IOWA CODE ANN. § 782.4 (Supp. 1975).

[137] See Justice Powell's dissent from the Supreme Court's opinion striking down the discretionary death penalty:

> I find it quite impossible to declare the death sentence grossly excessive for all rapes. Rape

of the criminal justice system urge lighter sentences,[138] as well as different degrees of rape[139] or the division of rape into different sexual offenses.[140] The point is to ease convictions.[141]

All the same, Ohio has opted to impose mandatory sentences of five years for rapists convicted a second time and ten years for a second offense if the victim is under the age of 13.[142] Life imprisonment is reserved for the person convicted, even the first time, of felonious sexual penetration of a victim under 13.[143] It is not clear why one who sexually molests children with objects is more of a menace than one who molests them with his penis, serious though the former crime is.

This is an especially questionable system of sentencing in light of the addition to the statute on probation which makes those convicted of first degree rape ineligible for probation.[144] While this prohibition will doubtless serve the best interests of potential victims, it is inconsistent with the mandatory sentencing provision insofar as it does not apply to felonious penetration of a child. As the law now stands, the offender who more than once rapes a child gets no probation but his prison term need be no longer than ten years. Another offender, one whose first offense is to molest a child sexually with some object, will be sentenced to life imprisonment but may soon be on the streets again, on probation.

## IV. CONCLUSION

Such inconsistencies, together with other potentially ineffective attempts to protect victims of sexual offenders, open Ohio's new rape law to strong criticism. However, the criticism poses no dangers to match that

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> is widely recognized as among the most serious of violent crimes. . . . It is widely viewed as the most atrocious of intrusions upon the privacy and dignity of the victim; never is the crime committed accidentally; rarely can it be said to be unpremeditated; often the victim suffers serious physical injury; the psychological impact can often be as great as the physical consequences; in a real sense, the threat of both types of injury is always present.

Furman v. Georgia, 408 U.S. 238, 458-59 (1972).

[138] *E.g.*, S. ROSS, THE RIGHTS OF WOMEN: THE BASIC ACLU GUIDE TO A WOMAN'S RIGHTS 185 (1973).

[139] *E.g.*, *Feminist View*, *supra* note 11, at 353.

[140] *See* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 187 (1971).

[141] *See* Schwartz, *The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape*, 59 J. CRIM. L.C. & P.S. 509 (1968) (more severe penalties resulted in no reduction in either rapes or attempted rapes).

[142] OHIO REV. CODE § 2907.10 (Baldwins Legis. Serv. Aug. 1975).

[143] OHIO REV. CODE § 2907.12(E) (Baldwins Legis. Serv. Aug. 1975). *But cf.* MICH. COMP. LAWS ANN. § 750.520f (Supp. 1975) (also providing for mandatory sentences but only of five years for those convicted more than once of any felonious sexual conduct).

[144] OHIO REV. CODE § 2951.02(F)(4) (Baldwins Legis. Serv. Aug. 1975).

of constitutional attack for violation of confrontation or due process rights. Yet, largely because of the careful evidence and in camera hearing provisions, the law should survive such attack.

The attack is likely to be initiated because of hasty presumptions about the law based on the publicity surrounding its enactment. The argument goes this way: The law came about in response to strong urging from women's organizations, many of them reputed as politically radical and thus inclined to seek measures in women's interest even at the expense of men's. The law was passed, some might say, symbolically, during the International Women's Year. On its face, it provides many new services for victims, most of whom are likely to be women. Therefore, the argument concludes, the law probably protects victims at the expense of the rights of the accused, most of whom are likely to be men. It is an easy argument to frame; hasty reading of the law seems to support it. However, careful study does not.

One cannot spend very many hours studying cases applying the confrontation clause and exclusionary rules without appreciating the confusion engendered by an exclusionary rule that protects the complaining witness as well as the accused. Most exclusionary rules are of course designed to eliminate the possibility of the trier of fact being prejudiced against the defendant by evidence illegally obtained or hearsay evidence that cannot be tested through cross-examination. It is crucial then to keep in mind that the rape law's exclusionary rule is atypical in that it is designed to exclude immaterial evidence potentially prejudicial to either defendant or complainant. Since the law does not authorize either illegally obtained or hearsay evidence to be used against the defendant, its language does not authorize any practice that has ever been condemned for denying a defendant's confrontation rights.

Some may seize upon the circumstances surrounding the enactment of the law as an invitation to claim denial of those rights, but proving the denial will not be easy. Long ago Justice Cardozo wrote of his refusal to set aside a conviction for claimed denial of confrontation:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.[145]

It should be possible to assume that Ohio trial judges will not be eager for reversals based on their unconstitutionally excluding evidence, but also

[145] Snyder v. Massachusetts, 291 U.S. 97, 122 (1933).

the judges should be able to assume their convictions will stand if the only challenges are "gossamer possibilities of prejudice."

Real prejudice is something else altogether, and Ohio's law is careful to protect the accused from it. In providing comparable protection for the complainant, the law only acknowledges how much the victim in a rape case has been treated like a defendant. By making the same provisions for defendants and complainants, the new law serves to expose the defects in the old.

Ohio has accomplished a comprehensive revision of the law on sexual offenses to correct long perpetuated defects. If put to the task of re-drafting to correct whatever minor defects remain, the legislature is not likely to forget the full instruction it received in 1975 on the subject of discrimination in rape laws. The new law may not earn a perfect score, but a high one it does deserve.

BARBARA CHILD