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Admissibility of a Rape Victim's Prior Sexual Conduct in Texas: A Contemporary Review and Analysis.

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ADMISSIBILITY OF A RAPE VICTIM'S PRIOR SEXUAL CONDUCT IN TEXAS: A CONTEMPORARY REVIEW AND ANALYSIS

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I. INTRODUCTION

The treatment of rape victims in criminal prosecutions has become and remains a matter of intense public and legal interest in America.[1] Feminists and others in the 1960s and 1970s attacked rape jurisprudence as representative of attitudes and stereotypes highly contemptuous of women.[2] Police and prosecutors, seeking to increase convictions by encouraging victims to report and prosecute rape offenses, formed a political alliance with feminist and other groups.[3]

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1. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 2 (1977); W. Michael Greene, Comment, *Forcible Rape: The Law in Texas*, 9 TEX. TECH L. REV. 563, 563 (1978); James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 317 (1979). A recent study by the majority staff of the Senate Judiciary Committee indicated that there is an "epidemic of rape" in this country:

> More American women were raped in 1990 than in any year in our nation's history. After contacting hundreds of state and local officials, the majority staff of the Senate Judiciary Committee has compiled the first comprehensive count of rape in 1990. And the picture is bleak; there is an epidemic of rape spreading across the country. There were over 100,000 rapes identified by authorities last year. The majority of states set all-time rape records—and more than four out of every five states reported increases in the number of rapes they recorded.

SENATE JUDICIARY COMMITTEE, VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 1990, 102d Cong., 1st Sess. 1 (1991). The majority staff of the Senate Judiciary Committee also made the following findings and conclusions:

> * In 1990, more women were raped than in any year in United States history.
> * In 1990, the number of rapes in this country reported to authorities exceeded 100,000 for the first time ever.
> * There was over a six percent increase in the number of rapes last year. The increase—5,929 attacks—was the largest in over a decade.
> * 1990 continued a three-year trend of increases in the number of rapes. Further, the 1990 increase was nearly 3 times greater than the 1989 increase.
> * Last year, over one-half of the states (29) set all-time records for the number and rate of rapes.

Id. at i-ii. If anything, the intensity of public and legal interest in the treatment of rape victims in criminal prosecutions has increased in recent years. *See The Mind of the Rapist*, NEWSWEEK, July 27, 1991, at 46-52 (discussing public's perception of rape); *Raped on Campus*, PEOPLE WEEKLY, Dec. 17, 1990, at 94-104 (according to a study of date rape on campus in 1984 and 1985, one in nine college women had been raped and eight of ten victims knew their attacker). The three areas in criminal law which receive the most media attention are alcohol, drugs, and rape. M.P. "Rusty" Duncan, III, *Special Considerations in the Defense of Rape Prosecutions, reprinted in* CRIMINAL DEF. LAW. PROJECT, INSTITUTE ON SEXUAL OFFENSES & DEFENSES 1 (1982).

2. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 768 (1986); *see* 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 516-30 (1980).

3. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 493-94 (1980); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 768 (1986).

Together they pushed rape reform measures through state legislatures and the United States Congress with amazing speed.[4]

The conventional use of evidence of a rape complainant's prior sexual history in rape prosecutions was a major focus of the rape reform movement.[5] Admissibility of such evidence is, in part, attributed to cultural myths and misconceptions suggesting that women want to be raped[6] or falsely report rape.[7] Unfortunately, society came to view such myths and misconceptions as stereotypical of the rape complainant.[8]

A major consequence of the movement for rape reform is that the federal government[9] and forty-nine states[10] have enacted rape shield laws limiting the admissibility of evidence concerning the complainant's sexual history in rape prosecutions. This article will analyze the

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4. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 493-94 (1980); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 32 (1977); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 768 (1986). Feminists working with police officers have also set up specialized police units and treatment centers to assist victims of rape. GERHARD MUELLER, SEXUAL CONDUCT AND THE LAW 33 (1980).

5. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 24 (1977).

6. *Id.* at 25. Typical expressions of this sentiment include: "She was asking for it"; "No female can ever be taken against her will"; and "It doesn't matter since she wasn't a virgin." *Id.* This notion is embraced even today. As recently as the 1990 Texas gubernatorial race, candidate Clayton Williams remarked that rape was like the weather: "If it's inevitable, just relax and enjoy it." Dallas Morning News, Mar. 25, 1990, at 1, col. 1.

7. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 21-22 (1977); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 792 (1986); *see also* Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 403 (1980) (historically, courts assumed women lie about nonconsent to blackmail men, explain discovery of an affair, or due to psychological illness).

8. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 25 (1977); *see* Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025-31 (1991).

9. *See* 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5381, at 485 (1980) (Federal Rule of Evidence 412 was signed into law October 30, 1978).

10. *See* Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 644 nn.1-3 (1987) (40 states enacted statutes and 9 states adopted evidentiary rules shielding rape victims). Arizona follows common law precedent limiting admissibility of a rape victim's prior sexual acts. *Id.*

admissibility of evidence of a rape complainant's prior sexual conduct in Texas from its common law origins concentrating on the issues of consent, the victim's credibility, physical evidence of intercourse, and the promiscuity defense. In addition, a contemporary analysis and discussion of the admissibility of evidence of a complainant's prior sexual conduct necessitates an examination of the justification and motives for the enactment of rape shield legislation.

II. JUSTIFICATION AND MOTIVES FOR RAPE SHIELD LEGISLATION

A. *Law Enforcement*

Prosecutors and police asserted that existing common law rules allowing the admissibility of a rape complainant's prior sexual conduct presented four problems in criminal prosecutions. First, rape victims were abused during cross-examination. Second, this abuse made victims reluctant to report the occurrence of rape, or, if the crime was reported, the victim was reluctant to cooperate in the prosecution of the accused. Third, the reluctance of victims to cooperate made it difficult to obtain convictions. Fourth, the low incidence of convictions usurped the deterrent effect usually obtained in criminal sanctions resulting in a startling increase of the occurrence of rape.[11]

Law enforcement agencies relied upon anecdotal accounts and studies of abuses incurred by rape complainants during cross-examination to initiate enactment of rape shield laws.[12] In a nationwide

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11. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 495 (1980).

12. *Id.* at 496. The following mock cross-examination of a robbery victim, conducted in rape-style interrogation is illustrative of abuses endured by victims in common law rape prosecutions:

Mr. Smith, you were held up at gunpoint on the corner of First and Main?
Yes.
Did you struggle with the robber?
No.
Why not?
He was armed.
Then you made a conscious decision to comply with his demands rather than resist?
Yes.
Did you scream? Cry out?
No. I was afraid.
I see. Have you ever been held up before?
No.
Have you ever *given* money away?

survey of 150 prosecutors' offices sponsored by the National Institute of Law Enforcement and Criminal Justice in 1974,[13] the most important change in existing rape laws desired by the vast majority of prosecutors was reformation of evidence rules limiting the extent of

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Yes, of course.
And you did so willingly?
What are you getting at?
Well, let's put it like this, Mr. Smith. You've given money away in the past. In fact, you have quite a reputation for philanthropy. How can we be sure that you weren't *contriving* to have your money taken from you by force?
Listen, if I wanted. . . .
Never mind. What time did this holdup take place, Mr. Smith?
About 11:00 P.M.
You were out on the street at 11:00 P.M.? Doing what?
Just walking.
Just walking? You know that it's dangerous being out on the street that late at night. Weren't you aware that you could have been held up?
I hadn't thought about it.
What were you wearing at the time, Mr. Smith?
Let's see . . . a suit. Yes, a suit.
An *expensive* suit?
Well—yes. I'm a successful lawyer, you know.
In other words, Mr. Smith, you were walking around the streets late at night in a suit that practically advertised the fact that you might be a good target for some easy money, isn't that so? I mean, if we didn't know better, Mr. Smith, we might even think that you were *asking* for this to happen, mightn't we?

House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments, 61 A.B.A. J. 463, 464 (1975). Connie Borkenhagen, a Law Student Division delegate, presented the hypothetical cross-examination and her arguments for a redefinition of rape to the House of Delegates of the American Bar Association in 1975. *Id.* at 463-64. As a result, the following rape resolution was adopted:

BE IT RESOLVED, That the American Bar Association authorizes the president of the Association or his designee to urge redefinition 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 to aid both the victim and the offender.

Id. at 465.

13. 1 NATIONAL INST. L. ENF. & CRIM. JUST., FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS 9 (1977). In the survey, the prosecutors reported that evidence of a victim's prior sexual conduct was admissible to some degree. *Id.* at 26. The survey revealed that in 5% of the prosecutors' offices surveyed, evidence of a complainant's prior sexual conduct was prohibited by statute and 10% stated that such evidence was prohibited by judicial decision. *Id.* Evidence of prior acts was admissible by statute in 23% of the offices and admissible by judicial decision in 63% of the offices. *Id.*

admissibility of the complainant's prior sexual conduct.[14] An example of abusive cross-examination was recounted in a 1975 study of seventeen rape trials in Philadelphia.[15] Observers noted that the defense attorney seemed to view his task as one of impugning the credibility of the victim in any way possible.[16] In most cases, the complainant felt that she was placed in a position of proving her innocence for somehow soliciting the rape.[17] Incredibly, on several occasions, the complainants were questioned during trial concerning whether they had enjoyed the intercourse occurring in the rape offense.[18]

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14. The following table was compiled by the National Institute of Law Enforcement and Criminal Justice as a result of the 1974 survey of prosecutors:

Most Important Changes in Rape Laws Desired by Prosecutors' Offices (Multiple Responses Acceptable)

Desired Change	Percent
Reforms in Evidence Parameters Limiting Extent of Victim Cross-Examination, e.g., Prior Sexual Conduct of Victim	36%
Statutory Reforms Including: System of Degrees; Broader Definition of Rape; Greater Range of Penalties; Eliminate Requirement of "Utmost Re-sistance"	13%
Permit Defendant Character and Propensity Evidence	12%
Harsher Sentencing	12%
Provide Medical and Psychological Programs	6%
Limit Publicity; Close Proceedings to Public	6%
Lower Penalties to Increase Convictions	5%
Remove Cautionary Instruction	4%
Provide Free Services to Victims	4%
Miscellaneous	5%

Id. at 32. *See generally* NATIONAL INST. L. ENF. & CRIM. JUST., RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES (1974) (presenting guidelines for treatment of rape victims for police, prosecutors, hospitals, and citizen action groups).

15. Carol Bohmer & Audrey Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 392 (1975).

16. *Id.* at 397.

17. *Id.* at 398.

18. *Id.* at 396. In the words of one of the judges interviewed, "A hostile vagina will not admit a penis," thus requiring proof of extensive physical trauma to substantiate a rape claim. *Id.* at 398. In contrast to the Philadelphia study, different results were obtained in a study of 21 rape trials in Travis County, Texas during 1970-1976. Robert A. Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 VA. L. REV. 357, 358-63 (1978). Observers reported that no evidence was introduced at trial of the complainant's sexual conduct with third persons or her reputation for unchastity. *Id.* at 363. Evidence of the complainant's prior sexual conduct may not have been offered for two reasons: (1) Texas case

Enactment of rape shield legislation is supported by the proposition that rape is the most under-reported violent crime in the United States.[19] Estimates of actual rapes range from three to twenty times that of reported rapes.[20] However, under-reporting of the incidence of rape is only significant in rape shield legislation if the failure to report rape is due to admissibility of evidence of the complainant's sexual history.[21] According to the 1977 Federal Bureau of Investigation nationwide crime report, failure to report rape is due largely to the victims' fear of their attackers and to a sense of embarrassment over the occurrence.[22] Some under-reporting of the crime has been attributed to the complainant's fear of her assailant, fear of publicity, and discontent due to delayed proceedings.[23] Nevertheless, existing laws allowing the admissibility of evidence of the victim's sexual history "is widely regarded as a prime deterrent to would-be complainants in cases of rape."[24]

It was argued that a large number of the cases did not go to trial due to the victims' fear that they would be subjected to questioning regarding their prior sexual conduct.[25] In 1974, Federal Bureau of Investigation statistics revealed that only fifty percent of rapists in the

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law limited the admissibility of such evidence, and (2) the district attorney was selective in accepting cases for prosecution. *Id.* at 364.

19. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 5 (1977); W. Michael Greene, Comment, *Forcible Rape: The Law in Texas*, 9 TEX. TECH. L. REV. 563, 564 (1978). In 1978, the New York Police Department estimated that only one in ten rapes is reported to the police. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 498 (1980).

20. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 5 (1977); W. Michael Greene, Comment, *Forcible Rape: The Law in Texas*, 9 TEX. TECH. L. REV. 563, 564 (1978). More conservative figures appeared in a national survey conducted by the Census Bureau and the Law Enforcement Assistance Administration in 1972, revealing that 85% of minority rape victims and 65% of white rape victims reported the offense to the police. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 498 (1980).

21. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 499 (1980).

22. *Id.* at 499-500.

23. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 24 (1977).

24. *Id.*; *see also* Robert Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 VA. L. REV. 357, 365 (1978) (concluding that a victim's fear of having her sexual history examined in court causes many rape victims to refuse to report the rape).

25. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 501 (1980).

United States were apprehended, only sixty percent of those arrested were charged, and fifty percent of those charged were acquitted or their cases were dismissed.[26] Although the empirical data suggested that an accused rapist had a seventy percent chance of walking free,[27] it failed to show why so few rapists were convicted. One study found that over forty percent of the accused rapists were not prosecuted due to the victim's refusal to prosecute.[28] A survey of police officials cited the evidence rule allowing admissibility of prior sexual conduct as a leading cause for the refusal of victims to cooperate in bringing rapists to trial.[29] Such data suggests but does not conclusively establish that the evidentiary rule is responsible for the victim's decision whether to prosecute or not.[30]

In all states, rape is a felony offense punishable by long-term imprisonment.[31] Despite the gravity of punishment for the crime, police officials were alarmed by the growing number of reported rapes—the rates of rape more than doubled in the United States between 1965 and 1974.[32] Police officials blamed the existing evidentiary rule for

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26. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 6 (1977). In the Travis County, Texas study, no complaints were filed in 51 reported rapes and in 54 cases, complaints did not result in indictments. Robert Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 VA. L. REV. 357, 375-76 (1978). Indictments resulted in 96 cases, indicating that over half of the reported rape cases do not result in indictments. *Id.* at 377.

27. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 6 (1977).

28. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 501 (1980).

29. *Id.* at 502.

30. *Id.*

31. GERHARD MUELLER, SEXUAL CONDUCT AND THE LAW 31 (1980). In some states, rape is even considered a capital offense. *Id.*

32. 1 NATIONAL INST. L. ENF. & CRIM. JUST., FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS 7 (1977). The following table was compiled by the Department of Justice, *Uniform Crime Reports for The United States, 1974.* (Washington D.C.: U.S. Government Printing Office, 1975):

the increases.[33] Assuming that crime rates have a correlation with conviction rates, the evidentiary rule may be indirectly responsible for the increase in incidence of rape.[34]

B. *Attitudes About Women and Sexuality*

Many myths and misconceptions concerning women, sexuality, and rape were incorporated into evidentiary rules. Feminists and others argued that women have been treated as children in sexual matters due to a holdover of Victorian attitudes.[35] Three aspects of this antiquated philosophy contributed to these attitudes. First, the male-dominated society was afraid that vindictive women would falsely accuse innocent men of rape. Second, the chastity of a woman was considered a character trait. Third, society had a pervading concern for its male members and little concern for its female members.[36]

These antiquated attitudes were prevalent in evidence rules codified

Index of Forcible Rape in the United States
(1965-1974)
Rate per 100,000

Year	Number	Inhabitants
1965	23,330	12.1
1966	25,730	13.2
1967	27,530	13.9
1968	31,560	15.8
1969	37,050	18.4
1970	37,860	18.6
1971	42,120	20.4
1972	46,690	22.4
1973	51,230	24.4
1974	55,210	26.1
Change in Rate of Reported Rape (1965-1974 = 115.7%)		

See also 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 503 (1980).

33. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 503 (1980).

34. *Id.* at 504.

35. M.P. "Rusty" Duncan, III, *Special Considerations in the Defense of Rape Prosecutions, reprinted in* CRIMINAL DEF. LAW PROJECT, INSTITUTE ON SEXUAL OFFENSES & DEFENSES 1, 3 (1982). One author suggests that the idea of rape has been mythified and glamorized for both the rapist and the victim. SUSAN BROWNMILLER, AGAINST OUR WILL 360 (1975).

36. Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 650 (1987).

in the United States.[37] For example, the well-known authority on evidence, John Henry Wigmore, urged courts to require that female complainants in rape cases be examined by a qualified physician in order to ascertain her social history and mental makeup.[38] He explained his reasoning as follows:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.[39]

Feminists and others criticized such views as chauvinistic and urged that evidentiary rules based upon these antiquated attitudes be reformed.[40]

One myth or misconception incorporated into evidentiary rules was that the victim's chastity was relevant concerning the guilt of the accused, the victim's consent to the intercourse, and the victim's credibility.[41] The "normal" woman did not desire sex, and the survival of the species was believed to be dependent on a predatory male sexuality.[42] The "chaste" woman was viewed as the exclusive possession of one man in marriage while the "unchaste" woman served as an outlet for "normal" male promiscuity.[43] Feminists and others argued that,

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37. *Id.* at 649-50.

38. 3A JOHN H. WIGMORE, EVIDENCE § 924a, at 737 (Chadbourn rev. ed. 1970).

39. *Id.* at 736.

40. Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 651 (1987).

41. *Id.* at 650.

42. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 513 (1980); *see also* SUE BESSMER, THE LAWS OF RAPE 11 (Annette K. Baxter ed., 1984) (the "normal" or "good" woman disdained sex and only submitted to sex after marriage).

43. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 792 (1986).

as a result of these myths, the criminal charge of rape did not function to protect a woman's freedom of sexual choice and bodily integrity, but rather to protect a man's property interest in a "chaste" woman.[44] Under existing evidentiary rules, an accused rapist could offer at least three justifications for rape. First, the woman was not "normal" and desired sex with him. Second, the woman was unchaste or considered "damaged goods" and of little value to her male owner. Third, the woman was a prostitute and deserving of the rape.[45]

One rationalization for admitting evidence of the complainant's chastity was that chastity was somehow linked to the complainant's veracity.[46] In other words, "chastity was equated with veracity while unchastity was associated with dishonesty."[47] Feminists and others complained that while the credibility of a female rape victim could be impeached with evidence of her prior sexual conduct, a male witness could not be impeached with similar evidence.[48] They argued that the existing evidentiary rule discriminated by allowing proof of sexual habits to apply to the credibility of women, but not to the credibility of men.[49] Another rationalization for the admissibility of evidence of the complainant's chastity was the presumption that the unchaste complainant consented to the rape.[50] Feminists and others concede that unchaste women are more likely to engage in consensual intercourse, but argue that there is no indication that unchaste women are more likely to falsely report rapes.[51]

Another myth or misconception was that unchaste women became

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44. *Id.*; *see also* 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR. FEDERAL PRACTICE AND PROCEDURE § 5382, at 513-14 (1980).

45. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 514 (1980).

46. Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 406 (1988). The theory behind this practice is that "once a loose woman, always a liar." SUE BESSMER, THE LAW OF RAPE 251 (Annette K. Baxter ed., 1984).

47. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 325 (1979).

48. Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 407 (1988).

49. *Id.*; *see also* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 47 (1977) (argument emphasizing sex-discriminatory aspect of evidentiary rule is stronger than argument that rape victims are discriminated against when compared with other crime victims).

50. SUE BESSMER, THE LAWS OF RAPE 253 (Annette K. Baxter ed., 1984).

51. *Id.* at 266; *see also* James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 325-26 (1979) (unchas-

either susceptible to sexual fantasies, or vindictive and likely to falsely accuse men of rape.[52] Courts distrusted the testimony of the rape victim and reasoned that a false charge was "brought by the spurned female that has as its underlying basis a desire for revenge, or a blackmail or shakedown scheme."[53] Others expressed concern that women fabricated rapes due to female psychic diseases causing them to have imaginary sexual encounters.[54] Proponents of the existing evidentiary rules argued that some of the supposed rape victims were actually prostitutes who failed to collect their fees.[55] Opponents of existing rules urged that the fear of false rape charges was unwarranted because statistical data reveals that a low percentage of rapes reported are false.[56]

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tity evidence would rarely help a jury in determining whether a complainant's testimony was untruthful).

52. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 792-93 (1986); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 21-22 (1977). "[M]any people believe that most rapes are fabrications of scornful, malicious females or females who consent, but subsequently change their minds and decide they were raped." James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 323 (1979). Opponents to rape shield legislation gained the support of men preoccupied with the fear of being falsely accused of rape. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 526-27 (1980).

53. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 21 (1977), *quoting* Morris Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROBS. 217, 223 (1960); *see also* Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 403 (1988) (Women lie about rape "to blackmail men, to explain the discovery of a consensual affair, or because of psychological illness.")

54. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 21-22 (1977); *see also* 3A JOHN H. WIGMORE, EVIDENCE § 924a, at 737 (Chadbourn rev. ed. 1970) (advocating that all rape victims be subjected to psychiatric evaluation).

55. SUE BESSMER, THE LAWS OF RAPE 145 (Annette K. Baxter ed., 1984).

56. "[T]here is no empirical data to prove that there are more false charges of rape than of any other violent crime. Estimates indicate that only two percent of all rape reports prove to be false, a rate comparable to the false report rate for other crimes." Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1028 (1991) (footnotes omitted); James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 323 (1979); *see* SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM—A SYNTHESIS OF RESEARCH FINDINGS 207-09 (1979) (ten studies reveal that the frequency of unfounded and false rape reports range from 2% to 25%). A Denver study concluded that less than 1% of all rape charges were proven to be false and a rape squad in New York City reported that only 2% of the rapes reported were false. 23 CHARLES A.

Feminists and others contended that allowing evidence of the complainant's sexual history resulted in her character assassination in open court.[57] Cross-examination delved into issues such as the victim's attendance of bars and nightspots, use of birth control, illegitimate offspring, and number of previous sexual encounters.[58] Such treatment became a trial of the victim's moral worth to determine if she deserved protection of the rape laws; in other words, the victim was on trial.[59]

Enactment of rape shield legislation is further supported by recognition that the changing societal values about sexual activity in the United States invalidated the basis for the existing rules.[60] Advocates for rape reform demonstrated that a majority of young women[61] participate in consensual premarital sex and that a corresponding majority of men surveyed believe such behavior to be normal and acceptable.[62] Since engaging in consensual premarital sexual relations is no longer considered unconventional, feminists and others believed that such evidence no longer supported the inference that "if she strayed once, she'll stray again."[63]

Another myth or misconception about rape was that it is a crime of sexual gratification and that a woman by her appearance, conduct, and activities may contribute to the perpetration of the crime.[64] This

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WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 529-30 (1980).

57. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 794 (1986).

58. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 14 (1977).

59. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 794-95 (1986). The phrase "victim on trial" summarizes the basis of the feminists' criticism of existing evidentiary rules. *Id.* at 794.

60. *Id.* at 798.

61. *See* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 21 (1977) (studies conducted in the late 1960s and early 1970s show that over 50% of rape victims are under the age of 20 and about 75% of rape victims are under the age of 26).

62. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 798 (1986); *see also* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 56 n.332 (1977) (noting that studies of sexual behavior in the 1970s revealed that over two-thirds of American women engaged in premarital sex by age 25).

63. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 798-99 (1986).

64. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 323 (1979).

notion was refuted by empirical studies involving interviews with incarcerated rapists and other data.[65] One 1971 study concluded that rape is "an expression of hostility by a male who feels weak, inadequate and dependent."[66] Today, there is a growing acceptance that rape is "a very ugly . . . crime of violence motivated by hostility and rage, not sexual passion."[67] The "profile of a rapist" has been summarized as follows:

> The rapist is typically a young man with a record of previous arrests—often for violence unassociated with sexual activity. He rarely fits the stereotype of "a callous man for whom women are simply sexual objects of little value beyond that of gratifying his erotic needs." Indeed, for most of these men, gratification comes *not* from coitus but from the force and violence surrounding it; the rapist is reassured by his ability to overpower and humiliate his victim, and often will proceed to abuse her physically after she has acceded to his sexual demands. There is really little sexuality in rape; it is, rather, a displacement of long-accumulated childhood rage or fear toward a rejecting or cruelly seductive mother. The manifest violence and hostility of the rapist is usually inversely proportional to his sexual potency with his victim. Rapists fall into three broad groups: those for whom the attack is a counter-phobic defense against a deep-rooted fear of women—whose esteem they perennially hope to win; those for whom violence and the victim's resistance are requisite to sexual arousal; and those whose attack primarily must involve bodily mutilation.[68]

These types of studies increased society's understanding of the rapist and the violence of the offense and gave additional support for rape

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65. W. Michael Greene, Comment, *Forcible Rape: The Law in Texas*, 9 TEX. TECH. L. REV. 563, 565 (1978).

66. *Id.* Results of a nationwide study revealed that gender inequality, pornography, and social disorganization contribute to rape. LARRY BARON & MURRAY A. STRAUS, FOUR THEORIES OF RAPE IN AMERICAN SOCIETY 185 (1989). The study also found that cultural approval of violence did not statistically contribute to rape. *Id.*

67. Michol O'Connor, *Texas Sex Laws*, Texas Observer, Dec. 15, 1978, at 13, col. 1; *see* NANCY GAGER & CATHLEEN SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA 207 (1976) (rape is an expression of rage and violence, rather than thwarted sexual desire); James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 323 (1979) (rape is a crime of violence, rather than one of sexual gratification).

68. Martin Blinder, *Psychodynamics of Criminal Behavior, reprinted in* CRIMINAL DEF. LAW. PROJECT, INSTITUTE ON SEXUAL OFFENSES & DEFENSES 9 (1982); *see also* LINDA B. BOURQUE, DEFINING RAPE 59-76 (1989) (summarizing studies of rapist profiles).

shield legislation.[69]

III. FEDERAL RULE OF EVIDENCE 412

Because of the overwhelming criticism against existing common law rules admitting evidence of rape victims' prior sexual history, the United States Congress began to consider rape shield legislation in 1975.[70] It was not until October 1978, however, that Federal Rule of Evidence 412[71] was enacted when the Privacy Protection for Rape

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69. W. Michael Greene, Comment, *Forcible Rape: The Law in Texas*, 9 TEX. TECH. L. REV. 563, 565 (1978).

70. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5381, at 484 (1980). Senator Lloyd Bentsen was responsible for introducing the first rape shield bill, but withdrew it after learning that drafters of the Federal Criminal Code were considering the matter. *Id.*

71. FED. R. EVID. 412 provides:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or (B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.

(c)(1) If the person accused of committing an offense under chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in

Victims Act of 1978[72] was signed into law.[73] Federal Rule of Evidence

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chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For the purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under chapter 109A of title 18, United States Code is alleged.

The Violence Against Women Act of 1991, S. 15, 102d Cong., 1st Sess. (1991) was filed in January 1991. The Violence Against Women Act of 1991 was amended, and as amended, was favorably reported by the Senate Judiciary Committee on July 18, 1991. That legislation would amend rule 412 by adding the following at the end of subdivision (c)(3):

In its order, the court should consider (A) the chain of reasoning leading to its finding of relevance; and (B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.

S. 15, 102d Cong., 1st Sess. § 153 (1991). In addition, the legislation would amend rule 412 by adding the following:

(e) INTERLOCUTORY APPEAL—Notwithstanding any other provision of law, any evidentiary rulings made pursuant to this rule are subject to interlocutory appeal by the government or by the alleged victim.

(f) RULE OF RELEVANCE AND PRIVILEGE—If the prosecution seeks to offer evidence of prior sexual history, the provisions of this rule may be waived by the alleged victim.

S. 15, 102d Cong., 1st Sess. § 153 (1991). The Violence Against Women Act of 1991 would amend the Federal Rules of Evidence by adding the following:

RULE 413. EVIDENCE OF VICTIM'S CLOTHING AS INCITING VIOLENCENotwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of an alleged victim's clothing is not admissible to show that the alleged victim incited or invited the offense charged.

S. 15, 102d Cong., 1st Sess. § 154 (1991). In addition, the proposed legislation would amend the Federal Rules of Evidence by adding rules 412A and 412B. Rule 412A concerns the admissibility of the victim's past sexual behavior in criminal cases other than those cases governed by rule 412. Rule 412B concerns the admissibility of the victim's past sexual behavior in civil cases in which the defendant is accused of actionable sexual conduct such as sexual harassment or discrimination claims. S. 15, 102d Cong., 1st Sess. §§ 151, 152 (1991).

72. Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978). New York Representative Elizabeth Holtzman, the principal sponsor of the bill which became rule 412, justified its enactment as follows:

Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. . . . H.R. 4727 would rectify this problem in Federal courts and I hope, also serve as a model to suggest to the remaining states [without rape shield laws] that reform of existing rape laws is important to the equity of our criminal justice system.

412 "represents a departure from a 200-year-old view typified by Lord Chief Justice Hale, who said that rape was 'an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent.' "[74] Contrary to common law rules, Rule 412 prohibits *all* reputation and opinion evidence concerning a rape complainant's prior sexual behavior.[75] Specific instances of the victim's prior sexual conduct may be admitted in only three circumstances: (1) the Constitution requires admissibility of the evidence; (2) the accused raises the issue of consent and the court determines, outside the jury's presence, that evidence of the victim's prior sexual relations *with the defendant* is relevant and its probative value outweighs the danger of unfair prejudice; and (3) the accused denies that he is the source of semen or injury and the court determines, outside the jury's presence, that evidence of the victim's prior sexual relations *with third persons* is relevant and its probative value outweighs the danger of unfair prejudice.[76]

H.R. 4727, 95th Cong., 1st Sess., 124 CONG. REC. H11944-45 (daily ed. October 10, 1978) (statement of Rep. Holtzman). The brief discussion of H.R. 4727 in the House is also set out in 28 U.S.C.A. § 412, at 362-65 (West 1984) and in HULEN D. WENDORF & DAVID A. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 486-90 (2d ed. 1988).

73. STEPHEN SALTZBURG & MICHAEL MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 392 (5th ed. 1990).

74. *Id.* at 393.

75. H.R. 4727, 95th Cong., 1st Sess., 124 CONG. REC. H11944-45 (daily ed. October 10, 1978) (statement of Rep. Mann); FED. R. EVID. 412.

76. H.R. 4727, 95th Cong., 1st Sess., 124 CONG. REC. H11944-45 (daily ed. October 10, 1978) (statement of Rep. Mann) (emphasis added); FED. R. EVID. 412.

Although most commentators concede that Federal Rule of Evidence 412 provides desirable protections to rape victims, the rule has received a great deal of criticism. *See, e.g.*, STEPHEN SALTZBURG & MICHAEL MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 393, 394-98 (5th ed. 1990) (rule 412 is well intentioned effort to protect the privacy of sexual assault victims, but may pose constitutional problems by banning reputation and opinion testimony); 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 506, 530 (1980) (rule 412 "is worthwhile if it does no more than encourage judges to curb excesses that were probably unjustified even under the prior law" but is "a sloppily drafted effort to foist off on the courts another politically-charged evidentiary issue that the legislators lacked the wit or courage to resolve"); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 883-88 (1986) (rule 412's "catch-basin" provision authorizing trial courts to determine admissibility according to a constitutional standard is unnecessary); David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1227-31 (1985) (generally enumerating inadequacies of the federal and state rape shield laws including the absence of definitions, the application of the "shield" only to the complainant and in limited sexual offenses, its unclear application in grand jury and other preliminary hearings and depositions, and the lack of express obligations on judges to enforce). One criticism is that courts will have to rely upon state legislation from which the hastily and

IV. ADMISSIBILITY OF PRIOR SEXUAL CONDUCT IN TEXAS

A. *Common Law Admissibility*

Prior to the enactment of a rape shield statute in 1975, the law concerning the admissibility of a rape victim's prior sexual conduct was developed by the courts. The primary vehicle used by the prosecution to exclude evidence of a rape victim's prior sexual conduct was a motion *in limine*.[77] Although a motion *in limine* was available to the prosecution to suppress irrelevant evidence, courts considered prior sexual conduct generally relevant to three issues: (1) the complainant's alleged consent to intercourse; (2) impeachment of the complainant's credibility as a witness; and (3) physical evidence of intercourse.[78]

1. Consent

In early rape prosecutions, the accused would often admit to the act of intercourse, but claim that it was consensual.[79] After the issue of

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poorly drafted rule 412 was composed in order to construe it. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5381, at 485 (1980). Another criticism is that the rule may impermissibly deny a defendant his sixth amendment right to confront the witnesses against him. David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1255-56 (1985). The American Civil Liberties Union complains that the rights of criminal defendants will be abrogated with rule 412, and defends the traditional evidentiary practices. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 526 (1980). Perhaps the problems are best summarized as follows:

> It is beginning to be realized that changes have been made in rape laws which were barely understood by those drafting new legislation, while the effect on other areas of criminal law was ignored or neglected. . . . These deficiencies and uncertainties now carry with them the danger of a backlash against rape victims, especially if the new legislation is found unconstitutional and old rape law is thereby entrenched with new vigor.

Id. at 531 n.24, *quoting* NATIONAL INST. L. ENF. & CRIM. JUST., FORCIBLE RAPE: AN ANALYSIS OF LEGAL ISSUES 4 (1978).

77. Sarah Weddington, *Rape Law In Texas: H.B. 284 and the Road to Reform*, 4 AM. J. CRIM. L. 1, 13 (1975); Robert Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 VA. L. REV. 357, 365 n.27 (1978); W. Michael Greene, Comment, *Forcible Rape: The Law in Texas*, 9 TEX. TECH. L. REV. 563, 577 (1978); James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 318 (1979).

78. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 318 (1979).

79. *E.g.*, Mitchell v. State, 544 S.W.2d 927 (Tex. Crim. App. 1977); Tyler v. State, 145 Tex. Crim. 315, 167 S.W.2d 755, 756 (1942); Satterwhite v. State, 113 Tex. Crim. 659, 23 S.W.2d 356, 356 (1929); Stafford v. State, 104 Tex. Crim. 677, 285 S.W. 314, 314 (1926); *see also* James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct:*

consent was raised, the complainant's general reputation for unchastity could be proven[80] and evidence of specific instances of intercourse with the accused could be introduced.[81] This type of evidence would have "a tendency to weaken the state's claim of nonconsent."[82] Merely raising the issue of consent, however, was not enough to automatically admit the general reputation and acts of intercourse with the accused. This evidence was inadmissible if the surroundings and physical facts of the assault precluded the question of consent.[83]

Initially, Texas courts held that evidence of the complainant's acts of sexual intercourse with men other than the accused had no bearing on the issue of consent.[84] Although recognizing that other jurisdic-

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What is the Law in Texas?, 31 BAYLOR L. REV. 317, 318 (1979) (common strategy for accused in rape prosecution was to claim consent).

80. *See, e.g.*, Burton v. State, 471 S.W.2d 817, 821 (Tex. Crim. App. 1971) (when consent raised, evidence of complainant's reputation for unchastity admissible); Graham v. State, 125 Tex. Crim. 210, 67 S.W.2d 296, 299 (1933) (on consent issue, proof of complainant's general reputation for chastity admissible); *Satterwhite*, 23 S.W.2d at 362 (when consent at issue, general bad reputation of complainant for chastity allowed to weaken state's case of lack of consent); Shields v. State, 32 Tex. Crim. 498, 23 S.W. 893, 895 (1893) (accused may show complainant's general reputation for chastity was bad to explain his conduct).

81. *See, e.g.*, Roper v. State, 375 S.W.2d 454, 456 (Tex. Crim. App. 1964) (when consent raised, specific acts of unchastity with accused may be admissible); *Tyler*, 167 S.W.2d at 756 (when consent at issue, evidence that complainant had previous relations with accused is admissible); *Graham*, 67 S.W.2d at 299 (when consent at issue, proof that complainant previously engaged in intercourse with accused is admissible).

82. *Satterwhite*, 23 S.W.2d at 362; *cf. Shields*, 23 S.W. at 895. "Men take liberties with fallen women without intending a rape, while they would not with chaste ladies." *Shields*, 23 S.W. at 895.

83. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 318 (1979) (*citing* Ross v. State, 60 Tex. Crim. 547, 132 S.W. 793, 797 (1910)). In *Ross*, the accused was unable to introduce testimony of a third party who had prior relations with the complainant. *Id.* The testimony was inadmissible because the accused failed to raise the issue of consent. *Id.* The Texas Court of Criminal Appeals noted: "If the surroundings and physical facts of the assault or the conduct of the parties previous thereto were of such a character as that the question of consent is suggested, then in this character of case proof of general reputation for chastity would be admissible." *Id. Compare Mitchell*, 544 S.W.2d at 927 (consent issue raised when accused testified intercourse was consensual) *with Roper*, 375 S.W.2d at 456 (consent issue not raised merely by a plea of not guilty to rape by force).

84. *See, e.g.*, Campbell v. State, 147 Tex. Crim. 192, 179 S.W.2d 547, 549 (1944) (evidence that complainant had intercourse with other men is inadmissible concerning consent issue); *Tyler*, 167 S.W.2d at 756 (fact that complainant had intercourse with other men is no evidence of consent with accused); *Graham*, 67 S.W.2d at 298 (evidence that complainant had intercourse with men other than the accused is inadmissible); Linder v. State, 94 Tex. Crim. 316, 250 S.W. 703, 705 (1923) (specific acts of complainant's immorality or misconduct with persons other than the accused cannot be shown); Wood v. State, 80 Tex. Crim. 398, 189 S.W. 474, 478 (1916) (evidence of complainant's acts with others is inadmissible in forcible rape);

tions allowed such testimony,[85] Texas courts followed English precedent refusing the accused the right to interrogate the complainant concerning prior relations with third persons.[86] In *Graham v. State*,[87] the Texas Court of Criminal Appeals announced the general rule as follows:

> [W]hen consent is an issue, the general bad reputation of the prosecutrix for chastity may be shown, as having a tendency to weaken the state's claim of nonconsent [and] proof that the prosecutrix had had sexual intercourse with the accused on other occasions is admissible, but intercourse with other men cannot be properly received in evidence on this point.[88]

In 1971, *Burton v. State*[89] changed the rule to allow general admissibility of evidence of specific acts of intercourse between the complainant *and other men* when consent was at issue.[90]

Proof that the complainant had a reputation as a prostitute was also admissible when consent was at issue.[91] Such evidence allowed the jury to conclude that the complainant consented to intercourse for money, and that her outcry was due to the accused's failure to pay her

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Pefferling v. State, 40 Tex. 486, 490-92 (1874) (evidence of specific acts of sexual conduct with men other than the accused is inadmissible in rape or assaults with intent to commit rape).

85. *See Pefferling*, 40 Tex. at 491 (noting that New York courts did not follow the English rule that evidence of prior sexual acts with third persons is inadmissible); Wilson v. State, 17 Tex. Ct. App. 525, 534 (1885) (noting that Tennessee courts admitted evidence of prior sexual acts with third persons because such acts were considered relevant to whether intercourse was consensual or forced).

86. *Pefferling*, 40 Tex. at 491.

87. 125 Tex. Crim. 210, 67 S.W.2d 296 (1933).

88. *Id.* at 298 (citations omitted). Four exceptions to the general rule were as follows: (1) when the victim contended that the accused caused her pregnancy, the accused could show she had intercourse with others; (2) when the victim introduced physical evidence of intercourse, the accused could show her condition resulted from acts of others; (3) when the victim testified that the rape was her first and only act of intercourse, the accused could show that the victim had intercourse with others; and (4) when there was proof that the complainant, "when upbraided for her intimacy with a certain person, threatens that, if there be further talk of it, she will lay it on the defendant," evidence of intercourse with others was admissible. *Id.*

89. 471 S.W.2d 817 (Tex. Crim. App. 1971).

90. *Id.* at 821. The Texas Court of Criminal Appeals was blatantly incorrect when it enlarged the long standing rule. The only authority cited for the proposition that "specific acts of unchastity between the prosecutrix and others are generally admissible" is 48 TEX. JUR. 2d *Rape* § 62 at 700 (1963). *Id.* This source, however, states that "as a general rule the defendant is not permitted to show specific acts of unchastity committed by the prosecutrix with persons other than himself." 48 TEX. JUR. 2d *Rape* § 62 at 700 (1963). Seventeen cases are cited in support of the general rule. *Id.* at 700 n.20.

91. *Mitchell*, 544 S.W.2d at 927; *Campbell*, 179 S.W.2d at 549; *Graham*, 67 S.W.2d at 298.

more money and not because she had been assaulted.[92]

2. Impeachment of the Complainant's Credibility

Testimony concerning the previous sexual conduct of the complainant was admissible to impeach her credibility as a witness in limited circumstances.[93] The accused could not offer evidence of prior sexual conduct with other men solely to impeach the complainant's credibility; he was also required to show that such evidence would bear upon a material issue in the case.[94] However, if the complainant offered evidence that she was a virgin prior to the alleged rape, evidence of intercourse or immoral conduct with third parties was admissible to rebut her testimony.[95]

Although proof of charges or convictions involving moral turpitude was admissible to attack the complainant's credibility, evidence of specific or isolated instances of prior sexual conduct with third parties was inadmissible.[96] For example, the Texas Court of Criminal Appeals explained:

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92. *Mitchell*, 544 S.W.2d at 928; *Campbell*, 179 S.W.2d at 550.

93. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 319 (1979). "[E]vidence of prior sexual conduct was admissible . . . in three instances: to rebut a complainant's testimony, to establish a course conduct indicating prostitution, and to show felonies and misdemeanors involving moral turpitude." *Id.* at 325.

94. *See, e.g.*, Campbell v. State, 147 Tex. Crim 192, 179 S.W.2d 547, 549-50 (1944) (consent and credibility of complainant at issue); Tyler v. State, 145 Tex. Crim. 315, 167 S.W.2d 755, 756 (1942) (consent and credibility of complainant at issue); Stafford v. State, 104 Tex. Crim. 677, 285 S.W. 314, 315-16 (1926) (credibility and physical condition of complainant at issue); Lusty v. State, 97 Tex. Crim. 167, 261 S.W. 775, 776-77 (1924) (credibility of complainant and whether intercourse was forced at issue); Bader v. State, 57 Tex. Crim. 293, 122 S.W. 555, 556 (1909) (credibility and physical condition of complainant at issue).

95. *See, e.g.*, *Campbell*, 179 S.W.2d at 549 (when complainant testifies that she was a virgin before the alleged rape, proof that third parties carnally knew her is admissible); Whaley v. State, 120 Tex. Crim. 517, 46 S.W.2d 996, 997 (1932) (when state introduces evidence that complainant had no previous relations prior to the alleged rape, accused may show that she had relations with other males); Satterwhite v. State, 113 Tex. Crim. 498, 23 S.W.2d 356, 362 (1929) (when complainant testifies that she was a virgin before the alleged rape, evidence that she was carnally known by others is admissible); *Lusty*, 261 S.W. at 776-77 (when complainant testifies that she was a virgin before the alleged rape, accused may impeach her with evidence that she had carnal knowledge of other persons); Bigliben v. State, 68 Tex. Crim. 530, 151 S.W. 1044, 1044-45 (1912) (upon complainant's testimony that she was a virgin prior to the alleged rape, evidence that complainant offers her body for sale is admissible on issue of credibility); *Bader*, 122 S.W. at 556 (after complainant testifies of her virginity prior to the alleged rape, evidence of intercourse with other men is admissible).

96. *Bigliben*, 151 S.W. at 1045.

> [I]t is not intended to hold that other isolated acts of intercourse may be shown as affecting her credit, or for any other purpose; it is only where by her whole conduct and course in life she manifests that low state of morals which would place her in the category of what is known as a common prostitute, that it becomes admissible.[97]

Inquiry into specific instances of past acts of immorality was thought to operate as a surprise for which the complainant would be unprepared, unless the attack was upon her general character.[98]

3. Physical Evidence of Intercourse

Another exception to the general rule disallowing evidence of prior sexual acts with men other than the accused existed when such evidence was used to explain the complainant's physical condition including the source or origin of semen, pregnancy, or vaginal injury.[99] As one commentator explained:

> The victim's sexual conduct immediately prior to the alleged offense was considered pertinent to the accused's responsibility for the physical evidence supporting the charge of rape. The prior acts of intercourse, however, were not admissible unless they would "have tended to explain the condition of her private parts after the alleged act of intercourse" with the accused. Evidence of intercourse with others was inadmissible when the accused claimed that the intercourse was consensual since the fact of intercourse with the victim was not in issue.[100]

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97. *Id.*

98. Stafford v. State, 104 Tex. Crim. 677, 285 S.W. 314, 315 (1926); Hart v. State, 76 Tex. Crim. 339, 175 S.W. 436, 437 (1915); Knowles v. State, 44 Tex. Crim. 322, 72 S.W. 398, 400 (1902); Pefferling v. State, 40 Tex. 487, 491 (1874).

99. *See, e.g.*, Graham v. State, 125 Tex. Crim. 210, 67 S.W.2d 296, 298 (1933) (evidence of intercourse with third persons admissible to show cause of pregnancy or explain condition of complainant's private parts); Satterwhite v. State, 113 Tex. Crim. 659, 23 S.W.2d 356, 362 (1929) (evidence of intercourse with third persons admissible to explain condition of vagina or cause of pregnancy); Lusty v. State, 97 Tex. Crim. 167, 261 S.W. 775, 776 (1924) (evidence of intercourse with third persons admissible to explain condition in which complainant found); Bader v. State, 57 Tex. Crim. 293, 122 S.W. 555, 556 (1909) (evidence of intercourse with third persons admissible to account for the condition of complainant's vagina, including destruction of her hymen); *see also* James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 319 (1979) (evidence of semen origin, pregnancy, or vaginal injury constituted a material issue).

100. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 319 (1979).

B. *Sections 21.13 and 22.065 of the Texas Penal Code*

In 1974, Representatives Kay Bailey and Sarah Weddington of the Texas House of Representatives asked the Legislative Council of the Texas Legislature to research rape prosecutions in Texas to determine areas for possible reform.[101] The legislative council determined that the low report-to-crime ratio is significantly caused by the public's perception of the rape complainant and the treatment she experiences during the investigative process and trial.[102] The council's research also identified problems that the complainant faced from cross-examination designed to denigrate her reputation or attack her character.[103]

In response to the council's study, the Bailey-Weddington bill was submitted to the Texas legislature for the purpose of reforming existing rape laws.[104] As originally proposed, the Bailey-Weddington bill excluded any reference to the complainant's prior sexual conduct unless, pursuant to an *in camera* hearing, the judge found that such conduct "occurred within a year prior to the offense or occurred with the defendant at any time before the offense" and that the conduct in question was "relevant."[105] Section 21.13,[106] as enacted, provided

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101. Sarah Weddington, *Rape Law in Texas: H.B. 284 and the Road to Reform*, 4 AM. J. CRIM. L. 1, 3 (1975).

102. *Id.*

103. *Id.* at 4.

104. Sarah Weddington, *Rape Law in Texas: H.B. 284 and the Road to Reform*, 4 AM. J. CRIM. L. 1, 3-6 (1975).

105. *Id.* at 6.

106. Act of May 15, 1975, 64th Leg., R.S., ch. 203, § 3, 1975 Tex. Gen. Laws 476, 477-78, *amended by* Act of May 27, 1983, 68th Leg., R.S., ch. 977, § 4, 1983 Tex. Gen. Laws 5311, 5315, *repealed by* Act of May 26, 1985, 69th Leg., R.S., ch. 685, § 4(b), 1985 Tex. Gen. Laws 2472, 2474 (current version at TEX. R. CRIM. EVID. 412) provided:

> (a) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may be admitted under Sections 21.02 through 21.05 of this code (rape, aggravated rape, sexual abuse, and aggravated sexual abuse) only if, and only to the extent that, the judge finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.
>
> (b) If the defendant proposes to ask any question concerning specific instances, opinion evidence, or reputation evidence of the victim's sexual conduct, either by direct examination or cross-examination of any witness, the defendant must inform the court out of the hearing of the jury prior to asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under Subsection (a) of this section. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits nor refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

that opinion and reputation evidence, as well as evidence of specific instances of the complainant's sexual conduct, may be admitted after an *in camera* hearing if the judge finds such evidence "is material to a fact in issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."[107]

The Texas legislature enacted section 21.13 to further the reporting and prosecution of forcible rape.[108] "[T]he Legislature recognized that women want, and are entitled to, full control over their own persons at any given time, notwithstanding past conduct, and to be accordingly protected."[109] Section 21.13 manifests a legislative intent to prohibit the introduction of evidence concerning a complainant's sexual past in most circumstances.[110] According to Ms. Weddington, the statute "is strongly worded in favor of excluding most of the victim's

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(c) The court shall seal the record of the in camera hearing required in Subsection (b) of this section for delivery to the appellate court in the event of an appeal.

(d) This section does not limit the right of the state or the accused to impeach credibility by showing prior felony convictions nor the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to rape of a child, sexual abuse of a child, or indecency with a child. If evidence of a previous felony conviction involving sexual conduct or evidence of promiscuous sexual conduct is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.

Section 21.13 was renumbered as § 22.065 by Act of May 27, 1983, 68th Leg., R.S., ch. 977, § 4, 1983 Tex. Gen. Laws 5311, 5315, and repealed by Act of May 26, 1985, 69th Leg., R.S., ch. 685, § 9(b), 1985 Tex. Gen. Laws 2472, 2474 for inclusion in the Texas Rules of Criminal Evidence as rule 412.

107. Act of May 15, 1975, 64th Leg., R.S., ch. 203, § 3, 1975 Tex. Gen. Laws 476, 477-78 (amended 1983, repealed 1985, current version at TEX. R. CRIM. EVID. 412). It should be noted that despite the requirement of an *in camera* hearing to determine the admissibility of evidence concerning prior sexual conduct of the complainant, a defendant desiring to preserve error must still make an offer of proof or a bill of exceptions, just as with other types of evidence, in order properly to preserve error for appellate review. *See* Wicker v. State, 696 S.W.2d 680, 684 (Tex. App.—Dallas 1985), *aff'd*, 740 S.W.2d 779 (Tex. Crim. App. 1987) (accused waived the issue regarding excluded evidence of complainant's prior sexual acts by failing to make a bill of exceptions or offer of proof at trial); Perez v. State, 677 S.W.2d 641, 643 (Tex. App.—Amarillo 1984, no pet.) (since accused failed to comply with statute and did not develop proffered testimony outside the jury's presence in a bill of exception, the issue may not be reviewed).

108. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 317 (1979). Additionally, adoption of the rape shield law was urged to increase the likelihood of conviction. Boston v. State, 642 S.W.2d 799, 802 (Tex. Crim. App. 1982).

109. Carpenter v. State, 639 S.W.2d 311, 313 (Tex. Crim. App. 1982).

110. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 320 (1979).

sexual activity."[111] Although one commentator has assumed that the "statutory standard represents nothing more than a codification of prior law,"[112] the legislative intent to impose a more stringent standard of admissibility is apparent in the change from "relevant" to "material to a fact at issue"—a requirement which necessarily encompasses relevance.[113]

As at common law, when the complainant's consent or credibility was at issue, or when physical evidence of intercourse was questioned, sections 21.13 and 22.065 allowed admission of evidence of the complainant's prior sexual conduct.[114] The statutes, however, imposed a more stringent predicate for admissibility.[115] They have also been applied to exclude evidence of promiscuity in cases involving sexual abuse of a child.

1. Consent

Since the "consent issue is the most common and effective manner in which a defendant may justify introduction of the victim's sexual conduct,"[116] the majority of cases concerning the admissibility of prior sexual acts under sections 21.13 and 22.065 involve consent.[117]

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111. Sarah Weddington, *Rape Law in Texas: H.B. 284 and the Road to Reform*, 4 AM. J. CRIM. L. 1, 13 (1975).

112. W. Michael Greene, Comment, *Forcible Rape: The Law in Texas*, 9 TEX. TECH. L. REV. 563, 576-77 (1978).

113. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 320 (1979).

114. The term "sexual conduct" as used in section 22.065 was defined in *Ex parte* Rose, 704 S.W.2d 751, 756 (Tex. Crim. App. 1984) as "sexual activity or conduct whether willingly engaged in or not, including situations where the 'victim' to whom § 22.065 is applicable was involved in a prior rape offense, alleged offense or situation." *But see Ex parte* Rose, 704 S.W.2d at 757 (Clinton, J., concurring) (explaining why majority's definition of "sexual conduct" is incorrect). Judge Clinton criticizes the majority's construction of "sexual conduct" by stating "[i]t is a wry construction of a statute designed to be protective of a victim of sexual abuse that may force her to reprise sexual abuses previously perpetrated against her." *Id.* at 760.

115. James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 321 (1979).

116. Capps v. State, 696 S.W.2d 486, 489 (Tex. App.—El Paso 1985, pet. ref'd).

117. *See* Holloway v. State, 751 S.W.2d 866, 867 (Tex. Crim. App. 1988) (accused presented defense of consent); Johnson v. State, 633 S.W.2d 888, 890-91 (Tex. Crim. App. 1982) (accused sought to introduce evidence of unchastity under consent issue); Wilson v. State, 548 S.W.2d 51, 52 (Tex. Crim. App. 1977) (accused attempted to introduce evidence germane to consent issue); Young v. State, 547 S.W.2d 23, 25 (Tex. Crim. App. 1977) (consent at issue); Barreda v. State, 739 S.W.2d 368, 370 (Tex. App.—Corpus Christi), *rev'd on other grounds on reconsideration*, 760 S.W.2d 1 (Tex. App.—Corpus Christi 1987), *pet. dism'd*, 760

If the accused failed to raise the issue of consent, evidence of prior sexual conduct was not admissible.[118] Even when consent was at issue, evidence of prior sexual acts could be excluded because such acts "were not germane to the issue of the victim's acquiescence, or any other issue raised."[119] Furthermore, even if evidence of prior sexual conduct was deemed material to the consent issue, it could still be inadmissible if the inflammatory or prejudicial nature of the evidence outweighed its probative value.[120]

Contrary to the common law, under sections 21.13 and 22.065, evidence of a complainant's reputation as a prostitute was inadmissible to show consent to intercourse. In *Holloway v. State*,[121] testimony of the complainant's reputation as a prostitute was properly excluded because it was irrelevant to whether she consented to sexual intercourse with the accused. The Texas Court of Criminal Appeals reasoned that it was ridiculous to assume "that a prostitute cannot be raped."[122]

2. Impeachment of the Complainant's Credibility

As at common law, sections 21.13 and 22.065 allowed admissibility of evidence of a victim's prior sexual conduct for purposes of impeachment in limited circumstances. Evidence which attempted to impeach a victim's credibility by showing prior sexual misconduct, however, was found generally inadmissible.[123] In *Allen v. State*,[124] the

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S.W.2d 1 (Tex. Crim. App. 1988) (accused failed to raise issue of consent); Lewis v. State, 709 S.W.2d 734, 735 (Tex. App.—San Antonio 1986, pet. ref'd, untimely filed) (accused failed to raise consent issue); *Capps*, 696 S.W.2d at 489 (consent at issue); Williams v. State, 690 S.W.2d 656, 658 (Tex. App.—Dallas 1985), *rev'd on other grounds*, 719 S.W.2d 573 (Tex. Crim. App. 1986) (evidence of complainant's prior sexual conduct not probative of consent); Canady v. State, 690 S.W.2d 620, 623 (Tex. App.—Dallas 1985, no pet.) (accused failed to raise consent issue).

118. *Johnson*, 633 S.W.2d at 891; *Barreda*, 739 S.W.2d at 370; *Lewis*, 709 S.W.2d at 735; *Canady*, 690 S.W.2d at 623.

119. *Young*, 547 S.W.2d at 25; *accord Wilson*, 548 S.W.2d at 52; Arnold v. State, 679 S.W.2d 156, 159 (Tex. App.—Dallas 1984, pet. ref'd); *see also Williams*, 690 S.W.2d at 658 (evidence of prior sexual conduct inadmissible because it was "insufficiently similar to the circumstances of the alleged rape to require admission"); *Lewis*, 709 S.W.2d at 735 (unchastity of complainant inadmissible because consent not raised and such conduct was "not material to a fact at issue in the case").

120. *Capps*, 696 S.W.2d at 490.

121. 751 S.W.2d 866 (Tex. Crim. App. 1988).

122. *Id.* at 871.

123. *See* Holloway v. State, 751 S.W.2d 866, 869 (Tex. Crim. App. 1988) (impeachment by evidence that complainant was a prostitute prohibited); Allen v. State, 700 S.W.2d 924, 930

Texas Court of Criminal Appeals defined the standard of admissibility of evidence under the rape shield law in a two-part test. First, the accused must show that the evidence of past sexual conduct was material to an issue in the case.[125] This was achieved by "a showing of a reasonable basis for believing that the past sexual conduct is pertinent."[126] Second, upon such a showing of relevancy, a balancing test must conclude that the inflammatory or prejudicial nature of the evidence does not outweigh its probative value.[127] Applying the above criteria, *Allen* found that testimony revealing that the victim was not a virgin was not material to an issue in the case and was, therefore, inadmissible for impeachment purposes.[128] The court further stated that denying the accused the right to cross-examine witnesses con-

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(Tex. Crim. App. 1985) (section 21.13 does not provide for admissibility of evidence of complainant's prior sexual relationship with her boyfriend for impeachment unless the evidence consisted of a prior felony conviction); Barreda v. State, 739 S.W.2d 368, 370 (Tex. App.—Corpus Christi), *rev'd on other grounds on reconsideration*, 760 S.W.2d 1 (Tex. App.—Corpus Christi 1987), *pet. dism'd*, 760 S.W.2d 1 (Tex. Crim. App. 1988)(impeachment on immaterial and collateral matters of prior sexual acts with two men other than accused and prior rape resulting in pregnancy and abortion prohibited); Sapien v. State, 705 S.W.2d 214, 216 (Tex. App.—Texarkana 1985, pet. ref'd) (section 22.065 prohibits use of prior sexual misconduct for general impeachment purposes); Bernal v. State, 647 S.W.2d 699, 708 (Tex. App.—San Antonio 1982, no pet.) (complainant's contracting of venereal disease inadmissible for impeachment purposes).

124. 700 S.W.2d 924 (Tex. Crim. App. 1985).

125. *Id.* at 929.

126. *Id.*

127. *Id. But see Allen*, 700 S.W.2d at 937 (Clinton, J., dissenting). In Judge Clinton's dissenting opinion, he states that the majority unnecessarily adopts a three part test by requiring: (1) a preliminary showing of relevancy; (2) that the evidence be material to the case; and (3) that the balancing test favors probative value over prejudicial nature. *Id.* at 939-40. In his opinion, "[a]ny currently acceptable definition of 'relevancy' includes the notion of 'materiality.'" *Id.* at 940.

Judge Clinton's dissent also expresses a concern that the majority opinion "is laying down a proposition for admitting testimony of prior sexual activity even broader than any extant before enactment of § 21.13." *Id.* at 938. This "proposition" permits admissibility of testimony regarding prior sexual conduct *for impeachment purposes* although section 21.13(d) does not contemplate admissibility of such evidence *beyond the showing of prior felony convictions. See id.* at 937-38; Act of May 15, 1975, 64th Leg., R.S., ch. 203, § 3, 1975 Tex. Gen. Laws 476, 477-78 (amended 1983, repealed 1985, current version at TEX. R. CRIM. EVID. 412(e)); *see also* Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 672-74 (1987) (analyzing application of the Texas rape shield law in *Allen*). "Judge Clinton's dissent offers a cogent, modern analysis of the majority's seemingly protective opinion which, in reality, pierces the avowed purpose of rape shield laws." Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 673 (1987).

128. *Allen*, 700 S.W.2d at 930.

cerning the victim's prior sexual conduct did not violate the accused's constitutional right to confront the witnesses against him.[129] The court reasoned that "[c]ourts have a responsibility to protect the victim from questions not within the proper bounds of cross-examination and which are designed only to harass, annoy or humiliate."[130]

3. Physical Evidence of Intercourse

Like the common law cases, evidence of the victim's prior sexual conduct with other men was admissible under sections 21.13 and 22.065 to explain the source or origin of the physical evidence of rape if the conduct was material to an issue in the case and its probative value outweighed its prejudicial nature. However, when attempts were made to introduce such evidence, defendants were unable to hurdle the materiality requirement.[131]

4. Promiscuity Defense

Section 22.011(d) of the Texas Penal Code permits a defense to prosecution of the offense of sexual assault of a child if "[t]he child was at the time of the offense 14 years of age or older and had prior to the time of the offense engaged promiscuously in conduct described."[132] Although section 22.011(d) specifically allows the defense of promiscuity, the rape shield statute nevertheless has been applied in an attempt to exclude such evidence in cases involving sexual assault of a child.[133] In these cases, Texas courts have held that evidence of promiscuity was inadmissible unless the requirements of

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129. *Id.* at 932; *see also* Sanchez v. State, 702 S.W.2d 258, 258-59 (Tex. App.—Dallas 1985, pet. ref'd) (defendant has fundamental right to be present during *in camera* hearing conducted pursuant to section 22.065).

130. *Allen*, 700 S.W.2d at 932.

131. *See* Pinson v. State, 778 S.W.2d 91, 92-94 (Tex. Crim. App. 1989) (results of complainant's medical examination, complainant's testimony of prior intercourse, doctor's testimony concerning sperm motility, and complainant's testimony that accused ejaculated is not material); Johnson v. State, 633 S.W.2d 888, 890-91 (Tex. Crim. App. 1982) (evidence of complainant's unchastity to disprove virginity is not material); Smith v. State, 737 S.W.2d 910, 915 (Tex. App.—Fort Worth 1987, pet. ref'd) (evidence that complainant had gonorrhea is not material).

132. TEX. PENAL CODE ANN. § 22.011(d)(1) (Vernon 1989).

133. *See* Simon v. State, 743 S.W.2d 318, 323 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd) (section 22.065 applied in offense of sexual assault of child); Lewis v. State, 709 S.W.2d 734, 735 (Tex. App.—San Antonio 1986, pet. ref'd) (section 21.13 applied in offense of sexual assault of child of 15 years); Ormand v. State, 697 S.W.2d 772, 774 (Tex. App.—Corpus Christi 1985, no pet.) (section 22.065 applied in offense of sexual assault of child of 15 years).

the rape shield statute were met.[134]

In *Boutwell v. State*,[135] the Texas Court of Criminal Appeals held that sections 21.13 and 22.065 only applied to "*nonconsensual* offenses which are accomplished through some degree of force, threats or fraud."[136] The court explained that in cases involving the offense of sexual assault of a child, prior sexual conduct is considered relevant to a material issue *by statute*.[137] Therefore, *any* evidence relevant to the issue of promiscuity is admissible.[138]

C. *Texas Rule of Criminal Evidence 412*

In 1985, section 22.065 was repealed[139] and replaced by rule 412 of the Texas Rules of Criminal Evidence.[140] Rule 412[141] represents a

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134. *See Simon*, 743 S.W.2d at 323 (evidence on the issue of promiscuity held admissible under section 22.065 only if all three witnesses claiming to have had intercourse with complainant testified); *Lewis*, 709 S.W.2d at 735 (evidence of promiscuity inadmissible because consent was not at issue); *Ormand*, 697 S.W.2d at 774 (evidence found inadmissible since section 22.011(d) provided no authorization for admission of *subsequent* promiscuity of a child, and section 22.065 precluded the evidence because it was not material to any fact issue); *see also* Keeter v. State, 723 S.W.2d 356, 358 (Tex. App.—Fort Worth 1987, pet. ref'd) (in offense of aggravated sexual assault of girl of 13 years, evidence of her promiscuity was inadmissible because it was not material to the issue of the appellant's character).

135. 719 S.W.2d 164 (Tex. Crim. App. 1985).

136. *Id.* at 168; *accord* Walker v. State, 727 S.W.2d 759, 761 (Tex. App.—Tyler 1987, no pet.); *see also* Charles v. State, 626 S.W.2d 868, 869 (Tex. App.—Corpus Christi 1981, pet. ref'd) (holding that section 21.13 does not apply to the offense of rape of a child).

137. Boutwell v. State, 719 S.W.2d 164, 168 (Tex. Crim. App. 1985).

138. *Id.*

139. Act of May 26, 1985, 69th Leg., R.S., ch. 685, § 9(b), 1985 Tex. Gen. Laws 2472, 2474.

140. TEX. R. CRIM. EVID. provides:

(a) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence (A) that is necessary to rebut or explain scientific or medical evidence offered by the state; (B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged; (C) that relates to the motive or bias of the alleged victim; (D) is admissible under Rule 609; or (E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific

revision of section 22.065 along with incorporation of portions of Fed-

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instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits nor refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

(e) This rule does not limit the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to sexual assault, aggravated sexual assault, indecency with a child or an attempt to commit any of the foregoing crimes. If such evidence is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.

141. Rule 412 is in a category of rape shield laws generally prohibiting sexual history evidence, except in specified situations, upon a hearing outside the jury's presence, to determine admissibility. *See generally* Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 653-54 (1987). The Texas rape shield law is considered very similar to statutes enacted in 28 other states. *See id.* at 695-98 (listing the following states as having rape shield laws similar to Texas: Arkansas, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wisconsin). The laws of the remaining 21 states with rape shield laws can be classified as: (1) laws generally prohibiting past sexual conduct evidence, except in special circumstances; (2) laws allowing the admissibility of sexual history evidence when its probative value outweighs its prejudicial effect; (3) laws allowing general admissibility of such evidence, but requiring a hearing prior to admissibility in certain instances; and (4) laws giving the trial judge general discretion in the admissibility of sexual history evidence after a hearing, but limiting the judge's discretion in special circumstances. *Id.* at 653. For a listing of the states in each category see *id.* at 693-98.

Of course, rape shield laws may be classified differently from the categories listed above, but whatever the labels used, it is apparent that the laws vary greatly from jurisdiction to jurisdiction. *See, e.g.*, Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 33 (1977) (categorizing rape shield laws from highly restrictive to highly permissive); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 773 (1986) (labeling the four unique approaches to rape shield laws as the Texas, Michigan, California, and federal approaches); David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1222 (1985) (classifying rape shield laws as special scrutiny, pure exceptions, scrutinized exceptions and mixed by issue); *see also* HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE 207-458 (1980) (giving a state-by-state analysis of rape laws); Kristine C. Karnezis, Annotation, *Modern Status of Admissibility, in Forcible Rape Prosecution, of Complainant's Prior Sexual Acts*, 94 A.L.R.3d 257, 265-86 (1979) (grouping admissibility of prior sexual acts according to issues including consent, credibility, physical evidence and other issues). One commentator, after examining the various rape shield laws, concluded that the most functional laws are those that allow judicial discretion in admissibility of sexual history evidence, but with substantial statutory guidance. Andrew Z.

Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 690 (1987). Rule 412 is included in this "directed discretion" category. *Id.* at 698.

A common theme of the scholars reviewing the states' rape shield statutes is that the laws are ambiguous, poorly drafted and should be revised. *See, e.g.*, HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE 179 (1980) (rape shield laws may be unable to accomplish their stated objectives); 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 531 n.24 (1980) (rape shield laws present deficiencies and uncertainties); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 39 (1977) (ill-conceived rape shield laws present practical or constitutional problems); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 776 (1986) (problems are encountered with all rape shield laws due to hasty enactment without functional concerns); Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 691 (1987) (state courts face a formidable task in interpreting poorly-drafted rape shield laws).

Many scholars have proposed model rape shield laws. One example appears in Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 97-99 (1977):

§ 1. Admissibility of Evidence of Sexual Conduct.

(a) Subject to constitutional limitations, in prosecutions for the crime of rape the defendant may not introduce reputation or opinion evidence or evidence of specific instances of the complainant's sexual conduct prior or subsequent to the act or acts charged or refer to such evidence in opening argument, in voir dire of prospective jurors, or otherwise in open court except as provided in sections 1(b) and 2 hereunder.

(b) The following evidence shall be admissible and may be referred to before the jury if the court finds that it is relevant to a material fact and that its probative value is not outweighed by the danger of unfair prejudice, confusion of the issues, or unwarranted invasion of the complainant's privacy or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence:

(1) Evidence of the complainant's sexual conduct with the defendant.

(2) Evidence of specific instances of sexual conduct tending to prove that a person other than the defendant committed the act or acts charged or caused the complainant's physical condition allegedly arising from these acts. Such evidence shall include proof of the origin of semen, pregnancy or disease.

(3) Evidence of a pattern of sexual conduct so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that she consented to the act or acts charged or behaved in such a manner as to lead the defendant [reasonably] to believe that she consented.

(4) Evidence of prior sexual conduct, known to the defendant at the time of the act or acts charged, tending to prove that he [reasonably] believed that the complainant was consenting to these acts.

(5) Evidence of sexual conduct tending to prove that the complainant has a motive to fabricate the charge.

(6) Evidence tending to rebut proof by the prosecution regarding the complainant's sexual conduct.

(7) Evidence of sexual conduct offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) As used in this section and in section 2, "complainant" means the alleged victim of the crime charged.

eral Rule of Evidence 412.[142] Although rule 412 presumably "does not substantively change the proscriptions found in its predecessor

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§ 2. Procedure for Determining Admissibility.

(a) In any prosecution for the crime of rape, if the defendant wishes to introduce evidence of prior or subsequent sexual conduct of the complainant or refer to such evidence in the ways set forth in section 1(a), the following procedure must be pursued:

(1) The defendant shall make a written motion seeking permission to use such evidence. The motion shall be accompanied by an affidavit stating an offer of proof of relevance.

(2) If the court finds the offer to be sufficient, it shall order a hearing outside the presence of the jury and the public and at such hearing shall permit the defendant to question witnesses, including the complainant. An offer of testimony of the complainant or other witness shown to be hostile to the defendant shall be deemed sufficient if it sets forth in good faith the purpose behind the proposed inquiry and its general relevance to the defense. The court shall ensure that no questioning of the complainant is carried on in an unduly harassing or degrading manner and shall cut off any line of inquiry at the point where it is clearly exhausted or futile.

(3) At the end of the hearing, if the court finds that the offered evidence fulfills the criteria of section 1(b) and is not otherwise inadmissible, it shall issue an order stating its findings and the evidence that may be introduced. The defendant may then use such evidence pursuant to the order of the court.

(b) An offer may be made and a hearing held at any time during or in advance of trial before the evidence is sought to be used. More than one offer may be made and additional hearings may be held where the defendant is proposing to use the evidence of several witnesses and wishes to avoid early disclosure of their testimony, or where new information is discovered after the prior offer or hearing, or for other good cause shown.

142. HULEN D. WENDORF & DAVID A. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 109 (2d ed. 1988); *see also* 2 JOHN ACKERMAN, TEXAS RULES OF EVIDENCE: CRIMINAL § 412, at 2 (1989) (Texas Rule of Criminal Evidence 412 "differs substantially from its Federal counterpart"). Texas rule 412 varies from Federal Rule of Evidence 412 in several respects. First, in Texas, specific instances of the victim's past sexual conduct with the accused are inadmissible unless the accused convinces the trial judge that it relates to the victim's motive or bias and its probative value outweighs the danger of unfair prejudice. TEX. R. CRIM. EVID. 412(b)(2)(C) & (c). The federal rule contains no similar exception to inadmissibility. *See* FED. R. EVID. 412. Second, Texas rule 412 provides that specific instances of sexual conduct with the accused are inadmissible unless the accused shows that the conduct was a felony crime or crime of moral turpitude in accordance with rule 609 and its probative value outweighs the danger of unfair prejudice. TEX. R. CRIM. EVID. 412(b)(2)(D) & (b)(3). Again, the federal rule contains no similar language. *See* FED. R. EVID. 412. Third, Texas rule 412 specifies that the shield does not apply to a defendant's right to introduce evidence of promiscuous sexual behavior of a child which is absent in its federal counterpart. *Compare* TEX. R. CRIM. EVID. 412(e) *with* FED. R. EVID. 412. Fourth, Texas does not require written notice fifteen days before trial that the accused intends to offer evidence of the complainant's specific instances of sexual conduct, a requirement of federal rule 412. *Compare* TEX. R. CRIM. EVID. 412(c) (requiring defendant to inform court outside jury's presence prior to introducing specific instances of victim's past sexual conduct) *with* FED. R. EVID. 412(c)(1) (requiring fifteen days notice in written motion before trial unless court waives notice in special circumstances). Fifth, Texas rule 412 does not define "past sexual behavior" which is defined in federal rule 412. *Compare* TEX. R. CRIM. EVID. 412 (containing no definitions) *with* FED. R. EVID. 412(d) (defining "past sexual behavior").

statutes,"[143] it should nevertheless produce some significant changes in the Texas practice of rape prosecutions.[144] Some of these changes include: (1) exclusion of *all* reputation or opinion evidence of a victim's past sexual behavior; (2) inclusion of attempted sexual assault and attempted aggravated sexual assault in the offenses protected by the rape shield statute; (3) a very restrictive standard of admissibility of evidence concerning specific instances of past sexual conduct; (4) the requirement that documentary evidence of specific instances of past sexual conduct be handled *in camera*; and (5) a presumption that evidence of past sexual conduct is inadmissible.[145]

1. Consent

Previously, sections 21.13 and 22.065 allowed admissibility of prior sexual conduct in circumstances when the conduct was material to the issue of consent and its probative value outweighed its prejudicial

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143. Pinson v. State, 778 S.W.2d 91, 94 n.2 (Tex. Crim. App. 1989).

144. HULEN D. WENDORF & DAVID A. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 109 (2d ed. 1988). However, some criticism has been levied against rule 412. Commentators have referred to the Texas rape shield law as one of "untrammeled judicial discretion." Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 876 (1986). In cases involving the rape shield law, "Texas courts applied extraneous interpretations inundated with confusing references to legislative history in order to substantiate their opinions." Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 671 (1987). The Texas rape shield law has also been described as requiring the trial judge to exercise "special scrutiny" before admitting evidence of a complainant's prior sexual behavior. David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1222 (1985).

145. TEX. R. CRIM. EVID. 412. *See generally* Andrew J. Cloutier, Development, *The Texas Rape-Shield Law: Texas Rule of Criminal Evidence 412*, 14 AM. J. CRIM. L. 281 (1988) (considering each of the changes separately). To date, only five appellate court cases have been published in which rule 412 was applied. *See* Leger v. State, 774 S.W.2d 99 (Tex. App.—Beaumont 1989, pet. ref'd) (prior sexual conduct and its relationship with consent and the victim's credibility under rule 412); Golden v. State, 762 S.W.2d 630 (Tex. App.—Texarkana 1989, pet. ref'd) (promiscuity defense); Lunn v. State, 753 S.W.2d 492 (Tex. App.—Beaumont 1988, no pet.) (the defendant failed to preserve error); Hernandez v. State, 754 S.W.2d 321 (Tex. App.—Houston [14th Dist.] 1988, pet. granted) (promiscuity defense); Cole v. State, 735 S.W.2d 686 (Tex. App.—Amarillo 1987), *rev'd on other grounds*, 1990 WL 176357 (Tex. Crim. App. Nov. 14, 1990). In *Cole v. State*, the complainant's testimony that prior to the rape she had informed the defendant that she was a virgin was admitted into evidence. The court of appeals explained that rule 412 should not be used to weaken or denigrate the "context of offense" doctrine. *Cole*, 735 S.W.2d at 693. In other words, "[e]vidence of what occurs immediately prior and subsequent to the commission of an offense is always admissible [since] events do not occur in a vacuum, and the jury has a right to have the offense placed in its proper context." *Id.*

nature.[146] Rule 412 applies a stricter standard of admissibility.[147] Under rule 412, evidence of *specific instances* of past sexual conduct *with the accused* is inadmissible unless the accused offers such evidence on the issue of consent to the alleged sexual assault[148] and "its probative value outweighs the danger of unfair prejudice."[149] As in sections 21.13 and 22.065, rule 412 retains the requirement that the defendant must tender such evidence outside the presence of the jury.[150] In *Leger v. State*,[151] the court of appeals found that evidence that the complainant worked as a topless dancer, accepted money for

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146. *See infra* notes 116-22 and accompanying text.

147. One commentator has proposed that the admissibility of evidence of prior sexual conduct with the accused concerning consent should be even more strictly limited:

> Evidence of the victim's prior intercourse with the accused should be admitted only when there is no evidence of force. For example, when there is evidence of the victim's actual physical injury, the presence or threatened use of a weapon, direct threats of physical injury [to the victim or others such as children], or other extrinsic evidence of nonconsent such as torn clothing or signs of forced entry into home or automobile, the issue of consent is foreclosed and evidence of prior intercourse with the accused should not be relevant.

James A. Vaught, Comment, *Rape—Admissibility of Victim's Prior Sexual Conduct: What is the Law in Texas?*, 31 BAYLOR L. REV. 317, 325 (1979).

Although Texas courts have not addressed the issue, some jurisdictions allow expert testimony regarding rape trauma syndrome on the issue of consent. *See* Michael J. Grills, Comment, *Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions*, 61 U. COLO. L. REV. 833, 847-51 (1990) (Montana, Kansas, Arizona, Maryland, Indiana, West Virginia, Illinois, Iowa, and Alaska allow testimony on rape trauma syndrome on the issue of consent, while Minnesota, California, Missouri, and Washington expressly reject such testimony). Proponents of rape trauma syndrome testimony argue that research shows that rape victims display consistent psychological and physical symptoms. David McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions* 26 B.C. L. REV. 1143, 1146-56 (1985); John L. Ross, *The Overlooked Expert in Rape Prosecutions*, 14 U. TOL. L. REV. 707, 721 (1983). These symptoms are relevant in rape prosecutions because women who engage in consensual intercourse do not experience rape trauma syndrome, and most rape victims do experience rape trauma syndrome. David McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 B.C. L. REV. 1143, 1212 (1985). Opponents of rape trauma syndrome evidence believe that research is inadequate to demonstrate that such evidence is probative on the issue of consent. Ernest S. Graham, *Rape Trauma Syndrome: Is It Probative of Lack of Consent?*, 13 LAW & PSYCHOLOGY REV. 25, 40-41 (1989). For the leading cases on rape trauma syndrome see State v. Marks, 647 P.2d 1292 (Kan. 1982) (holding rape trauma syndrome evidence admissible), and State v. Saldana, 324 N.W.2d 227 (Minn. 1982) (holding rape trauma syndrome evidence inadmissible).

148. TEX. R. CRIM. EVID. 412(b)(2)(B).

149. TEX. R. CRIM. EVID. 412(b)(3).

150. *See* TEX. R. CRIM. EVID. 412(c) (defendant must inform court of intent to introduce evidence out of presence of jury).

151. 774 S.W.2d 99 (Tex. App.—Beaumont 1989, pet. ref'd).

sex, and lived with a man outside of wedlock were specific instances of prior sexual behavior inadmissable on the issue of consent because the behavior did not occur with the *accused*.[152]

2. Impeachment of the Complainant's Credibility

Rule 412 proscribes evidence of specific instances of past sexual behavior unless the evidence consists of a conviction of a felony crime or a crime involving moral turpitude and "the probative value of admitting this evidence outweighs its prejudicial effect to a party."[153] Referring to Rule of Criminal Evidence 608(b), *Leger v. State* held that evidence of past sexual behavior for impeachment purposes was inadmissible, reasoning that "[t]he rule is quite clear [that] specific instances of misconduct could not be used to attack the victim's credibility."[154]

3. Physical Evidence of Intercourse

As in sections 21.13 and 22.065, rule 412 allows the admission of prior sexual acts to explain the source or origin of the physical evidence of rape.[155] However, only specific instances of such conduct are admissible to *rebut* or *explain* scientific or medical evidence introduced by the prosecution.[156] Additionally, the probative value of this evidence must outweigh its prejudicial nature.[157]

4. Promiscuity Defense

Rule 412 may be used to shield evidence of promiscuity in cases involving sexual assault of a child, but as in the cases relying upon sections 21.13 and 22.065, its application is uncertain.[158] In *Her-*

152. *Id.* at 101.

153. *See* TEX. R. CRIM. EVID. 412; TEX. R. CRIM. EVID. 609(a).

154. Leger v. State, 774 S.W.2d 99, 101 (Tex. App.—Beaumont 1989, pet. ref'd); *accord* Golden v. State, 762 S.W.2d 630, 632 (Tex. App.—Texarkana 1989, pet. ref'd) (specific instances of prior sexual conduct inadmissible under TEX. R. CRIM. EVID. 608(b)). *Golden* also noted that rule 412(b) "does not authorize general impeachment by insinuations of unchastity or immorality." *Id.*; *see also* TEX. R. CRIM. EVID. 608(b) which provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence."

155. *See infra* note 131 and accompanying text.

156. *See* TEX. R. CRIM. EVID. 412(b)(2)(A).

157. *See* TEX. R. CRIM. EVID. 412(b)(3).

158. *See infra* notes 132-38 and accompanying text.

nandez v. State,[159] the court of appeals noted that section 22.011(d) and rule 412 refer "to the defendant's right to produce evidence of promiscuous sexual conduct of a child fourteen years old or older."[160] Furthermore, the court opined that since consent is irrelevant in statutory rape cases, the defendant was not required to raise consent before asserting the promiscuity defense.[161] The court of appeals in *Golden v. State*[162] disagreed, however, stating that "*Hernandez* is contrary to other case law which provides that prior promiscuity is a defense only when consent is in issue."[163] *Golden* further held that evidence of promiscuity was inadmissible because the defendant failed to inform the court of his intention to introduce evidence prior to attempting to elicit testimony of the victim's prior sexual conduct.[164]

V. CONCLUSION

In Texas, sections 21.13 and 22.065 and rule 412 have improved many aspects of common law admissibility of the complainant's prior sexual conduct by virtually eliminating such evidence. The current law, however, admits promiscuity evidence in sexual offenses involving children. The probative value of such evidence is dubious and its admissibility should be limited by the legislature. Although some criticism has been levied against rule 412, its value is apparent in light of the egregious treatment afforded rape victims in the past.

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159. 754 S.W.2d 321 (Tex. App.—Houston [14th Dist.] 1988, pet. granted).

160. *Id.* at 324. However, the court recognized the "unhappy policy implications" of section 22.011(d):

> The purpose of the newer statutory rape statute [section 22.011] was to prevent imposition upon females under the age of seventeen by older and presumably more experienced males. It seems uncivilized to declare young females "fair game" for older males merely because they have had several sexual experiences with boys close to their own age. These girls seem as likely to sustain psychological and emotional damage from the imposition of older male relatives and family "friends" as their less experienced girlfriends. Nevertheless, the newer statutory scheme does not protect sexually "promiscuous" girls unless the State can allege forcible rape in the indictment and prove beyond a reasonable doubt the girl did not consent.

Id. at 326. In 1991, Representative Carolyn Park introduced legislation to amend section 22.011(d) to eliminate the promiscuity defense for a person who sexually assaults a child. Tex. H.B. 302, 72d Leg. (1991). However, H.B 302 was not enacted.

161. *Hernandez*, 754 S.W.2d at 326.

162. 762 S.W.2d 630 (Tex. App.—Texarkana 1989, pet. ref'd).

163. *Id.* at 631.

164. *Id.* at 632.