Notes

Indiana's Rape Shield Law: Conflict with the Confrontation Clause?

I. Introduction

In recent years public concern for the plight of rape victims has increased. With that concern has come sympathy for the all too frequent feeling on the part of the victim that it is she who is on trial, rather than the defendant. The primary contributor to this feeling on the part of the victim is the fact that, traditionally, evidence of a rape victim's previous sexual conduct has been admitted at trial for a variety of purposes, some highly relevant and others probably irrelevant. The Indiana General Assembly[1] and several other state legislatures[2] have passed statutes which strictly limit introduction of such evidence. The purpose of this Note is to ascertain whether such statutes will, under certain circumstances, violate a defendant's right to be confronted with the witnesses against him. To facilitate such an inquiry, this Note first briefly examines the confrontation clause. Following that review is an analysis of *Davis v. Alaska*,[3] a 1974 United States Supreme Court decision illustrative of the tests employed in determining whether a state shield statute, in *Davis* a juvenile adjudication shield statute, conflicts with the confrontation clause. Finally, the type of analysis employed in *Davis* is utilized to determine whether the new rape shield law will conflict with the confrontation clause.

II. The Confrontation Clause

The United States Constitution guarantees to a defendant in a criminal case the right "to be confronted with the witnesses

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[1] Ind. Code §§ 35-1-32.5-1 to -4 (Burns Supp. 1975).

[2] This Note does not purport to identify all states that have passed rape shield laws. Some exemplary statutes are the following: Cal. Evid. Code §§ 782, 1103 (West Supp. 1975); Fla. Stat. Ann. § 794.022(2) (Supp. 1975-76); Iowa Code Ann. § 782.4 (Supp. 1975-76); Mich. Comp. Laws Ann. § 750.520(j) (Supp. 1975-76).

[3] 415 U.S. 308 (1974).

against him."[4] That right has been incorporated into the fourteenth amendment and, thus, applies to the states.[5]

A primary purpose of the confrontation clause is to secure the right of cross-examination.[6] One of the original evils which the confrontation clause was designed to prevent was the admission into evidence of an *ex parte* affidavit when the witness was not present at the trial for questioning.[7] Addressing that concern, the Supreme Court in 1895 reasoned that the accused must be afforded an opportunity

> not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[8]

Three purposes of the confrontation clause are thus detectable: To insure the right of cross-examination, to afford the jury an opportunity to assess credibility by observing demeanor, and to insure that a witness will testify under oath and be sufficiently impressed with the seriousness of such testimony.[9]

These purposes are most often thwarted when the witness is not present in the courtroom to testify.[10] When considering rape

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[4]U.S. CONST. amend. VI. Similarly, the Indiana Constitution provides that "[i]n all criminal prosecutions the accused shall have the right . . . to meet the witness face to face." IND. CONST. art. 1, § 13.

[5]Davis v. Alaska, 415 U.S. 308 (1974); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

[6]Davis v. Alaska, 415 U.S. 308 (1974); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

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

[8]*Id.* at 242-43.

[9]California v. Green, 399 U.S. 149 (1970).

[10]Many of the Supreme Court decisions dealing with the confrontation clause involve an absent witness. For example, if the state wishes to introduce into evidence a statement made by a witness at a preliminary hearing, this may not be done if the defendant at the hearing was unrepresented by counsel and did not avail himself of the opportunity to cross-examine that witness. Pointer v. Texas, 380 U.S. 400 (1965). Even where the witness was cross-examined at a preliminary hearing, the hearing testimony is inadmissible at trial absent a good-faith showing that the state attempted to procure the witness' presence at trial. Barber v. Page, 390 U.S. 719 (1968).

Other cases deal with admission of out-of-court testimony where the witness is present at trial but is asserting a privilege. Typical of these cases is the problem presented by admission of a co-defendant's confession which incriminates the defendant. Bruton v. United States, 391 U.S. 123 (1968) (joint trial of the two defendants); Douglas v. Alabama, 380 U.S. 415 (1965) (separate trial of the two defendants). For rules applicable where the co-

shield laws, however, the more germane confrontation clause issues arise in cases where the witness has taken the stand, but, relying on a privilege, refuses to testify about certain subjects. For example, the constitutional privilege against self-incrimination may be relied upon by a witness. Where two constitutional guarantees conflict, such as the privilege against self-incrimination and the right to confrontation, it is not a foregone conclusion that the right to confrontation must prevail.[11] However, it appears that where the testifying witness is protected by a mere evidentiary rule, that rule must succumb to the defendant's right to confrontation.[12]

Unlike constitutional or evidentiary conflicts with the confrontation clause, the rape shield laws provide a possible statutory conflict. Utilizing the statutory privilege provided by a rape shield law, the state may successfully prohibit a defendant from questioning the chief prosecuting witness as to certain aspects of her sexual conduct. Rape shield laws are therefore analogous to other statutory privileges, such as the informer privilege and the juvenile adjudication shield. Thus, an analysis of the application of these two privileges may afford some insight into the constitutionality of a rape shield law.

The informer privilege operates to keep secret the identity of persons who provide information regarding criminal activities to law enforcement officials. That privilege, if asserted by an informant appearing on behalf of the state at trial, must yield to

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defendants are also considered co-conspirators, see United State v. Nixon, 418 U.S. 683 (1974); Dutton v. Evans, 400 U.S. 74 (1970).

[11]Frazier v. Cupp, 394 U.S. 731 (1969); Douglas v. Alabama, 380 U.S. 415 (1965); Alford v. United States, 282 U.S. 687 (1931). The Court in *Alford* noted an obligation on the part of a trial court to protect a witness from invasion of his rights against self-incrimination but not to protect the witness from being discredited.

[12]For example, in Mississippi the "voucher" rule, wherein a party "vouches" for any witness he may call, thus precluding any right to cross-examine that witness, could not operate to deprive a defendant of his right to confront an adverse witness. In Chambers v. Mississippi, 410 U.S. 284 (1973), a party not on trial had confessed four times to the crime for which the defendant was being prosecuted. The state failed to call that party as a witness. Subsequently, the defendant called the witness himself, primarily for the purpose of exposing such confessions. The Mississippi court, relying on the voucher rule, refused to allow cross-examination. The United States Supreme Court found the witness to be adverse and held the Mississippi ruling to be a denial of the defendant's right to confrontation.

Further, the requirements of the hearsay rule do not attach at all proceedings. Hearsay may be admissible at a suppression hearing. United States v. Matlock, 415 U.S. 164 (1974).

the defendant's right to confrontation.[13] The disclosure of an informant's identity may also be at issue, however, where the informant's identity is alluded to at trial when the informant himself is not present and testifying. In *Roviaro v. United States*,[14] the Supreme Court invoked a balancing test to determine if the state's interest in protecting the informant's identity would prevail over the defendant's desire to have his identity disclosed. Balancing these interests, the Court found the defendant's interest to be weightier. In arriving at this conclusion, the Court considered a number of factors. A factor on the state's side was the underlying purpose of protecting informers—encouragement of citizen crime reporting. Additionally, the Court considered a state's need to protect a particular informer, that is, whether an actual threat to that individual exists. Factors considered on the defendant's side included the possible exposure of defense theories, the nature of the crime charged, and the materiality and vulnerability of any testimony for which the informant may have been responsible. After weighing these factors, the Court determined in *Roviaro* that disclosure of the informant's identity was required.[15] The balancing approach utilized in *Rovairo* is similar to the approach taken in *Davis*, wherein a juvenile adjudication shield was at issue.

III. The Confrontation Clause in Conflict with a Juvenile Adjudication Shield Law: *Davis v. Alaska*[16]

The petitioner in *Davis* was convicted of grand larceny and burglary. At his trial, the court issued an order protecting a state

[13]Smith v. Illinois, 390 U.S. 129 (1968). Justice White, concurring, implied that the state would be permitted to protect the informant's identity by stating its reasons for nondisclosure. *Id.* at 133.

[14]353 U.S. 53 (1957).

[15]*Roviaro* was later distinguished in McCray v. Illinois, 386 U.S. 300 (1967), wherein the informant's statement was used to procure a probable cause affidavit. In *McCray*, the Court required that a magistrate issuing an affidavit be aware of the underlying circumstances supporting affiant's belief. Although an informant need not be identified on the affidavit, his reliability must be established to the satisfaction of the issuing magistrate. Aguilar v. Texas, 378 U.S. 108 (1964). For the quantum of evidence necessary to support the affiant's belief in an informer's reliability, see United States v. Harris, 403 U.S. 573 (1971). Despite the more stringent requirements with respect to disclosure set forth in *Aguilar* and *Roviaro*, it is still the rule that a defendant's right to confrontation is not infringed upon by failure to present the informer for testimony. McCray v. Illinois, *supra;* Cooper v. California, 386 U.S. 58 (1967).

Further, the Supreme Court recently held that the right to confrontation does not attach to a prison disciplinary proceeding. The Court recognized the inherent difficulties in maintaining prison discipline if a prisoner were privileged to cross-examine an unknown fellow prisoner who had turned informant. Wolff v. McConnell, 418 U.S. 539 (1974).

[16]415 U.S. 308 (1974).

witness, Green, from cross-examination regarding his adjudication as a juvenile delinquent pursuant to an Alaska rule of children's procedure[17] and an Alaska statute.[18] Green, a key state witness, had been adjudicated a juvenile offender. He was on probation for robbery both at the time of the events to which he would testify and during the time he was assisting the state in preparation of the case against Davis. The stolen property, a safe, was retrieved near Green's property. At trial, Green testified both as to Davis' identity and as to the events at the time of the alleged crime. The defense reasoned that Green's status as a probationer, together with the location of the stolen safe, cast suspicion upon him. Furthermore, in order to divert such suspicion, Green may have wished to incriminate Davis. He may also have felt sufficient pressure from surrounding circumstances to color his pretrial identification and, subsequently, his in-court identification. Such was the nature of Davis' theory of defense which he was prevented from submitting to the jury because of the juvenile adjudication shield statute and the rule of children's procedure.

While the Supreme Court did not deal with the constitutionality of the rule and statute themselves, it did hold that, on balance, the state interest in protecting juveniles was outweighed by the accused's interest in preparing his defense. The balance to be struck was between the probative value of the evidence sought from the witness and the state's legitimate interest protected by the statute and rule.

The state's legitimate interest in protecting juvenile offenders was recognized by the Court. This interest flows from the state's obligation to rehabilitate such offenders. Pursuant to that obligation, a juvenile deliquent might be shielded from exposure of his prior record because such exposure could encourage commission of further crimes and could result in a loss of employment opportunities.[19] Balancing the two interests, the Court concluded that "the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the pro-

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[17]ALAS. R. JUVENILE P. 23.

> No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

[18]ALASKA STAT. § 47.10.080(g) (1971) provides: "The commitment and placement of a child are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . . ."

[19]415 U.S. at 319.

cess of defending himself."[20] It is significant that the Court limited its holding to the facts of the *Davis* case rather than stating a general proposition of law. In fact, Justice Stewart, in his concurring opinion, emphasized "that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions."[21]

The *Davis* case in the area of a juvenile adjudication shield and the *Roviaro* case in the area of an informer shield clearly establish that it is not a foregone conclusion that the right to confrontation will prevail over a statutory shield in every instance. The approach used in both cases involved assessing the probative value of the excluded evidence and determining if that value outweighed the state interest in the asserted privilege.

IV. Application of the *Davis* Test to a Rape Shield Law

In applying the balancing test set forth in *Davis*, there are two relevant inquiries to determine if a rape shield law will violate the confrontation clause. First, what is the probative value of the evidence sought to be excluded by such a law? Second, what legitimate state interest is the statute designed to protect?

A. Relevancy of Sexual Conduct Evidence

From state to state there is little unanimity as to how and under what circumstances evidence of previous sexual conduct may

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[20] *Id.* at 320.

[21] *Id.* at 321 (Stewart, J., concurring). This language was heeded in construing the affect of *Davis* in a subsequent Alaska case. The fact that Green was on probation was seen as a primary factor which could provide him motivation to offer false testimony. Therefore, in Gonzales v. State, 521 P.2d 512 (Alas. 1974), a trial court's decision to exclude evidence of a state witness' prior juvenile adjudication was upheld because that witness was not on probation at the time the events occurred to which he testified and because the witness' lack of credibility was so firmly established at trial that the juvenile adjudication would only have been cumulative.

An Indiana case prior to *Davis* held that evidence of the juvenile adjudication of a state's witness was not admissible in a trial of the defendant for enticing a female into an immoral place. The defendant had set up a mobile house of ill repute in a school bus and solicited the prosecutrix, who was on parole from the Girls School, into his employment. Noel v. State, 247 Ind. 426, 215 N.E.2d 539, *cert. denied*, 385 U.S. 934 (1966).

The right to cross-examination espoused in *Davis* and other confrontation cases is tempered by the nature of a particular proceeding. For example, a deposition, the sole purpose of which is to authenticate records under 18 U.S.C. §§ 3492-93 (1970), need not come endowed with the same range of confrontation rights applicable to a general purpose deposition under 18 U.S.C. § 3503 (1970). United States v. Hay, 376 F. Supp. 264 (D. Colo. 1974).

be admitted. Examples of the various grounds for admissibility may be examined, however, to determine the nature of the probative value rationale.

1. *Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity is Strong.*—There are some instances in which the proffered evidence has strong probative value. For example, courts have held that where consent is in issue, evidence of previous sexual intercourse between the victim and the accused should be admitted.[22] Once a woman has consented to relations with a particular man, a strong argument can be made to infer that she consented on a subsequent occasion. Conversely, one could argue that no such inference should be drawn because every woman ought to be free to change her mind and reassess her wishes with each encounter. However, previous consent with a defendant does at least show the victim's state of mind at an earlier time, and the trier of fact could reasonably infer no change in that state of mind absent some evidence to the contrary.

Perhaps less obvious is the relevance of evidence of previous acts with the defendant where the charge is for carnal knowledge of a girl under the age of consent. It has been held that every act of intercourse committed with such a girl is rape.[23] However, other purposes are espoused for admitting evidence of previous intercourse between the defendant and a girl under the age of consent. One is that previous acts with the defendant might be admissible as crimes themselves.[24] Another purpose is to show an intimate relationship between the parties tending to break down self-respect and modesty.[25] The former purpose concerns a subject area outside the scope of this Note—admissibility of the defendant's previous wrongful acts. The latter purpose seems irrelevant. In statutory rape, if the prosecutrix is incapable of consent, it cannot be

[22]Peterson v. State, 90 Fla. 361, 106 So. 75 (1925); People v. Dermartzex, 390 Mich. 410, 213 N.W.2d 97 (1973). In *Dermartzex*, acts with the defendant both precedent and antecedent to the alleged rape were admitted, but the trial judge was charged with the responsibility of weighing the probative value of the proffered evidence against the risks of unfair surprise, undue confusion, and misleading the jury.

In Indiana the relevancy of intercourse with the defendant was stretched to its limits in Bedgood v. State, 115 Ind. 275, 17 N.E. 621 (1888). The victim therein was subjected to multiple rape, but she dismissed the charge against one defendant with whom she had previously engaged in intercourse. Nevertheless, the court admitted evidence of her sexual conduct with the dismissed defendant in the trial against his companions.

[23]People v. Abbott, 97 Mich. 484, 56 N.W. 862 (1893).

[24]A question to the prosecutrix was not objectionable because it tended to prove more than one felony. Daveros v. State, 204 Ind. 604, 185 N.E. 443 (1933).

[25]People v. Gangels, 218 Mich. 632, 188 N.W. 398 (1922).

relevant that she had an intimate relationship with the defendant which jeopardized her modesty or self-respect. Any act of intercourse with an underage girl would be rape regardless of her lack of virtue. It is more likely that the difficulty perceived in these instances is the possibility of a sophisticated and vindictive teenager charging a former boyfriend with rape. That difficulty is more appropriately addressed by statutory rape laws which reflect realistically the age at which a modern girl may be capable of giving consent and which protect younger girls from advances that they are ill-equipped to understand, regardless of their previous occurrence. One modern court held that previous acts with the defendant should have been inquired into where the prosecutrix was under age fifteen.[26] However, while acts with the defendant are likely to be relevant in a forcible rape case, their relevancy is questionable in statutory rape cases.

There is also an obvious probative value to evidence which discloses previous intercourse with someone other than the defendant when such evidence can account for a physical fact in evidence at the trial, such as semen,[27] a ruptured hymen,[28] a pregnancy,[29] or the prosecutrix's physical condition indicating intercourse.[30] However, to be admissible under this theory, a specific instance of intercourse must have been so timed as to conceivably account for the physical evidence.[31] An interesting split occurs if the defendant himself introduces the physical evidence which would be damaging to his case for the sole purpose of using this rationale to enter evidence of the victim's sexual conduct. Some courts have reasoned that where the defendant introduced evidence of a pregnancy himself, there should be no opportunity to rebut an inference flowing from evidence which would not have been introduced but for the defendant's own action. Accordingly, the defendant could not then introduce evidence of previous intercourse with third parties to account for the pregnancy.[32] Some courts have found this reasoning restrictive and have permitted the defendant to

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[26]Smotherman v. Beto, 276 F. Supp. 579 (N.D. Tex. 1967).

[27]State v. McDaniel, 204 N.W.2d 627 (Iowa 1973); Massey v. State, 447 S.W.2d 161 (Tex. Crim. App. 1969).

[28]People v. Pantages, 212 Cal. 237, 297 P. 890 (1931).

[29]Rowe v. State, 155 Ark. 419, 244 S.W. 463 (1922); People v. Currie, 14 Cal. App. 67, 111 P. 108 (1910); Harper v. State, 185 Ind. 322, 114 N.E. 4 (1916).

[30]People v. Russell, 241 Mich. 125, 216 N.W. 441 (1927).

[31]Rowe v. State, 155 Ark. 419, 244 S.W. 463 (1922); People v. Boston, 309 Ill. 77, 139 N.E. 880 (1923); State v. Blackburn, 136 Iowa 743, 114 N.W. 531 (1908); Massey v. State, 447 S.W.2d 161 (Tex. Crim. App. 1969).

[32]People v. Kilfoil, 27 Cal. App. 29, 148 P. 812 (1915); Yates v. Commonwealth, 211 Ky. 629, 277 S.W. 995 (1925).

enter evidence accounting for the physical fact.[33] The circumstances of one of these cases were such that the jury knew of a pregnancy without its introduction,[34] and in the other case, the evidence of sexual conduct with a third party was also being offered for impeachment as the prosecutrix had testified that she had had no sexual relations with other persons.[35] It would seem then that the cases can be reconciled. The defendant ought not to be permitted to misuse this physical evidence rationale in order to enter otherwise inadmissible sexual history evidence; but if exclusion of such evidence would result in injustice to the defendant, it should be admitted.

A third circumstance in which previous intercourse or a reputation of unchastity might be relevant exists where want of chastity is an element of the crime to be proven by the state in a statutory rape prosecution.[36]

Finally, evidence of the victim's sexual activity has strong probative value if that activity tends to establish a motive for charging the defendant with rape. A Texas case, *Shoemaker v. State*,[37] illustrates such a circumstance. The rape victim had been upbraided by her sisters for her illicit relations with a particular man. She threatened her sisters with a rape charge against her

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[33]Parker v. State, 62 Tex. Crim. 64, 136 S.W. 453 (1911); State v. Slane, 48 Wyo. 1, 41 P.2d 269 (1935).

[34]State v. Slane, 48 Wyo. 1, 41 P.2d 269 (1935). The prosecutrix was a member of a small community which was well aware of her pregnancy. Furthermore, evidence was introduced at trial that the prosecutrix had taken certain medication which the jurors could have understood was designed to induce menstruation. Following the reasoning in this case, it would seem that if the witness on the stand were pregnant at the time of trial, and if the alleged rape incident could have accounted for the pregnancy, the defendant would be permitted to present evidence of other acts which could account for her obvious pregnancy even though the state had not actually introduced it into evidence.

[35]Parker v. State, 62 Tex. Crim. 64, 136 S.W. 453 (1911).

[36]*See, e.g.*, FLA. STAT. ANN. § 794.05 (Supp. 1975-76). The statute includes "of previous chaste character" as an element. Cases decided under such a statute require the state prove the victim's chastity. Deas v. State, 119 Fla. 839, 161 So. 729 (1935); Steffanos v. State, 80 Fla. 309, 86 So. 204 (1920); Dallas v. State, 76 Fla. 358, 79 So. 690 (1918); Wright v. State, 199 So. 2d 321 (Fla. App. 1967). Apparently, according to an older case, People v. Mills, 94 Mich. 630, 54 N.W. 488 (1893), an 1887 Michigan statute required chastity as an element in statutory rape although the current statute does not. MICH. STAT. ANN. §§ 28.788(2)-(4) (Supp. 1975). In construing the former statute, the court in *Mills* found that a young woman who was still under the age of consent was considered "reformed" after six or seven years of chaste behavior so as to avail herself of statutory protection.

[37]58 Tex. Crim. 518, 126 S.W. 887 (1910). *See also* Packineau v. United States, 202 F.2d 681 (8th Cir. 1953) (the court reasoned that the victim might have been motivated to "cry rape" for her father's benefit).

brother-in-law if they did not cease their harassment. Subsequently, she did bring a charge of rape against her brother-in-law, and the court found evidence of her previous sexual conduct admissible at his trial.

2. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity is Arguably Relevant. —Traditionally, evidence of a woman's reputation for unchaste behavior has been admissible to show consent,[38] but such evidence may be limited to reputation testimony. The reason for so confining such evidence, rather than allowing the introduction of specific instances, was well stated in an 1895 Florida decision.

> The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indicator to warrant the conclusion that she would probably be guilty with another man who sought such favors with her.[39]

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[38]Peterson v. State, 90 Fla. 361, 106 So. 75 (1925); Tully v. State, 69 Fla. 662, 68 So. 934 (1915); People v. Griffin, 76 Ill. App. 2d 326, 222 N.E.2d 179 (1966); Carney v. State, 118 Ind. 525, 21 N.E. 48 (1889); Anderson v. State, 104 Ind. 467, 4 N.E. 63 (1885).

[39]Rice v. State, 35 Fla. 236, 237, 17 So. 286, 287 (1895). The holding in a modern Georgia case, Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974), was that specific acts of prior sexual conduct with men other than the defendant could not be inquired into. This case has been criticized. *See* 8 GA. L. REV. 973 (1974). The student author argued that such a blanket exclusionary rule was ill-advised and too mechanistic to protect a defendant's rights in every situation. The court in *Lynn* had relied on state court precedent. Further, the author found the decision objectionable in that it did not weigh the probative value of the evidence against undue prejudice, confusion of the issues, consumption of time, and unfair surprise. Following *Lynn*, however, the Georgia Supreme Court declined to reevaluate its position. Relying on *Lynn*, the court in Price v. State, 233 Ga. 332, 211 S.E.2d 290 (1974), held that a question of whether the victim had lived continuously with her husband was improper.

Similarly, the Tenth Circuit Court of Appeals refused to accept the argument that one incident was in fact proof of a woman's poor reputation for chastity, holding that "testimony of unchastity on the part of the prosecutrix proffered by a witness to one claimed prior act of intercourse is not evidence of her reputation for unchastity." United States v. Spoonhunter, 476 F.2d 1050, 1057 (10th Cir. 1973). However, the defense in that case was alibi, and, therefore, the evidence to show consent was not of great value. *See also* Crawford v. State, 254 Ark. 253, 492 S.W.2d 900 (1973); Tully v. State, 69 Fla. 662, 68 So. 934 (1951); Peterson v. State, 90 Fla. 361, 106 So. 75 (1925); Thomas v. State, 249 So. 2d 510 (Fla. Ct. App. 1971); State v. McDonough, 104 Iowa 6, 73 N.W. 357 (1897); People v. McClean, 71 Mich. 309, 38 N.W. 917 (1888).

Other courts, nonetheless, have admitted testimony of both reputation and specific instances to show consent.[40]

The rationalizations supporting the admissibility of such evidence, whether by reputation or specific instances, leave much to be desired. Typical of such rationalizations is this quotation from a 1942 Arizona case:

> If consent be a defense to the charge, then certainly any evidence which reasonably tends to show consent is relevant and material, and common experience teaches us that the woman who had once departed from the paths of virtue is far more apt to consent to another lapse than is the one who had never stepped aside from that path.[41]

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[40]People v. Battilana, 52 Cal. App. 2d 685, 126 P.2d 923 (1942); People v. Burnette, 39 Cal. App. 2d 215, 102 P.2d 799 (1940); People v. Mangum, 31 Cal. App. 2d 374, 88 P.2d 207 (1939). *But see* Brown v. Commonwealth, 102 Ky. 227, 43 S.W. 214 (1897) (confining such instances to those shortly before the alleged crime). The courts in California have been careful not to admit evidence which is designed to create an image of loose womanhood in the mind of the jury unless it actually shows a reputation of unchastity or specific acts of intercourse. *See, e.g.*, People v. Newton, 139 Cal. App. 2d 289, 293 P.2d 476 (1956) (evidence of an "innocuous" episode the night before the rape); People v. Merrill, 104 Cal. App. 2d 257, 231 P.2d 573 (1951) (frequenting bars); People v. Burnette, 39 Cal. App. 2d 685, 126 P.2d 923 (1942) (employment in a questionable place); People v. Mangum, 31 Cal. App. 2d 374, 88 P.2d 207 (1939) (intoxication).

[41]State v. Wood, 59 Ariz. 48, 49-50, 122 P.2d 416, 418 (1942). This language could easily be dismissed as outmoded had the case not been cited in 1973. *See* State v. Kelley, 110 Ariz. 196, 197, 516 P.2d 569, 570 (1973). The *Kelley* case, however, took on an interesting twist in that the language from *Wood* was used to exclude further evidence of unchastity which had already been established. In that case, the defense had already proven four previous instances of intercourse between the prosecutrix and third parties. The court found further evidence to be merely cumulative. Once astray, the frequency of such straying was irrelevant. Other examples of language similar to that in the *Wood* case include the following:

> Under the law permitting a showing of previous unchastity by prosecuting witnesses in cases of rape by force, an assertion by such a witness that force was exerted and that she resisted it is in the nature of an assertion that she is a woman of chastity.

People v. Biescar, 97 Cal. App. 205, 211, 275 P. 851, 856 (1929).

> Her lack of chastity exerted an important influence upon this question [consent], for the rule is that it is inferable that a courtesan is more likely to consent than a pure woman.

Carney v. State, 118 Ind. 525, 526, 21 N.E. 48, 49 (1889). Evidence of general reputation and specific acts of intercourse were admissible to show consent

> based on the theory that a woman who has previously consented to an act of sexual intercourse would be more likely to consent again to such an act, thereby negating a charge that force and violence were used against her in order to accomplish the rape.

People v. Walker, 150 Cal. App. 2d 594, 598-99, 310 P.2d 110, 115 (1957). Finally, in Indiana, a jury instruction was approved which explained the

Conversely one writer argued:

> Although character evidence is admitted on the issue of consent, its probative value is arguably low since the fact that a woman had consented to sexual relations with men in the past does not show that she has consented to intercourse with a particular man on a particular occasion. The probative value of character evidence on the issue of consent may also be outweighed by its prejudiciality to the victim. Such evidence should, in most cases, be excluded.[42]

Evidence showing consent to intercourse with a third party differs from evidence showing consent to previous intercourse with the defendant himself. In the latter case, the inference of consent is drawn from the fact that the victim's state of mind with respect to the defendant was known to be consensual at a given point in time, and the trier of fact might reasonably infer that the victim's state of mind had not changed. When the previous consensual intercourse was with someone other than the defendant, the victim's state of mind with respect to the defendant has not been established as consensual at any point in time. Both relations with the defendant and relations with a third party involve consent to intercourse at a particular time in the past. However, there is an argument to be made that the relations with the defendant are relevant and the relations with a third party are not relevant because of the unique and nontransferable nature of consent to sexual relations. The issue to be proven at trial is not that the victim consented to intercourse, but that she consented to intercourse *with the defendant.*

In the past, social codes of sexual conduct required that a woman never consent to intercourse with anyone other than her husband. In modern society, it is not taboo for a woman to have consented to sexual relations with more than one man in her lifetime. She is free to exercise her right to consent in a discriminatory manner. Because of such newly-found freedom, the identity of the particular man with whom she consented becomes more relevant.

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relevancy of chastity evidence as to credibility and commented on consent, allowing "that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse than one who is unchaste." Anderson v. State, 104 Ind. 467, 471, 4 N.E. 63, 65 (1885).

[42]Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 345 (1973). This statement finds support in Alford v. United States, 282 U.S. 687, 694 (1931), where the Court said:

> There is a duty to protect him [or her, meaning the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him [her].

No longer may it be assumed that once a woman has consented to intercourse out of wedlock with one man she will be likely to do so with any number of men by virtue of the fact that she has flown in the face of a rigid moral tradition. Today a woman may consent in a discriminating manner with several men in her lifetime and not be outside the bounds of socially acceptable behavior. Therefore, since the woman who consents to relations with more than one man may be doing so in a discriminatory manner, her consent with a third party is not probative of her consent with the defendant. One cannot logically infer that because a woman has consented to intercourse with one man, she would consent with another.

However, habitual indiscriminate sexual conduct with strangers may be relevant to the issue of consent with the defendant. In such a case, the woman's conduct tends to prove that consent to intercourse for her has lost its unique and nontransferable character. In that instance, the evidence sought to be introduced is in the nature of habit evidence. The difficult question to be resolved is at what point the woman's sexual conduct becomes so nondiscriminatory as to constitute evidence that she is in the habit of consenting with almost anyone. It is unlikely that such a question may be answered by rigid formulations of numbers of previous consents and numbers of different men. More likely the question would be resolved by examining the particular pattern of previous consents in a given case. This is the kind of consideration which would be given the proffered evidence in an *in camera* admissibility hearing.

A recent Florida case, *Huffman v. State*,[43] found relevant the evidence of habitual illicit sexual conduct of the prosecutrix. *Huffman* was tried before the passage of the new rape shield law[44] in Florida, but the appeal took place after its passage. The Florida Court of Appeals set out a rule of relevance consistent with the new statute. In an attempt to construe older Florida cases which created an exception to the general reputation rule and allowed specific instances of intercourse to be proven in order to show "promiscuous intercourse with men,"[45] the court of appeals in *Huffman* held that

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[43]301 So. 2d 815 (Fla. Ct. App. 1974).

[44]FLA. STAT. ANN. § 794.022(2) (Supp. 1975-76).

[45]

> On a trial for rape, the character of the prosecutrix for chastity, or the want of it, is competent evidence as bearing upon the probability of her consent to the defendant's act, but the impeachment of her character in this respect must be confined to evidence of her general reputation, except that the prosecutrix may herself be interrogated as to her previous intercourse with the defendant, or as to promiscuous intercourse with men, or common prostitution.

Peterson v. State, 90 Fla. 361, 363, 106 So. 75, 75-76 (1925); *accord*, Rice v. State, 35 Fla. 236, 17 So. 286 (1895).

such language was to be read as allowing "evidence of illicit relations on the part of the prosecutrix sufficiently widespread to show a pattern of conduct which would bear on the issue of consent."[46] This holding seems designed, at least in part, to admit evidence of prostitution.[47]

The implication of such an admission, however, is not that a prostitute cannot be raped.[48] But, the practical impact upon the jury of admitting evidence of prostitution is likely to be devastating to the state absent some exceptionally clear indication of nonconsent. However, evidence of indiscriminate promiscuity bordering on habit does seem relevant where consent is at issue and the evidence of nonconsent is questionable.

Ordinarily, evidence of unchastity offered to show consent should not be admissible in a statutory rape case, consent not being at issue.[49] However, where the charge is statutory rape with force, the issue of consent being thus revived, unchastity evidence may be admissible.[50] Such evidence should meet the same test of relevance as in any forcible rape case where consent is at issue.

In some cases, sexual conduct evidence may also be relevant for impeachment purposes. If the prosecutrix has testified as to her chaste character, then it seems appropriate to allow the defense to impeach such testimony.[51] Even a constitutional shield must give way when it is used as a cover for perjury.[52] However, the character evidence introduced for impeachment sometimes is limited

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[46]301 So. 2d at 817.

[47]Prostitution may only be proved by reputation rather than by specific instances as in Florida. Bigliben v. State, 68 Tex. Crim. 530, 151 S.W. 1044 (1912). Failure to investigate the prosecutrix's reputation where the defendant claimed she was a "common streetwalker" was a factor in denial of effective counsel since under Virginia law consent bars a rape prosecution. Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

[48]Haynes v. State, 498 S.W.2d 950 (Tex. Crim. App. 1973). The court in rejecting reputation evidence pointed out that:

> Even if it had been shown that prosecutrix was a prostitute, this would not have proved consent, or made her any the less the subject of rape by force. A prostitute does not lose the right of choice, and may consent or not consent according to her own will. The evidence shows that prosecutrix and appellant were on bad terms, and nothing in the record suggests that on this occasion any financial arrangements were made to obtain her consent, or that she otherwise consented.

Id. at 952; *accord*, Fite v. State, 139 Tex. Crim. 392, 140 S.W.2d 848 (1940). Indiana also recognizes that a common prostitute may be a victim of rape. Anderson v. State, 104 Ind. 467, 4 N.E. 63 (1885).

[49]See text accompanying note 58 *infra*.

[50]People v. Pantages, 212 Cal. 237, 297 P. 890 (1931).

[51]State v. Rivers, 82 Conn. 454, 74 A. 757 (1909).

[52]Harris v. New York, 401 U.S. 222 (1971).

to general reputation evidence.[53] If the alleged reputation for promiscuity is a topic explored in cross-examination, the courts in Arkansas have consistently held that the defense is bound by the prosecutrix's answers. They reason that no extrinsic evidence is admissible to impeach a witness on a collateral matter.[54]

3. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity Is Probably Irrelevant. —There are a number of instances in which admission of evidence of a victim's sexual conduct should be seriously questioned. These are situations in which prejudice to the victim probably outweighs any probative value the evidence may have. One such situation is admission of evidence to show consent where nonconsent is obvious. For example, some courts have recognized that strong evidence of force destroys the issue of consent sufficiently to render evidence of the prosecutrix's sexual history irrelevant. The use of a weapon or a confession that force was employed may obviate the issue of consent where the victim and rapist were strangers.[55] However, evidence of physical violence may not override admissibility of sexual history evidence where the victim and defendant were previously acquainted. In *Packineau v. United States*,[56] because the defendant and victim were not strangers, the majority showed little concern for the fact that the defendant's cohort had administered a stunning blow to the victim's jaw, causing the loss of two teeth. The dissenting judge, however, found this factor did obviate the issue of consent.

Evidence of the prosecutrix's previous sexual conduct should also not be admissible to show consent where consent is not at issue. Such cases are most often statutory rape cases. Similarily, some forcible rape cases, as a practical matter, do not hinge on a defense of consent, such as where the defendant denies the act of intercourse entirely and enters a plea of alibi.[57] Unless chastity of the

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[53]People v. McLean, 71 Mich. 309, 38 N.W. 917 (1888).

[54]Willis v. State, 220 Ark. 965, 251 S.W.2d 816 (1952); Waterman v. State, 202 Ark. 934, 154 S.W.2d 813 (1941); Rowe v. State, 155 Ark. 419, 244 S.W. 463 (1922); Peters v. State, 103 Ark. 119, 146 S.W. 491 (1912); Plunkett v. State, 72 Ark. 409, 82 S.W. 845 (1904).

[55]In State v. Zaccardi, 280 Minn. 291, 159 N.W.2d 108 (1968), chastity evidence was inadmissible where the defendant had entered the victim's house at night, threatened her with a knife and tied her up. Similarly, in California such evidence was excluded because the rapist had used a knife and had confessed to the use of force. People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (1957).

[56]202 F.2d 681 (8th Cir. 1953).

[57]Two Texas cases emphasize that a prostitute can be raped, and, therefore, evidence of the victim's reputation as a prostitute is not admissible where the defendant denied having intercourse at all on that occasion.

prosecutrix is necessary to the maintenance of a statutory rape conviction, most courts reason that evidence of unchastity is not admissible in a statutory rape case to show consent, consent not being at issue.[58] In rejecting a claim that chastity evidence was relevant because the youthful prosecutrix was delinquent, the Indiana Supreme Court observed: "Delinquent or not, she was incapable of consenting to intercourse."[59] Some courts have been less doctrinaire in their approach. While specific acts may be excluded because consent is not at issue, general reputation evidence may be allowed.[60] The evidence may come in as relevant to the necessary quantum of corroboration;[61] it may be admitted to mitigate against a penalty;[62] or it may be used to attack the credibility of the witness.[63] With the exception of the credibility issue, there seems to be no independent justification for admission of chastity evidence in statutory rape cases. Why, for example, if consent is not at issue, should a defendant receive a less severe penalty for the statutory rape of a promiscuous girl than for one who is not promiscuous? Total exclusion of such evidence where consent is not at issue is a more defensible position.

Haynes v. State, 498 S.W.2d 950 (Tex. Crim. App. 1973); Fite v. State, 139 Tex. Crim. 392, 140 S.W.2d 848 (1940). *See also* Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). However, a California court held that evidence of the victim's prior sexual conduct was admissible even though the defendant had denied having intercourse with the victim. Lack of consent, reasoned the court, was an element which the state had the burden of proving. People v. Degnen, 70 Cal. App. 567, 234 P. 129 (1925).

[58]People v. Hurlburt, 166 Cal. 2d 334, 333 P.2d 82 (1958); People v. Johnson, 106 Cal. 289, 39 P. 622 (1895); State v. Hammock, 18 Idaho 424, 110 P. 169 (1910); Douglas v. State, 234 Ind. 621, 130 N.E.2d 465 (1955); Barker v. State, 188 Ind. 263, 120 N.E. 593 (1918); Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); People v. Eddy, 252 Mich. 340, 233 N.W. 336 (1930); People v. Abbott, 97 Mich. 484, 56 N.W. 862 (1893); State v. Linton, 36 Wash. 2d 67, 216 P.2d 761 (1950); State v. Dorrough, 2 Wash. App. 820, 470 P.2d 230 (1970).

[59]Douglas v. State, 234 Ind. 621, 625, 130 N.E.2d 465, 467 (1955).

[60]People v. Walton, 6 Ill. App. 3d 17, 284 N.E.2d 508 (1972); State v. Speck, 202 Iowa 732, 210 N.W. 913 (1926).

[61]State v. Gee, 93 Idaho 636, 470 P.2d 296 (1970) (previous sexual conduct with the defendant).

[62]Vasquez v. State, 491 S.W.2d 173 (Tex. Crim. App. 1973); Keith v. State, 121 Tex. Crim. 508, 51 S.W.2d 603 (1931). Texas had bifurcated trials in such cases; chastity evidence was admissible at the penalty stage only.

[63]Bigliben v. State, 68 Tex. Crim. 530, 151 S.W. 1044 (1912). Some courts will not allow the prosecutrix to be questioned about previous sexual conduct in order to damage her credibility. People v. Johnson, 106 Cal. 289, 39 P. 622 (1895); Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974); State v. Hammock, 18 Idaho 424, 110 P. 169 (1910); People v. Abbott, 97 Mich. 484, 56 N.W. 862 (1893); State v. Linton, 36 Wash. 2d 67, 216 P.2d 761 (1950); State v. Dorrough, 2 Wash. App. 820, 470 P.2d 230 (1970).

Finally, the admissibility of sexual history evidence to damage the credibility of the victim is questionable. The rationale behind use of such evidence to affect credibility was articulated in an early Indiana instruction.

> This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will, *upon the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character* . . . .[64]

Such a rationale is vulnerable. Indeed, courts which do admit such evidence to attack credibility may limit the evidence to reputation.[65] In denying admissibility of sexual conduct evidence to affect credibility, a California court countered the above logic with this statement:

> If this class of evidence was admissible as going to the credibility of the testimony of the prosecutrix in its entirety, then it would be equally admissible as against the veracity of any female who might be called upon to give evidence in a case. Yet no such principle is recognized anywhere . . . .[66]

One need only imagine a female witness to a traffic accident being asked about her previous sexual conduct to appreciate the import of the California court's statement. Accordingly, many courts do not subscribe to the doctrine that one of "bad moral character" sexually will also be untruthful.[67]

This overview reveals that the grounds for admissibility of this class of evidence fall along a continuum from most relevant to least relevant. While inquiry into a specific act with a third party to prove the source of physical evidence might be highly relevant and might in fact exonerate the defendant, a generalized besmearchment of the victim's character for no better reason than to attack her credibility does not measure up to relevancy requirements which ought to be imposed. No longer should we heed the Victorian rhetoric of older cases. It is not necessary to distinguish between "one who would prefer death to pollution, and another

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[64]Anderson v. State, 104 Ind. 467, 471, 4 N.E. 63, 65 (1885) (emphasis added).

[65]Carney v. People, 118 Ind. 525, 21 N.E. 48 (1889); Anderson v. State, 104 Ind. 467, 4 N.E. 63 (1885); Bigliben v. State, 68 Tex. Crim. 530, 151 S.W. 1044 (1912).

[66]People v. Johnson, 106 Cal. 289, 294, 39 P. 622, 623 (1895).

[67]Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). *See also* cases cited note 63 *supra*.

who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex."[68] There now exists a wide range of sexual behavior between these two extremes. The contemporary woman values life too greatly to sacrifice it to "avoid pollution." Simplistic evidentiary rules are a luxury we can ill afford. A California court, in rejecting evidence of public intoxication as irrelevant to consent to intercourse, made the following observation:

> Suffice it to say, that we are permitted to take judicial knowledge of customs and the ordinary affairs of life. It must be conceded that habits and social customs have altered since the origin of the rule mentioned, so that, in many respects, its application, as set forth in the earlier cases, would be a grotesque anachronism.[69]

Today courts must not only be permitted, but should be obliged, to examine offers of sexual history evidence in order to avoid grotesque anachronisms.

Once the court has determined at what point along that continuum of relevancy the particular offer of evidence falls, then, in applying the *Davis* test, the court should determine how much weight can be given the offer when balanced against the legitimate state interests in passing a rape shield law.

B. Legitimate State Interest in Exclusion of Sexual Conduct Evidence

The second step in application of the *Davis* test is inquiry into the legitimate state interest in passing a law shielding the prosecutrix from examination of her sexual history. The apparent interests at stake are twofold. First, the state may wish to protect the privacy of its citizenry and avoid unnecessary, embarassing inquiry into private matters. Secondly, by avoiding such embarrassment, passage of a rape shield law may encourage the reporting of rape and thus aid crime prevention.

These dual interests were espoused in *State v. Evjue,*[70] wherein the Wisconsin Supreme Court upheld the constitutionality of a statute penalizing newspapers, magazines, periodicals or circular publications for identifying a female who had been subjected to rape or other similar criminal assault. However, such statutes[71] were

[68]People v. Abbot, 19 Wend. 192, 195 (N.Y. 1838).

[69]People v. Mangum, 31 Cal. App. 2d 374, 382, 88 P.2d 207, 211 (1939).

[70]253 Wis. 146, 33 N.W.2d 305 (1948). *See also* Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502 (4th Cir. 1963).

[71]Four states have such laws: Florida, South Carolina, Wisconsin, and Georgia. *See* FLA. STAT. ANN. §§ 794.03-04 (1965); GA. CODE ANN. § 26-9901 (1972); S.C. CODE ANN. § 16-81 (1962); WIS. STAT. ANN. § 942.02 (1958).

deemed violative of the first amendment right to freedom of the press in a recent United States Supreme Court decision, *Cox Broadcasting Co. v. Cohn.*[72]

In *Cox*, the appellant, a reporter for a television station owned by Cox, was the defendant in an action for damages for invasion of privacy brought by the father of a deceased rape victim. The father was relying upon a Georgia statute.[73] The Court, in upholding first amendment rights over this statute, recognized that the rape victim's name had been obtained from a public record, the indictment. The Court suggested that if the states are to protect the privacy interests of their citizens, they must do so by avoiding public documentation. After *Cox*, it is difficult to assess the weight of the legitimate state interests espoused by the Wisconsin court in *Evjue*. The Court in *Cox*, although citing *Evjue*, did not address itself to the state interests articulated by the Wisconsin Supreme Court. At a minimum, it is apparent from *Cox* that such state interests are not paramount to first amendment rights. Whether or not such interests will triumph over admissibility of a particular offer of evidence of previous sexual conduct must depend upon how relevant that evidence is, that is how close it comes to the weight accorded the first amendment claim in *Cox*.

It is predictable that a rape shield law with a blanket prohibition against admissibility of any sexual conduct evidence would fall short of sixth amendment confrontation guarantees. Beyond that predictable result, each shield law should be examined to determine the type of evidence that is admissible and the procedure to be followed in order to effectuate state interests and protect the defendant's confrontation rights.

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[72] 420 U.S. 469 (1975).

[73]

> It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

GA. CODE ANN. § 26-9901 (1972). This statute is similar to the one which the Wisconsin court upheld in State v. Evjue, 253 Wis. 146, 33 N.W.2d 305 (1948).

V. Application of the *Davis* Test to the Indiana Rape Shield Law

The legitimate state interest in passing a rape shield law in Indiana is probably the same as in any other state.[74] Such an interest is a constant factor to be evaluated with each specific offer of evidence. Therefore, the question of whether the statute will conflict with the confrontation clause is one which depends for its answer upon the weight of the evidence which the statute admits. If the statute admits practically all prior sexual conduct evidence under one theory or another, the state purpose in passing that statute will be seriously undercut.[75] On the other hand, if the statute is so restrictive that it excludes evidence with a high degree of probative value, it will run afoul of the defendant's right to confrontation.

The Indiana statute[76] excludes opinion, reputation, and specific

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[74]*See* section IV, *B supra.*

[75]The Iowa statute may suffer from this defect as it appears to exclude very little. *See* Iowa Code Ann. § 782.4 (Supp. 1975-76). The California statute might be criticized for its special treatment of prior sexual conduct evidence offered to attack credibility. The admissibility of that category might function as a loophole through which evidence otherwise not admissible might be entered at trial. *See* Cal. Evid. Code §§ 782, 1103 (West Supp. 1975).

[76]Ind. Code §§ 35-1-32.5-1 to -4 (Burns Supp. 1975). Section 35-1-32.5-1 provides:

> In a prosecution for the crime of rape, sodomy, assault or assault and battery with intent to commit a felony (where the felony is rape, sodomy, or incest), incest, or assault and battery, where the offense involves removing, tearing, unbuttoning or attempting to remove, tear, unbutton or unfasten any clothing of any child who has not attained his or her seventeenth birthday, or fondling or caressing the body or any part thereof of such child with the intent to gratify the sexual desires or appetites of the offending person or, under circumstances which frighten, excite, or tend to frighten or excite such child, evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct, and reputation evidence of the victim's past sexual conduct may not be admitted, nor may reference be made thereto in the presence of the jury, except as provided in this chapter.

(Citations omitted).

Section 35-1-32.5-2 provides:

> The following evidence proscribed in section 1 of this chapter may be introduced if the judge finds, pursuant to the procedure provided in section 3 of this chapter, that it is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) evidence of the victim's past sexual conduct with the defendant; or
>
> (b) evidence which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded.

instance evidence of the victim's past sexual conduct unless the evidence is of past sexual conduct with the defendant or it shows that the act upon which the prosecution was founded was committed by someone other than the defendant. If the offer falls within one of those two categories, the trial judge will make an *in camera* determination of its admissibility by weighing its probative value against its inflammatory or prejudicial nature and deciding if it is material to a fact at issue in the case.

A. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity is Strong

Previous activity between the victim and the accused where consent is argued by the defense is specifically includable under the Indiana statute. In a statutory rape prosecution, the evidence of conduct between the victim and defendant could be excluded because it would not be relevant to a fact at issue. Acts of intercourse which may account for a physical fact in evidence could be admitted as tending to show that some person other than the defendant committed the act upon which the prosecution was

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(Citations omitted).

Section 35-1-32.5-3 provides:

> If the defendant proposes to offer evidence described in section 2 of this chapter, the following procedure must be followed:
>
> (a) the defendant shall file a written motion stating that the defense has an offer of proof concerning such evidence and its relevancy to the case not less than ten [10] days before trial;
>
> (b) the written motion shall be accompanied by an affidavit in which the offer of proof is stated; and
>
> (c) if the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury and at such hearing allow the questioning of the victim regarding the offer of proof made by the defendant.
>
> At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the victim is admissible under section 2 of this chapter, the court shall make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.
>
> If new information is discovered during the course of the trial that may make evidence described in section 2 of this chapter admissible, the judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under this chapter.

(Citations omitted).

Section 35-1-32.5-4 provides:

> This chapter does not limit the right of either the state or the accused to impeach credibility by showing of prior felony convictions.

(Citations omitted).

founded. Introduction of evidence to show want of chastity in a statutory rape case where that is an element to be proven by the state would be inapplicable in Indiana. Finally, the Indiana statute makes no provision for introduction of a victim's sexual activity tending to show motive for a particular charge of rape unless such evidence happens to be of a previous relation with the defendant or happens to prove that the act upon which the prosecution was based was committed by someone other than the defendant.

B. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity is Arguably Relevant

There is no provision for admission of evidence showing habitual sexual conduct with strangers. There is also no provision for admission of indiscriminate sexual relations with third parties unless such instances tend to prove the defendant did not commit the act upon which the prosecution was founded. Further, there is no provision under the Indiana statute for impeachment of the prosecutrix where she has taken the stand and testified as to her prudent sexual conduct.

C. Circumstances in Which the Probative Value of the Complaining Witness' Previous Sexual Activity Is Probably Irrelevant

There is nothing in the Indiana statute to exclude evidence of prior sexual conduct introduced to show consent where lack of consent is obvious so long as the instance is with the defendant or tends to show that the act upon which the prosecution was based was committed by someone other than the defendant. Therefore, even if there is strong evidence to show that the defendant used force to procure consent, this would not preclude the defense from entering evidence of previous relations between the defendant and the victim. Evidence of prior sexual conduct in a statutory rape case where consent is not at issue would be excluded as not being material to a fact at issue. Finally, the Indiana statute makes no provision for admission of prior sexual history evidence to impeach the victim's reputation for veracity.

D. Summary

The Indiana statute seems to suffer more from underinclusion than from overinclusion. It would probably be constitutionally impermissible to allow the statute to be used to exclude probative

motive evidence or impeachment evidence where the victim may have committed perjury. On the authority of *Davis*, however, the statute could be properly utilized. The statute in *Davis* was not declared unconstitutional but was merely set aside in order to protect the defendant's right to confrontation. *Davis* would permit the trial judge to set aside the restrictive provisions of the statute if in his *in camera* proceeding he found such provisions to violate the defendant's right to confrontation. In the long run, the success or failure of the statute depends upon its judicious use by trial judges.

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