Louisiana Law Review

Volume 40 | Number 1
Fall 1979

Louisiana's Protection for Rape Victims: Too Much of a Good Thing?

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Repository Citation

Lora C. Sykora, *Louisiana's Protection for Rape Victims: Too Much of a Good Thing?*, 40 La. L. Rev. (1979)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol40/iss1/15

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negate the intent requisite for delictual liability. Rather, it would have been sufficient to determine that insanity may negate intent in regard to insurance liability.

Ultimately, the *von Dameck* decision allocates the risk of damages inflicted by an insane homeowner to the group of holders of homeowners' insurance policies, since they must eventually bear the cost in the form of higher premiums. While this allocation of risk is consonant with the fundamental aim of insurance,[52] it also serves as a guarantee to purchasers of homeowners' insurance that their liability coverage will not be excluded by a clause not designed to apply to the rare case of insanity. Since the peculiar facts of this case are not likely to be repeated, the risk placed upon insurers is not a formidable one. The underlying reason for the decision may be simply the court's belief that neither the insurer nor the insured contemplate an exclusion of coverage when damage is caused by the act of a nondiscerning person.

James F. Shuey

LOUISIANA'S PROTECTION FOR RAPE VICTIMS: TOO MUCH OF A GOOD THING?

In recognition of the problems faced by rape victims[1] who testify as prosecution witnesses at trials in which evidence of their sexual histories may be introduced, many states have enacted "rape shield

52. LA. R.S. 22:655 (Supp. 1962) states in part:

> [A]ll liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and . . . it is the purpose of all liability policies to give protection and coverage to all insured . . . for any legal liability said insured may have as or for a tort-feasor within the the terms and limits of said policy.

1. For the sake of brevity, the term "victim" is used instead of "alleged victim" as a synonym for prosecutrix or rape complainant. Simlarly, the term "rape" is used instead of "alleged rape," and "offender" instead of "alleged offender." Such usage is not intended to suggest that all rape complainants were in fact sexually assaulted. Nor is the use of the term "prosecutrix" intended to imply that the "victim" is the prosecuting party in the trial, rather than the state. Finally, although emphasis herein is placed on the problems of female complainants at rape trials, the same basic policies, problems, and proposed solutions should apply by analogy to male rape complainants and, where applicable, to "victims" of other sexual offenses as well. *See* LA. R.S. 14:41-43.1 (Supp. 1978).

statutes."[2] These laws shield complaining witnesses from invasions of their sexual privacy by prohibiting the admission of irrelevant evidence of prior sexual conduct and reputation for chastity at trial. Legislative protection of rape victims has been deemed necessary because of the abuse and humiliation frequently suffered by them at the hands of police, judges, and defense lawyers.[3]

In addition to the public policy of protecting the sexual privacy of rape victims,[4] the reform of evidence laws in rape trials serves many other valid state objectives. For example, shield laws encourage rape victims to report sexual crimes and later to have offenders prosecuted in court. Statistics indicate that rape is one of the most under-reported crimes.[5] A major factor believed responsible for this unwillingness of so many rape victims to report the crime and have the offender brought to trial is their fear that it will subject them to humiliating and embarrassing questions regarding past sexual experiences.[6] Thus, more rape victims should be encouraged to report and prosecute offenders if they can be protected

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2. For a complete list of state rape shield laws as of January, 1977, *see* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 32 n.196 (1977). The use of chastity evidence in rape trials has not been the only target for reform. The substantive definition of the crime has also been undergoing amendment in many jurisdictions. *See, e.g.*, Comment, *Towards A Consent Standard In The Law of Rape*, 43 U. CHI. L. REV. 613 (1976); Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1509 (1975).

3. Much has been written about the many problems which rape victims face in prosecuting their charges. The victim has often been portrayed as being on trial herself, at the mercy of a highly prejudiced jury, and suffering from a double trauma, all for the sake of bringing a rape charge which statistically results in acquittal in most cases. See note 5, *infra*. *See generally* Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391 (1975); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919 (1973).

4. For a complete analysis of the constitutional status of the sexual "privacy" rights of a rape victim, *see* Berger, *supra* note 2, at 41-45.

5. The conviction rate for rape is also low. For example, statistics from the United States Department of Justice show that in 1977, arrests were made in only 53.1% of reported forcible rape cases; only 65% of these were prosecuted; and only 47% of those prosecuted were found guilty as charged. UNITED STATES DEP'T OF JUSTICE, 1977 UNIFORM CRIME REPORTS 14-15, 165 (1978). In other words, less than one out of six of these reported rapes resulted in conviction as charged. *See also* statistics such as those reported in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 822-23 nn. 7-8 (1975) [hereinafter cited as B. BABCOCK].

6. *See* Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 347-51 (1973). For an example of an especially humiliating and embarrassing sequence of irrelevant cross-examination questions, *see* B. BABCOCK, *supra* note 5, at 833; Goodman, *Proposed Amendments to the Criminal Code with Respect to the Victims of Rape and Related Sexual Offenses*, 6 MANITOBA L.J. 275, 276-81 (1975). *See also* Comment, *Judicial Attitudes Towards Rape*, 57 JUDICATURE 303, 303 (1974), where it is stated: "Victims frequently report that their encounters with the police, District Attorneys and courtroom personnel were more traumatic than the rape incident itself."

from the degradation of having their sexual history unnecessarily exposed at trial through the introduction of irrelevant and embarrassing evidence.[7]

Other legitimate state aims include the prevention of unfair surprise, undue delay, waste of time, and confusion of the issues at trial, which can often result from the introduction of collateral issues.[8] By reforming the evidentiary rules, legislatures try to improve the typically low conviction rate for rape[9] which occurs when the jury's emotions and prejudices against an unchaste prosecutrix are aroused. Some writers note that this bias springs from the fact that the jury sympathizes with the offender before the trial starts.[10] Also important to lawmakers is the goal of extending the unchaste female victims the same equal protection of the law under the fourteenth amendment enjoyed by males and chaste females. Evidence reform is needed to correct the fact that unchaste prosecutrixes are disproportionately discouraged from having their violaters pros-

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> [L]imiting cross-examination of the victim of a rape or other related sexual offense to only what is relevant and material may dispel some of the concern on the part of the victims of these sexual assaults that they will be caused embarrassment if they make a complaint to the authorities . . . . [T]his is a step in the right direction.

Goodman, *supra* note 6, at 281.

8. C. MCCORMICK, EVIDENCE § 185, at 438-41 (2d ed. 1972); 1 J. WIGMORE, EVIDENCE § 42, at 441 (3d ed. 1940). *See* FED. R. EVID. 403 which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See also* LA. R.S. 15:275 (Supp. 1966) ("The . . . judge is vested with a sound discretion to stop the prolonged, unnecessary and irrelevant examination of a witness."); LA. R.S. 15:494 (1950) ("It is not competent to impeach a witness as to collateral facts or irrelevant matter."). Both of the above statutes were cited in *State v. Bolden*, 257 La. 60, 241 So. 2d 490 (1970), as authority for preventing defense counsel from questioning the prosecutrix regarding her sexual relationship with a third person. See note 15, *infra*.

9. *See* UNITED STATES DEP'T OF JUSTICE, *supra* note 5, at 14-15.

10. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 249 (1966). The authors also report that "[t]he jury . . . scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part." *Id.* at 249. The authors found that this partiality exists despite the fact that the legal theories of contributory negligence and assumption of the risk technically have no application in criminal law. Their research shows that if a jury has any evidence from which to infer that the victim in any way "assumed the risk" of attack, it will be inclined to acquit. It was reported that in 12% of the trials of "aggravated rape" (defined to include those rapes in which there was evidence of extrinsic violence, multiple assailants, or defendants and victims who were complete strangers at the time of the event), juries acquitted where a judge would have convicted the defendant. Astoundingly, in trials of "simple rape" (defined to include all rape cases other than those classified as "aggravated"), this figure rose to 60%. *Id.* at 253.

ecuted due to fear of exposure of their private lives and intimate conduct.[11]

Louisiana's attempt to reform its evidence law to meet the needs of the victim and the state resulted in the passage of Revised Statutes 15:498 which provides: "Evidence of prior sexual conduct and reputation for chastity of a victim of rape or carnal knowledge shall not be admissible except for incidents arising out of the victim's relationship with the accused."[12] With the exception of prior sexual conduct arising out of a victim's relationship with the accused himself, the new Louisiana law appears to prohibit the admission of *any* defense evidence relating to the prior sexual history of the complaining witness, regardless of whether it relates to the victim's general reputation or to specific sexual conduct.

The new shield law partially overrules more than half a century of jurisprudence. Formerly, Louisiana courts had admitted substantive evidence of a rape complainant's general general reputation for chastity when consent was put at issue by the defendant and the evidence tended to show that the victim consented to the sexual intercourse at issue.[13] Specific acts of sexual conduct were never ad-

11. For a complete analysis of the constitutional status of equal protection rights of the rape victim, *see* Berger, *supra* note 2, at 45. One author has suggested that allowing the use of evidence of prior sexual conduct to impeach female complainants in rape cases, while disallowing its use to impeach males, is a denial of equal protection. Comment, *Rape in Illinois: A Denial of Equal Protection*, 8 J. MAR. J. PRAC. & PROC. 457 (1975). "[T]he test of equal protection is simply that all must freely enjoy equal opportunities and obligations under the law unless the reasonable classification of groups in furtherance of a valid state interest dictates otherwise." Comment, *supra*, at 477. Another author has noted that the practical effect of admitting irrelevant evidence of sexual conduct in rape trials "places significant numbers of women, rather than a few outcasts, beyond the protection of the law." Comment, *supra* note 3, at 939.

"[S]exual activity outside marriage is so widespread that it provides no basis for inferring sexual conduct in a specific instance." Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 102 (1977).

12. 1975 La. Acts, No. 732, *adding* LA. R.S. 15:498. Instrumental in the passage of Louisiana's new rape shield law were the arguments and supporting evidence provided by representatives from the Bureau of Status of Women, the Governor's Commission of Status of Women, and the National Council of Jewish Women. *Minutes, Hearings on H.B. 619 Before House Comm. on Judiciary, Section D Meeting*, May 28, 1975, 1st Reg. Sess. (1975).

13. *See, e.g.*, State v. Jack, 285 So. 2d 204, 208 (La. 1973) ("Evidence of the [rape] victim's general reputation for chastity is admissible [only] when consent is put at issue by the defendant."); State v. Borde, 209 La. 905, 910, 25 So. 2d 736, 738 (1946) ("It is the universally recognized rule of evidence that [substantive] . . . evidence as to the chastity of the prosecuting witness in rape cases is never admissible except to impeach her when consent is pleaded as a defense by showing the probability of her consent."); State v. Perrine, 156 La. 855, 101 So. 243 (1924) ("When [consent] is the issue, in a prosecution for . . . rape . . . , evidence of the previous unchaste character of the woman is relevant.").

missible, unless they occurred between the prosecutrix and the defendant,[14] nor was evidence of prior sexual history admissible for purposes of impeachment.[15] Thus, read strictly, the recent legislative exclusionary rule prohibits the introduction of evidence which was formerly admissible (*i.e.*, evidence of the complainant's general reputation for chastity in cases where consent had been put at issue as a defense).

Despite the fact that evidence reform is a laudable goal, the admissibility of evidence of prior sexual conduct has long been an issue of debate among legal scholars.[16] Notwithstanding its legitimate purposes, a shield statute may conflict with the constitutional rights of the accused. The sixth amendment demands that the defendant be given the opportunity to present evidence and witnesses on his own behalf, as well as to cross-examine the witnesses against him.

These basic principles were expounded and given landmark interpretations in the two recent United States Supreme Court cases of *Chambers v. Mississippi*[17] and *Davis v. Alaska*.[18] *Chambers* dealt with a defendant's constitutional right to introduce exculpatory evidence on his behalf in order to make out his defense against the state's accusations. The Court reversed Chambers' conviction for murder because the trial court's strict application of two Mississippi evidence rules[19] had effectively denied the defendant his due process

14. State v. Broussard, 217 La. 90, 95-96, 46 So. 2d 48, 50-51 (1950).

> [Although it has been] generally held that a defendant should be allowed to prove prior acts of sexual intercourse between the prosecutrix and himself . . . , it has been definitely settled in this state that, in trials of rape, evidence is not admissible to prove specific acts of intercourse by the prosecutrix with other men.

217 La. at 95-96, 46 So. 2d at 50-51. *See* State v. Jack, 285 So. 2d 204, 208 (La. 1973) ("Though such general reputation evidence may be admissible, specific acts of immorality cannot be shown.").

15. In *State v. Bolden*, 257 La. 60, 241 So. 2d 490 (1970), it is stated:

> [I]t is not competent to impeach a witness as to collateral facts or irrelevant matter (R.S. 15:494).
>
> . . . .
>
> Obviously, the purpose of counsel's question ["Did you ever live common law with a man named Mustang?"] was to impeach the witness by an attack on her chastity. This is not proper. It is well settled that in rape cases, the chastity or lack of chastity . . . of the victim is not admissible for the purpose of impeaching credibility.

Id. at 63, 241 So. 2d at 491.

16. Dean Wigmore once declared that "no question of evidence has been more controverted." J. WIGMORE, *supra* note 8, § 200, at 682.

17. 410 U.S. 284 (1973).

18. 415 U.S. 308 (1974).

19. The common law "voucher rule" followed by Mississippi prohibited any party from discrediting the testimony of its own witnesses. Under this rule, Chambers was prevented from calling and cross-examining as a defense witness Gable McDonald, a

rights.[20] Because the trial court had excluded highly reliable and relevant evidence which was "critical" to Chambers' defense, the Court held that Chambers had been deprived of a fair trial.[21]

In *Davis*, the Supreme Court concerned itself with the constitutional rights of a defendant under the confrontation clause. The Court reversed Davis' convictions for burglary and grand larceny because the trial court, relying upon a juvenile shield law,[22] had prevented him from effectively impeaching the credibility of a "crucial" state witness.[23]

In light of *Chambers* and *Davis*, exclusionary rules cannot be mechanistically applied to deny admission of highly reliable and relevant evidence which is "critical" to an accused's rape defense.

man who had himself confessed to the murder at issue and whose testimony was therefore critical to Chambers' defense that someone else, rather than Chambers, had committed the murder. Because the state did not call McDonald as a witness, and since the trial court had refused to allow Chambers to examine him as an "adverse witness," even after McDonald repudiated his confession, McDonald remained immune from full cross-examination and impeachment. Since Mississippi's evidence rules did not provide for a declaration against penal interest exception to the hearsay rule, three other defense witnesses were not permitted to testify that McDonald had admitted his guilt to them in separate private conversations. The Court therefore concluded that the Mississippi voucher and hearsay rules had been applied unconstitutionally in Chambers' case. 410 U.S. at 302.

20. *Id.*

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Id. at 294, *citing In re* Oliver, 333 U.S. 257 (1948).

21. 410 U.S. at 302-03. "The testimony rejected by the trial court here bore persuasive assurances of trustworthiness . . . . That testimony was also critical to Chambers' defense. . . . We conclude that the exclusion of this critical evidence . . . denied him a trial in accord with traditional and fundamental standards of due process." *Id.* at 302.

22. Juvenile shield laws are analogous to rape shield laws insofar as they shield a witness from the embarrassment of having prior juvenile adjudications disclosed in court by prohibiting the introduction of such adjudications in evidence at trial. The state's interests in guarding the anonymity of juvenile offenders are the protection of the juvenile and his family from the embarrassment of having his juvenile adjudications disclosed in open court and the encouragement of rehabilitation by protecting juvenile offenders against loss of future employment opportunities or other disadvantages which might otherwise be imposed upon them for their "youthful transgression." 415 U.S. at 319. However, the *Davis* Court concluded that "[t]he State's policy interest in protecting . . . confidentiality . . . cannot require [the] yielding of so vital a constitutional right as the effective cross-examination for bias of [a crucial] adverse witness." *Id.* at 320.

23. The defendant had sought to reveal the "possible biases, prejudices or ulterior motives of [a] witness," by showing that, because of his juvenile probationary status, he was "subject to undue pressure from the police and had made his identifications under fear of possible probation revocation." *Id.* at 311, 316.

However, it is difficult to determine the precise extent to which the Constitution may restrict the application of exclusionary rules in less compelling cases.[24] The holdings of the *Chambers-Davis* line of cases are all very narrowly drawn, making it difficult to define a clear constitutional standard of admissibility.[25] Nevertheless, despite the difficulty of extrapolating from these narrow holdings, the decisions reached in these cases appear to be based on the premise that the defendant's sixth amendment rights are fundamental—but subject to being outweighed by competing governmental interests.[26]

Although these cases "almost totally fail to provide any . . . consistent test"[27] for establishing *when* the Constitution compels the admission of evidence, the case language strongly implies the use of a "balancing of interests" approach to reconcile the competing interests involved.[28] The cases presume that the exclusionary rules sought to be enforced by the state promote valid governmental interests. The constitutional issue then focuses upon fairness to the defendant. The value of the evidence sought to be admitted by the defendant is weighed in terms of its relevancy, reliability, and importance to determine whether, despite the governmental interests

24. Rape shield laws are based on the primary rationale that evidence of the complainant's prior sexual history is irrelevant in most cases to the issues presented at rape trials. However, if such evidence does become relevant in a particular situation, its exclusion could cause constitutional problems. *See* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 150 n.382 (1974) ("State (and federal) standards of materiality and relevance could conflict with compulsory process if redefined so narrowly as to prevent the defendant from introducing probative evidence 'in his favor' that might influence the outcome of the trial.").

25. Westen, *supra* note 24, at 151. *See* Clinton, *The Right to Present A Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 792-96 (1976). Clinton has described the decisions as "idiosyncratic reactions to manifest injustices" and has lamented the Court's failure to develop an analytical test which could regulate the application of exclusionary rules. Clinton, *supra*, at 795-96.

26. Clinton, *supra* note 25, at 793. In a sub-section entitled "Beyond *Chambers:* In Search of a Standard of Review," Clinton submits that since the Court has classified the right to defend oneself as a "fundamental right," this implies, according to traditional constitutional principles, that a compelling or legitimate governmental interest test must be applied before such a right can be denied by the State. *Id.* at 798. Subsequent cases have utilized language consistent with the balancing approach. *See, e.g.*, United States v. Booker, 480 F.2d 1310, 1311 (7th Cir. 1973) ("[T]echnical rules [of evidence] . . . are clearly less significant than fundamental rights of fairness.").

27. Clinton, *supra* note 25, at 795.

28. *See, e.g.*, 415 U.S. at 319 ("[T]he State . . . interest in protecting the anonymity of juvenile offenders . . . is *outweighed* by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." (Emphasis added.)); 410 U.S. at 295 ("Of course, the right to confront and cross-examine is not absolute and may in appropriate cases bow to accommodate other legitimate [governmental] interests . . . . But its denial . . . requires that the *competing interest* be closely examined." (Emphasis added.)).

involved, the Constitution mandates admission. Using this approach, if evidence which is sought to be admitted by a defendant is relevant and reliable, and particularly if it is sufficiently important so as to be "critical"[29] or "crucial"[30] or "vital,"[31] then the Constitution will require its admission regardless of an existing shield statute.[32]

Evidence of a complainant's sexual conduct and reputation for chastity will normally be irrelevant, both for substantive and impeachment purposes, to the issues considered at rape trials.[33] The mere fact that a prosecutrix is unchaste usually is not pertinent to the inquiry of whether the defendant forced her to engage in sexual intercourse.[34] Likewise, chastity per se has little or no relevance as a

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29. 410 U.S. at 302.

30. 415 U.S. at 317, 319.

31. Washington v. Texas, 388 U.S. 14, 16 (1967).

32. "[T]he defendant's right to a fair trial must be given precedence over the alleged victim's right to privacy." 2 J. WEINSTEIN, EVIDENCE, UNITED STATES RULES 411-12 (1978).

> When the defendant offers critical evidence in his favor as part of his sixth amendment right to present a defense, . . . the prosecution has a constitutional obligation to present some good reason for excluding exculpatory evidence. The prosecutor . . . must demonstrate that exclusion is necessary to further a compelling state interest.

Westen, *supra* note 24, at 156. The Supreme Court has indicated that privacy protection does not qualify as a "compelling state interest" sufficient to justify the exclusion of such evidence. "[W]e conclude that the right of confrontation is *paramount* to the State's policy of protecting the privacy of a juvenile offender." 415 U.S. at 319 (emphasis added).

33. In *California v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rtpr. 864 (1978), the court stated: "The relevance of past sexual conduct of the alleged victim of the rape with persons other than the defendant to the issue of her consent to a particular act of sexual intercourse with the defendant is slight at best." *Id.* at 690, 128 Cal. Rptr. at 867.

34. *Cf.* Ordover, *supra* note 11, at 97 ("[T]he traditional rule (*i.e.*, that an unchaste character trait is predictive of present consent) is wrong. It proceeds from a faulty premise (*i.e.*, that all non-marital intercourse is abnormal, immoral, reprehensible and uncondoned by contemporary society) and contravenes principles and policies long embodied in the law of evidence."); Comment, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U.L. REV. 127, 138 (1976) ("[T]he victim's lack of chastity has little, if any, probative value on the issue of consent."); Comment, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36, 54 (1974) ("[A] victim's reputation and sexual activities with men other than her assailant are irrelevant."); Note, *supra* note 6, at 343 ("The concentration upon the reputation of the prosecutrix, almost as if she were the one whose guilt or innocence were to be determined, is an indication of the bias against the rape victim in the current system."). *See also* Comment, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403, 414 (1975) [hereinafter cited as *Limitations*] ("[This] antiquated, victorian concept of women . . . bears no relation to the reality of today.").

factor in judging the "credibility" of the prosecutrix as a truthful witness, nor is this factor a reliable indication of a victim's motivation to "frame" the defendant.[35]

However, factual situations could arise which would qualify as exceptions to the general rule. For instance, Louisiana's own statute recognizes the relevance of past sexual relationships between the victim and the accused.[36] Evidence that the victim has voluntarily engaged in sexual intercourse with the defendant is deemed to have strong probative value insofar as it concerns the issue of her consent to the sex act in question.[37] Another example would be the case of a rape complainant who engages in an established pattern of indiscriminate sex as a prostitute.[38] In such a case, evidence of the prior sexual conduct of the complainant may be extremely relevant to a defense of consent[39] or a reasonable *belief* of consent.[40] Evidence

35. *See* Note, *Florida's Sexual Battery Statute: Significant Reform But Bias Against the Victim Still Prevails*, 30 U. FLA. L. REV. 419 (1978). The author states:

> The *Davis* court concluded that the defense was entitled to show that the witness was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against the defendant. No parallel exists in the case of sexual battery; prior sexual activity indicates neither bias nor involvement in crime.

Id. at 442.

36. LA. R.S. 15:498 (Supp. 1975). See statute as reproduced in text at note 12, *supra*.

37. However, there is an inverse relationship between the remoteness in time of voluntary consent previously given by the victim and its relevancy to the present issue of consent. In other words, the more distant in time the earlier consent was given, the less likely it is that the consent continued to exist at the time of the act in question. Thus, under ordinary circumstances, the fact that the victim once had a sexual relationship with the accused in the remote past has very little relevance to the issue of whether a *current* voluntary relationship existed.

38. *See The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Evidence*, 39 LA. L. REV. 955, 956 (1979) [hereinafter cited as *Evidence*].

39. *Cf.* FED. R. EVID. 406, which provides: "Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit." The Advisory Committee's note following the rule cites Professor C. McCormick as the basis for the statement that "agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion." FED. R. EVID. 406, comment.

Note, however, that even the routine practice of prostitution would probably not qualify as "habit," which is restricted in its technical definition to "semi-automatic" conduct performed without conscious thought, *i.e.*, "[a non-volitional] regular response to a repeated specific situation." C. MCCORMICK, *supra* note 8, § 195, at 462.

40. Evidence that the defendant had a reasonable belief that the complainant consented to the conduct at issue will be relevant in most prosecutions for rape and sexual battery in order to show that the complainant *in fact* consented. Lack of consent on the part of the victim is an essential element of these crimes, except in cases of sexual offenses committed upon minors. In the latter cases, express statutory language provides that lack of knowledge of the victim's age shall not be a defense. Thus, not only is evidence of a reasonable *belief* of consent irrelevant, but also evidence of *actual* consent is irrelevant. LA. R.S. 14:42(3) & 14:80 (Supp. 1978); LA. R.S. 14:81-81.1 (Supp.

of prior sexual conduct may also be highly relevant where the circumstances of the previous conduct are so distinctive and so closely resemble the defendant's version of the alleged encounter with the complainant that the evidence could be classified as "modus operandi."[41] Additionally, if the accused wishes to defend on the basis of evidence that some other person is responsible for the complainant's abused condition, then evidence of the victim's prior sexual conduct which occurred near the time in question would be relevant to establish the origin of semen, pregnancy, disease or injury allegedly arising from the rape.

For purposes of impeachment, evidence of a victim's sexual conduct with men other than the defendant is relevant if it tends to show that the testimony of an adverse witness is unreliable or nontrustworthy. For instance, in *Minnesota v. Elijah*,[42] the defendant unsuccessfully sought to establish the bias and to impeach the credibility of a witness who testified as a friend of the victim by showing that the couple had engaged in sexual intercourse and had generally been on most intimate terms. The evidence would have supported an inference that the witness's sexual involvement with the victim led him to harbor a deep-seated jealousy against the accused. The defendant's subsequent carnal knowledge conviction was

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1977). However, in other cases of rape which require proof of lack of consent of the victim, the reasonableness of the defendant's belief of consent is probative of the complainant's actual consent to the conduct in issue, since consent is an issue of fact.

Furthermore, under Revised Statutes 14:16, evidence that the defendant reasonably believed that the complainant consented to the conduct in issue would also be relevant as the basis of a reasonable "mistake of fact" defense in cases where the offense requires a mental element. For example, the Louisiana statute defining sexual battery expressly requires that the offensive conduct be "intentional." LA. R.S. 14:43.1 (Supp. 1978). It is submitted that, despite the absence of any express intent requirement in the statutes defining aggravated, forcible, and simple rape, a mens rea requirement nevertheless exists for these crimes, under which a defendant must have a general intent to commit the offense (*i.e.*, to engage in prohibited *non-consensual* intercourse). *See* State v. Fletcher, 341 So. 2d 340, 343 (La. 1976) (finding that, in light of all the evidence, defendant was not justified by any reasonable mistake of fact to conclude that the victim consented to the conduct in issue); *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Criminal Law*, 39 LA. L. REV. 771, 782 (1979).

41. Louisiana provides for the admission of evidence of "other crimes" committed by a defendant if the prior misconduct was of such a distinctive character that it becomes relevant in proving the identity of the perpetrator of the present crime. *See* LA. R.S. 15:445 (1950) which provides: "In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction." An analogy can be drawn between such "signature crimes" previously committed by a defendant which are admitted to show intent and distinctive past sexual behavior on the part of a prosecutrix which could be relevant to show voluntariness (or consent) with respect to the sex act in issue.

42. 206 Minn. 619, 289 N.W. 575 (1940).

reversed because his attempt at cross-examination had been unconstitutionally curtailed.

Evidence of the complainant's sexual conduct will also be relevant for impeachment purposes in cases where the defendant seeks to introduce it in support of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.[43] Some courts and commentators[44] have expressed concern that many sexual offense accusations are made by "psychologically disturbed individuals";[45] therefore such evidence, where relevant and reliable, should be admitted in order to protect the falsely accused. Evidence of prior sexual conduct would also be relevant to impeach a victim who has, on direct examination, made a material misrepresentation as to the nature of her sexual experience on occasions other than that of the alleged rape. Under these circumstances, the defendant should be allowed to "confront" the witness by introducing reliable evidence of any prior inconsistent statement or prior inconsistent conduct, even if this evidence involves prior sexual history. Thus, in situations similar to the above examples, the exclusion of relevant and reliable defense evidence, especially if "critical" to an accused's defense, could constitute a denial of constitutional guarantees.[46]

Many states[47] and Congress[48] have endeavored to draft rape

43. *See generally* Comment, *Complainant Credibility in Sexual Offense Cases: A Survey of Character Testimony and Psychiatric Experts*, 64 J. CRIM. L. 67 (1973).

44. *Id.* at 67 nn.2-3.

45. *Id.* at 67.

46. See notes 17-31, *supra*, and accompanying text.

47. For an analysis and categorization of the most common provisions contained in the majority of such legislation, *see* Berger, *supra* note 2, at 100-03. For example, of the twenty-eight state rape shield statutes in force as of 1977, twenty-three contain protective procedural provisions requiring the defendant to seek the judge's permission before introducing chastity evidence at trial. Eleven of these explicitly require the defendant to make an offer of proof of relevance to the judge, and almost all of the statutes provide for mandatory or discretionary preliminary hearings, to be held outside the hearing of the jury. *Id.*

48. *See* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, § 2(a), 92 Stat. 2046 (1978), *adding* FED. R. EVID. 412 (governing the admissibility at trial of chastity evidence of a complainant's past sexual behavior). The new federal legislation attempts to balance the competing interests of the prosecution and the accused by providing for the admission, after a relevancy hearing in chambers, of the following evidence (other than reputation or opinion evidence) when the defendent has filed written motion to offer such evidence, accompanied by a written offer of proof containing one or more of the following:

(1) evidence of a victim's past sexual behavior which is constitutionally required to be admitted; or

(2) evidence of a victim's past sexual behavior with persons other than the accused to show the source of semen or injury; or

(3) evidence of a victim's past sexual behavior with the accused and offered by him upon the issue of consent.

shield statutes which recognize the delicacy of balancing opposing interests "in such a way as to dignify the complainant's role without imperiling the person accused."[49] By incorporating provisions for flexibility and discretion into the shield laws, allowance has been made for the admission of highly relevant defense evidence which is likely to be "critical" in cases where it would otherwise be excluded.

Early experience in the application of some recently drafted rape shield laws indicates that the exclusion of evidence of prior sexual conduct may cause constitutional problems unless the judge has discretion to admit reliable and probative, but otherwise inadmissible, evidence when it is critically relevant to the accused's defense. For instance, the New York statute,[50] a much more detailed and narrowly-drawn statute than Louisiana's, was recently threatened by a constitutional challenge in the case of *New York v. Conyers*.[51] Citing *Davis*, the New York Supreme Court held that "but for" the statute's omnibus clause, which allowed the court discretion to admit evidence of the victim's sexual conduct, the statute would have serious constitutional problems.[52]

A successful constitutional attack on the exclusion of similar evidence in a sex offense trial resulted in a reversal of a carnal knowledge conviction in *Maryland v. DeLawder*.[53] Because of a jurisprudential rule excluding evidence of prior sexual conduct in prosecutions for carnal knowledge of a juvenile—under the rationale that such females were legally incapable of consenting to sexual intercourse—the defendant in *DeLawder* had not been permitted to introduce evidence relating to prior acts of sexual intercourse by the prosecutrix with other men. The defendant had made an elaborate offer of proof indicating that the alleged victim had accused

49. Berger, *supra* note 2, at 100.

50. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1975) provides:

> Evidence of a victim's sexual conduct shall not be admissible in a prosecution for [rape] unless such evidence: (1) proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or (2) proves or tends to prove that the victim has been convicted of [prostitution] within 3 years prior to the [date of the alleged rape]; or (3) rebuts [prosecution] evidence of the victim's failure to engage in sexual intercourse, deviate sexual intercourse or sexual contact during a given period of time; or (4) rebuts [prosecution] evidence which proves or tends to prove that the accused is the cause of the pregnancy or disease of the victim, or the source of semen found in the victim; or (5) is determined by the court after an offer of proof by the accused outside the hearing of the jury . . . to be relevant and admissible in the interests of justice.

51. 382 N.Y.S.2d 437, 86 Misc. 2d 754 (1976).

52. *Id.* at 444, 86 Misc. 2d at 763. The New York Supreme Court upheld the trial court's exclusion of the evidence because the defendant had not put consent at issue, but merely wished to impeach the general credibility of the prosecutrix by offering her record as a prostitute.

53. 28 Md. App. 212, 344 A.2d 446 (1975).

him of rape only because she believed she was pregnant by another man and was afraid to tell her mother that she had had voluntary sexual intercourse with others. On the strength of *Davis*, the court held that the exclusionary rule had been unconstitutionally applied to prevent the defendant from effectively exposing the possible bias, prejudice, and ulterior motive of the prosecutrix.

Another reversal of a sex offense conviction came as a result of an attack on the constitutionality of a 1975 amendment to an Oregon statute[54] which limited the admissibility of evidence of past sexual conduct of rape victim. In *Oregon v. Jalo*,[55] the Oregon appellate court held that the application of the Oregon rape shield statute in that case infringed upon the defendant's constitutional right to confrontation because the statute resulted in the exclusion of reliable evidence of the complainant's ulterior motive.[56]

The Louisiana Supreme Court has on two occasions considered the constitutionality of the new Louisiana law, but in neither case was the validity of the shield law disturbed. In *State v. Domangue*,[57] the defendant did not demonstrate that the excluded evidence of the victim's prior sexual history was relevant to the issues at trial. In *State v. Decuir*,[58] the court also found that the defendant had not shown any correlation between the excluded evidence of the complainant's prior sexual conduct and the instant charge, nor had he shown that the earlier conduct suggested any motive on the part of the prosecutrix to fabricate.[59] However, Justice Dennis in a concur-

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54. OR. REV. STAT. § 163.475 (1975). The particular section of the statute at issue was section three, which provided that "evidence of previous sexual conduct of a complainant is presumed to be irrelevant and shall not be admitted . . . . This presumption may be overcome." The Oregon statute contained provisions for a preliminary hearing, at which the relevancy and subsequent admissibility of the proffered evidence was determined.

55. 27 Or. App. 845, 557 P.2d 1359 (1976).

56. *Id.* at 850-51, 557 P.2d at 1362. The court noted:

> The charges arose when the 10-year-old complainant reported that the 41-year-old defendant had engaged in and attempted various sexual acts with her. Defendant denied this, contending he had discovered that the girl had engaged in sexual conduct with his 13-year-old son, another young boy and her uncle, had told her he would inform her parents, and that before he did so she falsely accused him of the crimes charged.

Id. at 847, 557 P.2d at 1360.

57. 350 So. 2d 599 (La. 1977).

58. 364 So. 2d 946 (La. 1978).

59. *Id.* at 948. The *Decuir* court concluded:

> In view of our finding that the evidence sought to be elicited was not competent to impeach the witness because of its irrelevancy and was therefore inadmissible, we need not consider the applicability of La. R.S. 15:498 where the evidence of prior sexual conduct of a rape victim is *in fact relevant* to establish bias, interest or corruption on the part of the witness.

Id. (Emphasis added.)

ring opinion cautioned that "this case has exposed an infirmity of constitutional dimensions in . . . La. R.S. 15:498"[60] and anticipated that in future cases exclusion of genuinely relevant evidence might overreach its legitimate aims and violate the accused's right to a fair trial.[61]

Viewed in light of the aforementioned jurisprudence,[62] the language of Louisiana's rape shield law[63] appears to set forth an inflexible, overly-protective rule which is not attuned to the legitimate needs of an accused[64] and therefore is almost certain to be attacked by defendants who are frustrated in their attempts to present relevant evidence critical to their defense. As indicated above, if the broad language of the new law is relied upon to exclude important, relevant, and trustworthy defense evidence of prior sexual conduct, then the new statute may well be unconstitutional *as applied.*

In order to avoid constitutional infirmity[65] and the concomitant danger of conviction reversals, while continuing to provide effective privacy protection for victims of sexual offenses, Revised Statutes 15:498 should be amended. The proposed statute suggested below is a composite of two model rape shield laws drafted by authorities on this subject,[66] and is similar in form to the federal shield statute.[67]

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60. 364 So. 2d at 948 (Dennis, J., concurring).

61. *Id.* at 949, *citing* Davis v. Alaska, 415 U.S. 308 (1974).

> The ultimate question is one of relevancy, and it cannot be reasonably determined by an inflexible rule having no regard for the facts of a particular case. Rather, the decision whether to admit evidence . . . should be consigned to the trial judge who can delicately weigh the competing interests of complainant and defendant.

Id. at 949.

62. See notes 17-32, 42, 51-61, *supra*, and accompanying text.

63. LA. R.S. 15:498 (Supp. 1975). The statute is reproduced in text at note 12, *supra.*

64. In one aspect, the Louisiana statute may be inadvertently *under-protective* of the victim and *overprotective* of the defendant insofar as it mandates admission, in *all* cases, of evidence of prior sexual relationships between them, even in cases where the relationship was remote in time. See note 37, *supra.*

65. See text at notes 51-61, *supra.* For examples of constitutional criticisms of rape shield statutes, *see* Berger, *supra* note 2, at 69-87; Herman, *What's Wrong With Rape Reform?*, CIV. LIB. REV., Dec. 1976/Jan. 1977, at 60; Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1, 14-45 (1976); *Limitations*, supra note 34, at 419-25; Comment, *The Kentucky Rape Shield Law: One Step Too Far*, 66 KY. L.J. 426 (1977); Note, *Indiana's Rape Sheild Law: Conflict With the Confrontation Clause?*, 9 IND. L. REV. 418 (1976).

66. *See* B. BABCOCK, *supra* note 5, at 840-42; Berger, *supra* note 2, at 97-99.

67. See note 48, *supra.* Since Louisiana evidence law substantially coincides with most of the other provisions of the Federal Rules of Evidence, it would be consistent for the legislature to adopt a statute similar in form to this most recent enactment. For a student symposium comparing Louisiana evidence law with the Federal Rules of Evidence, *see Symposium—Federal Rules of Evidence*, 36 LA. L. REV. 59 (1975).

The models provide a detailed, workable solution to the constitutional problems encountered in drafting an effective shield statute. The proposed statute makes evidence of a victim's sexual history generally inadmissible, except in cases where (1) the evidence falls within one of the excepted categories and (2) the court determines that it is relevant to a material fact and that its probative value is not outweighed by the danger of unfair prejudice. The statute, however, is explicitly made subject to constitutional limitations; therefore, if the Constitution compels the admission of reliable, relevant evidence, the fact that such evidence does not fall within one of the excepted categories will not render it inadmissible. Thus, the proposed statute protects both the constitutional rights of defendants and the privacy interests of complainants.

Text of Proposed Statute

Subject to constitutional limitations, in prosecutions for rape, attempted rape, and other sexual offenses, the defendant may not introduce reputation or opinion evidence or evidence of specific instances of the complainant's sexual conduct except:

Upon written motion of the defendant to offer such evidence, accompanied by a written offer of proof of relevance, the following evidence shall be admissible if the court, after hearing the proffered evidence in an *in camera* hearing,[68] 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:

68. When Revised Statutes 15:498, then House Bill 619, was passed by the House on July 3, 1975, it concluded with the following provisions: "However, such evidence may be received by the judge in chambers. If the judge determines the evidence to be relevant and material, it may be introduced in open court, subject to the rules of evidence." OFFICIAL JOURNAL OF THE PROCEEDINGS OF HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 1st Reg. Sess. at 49 (July 3, 1975). Before reporting the bill, the Senate Committee on Judiciary "B" amended the above provision to delete the word "chambers" and inserted in lieu thereof the phrase "open court out of the presence of the jury." OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE STATE OF LOUISIANA, 1st Reg. Sess. at 11 (July 10, 1975). The Senate committee had feared that the in camera hearing would interfere with the defendant's right to a "public trial" guaranteed by the sixth amendment of the Constitution. Therefore, prior to passage of the bill in the Senate on July 14, 1975, the entire provision was deleted.

However, *in camera* hearings are frequently used in criminal trials to determine issues of admissibility of evidence, and the appropriateness of holding such non-public hearings to screen evidence of a complainant's past sexual conduct is recognized in the federal shield statute. FED. R. EVID. 412(c)(2). Louisiana jurisprudence has also acknowledged the use of *in camera* hearings in criminal trials to protect privacy interests of third persons. *See, e.g.*, State v. Babin, 319 So. 2d 367, 374 (1975). *Cf.* United States v. Nixon, 418 U.S. 689 (1974) (holding that an *in camera* inspection of disputed evidence would meet the needs of the judicial process in securing relevant evidence without significantly diminishing the privacy interests of the defendant).

(1) Evidence of prior sexual conduct or consensual sexual intercourse between the complainant and the defendant which tends to prove that the complainant consented to the conduct in issue.

(2) Evidence of an established pattern of prior sexual conduct on the part of the complainant which tends to prove that the complainant consented to the conduct in issue or such evidence, if known to the defendant at the time of the act or acts charged, which tends to prove that the defendant reasonably believed that the complainant was consenting.

(3) Evidence of prior sexual conduct on the part of the complainant 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 conduct in issue.

(4) Evidence of prior sexual conduct on the part of the complainant which tends 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, disease or injury allegedly resulting from these acts.

(5) Evidence of sexual conduct on the part of the complainant which tends to prove that the complaint has a motive for fabricating the charge or charges made.

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

(7) Evidence of prior sexual conduct on the part of the complainant which tends to show that the complaining witness has, on direct examination, made a material misrepresentation as to the nature of her sexual experience on occasions other than that of the alleged offense.

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