

# RAPE SHIELD STATUTES: LEGISLATIVE RESPONSES TO PROBATIVE DANGERS

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## I. INTRODUCTION

In recent years, public concern for the dilemma facing rape victims has increased. The rape victim<sup>1</sup> often is reluctant to report and prosecute the crime because she feels as if she, rather than the accused, is the defendant. At trial, the reason for the victim's feelings of apprehension is the admission of evidence of her sexual history. Traditionally, this evidence has been admissible, despite its frequent irrelevance to the issues at trial.

Attempting to lessen deterrents to reporting and to prosecuting rape, forty-six state legislatures passed statutes that limit the introduction of evidence of the victim's prior sexual conduct.<sup>2</sup> These rape

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1. Throughout this Note the term "rape victim" or "victim" will refer to the person bringing charges. "Victim" actually will mean alleged victim, because the defendant has not yet been convicted of the offense.

2. The following are the state rape shield statutes enacted to date: ALA. CODE § 12-21-203 (Supp. 1983); ALASKA STAT. § 12.45.045 (Supp. 1982); ARK. STAT. ANN. §§ 41-1810.1-2 (Supp. 1983); CAL. EVID. CODE § 1103 (Deering Supp. 1984); COLO. REV. STAT. § 18-3-407 (Supp. 1983); CONN. GEN. STAT. § 59-86f (1983); DEL. CODE ANN. tit. 11, § 3509 (Supp. 1982); FLA. STAT. ANN. § 794.022 (West Supp. 1983); GA. CODE ANN. § 38-202.1 (Supp. 1982); HAWAII REV. STAT. § 707-742 (Supp. 1983); IDAHO CODE § 18-6105 (1984); ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-37-4-4 (Burns Supp. 1983); IOWA CODE ANN. § 813.2, R. 20(5) (West 1983-84); KAN. STAT. ANN. § 60-447a (1983); KY. REV. STAT. ANN. § 510.145 (Baldwin Supp. 1978); LA. REV. STAT. ANN. § 15:498 (West Supp. 1983); MD. ANN. CODE art. 27, § 461A (Supp. 1983); MASS. ANN. LAWS ch. 233, § 21B (Michie/Law. Co-op. Supp. 1983); MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1983-84); MINN. STAT. ANN. § 609.347 (West Supp. 1983); MISS. CODE ANN. §§ 97-3-68 to 97-3-70 (Supp. 1983); MO. ANN. STAT. § 491.015 (Vernon Supp. 1983); MONT.

shield statutes vary in scope and procedural detail,<sup>3</sup> but all the statutes end the presumptive admissibility of sexual history evidence. The statutes restrict the circumstances in which and the extent to which the defendant may present such evidence to the jury. States pass rape shield statutes to balance the rights of the parties in a rape trial. The prosecutrix has a right to privacy and a right to be free from harassment at trial. The defendant has a right to introduce evidence relevant to his defense and has a right to confront all witnesses.

This Note studies and criticizes the various standards of admissibility of sexual history evidence contained in rape shield statutes. It examines the traditional rules of evidence in rape trials,<sup>4</sup> and the rationales behind the statutory reforms.<sup>5</sup> Following a general survey of state rape shield statutes,<sup>6</sup> the Note's analysis of five statutes,<sup>7</sup> which are representative of various degrees of admissibility, illustrates the weaknesses inherent in the statutes. Finally, this Note proposes a statutory scheme that better protects the interests of both the rape victim and the defendant.<sup>8</sup>

## II. COMMON LAW EVIDENCE RULINGS IN RAPE CASES

Prior to the enactment of state rape shield statutes, trial courts reg-

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CODE ANN. § 45-5-503(5) (1983); NEB. REV. STAT. §§ 28-321 to 323 (Supp. 1983); NEV. REV. STAT. § 50.090 (1983); N.H. REV. STAT. ANN. § 322-A:6 (Supp. 1983); N.J. STAT. ANN. §§ 2A:84A-32.1 to 32.2 (West Supp. 1983-84); N.M. STAT. ANN. § 30-9-16 (1983); N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84); N.C. GEN. STAT. § 8-58.6 (Supp. 1983) (amended 1979); N.D. CENT. CODE § 12.1-20-15 (1983); OHIO REV. CODE ANN. §§ 2907.02(D)-.02(F) (Page Supp. 1983); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1983-84); OR. REV. STAT. § 163.475 (1983); 18 PA. CONS. STAT. ANN. § 3104 (Purdon Supp. 1983-84); R.I. R. CRIM. PRO. 26.2; S.C. CODE § 16-3-659.1 (Supp. 1983); S.D. COMP. LAWS ANN. § 23-44-16.2 (Supp. 1983); TENN. CODE ANN. § 40-2445 (Supp. 1983); TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1983-84); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1983); WASH. REV. CODE ANN. § 9.79.150 (1983); W. Va. Code § 61-8B-12 (1977); WIS. STAT ANN. §§ 971.31, 972.11 (West Supp. 1983-84); WYO. STAT. ANN. § 6-4-312 (Supp. 1983). Arizona, Maine, Vermont and Virginia have not enacted statutes.

3. This Note deals primarily with the differences in admissibility standards, rather than procedural differences between statutes. *See infra* notes 86-129 and accompanying text.

4. *See infra* notes 9-32 and accompanying text.

5. *See infra* notes 33-41 and accompanying text.

6. *See infra* notes 42-81 and accompanying text.

7. *See infra* notes 86-148 and accompanying text.

8. *See infra* notes 152-58 and accompanying text.

ularly admitted evidence of the complainant's sexual history.<sup>9</sup> Several generally accepted beliefs concerning women purported to justify this rule of admissibility.<sup>10</sup> First, courts feared that vindictive women would fabricate charges of rape and emphasized the difficulty of defending against such charges.<sup>11</sup> Second, courts believed that chastity was a character trait and allowed sexual history evidence to prove a complainant's unchaste nature.<sup>12</sup> Third, courts judged premarital sex to be immoral and admitted evidence of it to impeach the victim's credibility.<sup>13</sup>

At common law, trial courts gave the defendant the opportunity to prove that the complainant consented to the rape. At trial, the defendant could attack the complainant's character<sup>14</sup> for chastity<sup>15</sup> on cross-examination and when pleading consent as an affirmative defense.<sup>16</sup> The basic theory of admissibility is that unchastity is a char-

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9. See Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 546, 551 (1980) (discusses rationale behind common law evidence rules in rape cases).

10. See Tanford & Bocchino, *supra* note 9, at 546. In addition to fears that vengeful women would falsely accuse men of rape, at least one scholar was concerned that women's sexual fantasies would lead to false accusation. Dean Wigmore suggested that psychiatrists examine complainants in rape cases to ensure that their accusations are not based upon sexual fantasies rather than actual events. See 3A J. WIGMORE, EVIDENCE § 924a (Chadbourn rev. ed. 1970); Tanford & Bocchino, *supra* note 9, at 547.

11. Tanford & Bocchino, *supra* note 9, at 546.

12. See *infra* notes 18-24 and accompanying text.

13. Tanford & Bocchino, *supra* note 9, at 547. For a discussion of impeachment by proof of an unchaste character, see *infra* notes 28-32 and accompanying text.

14. "'Character' is a generalized description of one's disposition in respect to a general trait such as honesty, temperance. . . . carefulness. . . ." *Fraser v. Henry*, 444 F.2d 1228, 1232 (10th Cir. 1971).

15. "Chastity" refers to the abstention from unlawful sexual intercourse with a male person. *State v. Brionez*, 188 Neb. 488, 490, 197 N.W.2d 639, 640 (1972).

16. See Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1, 5 (1976). For recent cases stating this rule, see *Williams v. State*, 51 Ala. App. 1, 7, 282 So. 2d 349, 354 (1973) (general character of prosecutrix for chastity may be impeached, but not particular instances of unchastity); *State v. Jack*, 285 So. 2d 204, 208 (La. 1973) (evidence of rape victim's general reputation for chastity is admissible when consent is at issue, although specific acts of immorality cannot be shown); *People v. Whitfield*, 58 Mich. App. 585, 592, 228 N.W.2d 475, 478 (1978) (evidence of complainant's reputation for chastity and evidence as to specific acts with defendant may be admissible to prove consent); *State v. Yowell*, 513 S.W.2d 397, 403 (Mo. 1974) (where consent is at issue in rape case, an attack on character of prosecutrix for chastity can be made by evidence of general reputation).

acter flaw that caused the complainant to consent to sexual relations in the past, and so should be admitted to suggest her consent in the present situation.<sup>17</sup>

Courts were divided over what type of character evidence was admissible to prove the complainant's unchaste nature. The types of evidence generally introduced as proof of character were specific acts, opinion, and reputation.<sup>18</sup> The majority of courts allowed only the introduction of reputation evidence<sup>19</sup> to show unchastity. This restriction existed because courts believed that evidence of specific sexual acts and opinions could have a prejudicial effect that outweighed its probative value.<sup>20</sup> Additionally, collateral issues relating to the specific acts might have distracted the jury from the main issues of the case.<sup>21</sup> Evidence of specific acts and opinion testimony also might have resulted in unfair surprise to the complainant.<sup>22</sup> A strong minority of courts admitted only evidence of the victim's specific sexual acts.<sup>23</sup> Proponents of the view contended that juries were not dis-

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17. See Rudstein, *supra* note 16, at 4-5. The court in *People v. Collins*, 25 Ill. 2d 605, 186 N.E.2d 30 (1962), stated the proposition that "The underlying thought here is that it is more probable that an unchaste woman would consent . . . than a virtuous woman. . . ." *Id.* at 611, 186 N.E.2d at 33. Judge Cowen, in the often quoted *People v. Abbot*, 19 Wend. 192 (N.Y. 1838), asked, "And will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretis?" *Id.* at 195-96.

18. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *MATERIALS FOR THE STUDY OF EVIDENCE* 341 (1983).

19. See Rudstein, *supra* note 16, at 5. Cases allowing only reputation evidence to show consent include: *Huffman v. State*, 301 So. 2d 815, 817 (Fla. App. 1974) (reputation is admissible, but not specific acts of intercourse between prosecutrix and third parties); *State v. Dipietrantonio*, 152 Me. 41, 48, 122 A.2d 414, 421 (1956) (evidence of general reputation of prosecutrix for unchastity may sometimes be admissible in rape trial, but not evidence of specific acts).

The exclusion of specific acts evidence in the above cases is consistent with the general exclusion of this evidence in any case in which a party wishes to use character as circumstantial evidence of a person's conduct. Rudstein, *supra* note 16, at 5 n.24. See C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 186 (2d ed. 1972) (discusses types of character evidence and their admissibility).

20. See Rudstein, *supra* note 16, at 5. The rationale for the majority view is the likelihood that the slight probative value of specific instances of sex with third parties is outweighed by the probability that collateral questions relating to the specific acts would distract the jury, take too much time, and perhaps would unfairly surprise the complainant. *Id.* at 5.

21. See *supra* note 20 and accompanying text.

22. See *supra* note 20 and accompanying text.

23. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 156-57 (1928); 1 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS*

tracted significantly by collateral issues. The minority asserted that using reputation alone to gauge a witness' character was unreliable in an expanding, mobile society.<sup>24</sup>

Occasionally, at common law, the victim's prior sexual conduct was admissible even when the defense did not raise consent as an issue.<sup>25</sup> For example, in statutory rape cases, where the unchastity of the victim is a defense or a mitigating factor, specific sexual acts were relevant and admissible.<sup>26</sup> Also, the defense could introduce evidence of the complaint's specific sexual acts with third parties to rebut testimony concerning her physical condition following the alleged rape.<sup>27</sup> Traditionally, prior sexual conduct also was admissible to impeach the credibility of the prosecutrix.<sup>28</sup> Courts reasoned that promiscuity is a form of dishonesty; therefore promiscuity diminishes the complaint's credibility.<sup>29</sup> A majority of jurisdictions re-

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AT COMMON LAW § 200 (3d ed. 1940). *See generally* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 2, 18 (1977).

24. *See* Berger, *supra* note 23. For cases accepting specific acts as proof of bad character, see *State v. Wulff*, 194 Minn. 271, 274, 260 N.W. 515, 516 (1935) (in rape prosecution, evidence of specific acts to show chastity is admissible); *Burton v. State*, 471 S.W.2d 817, 821 (Tex. Crim. App. 1971) (when consent of prosecutrix is at issue, specific acts of her unchastity are admissible).

25. *See* Rudstein, *supra* note 16, at 7.

26. *Id.* *See, e.g.*, *Hickman v. State*, 97 So. 2d 37, 39 (Fla. App. 1957) (specific acts showing unchaste character are admissible in statutory rape case); *State v. Weber*, 272 Mo. 475, 483, 199 S.W. 147, 148 (1917) (in statutory rape case, specific acts between prosecutrix and third parties are admissible on question of previous chaste character of prosecutrix).

27. *See, e.g.*, *Harper v. State*, 185 Ind. 322, 324, 114 N.E. 4, 5 (1916) (the birth of a child); *People v. Werner*, 221 Mich. 123, 125, 190 N.W. 652, 653 (1922) (a ruptured hymen); *Shapnard v. State*, 437 P.2d 565, 591 (Okla. Crim. App. 1967) (pregnancy of prosecutrix), *cert. denied*, 393 U.S. 826 (1968).

28. *Brown v. State*, 50 Ala. App. 471, 474, 280 So. 2d 177, 179 (1973) (someone of bad moral character, such as an unchaste woman, is less likely to be truthful than a person of good moral character); *Frank v. State*, 150 Neb. 745, 753, 35 N.W.2d 816, 822 (1949) (reputation for unchasteness and specific unchaste acts admissible to impeach credibility).

Prior sexual conduct used to impeach the victim's credibility also served as substantive evidence, for example, to show consent, because it is relevant to facts material to the prosecution. This general attack on credibility is distinguishable from more specific methods of impeachment, such as contradiction of a witness' story. *See* C. McCORMICK, *supra* note 19, § 47.

29. *But cf.* Tanford & Bocchino, *supra* note 9, at 549. Tanford and Bocchino argue that the reasoning behind admitting sexual history to impeach credibility is flawed. First, the inferences about promiscuity were limited to women; promiscuous men could not be similarly impeached. Second, women that charged defendants with

fused to admit for impeachment purposes evidence of the complainant's promiscuity, limiting impeachment of the complainant to evidence of her biases, defects in her sensory capacity, prior inconsistent statements, prior convictions, and poor reputation for truthfulness.<sup>30</sup> A minority of jurisdictions admitted evidence of a complainant's reputation for unchasteness to impeach her credibility.<sup>31</sup> A small number of courts permitted the defendant to impeach the prosecutrix using evidence of specific sexual acts.<sup>32</sup>

### III. LEGISLATIVE PURPOSES FOR ENACTMENT OF RAPE SHIELD STATUTES

In the early 1970's, state legislatures recognized the injustice inflicted upon rape victims by traditional evidence rules. In response, the legislatures enacted rape shield statutes.<sup>33</sup> These statutes attempt to protect the rights of both the complainant and the accused,<sup>34</sup> but primarily the legislatures desired to shield the victim from humiliation and psychological damage at trial.<sup>35</sup> By restricting the admissibility of a victim's sexual history, legislatures intended to make the

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crimes other than rape could not be impeached by their prior sexual history. *Id.* at 549.

30. See generally C. McCORMICK, *supra* note 19, §§ 33-48.

31. *E.g.*, *Andrews v. State*, 196 Ga. 84, 98, 26 S.E.2d 263, 278 (1943) (general reputation of prosecutrix may be proved by accused), *cert. denied*, 320 U.S. 780 (1943); *Frank v. State*, 150 Neb. 745, 753, 35 N.W.2d 816, 822 (1949) (bad reputation for chastity admissible to impeach credibility); *State v. Cox*, 280 N.C. 689, 695, 187 S.E.2d 1, 5 (1972) (general character of prosecutrix for unchastity may be shown to attack credibility).

32. *E.g.*, *Frady v. State*, 212 Ga. 84, 86, 90 S.E.2d 664, 665-66 (1955) (defendant may show victim's prior unchaste acts for impeachment or to suggest consent); *Frank v. State*, 150 Neb. 745, 753, 35 N.W.2d 816, 822 (1949) (specific acts of promiscuity are admissible to impeach credibility); *State v. Tuttle*, 28 N.C. App. 198, 199, 220 S.E.2d 630, 631 (1975) (specific acts admissible to impeach credibility only on cross-examination of complainant).

33. The Michigan Legislature enacted the first rape shield statute in 1974. Act of Aug. 12, 1974, 1974 Mich. Pub. Acts 266.

34. See generally Berger, *supra* note 23, at 39-84; Crawford, *The Rape Shield Law: Making It Work*, 24 N.H.B.J. 109 (July 1983) (general discussions of legislative policies underlying statutes); Rudstein, *supra* note 16, at 9-14 (describes rape shield laws); Tanford & Bocchino, *supra* note 9, at 566-90 (applying the standard to cases).

35. See, e.g., *Hardy v. State*, 159 Ga. App. 854, 860, 285 S.E.2d 547, 550 (1981) (purpose of Georgia statute is "to eliminate the philosophy 'that women of promiscuous sexual reputation are entitled to less protection than women of chaste reputation'"); *Johnson v. State*, 146 Ga. App. 277, 280, 246 S.E.2d 363, 365 (1978) (purpose of Georgia rape shield statute generally is to protect complaining witness); *State v.*

trial less traumatic for the victim. A correlative purpose of rape shield legislation is to protect the victim's privacy.<sup>36</sup> In addition, rape shield statutes eliminate the prejudice jurors harbor toward a victim that has a detailed sexual history.<sup>37</sup>

States also must protect the constitutional rights of the defendant in rape cases. A criminally accused is entitled to introduce evidence relevant to his defense, especially evidence tending to prove his innocence.<sup>38</sup> Many states enacted rape shield acts that attempt to balance the victim's right to privacy against the defendant's right to present an adequate defense.<sup>39</sup>

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Cloatz, 305 N.C. 116, 120, 286 S.E.2d 793, 797 (1982) (North Carolina statute intended to prevent unnecessary intrusion into privacy of victims of sex crimes).

Congress enacted a federal rape shield act, the Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (codified as FED. R. EVID. 412). Congress intended the statute "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives." 124 CONG. REC. 34,913 (1978) (remarks of Rep. Mann). For a history of state rape shield statutes with similar stated purposes, see Note, *Indiana's Rape Shield Law: Conflict With the Confrontation Clause?*, 9 IND. L. REV. 418, 435 (1976).

36. The privacy issue is a constitutional one, involving the individual interest in avoiding disclosure of personal matters. Cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt, v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 410 U.S. 113 (1973), illustrate the constitutional limits on state intrusion into private sexual activities.

37. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 249, 252-53 (1966) (states that in 60% of simple rape cases, juries acquitted where a judge would have convicted); Note, *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, 407 (1975) (discusses frustration of complainant and prosecutor when jury's acquittal is obviously attributable to its low opinion of the victim's moral character).

38. U.S. CONST. amend. VI, XIV. A defendant has the constitutional guarantee of a fair trial with the opportunity to confront witnesses against him. U.S. CONST. amend. VI. In *Pointer v. Texas*, 380 U.S. 400 (1965), the United States Supreme Court applied the sixth amendment right of confrontation to the states through the fourteenth amendment's due process clause. These amendments give the defendant the right to confront his accuser with questions and evidence that tend to prove his innocence. The problem facing state law-makers is the extent to which this right justifies an invasion of the rape victim's privacy by the introduction of sexual history evidence.

39. See, e.g., *Amburg & Rehtin, Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims*, 22 ST. LOUIS U.L.J. 367, 383-84 (1978) (discusses Missouri statute's attempt to balance the victim's and accused's interests).

Two Supreme Court cases, *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Davis v. Alaska*, 415 U.S. 308 (1974), together stand for the proposition that a state, through the mechanistic application of its evidentiary rules, cannot exclude trustwor-

Public policy considerations also motivated the reform of common law evidence rules in rape trials. Rape victims that are not forced to reveal publicly their sexual histories are less hesitant to prosecute their attackers.<sup>40</sup> Rape shield statutes also promote judicial economy by specifying the prerequisites for the admissibility of sexual history evidence. By providing the courts with detailed guidelines, these statutes eliminate appeals and retrials based on evidentiary issues.<sup>41</sup>

#### IV. A SURVEY OF RAPE SHIELD STATUTES

All of the forty-six rape shield statutes enacted reject the traditional assumption that the victim's sexual history automatically is admissible into evidence.<sup>42</sup> Most statutes admit evidence of the prosecutrix's prior sexual relations with the defendant, either automatically<sup>43</sup> or upon a showing of materiality.<sup>44</sup> Beyond this provision, however, no uniformity exists among the state statutes. These statutes can be analyzed according to four characteristics: 1) their standards of admissibility;<sup>45</sup> 2) their uses for sexual history evi-

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thy evidence critical to the accused's defense, without violating his right to due process. Nor can a state deny or significantly curtail the defendant's cross-examination of crucial witnesses without violating his right of confrontation, unless the defendant's interest is outweighed by a legitimate competing state interest in excluding the evidence or limiting the cross examination. See Rudstein, *supra* note 16, at 18. State legislators must use a balancing test such as the one suggested by *Chambers* and *Davis* in order to ensure the constitutional rights of both victim and accused.

The constitutionality of rape shield statutes is a complex issue, and beyond the scope of this Note. For discussions of the constitutionality of rape shield statutes, see Rudstein, *supra* note 16; Note, *supra* note 35; Note, *The Illinois Rape Shield Statute: Privacy at Any Cost?*, 15 J. MAR. 157 (1982); Note, *The Illinois Rape Shield Statute: Will it Withstand Constitutional Attack?*, 1981 U. ILL. L.F. 211.

40. See Note, *supra* note 37, at 407. The Illinois Court of Appeals referred to the Illinois rape shield statute as an "effective law enforcement tool . . . encouraging victims of rapes and other sexual assaults to report these crimes to the proper authorities without fear of having the intimate details of their past sexual activity brought before the public." *People v. Cornes*, 80 Ill. App. 3d 166, 175, 399 N.E.2d 1346, 1353 (5th Dist. 1980).

41. See Amburg & Rehtin, *supra* note 39, at 383.

42. See *supra* note 2 (listing of state statutes). See Tanford & Bocchino, *supra* note 9; Note, *supra* note 37 (discussion of rationales behind statutory reforms of common law).

43. See, e.g., CAL. EVID. CODE § 1103(b)(2) (Deering Supp. 1983); OKLA. STAT. ANN. tit. 22, § 750(A) (West Supp. 1983-84).

44. See, e.g., MINN. STAT. ANN. § 606.347 Sub. 3 (West Supp. 1983); OHIO REV. CODE ANN. § 2907.02(D) (Page Supp. 1983).

45. See *infra* notes 49-59 and accompanying text.



dence;<sup>46</sup> 3) the types of character evidence they admit;<sup>47</sup> and 4) their exceptions to the general exclusion of sexual history evidence.<sup>48</sup>

State rape shield statutes vary in their standards of admitting sexual history evidence. Some statutes prohibit almost any introduction of a complaint's prior sexual conduct.<sup>49</sup> For example, the Michigan statute<sup>50</sup> permits only the introduction of evidence of sexual relations with the defendant and specific acts of intercourse with third parties that may explain the victim's physical condition.<sup>51</sup> This statute protects the interests of the victim at the expense of those of the accused, by prohibiting the introduction of most evidence that may embarrass the victim.

At the opposite end of the spectrum are those statutes that permit the introduction of almost all sexual history evidence.<sup>52</sup> For example, statutes such as those of Texas<sup>53</sup> and New Mexico<sup>54</sup> admit any sexual history evidence if its prejudicial nature does not outweigh its probative value.<sup>55</sup> New York's statute<sup>56</sup> also is permissive in its ad-

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46. See *infra* notes 60-68 and accompanying text.

47. See *infra* notes 69-72 and accompanying text.

48. See *infra* notes 73-80 and accompanying text.

49. See *infra* notes 110-29 and accompanying text.

50. MICH. COMP. LAWS ANN. § 750.520 (West Supp. 1983-84).

51. *Id.* See also IND. CODE ANN. § 35-37-4-4 (Burns Supp. 1983); OHIO REV. CODE ANN. §§ 2902.02(D)-.02(F) (Page Supp. 1983). This evidence is admissible only if it is material to a fact at issue, and if its prejudicial nature does not outweigh its probative value.

The federal rape shield statute, FED. R. EVID. 412, also is highly restrictive. This statute prohibits absolutely reputation and opinion evidence. FED. R. EVID. 412(a). The statute only admits specific instances of sexual conduct if they are with third persons and are relevant to the physical conditions of the victim, *id.* 412(b)(2)(A), or are with the defendant and are relevant to the issue of consent. *Id.* 412(b)(2)(B).

52. See *infra* notes 86-105 and accompanying text.

53. TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1983-84). See *infra* notes 86-93 and accompanying text.

54. N.M. STAT. ANN. § 30-9-16 (1983).

55. See also ALASKA STAT. § 12.45.045 (Supp. 1982) (admissible evidence must be relevant and its probative value "not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness"); COLO. REV. STAT. § 18-3-407(e) (Supp. 1983) (evidence must be "relevant to a material issue in the case"); WASH. REV. CODE ANN. § 9.79.150 (1983) (evidence must be "relevant to the issue of the victim's consent; . . . not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; . . . and . . . its exclusion would result in denial of substantial justice to the defendant").

56. N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84).

mission of such evidence. The statute contains a general rule of exclusion with specific exceptions, but has a catch-all provision that allows the admission of evidence "determined by the court . . . to be relevant and admissible in the interests of justice."<sup>57</sup> These statutes favor the defendant by their liberal admission of a victim's sexual history, at the expense of her privacy.

Between these two extremes are statutes such as the New Jersey statute<sup>58</sup> that attempt to balance the interests of the victim with those of the defendant. The New Jersey statute generally excludes sexual history evidence, but allows for the admission of certain evidence if its prejudicial nature does not outweigh its probative value. If the sexual conduct occurred more than one year prior to the alleged rape, however, it is inadmissible.<sup>59</sup>

Some statutes distinguish the admission of sexual history evidence for substantive uses<sup>60</sup> from its admission solely to impeach the complainant's credibility.<sup>61</sup> The California Evidence Code<sup>62</sup> prohibits the introduction of such evidence to prove consent,<sup>63</sup> but permits the use of prior sexual conduct to attack the victim's credibility.<sup>64</sup> Statutes like those of Michigan<sup>65</sup> and Texas<sup>66</sup> arguably prohibit absolutely the use of sexual history evidence to impeach the victim. These statutes bar all evidence of the complainant's sexual conduct that is

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57. *Id.* See *infra* notes 94-103 and accompanying text.

58. N.J. STAT. ANN. §§ 2A:84A-32.1 to -32.2 (West Supp. 1983-84). See *infra* notes 104-09 and accompanying text.

59. N.J. STAT. ANN. § 2A:84A-32.2 (West Supp. 1983-84).

60. Substantive uses for sexual history evidence include admitting it to prove consent of source of semen, disease, or pregnancy. See N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84).

61. The credibility of a witness is always at issue from the moment he takes the witness stand. C. MCCORMICK, *supra* note 19, §§ 33-48.

62. CAL. EVID. CODE §§ 782, 1103 (Deering Supp. 1984).

63. The California Evidence Code, however, provides two instances in which sexual history evidence is admissible to show consent: proof of the complaining witness' sexual conduct with the defendant, CAL. EVID. CODE § 1103(b)(2) (Deering Supp. 1984), and rebuttal evidence respecting the complainant's sexual conduct. *Id.* § 1103(b)(3).

64. CAL. EVID. CODE § 782 (Deering Supp. 1984). The Code permits sexual conduct evidence to impeach credibility only if the trial judge first conducts a hearing as to its admissibility. See also ALASKA STAT. ANN. § 12.45.045 (Supp. 1982); DEL. CODE ANN. tit. 11, § 3509 (1982); N.D. CENT. CODE § 12.1-20-15 (1983).

65. MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1983-84).

66. TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1983-84).

not "material to a fact at issue."<sup>67</sup> Because credibility is not technically a "fact at issue," the statutes could be construed to bar any sexual history evidence offered to attack a complainant's credibility.<sup>68</sup>

Some statutes distinguish types of admissible sexual history evidence.<sup>69</sup> The different types of sexual history evidence are reputation, opinion, and specific acts.<sup>70</sup> Some statutes bar only certain types of sexual history evidence, such as specific acts, but do not exclude evidence of reputation.<sup>71</sup> The majority of statutes, however, include all types of this evidence within the general prohibition.<sup>72</sup>

Some statutes can be grouped according to the exceptions they make to the general exclusion of sexual history evidence. As noted above, most statutes admit evidence of a complainant's sexual relations with the defendant.<sup>73</sup> Some statutes allow sexual history evidence to rebut the state's showing of the victim's prior chastity.<sup>74</sup> Other statutes permit the introduction of sexual history evidence to prove the source of semen, pregnancy, or disease.<sup>75</sup> In an attempt to exclude stale evidence,<sup>76</sup> several jurisdictions impose limits on how old sexual history evidence can be.<sup>77</sup> Some states allow sexual history evidence if it shows that the prosecutrix is biased or has a motive to fabricate rape charges.<sup>78</sup> To prove consent, a few statutes allow evidence of the victim's prior consensual relations with third parties,

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67. *Id.* § 21.13(a). MICH. COMP. LAWS ANN. § 750.520j(1) (West Supp. 1983-84).

68. Other statutes that absolutely prohibit the use of sexual history evidence for impeachment purposes include: IND. CODE ANN. § 35-37-4-4(b) (Burns Supp. 1983); OHIO REV. CODE ANN. §§ 2907.02(D)-02(F) (Page Supp. 1983); OR. REV. STAT. § 163.475 (1983).

69. *See* Burger, *supra* note 23, at 36-37.

70. *See* TEX. PENAL CODE ANN. tit. 5, § 21.13(a) (Vernon Supp. 1983-84); Berger, *supra* note 23, at 36.

71. *See, e.g.*, FLA. STAT. ANN. § 794.022 (West Supp. 1983); S.D. COMP. LAWS ANN. § 23-44-16.2 (Supp. 1983).

72. *See* Berger, *supra* note 23, at 36.

73. *See supra* note 43 and accompanying text.

74. *See, e.g.*, N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1983-84).

75. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520j(1)(b) (West Supp. 1983-84); MINN. STAT. ANN. § 609.347 (West Supp. 1984).

76. *See, e.g.*, N.J. STAT. ANN. § 2A:84A-32.2 (West Supp. 1983-84). The time limit imposed by rape shield statutes is usually one year.

77. *See, e.g.*, ALASKA STAT. § 12.45.045 (Supp. 1982); IOWA CODE ANN. § 813.2 R 20(5) (West 1983-84).

78. *See, e.g.*, MD. ANN. CODE art. 27, § 461A (Supp. 1983).

if they are substantially similar to the alleged conduct with the defendant.<sup>79</sup> Some statutes admit evidence that proves that the defendant reasonably believed the complainant consented.<sup>80</sup>

The above survey of rape shield statutes demonstrates a wide variation in what sexual history evidence different jurisdictions consider sufficiently probative to outweigh countervailing prejudicial dangers. The legislatures' preference for protecting either the interests of the victim or those of the defendant, or for creating a balance between the two,<sup>81</sup> determines how the statutes define relevant, admissible evidence.

#### V. THE LEGAL RELEVANCE DOCTRINE AND RAPE SHIELD STATUTES

Although sexual history evidence is logically relevant<sup>82</sup> to the issues of consent and credibility, logical relevance alone does not ensure the admissibility of this evidence. The evidence also must be

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79. See FLA. STAT. ANN. § 794.022 (West 1976 & Supp. 1983) (when consent is at issue, evidence is admissible if "it tends to establish a pattern of conduct or behavior" by victim); MINN. STAT. ANN. § 609.347 (West Supp. 1984) (when defense is consent or fabrication of charges, evidence is allowed if it tends to establish a scheme or plan of similar conduct by prosecutrix).

80. See GA. CODE ANN. § 38-202.1 (Supp. 1982).

81. See *supra* notes 38-39 and accompanying text.

82. C. McCORMICK, *supra* note 19, § 184. Logical relevance, or probative worth, is the basic prerequisite for the admissibility of evidence. *Id.* § 184. To be relevant, evidence must render a desired inference more probable than it would be without the evidence. *Id.* § 185. Relevant evidence is *prima facie* admissible. *Id.* § 185.

Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

The Advisory Committee's note following the rule states that relevancy "is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." FED. R. EVID. 401 advisory committee note.

At a rape trial, the judge first must inquire as to whether the complainant's past sexual conduct is relevant to any material issue. Usually, this inquiry entails deciding whether the proffered evidence is probative of the victim's propensity to have consensual relations. The inquiry also entails deciding whether the evidence is relevant to the prosecutrix's credibility, which becomes an issue when she takes the witness stand. C. McCORMICK, *supra* note 19, §§ 41-48. See *supra* note 61 and accompanying text. See Note, *supra* note 37, at 414.

Those who claim that sexual history evidence is not logically relevant to the issue of consent argue that women are free to control their own bodies and to consent or not consent to sexual relations as they please. Each decision to consent to sexual inter-

legally relevant.<sup>83</sup> The legal relevance doctrine states that the trial judge retains the discretion to exclude logically relevant evidence if, in his or her judgment, the probative dangers of the evidence—such as undue prejudice—outweigh its probative value.<sup>84</sup> Section A below examines five rape shield statutes<sup>85</sup> representative of the different standards of admissibility and analyzes each jurisdiction's application of the legal relevance doctrine. Section B discusses the problems associated with these statutes.

### A. *Five Rape Shield Statutes and Judicial Interpretations*

The Texas rape shield statute<sup>86</sup> contains a lenient two-part stan-

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course is discrete and unaffected by the past behavior of the woman. Note, *supra* note 37, at 414.

Proponents of the idea that prior sexual conduct is logically relevant to show consent point out that it is the societal norm today for women to be non-virgins. See M. HUNT, *SEXUAL BEHAVIOR IN THE 1970s* 149 (1974). The theory is that a virgin is less likely to consent to intercourse than a non-virgin. People that engage in a certain type of behavior are more likely to engage in this behavior at any randomly selected moment than are people that have never before engaged in such conduct. Note, *supra* note 37, at 415.

83. C. McCORMICK, *supra* note 19, § 185. See also E. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 95 (1980).

84. C. McCORMICK, *supra* note 19, § 185. See also E. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 95 (1980).

Four generally recognized probative dangers may convince a judge to exclude logically relevant evidence. The first is "prejudice," the evidence's tendency to tempt the jury to decide the case on an improper, emotional basis. A second probative danger is the tendency of the evidence to distract jurors from the main issues in the case. The third danger is undue time consumption, and the fourth is unfair surprise to the opposing party. E. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 95-96 (1980).

Federal Rule of Evidence 403 lists the countervailing probative dangers as "unfair prejudice, confusion of the issues, or misleading the jury, . . . undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. The rule does not list unfair surprise as a ground for exclusion of evidence. The Advisory Committee's note explains that notice, discovery, and continuances are more appropriate remedies for surprise than exclusion. FED. R. EVID. 403 advisory committee note.

See generally Larsen & Brown, *Foreward and Commentary, Point, Counterpoint*, 24 N.H.B.J. 77 (July 1983) (arguments for and against the legal relevance of prior sexual history evidence in a rape trial).

85. ILL. ANN. STAT. ch. 38, §§ 115-17 (Smith-Hurd Supp. 1983); MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1983-84); N.J. STAT. ANN. §§ 2A:84A-32.1 to -32.3 (West Supp. 1983-84); N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84); TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1983-84).

86. TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1983-84). The statute reads, in relevant part:

dard of admissibility.<sup>87</sup> The statute allows evidence of specific acts, opinion, and reputation, if the judge finds that the evidence is material to a fact at issue and that its prejudicial nature does not outweigh its probative value.<sup>88</sup> Both the state and the defendant have the right to impeach a witness' credibility by showing prior felony convictions, including those involving promiscuous sexual conduct. Furthermore, at counsel's request, the court must give the jury a limiting instruction regarding the purposes for which the jury may consider the evidence.<sup>89</sup>

The Texas courts have addressed this statute only three times since its enactment in 1975.<sup>90</sup> In *Wilson v. State*,<sup>91</sup> the Texas Criminal Court of Appeals excluded evidence of a victim's prior sexual conduct and articulated the admissibility standard that the proffered evidence must be "germane" to the issue of consent.<sup>92</sup> This vague standard provides little guidance in determining when prior sexual

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#### § 21.13 Evidence of Previous Sexual Conduct

(a) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may be admitted under Sections 21.02 through 21.05 of this code (rape, aggravated rape, sexual abuse, and aggravated sexual abuse) only if, and only to the extent that, the judge finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. . . .

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

87. See *supra* note 53 and accompanying text.

88. TEX. PENAL CODE ANN. tit. 5, § 21.13(a) (Vernon Supp. 1983-84). See *supra* note 86.

89. TEX. PENAL CODE ANN. tit. 5, § 21.13(d) (Vernon Supp. 1983-84). See *supra* note 86.

90. See *Johnson v. State*, 633 S.W.2d 890 (Tex. 1982); *Wilson v. State*, 548 S.W.2d 51 (Tex. 1977); *Young v. State*, 547 S.W.2d 23 (Tex. 1977). The court in *Johnson v. State*, 633 S.W.2d 890 (Tex. 1982), stated that absent the issue of consent, evidence of unchastity is inadmissible. *Id.* at 891. *Young v. State*, 547 S.W.2d 23 (Tex. 1977), also stands for the principle that evidence of a victim's sexual conduct is properly excluded. *Id.* at 25.

91. 548 S.W.2d 51 (Tex. 1977).

92. *Id.* at 52. In *Wilson*, the defendant wanted to introduce evidence that the victim had had an abortion two or three years prior to the alleged rape, that she had been treated for venereal disease, and that she was taking oral contraceptives on the

conduct is admissible.<sup>93</sup>

The New York rape shield statute<sup>94</sup> also sets a lenient standard for admitting sexual history evidence. The statute contains a general prohibition of sexual history evidence,<sup>95</sup> but enumerates four circumstances when it is admissible.<sup>96</sup> In addition, the statute has a catch-all provision, which admits evidence that the judge determines to be

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date of the rape. The trial court excluded the evidence, and the Texas Court of Criminal Appeals affirmed, holding that it was not germane to the issue of consent. *Id.*

93. The New Mexico statute also precludes sexual conduct evidence unless it is "material to the case" and "its inflammatory or prejudicial nature does not outweigh its probative value." N.M. STAT. ANN. § 30-9-16 (1983). The New Mexico courts have articulated more meaningful guidelines than the *Wilson* "germane" test for interpreting this language.

In *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978), the Court of Appeals of New Mexico stated that the New Mexico rape shield statute incorporates a three-part standard of admissibility. First, the defendant must make a preliminary showing of relevancy of the sexual history evidence. Second, the evidence must be "material to the case." Third, even if the evidence is material, its inflammatory or prejudicial nature cannot outweigh its probative value. *Id.* at 15-16, 582 P.2d at 393 (1978). This three-part test presents clearer guidelines for determining admissibility than the Texas court's amorphous "germane" test. See also *State v. Romero*, 94 N.M. 22, 25-26, 606 P.2d 1116, 1119-20 (Ct. App. 1980).

94. N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84). The statute states:

§ 60.42. Rules of evidence; admissibility of evidence of victim's sexual conduct in sex offense cases. Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law 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 an offense under section 230.00 of the penal law within three years prior to the sex offense which is the subject of the prosecution; or
3. rebuts evidence introduced by the people 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 evidence introduced by the people which proves or tends to prove that the accused is the cause of 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, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

*Id.*

95. *Id.* § 60.42. See *supra* note 94.

96. *Id.* §§ 60.42(1)-(4) (McKinney Supp. 1983-84). See *supra* note 94.

“relevant and admissible in the interests of justice.”<sup>97</sup>

In the leading case of *People v. Conyers*,<sup>98</sup> a New York court held that trial courts can decide the extent to which an attorney can cross-examine a witness about her prior prostitution convictions to attack the witness' credibility.<sup>99</sup> The court based its interpretation on the statute's catch-all provision.<sup>100</sup> Without having raised consent as a defense, the defendant in *Conyers* wanted to introduce evidence of the complainant's prior conviction for prostitution.<sup>101</sup> Because this evidence was applicable only to the issue of credibility, the New York Supreme Court held that the trial judge did not abuse his discretion by excluding the evidence.<sup>102</sup> The court concluded that the New York statute instructs the courts, via the catch-all provision, to restrict unfair and irrelevant cross-examination of victims of sexual crimes.<sup>103</sup>

The New Jersey statute<sup>104</sup> gives the trial judge discretion to admit

97. *Id.* § 60.42(5) (McKinney Supp. 1983-84). See *supra* note 94.

98. 86 Misc. 2d 754, 382 N.Y.S.2d 437 (N.Y. Sup. Ct. 1976).

99. *Id.* at 761, 382 N.Y.S.2d at 443.

100. *Id.*

101. *Id.* at 762, 382 N.Y.S.2d at 443.

102. *Id.* See also *State v. Iaukea*, 616 P.2d 219, 221 (Hawaii 1980) (interpreting similarly lenient statutes); *Commonwealth v. Edgerly*, 13 Mass. App. 562, 568, 435 N.E.2d 641, 645 (1982).

103. 86 Misc. 2d at 764, 382 N.Y.S.2d at 445. See also *People v. Souvenir*, 83 Misc. 2d 1038, 373 N.Y.S.2d 824 (N.Y. Crim. Ct. 1975) (N.Y. statute only disallows evidence of victim's sexual relations with third parties).

104. N.J. STAT. ANN. §§ 2A:84A-32.1 to -32.2 (West Supp. 1983-84). The statute reads:

2A:84A-32.1 Prosecutions involving rape; evidence of complaining witness' previous sexual conduct

In prosecutions for the crime of rape, assault with intent to commit rape, and breaking and entering with intent to commit rape, evidence of the complaining witness' previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in this act. When the defendant seeks to admit the evidence for any purpose, he may apply for an order of the court at any time before or during the trial or preliminary hearing. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the complaint witness is relevant, and that the probative value of the evidence offered is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness, the court shall make an order stating what evidence may be introduced and the nature of the questions which shall be permitted. The defendant may then offer evidence under the order of the court.



sexual history evidence only after an in camera hearing. Evidence of the complainant's sexual conduct is presumed inadmissible if the conduct occurred more than one year before the date of the charged offense.<sup>105</sup> In the hearing, the trial judge must balance the probative value of the proffered evidence against the possibility of undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness.<sup>106</sup>

Little case law exists interpreting the New Jersey statute. In *State v. Ryan*,<sup>107</sup> the Superior Court of New Jersey excluded evidence of specific acts with third parties to prove consent or to impeach credibility.<sup>108</sup> This exclusion of specific acts evidence and the statute's one-year time limit<sup>109</sup> are the only explicit restrictions on admissibility. Thus, New Jersey trial judges have broad discretion to admit sexual history evidence.

The Illinois Legislature enacted a more restrictive statute.<sup>110</sup> This statute prohibits the introduction of reputation and specific acts evidence, except if the evidence concerns victim's previous sexual con-

2A:84A-32.2 Conduct one year or more prior to date of offense; presumption of inadmissibility

In the absence of clear and convincing proof to the contrary, evidence of the complaining witness' sexual conduct occurring more than 1 year before the date of the offense charged is presumed to be inadmissible under this act. L.1976, c. 71, § 2, eff. Aug. 26, 1976.

105. *Id.* § 2A:84A-32.3 (West Supp. 1983-84).

106. *See supra* note 104.

107. 157 N.J. Super. 121, 384 A.2d 570 (N.J. Super. Ct. App. Div. 1978).

108. *Id.* at 124, 384 A.2d at 573. *See also* *State v. Holmes*, 157 N.J. Super. 37, 38, 384 A.2d 528, 529 (N.J. Super. Ct. App. Div. 1978) (trial court properly refused defense attorney's request to question victim as to her particular sexual acts).

109. *See supra* note 104 and accompanying text.

110. ILL. ANN. STAT. ch. 38, § 115-17 (Smith-Hurd Supp. 1983). The statute reads:

§ 115-17. Prior sexual activity or reputation as evidence.

a. In prosecutions for rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.

b. No evidence admissible under this Section shall be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. Unless the court finds that such evidence is available, counsel for the defendant shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim and the defendant.

duct with the defendant.<sup>111</sup> At the trial judge's discretion, sexual history evidence is admissible to impeach the victim's credibility.<sup>112</sup> In determining admissibility for substantive purposes, such as showing consent, however, the statute does not allow for judicial discretion: only evidence of the complainant's prior sexual relations with the accused is admissible.<sup>113</sup>

Illinois courts have determined that the rape shield statute properly admits relevant evidence and excludes that which is irrelevant and prohibitively dangerous.<sup>114</sup> In *People v. Cornes*,<sup>115</sup> the Illinois Court of Appeals articulated the rationale behind the statute, stating that a rape victim's past sexual conduct has no bearing on whether she consented to sexual relations with the defendant.<sup>116</sup> The court excluded the defendant's proffered evidence of the victim's reputation for unchastity and immorality.<sup>117</sup> Citing legislative intent, the court explained that excluding evidence of reputation and specific acts ensures that the defendant cannot harass the victim nor divert the jury's attention to collateral issues, but does not deprive him of his right to introduce relevant evidence.<sup>118</sup>

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111. *Id.* § 115-7(a). *See supra* note 110.

112. ILL. STAT. ANN. ch. 38, § 115-7(b) (Smith-Hurd Supp. 1983). *See supra* note 110.

113. *See supra* note 110. The statute makes no distinction between reputation, opinion, or specific acts evidence. The trial judge may not prefer one type of sexual history evidence over another.

114. *People v. Requena*, 105 Ill. App. 3d 831, 435 N.E.2d 125 (1982) (rape shield statute does not preclude cross-examination of victim or prevent defendant from attacking credibility); *People v. Mangiaracina*, 98 Ill. App. 3d 606, 424 N.E.2d 860 (1981) (statute permits introduction of sexual history between victim and defendant to show consent); *People v. Siefke*, 97 Ill. App. 3d 14, 421 N.E.2d 1071 (1981) (Illinois rape shield statute constitutionally excludes sexual history evidence); *People v. Backman*, 92 Ill. App. 3d 419, 414 N.E.2d 1369 (1981) (Illinois statute that precludes defendant from questioning victim about prior sexual activity with third parties is constitutional); *People v. Cornes*, 80 Ill. App. 3d 166, 399 N.E.2d 1346 (1980) (exclusion of victim's reputation for unchastity is proper); *People v. Dorff*, 77 Ill. App. 3d 882, 396 N.E.2d 827 (1979) (sexual history to impeach credibility where consent is at issue is precluded under statute).

115. 80 Ill. App. 3d 166, 399 N.E.2d 1346 (1980).

116. *Id.* at 175, 399 N.E.2d at 1357.

117. *Id.*

118. *Id.* *See generally* Murphy, *Rape Shield Statute Upheld by Illinois Appellate Court*, 69 ILL. B.J. 110 (Oct. 1980) (discussion of *Cornes*).

The Michigan statute<sup>119</sup> contains one of the most stringent standards for admitting sexual history evidence. The act prohibits evidence of specific acts, opinion, and reputation. Evidence of sexual conduct with the accused, or specific sexual acts that show the source of semen, pregnancy, or disease is admissible only to the extent that its probative value outweighs its prejudicial nature.<sup>120</sup>

Michigan courts interpret this rape shield statute as severely restricting the admissibility of sexual history evidence. In *People v. Thompson*,<sup>121</sup> the Michigan Court of Appeals held that a victim's sexual behavior with third parties is not relevant either to the issue of consent<sup>122</sup> or to the victim's credibility.<sup>123</sup> The test for admissibility stated in *People v. Khan*<sup>124</sup> is that proof of prior sexual conduct with third persons must pertain narrowly to acts evincing a pattern of voluntary encounters characterized by distinctive facts similar to the current charges. A court must balance the interests of the defendant and the state and determine whether the defendant has made a preliminary showing of a logical nexus between the complainant's past sexual conduct and the issue of consent in the present case.<sup>125</sup> Most recently, in *People v. Paquette*,<sup>126</sup> the court of appeals discussed the relevancy of voluntary sexual acts with third parties to the consent issue<sup>127</sup> and reaffirmed the *Khan* test for admissibility.<sup>128</sup> These judi-

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119. MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1983-84). The statute reads in relevant part:

§ 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under section 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence 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 actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

120. *Id.* § 750.520j(1)(b). The Michigan statute, enacted in 1974, was the first rape shield statute adopted, and the model for other restrictive statutes.

121. 76 Mich. App. 705, 257 N.W.2d 268 (1977).

122. *Id.* at 711, 257 N.W.2d at 272.

123. *Id.* at 713, 257 N.W.2d at 272.

124. 80 Mich. App. 605, 264 N.W.2d 360 (1978).

125. *Id.* at 620, 264 N.W.2d at 368.

126. 114 Mich. App. 773, 319 N.W.2d 390 (1982).

127. *Id.* at 777, 319 N.W.2d at 392.

128. *See supra* note 125 and accompanying text.

cial interpretations<sup>129</sup> make the Michigan statute beneficial for rape victims, because they articulate a highly restrictive standard of admissibility.

### B. *Problems with Rape Shield Statutes*

State legislatures enacted rape shield statutes to balance the rights of the victim and the accused.<sup>130</sup> The statutes examined above fail to achieve this desired balance. The statutory language and the judicial interpretations use the legal relevance doctrine<sup>131</sup> in a rape case to protect the interests of one party at the expense of those of the other.

The Texas statute's<sup>132</sup> liberal admissibility standard renders it overinclusive. The statute admits sexual history evidence if it is material to a fact at issue, and probative without being overly prejudicial.<sup>133</sup> Thus, the statute confers too much discretionary power on trial judges. The "germane" admissibility standard stated in *Wilson*<sup>134</sup> is an inadequate safeguard against potential abuses of this judicial discretion. The Texas statute presents the danger of admitting prejudicial sexual history evidence at the expense of the victim's privacy.

The scheme of the New York statute<sup>135</sup> partially achieves a balance between the interests of the complainant and those of the defendant. The statute's exceptions to the general prohibition<sup>136</sup> admit

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129. Missouri and North Carolina have restrictive rape shield statutes similar to the Michigan statute. See MO. ANN. STAT. § 495.015 (Vernon Supp. 1983); N.C. GEN. STAT. § 8-58.6 (Supp. 1983). The following cases interpret the Missouri statute: *State v. Gibson*, 636 S.W.2d 956 (Mo. 1982) (en banc) (allows sexual history only where probative of consent); *State v. Brown*, 636 S.W.2d 929 (Mo. 1982) (en banc) (victim's sexual history is presumptively irrelevant under statute); *State v. Thurber*, 625 S.W.2d 931 (Mo. App. 1981) (facially irrelevant sexual history is properly excluded). The following cases interpret the North Carolina statute: *State v. Baron*, 292 S.E.2d 741 (N.C. App. 1982) (prior actual sexual conduct of victim is inadmissible, not prior accusations); *State v. Clontz*, 286 S.E.2d 793 (N.C. App. 1982) (N.C. statute is intended to protect privacy of rape victim).

130. See *supra* notes 33-41 and accompanying text.

131. See *supra* notes 83-84 and accompanying text. TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1983-84).

132. See *supra* notes 86-89 and accompanying text.

133. See *supra* note 86 and accompanying text.

134. See *supra* notes 91-93 and accompanying text.

135. N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84). See *supra* notes 94-97 and accompanying text.

136. See *supra* note 96 and accompanying text.

relevant evidence for the defense and are not unduly prejudicial to the victim. The statute's catch-all provision,<sup>137</sup> however, presents a potential problem. Although *Conyers* interpreted the provision as a mandate to restrict unfair and irrelevant cross-examination of rape victims,<sup>138</sup> no concrete standard exists for determining what evidence is unfair and irrelevant. Therefore, the catch-all provision presents the opportunity for abuse of judicial discretion and the admission of unduly prejudicial evidence.

The New Jersey statute<sup>139</sup> gives a trial judge discretion to admit sexual history evidence if the probative value of the evidence outweighs the prejudicial dangers. This broad standard<sup>140</sup> again creates the potential for abuse of discretion. The one-year time limit on sexual history evidence also presents problems. The legislature intended to exclude stale evidence and thus ensure the relevancy of all admitted evidence.<sup>141</sup> This provision, however, could exclude potentially relevant evidence, such as the victim's distinctive pattern of sexual behavior, a motive for fabricating charges, or testimony impeaching the victim's credibility. Although the statute attempts to protect both the victim and the accused, it also contains problems that could impair the interests of both parties.

In its effort to protect the victim from harassment, the Illinois statute<sup>142</sup> denies the defendant his right to present all relevant non-prejudicial evidence. General reputation evidence is irrelevant to the issues of consent and credibility, so its exclusion is proper. But the statute's blanket exclusion of specific acts evidence, could prevent the introduction of relevant, non-prejudicial evidence, such as the victim's pattern of sexual conduct, or the victim's bias or motive for falsifying charges. The *Cornes*<sup>143</sup> court erroneously applied the legal relevance doctrine in interpreting the Illinois statute. The court held that prohibiting evidence of both reputation and specific acts does not

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137. See *supra* note 97 and accompanying text.

138. See *supra* notes 98-103 and accompanying text.

139. N.J. STAT. ANN. §§ 2A:84A-32.1 to -32.2 (West Supp. 1983-84). See *supra* notes 104-06 and accompanying text.

140. See *supra* notes 107-09 and accompanying text.

141. See *supra* notes 104-06 and accompanying text.

142. ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1983). See *supra* notes 110-13 and accompanying text.

143. 80 Ill. App. 3d 166, 399 N.E.2d 1346 (1980). See *supra* notes 115-18 and accompanying text.

deprive a defendant of the right to introduce relevant evidence.<sup>144</sup> This interpretation of the statute over-emphasized the prejudicial nature of specific sexual acts evidence and did not consider its possible relevance.

The Michigan statute<sup>145</sup> is too inflexible and excludes evidence that could be relevant to the defendant's case. The courts' strict interpretations of the statute<sup>146</sup> also favors the victim. In particular, the *Khan* test, which requires that admissible sexual history evidence involve distinctive facts similar to the present case,<sup>147</sup> is likely to result in the exclusion of probative, relevant evidence. A trial court has no discretion to weigh the evidence and admit potentially probative evidence. The statute also does not admit sexual history evidence to impeach credibility, a prohibition that again may unfairly prejudice the defendant's case.<sup>148</sup>

## VI. CONCLUSION

State legislatures have applied the legal relevance doctrine differently in drafting their respective rape shield statutes. The numerous applications of the doctrine illustrate the difficulty of devising a completely equitable rule for admitting sexual history evidence. The statutes that articulate a lenient standard of admissibility pose the risk of admitting irrelevant or unduly prejudicial evidence, which may impair the victim's interests.<sup>149</sup> Statutes that contain a strict standard of admissibility prohibit evidence that could be relevant, and in fact, critical to the defendant's case.<sup>150</sup> Statutes that attempt to protect the interests of both victim and accused are admirable, but often include provisions that are detrimental to one of the parties.<sup>151</sup>

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144. See *supra* notes 83-84 and accompanying text.

145. MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1983-84). See *supra* notes 119-20 and accompanying text.

146. See *supra* notes 121-29 and accompanying text.

147. See *supra* notes 124-25 and accompanying text.

148. See *supra* notes 119-20 and accompanying text.

149. See, e.g., TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1983-84). See *supra* notes 86-93 and accompanying text.

150. See, e.g., ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1983); MICH. COMP. LAWS ANN. § 750.520j (West 1983-84). See *supra* notes 110-29 and accompanying text.

151. See, e.g., N.J. STAT. ANN. §§ 2A:84A-32.1 to -32.2 (West Supp. 1983-84); N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84). See *supra* notes 94-109 and accompanying text.

A synthesis of elements from these statutes provides a more equitable standard of admissibility. To avoid undue prejudice to the victim, a rape shield statute generally should prohibit evidence of reputation, opinion, and specific instances of prior sexual conduct with third parties.<sup>152</sup> To ensure that evidence relevant to the defense is allowed, the statute should list exceptions under which a trial judge may admit evidence if the judge finds the evidence relevant to a material fact, and that its probative value is not outweighed by its prejudicial nature.<sup>153</sup> Evidence that is legally relevant should be admissible for both substantive and impeachment purposes. This evidence is crucial to the defendant's right to present relevant evidence and to rebut the state's evidence.

Some of the statutes discussed above contain exceptions to the prohibition of use of sexual history evidence, which if combined into one statute, would fully protect the defendant's interest. These exceptions to the general prohibition of sexual history evidence are: 1) Victim's sexual conduct with the accused;<sup>154</sup> 2) specific acts of sexual conduct that tend to prove the source of disease, pregnancy, or semen (if such acts occurred within a specific time period);<sup>155</sup> 3) sexual conduct that tends to prove a victim's bias or motive to fabricate rape charges;<sup>156</sup> 4) a pattern of sexual conduct so distinctive and so closely resembling the defendant's version of the incident at bar as would tend to prove the victim's consent, or that she behaved in such a manner that the defendant believed she consented;<sup>157</sup> and 5) credibility evidence that may rebut the complainant's proof concerning her prior chastity or that the defendant caused her physical condition.<sup>158</sup>

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152. See, e.g., ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1983); MICH. COMP. LAWS ANN. § 750.520j (West 1983-84); N.J. STAT. ANN. § 2A:84A-32.1 to 32.2 (West Supp. 1983-84); N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84). See *supra* notes 94-129 and accompanying text.

153. See, e.g., MICH. COMP. LAWS ANN. § 750.520j (West 1983-84); N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84). See *supra* notes 94-96, 119-20 and accompanying text.

154. See, e.g., ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1983); MICH. COMP. LAWS ANN. § 750.520j (West 1983-84); N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84). See *supra* notes 94, 110, 119 and accompanying text.

155. See, e.g., MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1982-84); N.Y. CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84). See *supra* notes 94, 119 and accompanying text.

156. See *supra* note 78 and accompanying text.

157. See *supra* note 79 and accompanying text.

158. See, e.g., ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1983); N.Y.

These proposed guidelines attempt to eliminate the problems criticized in the above statutes. The general prohibition and explicit exceptions should accommodate adequately the interests of the state, the defendant, and the victim.

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CRIM. PROC. LAW § 60.42 (McKinney Supp. 1983-84); TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Supp. 1983-84). See *supra* notes 86, 94, 110 and accompanying text.

Berger, *supra* note 23, at 97-100, proposes a similar model rape shield statute. In addition to the above exceptions, Berger would also allow sexual history evidence to show: 1) Evidence of prior sexual conduct, known to the defendant at the time of act charged, tending to prove that he believed the complainant was consenting to this act; and 2) evidence of sexual conduct offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act charged. *Id.* at 98-99.

Berger's proposed statute includes a second section entitled "Procedure for Determining Admissibility." *Id.* at 99. This section proposes that the defendant be required to make a written motion seeking permission to use such evidence, together with an offer of proof of its relevance. A judge would rule on the motion in an out-of-court hearing and the accused would be permitted to question witnesses, including the prosecutor. *Id.*

Because this Note does not deal with procedural differences between state rape shield statutes, the Note's proposed statute does not include a procedural section.