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Comments

ADMISSIBILITY OF CHARACTER EVIDENCE IN RAPE PROSECUTIONS IN MISSOURI

I. Introduction

The admissibility of character evidence in rape prosecutions is a topic of no small controversy. Prosecuting attorneys urge reform, alleging that present rules of evidence force victims to endure such humiliation and embarrassment that many women refuse even to report the crime.[1] Furthermore, they claim the evidence presented to juries to attack the victim's character is so prejudicial that guilty defendants are often set free.[2] However, defense attorneys argue that because of the nature of the crime, the fact that it is rarely witnessed, and the natural prejudice against one accused of such an offense, the only effective defense available is a probing inquiry into the credibility of the accuser.

Authors of several recent law review articles have presented both the prosecution's[3] and defense attorneys'[4] points of view. Legislation proposing reform has been introduced in several state legislatures, including Missouri.[5] The general public has been made increasingly aware of the topic by a number of books exploring the sociological and psychological causes and ramifications of rape.[6] Moreover, the entertainment media has dramatized, indeed in some instances exaggerated and distorted, the situation. In spite of, or perhaps because of, this burgeoning body of information, there exists a great deal of confusion and misinformation both about what the law is and what it should be.

This comment will attempt to present an unbiased summary of the present law in Missouri regarding the admissibility of character evidence in rape prosecutions. Missouri statutes divide the crime of rape into three separate offenses depending on the age and previous character of the woman. Because the rules of admissibility vary, each offense will be discussed individually. Different rules also govern the admissibility of evidence of general character as opposed to evidence of specific acts of immorality and the comment is subdivided accordingly.

II. Statutory Rape: Intercourse With A Female Under Age Sixteen

A. *Elements of the Crime*

Missouri law defines rape as either forcibly having intercourse with a female 16 years of age or older, or having intercourse with a female under that age regardless of her consent.[7] The latter act is commonly referred to as "statutory rape." The purpose of this part of the statute is clearly to protect a girl under the age of 16 from her own immaturity and weakness.[8] The protection is absolute. All that need be shown for a conviction is that the defendant had sexual intercourse with a female who was in fact under age 16 at the time.[9] It makes no difference how old the defendant thought the girl was or what basis he had for that belief.[10] It is immaterial whether force was used[11] or whether the girl consented.[12]

1. "[L]aw enforcement administrators recognize that this offense (Rape) is probably one of the most underreported crimes due primarily to fear and/or embarrassment on the part of the victims." Federal Bureau of Investigation, Uniform Crime Reports 22 (1975).

2. Out of every 100 reported rapes, approximately 51 men are arrested, 31 are prosecuted, 15 are acquitted, 11 are found guilty of the offense charged, and 5 are convicted of lesser offenses. *Id.*

3. Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 Calif. L. Rev. 919 (1973); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 Am. Crim. L. Rev. 335 (1973).

4. Comment, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 Am. Crim. L. Rev. 309 (1973).

5. Two bills were introduced in the 1976 session of the Missouri legislature, neither of which passed. They were typical of the types of reform being proposed nationally.

House Bill 1327 provided that in prosecutions for rape or attempted rape, opinion evidence, reputation evidence, and evidence of specific instances of sexual conduct of the complaining witness would not be admissible except in special instances. If a defendant wishes to offer such evidence under the permitted exceptions, he would have to make an offer of proof and the judge would have to hold an *in camera* hearing to determine what evidence may go to the jury.

Senate Bill 644 provided that in the prosecution of sexual offenses, the defendant may not offer evidence of the prior sexual conduct of the alleged victim, except in certain situations where a written motion has been filed by the defense regarding such prior conduct and a hearing has been held out of the presence of the jury to determine the relevancy of such prior conduct.

6. S. Brownmiller, Against Our Will: Men, Women and Rape (1975); M. Amir, Patterns in Forcible Rape (1971).

7. The primary Missouri statute on rape is section 559.260, RSMo 1969, which provides:

> Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upwards, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury.

8. State v. Blessing, 183 S.W. 279 (Mo. 1916).

9. An amendment to the statute in 1921 raised the age of consent from fourteen to sixteen, thereby extending the length of protection, but the same amendment lowered the minimum term of imprisonment upon conviction from five to two years.

10. State v. Basket, 111 Mo. 271, 19 S.W. 1097 (1892); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892).

11. State v. Weekly, 223 S.W.2d 494 (Mo. 1949); State v. King, 342 Mo. 975, 119 S.W.2d 277 (1938); State v. Blessing, 183 S.W. 279 (Mo. 1916); State v. George, 214 Mo. 262, 113 S.W. 1116 (1908); State v. Ernest, 150 Mo. 347, 51 S.W. 688 (1899).

12. State v. Lawson, 136 S.W.2d 992 (Mo. 1940); State v. Conrad, 322 Mo. 246, 14 S.W.2d 608 (1928); State v. Gruber, 285 S.W. 426 (Mo. 1926); State v. Nevitt, 270 S.W. 337 (Mo. 1924); State v. Ansel, 256 S.W. 762 (Mo. 1923); State v. Shellman, 192 S.W. 435 (Mo. 1917); State v. George, 214 Mo. 262, 113 S.W. 1116 (1908); State v. Allen, 174 Mo. 689, 74 S.W. 839 (1903); State v. Ernest, 150 Mo. 347, 51 S.W. 688 (1899); State v. Duffey, 128 Mo. 549, 31 S.W. 98 (1895); State v. Lacey, 111 Mo. 513, 20 S.W. 238 (1892); State v. Wray, 109 Mo. 594, 19 S.W. 86 (1892). The prosecution is entitled to a jury instruction that consent is no defense. State v. Mace, 278 S.W. 718 (Mo. 1925). Even a later marriage of

The question of what kind of evidence should be admissible is brought sharply into focus by the fact that the defendant can be convicted solely on the uncorroborated testimony of the victim,[13] unless such testimony is contradictory or totally unbelievable.[14] Because neither force nor lack of consent are elements of the crime,[15] evidence that the victim made outcry or complaint is immaterial and therefore inadmissible in some jurisdictions.[16] In Missouri, however, evidence that a complaint or outcry was made is always admissible where there is any evidence that the rape was accomplished by force,[17] and some decisions have held such evidence admissible even without any reference to force.[18] Likewise, evidence of a failure to make complaint or outcry is admissible,[19] but neither prosecution[20] nor defense[21] is entitled to a jury instruction concerning such evidence.

B. *Evidence of the Victim's Character*

1. Specific Acts of Immorality

Evidence of previous immoral conduct, short of actual intercourse, between the defendant and the prosecutrix is admissible when offered

the prosecutrix and the defendant will not bar a prosecution. However, as a practical matter, such a prosecution would be unlikely due to the husband-wife immunity which would prevent the wife from testifying but it has happened. State v. Evans, 138 Mo. 116, 39 S.W. 462 (1897).

13. State v. Lee, 404 S.W.2d 740 (Mo. 1966); State v. Nash, 272 S.W.2d 179 (Mo. 1954); State v. Wood, 355 Mo. 1008, 199 S.W.2d 396 (1947); State v. Burton, 355 Mo. 792, 198 S.W.2d 19 (1946); State v. Lawson, 136 S.W.2d 992 (Mo. 1940); State v. Ball, 133 S.W.2d 414 (Mo. 1939); State v. King, 342 Mo. 975, 119 S.W.2d 277 (1938); State v. Mitchell, 86 S.W.2d 185 (Mo. 1935); State v. Gruber, 285 S.W. 426 (Mo. 1926); State v. Wade, 306 Mo. 457, 268 S.W. 52 (1924); State v. Smith, 237 S.W. 482 (Mo. 1922); State v. Hammontree, 177 S.W. 367 (Mo. 1915); State v. Hughes, 258 Mo. 264, 167 S.W. 529 (1914); State v. Stackhouse, 242 Mo. 444, 146 S.W. 1151 (1912); State v. Wilcox, 111 Mo. 569, 20 S.W. 314 (1892). In *Ball, supra*, the only evidence introduced was the girl's testimony, and she did not come forward until more than a year after the offense. If the testimony of the prosecutrix is contradictory and conflicts with physical facts, surrounding circumstances, and ordinary experience, then it must be corroborated.

14. State v. Tevis, 234 Mo. 276, 136 S.W. 339 (1911); State v. Goodale, 210 Mo. 275, 109 S.W. 9 (1908).

15. Cases cited notes 11 and 12 *supra*.

16. *See* 3 H. UNDERHILL, CRIMINAL EVIDENCE § 757 at 1738 (5th ed. 1957); 4 J. WIGMORE, EVIDENCE § 1133 at 223 (3d ed. 1940) and cases cited therein.

17. State v. Hammontree, 177 S.W. 367 (Mo. 1915); State v. Palmberg, 199 Mo. 233, 97 S.W. 566 (1906). The details of a complaint made to a third person are clearly hearsay and therefore inadmissible unless the prosecutrix has been impeached by prior inconsistent statements and the statements made in the complaint are used as prior consistent statements to rehabilitate the prosecutrix on that specific point. State v. Fleming, 354 Mo. 31, 188 S.W.2d 12 (1945); State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942).

18. State v. Robinson, 106 S.W.2d 425 (Mo. 1937); State v. Conrad, 322 Mo. 246, 14 S.W.2d 608 (1928).

19. State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942).

20. An instruction that the jury should consider the failure of the prosecutrix to complain promptly has been held "a comment upon the prosecutrix' testimony on a point not within the issuable facts." State v. Bowman, 278 Mo. 492, 497, 213 S.W. 64, 65 (1919).

21. State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942).

by the prosecution, because it tends to show the relationship between the parties and their inclination to engage in intercourse.[22] In *State v. Bascue*[23] the appellant, who had been convicted of the statutory rape of his 14 year old stepdaughter, argued that the trial court erred in admitting evidence of prior acts of "messing around" with the child because such acts constituted the separate crime of child molestation which was not reasonably related to the subsequent act of statutory rape. The general rule is that evidence of other criminal acts, if offered to prove the crime charged, is inadmissible except when it tends to establish motive, intent, or a common scheme or plan embracing the commission of separate similar crimes so interrelated that proof of one tends to prove the others.[24] The court in *Bascue* held these prior acts are so related to the act charged as to be admissible.[25] The court said these acts showed the state of intimacy between the parties and constituted "the foundation for an antecedent probability"[26] that the parties engaged in intercourse.[27]

A fortiori, evidence of prior acts of intercourse between the prosecutrix and the defendant is admissible as tending to create an "antecedent probability" of crime charged.[28] Previous acts of intercourse as remote as seven years prior to the act charged have been held admissible because they demonstrate a pattern of sexual misconduct continuing over an extended period.[29] The statute of limitations imposes no restrictions on admission into evidence of offenses barred by the statute.[30] An objection based on remoteness is untenable because this factor affects only the weight and not the admissibility of the testimony.[31] However, the state cannot introduce evidence of subsequent acts of intercourse,[32] even evidence that the defendant regularly had intercourse with the prosecutrix with her consent after she reached age sixteen[33] in a prosecution for one act of intercourse before the girl attained that age.

22. "[P]rior amorous acts, which ordinarily precede the sexual act, although actually constituting assaults and therefore separate offenses may properly be shown." State v. Cooper, 271 S.W. 471, 474 (Mo. 1923).

23. 485 S.W.2d 35 (Mo. 1972).

24. C. MCCORMICK, EVIDENCE § 42 at 82 (2d ed. 1972).

25. State v. Bascue, 485 S.W.2d 35 (Mo. 1972).

26. *Id.*

27. *See also* State v. Garner, 481 S.W.2d 239 (Mo. 1972); State v. Akers, 328 S.W.2d 31 (Mo. 1959); State v. Baker, 318 Mo. 542, 300 S.W. 699 (1927); State v. Pruitt, 202 Mo. 49, 100 S.W. 431 (1907).

28. State v. Tyler, 306 S.W.2d 452 (Mo. 1957); State v. Burkhart, 242 S.W.2d 12 (Mo. 1951); State v. King, 342 Mo. 975, 119 S.W.2d 277 (1938); State v. Hersh, 296 S.W. 433 (Mo. 1927); State v. Cooper, 271 S.W. 471 (Mo. 1925); State v. Cason, 252 S.W. 688 (Mo. 1923).

29. State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942).

30. *Id.*

31. State v. Bascue, 485 S.W.2d 35 (Mo. 1972). *See also* State v. Simerly, 463 S.W.2d 846 (Mo. 1971).

32. State v. Amende, 338 Mo. 717, 92 S.W.2d 106 (1936); State v. Bullington, 274 S.W. 18 (Mo. 1925); State v. Guye, 299 Mo. 348, 252 S.W. 955 (1923); State v. Arnold, 267 Mo. 33, 183 S.W. 289 (1916); State v. Palmberg, 199 Mo. 233, 97 S.W. 566 (1906).

33. State v. Caldwell, 311 Mo. 534, 278 S.W. 700 (1925).

It is a felony to have carnal knowledge of a girl under the age of sixteen, regardless of whether others have had such knowledge of her. Therefore, evidence offered by the defendant of the victim's specific immoral acts with others is immaterial and inadmissible.[34]

2. General Reputation of the Victim

A number of old Missouri cases held that the general bad reputation of the prosecutrix could be shown to affect her credibility if she took the stand to testify.[35] This was consistent with the rule which existed at the time that the general bad reputation of any witness for morality could be shown to impeach.[36] This rule was reversed by *State v. Williams*,[37] which held that the general reputation for morality was inadmissible as bearing on the credibility of a witness. The rule in *State v. Williams* has been applied in prosecutions for forcible rape,[38] but no case has specifically held it applicable to statutory rape. Unless a different rationale is to be followed due to the age of the prosecuting witness, this rule rejecting general reputation for morality as bearing on the credibility of the prosecuting witness is applicable to statutory rape prosecutions. Moreover, because consent of the victim is immaterial, her general reputation for morality is inadmissible on that issue.

C. *Evidence of the Defendant's Character*

Missouri courts have recognized the precarious position of one who stands accused of statutory rape. In *State v. Seay*[39] the Supreme Court of Missouri stated:

> A crime of the character of the one with which the defendant is charged is so abhorrent that conviction is easy; in fact, the charge is almost equivalent to a conviction. So strong is the prejudice against a defendant in such case that the court must take every precaution to see that he obtains an impartial trial.[40]

1. Specific Acts of Immorality

Evidence of specific acts of immorality on the part of the defendant with anyone other than the prosecutrix is generally inadmissible. It is never permissible for the prosecution to prove that the defendant has had illicit relations with women over the age of consent.[41] Likewise, it is generally held to be reversible error to permit the introduction of evidence that the defendant has had illicit relations with females under the age of sixteen.[42] Such evidence is obviously highly prejudicial and does not tend to make it more probable that the defendant is guilty of the offense for which he is on trial.[43] However, in a few situations, evidence of a specific, prior, similar crime has been held properly admitted. For example, in *State v. King*[44] a porter in a private school was charged with the statutory rape of a pupil. Correspondence between defendant and another pupil indicating that defendant had committed a similar offense with the second pupil, although inadmissible as part of the state's case in chief, was admissible in rebuttal when defendant raised the issue by testifying that he never "got smart" with any other pupils.

2. General Reputation of the Defendant

The general rule in all criminal prosecutions is that the prosecution cannot introduce evidence that the defendant's general reputation for morality is bad, unless the defendant, in an attempt to bolster his own credibility, calls a witness to testify to his good character and reputation.[45] In such a case, the state may call witnesses to show that his general reputation for morality is bad. It is also proper for the state to cross-examine thoroughly defendant's character witness for the purpose of testing the witness' knowledge of the defendant's reputation, the witness' sources of information, and the witness' credibility. The extent of permissible cross-examination of the defendant's character witness is largely within the trial court's discretion.[46] This type of questioning is proper even if it relates to crimes other than the one charged.[47] In order to determine upon what the character witness bases his judgment, it is permissible to inquire of the witness whether he had heard it rumored that defendant was involved in other criminal acts which would reflect upon defendant's character.[48] However, such questions are improper unless such rumors are actually being circulated.[49] It is not permissible for the prosecutor,

34. State v. Smith, 289 S.W. 590 (Mo. 1926); State v. Shobe, 268 S.W. 81 (Mo. 1924); State v. Ansel, 256 S.W. 762 (Mo. 1923); State v. Guye, 299 Mo. 348, 252 S.W. 955 (1923); State v. Loness, 238 S.W. 112 (Mo. 1922); State v. Devorss, 221 Mo. 469, 120 S.W. 75 (1909).

35. State v. Stevens, 325 Mo. 434, 29 S.W.2d 113 (1930); State v. Guye, 299 Mo. 348, 252 S.W. 955 (1923); State v. Loness, 238 S.W. 112 (Mo. 1922); State v. Nibarger, 255 Mo. 289, 164 S.W. 453 (1914); State v. Duffey, 128 Mo. 549, 31 S.W. 98 (1895).

36. State v. Shields, 13 Mo. 236 (1850).

37. 337 Mo. 889, 87 S.W.2d 175 (1935).

38. State v. Kain, 330 S.W.2d 842 (Mo. 1960).

39. 282 Mo. 672, 222 S.W. 427 (1920).

40. *Id.* at 679, 22 S.W. at 429.

41. State v. Hayes, 356 Mo. 1033, 204 S.W.2d 723 (1947); State v. Cox, 263 S.W. 215 (Mo. 1924); State v. Bowman, 272 Mo. 491, 199 S.W. 161 (1917); State v. Burgess, 259 Mo. 383, 168 S.W. 740 (1914).

42. State v. Spinks, 344 Mo. 105, 125 S.W.2d 60 (1939); State v. Bowman, 272 Mo. 491, 199 S.W. 161 (1917); State v. Smith, 250 Mo. 274, 157 S.W. 307 (1913); State v. Horton, 247 Mo. 657, 153 S.W. 1051 (1913); State v. Teeter, 239 Mo. 475, 144 S.W. 445 (1912).

43. Cases cited note 42 *supra*.

44. 342 Mo. 975, 119 S.W.2d 277 (1938).

45. State v. Williams, 337 Mo. 884, 87 S.W.2d 175 (1935).

46. State v. Cooper, 271 S.W. 471 (Mo. 1925); State v. Seay, 282 Mo. 672, 222 S.W. 427 (1920); State v. Phillips, 233 Mo. 299, 135 S.W. 4 (1911); State v. Harris, 209 Mo. 423, 108 S.W. 28 (1908); State v. Parker, 172 Mo. 191, 72 S.W. 650 (1903).

47. State v. Seay, 282 Mo. 672, 222 S.W. 427 (1920).

48. *Id.*

49. *Id.*

under the pretext of testing the credibility and information of the character witness, to bring before the jury bad acts or crimes which occurred after the offenses charged or about which the character witness would have no way of knowing.[50]

III. Statutory Rape: Intercourse With a Female of Previously Chaste Character Between the Ages of Sixteen and Eighteen

A. *Elements of the Crime*

Missouri law extends, by a separate statutory rape statute, the period of protection an additional two years for young women of "previously chaste character."[51] Being of "previously chaste character" means simply that the young woman was a virgin prior to the act charged.[52] This fact must be proved affirmatively by the state.[53] Although earlier Missouri cases held that chastity was presumed until the contrary was shown,[54] the clear rule today is that there is no presumption that the prosecutrix was chaste.[55] However, defendant is not entitled to an instruction that no presumption exists, because such an instruction would have a tendency to mislead the jury into assuming that a contrary presumption exists.[56] If the state establishes that the young woman was of "previously chaste character," the same protection given a female under age sixteen is applicable—*i.e.*, both the consent of the prosecutrix[57] and the use of force[58] are immaterial.

In a prosecution under this statute the defendant can be convicted

50. *Id.* It is, of course, improper for the prosecutor to state to the jury during closing argument, or at any other time, his personal belief in the guilt of the defendant, because the jury may put undue weight on this opinion and assume that it is based on information not in evidence. *Id. See also* State v. Reppley, 278 Mo. 333, 213 S.W. 477 (1919); State v. Webb, 254 Mo. 414, 162 S.W. 622 (1914); State v. Hess, 240 Mo. 147, 144 S.W. 489 (1912).

51. § 559.300, RSMo 1969, provides:

> If any person over the age of seventeen years shall have carnal knowledge of any unmarried female, of previously chaste character, between the age of sixteen and eighteen years of age, he shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term of two years, or by a fine of not less than one hundred dollars nor more than five hundred dollars or by imprisonment in the county jail for not less than one month or more than six months, or by both such fine and imprisonment, in the discretion of the court.

52. State v. Luckett, 246 S.W. 881 (Mo. 1922); State v. Cook, 207 S.W. 831 (Mo. 1918). The defendant is not entitled to an instruction on the meaning of "previously chaste character" because "an ordinary intelligent juror would understand that the phrase referred to a female who had never indulged in an act of sexual intercourse." State v. Wells, 367 S.W.2d 652, 655-56 (Mo. 1963).

53. State v. Cook, 207 S.W. 831 (Mo. 1918); State v. Volz, 269 Mo. 194, 190 S.W. 307 (1916); State v. Kelly, 245 Mo. 489, 150 S.W. 1057 (1912); State v. McMahon, 234 Mo. 611, 137 S.W. 872 (1911).

54. State v. Kelly, 191 Mo. 680, 90 S.W. 834 (1905).

55. State v. Volz, 269 Mo. 194, 190 S.W. 307 (1916); State v. Kelly, 245 Mo. 489, 150 S.W. 1057 (1912).

56. State v. Volz, 269 Mo. 194, 190 S.W. 307 (1916).

57. State v. Wells, 367 S.W.2d 652 (Mo. 1963); State v. Volz, 269 Mo. 194, 190 S.W. 307 (1916); State v. Taylor, 267 Mo. 41, 183 S.W. 299 (1916).

58. Cases cited note 57 *supra.*

solely on the testimony of the prosecutrix.[59] Corroboration is not necessary unless her testimony is contradictory or unconvincing when "applied to the admitted facts and ordinary experiences of mankind."[60]

B. *Evidence of the Victim's Character*

1. Specific Acts of Immorality

Because virginity of the prosecutrix is an essential element of the offense, prior specific acts of intercourse on her part are clearly relevant and admissible.[61] Any prior act of intercourse with others[62] or with the defendant[63] is, if proved, a complete defense to a prosecution under this statute. If the evidence indicates more than one act of intercourse with the defendant, he can only be convicted of the first act, because the woman was not "of chaste character" at the time of the later acts.[64] The statute of limitations starts to run as of the first act of intercourse.[65]

Courts have stated that prior specific acts of immorality are inadmissible to impeach the credibility of the prosecutrix,[66] but this prohibition is meaningless because specific prior acts are admissible on the issue of chastity.[67] However, evidence of specific acts of intercourse occurring subsequent to the crime charged is inadmissible for any purpose.[68]

2. General Reputation of the Victim

The defendant may offer evidence that the general reputation of the prosecutrix for chastity was bad prior to the offense charged because such evidence is relevant to the issue of chastity.[69] The rationale for admitting such evidence is that, although "chaste character" and a "reputation for chastity" are not the same, reputation is still some evidence of actual character.[70] Likewise, the prosecution may offer evidence that the prosecutrix' general reputation for morality was good prior to the offense because it tends to prove her "previously chaste character."[71] Evidence

59. State v. Clark, 353 Mo. 470, 182 S.W.2d 619 (1944); State v. Cox, 263 S.W. 215 (Mo. 1924); State v. Wade, 306 Mo. 457, 268 S.W. 52 (1924); State v. Hughes, 258 Mo. 264, 167 S.W. 529 (1914); State v. Tevis, 234 Mo. 276, 136 S.W. 339 (1911); State v. Day, 188 Mo. 359, 87 S.W. 465 (1905).

60. *See* cases cited note 59 *supra.*

61. State v. Foster, 225 S.W. 671 (Mo. 1920); State v. Cook, 207 S.W. 831 (Mo. 1918); State v. Weber, 272 Mo. 475, 199 S.W. 147 (1917).

62. Cases cited note 61 *supra.*

63. State v. Foster, 225 S.W. 671 (Mo. 1920); State v. Schenk, 238 Mo. 429, 142 S.W. 263 (1911); State v. McMahon, 234 Mo. 611, 137 S.W. 872 (1911).

64. State v. Schenk, 238 Mo. 429, 142 S.W. 263 (1911).

65. State v. McMahon, 234 Mo. 611, 137 S.W. 872 (1911).

66. *See, e.g.*, State v. Luckett, 246 S.W. 881 (Mo. 1922).

67. State v. Cook, 207 S.W. 831 (Mo. 1918); State v. Weber, 272 Mo. 475, 199 S.W. 147 (1917).

68. State v. Perrigin, 258 Mo. 233, 167 S.W. 573 (1914).

69. Character refers to what a person really is while reputation is only what public opinion reputes him to be. State v. Cook, 207 S.W. 831, 833 (Mo. 1918).

70. *Id.*

71. State v. Taylor, 267 Mo. 41, 183 S.W. 299 (1916). State v. Kelley, 191 Mo. 680, 90 S.W. 834 (1905), contains dictum to the contrary, but was expressly overruled by *Taylor.*

of the general reputation of the prosecutrix subsequent to the offense charged is inadmissible.[72]

Older Missouri cases held that if the prosecuting witness testified, evidence of her general bad reputation for morality would be admissible to impeach her credibility.[73] This rule has not been followed in Missouri since 1935 when the supreme court held in *State v. Williams*[74] that the general reputation of a witness is inadmissible as bearing on the issue of credibility. Presently, the only general reputation evidence admissible to impeach a witness is general reputation for truth and veracity.[75]

C. *Evidence of Defendant's Character*

Despite the dearth of cases on this issue, it appears that the rules governing the admissibility of evidence of the defendant's character when the charge is statutory rape of a "chaste" 16 to 18 year old are the same as those applicable in a prosecution for the statutory rape of a girl under the age of 16.[76] Because the only difference between the two offenses is the characteristics of the victim, there is no reason to treat evidence of the defendant's character any differently.

IV. Forcible Rape

A. *Elements of the Crime*

In Missouri the essential elements of forcible rape[77] are: (1) penetration (however slight) of a female's sexual organs;[78] (2) accomplished by force or threats;[79] and (3) against the will of the woman.[80] The state, of course, must prove these elements beyond a reasonable doubt.[81]

The force used must be sufficient to overcome the "utmost resistance" of the woman—*i.e.*, to overpower the mind, thereby negating consent.[82]

72. State v. Day, 188 Mo. 359, 87 S.W. 465 (1905).
73. State v. Shearon, 183 S.W. 293 (Mo. 1916).
74. 337 Mo. 884, 87 S.W.2d 175 (1935). *See also* State v. Kain, 330 S.W.2d 842 (Mo. 1960).
75. State v. Williams, 492 S.W.2d 1 (Mo. App., D. St. L. 1973).
76. Evidence that the defendant proposed marriage, either before or after the alleged act of intercourse is admissible on the theory that a subsequent promise of marriage shows a "consciousness of guilt and a desire to conceal the offense" and a prior promise bears on the issue of chastity in that it indicates why the woman submitted. State v. Walker, 357 Mo. 394, 208 S.W.2d 233 (1948); State v. Oliver, 337 Mo. 1037, 87 S.W.2d 644 (1935); State v. Reed, 237 Mo. 224, 140 S.W. 909 (1911).
77. § 559.260, RSMo 1969.
78. State v. Oliver, 333 Mo. 1231, 64 S.W.2d 118 (1933); State v. Ruhr, 533 S.W.2d 656 (Mo. App., D.K.C. 1976).
79. State v. Garrett, 494 SW.2d 336 (Mo. 1973); State v. Deckard, 426 S.W.2d 88 (Mo 1968); State v. Egner, 317 Mo. 427, 296 S.W. 145 (1927); State v. Catron, 317 Mo. 894, 296 S.W. 141 (1927); State v. Johnson, 316 Mo. 86, 289 S.W. 847 (1926); State v. Barbour, 234 Mo. 526, 137 S.W. 874 (1911); State v. Neal, 178 Mo. 63, 76 S.W. 958 (1903); State v. Cunningham, 100 Mo. 382, 12 S.W. 376 (1889); State v. Ruhr, 533 S.W.2d 656, (Mo. App., D.K.C. 1976)
80. *See* cases cited note 79 *supra*.
81. State v. Moore, 435 S.W.2d 8 (Mo. En Banc 1968).
82. State v. Gray, 423 S.W.2d 776 (Mo. 1968); State v. Schuster, 282 S.W.2d 553 (Mo. 1955).

Such force need not be actually applied, but may be merely an "array of force."[83] Unless the woman demonstrates the "utmost reluctance" to engage in the act and presents the "greatest resistance" of which she is capable, she will be deemed to have consented.[84] However, consent induced by a fear of personal violence is no consent,[85] and thus the utmost resistance doctrine is not applicable when the woman is put in fear of injury.[86] In other words, the amount of resistance necessary depends on the uselessness of resistance.[87]

A conviction of forcible rape may generally be sustained on the uncorroborated testimony of the prosecutrix.[88] However, if the prosecutrix' testimony is in conflict with surrounding circumstances and ordinary experience, it must be corroborated. [89] Thus the need for corroboration must be decided on a case by case basis.[90]

Evidence that the prosecutrix made an outcry or complaint following the alleged rape is not excluded by the hearsay rule.[91] Likewise, evidence

83. State v. Kirkpatrick, 428 S.W.2d 513 (Mo. 1968); State v. Wynn, 357 S.W.2d 936 (Mo. 1962); State v. Schuster, 282 S.W.2d 553 (Mo. 1955); State v. Ruhr, 533 S.W.2d 656 (Mo. App., D.K.C. 1976).
84. State v. Abron, 492 S.W.2d 387 (Mo. App., D. St. L. 1973); State v. Cottengim, 12 S.W.2d 53 (Mo. 1928); State v. Egner, 317 Mo. 427, 296 S.W. 145 (1927); State v. McChesney, 185 S.W. 197 (Mo. 1916).
85. State v. Kirkpatrick, 428 S.W.2d 513 (Mo. 1968); State v. Schuster, 282 S.W.2d 553 (Mo. 1962); State v. Ruhr, 533 S.W.2d 656 (Mo. App., D.K.C. 1976).
86. State v. Walker, 484 S.W.2d 281 (Mo. 1972); State v. Neal, 484 S.W.2d 270 (Mo. 1972); State v. Gray, 423 S.W.2d 776 (Mo. 1968); State v. Beck, 368 S.W.2d 490 (Mo. 1963); State v. Moore, 143 S.W.2d 288 (Mo. 1940); State v. Catron, 317 Mo. 894, 296 S.W. 141 (1927); State v. Barbour, 234 Mo. 526, 137 S.W. 874 (1911).
The doctrine is also not applicable where the woman is rendered insensible by intoxicants or drugs. State v. Dusenberry, 112 Mo. 277, 20 S.W. 461 (1892).
It is also rape to have intercourse with a woman of unsound mind. Her mental condition must be so severe as to totally destroy her capacity to consent, and the defendant must know of her infirmity. A woman who is too weak-minded legally to enter into a contract can still consent to sexual intercourse. The burden is on the state to prove both the severity of the woman's mental condition and the defendant's knowledge of her incapacity. State v. Robinson, 345 Mo. 897, 136 S.W.2d 1008 (1940); State v. Helderle, 186 S.W. 696 (Mo. En Banc 1916); State v. Warren, 232 Mo. 185, 134 S.W. 522 (1911).
87. State v. Beck, 368 S.W.2d 490 (Mo. 1963).
88. State v. Gray, 423 S.W.2d 776 (Mo. 1968); State v. Quinn, 405 S.W.2d 895 (Mo. 1966); State v. Baugh, 323 S.W.2d 685 (Mo. En Banc 1959); State v. Roddy, 171 S.W.2d 713 (Mo. 1943); State v. Lawson, 136 S.W.2d 992 (Mo. 1940); State v. Dilts, 191 Mo. 665, 90 S.W. 782 (1905); State v. Welch, 191 Mo. 179, 89 S.W. 945 (1905); State v. Harris, 150 Mo. 56, 51 S.W. 481 (1899); State v. Marcks, 140 Mo. 656, 41 S.W. 973 (1897); State v. Dusenberry, 112 Mo. 277, 20 S.W. 461 (1892); State v. Davis, 497 S.W.2d 204 (Mo. App., D. St. L., 1973).
89. State v. Burton, 355 Mo. 467, 196 S.W.2d 621 (1946); State v. Marshall, 354 Mo. 312, 189 S.W.2d 301 (1945); State v. Gruber, 285 S.W. 426 (Mo. 1926); State v. Donnington, 246 Mo. 343, 151 S.W. 975 (1912); State v. Tevis, 234 Mo. 276, 136 S.W. 339 (1911).
90. State v. Thomas, 351 Mo. 804, 174 S.W.2d 337 (1943). If the conviction was obtained solely on the uncorroborated testimony of the prosecutrix, the appellate court will closely scrutinize that evidence and reverse if it appears incredible or too insubstantial. State v. Goodale, 210 Mo. 275, 109 S.W. 9 (1908).
91. The theory applied in admitting the evidence is that "womanly instinct"

that the alleged victim failed to do so is admissible,[92] and the accused is entitled to a cautionary instruction advising the jury that her failure to make prompt complaint is a factor to consider in assessing her believability.[93]

B. *Evidence of the Victim's Character*

1. Specific Acts of Immorality

Prior specific acts of voluntary intercourse between the prosecutrix and the defendant are admissible as tending to show the inclination of the woman to consent.[94] Likewise, evidence of continued friendly intercourse between defendant and prosecutrix after the alleged rape is admissible to impeach her testimony.[95] However, evidence of prior acts of forcible rape by the accused upon the prosecutrix is inadmissible.[96] Such acts are held not to have a tendency to constitute an "antecedent probability" that defendant committed the act charged.[97] This approach is consistent with the rule prohibiting the admission of evidence of prior criminal acts against a defendant in a criminal case.

Except in very limited circumstances, evidence of prior specific acts of intercourse between the prosecutrix and men other than the defendant is inadmissible for any purpose.[98] The prosecuting witness may not be cross-examined with regard to specific acts of immorality with others, either

prompts the outraged female to make outcry. State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942). Such evidence is not a necessary element of the state's case. State v. Garrett, 494 S.W.2d 336 (Mo. 1973); State v. Miller, 191 Mo. 587, 90 S.W. 767 (1905). Such evidence is admissible only in corroboration of the prosecutrix and not as independent proof of the crime. State v. Marshall, 354 Mo. 312, 189 S.W.2d 301 (1945); State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942); State v. Wilkens, 100 S.W.2d 889 (Mo. 1936); State v. Conrad, 322 Mo. 246, 14 S.W.2d 608 (1928); State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); State v. Atkins, 292 S.W. 422 (Mo. 1926); State v. Lawhorn, 250 Mo. 293, 157 S.W. 344 (1913). As a general rule, the details of the outcry or complaint are inadmissible. State v. Marshall, 354 Mo. 312, 189 S.W.2d 301 (1945); State v. Parsons, 285 S.W. 412 (Mo. 1926); State v. Burgess, 259 Mo. 383, 168 S.W. 740 (1914); State v. Yocum, 117 Mo. 622, 23 S.W. 765 (1893). However, the details may come in when drawn from the complainant on cross-examination or introduced to rehabilitate the witness after the introduction of prior inconsistent extrajudicial statements. State v. Fleming, 354 Mo. 31, 188 S.W.2d 12 (1945); State v. Lawhorn, 250 Mo. 293, 157 S.W. 344 (1913); State v. Bateman, 198 Mo. 212, 94 S.W. 843 (1906).

92. State v. Palmer, 344 Mo. 1063, 130 S.W.2d 599 (1939); State v. Wilkens, 100 S.W.2d 889 (Mo. 1936); State v. Bigley, 247 S.W. 169 (Mo. 1922).

93. State v. Thomas, 351 Mo. 804, 174 S.W.2d 337 (1943).

94. State v. Northern, 472 S.W.2d 409 (Mo. 1971). *See also* 1 J. WIGMORE, EVIDENCE § 200 at 688 (3d ed. 1940); 2 J. WIGMORE, EVIDENCE § 402 at 369 (3d ed. 1940).

95. State v. Patrick, 107 Mo. 147, 17 S.W. 666 (1891).

96. State v. Lebo, 339 Mo. 960, 98 S.W.2d 695 (1936).

97. *Id.*

98. State v. Ball, 527 S.W.2d 414 (Mo. App., D. St. L. 1975); State v. Kirkpatrick, 428 S.W.2d 513 (Mo. 1968); State v. Pyle, 343 Mo. 876, 123 S.W.2d 166 (1938); State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); State v. Hewitt, 259 S.W. 773 (Mo. 1924); State v. Guye, 299 Mo. 348, 252 S.W. 955 (1923); State v. Osborne, 246 S.W. 878 (Mo. 1922); State v. White, 35 Mo. 500 (1865).

for impeachment purposes or as bearing on the issue of consent.[99] However, the Missouri Supreme Court has recognized that there may be a few situations justifying the admission of evidence of specific acts of unchastity with others.[100] These situations are limited to the rebuttal of corroborating circumstantial evidence. For example, evidence of a specific act of intercourse with another would be relevant to explain medical evidence introduced by the state showing a ruptured hymen, venereal disease, or pregnancy.[101] Evidence of a specific act of intercourse the same day with another has been held admissible because it would account for the presence of sperm in the vagina of the prosecutrix.[102] Whenever specific acts of lewdness and unchastity on the part of the prosecutrix are shown by the defense for the limited purpose of explaining corroborating circumstances, such constitutes an attack on the good character of the prosecutrix.[103] The state may then introduce evidence of the prosecutrix' good reputation for morality and chastity.[104]

2. General Reputation of the Victim

The majority of jurisdictions which have considered the question, including Missouri, have held evidence of the prosecutrix' general reputation for morality and chastity admissible as bearing on the issue of her consent.[105] In fact, the Fourth Circuit has held that an attorney's failure to investigate the character of a complainant in a rape case constitutes ineffective assistance of counsel.[106] However, a bad reputation for chastity is not always admissible; it is not admissible in Missouri as a defense or in mitigation[107] because the lack of chastity may only be shown when *consent* is "in issue."[108] The phrase "in issue" is not defined, but a good argument can be made that if the defendant denies intercourse and introduces no evidence concerning consent, evidence of the prosecutrix' bad general reputation for morality would be inadmissible.

The person testifying as to the general reputation of the prosecutrix must possess the necessary testimonial qualifications—*i.e.*, acquaintance with the general reputation of the prosecutrix for morality in the neighbor-

99. State v. Kain, 330 S.W.2d 842 (Mo. 1960); State v. Whipkey, 215 S.W.2d 492 (Mo. 1948); State v. Osborne, 246 S.W. 878 (Mo. 1922).

100. State v. Kain, 330 S.W.2d 842 (Mo. 1960).

101. 75 C.J.S., *Rape* § 63 at 535 (1952), *cited with approval* in State v. Kain, 330 S.W.2d 842 (Mo. 1960).

102. State v. Daugherty, 126 S.W.2d 237 (Mo. 1939).

103. *Id.*; State v. Lovitt, 243 Mo. 510, 147 S.W. 481 (1912); State v. Jones, 191 Mo. 653, 90 S.W. 465 (1905); State v. Speritus, 191 Mo. 24, 90 S.W. 459 (1905).

104. *Id.*

105. 1 J. WIGMORE, EVIDENCE § 62 at 464 (3d ed. 1940).

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

107. State v. Catron, 317 Mo. 894, 296 S.W. 141 (1927).

108. State v. Yowell, 513 S.W.2d 397 (Mo. En Banc 1974); State v. Kirkpatrick, 428 S.W.2d 513 (Mo. 1968); State v. Kain, 330 S.W.2d 842 (Mo. 1960); State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); State v. Ruhr, 533 S.W.2d 656 (Mo. App., D. St. L. 1976); State v. Ball, 527 S.W.2d 414 (Mo. App., D. St. L. 1975).

hood or among people with whom the prosecutrix associates.[109] The testimony given must be general and not specific. For example, testimony that the prosecutrix was reputed to have given birth to an illegitimate child is evidence of a specific act and therefore not admissible.[110]

The general rule in Missouri and most jurisdictions is that the credibility of a witness may not be impeached by a showing that his general reputation for morality is bad. An attack on credibility must be addressed to the reputation of the witness for truth and veracity.[111] Many writers, notably Professor Wigmore,[112] advocate an exception to the general rule which would admit general reputation evidence to impeach the testimony of the alleged victim in prosecutions of men charged with sexual crimes against women. Wigmore's rationale for the exception was to provide protection against "the sinister possibilities of injustice that lurk in believing such a witness without careful psychiatric scrutiny."[113] Wigmore's fear was that women who have what he called an "unchaste mentality" tend to contrive false charges of sexual offenses by innocent men, and the sympathy naturally felt for a wronged female would "give easy credit to such plausible tale."[114] In *State v. Kain*[115] Missouri rejected Wigmore's proposed exception and adopted the general rule even in rape prosecutions:

> The prosecutors and trial courts already have a considerable latitude in dealing with the abuses suggested by Professor Wigmore. There is no assurance that permitting the witness' credibility to be attacked by proof of her bad repute for chastity would remedy the situation and it might open the door to other and greater abuses.[116]

C. *Evidence of the Defendant's Character*

1. Specific Acts of Immorality

As a general rule, specific acts of immorality are not admissible against the defendant. However, there are a few limited exceptions. Evidence of prior convictions can be used to impeach,[117] but evidence of other crimes, absent a conviction, is only admissible if it tends to establish motive, intent, absence of mistake or accident, common scheme or plan, or the identity

109. State v. Kain, 330 S.W.2d 842 (Mo. 1960). *See also*, State v. Deshon, 334 Mo. 862, 68 S.W.2d 805 (1934); State v. Fairlamb, 121 Mo. 137, 25 S.W. 895 (1894).
110. State v. Yowell, 513 S.W.2d 397 (Mo. En Banc 1974).
111. State v. Rand, 496 S.W.2d 30 (Mo. App., D. St. L. 1973); State v. Lora, 305 S.W.2d 452 (Mo. 1957); State v. Whipkey, 358 Mo. 563, 215 S.W.2d 492 (1948); State v. Hayes, 356 Mo. 1033, 204 S.W.2d 723 (1947); State v. Menz, 314 Mo. 74, 106 S.W.2d 440 (1937); State v. Williams, 337 Mo. 884, 87 S.W.2d 175 (1935).
112. 3 J. WIGMORE, EVIDENCE § 924 (a) at 459 (3d ed. 1940).
113. *Id.* at 460.
114. *Id.* at 459.
115. 330 S.W.2d 842 (Mo. 1960). *See also* State v. Hayes, 356 Mo. 1033, 204 S.W.2d 723 (1947).
116. 330 S.W.2d at 845.
117. § 491.050, RSMo 1969; State v. Byrth, 395 S.W.2d 133 (Mo. 1965).

of the person on trial.[118] In *State v. Mitchell*[119] defendant made an issue of his identity. Therefore, evidence of a second rape which occurred a few minutes after the rape for which he was on trial, was held admissible to show the opportunity to commit the first rape and the identity of the defendant as the rapist. Also, crimes committed in a chain of events are admissible because they tend to establish the crime charged.[120] For example, when the defendant shot one person, kidnapped two others, and eventually raped one of the hostages, evidence of the shooting and the kidnapping was held admissible in the rape prosecution.[121]

2. General Reputation of Defendant

Missouri courts recognize that when a person is being prosecuted for a crime such as forcible rape, the trial must be conducted with "scrupulous fairness" in order to avoid adding additional prejudice to that which the charge itself frequently produces.[122] However, if the defendant takes the stand in his own behalf, he is subject to the same impeachment as any other witness.[123] There is an old line of cases holding that any witness could be impeached by a showing of his general bad reputation for morality (as opposed to reputation for truth and veracity).[124] The same rule was applied to defendants,[125] including defendants in rape prosecutions.[126] This rule was reversed in 1935 as to both witnesses[127] and defendants in *State v. Williams*:[128]

> [To] avoid ambiguity and injustice to the defendant as far as possible, it seems better that the impeaching testimony should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity.[129]

Thus, the present rule is that the only general reputation evidence

118. State v. Mitchell, 491 S.W.2d 292 (Mo. En Banc 1973).
119. 491 S.W.2d 292 (Mo. En Banc 1973).
120. State v. Pollard, 447 S.W.2d 249 (Mo. 1969).
121. *Id.* Any crime committed as a part of the res gestae is admissible. State v. Moore, 353 S.W.2d 712 (Mo. 1962) (stealing the victim's purse).
122. State v. Gentry, 320 Mo. 389, 8 S.W.2d 20 (1928).
123. § 546.260, RSMo 1969; Berra v. United States, 221 F.2d 590 (1955), *aff'd*, 351 U.S. 131 (1956); State v. Hammilton, 310 S.W.2d 909 (Mo. 1955); State v. Baker, 209 Mo. 444, 108 S.W. 6 (1908); State v. Shanks, 150 Mo. App. 370, 130 S.W. 451 (St. L. Ct. App. 1910).
124. State v. Shields, 13 Mo. 236 (1850).
125. State v. Clinton, 67 Mo. 380 (1878).
126. State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); State v. Gentry, 320 Mo. 389, 8 S.W.2d 20 (1928).
127. The *Williams* opinion refers to Professor Wigmore's theory proposing an exception when impeaching a prosecutrix in a rape prosecution and specifically states that the opinion does not apply to this situation. However, Wigmore's theory has been rejected in Missouri. State v. Kain, 330 S.W.2d 842 (Mo. 1960).
128. 337 Mo. 884, 87 S.W.2d 175 (En Banc 1935).
129. *Id.* at 898, 87 S.W.2d at 182. In so holding, the court reversed a second degree murder conviction because the trial court permitted the state in rebuttal to appellant's testimony to prove that appellant had a bad general reputation for morality in the community.

admissible to impeach the credibility of a defendant charged with forcible rape is his general reputation for truth and veracity.[130]

V. Conclusion

Although the present law in Missouri regarding the admissibility of character evidence in rape prosecutions is not as irrational nor anti-victim as some have alleged, there are some areas in need of reform. In determining what evidence should go to the jury, a careful weighing of the competing interests must be made. Rape subjects the victim to tremendous psychological damage as well as physical injury. Few men, save those prisoners subjected to brutal homosexual attack, can really understand the fear, humiliation, and shame suffered by the victim of a rape. Introduction of evidence attacking the victim's character aggravates this psychological damage. Yet, such evidence may be the only defense available. Rape is rarely witnessed by anyone other than the victim and the rapist. Because a rape trial is often by necessity a swearing match between the victim and the defendant, evidence of credibility is often essential. Moreover, the defendant in a rape prosecution faces the mose severe penalty the law can impose[131] and must be guaranteed a fair trial.

The jury is normally required to decide one of two questions in forcible rape prosecutions: (1) whether the defendant is the man who committed the crime, a question of identity; or (2) whether the woman voluntarily engaged in the act, a question of consent. If the issue is identity, character evidence has no relevance and should be inadmissible. The Missouri courts have properly recognized this by allowing such evidence only when consent is "in issue." However, this phrase should be more clearly defined and there should be a clear prohibition of character evidence when consent is not the issue.

When consent is the question, Missouri courts have properly recognized that prior acts of intimacy between defendant and prosecutrix have some relevance and may therefore be considered by the jury. They have also properly recognized that specific acts with others are normally irrelevant. However, Missouri courts have improperly assumed that the general reputation of the victim for morality is *always* indicative of whether she consented to the act in question. There should be a presumption against the admissibility of this type of evidence. An absolute prohibition may prejudice a defendant in the rare case where there is some special reason for its relevance. Therefore, the logical solution is to provide for the judge to hear, out of the presence of the jury, the evidence which the defendant wishes to offer together with the reasons for its relevance in that particular case. If the judge determines that the evidence is relevant, he can enter an order as to what part of the evidence may be introduced and the exact questions to be permitted. The same procedure should be followed when there are circumstances making specific acts of intercourse with others relevant. Determining these issues initially out of the hearing of the jury serves to insulate them from such prejudicial evidence in those cases where it is ultimately determined to be inadmissible. Such a procedure would more effectively enable Missouri courts to minimize psychological damage to the victim and maximize protection to the defendant.

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130. State v. Williams, 492 S.W.2d 1 (Mo. App., D. St. L. 1973).

131. The maximum penalty stated in the statute is death. However, in light of Furman v. Georgia, 408 U.S. 238 (1972) which held the imposition and carrying out of the death penalty at the discretion of the jury to be cruel and unusual punishment in violation of the eighth and fourteenth amendments, presently the maximum penalty is life imprisonment.

COLLATERAL ESTOPPEL: THE CHANGING ROLE OF THE RULE OF MUTUALITY

I. Introduction

The term res judicata traditionally refers to the effect given a prior judgment in a later action between the same parties on the same cause of action.[1] Professor Vestal has given this effect the more descriptive title of "claim preclusion."[2] As a general rule, the plea of res judicata or claim preclusion prevents the same parties or their privies from relitigating the same cause of action and bars not only all the issues previously decided, but also every matter which might have been offered and received to sustain or defeat the claim.[3]

The term collateral estoppel refers to the effect given a prior adjudication in a second action based upon a different claim or cause of action. Collateral estoppel is similar to res judicata in that its purpose is also the prevention of relitigation.[4] It is, however, more limited than res judicata because only those issues or facts actually litigated and determined in the previous suit are precluded.[5] Professor Vestal describes this effect as "issue preclusion."[6] At common law and in the majority of jurisdiction today, the doctrine of collateral estoppel also requires that the parties to the second action be the same as, or in privity with, the parties to the first

1. Restatement of Judgments § 45 (1942).

2. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964) (hereinafter cited as Vestal).

3. *Accord*, Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974); Hauber v. Halls Levee Dist., 497 S.W.2d 175 (Mo. 1973). *See also* Restatement (Second) of Judgments § 61 (Tent. Draft No. 1, 1973).

4. F. James, Civil Procedure § 11.18 (1965).

5. *See* Cromwell v. County of Sac, 94 U.S. 351 (1876); Stickle v. Link, 511 S.W.2d 848 (Mo. 1974). As a general rule, default judgments will not be given collateral estoppel effect. *Contra*, Overseas Motors, Inc. v. Import Motors, Ltd., 375 F. Supp. 499 (E.D. Mich. 1974); Braxton v. Litchalk, 55 Mich. App. 708, 223 N.W.2d 316 (1974).

6. *See* Vestal, *supra* note 2, at 28.

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Burglary tools taken from the trunk of a vehicle by officers when they arrested defendant are admissible in a burglary prosecution.[14] In the same case it was pointed out that malicious destruction of property was not a lessor offense of the charge of burglary and therefore there was no need for the trial court to instruct on such an offense.

In a burglary prosecution, evidence that when the defendant was discovered in a service station, he left the service station and ran, was admissible to show consciousness of guilt and to show flight.[15]

D. *Rape*

In a statutory rape prosecution, penetration may be shown by circumstantial evidence and slight proof of actual penetration is sufficient.[16] Generally a prima facie case can be made in a statutory rape prosecution on the uncorroborated testimony of the prosecutrix unless such testimony is contradictory with physical facts and common experience, so as to be unconvincing.[17] In this type of case evidence of similar acts committed by defendant with prosecutrix prior to the date charged in the information is admissible.[18]

Where a defendant was charged in two counts of an information[19] with assault with intent to rape and molestation of a minor, and the two counts involved occurrences at one time and place and with reference to defendant's conduct toward the same child, then the state was not required to elect, prior to the close of its case, whether to proceed on the charge of assault with intent to rape or the charge of molestation of a minor.

E. *Driving Motor Vehicle While Intoxicated*

State v. Powell[20] is a novel case in that the defendant was convicted of operating a motor vehicle while intoxicated where the evidence showed that at the time of the offense he was driving a farm tractor.

F. *Forgery*

In a forgery prosecution, evidence of the utterance by defendant of another check on the same day he uttered the check mentioned in the

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14. State v. Drake, 298 S.W.2d 374 (Mo. 1957).
15. State v. Peterson, 305 S.W.2d 695 (Mo. 1957).
16. State v. Ivey, 303 S.W.2d 585 (Mo. 1957).
17. State v. Palmer, 306 S.W.2d 441 (Mo. 1957).
18. State v. Tyler, 306 S.W.2d 452 (Mo. 1957).
19. State v. King, 303 S.W.2d 930 (Mo. 1957).
20. 306 S.W.2d 531 (Mo. 1957).

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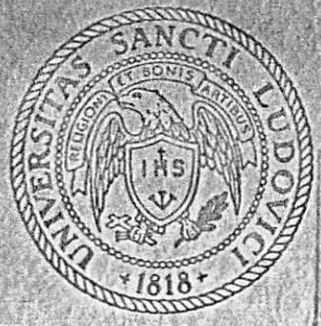

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RAPE EVIDENCE REFORM IN MISSOURI: A REMEDY FOR THE ADVERSE IMPACT OF EVIDENTIARY RULES ON RAPE VICTIMS*

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I. INTRODUCTION

On September 28, 1977, the Missouri legislature enacted House Bill 502,[1] which is designed to substantially limit the admissibility of evidence of the prior sexual conduct of the complaining witness in rape prosecutions. The statute flatly and wholly rejects the use of opinion and reputation evidence concerning the prior sexual conduct of the complaining witness. Evidence of specific instances of such conduct is admissible only under certain limited circumstances and to the extent

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1. House Bill No. 502 reads in full:

Section 1. 1. In prosecutions for the crimes of rape, attempt to commit rape, or conspiracy to commit rape, opinion and reputation evidence of the complaining witness' prior sexual conduct is inadmissible; evidence of specific instances of the complaining witness' prior sexual conduct or the absence of such instances or conduct is inadmissible, except where such specific instances are:

(1) Evidence of the sexual conduct of the complaining witness with the defendant to prove consent and the evidence is reasonably contemporaneous with the date of the alleged crime; or

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

(3) Evidence of immediate surrounding circumstances of the alleged crime; or

(4) Evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution.

2. Evidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue.

3. If the defendant proposes to offer evidence of the sexual conduct of the complaining witness under this section, he shall file with the court a written motion accompanied by an offer of proof or make an offer of proof on the record outside the hearing of the jury. The court shall hold an in camera hearing to determine the sufficiency of the offer of proof and may at that hearing hear evidence if the court deems it necessary to determine the sufficiency of the offer of proof. If the court finds any of the evidence offered admissible under this section the court shall make an order stating the scope of the evidence which may be introduced. Objections to any decision of the court under this section may be made by either the prosecution or the defendant in the manner provided by law. The in camera hearing shall be recorded and the court shall set forth its reasons for its ruling. The record of the in camera hearing shall be sealed for delivery to the parties and to the appellate court in the event of an appeal or other post trial proceeding.

relevant. Furthermore, the admissibility of this limited evidence must be approved by a process of *in camera* hearings held by the court upon written notice and offer of proof by the defendant. These new standards go far to remedy the prior "no holds barred" practice which subjected the comlaining witness in a rape prosecution to an unjustified invasion of her privacy[2] for the purposes of displaying unfairly prejudicial facts to the jury. The injustice of this invasion of privacy was augmented by the effect of sexual history evidence on the jury, producing acquittals premised on nothing but the victim's unchastity.

The Missouri rape evidence reform statute is part of a nationwide pattern of similar statutes limiting the admissibility of this type of evidence. At least twenty-four states, including Missouri, have statutes which exclude such evidence,[3] much of which was admissible under common law as relevant to the issue of consent in a prosecution for rape.[4] The purpose of these limitations is the recognition of important state interests in the conviction of rapists and the protection of rape victims.[5]

A sort of judicial sleight of hand has long characterized the common law's treatment of reputation[6] evidence regarding the rape complaining witness. Despite its highly inflammatory and misleading nature, which would normally lead to its exclusion, reputation evidence of prior sexual conduct or unchastity[7] was generally admissible as

2. *See* note 83 *infra* for some discussion of the weight of the privacy right of a witness in this context.

3. Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1, 9-10 (1976). For a comprehensive summary of rape laws throughout the United States, *see* Bienen, *Rape II*, 3 WOMEN'S RIGHTS L. REP. 90-137 (1977).

4. *See* notes 15-34 *infra* and accompanying text. The elements of the crime of rape are discussed in State v. Egner, 296 S.W. 145, 146 (1927): "At common law, there are three elements which must be present to constitute the crime—carnal knowledge, force, and the commission of the act without the consent or against the will of the woman." *See also* State v. Moore, 353 S.W.2d 712, 713 (Mo. 1962) and State v. Adams, 380 S.W.2d 362, 367 (Mo. 1964).

When evidence of physical force exists, it has been held that the prosecution must show the victim's "utmost resistance". *See* Missouri Approved Instructions-Criminal 6.40 and State v. Cottengim 12 S.W.2d 53 (Mo. 1928). *See generally* Comment, *Admissibility of Character Evidence in Rape Prosecutions in Missouri*, 41 MO. L. REV. 506, 514-15 (1976) for a discussion of several exceptions to this rule. *See also* Richardson, *Rape*, in COMMENTS ON MISSOURI APPROVED INSTRUCTIONS—CRIMINAL 6 (O. Richardson ed. 1974).

A more recent case seemed to uphold this reasoning by its discussion of force or threats of force "serving in lieu of the requirement of resistance." State v. Adams, 380 S.W.2d 362, 367 (Mo. 1964). *See also* State v. Abron, 492 S.W.2d 387 (Mo. App. 1973) After citing R. PERKINS, CRIMINAL LAW, 120 (1957) which states that lack of evidence of great force generally disproves lack of consent, Judge Richardson, in his comment on Missouri's rape instructions, notes that utmost resistance is not required of victims of other assaults, such as robbery, which is also a "non-consensual and forcible version of an ordinary human interaction". *Id.* Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 638 (1976).

5. *See* notes 83-87 *infra* and accompanying text.

6. Reputation evidence is merely one type of evidence of disposition or character. 3 J. WIGMORE, EVIDENCE, § 920 (1940) [hereinafter cited as WIGMORE or WIGMORE, CHADBOURN REV.] It is the net expression of a multitude of personal opinions, based more or less on personal conversation. *Id.*

7. Unchastity is a term of moral judgment used to describe a woman's conduct other than virginity or marital fidelity. Comment, *California Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS LAW J. 1551, 1551 (1975). [hereinafter cited as *California Evidence Reform*]

relevant to the issue of lack of consent.[8] Evidence of consent is clearly admissible in the prosecution of a crime in which lack of consent is an element, such as robbery or kidnapping. But would anyone seriously argue that, without more, reputation evidence of gift-giving or voluntary travels, analogous to consensual intercourse in a rape prosecution, would be admissible and relevant to show consent to a robbery or kidnapping.[9] By contrast, even though sexual intercourse is a normal and frequent activity, evidence of the prior sexual conduct of the complaining witness in a rape case, absent even the slightest connection to the alleged crime, has been admitted to show consent.[10] The admission of such evidence may transform the trial into a prosecution of the complaining witness and may destroy the rape prosecution of the defendant, because of the emotionally charged and unduly prejudicial character of this evidence.

In the past, courts frequently ignored the undue prejudice resulting from the admission of this evidence. It may be convincingly argued that the courts unconstitutionally abused their discretion by admitting such reputation evidence against complaining witnesses in rape cases, while excluding it in other cases.[11] The result was to create two classes of complaining witnesses and a potential claim of discrimination in the administration of the law, in violation of the equal protection clause of the Fourteenth Amendment.[12] Furthermore, the admission of this repu-

8. See note 29 and accompanying text *infra*.

9. A mock cross-examination of a robbery victim, conducted in the manner of rape interrogation illustrates the irrelevancy of the use of evidence of former gifts in a robbery prosecution:

> Mr. Smith, you were held up at gunpoint on the corner of First and Main?
> Yes.
> **
> . . . Have you ever been held up before?
> No.
> Have you ever given money away?
> Yes, of course.
> And you did so willingly?
> What are you getting at?
> Well, let's put it like this, Mr. Smith. You've given money away in the past. In fact, you have quite a reputation for philanthropy. How can we be sure that you weren't contriving to have your money taken from you by force?

Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUMBIA L. REV. 1, 26, note 163 (1977), [hereinafter cited as *Berger*], citing *House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments*, 61 A.B.A.J. 465 (1975). [hereinafter cited as *House of Delegates*]

10. *See* Landau, *The Victim as Defendant*, TRIAL (July-August, 1974), and Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 398 (1975).

11. Yick Wo v. Hopkins, 6 S. Ct. 1064 (1886) exemplifies the rule that a consistent exercise of direction more harshly with respect to a suspect class is a denial of the equal protection of the Court. Here the Supreme Court reversed the conviction of a Chinese person for the violation of an ordinance which which was consistently unenforced against non-Chinese persons.

12. It is possible that this disparate treatment could form the basis of a claim of a Fourteenth Amendment equal protection violation against rape complaining witnesses, as opposed to the claim of non-constitutional adverse impact on rape

tation evidence may have had a significant effect on the outcome of rape prosecutions. Evidence that juries consider more than the proof of the elements of rape is found in the conclusion of a famous study that judges agreed with jury verdicts in rape prosecutions only forty percent of the time.[13] The admission of highly prejudicial reputation evidence may account for the insufficiency of concurrence. These objections demonstrate the serious errors in the prior practice.

Nevertheless, in conjunction with their position that the courts should retain absolute discretion to determine the admissibility of evidence, the opposition to House Bill 502 argued that the statute violates Sixth and Fourteenth Amendment rights.[14] In reaching the conclusion that House Bill 502 does not violate defendants' constitutional rights, but merely forecloses the admissibility of unfairly prejudicial evidence, this comment will first set forth the pertinent law of evidence. It will compare House Bill 502 with Missouri common law and assess the statute's practical effect on rape prosecutions. Finally, it will analyze

complaining witnesses because of the application of neutral evidentiary rules. The admission of evidence at trial is arguably state action. The classes would consist of one class of complaining witnesses of whom utmost resistance is required, i.e., rape complaining witnesses, and another of whom it is not required, i.e., all other assault complaining witnesses. Because the basis of the distinction is sex, since rape statutes provide that only women can be raped (*see, e.g.*, MO. REV. STAT. § 559.260 (1969) and the revised criminal code, effective 1978, 566.030), the classification is arguably sex discrimination. Therefore, it could merit middle-level scrutiny, in the manner of Reed v. Reed, 92 S. Ct. 251 (1971) or strict scrutiny as used by a four justice plurality in Frontiero v. Richardson, 98 S. Ct. 1785 (1973). The result might be a finding of invidious discrimination. Otherwise, the court would use a rational basis test, and sustain the classification if "there clearly appears in the relevant materials some overriding state interest justifying the distinction based on class." McLaughlin v. Florida, 85 S. Ct. 223 (1964). However, it is possible that the Supreme Court would not find the distinction a pretext for invidious discrimination and would sustain it as no equal protection violation, as it did the classification based on pregnancy in Gedulding v. Aiello, 94 S. Ct. 2485 (1974), notwithstanding the dissent's argument that the denial of disability benefits for pregnancy resulted in two classes: one of women who receive incomplete disability coverage and the other of men who receive complete coverage.

The reluctance of the Supreme Court to find a violation of the equal protection clause is further demonstrated by cases such as Snowden v. Hughes, 64 S. Ct. 397 (1944) which held that unequal application of statutes fair on their face is not a violation of equal protection unless intent to discriminate is present. The application of evidentiary rules may be seen as analagous to the enforcement of statutes. *See* Washington v. Davis, 96 S. Ct. 2040 (1976) which held that the adverse impact of an employment qualifying exam was not an equal protection violation since no purposeful discrimination was shown.

13. H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 252-253 (1966). (hereinafter cited as *Kalven v. Zeisel* In sixty percent of cases of simple rape, juries acquitted when judges would not have done so, while in cases of aggravated rape (i.e. cases involving extrinsic violence or multiple assailants, or cases in which the victim and defendant were strangers), the discrepancy was only twelve percent.

14. Professor Michael A. Wolff, Associate Professor of Law, Saint Louis University School of Law, who drafted the rape reform statute for the South Dakota legislature, stated that the reform statutes also raise the question of whether the state legislatures have infringed on the power of courts in violation of state constitutions. Legislation limiting the admission of evidence in a judicial proceeding suggests some overstepping of the boundaries separating the judicial and legislative powers. However, in light of the acceptance of the Federal Rules of Evidence by courts of the federal system, such a claim of violation of the separation of powers would seem to hold little weight.

the constitutional rights of defendants as they interact with the state's interests in the conviction of rapists and the protection of rape victims.

II. ADMISSIBILITY OF CHARACTER EVIDENCE

Evidence of the past sexual conduct of the victim in a rape prosecution has generally been admitted for one of two purposes: either, to show that the victim consented, or, to impeach the victim's testimony on the theory that unchaste women lie.[15] The logic of these rationales for admission is deeply imbedded in distrust of the female victim and an excess of solicitude for the defendant.[16] This position is evident in light of the common law origin of these rules. Character evidence in any form, whether reputation,[17] opinion based on observation,[18] or specific acts,[19] is generally inadmissible to prove that the person characterized acted in conformity with that character on a particular occasion.[20] Common sense indicates that evidence of character is relevant to prove action in conformity with that character, i.e., it has *some* probative value.[21] It therefore has prima facie admissibility, unlike non-relevant evidence, which is automatically excluded.[22] However, relevancy alone is not the key to admissibility. The court must balance probative value of the proffered evidence against the dangers of undue prejudice to either side, and exclude the evidence if the negative effects outweigh

15. A majority of jurisdiction permitted evidence of the complaining witness' reputation for chastity or relevant to the issue of her consent. *See Admissibility of Character Evidence in Missouri*, *supra* note 4, at 517. Missouri common law cases adhered to this rule. *Id.* On the other hand, only a few jurisdictions admit evidence of unchastity for purposes of impeachment. *Id.* at 518. Missouri rejected the use of evidence of unchastity for impeachment in State v. Williams, 87 S.W.2d 175 (1935). *See generally* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 91 (2d ed. E. Cleary 1972) (hereinafter cited on MCCORMICK)

16. *See Berger*, *supra* note 9, at 27. Wigmore in his treatise on evidence illustrates this anti-female bias through his own attitudes. 3 A WIGMORE *supra* note 6, at § 924(a).

17. Reputation evidence is designed to convey to the jury the opinion of the community as to the character of the witness. See State v. Cook, 207 S.W. 831, 833 (Mo. 1918). See generally WIGMORE, CHADBOURN REV., *supra* note 6, at §§ 920, 1609.

18. Opinion evidence is based on the personal knowledge of one who has observed a person. WIGMORE, CHADBOURN REV., *supra* note 6, at § 920.

19. Evidence of specific acts is characterized by concrete statements of fact, *e.g.* date, time, place. Permanent disposition might be inferred from particular acts. *Id.*

20. MCCORMICK, *supra* note 15, at 445.

Cf. FED. R. EVID. 404(a): "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . ."

21. Relevant evidence is defined as that which renders a desired inference more probable than it would be without the evidence. *Id.* at 437.

Cf. FED. R. EVID. 401: "Relevant evidence is that 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."

22. MCCORMICK, *supra* note 15, at 433-434, citing THAYER, PRELIMINARY TREATISE ON EVIDENCE, 264-266 (1898). *Cf.* FED. R. EVID. 402: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

the probative value.[23] Prejudice here means more than simply damage to the other side.[24] Rather, it refers to the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy.[25] In this context, prejudice means an undue tendency to move the fact finder to decide on an improper basis, commonly, an emotional one.[26] No evidence could be better calculated to call forth an irrational and emotional basis for acquittal than evidence of the past unchastity of the victim. Yet despite the minimal probative value of character evidence to show action in conformity on a particular occasion, recognized by the general rule rejecting its admissibility, plus the massive propensity for unfair prejudice, the common law permitted this evidence to be dangled before the jury, distracting them from the more significant issues and creating bias against the rape victim.

Examination of the purported relevancy of evidence of character as shown by sexual conduct demonstrates the weakness of the logic used.

First, the evidence was permitted simply to impeach the witness. Character evidence has often been admitted to attack a witness' credibility.[27] Most jurisdictions limited the scope of this evidence to character traits relating specifically to truth and veracity, excluding evidence of a witness' general morality, yet prior sexual conduct of a rape victim, with no clear relation to veracity and within the scope only of general morality, was admitted by some courts to discredit the credibility of the rape victim.[28] Neither common sense nor any application of cold logic support the conclusion that one's sexual activity sheds light on one's propensity for telling the truth. A liar may refrain from all but marital sex; a promiscuous woman may be absolutely truthful; and for the average contemporary woman no connection exists between her sex life and her responsibility to testify truthfully.

23. McCORMICK, *supra* note 15, at 440, 445.
Cf. FED. R. EVID. 403: "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."

24. McCORMICK, *supra* note 15, at 439. E.g., Daniels v. Dillinger, 445 S.W.2d 410 (Mo. App. 1969).

25. *Id.*

26. *Id.*

27. Impeachment evidence is not offered to prove or disprove a specific fact or element of a crime, as is substantive evidence. *California Evidence Reform*, *supra* note 7, at 1557-58.
The other modes of impeachment are prior inconsistent statements, bias, sensory defect, and contradiction. McCORMICK, *supra* note 15, at 66.

28. McCORMICK, *supra* note 15, at 91. Missouri law follows this majority rule. State v. Williams, 87 S.W.2d 175, 182 (Mo. 1935); State v. Williams, 492 S.W.2d 1, 4 (Mo. App. 1973). Also see State v. Brookshire, 368 S.W.2d 373, 385 (Mo. 1963), specifying the use of reputation evidence for truth and veracity for impeachment.
By contrast, California allows evidence of morality for impeachment. Under the California Evidence Code, evidence of a complaining witness' sexual conduct with persons other than the defendant may be admitted, as credibility evidence, despite its inadmissibility to prove consent. *California Evidence Reform*, *supra* note 7, at 1557, citing B. WITKIN, CALIFORNIA EVIDENCE, § 335 (2d ed. Supp. 1974).

Of even greater significance was the prior practice of admitting character evidence regarding the complaining witness when offered by a defendant as relevant to the issue of consent.[29] A showing of consent to sexual intercourse is then an affirmative defense to a charge of rape.[30] The use of this character evidence to show action in conformity is squarely contradictory to the general rule and is nonsensical. Without some additional factual nexus between the sexual conduct and the issue of consent, past non-marital sexual activity alone simply does not make consent in a particular instance so much more likely that the relevancy of this evidence will not be outweighed by the unfair prejudice, delay and distraction inherent in its presentation to the jury.

Exceptions to the general rule of exclusion of character evidence have commonly been made at the defendant's discretion.[31] For example, it is almost universally recognized that when a defendant has offered evidence of self-defense in a murder trial, the defendant may introduce evidence of the deceased's character for turbulence and violence, which the state may then rebut.[32] Similarly, the undue prejudice is lacking when the defendant offers character as evidence of innocence.[33] Preju-

29. Noting that the non-consent of the complainant is a material element of the crime of rape, Wigmore found that "the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent." WIGMORE, *supra* note 15, at § 62.
Cf. FED. R. EVID. 404 (2): "Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor".

30. Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309, 321 (1973): "In criminal cases an affirmative defense is one which does not dispute the occurrence of a certain event or transaction; it attempts to legitimize it (consent), specially excuse it (duress, self-defense, insanity, mistake), condemn it (entrapment), or establish that it transpired without action by the defendant (alibi)."
Certain of these affirmative defenses, specifically substantive law defenses, negative guilt by cancelling out the existence of some required element of a crime, such as lack of the necessary mental state. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, 46-47 (1972) Other affirmative defenses demonstrate justification or excuse as a bar to imposition of liability. *Id.* Consent as a defense to rape is the latter type.
Missouri law utilizes the term special negative defense instead of affirmative defense. MISSOURI APPROVED INSTRUCTIONS—CRIMINAL § 2.04, defines special negative defense as a defense (1) upon which a defendant does not carry the burden of proof (self-defense, accident, honest claim to ownership or use of property, entrapment, etc.); (2) supported by enough evidence to raise reasonable doubt of defendant's guilt; and (3) presenting a fact or set of circumstances, other than a bare denial, which would negate one or more elements of a crime. LAFAVE & SCOTT at 48, cites State v. Strowther, 116 S.W.2d 133 (Mo. 1938), involving defense of another, as an example of this principle.
Consent, whether called an affirmative defense or a special negative defense, must be disproved by the prosecution in rape trials beyond a reasonable doubt.

31. McCORMICK, *supra* note 15, at 454. *See, e.g.*, State v. Jackson, 373 S.W.2d 4, 7-9 (Mo. 1963), in which the defendant raised his character as a defense to the charge of assault with intent to kill.
Cf. FED. R. EVID. 404 (1): "Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same".

32. McCORMICK, *supra* note 15, at 461. *See, e.g.*, State v. Bounds, 305 S.W.2d 487, 490-491 (Mo. 1957), involving the identity of the aggressor in a homicide case.

33. McCORMICK, *supra* note 15, at 433-434, citing THAYER, PRELIMINARY TREATISE ON EVIDENCE, 264-266 (1898). McCormick's discussion significantly does not treat prejudice to the prosecution.

dice to the prosecution was generally disregarded. This solicitude for the defendant was carried over into rape prosecutions, where the sexual character of the offense and the evidence combined to generate an especially prejudicial effect.[34] The trial was transformed into a test of the victim's morality. Fairness to the defendant does not justify admission of inflammatory evidence with so little probative value.

This excessive solicitude for the defendant combined with an antiquanian view of female sexuality to restrict severely the state's ability to prosecute rape offenders and to frustrate and discourage the victim in any attempt to seek justice for her injury.

III. The Missouri Response

House Bill 502 states: "In prosecutions for the crimes of rape, attempt to commit rape or conspiracy to commit rape, opinion and reputation evidence of the complaining witness' prior sexual conduct is inadmissible."[35] The exclusion of reputation evidence of a complaining witness' prior sexual conduct is divergent from Missouri common law, which had always found such evidence admissible as relevant to the element of lack of consent.[36] The exclusion of opinion evidence is,

34. The possibility that legislation similar to House Bill No. 502 should be adopted with respect to other sex-related crimes will not be treated in this article. It would take the discussion far afield from the immediate concerns at hand, that is, the new Missouri bill. Rules such as those adopted in this bill would, however, seem to be fair and beneficial to the just prosecution of other sexual offenses, wherever sexual history evidence threatens to overwhelm the rationality of a jury. *Cf.* N.Y. Crim. Pro. Law § 60.42 (McKinney Supp. 1977) applying to any prosecution for any offense defined in N.Y. Penal Law, Art. 130 (McKinney 1975) which includes rape, sodomy, sexual abuse and certain other forms of sexual misconduct. *Cf.* also Ind. Code §§ 35-1—32.5-1. (Burns Supp. 1975) relating to the crimes of rape, sodomy, assault and battery and incest and S. 1437, 95th Cong., 1st Sess. § 1646(b)(2)(1977) excluding evidence the victim's past sexual behavior "except as otherwise required by the Constitution."

35. H.B. 502 § 1.1.

36. *See* State v. Kain, 330 S.W.2d 842, 845 (Mo. 1960); State v. Yowell, 513 S.W.2d 397, 403 (Mo. 1974).

For a summary of Missouri cases law on rape prosecution, see Comment, *Admissibility of Character Evidence in Rape Prosecutions in Missouri*, 41 Mo. L. Rev. 506 (1976).

Cf. Fed. R. Evid. 405 (a) which states: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. . . ."

The D.C. Court of Appeals recently held that, in the absence of unusual circumstances, the probative value of reputation evidence to prove consent or for impeachment is outweighed by its unduly prejudicial effect on rape prosecutions. McLean v. United States, 46 U.S.L.W. 2153 (1977). It said that the reputation of a woman for unchastity raises unnecessary collateral issues which are nearly impossible to rebut, which divert the jury's attention from the issues at trial and result in undue prejudice to the complaining witness which greatly outweigh its limited probative value.

Until McLean, federal case law had unanimously sustained the admissibility of reputation evidence of a complaining witness' prior sexual conduct. *E.g.*, Hicks v. Hiatt, 64 F.Supp. 238 (M.D. Pa. 1946); Gish v. Wisner, 288 F. 562 (5th Cir. 1923). *See also* Lovely v. United States, 175 F.2d 312, 314 (4th Cir. 1949), *cert. denied*, 70 S.Ct. 38 (1949).

however, consistent with the common law.[37]

The bill further states that "evidence of specific instances of the complaining witness' prior sexual conduct or the absence of such instances or conduct is inadmissible, except . . ."[38] The general exclusion of evidence of specific instances of sexual conduct comports with Missouri case law.[39]

Following the bill's general exclusionary language are a number of exceptions with respect to evidence of specific instances of a complaining witness' prior sexual conduct. Evidence of specific instances of the complaining witness' prior sexual conduct are admissible if it is "[E]vidence of the sexual conduct of the complaining witness with the defendant to prove consent, and the evidence is reasonably contemporaneous with the date of the alleged crime."[40] The requirement that evidence of the sexual conduct of the complaining witness with the defendant, when admissible to prove consent, be reasonably contemporaneous with the date of the alleged crime is a departure from Missouri common law, which had found all sexual history between the two relevant to consent.[41]

Another exception to the general prohibition of evidence of specific instances of a complaining witness' prior sexual conduct is "[E]vidence of specific instances of sexual activity showing alternative source of

The proposed revision of the Federal Criminal Code also restricts inquiry into the prior sexual conduct of victims and eliminates the need for corroabation of the alleged rape. S. 1437, 95th Cong., 1st Sess. (1977); H.R. 6869, 95th Cong., 1st Sess. (1977). *reprinted in* 1977 U.S. Code Cong. & Ad. News.

37. *See* State v. Kain 330 S.W.2d 842 (Mo. 1960), *Cf.* Fed. R. Evid. 405 (a) which states: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by . . . testimony in the form of an opinion. . . ." Thus, federal law differs from both Missouri case law and H.B. 502.

38. H.B. 502 § 1.1. It would appear that consistency requires that H.B. 502 must exclude both specific instances and the absence of such. It must be recognized, however, that evidence of the absence of prior sexual conduct would benefit prosecutions in which the complaining witnesses have no sexual history.

39. State v. Ruhr, 533 S.W.2d 656 (Mo. App. 1976); State v. Kain, 330 S.W.2d 842 (Mo. 1960) State v. Taylor, 8 S.W.2d 29 (Mo. 1928).

In McLean v. United States, 46 U.S.L.W. 2153, cited in footnote 41, the court held that, in the absence of unusual circumstances, the probative value of evidence of specific instances of conduct to prove consent or for purposes of impeachment is generally outweighed by its unduly prejudicial effect in prosecutions for rape. The court reasoned that the mere fact that a woman had consented to sexual intercourse on one occasion was not sufficient evidence that she would so consent on another occasion. The court did note, however, that if specific evidence would refute scientific or physical evidence, i.e. the alleged loss of virginity, the origin of semen, pregnancy or disease, such evidence may be admitted as its probative value would outweigh any potential prejudicial effects.

The *McClean* result conflicts with several other federal decisions which have admitted specific instances of conduct to prove both consent and credibility. *See* 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[06], at 404-36 (1877) (citing Packineau v. United States, 202 F.2d & 681 (8th Cir. 1953)).

40. H.B. 502 § 1.1(1).

41. State v. Northern, 472 S.W.2d 409 (Mo. 1971). The case cites a quote of Wigmore that prior intimacies are admissible as showing ". . . an inclination on her (the complaining witness's) part to consent to his (the defendant's) embraces and thus negating an essential element of the crime charged . . ." Wigmore, *supra* note 5, at § 402, at 369. The case also cites § 200, at 688. *See also Admissibility of Character Evidence in Missouri*, *supra* note 4, at 517.

semen, pregnancy, or disease."[42] The admission of this evidence is no change from case law, which permitted evidence of specific acts to explain medical evidence introduced by the state showing a ruptured hymen, venereal disease, or pregnancy[43] and evidence of alternate sources of semen.[44]

Another exception is "[E]vidence of the immediate surrounding circumstances of the alleged crime."[45] House Bill 502's sponsor stated that this exception was intended to protect defendants from false claims of rape by prostitutes and young women who had participated in group sexual intercourse prior to the alleged rape.[46]

A final exception is "[E]vidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proven by the prosecution."[47] This exception refers to cases of statutory rape in which the complaining witness is between the ages of sixteen and eighteen, in which case, under the old Missouri code, the complaining witness' previously chaste character must be proven.[48] This exception will be unnecessary when the revised criminal code becomes effective in 1979.[49]

The statute further states that "[E]vidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue."[50] This specification is simply a restatement of the general rule that non-relevant evidence is inadmissible. It should be noted, however, that the statute in this section makes no explicit reference to the necessity of weighing any potential prejudice which might result from admission.

The procedure for admission of evidence under House Bill 502 is as follows:

> "If the defendant proposes to offer evidence of the sexual conduct of the complaining witness under this section, he shall file with the court a written motion accompanied by an offer of proof or make an offer of proof on the record outside the hearing of the jury. The court shall hold an in camera hearing to determine the sufficiency of the offer of the proof and may at that hearing hear evidence if the court deems it necessary to determine the sufficiency of the offer of proof. If the court finds any of the evidence offered admissible under this section the court shall make an order stating the scope of the evidence which may be introduced."[51]

42. H.B. 502 § 1.1(2).
43. 75 C.J.S., Rape § 63, at 535 (1952), cited with approval in State v. Kain, 330 S.W.2d at 846.
44. Evidence of a specific act of intercourse the same day as the alleged rape has been held admissible because it would account for the presence of sperm in the vagina of the complaining witness. State v. Daughter, 126 S.W.2d 237 (Mo. 1939).
45. H.B. 502. § 1.1(3).
46. Interview with Missouri State Senator John Buechner, H.B. 502's sponsor, on October 10, 1977.
47. H.B. 502 § 1.1(4).
48. *See* MO. REV. STAT. § 559.300 (1969).
49. The Missouri Revised Criminal Code nowhere requires that previously chaste condition be demonstrated in defining the offenses of rape and sexual assault in the first and second degrees. *See* MO. ANN. STAT. §§ 566.030-566.050 (Vernon 1978 Special Pamphlet).
50. H.B. 502 § 1.2.

The requirement of written motions accompanied by offers of proof or of offers of proof outside the hearing of juries,[52] and of in camera hearings[53] to determine the sufficiency of the proof, are departures from common law. The standard practice had been that objections to evidence be made subsequent to the offer of evidence at trial.[54]

IV. PRACTICAL EFFECT OF HOUSE BILL 502

With this understanding of the changes in the law made by the rape evidence reform statute, it may now be asked what effect will be felt in the courtroom. This will depend largely on the use of the discretion left to the courts by the statute.

The defendant will still have every other normal means of impeachment of the victim. Character evidence relating to truth or veracity remains admissible for impeachment, since the statute excludes only certain evidence of prior sexual conduct. Since prior sexual conduct has no relevancy to or bearing on the probable veracity of the victim, it should be rejected. However, the exclusion does not prevent a defendant from showing that a complaining witness is probably lying through the use of other impeachment evidence.[55]

The elimination of the free use of reputation evidence to show consent is a major departure from the common law.[56] The opinion and reputation evidence excluded by House Bill 502 was previously used to lead to the inference that a woman, who was thought by a community to participate often in sexual activities, probably did so again voluntarily and that, therefore, there was no rape. The statute forecloses this argument of the defendant upon a determination that it has minimal logical force and is unfairly prejudicial because of its high emotional charge.

The second clause of Section one presents a more complex set of rules to govern the use of evidence of specific instances of sexual conduct to show consent or disprove the defendant's alleged role. Fairness to the defendant mandates admission of such evidence since in many instances it may be of great probative value.[57] The Missouri

51. H.B. 502 § 1.3.
52. Such motions are similar to a motion in limine, defined as a pretrial request for an order directing the opposing party, his counsel and witnesses to refrain from introducting prejudicial evidence, either directly or indirectly, without first determining its admissibility outside the presence of the jury. Comment, *Motion in Limine*, 29 ARK. L. REV. 215, 217 (1975). [hereinafter cited as *Motion in Limine*].
53. An *in camera* hearing is a review of evidence by a court for the purpose of determining its admissibility.
54. *Motion in Limine*, *supra* note 52, at 215.
55. This rule coincides with that of most jurisdictions which reject reputation evidence of unchastity or hearing on the veracity of the witness. *See* note 15 *supra*.
56. *See* note 15 *supra*.
57. The constitutional test is set forth in Davis v. Alaska, 94 S. Ct. 1105 (1974) and Chambers v. Mississippi, 93 S. Ct. 1038 (1973). *See generally* Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause*, 9 IND. L. REV. 418 (1976).

legislature, nevertheless, has stringently limited the use of this type of evidence to those situations in which its probative value is greatest.

Each of the statutory exceptions marks out an area of discretion in which the trial judge will be free to determine the admissibility of the evidence. The statute's effectiveness in limiting the admission of such material will therefore be determined by the trial judge's interpretation of terms such as "reasonably contemporaneous," "immediate surrounding circumstances" and relevancy. Since rulings on relevancy must "filter through the judge's experience, his judgment, and his knowledge of human conduct and motivation,"[58] thereby introducing some subjectivity, determinations of the relevancy of sexual conduct may vary with trial judges. It is possible that all evidence of : specific instances and of prior sexual conduct between a complaining witness and a defendant will be admissible as reasonably contemporaneous and relevant to the issue of lack of consent.[59] The "immediate surrounding circumstances" clause further protects a defendant from false charges of rape by a complaining witness who actively participated sexually with the defendant but claimed rape. Moreover, this clause may even unfairly prejudice the state's case by permitting an argument for victim precipitation, one form of which is defined as the rapist's interpretation of the victim's non-verbal behavior as communicative of an invitation to sexual intercourse.[60] The immediate surrounding circumstances may clearly be relevant to the issue of consent and must be admitted in fairness to the defendant where they tend to make consent more probable, but they should not be allowed to cloud the jury's thinking where consent is not an issue or the evidence is otherwise irrelevant.

Another factor will encourage admissibility of evidence falling within these exceptions. The Missouri statute lacks the provision found in most similar statutes that the probative value of evidence must not be outweighed by its prejudicial value, or some other enumerated collateral policy.[61] The lack of such a provision may increase admissibility, since the statute directs courts to consider only relevancy, or probative value. Although the act does not preclude determinations that certain evidence is unduly prejudicial, conservative trial judges may not look beyond a minimal assessment of relevancy.

The final and major procedural reform of the bill is contained in the provision for *in camera* approval of the evidence outside of the presence of the jury. This shield precludes discussions of admissibility in the presence of juries. In rape trials, juries have been exposed to much evidence of specific instances of complaining witnesses' prior sexual conduct proscribed by common law, in objectionable questions posed by shrewd defense counsel.[62] When objection is made, jury members feel that the objecting counsel is trying to keep evidence from them.[63] A defense counsel can therefore disadvantage an opponent by continual attempts to transgress the boundary of admissibility. Furthermore, once juries have been exposed to prejudicial material, the assumption that the unfair effects can be overcome by jury instructions to disregard the material "all practicing lawyers know to be unmitigated fiction."[64]

58. McCORMICK, *supra* note 15, at 438.
There is no test for relevancy other than the collective wisdom of appellate judges. Washburn, *Rape Law: The Need for Reform*, 5 N. MEX. L. REV. 279, 295 (1975) [hereinafter cited as *Washburn*], citing James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 693-705 (1941).

59. Interview with Allen Harris, St. Louis defense attorney, August 11, 1977. Mr. Harris predicted that all evidence of sexual conduct between former consenting partners will be admitted as before, as relevant to consent, showing proclivity or in mitigation, except for evidence of prior rape. He further anticipated that no evidence would be excluded as not reasonably contemporaneous, noting that he had never encountered a case involving a long span of time between consensual sexual conduct between two persons, followed later by an alleged rape of one by the other.

60. M. AMIR, PATTERNS IN FORCIBLE RAPE, 494 (1971): ". . . a man can interpret verbal and non-verbal behavior . . . a woman's behavior, if passive may be seen as worthy to suit action, and if active it may be taken as an actual promise of her access for one's sexual intentions." *E.g.* drinking with a man prior to his alleged rape. *Id.* at 22.
In S. BROWNMILLER, AGAINST OUR WILLS, 396 (hereinafter cited as BROWNMILLER), it was defined it more succinctly, as "When the victim agreed to sexual relations but retracted before the actual act or when she clearly invited sexual relations through language, gestures, etc." This study determined that 4.4% of rapes were victim-precipitated, while the Amir study, which used the vague standard of the rapist's interpretation of the victim's actions, found the figure to be 19% BROWNMILLER, at 396-397.
The absurdity of Amir's broader concept of victim precipitation is placed in bold relief by a mock cross-examination of a robbery victim, conducted in the manner of a rape interrogation.

> What time did this holdup take place, Mr. Smith?
> About 11:00 P.M.
> You were out on the street at 11:00 P.M. Doing what?
> Just walking.
> Just walking? You know that it's dangerous being out on the street that late at night. Weren't you aware that you could have been held up?
> I hadn't thought about it.
> What were you wearing at the time, Mr. Smith?
> Let's see . . . a suit. Yes, a suit.
> An *expensive* suit?
> Well, yes. I'm a successful lawyer, you know.
> In other words, Mr. Smith, you were walking around the streets late at night in a suit that practically advertised the fact that you might be a good target for some easy money, isn't that so? I mean, if we didn't know better, Mr. Smith, we might even think that you were *asking* for this to happen, mightn't we?

House of Delegates, *supra* note 9, at 464.

61. *Rudstein*, *supra* note 3, at 11-12, citing, *e.g.*, OHIO REV. CODE ANN. §§ 2907.02 (D), (E) (Supp. 1975).

62. Discussions with St. Louis prosecuting attorney Marion Eisen, August 10, 1977, who testified regarding H.B. 502 before the Missouri legislative committee hearings, and with St. Louis County assistant public defender Mary Fiser, August 25, 1977. Ms. Fiser estimated that defense counsel knowingly ask objectionable questions to attack complaining witnesses in seventy-five percent of rape prosecutions. She stated that they refrain from "hitting hard" on dates, times, and places of sexual conduct only when the complaining witnesses are ones with whom juries are sympathetic.

63. *Motion in Limine*, *supra* note 52, at 216, citing Armstrong, *Objections to Evidence at Jury Trials: A Multiple Review*, 23 TENN L. REV. 943, 945 (1955).

64. Krulewitch v. United States, 69 S. Ct. 716, 723 (1949) (Jackson, J. concurring).

In camera hearings resulting in non-admission of evidence could thus appreciably change rape prosecutions, since any references at trial to the excluded evidence or to rulings on it by defence counsel could result in mistrials, the granting of motions for new trials, or contempt of court citations.[65]

Such results are more likely when determinations of admissibility have been made out-of-court, rather than in spontaneous rulings from the bench. Defense lawyers are rarely cited for contempt because of their familiarity with trial judges' limits.[66] Thus, in this emotional area, an *in camera* hearing would enhance the fair conduct of the trial and prevent unjustifiable emotional distress inflicted on the victim.

V. Rape Evidence Reform and the Constitution

Having observed the probable effects of the statute and its general operation, there remain certain questions with respect to the constitutionality of the legislation or parts thereof. The constitution above all mandates fairness in criminal proceedings.[67] The Missouri rape shield statute must be judged in light of this standard.

The principal opposition to House Bill 502 and similar legislation in other states rests upon the charge that this type of statute denies the defendant the right to confront the complaining witness under the Sixth Amendment and the more broadly defined right to a fair trial under the Fourteenth Amendment.[68] To properly address this issue it is necessary first to set the appropriate constitutional standards and second to consider the various elements of this legislation in view of those standards.

65. *Motion in Limine*, *supra* note 52, at 218-219.
66. Interview with Sen. Buechner, *supra* note 50.
67. Chambers v. Mississippi, 93 S. Ct 1038, 1045 (1973).
68. *See, e.g.*, 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, 408 (1975) [hereinafter cited as *Hofstra Note*]

Another approach focuses on the claim that exclusion of evidence by rape reform legislation is unfair to a defendant's right to be considered innocent until proven guilty, and to his right to participate in the fact determining process by offering evidence to cast doubt on the prosecution's case. Herman, *What's Wrong with the Rape Reform Laws?*, 3 Civ. Lib. Rev. 60, 70 (Dec. 1976/Jan. 1977).

Another proferred justification for the admission of sexual conduct evidence is the lack of a corroboration requirement in most jurisdictions. *See* Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L. S. 1365, 1367 (1972). *See also* Wigmore, *supra* note 5, at § 2061. Recent Missouri cases are generally consistent with other jurisdictions in either finding corroboration in some form or holding it unnecessary because the victim's testimony was not contradictory or unbelievable. Richardson, *Rape* in Comments on Missouri Approved Instructions—Criminal 9 (O. Richardson ed. 1974), citing State v. Davis, 497 S.W.2d 204 (Mo. App. 1973); State v. Garrett, 494 S.W.2d 336 (Mo. 1973); State v. Neal, 484 S.W.2d 270 (Mo. 1972); and State v. Edwards, 476 S.W.2d 556 (Mo. 1972). Nevertheless, surveys show that prosecutors seldom bring rape cases to trial without some form of corroborative proof because, regardless of the jurisdiction's rules of evidence, juries refuse convictions without corroboration. Note, *The Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365, 1382-83 (1972). Therefore, the justification is hollow, since corroboration evidence is a practical necessity, if not a legal one.

A. *Constitutional Safeguards in Rape Prosecution*

The constitutional infirmity of legislation similar to this Missouri act has been predicted[69] on the basis of the Supreme Court decisions in *Chambers v. Mississippi*[70] and *Davis v. Alaska*.[71] Critics of rape reform legislation assert that these cases demonstrate that the rejection of evidence of the specific prior sexual conduct and general reputation of the complaining witness constitute violations of the sixth and fourteenth amendments.[72] Clearly the defendant cannot be unfairly frustrated in the assertion of his right to question the complaining witness or in the presentation of witnesses on his own behalf. These rights are embodied both in the specific guarantees of the sixth amendment and the more general right of a fair trial and due process in the fourteenth.[73]

While it is indisputable that these rights inhere in the Anglo-American concepts of fair judicial process, by their very nature, they are imprecise and require a broad evaluation of the surrounding circumstances. The two cases cited above support this proposition and give it fuller meaning.

Davis v. Alaska bears most directly on the issue here; for, in this case a state protective statute was held ineffective to bar certain evidence for purposes of impeachment. The focus of *Davis* was a state statute and a court rule designed to preserve the confidentiality of juvenile adjudications of delinquency.[74] The defendant was prevented by this rule from impeaching the credibility of a prosecution witness by cross-examination designed to establish possible bias because of the witness' probationary status as a juvenile delinquent. The juvenile prosecution witness had identified the defendant as the man he had seen near the scene of the crime. The United States Supreme Court reversed the conviction holding that the prohibition of impeachment, which might have shown that the witness had identified the defendant because of fear of possible probation revocation, was a violation of the defendant's Sixth Amendment right to confrontation.[75] While this holding seems to cast doubt on rape evidence legislation, it is crucial to realize that the Court's conclusion was the result of a balancing process culminating in the statement that, "In this setting the right of confrontation is paramount to the State's policy of protecting a juvenile offender."[76] Thus the limitation on the right of confrontation must be weighed

69. *Rudstein*, *supra* note 3, at 19.
70. 93 S. Ct. 1038 (1973).
71. 94 S. Ct. 1105 (1974).
72. *Rudstein*, *supra* note 3, at 19.
73. Chambers v. Mississippi, 93 S. Ct 1038, 1045 (1973). U.S. Const. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."
74. 94 S. Ct. 1105 (1974).
75. *Id.* at 1112.
76. *Id.*

against the State's policy under the facts of each case. In *Davis* the impeachment evidence was critical to the defense's attack on the crucial witness. The evidence of bias toward the government because of a probationary status was logical and not highly prejudicial. The State's policy of protecting juveniles would not be seriously impaired as a whole.

In *Chambers*, the Court was presented with facts even more compelling. At issue was the confession of a third party to the murder for which Chambers was on trial. The written confession was admitted into evidence and then repudiated on the stand when the witness offered an alibi. Chambers was not allowed to cross-examine this witness, nor was he allowed to introduce the testimony of three other witnesses to whom the first witness had confessed. Thus, evidence regarding a confession to a crime for which Chambers was charged was ruled inadmissible on four separate occasions. With regard to the exclusion of hearsay statements concerning the third party confession, the Court did not make a blanket ruling about all declarations against penal interest or impeaching one's own witness in criminal trials, nor did it say that certain forms of hearsay should be admissible.[77] What the Court did say is that if there is excluded highly relevant, reliable and exculpatory evidence, or if the defendant is denied the right to confront, present or cross-examine witnesses, the criminal trial has not met constitutional requirements.[78] It is noteworthy, however, that the Court did not overrule any state evidentiary rules.[79] In fact, the Court explicitly recognized the states' right to autonomy in matters of evidence and criminal procedure: "Nor does our holding signal any diminution in the respect traditionally accorded to the States in establishment and implementation of their own criminal trial rules and procedures."[80]

These cases demonstrate that any constitutional evaluation of the Missouri act requires careful evaluation of the defendant's need for the evidence in order to demonstrate his innocence, develop a defense or impeach a witness and a weighing of this need against the State's interests expressed in the act. The defendant's right to use of the evidence must thus turn on its probative value weighed against its unfairly prejudicial effects. The enactment of this protective legislation represents the determination by the people's representatives that evidence of prior sexual conduct is normally of such slight probative value and great prejudicial effect that it should be excluded.

B. *Application of the Standard*

The first step in evaluation of the constitutionality of this rape evidence act must be a delineation of its legislative purposes.

77. 96 S.Ct. at 1049.
78. *Id.* at 1048-49.
79. *Id.* at 1049.
80. *Id.*.

Although Missouri courts do not have the benefit of recorded legislative deliberations outlining these purposes, the sponsor of this legislation has indicated his own belief as to its goals.[81] The cited purposes were the promotion of increased reporting of rapes, the creation of guidelines for exclusion of this type of evidence in view of a judicial tendency to admit this evidence very broadly so as to eliminate appeals and retrials, and the elimination of the prejudicial trial practice of pressing embarrassing questions of past sexual history so as to put the complaining witness on the defensive.[82] Added these concerns are those of assuring the conviction of rape defendants upon a fair consideration of the relevant evidence by a jury and a concern for eliminating unjustified invasions of privacy.[83]

The protection of the health and welfare of the public through the encouragement of the reporting and prosecution of crime represents a major interest of the state. Though the incidence of rape has increased

81. Interview with Sen. Buechner, *supra* note 46.
82. *Id.*
83. The privacy issue here falls into a classic area of constitutional privacy litigation which involves the individual interest in avoiding disclosure of personal matters. Cases such as Roe v. Wade, 93 S. Ct. 705 (1973), Griswold v. Connecticut, 85 S. Ct. 1678 (1965) and Eisenstadt v. Baird, 92 S.Ct. 1029 (1972), demonstrate the existence of constitutional limitations on state intrusion into private sexual activities. *See generally*, Silver, *The Future of Constitutional Privacy*, 21 ST. LOUIS U.L.J. 211 (1977). Absent strong countervailing justification, the state should be barred from exposing a person's sexual history to the community.

A strong countervailing justification, however may arguably be found in the constitutional guarantee to any accused of a fair trial with the opportunity to confront witnesses against him. U.S. CONST. amend. VI and XIV. The defendant has a right under these amendments to confront his accuser with questions and evidence which tend to prove his innocence. The crucial problem here is the extent to which that right justifies an invasion of the privacy of another person via evidence of past sexual conduct.

The resolution of this conflict of the constitutional principles of the right to privacy and the right to confront witnesses demands a balancing of the rights involved. FED. R. EVID. 403 incorporates such a balancing in its weighing of the probative value of the evidence against the danger of misleading of the jury through unfair prejudice or confusion of the issues. The purpose of the rule is to expedite the trial and to prevent emotional manipulation of the jury.

The emphasis must be on a strict application of the relevancy test without undue deference to the defendant where evidence may be of some probative value but tends to unfairly arouse the passions and prejudices of the jury. If the evidence should not properly be admitted under a strict application of the test of relevancy and prejudice, its exclusion does not violate the defendants rights under the confrontation clause. Davis v. Alaska, 94 S. Ct. 1105 (1974) and Chambers v. Mississppi, 93 S. Ct. 1038 (1973).

If however, the evidence survives the 403 test, constitutional due process demands its admissibility. Whether a witness is considered to waive a privacy right by appearing voluntarily or is compelled to testify under spoena is insignificant. The privacy right of the victim yields to the defendant's guarantee to a full and fair hearing where the evidence should be admissible under a 403 test. However, where evidence would be in inadmissible when a 403 test is strictly applied, the privacy right of the witness compels the court to reject it. Thus the privacy right of the witness should be seen as requiring a strict application of the tests of relevancy and unfair prejudice, so as to avoid unjustified invasion of the witness' most private past.

The new Missouri shield statute embodies the determination by the Missouri legislature that a properly strict application of the relevancy and prejudice test requires exclusion of most evidence of the victim's sexual history. The privacy right of a witness demands no less.

dramatically in recent years,[84] the Federal Bureau of Investigation estimates that rape is one of the most underreported crimes.[85] Estimates of actual incidence range between three and one-half and five times higher than reported incidence.[86] Of the reported cases approximately eighteen percent go unprosecuted.[87] This behavior may be explained at least partially by the victim's fears of the trial experience and her awareness that her past sexual life may be exposed and derided in public. The state seems justified in giving the victim statutory assurance that this invasion of privacy will not be countenanced absent some special circumstances making the evidence relevant to the defense. Essential fairness does not mandate that highly prejudicial and minimally relevant evidence be presented to the jury at the defendant's request.

The same evidentiary rules which will lead to increased reporting of rape by assuring fair treatment of the complaining witness will provide fair treatment for the defendant and assure that the state's interest in conviction respected. The due process rights of the defendant do not require the admission of evidence the relevancy of which is outweighed by its unfair prejudice. The rape evidence reform act serves the paramount state interest in the conviction of a criminal based on a fair presentation of evidence on both sides. The defendant has no right to introduce evidence designed simply to bias the jury against the victim because of her past sexual history and to "sweep them beyond a rational consideration of guilt or innocence of the crime on trial."[88] The state can rationally determine that the acquittal of an accused ought not be encouraged where based on highly prejudicial and minimally relevant evidence.

VI. The Exclusion of Specific Types of Evidence

Missouri's legislation initially completely rejects opinion and reputation evidence and rightly so, as this was the most unfair use of prior

84. Federal Bureau of Investigation, Uniform Crime Reports for the United States 11 (1974) [hereinafter cited as FBI Report] (The FBI defines rape as including attempts. *Id.* at 22,) By comparison, murder and non-negligent manslaughter have increased 40%, aggravated assault, 47%, and robbery, 48%. *Id.* at 11. Of the FBI's "Index Crime" offenses, *Id.* at 1-7, only the non-violent crime of burglary exceeded rape in rate of increase. (53%). *Id.* at 15, 20, 24, 28.

85. Id. at 22.

86. One study concluded that the incidence of rape is three and half times the reported figure. National Opinion Research Center of the U. of Chi. survey reported in President's Commision on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 23 (1967).

Another study estimated the figure was five times the reported figure. State of California, Subcomm. on Sex Crimes of the Assembly Interim Comm. on Judicial System and Judicial Process, Preliminary Report 26 (1950).

By contrast, one comment estimated the actual incidence of other crimes is only one-half to four-fifths greater than the reported figure. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case* 28 Vand. L. Rev. 931, 935-36 (1975).

87. FBI Report, *supra* note 84, at 14.

88. McCormick, *supra* note 15, at 453-454.

sexual history at common law. Does the defendant have a constitutional right to confront the complaining witness before the jury with reputation evidence of the woman's prior sexual conduct? The view that evidence of a rape complaining witness' prior sexual conduct is highly probative in all prosecutions may be seen as a remnant of the common law notions that women who had nonmarital sexual relations were not likely to have been raped,[89] and that prostitutes could not be raped.[90] Reputation evidence for "unchastity" was used to promote the inference that a rape complaining witness had, in fact, consented. Nonmarital sex cast such opprobrium on women in the nineteenth century that reputation evidence for consent tended to negate the claim of rape.[91]

One asserted basis for the claim that the rape complaining witness' prior sexual conduct is highly probative is that propensity for consensual sexual intercourse is a function of both quantity and quality of prior sexual experience, *i.e.*, number of prior sexual partners and their physical characteristics.[92] However, the change in sexual mores in the twentieth century means that, statistically, most rape victims have experienced non-marital sexual relations.[93] It seems unreasonable to find that a factor common to almost all the complaining witnesses is determinative of whether any one of them claimed rape when she actually consented.[94]

The use of reputation evidence of unchastity to impeach the witness' credibility also seems unreasonable. Unchastity does not indicate mendacity.[95] Thus unchastity is simply irrelevant to the probable truth

89. *See, e.g.*, Lee v. State, 179 S.W. 145 (Tenn. 1915): "[N]o iartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure." A woman who had "already submitted herself to the lewd embraces of another" was contrasted with the "coy and modest female, severely chaste and instinctively shuddering at the thought of impurity." People v. Abbot, 19 Wend. 192 195 (N.Y. 1838), quoted in 140 A.L.R. 364, 387 (1942).

90. 4 W. Blackstone, Commentaries, 213. (W. Lewis ed. 1902), Blackstone wrote, rather dramatically, that it was a felony to force *even* (emphasis added) a prostitute to have sexual relations because the "woman may have forsaken that unlawful course of life." His implication was that rape of a practicing prostitute did not merit being considered a felony.

91. That non-marital sex cast little shame on men in the nineteenth century is illustrated in State v. Sibley, 33 S.W. 167, 171 (Mo. 1895).

92. *Hofstra Note*, *supra* note 68, at 411. The distinctions which the author would have a court draw are truly amazing. He states: "The quality factor might also include the physical type of sexual partner the complainant has had in the past. Thus, a woman who had had intercourse with a substantial number of different men would not necessarily have a high propensity to consent to intercourse with the alleged rapist if he were, for example, short, dark and stocky and all her prior sexual partners were tall, fair and lean." *Id.*

93. M. Hunt, Sexual Behavior in the 1970's, 33-34 (1974): The study concluded that by age twenty-five, two-thirds of all women have had non-marital sexual relations, as have eighty-one percent of women who are married by that age.

94. *Washburn*, *supra* note 58, at 296.

95. Berger, *supra* note 9, at 55; *see also* Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?*, 9 Ind. L. Rev. 418 (1976); Note; *Limitations on the Right to Introduce Evidence Pertaining to the Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?*, 3 Hofstra L. Rev. 403 (1975).

of the witness testimony. Since this reputation evidence has no probative value for impeachment, exclusion of reputation evidence, which merely restates the Missouri common law position, does not impinge on the constitutional rights of the defendant to confront the witness against him or to be accorded a fair trial.[96]

The act next addresses the use of evidence of specific instances of prior sexual activity.[97] Here the legislature was confronted with more complex constitutional questions and properly found that certain exceptions to the general exclusion were constitutionally mandated. But did the legislature provide exceptions for all those situations in which the defendant is constitutionally guaranteed the opportunity to demonstrate consent or nonoccurrence through evidence of specific prior sexual acts? A response to this question requires a canvassing of those hypothetical situations, but first this article must address the question of whether the exceptions allowed are in fact sufficiently broad.

Exception (1) permits evidence of the "sexual conduct of the complaining witness with the defendant" where that evidence is "reasonably contemporaneous with the date of the alleged crime." It certainly seems clear that normally evidence of a prior sexual relationship between the complaining witness and the accused rapist would appreciably strengthen the likelihood that there was consent to intercourse. Common sense and a knowledge of human nature suggests that consent would be more likely where there had previously been consent with the same individual. The primary question then is whether the "reasonably contemporaneous" limitation might unfairly exclude evidence under certain circumstances.[98] Would it be fundamentally unfair to exclude evidence of a single sexual encounter ten years earlier? It seems not since such evidence has but slight relevancy and could have a strong emotional impact on the jury. On the other hand, evidence that the parties had been sexually involved over a long period until the relationship ended in hostility would seem highly probative, even if many years had elapsed. To exclude such evidence seems highly arbitrary and would unfairly constrict the defense. The courts may well avoid this problem by simply construing the "reasonably contemporaneous" standard as equivalent to a standard of simple relevancy. While this would certainly twist the language of the statute, such a result may seem preferable to a constitutional confrontation.

The second exception needs little comment. Where the sexual act itself is not admitted, there is no claim of consent or other defense,

96. *See Admissibility of Character Evidence in Missouri*, *supra* note 4, at 510.
97. The complexity of legislation involving evidentiary rules is heightened by the tendency of legislators to lump legal concepts into abnormal packages as here when H.B. 502 treats all the different purposes, for which evidence of specific instances might be used, in one section. *But cf.* the multiplicity of sections relating to this type of evidence is the Federal Rules of Evidence.
98. See note 59 *supra* and accompanying text suggesting such evidence will be routinely admitted despite the limitation in H.B. 502 § 1.1(1).

evidence of other potential sources for semen, pregnancy or disease may be crucial to the defendant so as to show that the condition might have arisen otherwise than through the alleged rape. The act wisely gives free rein to the use of this evidence once a proper foundation is shown before the judge *in camera*.[99]

Again the third exception seems highly appropriate and clearly suggests evidence which could not constitutionally be excluded. The seductive conduct of the complaining witness immediately prior to the event would be crucial to any defense of consent or reasonable mistake and as such could not be excluded.[100]

The fourth exception needs no discussion. This leaves the question of whether there are any situations in which crucial relevant evidence would not be admitted because no exception has been provided.

A leading commentator, through a model statute, has suggested the need for several other exceptions to a general exclusionary rule. She concluded the following additional exceptions were necessary:

> 1. Evidence of a pattern of sexual conduct so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that she consented to the act or acts charged or behaved in such a manner as to lead the defendant [reasonably] to believe that she consented.
> 2. Evidence of prior sexual conduct, known to the defendant at the time of the act or acts charged, tending to prove that he [reasonably] believed that the complainant was consenting to these acts.
> 3. Evidence of sexual conduct tending to prove that the complainant has a motive to fabricate the charge.
> 4. Evidence tending to rebut proof by the prosecution regarding the complainant's sexual conduct.
> 5. Evidence of sexual conduct offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.[101]

The first of these additional exceptions seems the most requisite. The following example illustrates the proposed exception.[102] The victim has habitually frequented local bars where she picks up strangers with whom she has sexual relations. This has occurred numerous times in recent months. If the defendant declares this is the same pattern as transpired in his encounter, this evidence could well be argued to be highly relevant to the issue of consent. This exception would seem analogous to the rule permitting evidence of prior crimes where they demonstrate an identifying *modus operandi*, but not otherwise.[103] But

99. H.B. 502 § 1.3. The constitutionality of a closed review of evidence of sexual history has been questioned on the basis of the Sixth Amendment right of the dependant to present his defense in a public trial. U.S. CONST. amend. VI. These arguments are canvassed and rejected in *Berger*, *supra* note 9, at 72-84, 95-96. In a similar context, the Supreme Court has approved a preclusion rule where the defendant refused to provide a defense report to the state. United States v. Nobles, 95 S. Ct. 2160 (1975).
100. *Berger*, *supra* note 9, at 61.
101. *Id.* at 98.
102. *Id.* at 60.
103. *Cf.* FED. R. EVID 404(b).

suppose that there had in fact been a rape in such a case, would any jury be willing to convict, even with some evidence of violence, after introduction of such emotionally charged evidence suggesting the victim was no more than an unpaid prostitute? The unfairly prejudicial aspects of this evidence is staggering. In perhaps an extreme case such evidence would be absolutely crucial to the defendant but, otherwise, the legislature seems justified in opting for its exclusion.[104]

The second proposed additional exclusion overlaps somewhat with the first, but focus was on the state of mind of the defendant.[105] Did he reasonably mistake the victim's actions for consent? This exception assumes that the defendant was aware of the complaining witness sexual history and that it reasonably led him to mistake her intent. As such the exception would be relatively limited. Since the defense of reasonable mistake is clearly available to the defendant and this evidence seems probative as to the defendant's frame of mind,[106] there is certainly some argument for the validity of the exception. However, it is also true that the defendant can offer evidence of the immediately surrounding circumstances of the alleged crime to show his reasonable mistake. Again, in light of this possibility and the risk of the emotional impact of this evidence on the jury, this evidence would not seem to be of such great probative value as to mandate its admission where the legislature has rejected it.

The third suggested exception would seem to relate to some claim that the accusing witness is hostile to the accused and thus is punishing him with the charge of rape. Such a claim would come from a hostile former sexual partner in most cases and thus would seem to be covered by the first exception in the Missouri act where the defendant was also alleging consent. Whether or not consent is alleged, the defendant would be able to show the basis for the hostility. If their relationship had ended in a quarrel, this could be described simply with deletion of the highly emotionally charged details of their sexual intimacy. Evidence that they had been very close friends or constant companions before their quarrel can suggest their intimacy without arousing a strong emotional reaction in the jury. Such a judgment by the legislature seems justifiable in all but the most extreme circumstances.[107]

104. As noted above in the text, the test of constitutionality is the balancing of the the probative value of the excluded evidence against the state interest asserted in the shield statute. Davis v. Alaska, 94 S. Ct. 1105, 1111-12 (1974). In making this evaluation a trial or appellate court should be aware that the legislature considered the constitutional questions related to the exclusion of this evidence. See text accompanying note 70, *supra*. The passage of the legislation despite this constitutional challenge represents that governing body's conclusion that the probative value of the excluded evidence is outweighed by the state's interest in protecting the victim's privacy and encouraging crime reporting. This determination by the people's elected representatives should be accorded considerable weight.

105. *Berger*, *supra* note 9, at 63.

106. *Id.* at 63.

107. *See Berger*, *supra* note 9; at 65-67 for discussion of certain of the extreme circumstances where admission of evidence of bias or motive to fabricate would constitutionally be compelled.

The fourth exception does not seem appropriate within the Missouri framework since the prosecution is as fully barred from presenting evidence of the complaining witness' chaste past as the defendant is from depicting its scandalous nature. Sexual history is inadmissible and there is no apparent exception for sexual history supportive of the prosecution's case, so no exception is needed to rebut that type of evidence.[108]

The final situation calling for an exception would arise only rarely but constitutionally demands admission.[109] Suppose the defendant offers to show through a psychologist or psychiatrist that the alleged rape was the pure fantasy of a confused mind. The hypothetical question put to the doctor must rely on past sexual history and thus such evidence must be proved to support the expert opinion.[110] If presented with such a case, proof of the complaining witness' psychological state through this evidence would seem to be fundamental to the defendant's case and it could not be excluded in conformance with the constitution in that event. Where this evidence is used in a cold and clinical fashion it may, perhaps, raise less passion in the jury, but, whether or not this is so, the defendant's right to a fair trial demands its admissibility where it is used in such a strongly probative fashion.[111]

The conclusion that this exception should be allowed, when the situation arises, will do little to lessen the efficacy of the act. The act would merely be held unconstitutional as applied and an unwritten exception added to its terms.[112] Further, it will only be in rare circumstances that such a defense can be put forward and it will still be

108. The exclusion of evidence of the victim's past sexual history seems properly excluded even when offered by the prosecution. Here the evidence may unfairly prejudice the defendant by depicting an image of ravished purity to the jury, inflaming their emotions. Absent evidence of past chastity, evidence of past unchastity would be irrelevant for the purpose of rebuttal. *Cf. Berger*, *supra* note 8, at 67-68 and Zucker, *Evidence of Complainant's Sexual Conduct in Rape Cases*, 27 Brooklyn Barrister 55 (1975).

109. *See Berger*, *supra* note 9, at 68-69.

110. The opinion of an expert witness, such as a psychologist or psychiatrist, is mandatory to prove such psychological disturbance as a means of distinguishing a true case where fantasy might occur and a mere attempt by the defendant to introduce unfairly prejudicial evidence of past sexual activities. *See generally* Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324 (1950).

111. An example of a case where such psychological disturbances appear is Giles v. Maryland, 87 S. Ct. 793 (1967). There a psychiatrist had diagnosed mental illness in the complaining witness, who had made other apparently unfounded accusations of rape and had attempted suicide. This evidence was withheld from the defense. The Supreme Court indicated its distaste for this suppression, but merely vacated and remanded to the state courts in pursuance of their practice of avoiding constitutional decisions. For a perhaps overstated view *see* Note, *Psychiatric Examination of Prosecutrix in a Rape Case*, 45 N.C.L. REV. 234 (1966). *See also Berger*, *supra* note 9, at 68 n. 389-90.

112. Davis v. Alaska, 94 S. Ct. 1105 (1974) illustrates the Supreme Court's application of this rule. There the statute shielding the juvenile's police record was set aside in light of the defendant's crucial need to present evidence of the witness' bias. The statute was merely held unconstitutional or applied to the facts of that case. The application of the same statute was subsequently upheld, where the witness was not on probation and his credibility was otherwise impeached, in Gonzales v. State, 521 P.2d 512 (Alas. 1974).

necessary to present it to the judge in camera so that it is screened for admissibility before its suggestion to the jury, *i.e.*, section three of the act would still seem applicable to it.

VII. CONCLUSION

House Bill 502 should effect significant changes in the prosecution of rape defendants. These changes should, in turn, generate increased reporting of rapes. Both these goals have been eagerly sought by the feminist movement which has created a new lobbying force for the vocalization of the needs and interests of women.[113] These needs and interests were often unrepresented both through lack of expression and through open hostility from governmental policymakers. The enactment of this legislation demonstrates one such recognition of those needs. Here the legislature has reviewed the prior practice of the judiciary in light of a new-found awareness of the needs of rape victims, found it wanting in its appreciation of those interests and reformulated the judicial practice so as to achieve a new accommodation of the state's interest in protecting the interests of women and the defendant's rights to fair treatment.

Naturally any legislation affecting the criminal process will raise serious questions of due process under the federal constitution. This article concludes that the Missouri legislation is constitutional in all substantial respects. The greatest constitutional doubt circles about the sufficiency of the list of exceptions to the general rule of exclusion. In certain limited contexts it may be essential to create additional exceptions to avoid a constitutional violation. But above all it should be recalled that the policy of this act is to limit the unfairly destructive nature of this evidence in rape prosecutions. This policy should be kept firmly in mind in the construction and operation of the act and the application of the constitution to its terms.

113. *See, e.g.* Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973).

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