sion of otherwise admissible police reports. Justice Fromme, concurring, makes this observation, arguing the majority opinion abrogates *K.S.A.* § 60-456(d).[70]

Lollis establishes a solid but curious foundation for future questions concerning police report admissibility as expert opinion in Kansas. The court takes a more conservative admissibility position, reaffirming the important role of the jury by limiting the police expert to opinion on penultimate issues.[71] Because police reports are judicially but not statutorily[72] excluded, a statutory harmonization should be made. With judicial and statutory authority in accord, inquiries could be resolved at the trial court level. Until such agreement, there still exists the possibility police reports may be admitted as expert testimony in vehicular collision cases.

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372 (1978), wherein the court refused a highway patrolman's testimony that decendent's inattentive driving contributed to his death.

70. 224 Kan. at 265, 580 P.2d at 432 (Fromme, J., concurring).

71. Opinion on vehicle speed based upon direction of travel, skid marks, point of impact, vehicle damage, and vehicle location after collision would be considered opinion on a penultimate issue. 224 Kan. at 263, 580 P.2d at 431. *See also* Spraker v. Lankin, 218 Kan. 609, 612, 545 P.2d 352, 355 (1976).

72. *See* KAN. STAT. ANN. § 60-456(d) (1976).

Evidence: Rape Victim Protection

The rape victim's past sexual conduct has long presented an evidentiary problem. When admitted to prove consent, long, detailed and mocking cross-examination made some victims believe they were being prosecuted, not the accused.[1] In response, many state legislatures enacted rape shield statutes. The Kansas Court of Appeals in *In re Nichols*, 2 Kan. App. 2d 431, 580 P.2d 1370 (1978), enforces the Kansas rape shield law[2] and holds a victim's past sexual conduct inadmissible in rape prosecutions.

Rape as a crime developed in ancient times when women were regarded property.[3] English common law recognized rape as criminal and later codified the prohibition.[4] Under Kansas law, rape is statutorily defined.[5]

Because rape definitionally requires lack of consent,[6] if consent is proved, no rape occurred unless the victim lacked capacity to consent.[7] One method employed to show or imply consent has been to expose a victim's prior sexual experience. Regardless of whether her character was in issue, the traditional view ruled a victim's previous sexual experience admissible concerning consent to intercourse.[8]

Previous sexual experience encompasses general reputation for unchastity and specific unchaste acts. A victim's general reputation for unchastity has been[9] widely held admissible on the consent issue. "The underlying thought here is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman . . . ."[10] Under this rule, courts were presented

1. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 13-15 (1977).

2. KAN. STAT. ANN. § 60-447a (Supp. 1978).

3. *See generally* S. BROWNMILLER, AGAINST OUR WILL 8-15 (1975).

4. *Id.* at 15-22.

5. KAN. STAT. ANN. § 21-3502 (Supp. 1978) provides:

> Rape is the act of sexual intercourse committed by a man with a woman not his wife, and without her consent when committed under any of the following circumstances:
>
> (a) When a woman's resistance is overcome by force or fear; or
>
> (b) When the woman is unconscious or physically powerless to resist; or
>
> (c) When the woman is incapable of giving her consent because of mental deficiency or disease, which condition was known by the man or was reasonably apparent to him; or
>
> (d) When the woman's resistance is prevented by the effect of any alchoholic liquor, narcotic, drug or other substance administered to the woman by the man or another for the purpose of preventing the woman's resistance, unless the woman voluntarily consumes or allows the administration of the substance with knowledge of its nature.

Id.

6. State v. Clark, 218 Kan. 726, 544 P.2d 1372, *cert. denied*, 426 U.S. 939 (1976); State v. Lora, 213 Kan. 184, 515 P.2d 1086 (1973).

7. State v. Huffman, 14 W. Va. 55, 87 S.E. 2d 541 (1955).

8. 1 S. GARD, JONES ON EVIDENCE *Relevancy* § 4:37 (6th ed. 1972); MCCORMICK ON EVIDENCE § 193 (2d ed. E. Cleary 1978 Supp.); 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 62, 200 (3d ed. 1940); Annot., 140 A.L.R. 364 (1942).

9. *See* State v. Wood, 59 Ariz. 48, 122 P.2d 416 (1942), *overruled in* State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976); People v. Johnson, 106 Cal. 289, 39 P. 622 (1895); People v. Collins, 25 Ill. 2d 605, 186 N.E.2d 30 (1962); State v. Yowell, 513 S.W. 2d 397 (Mo. 1974); Annot., 140 A.L.R. 364 (1942).

10. People v. Collins, 25 Ill. 2d 605, 611, 186 N.E. 2d 30, 33 (1962), *cert. denied*, 373 U.S. 942 (1963). For further examples of similar but more colorfully phrased reasoning, *see* State v. Wood, 59 Ariz. 48, 52, 122 P.2d 416, 418 (1942); Lee v. State, 132 Tenn. 655, 658, 179 S.W. 145, 145 (1915).

with such questions as whether reputation evidence was admissible to impeach credibility,[11] and whether chastity was relevent where defendant denied sexual intercourse.[12]

Evidence of specific sexual acts with defendant and/or others has presented additional problems. Prior sexual intercourse between the victim and defendant was traditionally held admissible to show consent;[13] however, sexual acts with others has been less clear. Although some courts admit such evidence regardless of partner,[14] others exclude it for low probative value.[15] As with reputation, use of specific acts evidence prompted questions: Was it admissible to impeach credibility?[16] Were prior acts relevant absent the consent issue?[17] Were specific acts admissible to support medical evidence regarding sexual intercourse[18] to determine paternity?[19]

With the women's movement came heightened rape awareness.[20] The legal profession thus became increasingly cognizant of rape prosecution

11. Under the majority rule, reputation is inadmissible to impeach credibility. State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976). "The law does not and should not recognize any necessary connection between a witness' veracity and her sexual immorality." *Id.* at 26, 545 P.2d at 950. The Arizona Supreme Court endorsed California Supreme Court reasoning found in People v. Johnson, 106 Cal. 289, 294, 39 P. 622, 623 (1895), that if such evidence were admissible it could be employed to impeach a female witness in any trial wherein she testified. 113 Ariz. at 26, 545 P.2d at 950. *See also* Commonwealth v. Manning, 367 Mass. 605, 328 N.E.2d 496 (1975) (reputation for unchastity admissible on consent issue but not for impeachment); State v. Geer, 13 Wash. App. 71, 533 P.2d 389 (1975) (reputation for unchastity generally inadmissible but possibly relevant in proper circumstances).

The minority rule declares reputation for unchastity admissible credibility evidence. *See* Brown v. State, 291 Ala. 789, 280 So. 2d 177 (1973); Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955); State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978). These courts reason "promiscuity imports dishonesty." Berger, *supra* note 1, at 16.

12. Here, the issue is relevance. Where consent is not a raised defense, evidence of reputation for unchastity has been excluded as irrelevant. *See* Shapard v. State, 437 P.2d 565 (Okla. Crim. App. 1967), *cert. denied*, 393 U.S. 826 (1968).

13. *See, e.g.*, State v. Wood, 59 Ariz. 48, 122 P.2d 416 (1942), *overruled in* State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976).

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

Id. at 52, 122 P.2d at 418. *See also* People v. Pantages, 212 Cal. 237, 297 P. 890 (1931); Rice v. State, 35 Fla. 236, 17 So. 286 (1895); Shapard v. State, 437 P.2d 565 (Okla. Crim. App. 1967), *cert. denied*, 393 U.S. 826 (1968).

14. *See* statement of the court in *Wood*, note 13 *supra*. Professor Wigmore advanced another reason for admissibility. Risk of impuning an innocent woman's character was outweighed by danger an innocent man would be convicted upon word of the proverbial woman scorned. 1 J. WIGMORE, supra note 8, § 200.

15. *See, e.g.*, Rice v. State, 35 Fla. 236, 17 So. 286 (1895). "The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indication to warrant the conclusion that she would be guilty with any other man who sought such favors of her." *Id.* at 238, 17 So. at 286. *See also* State v. Ulmer, 37 N.M. 222, 20 P.2d 934 (1933); State v. Allen, 68 Wash. 2d 641, 404 P.2d 18 (1965).

16. State v. Severns, 13 Wash. 2d 542, 125 P.2d 659 (1942) (specific acts inadmissible on consent and credibility issues).

17. State v. Settle, 111 Ariz. 394, 531 P.2d 151 (1975) (consent issue must be raised before prior acts are admissible).

18. State v. Nab, 245 Or. 454, 421 P.2d 388 (1966) (specific acts with others admissible only when medical testimony shows victim's ruptured hymen probably resulted from sexual intercourse).

19. Shapard v. State, 437 P.2d 565 (Okla. Crim. App. 1967), *cert. denied*, 393 U.S. 826 (1968) (specific acts with others admissible where victim is pregnant to disprove defendant's paternity).

20. *See generally* S. BROWNMILLER, *supra* note 3, at 445-58; Berger, *supra* note 1, at 2-3.

problems, especially regarding past sexual conduct evidence vis-à-vis consent.[21] State legislatures responded with various rape shield statutes.[22] Vivian Berger, in her long and detailed article,[23] examined many such statutes. She found a broad admissibility spectrum—from extreme permissiveness to extreme restriction—with most statutes expressing a general exclusion principle but providing certain exceptions where the evidence was relevant and the probative value outweighed prejudice.[24]

Appellate courts soon decided rape shield issues. In a 1974 case,[25] defendant contended a Florida trial court erred sustaining objection to the question whether the victim had engaged in sexual intercourse with any other individual.[26] On appeal the court, following Florida precedent,[27] held such evidence raised a collateral issue not bearing upon a defendant's guilt or innocence, but could be admissible if repeated acts demonstrated the likelihood of a consensual pattern of conduct.[28]

In a notable California decision,[29] appellant challenged California's rape shield statute[30] alleging excluding previous sexual conduct evidence regarding

21. *See, e.g.*, Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391 (1975); Washburn, *Rape Law: The Need for Reform*, 5 N.M.L. REV. 279 (1975); Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?*, 9 IND. L. REV. 418 (1976); Note, *Evidence-Criminal Law-Prior Sexual Offenses Against a Person Other than the Prosecutrix*, 46 TUL. L. REV. 336 (1971); Comment, *Evidence of Prosecutrix' Sexual Relations With Persons Other Than Defendant in Rape Prosecutions*, 29 OKLA. L. REV. 742 (1976); Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613 (1976).

22. By January 1979, the following states had adopted rape shield statutes: ALA. CODE § 12-21-203 (Supp. 1978); ALASKA STAT. § 12.45.045 (Supp. 1978); CAL. EVID. CODE §§ 782, 1103 (West Supp. 1979); COLO. REV. STAT. § 18-3-407 (1978); DEL. CODE ANN. tit. 11, §§ 3508-3509 (West Supp. 1979); FLA. STAT. ANN. § 794.022 (West Supp. 1979); GA. CODE ANN. § 38-201.1 (Supp. 1978); HAWAII REV. STAT. § 707-742 (Supp. 1978); IDAHO CODE § 18-6105 (Supp. 1978); IND. CODE §§ 35-1-32.5-1 to -4 (Supp. 1979); IOWA CODE ANN. § 813.2 rule 20(5) (West Special Pamphlet 1978); KAN. STAT. ANN. § 60-447a (Supp. 1978); KY. REV. STAT. § 510.145 (Supp. 1976); LA. REV. STAT. ANN. § 15:498 (West Supp. 1978); MD. ANN. CODE art. 27, § 461A (Supp. 1978); MASS. ANN. LAWS, ch. 233, § 21b (Law. Co-op Supp. 1979); MICH. STAT. ANN. § 28.788(10) (Supp. 1978-79); MINN. STAT. ANN. § 609.347 (West Supp. 1979); MISS. CODE. ANN. § 97-3-70 (Supp. 1978); MO. ANN. STAT. § 491.015 (Vernon Supp. 1978); MONT. CODE ANN. § 45-5-503(5) (1978); NEB. REV. STAT. § 28-323 (Supp. 1978); NEV. REV. STAT. § 48.069 (1978); N.H. REV. STAT. ANN. § 632-a:6 (Supp. 1977); N.J. STAT. ANN. § 2A:84A-32.1 (West Supp. 1978-79); N.M. STAT. ANN. § 30-9-16 (1978); N.Y. CRIM. PROC. LAW. § 60.42 (McKinney Supp. 1978-79); N.C. GEN. STAT. § 8-58.6 (Supp. 1977); N.D. CENT. CODE §§ 12.1-20-14 to -15 (1976); OHIO REV. CODE ANN. § 2907.02 (d)-(f) (Page Supp. 1977); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1978-79); OR. REV. STAT. § 163.475 (1977); PA. STAT. ANN. tit. 18, § 3104 (Purdon Supp. 1978-79); S.C. CODE § 16-3-659.1 (Supp. 1978); S.D. COMP. LAWS ANN. § 23-44-16.1 (Supp. 1978); TENN. CODE ANN. § 40.2445 (Supp. 1978); TEX. PENAL CODE. ANN. tit. 5, § 21.13 (Vernon Supp. 1978-79); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1978); WASH. REV. CODE § 9.79.150 (1977); W. VA. CODE § 61-8b-12 (1977); WIS. STAT. ANN. §§ 971.31(11), 972.11(2) (West Supp. 1978-79); WYO. STAT. § 6-4-312 (Supp. 1978). Rhode Island has adopted a rape shield provision in its rules for criminal trials. *See* R.I. SUPER. CT. R. CRIM. PRO. 26.3. The Privacy Protection for Rape Victims Act signed by President Carter October 28, 1978, added a rape shield rule to the Federal Rules of Evidence. *See* Privacy Protection For Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978); FED. R. EVID. 412.

23. Berger, *supra* note 1.

24. *Id.* at 33-39.

25. Huffman v. State, 301 So. 2d 815 (Fla. Dist. Ct. App. 1974).

26. *Id.* at 816.

27. Rice v. State, 35 Fla. 236, 17 So. 286 (1895).

28. 301 So. 2d at 816-17. The Washington Court of Appeals decided a similar issue in State v. Geer, 13 Wash. App. 71, 533 P.2d 389 (1975). The court held the trial court did not err excluding evidence of prior illicit relationships. *Id.* at 74, 533 P.2d at 391.

29. People v. Blackburn, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976).

30. CAL. EVID. CODE §§ 782, 1103(2) (West Supp. 1979).

the consent issue deprived him confrontation and fair trial due process rights. The court disagreed, holding because past sexual conduct has, at best, slight relevance, and due process did not require all relevant evidence be introduced, a fair trial had not been denied. Because the statute did not bar presentation of such evidence to attack credibility, no confrontation infringement resulted.[31]

In *State v. Herrera*,[32] defendant challenged exclusion of evidence the victim, a single woman, had been previously fitted with an intrauterine contraceptive device. The New Mexico statute[33] provided a victim's past sexual conduct, and opinion and reputation regarding her conduct, was inadmissible unless after a hearing the court found evidence thereof material and its probative value outweighed its prejudicial nature.[34] The court noted two possible approaches[35] regarding past sexual conduct admissibility, followed neither, and adopted a rule which conditioned admissibility upon relevance.[36]

While most states legislatively shield rape victims,[37] two jurisdictions ef-

31. 56 Cal. App. 3d at 690-91, 128 Cal. Rptr. at 866-67. *See also* State v. Hill, 309 Minn. 206, 244 N.W.2d 728 (1976) (proffered evidence of nonmarital cohabitation lacked sufficient value on consent issue), *cert. denied*, 429 U.S. 1065 (1977). The court in *Blackburn* held an offer of proof requirement was constitutional notwithstanding it lacked a sufficiency standard. Requirement propriety rested with the trial court, and, in any event, the information required could not have violated defendant's right against self-incrimination because it related to the victim, not the crime charged. 56 Cal. App. 3d at 692, 128 Cal. Rptr. at 868.

32. 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978).

33. N.M. STAT. ANN. § 30-9-16 (1978).

34. *Id.*

35. 92 N.M. at —, 582 P.2d at 392-93. The two approaches noted were: such conduct is irrelevant to the consent issue, and admissibility depends upon a balance between relevance and prejudice.

36. The proper approach, in our opinion, is to recognize that past sexual conduct, in itself, indicates nothing concerning consent in a particular case. This is the starting point because relevancy is not an inherent characteristic of any item of evidence, but exists only as a relation between an item of evidence and a matter properly provable in the case . . . .

If defendant claims a victim's past sexual conduct is relevant to the issue of the victim's consent, it is up to defendant to make a preliminary showing which indicates relevancy . . . . The question of relevancy is not raised by asserting that it exists, there must be a showing of a reasonable basis for believing that past sexual conduct is pertinent to the consent issue.

Id. at —, 582 P.2d at 393. The court held exclusion proper because defendant had made no relevance showing. Defendant had not been denied confrontation because the constitution grants no right to ask irrelevant questions. *Id.*

37. Regarding the effect of rape shield statues on admissibility of reputation or past unchaste acts, *see* Smith v. Commonwealth, 566 S.W.2d 181 (Ky. App. 1978) (statute held constitutional and specific acts evidence excluded because of low probative value); People v. Kahn, 80 Mich. App. 605, 264 N.W.2d 360 (1978) (evidence of past sexual conduct with others failed probative value-prejudice balancing test); State v. Tiff, 199 Neb. 519, 260 N.W.2d 296 (1977) (prior sexual history held not material to consent issue); State v. Ryan, 157 N.J. Super. 121, 384 A.2d 570 (1978) (disallowing victim cross examination regarding alleged intercourse shortly before rape upheld because evidence was of low probative value); State v. Piper, 261 N.W.2d 650 (N.D. 1977) (exclusion of prior acts upheld because defendant failed to make offer of proof showing relevance); Cameron v. State, 561 P.2d 118 (Okla. Crim. App. 1977) (specific acts with others inadmissible absent evidence of consent). In State v. Eggleston, 31 Or. App. 9, 569 P.2d 1088 (1977), the court held the Oregon rape shield statute applied to defendant's attempted evidence introduction regarding the victim's past sexual history and did not prohibit the state from introducing evidence of defendant's prior criminal acts with the victims in a statutory rape prosecution. In Young v. State, 547 S.W. 2d 23 (Tex. Crim. App. 1977), evidence the victim once had an abortion and performed sexual intercourse the night before the incident was excluded because its probative value did not outweigh prejudice.

fect similar results judicially. In *State ex rel. Pope v. Superior Court*,[38] the Arizona Supreme Court held reputation for unchastity and specific acts of sexual misconduct inadmissible to attack credibility, recognizing no connection between a witness' sexual morality and veracity.[39]

Kansas courts have rarely considered admissiblity of reputation for unchastity and specific acts of sexual intercourse to prove or imply consent. In *State v. Brown*,[40] the Kansas Supreme Court held evidence of an unchaste reputation admissible to imply consent,[41] but ruled no inference could be drawn from evidence of specific unchaste acts. "A woman is presumably prepared to defend her general reputation for chastity, but there is no such presumption that she is always prepared to disprove specific accusations of character."[42] Kansas also disallows complaining witness impeachment by evidence of sexual immorality.[43] In 1976, the Kansas legislature adopted a rape shield, *Kansas Statues Annotated (K.S.A.)* § 60-447a.[44] Because evidence of

38. 113 Ariz. 22, 545 P.2d 946 (1976).

39. *Id.* at 26, 545 P.2d at 950. The court added reputation for unchastity and evidence of specific sexual acts were inadmissible on the consent issue, overruling State v. Wood, 59 Ariz. 48, 122 P.2d 416 (1942). The Arizona Supreme Court further noted reputation for unchastity could be admissible regarding veracity if it were so bad it had in some manner affected her veracity. 113 Ariz. at 26-29, 545 P.2d at 950-53. *See also* McLean v. United States, 377 A. 2d 74 (D.C. 1977), wherein the court, on the reputation for unchastity issue, noted:

We deem a woman's reputation for unchastity to be of very slight probative value since it is neither relevant to her credibility as a witness, nor material on the issue whether on the occasion of the alleged crime she consented or was forced to submit to an act of sexual intercourse. Indeed, we agree with the court's holding in *Pope v. Superior Court* . . . that the rationale for excluding specific acts of sexual intercourse applies *with equal force* to the exclusion of reputation testimony. The reputation of a woman for unchastity raises unnecessary collateral issues which are nearly impossible to rebut, it diverts the jury's attention from the principal issues at trial and it results in prejudice to the complaining witness which greatly outweighs its extremely limited probative value.

Id. at 79 (emphasis in original).

40. 55 Kan. 766, 42 P. 363 (1895).

41. *Id.* at 770, 42 P. at 364.

42. *Id.* at 772, 42 P. at 365. In State v. Gerike, 74 Kan. 196, 87 P. 759 (1906), the rape produced a child. On rehearing, the supreme court reversed itself and held the defense should be allowed to cross-examine the victim regarding her conduct with other men near the alleged rape although no distinct offer was made to show improper acts.

43. Dewey v. Funk, 211 Kan. 54, 505 P.2d 722 (1973) (paternity action wherein defendant attempted to impeach mother's claim of virginity by showing prior acts); State v. Eberline, 47 Kan. 155, 27 P. 839 (1891) (statutory rape case where defendant attempted to attack victim's credibility by showing a general reputation for unchastity).

44. KAN. STAT. ANN. § 60-447a (Supp. 1978).

(1) Except as otherwise provided in subsection (2), in any prosecution for the crime of rape, as defined by K.S.A. 21-3502, or for aggravated assault with intent to commit rape, as provided in K.S.A. 21-3410, or for an attempt to commit rape, as provided in K.S.A. 21-3301, or for conspiracy to commit rape, as provided in K.S.A. 21-3302, evidence of the complaining witnesses' previous sexual conduct with any person including the defendant shall not be admissible, nor shall any reference be made thereto in the presence of the jury, except under the following conditions: A written motion by the defendant shall be made at least seven days before the commencement of the trial to the court to admit evidence or testimony concerning the previous sexual conduct of the complaining witness. The seven-day notice required herein may be waived by the court. The motion shall state the nature of such evidence or testimony and relevancy thereof, and shall be accompanied by an affidavit in which an offer of proof of such previous sexual conduct of the complaining witness is stated. The court shall conduct a hearing on the motion in camera. At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the previous sexual conduct of the complaining witness is relevant and is not otherwise inadmissible as evidence, the court may make an order stating what evidence may be introduced by the defendant and

specific acts with others would be inadmissible to show unchaste character, the real impact of *K.S.A.* § 60-447a "is to forbid defense counsel from even asking a question regarding such prior sexual conduct where, although an objection might be sustained, the suggestion of unchastity would be implanted in the jury's mind."[45]

The statute was challenged. In *State v. Corn*,[46] the Kansas Supreme Court upheld limiting use of evidence regarding the victim's previous sexual conduct on cross examination.[47] In *State v. Cook*,[48] tried two months before the effective date of *K.S.A.* § 60-447a, restriction of questioning regarding the victim's previous sexual relations was similarly upheld.[49]

The Kansas Court of Appeals discusses related evidentiary questions in *In re Nichols*.[50] Nichols, accompanied by two other men, entered complainant's trailer, engaged in sexual intercourse with the complainant, and by force assisted the other's similiar acts.[51] On trial for rape[52] and aggravated burglary[53], Nichols attempted to introduce evidence regarding complainant's prior sexual activity with him and others, hoping to prove consensual intercourse on the evening in question.[54] The trial court in a pretrial hearing refused to allow the proffered evidence, ruling it lacked relevance.[55]

On appeal, the Kansas Court of Appeals decides whether *K.S.A.* § 60-447a may constitutionally require exclusion of a rape victim's previous sexual conduct when determining consent. Specifically, the court addresses whether *K.S.A.* § 60-447a denies a defendant confrontation guaranteed by the sixth amendment and section 10 of the Kansas Constitution, and whether, even if *K.S.A.* § 60-447a is facially constitutional, it is constitutionally infirm as applied to defendant Nichols.

The Kansas Court of Appeals holds *K.S.A.* § 60-447a may constitutionally compel exclusion of evidence in rape prosecutions concerning a victim's previous sexual conduct. *K.S.A.* § 60-447a's application to defendant was constitutional but for the exclusion of previous sexual conduct evidence offered to disprove the felonious intent element of aggravated burglary. "The threshold question for admissibility of evidence is *relevancy*."[56] The court finds *K.S.A.* § 60-447a excludes evidence only if irrelevant.[57]

The court of appeals examines recent United States Supreme Court confrontation decisions[58] and finds them helpful but not determinative in the shield-confrontation balance.[59] *K.S.A.* § 60-447a is distinguished from juvenile shield laws because the latter categorically forbid juvenile record introduction, while *K.S.A.* § 60-447a permits introduction of a victim's prior sexual conduct if shown relevant to a disputed fact.[60]

> The Kansas statute merely serves to focus both judges' and attorneys' attention upon the fact that the victim's prior sexual activity is generally not relevant, reminding them that a victim's lack of chastity has no bearing whatsoever on her truthfulness and generally has no bearing on the important issue of consent.[61]

Sixth amendment guarantees, although important, do not afford a defendant unrestricted license to introduce evidence and cross-examine opposing witnesses.[62] The pretrial hearing required to determine relevancy results in only slight, if any, confrontation deprivation. This slight deprivation, the court reasons, is outweighed by the state's interest in protecting a rape victim from trauma and unnecessary embarassment often surrounding rape trials. Further, these protections encourage victims to report and prosecute the crime.[63] The court concludes *K.S.A.* § 60-447a serves defendant, victim, and state interests in rape prosecutions.[64]

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the nature of the questions to be permitted. The defendant may then offer evidence and question witnesses in accordance with the order of the court.

(2) In any prosecution for a crime designated in subsection (1), the prosecuting attorney may introduce evidence concerning any previous sexual conduct of the complaining witness, and the complaining witness may testify as to any such previous sexual conduct. If such evidence or testimony is introduced, the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence or testimony introduced by the prosecutor or given by the complaining witness.

(3) As used in this section, "complaining witness" means the alleged victim of any crime designated in subsection (1), the prosecution of which is subject to this section.

Id.

45. KAN. CIV. PRO. CODE ANN. § 60-447a, author's comments (Vernon Supp. 1978).

46. 223 Kan. 583, 575 P.2d 1308 (1978).

47. *Id.* Before trial, defendant deposed the victim at great length regarding her past sexual experiences. At trial, defendant attempted to use this information to show the prosecutrix enjoyed "kinky sex" and, therefore, had consented to defendant locking her in his car trunk and taking her to an isolated area where he raped her and allowed his accomplice to follow. On relevance grounds, the trial court limited cross-examination to establishing the victim had varied sexual experiences. *Id.* at 585-86, 575 P.2d at 1311.

48. 224 Kan. 132, 578 P.2d 257 (1978).

49. *Id.* In *Cook*, the charges were rape, kidnapping, and indecent liberties with a child. The trial court refused to allow questions regarding the victim's previous sexual conduct despite counsel's claim such relations would be relevant to determine whether the prosecutrix would know if penetration had occured. Trial occurred two months before the effective date of KAN. STAT. ANN. § 60-447a (Supp. 1978), the evidence being excluded as relevant only to prove a character trait other than veracity. The court noted a similar result was likely under KAN. STAT. ANN. § 60-447a (Supp. 1978), once applicable. 224 Kan. at 134-35, 578 P.2d at 259-60.

50. 2 Kan. App. 2d 431, 580 P.2d 1370 (1978).

51. *Id.* at 432, 580 P.2d at 1372.

52. KAN. STAT. ANN. § 21-3502 (Supp. 1978).

53. KAN. STAT. ANN. § 21-3716 (1974).

54. 2 Kan. App. 2d at 431-32, 580 P.2d at 1372. Specifically, defendant attempted to introduce that he and the complainant had engaged in sexual intercourse for several months, that they enjoyed "rough sex," that they employed a signal method to give the all-clear sign for entry into her home, and that complainant had engaged in sexual intercourse with her boyfriend only hours before the incident. *Id.* at 431-32, 580 P.2d at 1372.

55. Brief for Appellant at 3, *In re* Nichols, 2 Kan. App. 2d 431, 580 P.2d 1370 (1978).

56. 2 Kan. App. 2d at 434, 580 P.2d at 1374.

57. *Id.* at 435, 580 P.2d at 1374.

58. *See, e.g.*, Davis v. Alaska, 415 U.S. 308 (1974) (state law requiring juvenile record confidentiality must yield to defendant's right to confront and cross-examine). Kansas reached a similar conclusion in State v. Wilkins, 215 Kan. 145, 523 P.2d 728 (1974). *See also* Chambers v. Mississippi, 410 U.S. 284 (1973) (denying defendant's right to cross examine or introduce testimony is due process denial); Washington v. Texas, 388 U.S. 14 (1967) (sixth amendment affords defendant right to present witnesses to establish defense); Pointer v. Texas, 380 U.S. 400 (1965) (right to cross-examine is inherent under sixth amendment guarantee).

59. *In re* Nichols, 2 Kan. App. 2d at 434, 580 P.2d at 1373.

60. *Id.* at 434, 580 P.2d at 1373.

61. *Id.*

62. *Id.* *See also* note 36 *supra*; text accompanying note 31 *supra*.

63. 2 Kan. App. 2d at 435, 580 P.2d at 1374.

64. *Id.* In a case decided just one day after *Nichols*, the Kansas Supreme Court rejected a due process challenge to the statute in State v. Williams, 224 Kan. 468, 580 P.2d 1341 (1978). Defendant alleged the statute constitutionally required the prosecution reciprocally afford seven days notice of its intent to move for limitation of inquiry into the victim's past sexual conduct. The motion was granted but defense counsel was allowed to inquire into any areas opened by the

Responding to defense argument that *K.S.A.* § 60-447a is unconstitutional as applied, the court of appeals holds evidence the victim participated in sexual intercourse with her boyfriend only hours before her rape of no relevance to *any* issue. This fact, plus other evidence, made irrelevant the possibility that the semen medically proved to be present could have come from another source.[65]

The victim's prior sexual acts with defendant presented a difficult evidentiary question. Defendant sought to introduce evidence of prior engagements, particularly those involving "rough sex," to show consent or alternatively, mistake of fact regarding the victim's struggles. The court agrees such evidence could be relevant and admissible under *K.S.A.* § 60-447a, but finds no discretion abuse under the facts.[66]

> It must be remembered that the defendant arrived at the victim's trailer in the company of two friends. It does not appear that the trial court acted capriciously in determining that the defendant should not have presumed that her prior consensual activity with him alone would imply her consent to having intercourse with his friends, or even having intercourse only with him, but in the presence of his friends.[67]

With *Nichols*, Kansas joins other states restricting evidentiary use of prior sexual conduct in rape prosecutions. For defendant, this hampers his ability to harrass his victim with her past conduct. For Kansas, this promotes more vigorous rape prosecutions. For the rape victim, this precludes a second ordeal merely because she chose prosecution. *Nichols* ends what one jurist called "part of a legal tradition, established by men, that the complaining woman in a rape case is fair game for character assasination in open court."[68]

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state. This limitation prevented defendant from showing the victim was separated from her husband and living with another man although the state introduced this testimony in rebuttal. The supreme court rejected defendant's constitutional claim noting statutory purpose was to eliminate the "common defense strategy of trying the complaining witness rather than the defendant." 224 Kan. at 469, 580 P.2d at 1342. The court found KAN. STAT. ANN. § 60-447a (Supp. 1978) contained "adequate safeguards" to admit a victim's prior sexual conduct when appropriate. 224 Kan. at 470, 580 P.2d at 1342-43.

65. *In re* Nichols, 2 Kan. App. 2d at 436, 580 P.2d at 1374.

66. *Id.* at 436, 580 P.2d at 1374-75.

67. *Id.* at 436, 580 P.2d at 1375.

68. Commonwealth v. Manning, 367 Mass. 605, 614, 328 N.E. 2d 496, 501 (1975) (Braucher, J., dissenting).

Mass Transportation: Separate But Equal

Mobility-handicapped persons[1] have long suffered discrimination when attempting to utilize public transportation. Vehicle designs which failed to consider wheelchair ambulatory or elderly individuals have denied them access, although common-law decisions forbade common carriers to deny the handicapped service solely by reason of disability.[2] Nondiscrimination statutes[3] now guarantee that common-law service right, and national policy mandates cities make "special efforts" when planning and designing federally funded mass transportation programs to design for elderly and handicapped individuals.[4] Regulations interpreting these statutes may be adequate to determine whether appropriate special efforts have been made. In *Atlantis Community, Inc. v. Adams*, 453 F. Supp. 825 (D. Colo. 1978), the court holds while existing statutes state what may not be done, they do not sufficiently define the federal defendants' duties to permit the court to direct what should be done.[5]

Traditionally, the elderly and handicapped possessed few infirmity related rights. Courts later recognized the mobility handicapped had unique problems, but were unable to force nonfederally funded parties to conform their premises to accessibility standards established for federally funded structures.[6] Judicial sensitivity to the handicapped's plight was increasing, al-

1. The classification "handicapped" has proven difficult to define. *See, e.g.*, 29 U.S.C. § 706 (1976); 49 U.S.C. § 1612 (1976); 45 C.F.R. § 84.3 (1977); 49 C.F.R. § 609.3 (1977); 43 Fed. Reg. 2,137 (1978). 29 U.S.C. § 706 (1976) defines the handicapped as: "[A]nyone with a physical or mental impairment which substantially limits one or more of such person's major life activities, anyone who has a record of such an impairment or who is regarded as having such an impairment." *Id.* § 706(6). 49 U.S.C. § 1612 (1976) includes anyone who, due to "illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability," is unable to use mass transportation facilities as effectively as the nonhandicapped unless specially equipped. *Id.* § 1612(d). 45 C.F.R. § 84.3 (1977) defines physical or mental impairment:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; muscoloskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Id. § 84.3(j)(2)(i). 49 C.F.R. § 609.3 (1977) defines "elderly and handicapped" with words similar to those employed in 49 U.S.C. § 1612(d) (1976). In addition to language in 45 C.F.R. § 84.3(j)(2)(i) (1977), 43 Fed. Reg. 2,137 (1978) (to be codified in 45 C.F.R. § 85.31) defines physical or mental impairment "diseases and conditions [such] as orthopedic, visual, speech, and hearing impairments, cerebal palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism." *Id. See generally* Wright, *Equal Treatment of the Handicapped By Federal Contractors*, 26 EMORY L.J. 65, 68-70 (1977).

2. Comment, *Mass Transportation For the Handicapped and the Elderly*, 2 DET. C.L. REV. 277, 278 (1976) [hereinafter cited as Comment, *Mass Transportation*].

3. Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976); Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976).

4. Urban Mass Transportation Act of 1964, 49 U.S.C. § 1612(a) (1976).

5. 453 F. Supp. at 831.

6. *See* Marsh v. Edwards Theatres Circuit, Inc., 64 Cal. App. 3d 881, 134 Cal. Rptr. 844 (1976) (motion picture theatre operator not compelled to modify seating to accommodate wheelchairs by statutes mandating physically handicapped have same right to use public facilities as others); Raynes v. New York City Transit Auth., 63 Misc. 2d 598, 313 N.Y.S.2d 64 (Sup. Ct. 1970) (transit authority not federally funded not compelled to install escalator on railway platform because city used reasonable criterion in decision to not build and situation was widespread). *See generally* Thomas, *Legal Compliance With Laws and Regulations Affecting Mass Transit Operations*, 52 J. URB. L. 835 (1975).