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The Illinois Rape Shield Statute: Privacy at Any Cost, 15 J. Marshall L. Rev. 157 (1982)

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THE ILLINOIS RAPE SHIELD STATUTE: PRIVACY AT ANY COST?

Historically, rape victims have had the difficult burden of proving not only the defendant's guilt beyond a reasonable doubt, but their innocence as a nonconsenting party to the act of sexual intercourse.[1] This difficult burden arose from the preconceived notion that false charges of rape were frequently made by hysterical, vengeful women.[2] Matthew Hale, Lord Chief Justice of England, commented on the nature of a rape accusation: "[R]ape is an accusation easily made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[3]

Rape thus became a crime in which the victim was violated twice; first by her attacker, then by the defense attorney at trial.[4] The victim's sexual habits were routinely exposed and exploited by the adversary during trial.[5] Little concern was shown for the victim or her right of privacy.[6]

With the advent of the women's movement, the inhumane treatment of rape victims at trial became an increasingly

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1. Rape laws traditionally punished victims as well as criminals. For example, in ancient Israel, married women who were raped were put to death along with their assailants. S. BROWNMILLER, AGAINST OUR WILL 18-20 (1975) [hereinafter cited as BROWNMILLER]. *See generally* Comment, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973) [hereinafter cited as *Feminist View*].

2. BROWNMILLER, *supra* note 1, at 22. The author contends that the fundamental fear that women will cry rape is rooted in Biblical notions of female vengeance and in psychological propositions that women frequently fantasize about rape. *See also* Comment, *The Kentucky Rape Shield Law: One Step Too Far*, 66 KY. L.J. 426 (1977) [hereinafter cited as *Kentucky Rape Shield*]. The principles governing the conduct of rape trials are at least partly grounded in the fear that false charges are frequently made in such cases.

3. M. HALE, HISTORY OF THE PLEAS OF THE CROWN (1646) [hereinafter cited as HALE].

4. *See* Bohmer & Blumberg, *Twice-Traumatized: The Rape Victim and the Court*, 58 JUD. 391 (1975) [hereinafter cited as Blumberg]. For an example of the type of questions asked by defense attorneys in rape cases *see Hibey, The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309, 323 (1973).

5. *See generally* BROWNMILLER *supra* note 1, at 369-72; Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUD. 303 (1974); Comment, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977) (defense attorneys employed various techniques to make the victim appear like the guilty party at a rape prosecution).

6. *See* notes 35-37 and accompanying text *infra*.

sensitive issue.[7] Forty-five states enacted rape shield statutes designed to protect the prosecutrix from undue humiliation and embarrassment at trial.[8] Rape shield statutes are primarily structured to prohibit the admission of evidence concerning the rape victim's past sexual experience.[9]

Illinois joined the ranks of those states protecting victims by the enactment of a rape shield statute in 1978.[10] The statute precludes disclosure of all evidence concerning the complainant's prior sexual activity at trial, unless such evidence relates to prior sexual relations between the victim and the alleged rapist.[11] If the victim denies previous sexual intimacy with the accused, the court holds an *in camera*[12] hearing to determine whether such conduct had in fact occurred.[13] The court's *in*

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7. *See generally* B. FRIEDAN, THE FEMININE MYSTIQUE (1963); G. GREER, THE FEMALE EUNUCH (1970).

8. The five states that have not enacted rape shield statutes as of December, 1980 are: Arizona, Connecticut, Maine, Utah and Virginia. The states that have enacted rape shield statutes utilize various standards in determining the admissibility of the victim's prior sexual habits. Generally, the statutes fall into five categories: (1) statutes which admit sexual history testimony on the same basis as other evidence; (2) statutes that require hearings for some specified uses of sexual history evidence; (3) statutes that follow a pattern of admitting such evidence after a hearing and on a finding of relevance; (4) statutes that allow the trial judge no discretion, declaring sexual conduct evidence inadmissible, except to impeach, to show consent of the victim and to show prior sexual relations with the accused; and (5) statutes that prohibit sexual history evidence except to show source of semen, disease or pregnancy, to show consent, evidence relating to the act for which the defendant is accused, and to show prior sexual relations with the accused, but the trial judge may exclude the evidence after a hearing. For a general discussion and a statistical analysis of the various standards employed by state rape shield statutes *see* Bocchino & Tanford, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980) [hereinafter cited as Bocchino].

9. All forty five of the rape shield statutes prohibit the admission of sexual conduct evidence which is introduced solely to embarass the prosecutrix at trial. *See* Bocchino, *supra* note 8, at 551-55.

10. ILL. REV. STAT. ch. 38, § 115-7 (1978).

11. ILL. REV. STAT. ch. 38, § 115-7(a) (1978) provides: "In prosecutions of rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused."

12. BLACK'S LAW DICTIONARY 892 (4th ed. 1978) defines an *in camera* hearing as follows: "In chambers, in private. A cause is said to be heard *in camera* either, when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom."

13. ILL. REV. STAT. ch. 38, § 115-7(b) (1978) provides:

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

camera decision controls the defendant's ability to introduce evidence of this nature at trial.[14]

While the Illinois Rape Shield Statute safeguards a victim's right to privacy and freedom from harassment at trial, the statute's blanket exclusion of prior sexual experience places the accused at a decided disadvantage in the preparation of his defense. The alleged rapist is prohibited from establishing the victim's consent as a defense through the introduction of the victim's past sexual conduct with persons other than the accused.[15]

The exclusionary effect of the statute also places its constitutionality in jeopardy. The sixth amendment mandates that a criminal defendant be given an opportunity to present witnesses on his own behalf, to cross-examine adverse witnesses, and to develop a full and fair defense.[16] The complete denial of access to a proper area of cross-examination is constitutional error of the first magnitude which cannot be considered harmless.[17]

While a rape victim's past sexual activity may be probative on an issue material to determining the guilt of the accused rapist,[18] the situations in which such evidence is admissible may indeed be limited. Yet, the present Illinois Rape Shield Statute[19] provides no alternative to a defendant who can show that this evidence is essential to his criminal defense,[20] thus placing

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refrain from inquiring into prior sexual activity between the alleged victim and the defendant.

14. *Id.*

15. Under the present Illinois Rape Shield Statute, unless the defendant has had prior sexual relations with the victim, he is unable to introduce evidence of the victim's past sexual history at trial. *See* notes 11, 13 *supra*.

16. In all criminal prosecutions, the accused shall enjoy the right to a speedy and a public trial, by an impartial jury of the state and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; *to be confronted with witnesses against him*; and to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. CONST. amend. VI (emphasis added).

17. Davis v. Alaska, 415 U.S. 308, 310 (1974). *Accord*, Smith v. Illinois, 390 U.S. 129 (1968); Brookhart v. Janis, 384 U.S. 1 (1966). In Mattox v. United States, 156 U.S. 237 (1895) the Court stated: "The substance of the [sixth amendment] constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . ." *Id.* at 244.

18. *See* notes 107-110 and accompanying text *infra*; Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 97-108 (1977) [hereinafter cited as Ordover].

19. ILL. REV. STAT. ch. 38, § 115-7 (1978).

20. A reading of the Illinois Rape Shield Statute indicates that the statute is void of provisions allowing a defendant to introduce the victim's past sexual conduct as evidence in a rape prosecution. Subsection (b) of the statute only applies in the limited situation where the accused and the al-

its validity in question. The statute's procedural failures substantially affect its constitutionality.

PRESTATUTE TREATMENT OF RAPE PROSECUTIONS IN ILLINOIS

Under common law, rape was considered a felony requiring "the carnal knowledge of a woman, forcibly and against her will."[21] Much of the common law definition is preserved in the present Illinois rape statute: "A male person of the age of fourteen years and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape."[22] Rape is still considered a felony under Illinois law.

To obtain a conviction for the offense of rape in Illinois, three elements must be established: (1) penetration (however slight) of the female's sexual organs by the male's penis, (2) accomplished by the use of force,[23] and (3) against the will of the complainant.[24] The uncorroborated testimony of the prosecutrix, if clear and convincing, will sustain a conviction for rape, provided each of the above three elements are established beyond a reasonable doubt.[25] If the rape victim's testimony conflicts with surrounding circumstances and ordinary experience, it must be corroborated with other facts or circumstantial evidence.[26] Credibility of the rape victim's testimony, therefore, bears substantial importance to the defense, due to the weight given by the court to her uncorroborated testimony.

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leged victim have had prior sexual relations. For full text of the statute *see* notes 11, 13 *supra*.

21. HALE, *supra* note 3, at 628 (rape was considered a felony under the common law and criminals were punished by the loss of life or castration). *See generally* Comment, *Rape in Early English Law*, 121 JUST. P. 223 (1957).

22. ILL. REV. STAT. ch. 38, § 11-1 (1978).

23. Case law in Illinois indicates that a flexible standard is employed in determining the amount of force necessary to establish that a rape has occurred. *See* People v. Faulisi, 25 Ill. 2d 457, 185 N.E.2d 211 (1962) (there are no fixed standards for determining the amount of force from defendant and resistance on the part of the victim necessary to uphold conviction); People v. Barksdale, 44 Ill. App. 3d 770, 358 N.E.2d 1150 (1976) (each case of rape must be decided on its own merits regarding the amount of force necessary for conviction of the crime).

24. People v. Genus, 74 Ill. App. 3d 1002, 393 N.E.2d 1162 (1979) (Illinois requires three elements to be established for a conviction of forcible rape: penetration, by force, and against the will of the complainant).

25. People v. Griffin, 76 Ill. App. 2d 326, 222 N.E.2d 179 (1966) (state must establish the criminal defendant's guilt beyond a reasonable doubt).

26. *See* People v. White, 26 Ill. 2d 199, 186 N.E.2d 351 (1962) (no corroboration needed in a rape prosecution if the complainant's testimony is convincing); People v. Griggs, 60 Ill. App. 2d 49, 266 N.E.2d 398 (1970) (if the testimony of the prosecutrix in a rape trial is clear and convincing, no corroboration is needed).

The defendant in a rape prosecution has three basic defenses: (1) the alleged rape never took place; (2) sexual intercourse between the defendant and the complainant did occur, but was consensual; or (3) the rape did take place, but defendant was not the rapist.[27] Regardless of the defense, however, the opposing counsel must strive to undermine the credibility of the rape victim's testimony by introducing evidence of the victim's past reputation for promiscuity.[28] Prior to the enactment of rape shield statutes many courts accepted the view that a woman of unchaste character was more likely to consent or fabricate than a woman of virtuous character,[29] and considered evidence of the complainant's past sexual conduct relevant.

Prior to 1978,[30] Illinois allowed evidence of the victim's past sexual conduct to be admitted at rape prosecutions when the defendant claimed consent as an affirmative defense.[31]

> Want of consent on the part of the prosecutrix is the essence of the crime of forcible rape and must be proved by the prosecution beyond a reasonable doubt before there can be a legal conviction of the crime. *Inasmuch as want of consent is a substantive issue in the state's case, the prior chastity of the complaining witness is both material and relevant.*[32]

Illinois courts limited admissibility of the rape victim's past sexual conduct to her general reputation before the alleged rape[33] and would not allow specific acts of promiscuity to be introduced.[34]

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27. *See* Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUD. 303, 304 (1974). For a general discussion of the defenses raised at a rape prosecution, *see* Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309 (1973).

28. *See* notes 35-37 and accompanying text *infra*.

29. People v. Collins, 25 Ill. 2d 605, 186 N.E.2d 30, 33 (1962). In Camp v. State, 3 Ga. 417 (1847), the court summarized:

> Again, no evil habitude of humanity so depraves the nature, so deadens the moral sense, and obliterates the distinctions between right and wrong, as common, licentious indulgence. Particularly is this true of women, the citadel whose character is virtue; when that is lost, all is gone; her love of justice, sense of character, and regard for truth.

Id. at 422.

30. Illinois enacted its Rape Shield Statute in 1978. *See* notes 42-52 and accompanying text *infra*.

31. *See* People v. Fryman, 4 Ill. 2d 224, 122 N.E.2d 573 (1954) (the general immoral reputation of the prosecutrix can be shown at a rape prosecution); People v. Eilers, 18 Ill. App. 3d 213, 309 N.E.2d 627 (1974) (reputation testimony admissible where defense of accused is consent).

32. People v. Hastings, 72 Ill. App. 3d 816, 818, 390 N.E.2d 1273, 1275 (1979) (emphasis added).

33. People v. Stephens, 18 Ill. App. 3d 971, 310 N.E.2d 824 (1974).

34. People v. Fink, 59 Ill. App. 3d 51, 54, 374 N.E.2d 1311, 1314 (1978). *Accord*, People v. Collins, 25 Ill. 2d 605, 186 N.E.2d 30 (1962) (no need for defense to introduce specific acts of unchastity at trial).

A common practice arose among defense attorneys to publicly humiliate rape victims at trial by delving into such issues as the victim's use of birth control, her unescorted attendance at bars, and the existence of illegitimate children.[35] Often the defense would initiate its case by inquiring into the number of men the prosecutrix had had sexual intercourse with prior to the alleged rape.[36] Cross-examination became a grueling process whereby complainants were treated as if they were the accused rather than the victims of the rape.[37]

Evidence of the victim's sexual character had a profound influence on juries in rape trials.[38] Specifically, they punished sexually experienced women by refusing to credit their accusations even in clearly meritorious cases involving no hint of precipitating conduct.[39] In one instance, three men kidnapped a woman from the street, took her to an apartment and gang raped her. The jury acquitted, in obvious response to evidence that the unmarried victim had borne two illegitimate children.[40]

Illinois legislators recognized the controversial nature of this type of evidence and, consequently, undertook corrective action by enacting a rape shield statute.[41] Complainants would no longer be considered the guilty party at a rape prosecution—but the victim of a violent crime.

HISTORY OF THE ILLINOIS RAPE SHIELD STATUTE

In 1977, the Illinois House enacted House Bill 760. This Bill prohibited admission of the prior sexual history of the rape vic-

35. *See* Fike v. State, 255 Ark. 956, 504 S.W.2d 363 (1974) (illegitimate children); People v. Merrill, 104 Cal. App. 2d 257, 231 P.2d 573 (1951) (attendance at bars); Roper v. State, 375 S.W.2d 454 (Tex. Crim. App. 1964) (use of birth control).

36. *See* PIERCY, *Missoula Rape Poem* (excerpt), *reprinted in* SEXUAL ASSAULT 149 (M. Walker & S. Bodsky eds. 1976): "There is no difference between being raped and being run over by a truck, except that afterward, men ask if you enjoyed it."

37. *See* notes 4-6 and accompanying text *supra*.

38. *See generally* KALVEN & ZEISEL, THE AMERICAN JURY (2d ed. 1966) [hereinafter cited as KALVEN]. The authors conducted a study which revealed that in forty-two cases of simple rape (rapes involving one assailant, nonstrangers and no proof of extrinsic violence) a verdict of guilt was rendered only three times by the jury where the victim's sexual conduct was introduced in evidence. *Id.* at 249.

39. Jurors are not the only persons who have displayed biases in rape trials. Recent statements by at least one judge, implying that skimpily dressed women get what they ask for when they are raped, indicates that prejudices as to victim precipitation of rape are not confined to persons without legal training. TIME, Sept. 12, 1977, at 41.

40. KALVEN, supra note 38, at 251.

41. ILL. REV. STAT. ch. 38, § 115-7 (1978). For a full reading of the text of the statute see notes 11, 13 *supra*.

tim as evidence in a rape prosecution.[42] This prohibition, however, was limited by two exceptions; (1) opinion evidence concerning the prosecutrix's reputation for chastity, and (2) evidence concerning past sexual relations between the victim and the accused.[43] The Illinois Senate adopted House Bill 760 only after assurances that the Bill would not substantially change existing law concerning admissible evidence in rape prosecutions.[44]

The legislative record indicates that the Illinois Legislature was primarily concerned with preserving the defendant's opportunity to present evidence of the prosecutrix's general reputation for sexual promiscuity at an *in camera* hearing.[45] House Bill 760 did not absolutely preclude all evidence of the rape victim's past sexual conduct from being admitted at rape prosecutions.[46] Rather, it vested the trial judge with discretion to determine on a case-by-case approach, when and if, such evidence should be admissible.[47]

The provision which allowed the defendant to make an offer of proof at an *in camera* hearing[48] before the trial court, was struck down by Governor Thompson.[49] In a letter to the Illinois

42. ILL. H.B. No. 760 (1977).

43. *Id.*

44. The minutes indicate that the Senate adopted proposed Bill 760 only after assurance by a proponent of the bill that it would not substantially change the existing law concerning admissible evidence in rape prosecutions; the allowance of evidence of the victim's past sexual conduct at trial where the accused's defense was consent. *See Senate Hearings on Ill. H.B. 760*, (April 27, 1977).

45. Speaker Leinenweber of the Illinois House commented on the proposed bill's *in camera* provision:

> It was suggested that perhaps the way to get around it rather than having a fishing expedition would be to have a Session, *in camera* Session before the court as to the relevancy of any past sexual history and have the court rule prior to making it public. This has now been incorporated into House Bill 760, *it gives, now new protection to both the defendant and the prosecution witness*. (emphasis added) *House Hearings on Ill. H.B. 760*. (May 11, 1977).

46. House Bill 760 allowed a defendant to make a preliminary showing of relevancy of the sexual conduct evidence at a closed session before the judge.

47. Senator Washington commented on the role of the judge at an *in camera* hearing:

> Take the hypothetical cases where a woman has been promiscuous with five individuals in a row and she decides on the sixth to indicate he raped her. Let the judge weigh the relevancy of the sexual conduct evidence. That's what judges get paid for. . . . We have to assume they're competent and we're going to have to assume they're going to rule relevant and admissible testimony which bears upon the credibility of the prosecuting witness. *Senate Hearings on Ill. H.B. 760*, (April 27, 1977).

48. *See* note 12 *supra*.

49. Governor Thompson has been the governor of Illinois since 1974. He is currently serving his second term in office.

House of Representatives the Governor expressed his feelings regarding the proposed bill:

> Under existing case law in Illinois, a defendant in a rape case who claims consent as a defense can introduce evidence of the victim's reputation for sexual promiscuity. This bill in the manner in which it protects rape victims, is a small step in the right direction. I believe that we should take a giant stride in that direction. In my judgment, neither the victim's prior sexual activity nor her reputation should ever be inquired into in a rape case unless she was previously involved with the alleged rapist.[50]

The substantial changes suggested by Governor Thompson in House Bill 760 are reflected in the present Illinois Rape Shield Statute.[51] The statute precludes admission of evidence of the rape victim's past sexual conduct at trial, unless such evidence concerns past sexual relations with the accused.[52]

Thus, the Illinois Rape Shield Statute does not reflect the original legislative intent of either the Illinois House or Senate.[53] Both legislative bodies were concerned with allowing a defendant the opportunity to present evidence of the rape victim's past sexual conduct at an *in camera* hearing.[54] In reality, the present rape shield statute is more a product of the Governor's lobbying efforts. The statute predetermines, by codification, the delicate question of what evidence is relevant and admissible. Its failure to adequately provide the defendant with the opportunity to show that evidence of the rape victim's past sexual conduct is relevant, conflicts with the defendant's sixth amendment right of confrontation and his right to present a full and fair defense.[55]

Rights Of The Accused

The Sixth Amendment to the United States Constitution is the principal safeguard of a criminal defendant's right to a fair trial.[56] It provides, in part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with wit-

50. Letter from Governor James Thompson to the Illinois House of Representatives (Oct. 24, 1977), *reprinted in* J. Ill. H.R., No. 4, 80th Gen. Assembly 6404 (1977).

51. Ill. Rev. Stat. ch. 38, § 115-7 (1978).

52. *Id.*

53. Illinois House Bill 760 was passed in the House and Senate upon the condition that an *in camera* hearing would be held in situations where defendant's evidence of the rape victim's past sexual conduct was relevant to the issues being litigated. The Illinois House and Senate accepted the Governor's revision of the bill only after he had exercised his amendatory veto power.

54. *See* notes 45-47 and accompanying text *supra*.

55. For a full reading of the text of the sixth amendment *see* note 16 *supra*.

56. Mattox v. United States, 156 U.S. 237, 238 (1895).

nesses against him . . . [and] to have the assistance of counsel for his defense."[57] The confrontation clause secures for the defendant the right to cross-examine all adverse witnesses; a right fundamental to a fair trial.[58] Three broad purposes are recognizable in the confrontation clause: (1) to afford the jury the opportunity to assess the credibility of the witness by observing his demeanor; (2) to insure that a witness will testify under oath and be sufficiently impressed with the seriousness of such testimony; and (3) to insure the defendant the right of cross-examination.[59]

In *Pointer v. Texas*,[60] the United States Supreme Court held that the sixth amendment right of an accused to confront the witnesses against him is a "fundamental right made obligatory on the states by the fourteenth amendment."[61] This fundamental right is deeply embedded in the American criminal court system as noted in *Alford v. United States*:[62]

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantive right and withdraw one of the safeguards essential to a fair trial.[63]

The basic aim of the confrontation clause, therefore, is to ensure the "integrity of the fact-finding process."[64]

Limitations on the Accused's Constitutional Rights

Although the defendant's interest in cross-examining the witnesses against him is undeniably fundamental, the sixth amendment does not mandate that the defendant be permitted to introduce any evidence he wishes, or to cross-examine wit-

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57. U.S. CONST. amend. VI. *See* note 16 *supra* for full text of the sixth amendment.

58. *See* Goldberg v. Kelly, 397 U.S. 254 (1975) (fundamental right afforded to the defendant to confront his accusers); Alford v. United States, 282 U.S. 687 (1930) (right of confrontation is basic to defendant's constitutional rights).

59. California v. Green, 399 U.S. 149 (1970).

60. 380 U.S. 400 (1965).

61. Pointer v. Texas, 380 U.S. 400, 403 (1965).

62. 282 U.S. 687 (1930).

63. Alford v. United States, 282 U.S. 687, 692 (1931).

64. Berger v. California, 393 U.S. 314, 315 (1969).

nesses in any manner he pleases.[65] Thus, it is generally held that the scope of cross-examination may not exceed the limits of the direct examination. Additionally, the defendant's sixth amendment rights are subject to the general rules of evidence.[66] The threshold question for the admissibility of any evidence at trial is its relevancy to the issues being litigated.

The Federal Rules of Evidence define relevant evidence as that evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.[67] The Federal Rules, however, permit the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, waste of time or needless presentation of cumulative evidence.[68] Conflicts arise in determining whether the evidence's probative value outweighs its prejudicial effect. Therefore, the trial court is given the discretion to make a judicial finding on the admissibility of all evidence.[69]

Further complications ensue when a criminal defendant is denied the right to introduce relevant evidence, or to cross-examine adverse witnesses due to a state's prohibitory evidentiary rules.[70] Whether a state's public policy for excluding such evidence can outweigh a defendant's constitutional rights is an issue which has caused much controversy.[71] The United States

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65. *See* Jenkins v. Moore, 395 F. Supp. 1337 (E.D. Tenn. 1975) (a violation of the defendant's constitutional rights does not occur when he seeks to introduce irrelevant or prejudicial evidence at trial).

66. *See* notes 67-69 and accompanying text *infra*.

67. FED. R. EVID. 401. "The essence of relevance is its logical relationship. Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." FED. R. EVID. 401, Fed. R. Advisory Committee Notes. *See generally* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941).

68. FED. R. EVID. 403.

69. FED. R. EVID. 104(a) states in part: "Preliminary question concerning . . . the admissibility of evidence shall be determined by the court . . . ."

70. A state's absolute exclusion of evidence by statute, either in tangible or intangible form, can conflict with the fundamental right of the defendant to prepare a full defense for trial. *See* Chambers v. Mississippi, 410 U.S. 284 (1978) (operation of the state's voucher rule unconstitutionally excluded evidence); Davis v. Alaska, 415 U.S. 308 (1974) (operation of the state's juvenile shield statute unconstitutionally precluded evidence); United States v. Nixon, 418 U.S. 683 (1974) (presidential interest in confidentiality unconstitutionally operated as a shield to disclosure).

71. In *United States v. Nixon*, 418 U.S. 683 (1974), the controversy between the President and the Special Prosecutor, over the disclosure of the Watergate tapes, became of nationwide importance. The President refused to deliver the tapes, claiming that they were privileged presidential communications. In resolving the matter, the Court weighed the interest of the

Supreme Court provided guidance for lower courts addressing this issue in *Davis v. Alaska*.[72]

In *Davis*, the defendant alleged that the application of a state statute and a court rule preserving the confidentiality of juvenile adjudications of delinquency[73] violated his right of confrontation. The statute and rule prevented the defendant from impeaching the credibility of the prosecution witness by cross-examination designed to establish possible bias because of the witness's probationary status as a juvenile delinquent.[74] Davis was charged and convicted of breaking into a tavern and stealing cash and checks. The primary evidence introduced against him at trial was the testimony of Green, a youth adjudicated a delinquent who was then on probation for committing two acts of burglary.[75] On cross-examination, Davis' attorney was precluded from impeaching Green by showing that, in reporting the incident to the police, Green might have been acting out of fear of possible probation revocation.[76] The Alaska Supreme Court rejected Davis' challenge and affirmed the conviction.[77]

The United States Supreme Court reversed Davis' conviction and held that the limitation placed on the cross-examination of the state's witness violated the defendant's right of confrontation.[78] The Court noted that "[t]he accuracy and

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Watergate defendants to confrontation and compulsory process, against the Presidential interest in confidentiality. Although the President's interest in confidentiality was found to be "weighty indeed and entitled to great respect," the Court held that it "must yield." *Id.* at 712. *Nixon* is significant in terms of identifying the nature of an excluding type privilege.

72. 415 U.S. 308 (1974).

73. ALASKA R. JUV. P. 23 stated: "No adjudication order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a pre-sentencing procedure in a criminal case where the superior court, in its discretion, determines that such evidence is appropriate."

The Alaska Juvenile Shield Statute states in part: "The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court." ALASKA STAT. § 47.10.080(g) (1971).

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

75. Davis v. Alaska, 415 U.S. 308, 314 (1974).

76. The defense attorney was intending to impeach the credibility of the state's witness by attempting to show a possible motive for fabrication of his testimony. "Traditionally, cross-examiners have had ample leeway to impeach, i.e., discredit, the witness." 3A J. WIGMORE, EVIDENCE § 940 (Chadbourn rev. 1970).

77. Davis v. Alaska, 415 U.S. 308, 314 (1974).

78. The United States Supreme Court acknowledged that the juvenile shield law was supported by legitimate and important state policy. The Court also recognized the defendant's interest in exposing Green's background through cross-examination designed to discredit his testimony. In striking the balance between these two competing interests the Court stated: "[W]e conclude that the State's desire that Green fulfill his public

truthfulness of Green's testimony were key elements in the State's case against the petitioner."[79] In reaching this decision, the Supreme Court relied upon the due process test developed in *Chambers v. Mississippi*,[80] which requires that the court identify a state's interest in excluding evidence and weigh that interest against the rights of a criminal defendant.[81] If the state's policy supporting exclusion does not outweigh the defendant's need for the evidence, the policy of exclusion must yield.[82]

In *Davis*, the United States Supreme Court determined that the state's interest in excluding evidence of Green's juvenile offender record did not outweigh the defendant's confrontation right.[83] Since the state's juvenile shield statute[84] could not be reconciled with the constitutional mandates of a fair trial,[85] the policy of exclusion would have to yield. "The jurors were entitled to have the benefit of the defense theory before them so they could make an informed judgment as to the weight to place on the witness' testimony which provided a crucial link in the proof of the petitioner's case."[86]

The result in *Davis* indicates that a state's exclusionary evidentiary rules will be closely scrutinized when the effect of such rules denies a criminal defendant's right of confrontation. The state must satisfy due process requirements before its exclusionary rule of evidence will be considered valid.[87] Illinois, how-

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duty to *testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.*" Davis v. Alaska, 415 U.S. 308, 312 (1974) (emphasis added).

79. *Id.* at 317.

80. 410 U.S. 284 (1973). In *Chambers*, the defendant was precluded from cross-examining a key prosecution witness because of the state's party voucher rule. The United States Supreme Court held that the Constitution requires that the competing interests of the defendant's right of confrontation and the state's public policy for enacting the rule be closely examined. In striking a balance between these two competing interests, the Supreme Court concluded that the state's interest must yield to the defendant's right of confrontation. *Id.* at 302.

81. The Supreme Court developed the due process test in its analysis of Chambers v. Mississippi, 410 U.S. 284 (1973). The test has been utilized and expanded by the Court in Davis v. Alaska, 415 U.S. 308 (1974) and United States v. Nixon, 418 U.S. 683 (1974).

82. Chambers v. Mississippi, 410 U.S. 284, 292 (1973).

83. *See* notes 56-64 and accompanying text *supra*.

84. ALASKA STAT. § 47.10.080(g) (1971). For a full reading of the text of the statute *see* note 73 *supra*.

85. "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Davis v. Alaska, 415 U.S. 308, 320 (1974).

86. *Id.* at 317.

87. The Supreme Court's position in both Chambers v. Mississippi, 410 U.S. 284 (1973) and Davis v. Alaska, 415 U.S. 308 (1974) has been consistent

ever, has ignored the implications of the *Davis* test in analyzing its Rape Shield Statute.

Constitutionality of Illinois' Rape Shield Statute Tested

In *People v. Cornes*,[88] an Illinois Appellate Court was confronted with a constitutional attack on the Illinois Rape Shield Statute.[89] Cornes alleged that the prohibitory statute denied him the right to a fair trial, but did not allege any specific constitutional infringement. The court upheld the validity of the statute without considering the *Davis* test or the constitutional implications of the state's absolute exclusion of all evidence of the rape victim's past sexual conduct. Rather, the court relied on the following argument to uphold the statute's constitutionality: "Defendant's right of confrontation necessarily includes the right to cross-examine witnesses. That right does not extend to matters which are irrelevant and have little or no probative value."[90] The court considered the exclusion of evidence of the rape victim's past sexual history legitimate due to its irrelevancy.[91]

To contend that a rape victim's past sexual conduct is irrelevant begs the question. The court should have determined whether such evidence was relevant in some instances, and if so, what alternatives were available to the defendant for the introduction of such evidence under the present rape shield statute. In view of the court's lack of discussion on these essential points, the constitutionality of the Illinois Rape Shield Statute remains undecided.[92]

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with respect to the state's burden of proof. The state must show that the exclusionary nature of the statute is justified when balanced against a defendant's constitutional rights. This is a difficult burden for any state to sustain in light of the court's attitude toward a defendant's sixth amendment rights. "The substance of the [sixth amendment] constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, *he shall under no circumstances be deprived of* . . . ." Mattox v. United States, 156 U.S. 237, 244 (1895) (emphasis added).

88. 80 Ill. App. 3d 166, 399 N.E.2d 1346 (1980).

89. Cornes failed to allege in his complaint the basis of his constitutional challenge to the statute. Only general allegations of unconstitutionality were pleaded. People v. Cornes, 80 Ill. App. 3d 166, 175, 399 N.E.2d 1346, 1348 (1980).

90. *Id.* at 175, 399 N.E.2d at 1348.

91. *See* 1 J. WIGMORE, WIGMORE ON EVIDENCE § 12(2) (3d ed. 1940). "To be relevant, the evidence need not by itself prove the issue. The test is whether, taken in conjunction with other evidence, it has a tendency to make a fact or issue more or less likely." *Id.*

92. The rape shield's constitutionality has yet to be tested by the Illinois Supreme Court or the United States Supreme Court.

APPLICATION OF THE *DAVIS* TEST TO THE ILLINOIS RAPE SHIELD STATUTE

In applying the due process test set forth in *Davis*[93] to the Illinois Rape Shield Statute, three relevant factors must be considered. First, the state's public policy argument for enacting the statute. Second, the relevancy of evidence of a rape victim's prior sexual conduct and the prejudicial effect of such evidence. Finally, the constitutional implications of the statute's exclusion must be weighed against the state's interest in such exclusion.[94]

State's Interest in the Rape Shield Statute

Three objectives were cited for enacting the Illinois Rape Shield Statute: (1) to prevent confusion of issues at trial; (2) to encourage victims to report incidents of rape; and (3) to protect rape victims from harassment at trial.[95] There appears to be some support for the proposition that courts have a duty to protect witnesses at trial. In *People v. Hanks*,[96] an Illinois court stated:

> Although on cross-examination the range of evidence for the purpose of discrediting is very liberal, an undue latitude . . . injects issues other than the guilt of the defendant and tends to shift unjustly that guilt to persons other than the defendant. . . . Recognition should be given to the witness's rights, their fears, their time and inconvenience, and their public harassment or ridicule; and to this end the courts should guard and protect them when possible, especially when by so doing, the aim is to assure both society and the defendant a fair trial.[97]

The United States Supreme Court, however, took a more limited approach to this issue in *Alford v. United States*.[98]

> But no obligation is imposed on the court, . . . to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him

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93. Davis v. Alaska, 415 U.S. 308 (1974). *See* notes 80-86 and accompanying text *supra*.

94. *See* note 81 *supra*. For a general discussion of the operation of the due process test in relation to various rape shield statutes, *see* Bocchino, *supra* note 8, at 544. *See also Kentucky Rape Shield, supra* note 2, at 426.

95. The Illinois Appellate Court acknowledged these three objectives in People v. Cornes, 80 Ill. App. 3d 166, 175-76, 399 N.E.2d 1346, 1353 (1980), in its discussion of the constitutionality of the statute.

96. 17 Ill. App. 3d 633, 307 N.E.2d 638 (1974).

97. *Id.* at 638, 307 N.E.2d at 643.

98. 282 U.S. 687 (1931).

> from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.[99]

The Supreme Court acknowledged that it was within the sound discretion of the trial court to determine what constituted proper cross-examination of a witness.[100]

Additionally, while the Supreme Court has recognized a duty on the part of trial courts to protect a witness from irrelevant and humiliating cross-examination, it has not recognized a duty to protect witnesses from cross-examination designed to discredit their testimony.[101] The trial court should have the discretion to determine whether cross-examination is relevant or irrelevant on a case-by-case approach.[102] The proper scope of cross-examination should be determined by the court within the specific context of each particular factual situation.

The Illinois Rape Shield Statute removes this discretion from the trial court by establishing an inflexible rule of evidence which renders all evidence of a rape victim's past sexual conduct inadmissible.[103] The statute virtually ignores the vital distinction between relevant and irrelevant evidence and disallows cross-examination of the victim concerning her past sexual conduct. The only time the complainant may be cross-examined regarding her past sexual conduct is when she has admittedly had prior sexual relations with the accused.[104] In the event the victim denies prior sexual relations with the accused, the court will hold an *in camera* hearing to determine if prior sexual relations between the accused and the alleged victim have occurred.

The state's duty to protect a witness at trial does not extend to the limits proposed by the rape shield statute. Illinois does not have such a compelling state interest in the absolute protection of rape victims to encroach upon the defendant's right of confrontation in every rape prosecution. A defendant's constitutional rights will outweigh the state's interest in some situations and the statute should provide a feasible alternative for the defendant in these situations.[105]

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99. *Id.* at 694. *See* note 78 *supra*, where the Supreme Court reaffirmed its belief that the defendant's constitutional rights weighed more heavily than a witness's fear of humiliation.

100. Alford v. United States, 282 U.S. 687, 694 (1931).

101. *See* note 100 and accompanying text *supra*.

102. The trial court has the discretion to rule on relevancy and the prejudicial effect of the evidence under the Federal Rules of Evidence. *See* notes 67-69 *supra*.

103. *See* ILL. REV. STAT. ch. 38, § 115-7 (1978).

104. *See* ILL. REV. STAT. ch. 38, § 115-7(b) (1978). *See* note 13 *supra* for the full text of this subsection.

105. The Mississippi Rape Shield Statute might be used as a sample model for revising the Illinois statute. Under the Mississippi statute, the following evidence is admissible without a hearing: conduct with the ac-

Relevancy of Past Sexual Conduct

The relevancy of virtuous character is questionable, primarily because "[i]ts logical underpinnings are shaky in the extreme."[106] In fact, there may be nothing particularly distinguishing about the lack of chastity in modern society. Sexual attitudes have changed and the lack of virginal character no longer carries the connotation of immorality it once did.[107]

However, evidence of the rape victim's past sexual conduct may be relevant where such evidence is offered as proof that the victim acted on this particular occasion in conformity with a general character trait.[108] Proof of prior sexual conduct may evince a similar pattern of voluntary encounters that may have some relationship to her conduct and state of mind at the time of the alleged rape.[109] While such evidence is not conclusive on the issue of consent, it is relevant.

Evidence of the victim's past sexual conduct may also be relevant in determining whether there could be a possible motive to fabricate false charges of rape. In *State v. Jalo*,[110] the defendant was convicted of sodomy and the attempted rape of a ten year old child. Defendant denied the charge and contended that the complainant had fabricated the story to discredit the defendant's character. In reality, the complainant had had sexual intercourse with the defendant's son, and when she learned that the defendant was going to report this incident to her parents, she cried rape.[111] The trial court declared a mistrial when the defendant introduced testimony of the victim's sexual intercourse with the defendant's son since Oregon's Rape Shield

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cused; rebuttal of state's evidence of victim's conduct or source of semen, pregnancy, or disease. Any other evidence to impeach the credibility of the witness or to prove consent is admissible only after a hearing. The test for admissibility of such evidence is that its relevance is not outweighed by its prejudicial effect. If offered to show consent, the evidence must be admissible in the interests of justice. MISS. CODE ANN. §§ 97-3-68—97-3-70 (Supp. 1979).

106. Commonwealth v. Manning, 367 Mass. 605, 327 N.E.2d 715 (1972) (J. Braucher, dissenting).

107. *See generally* M. HUNT, SEXUAL BEHAVIOR IN THE 1970S 150 (1974); Oswalt, *Sexual Contraceptive Behavior of College Females*, 22 AM. COL. HEALTH ASSN. J. 392 (1974) (demonstration that although 65% of the unmarried women sampled had engaged in sexual intercourse, over 80% of that segment had intercourse with only three or fewer partners); Ordover, *supra* note 18, at 90.

108. For a discussion of the relevancy of sexual conduct evidence *see* Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause*, 9 IND. L. REV. 418 (1976); Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1 (1976).

109. *See* note 107 *supra*.

110. 27 Or. App. 845, 557 P.2d 1359 (1976).

111. *Id.* at 846, 557 P.2d at 1360.

Statute like Illinois' prohibited evidence of the rape victim's prior sexual conduct at trial.[112]

The Supreme Court of Oregon reversed the trial court and held that the defendant's constitutional right of confrontation had been denied.[113] The court applied the *Davis* due process test[114] and concluded that the rape shield statute would have to be subordinated to the defendant's constitutional right to cross-examine the complainant concerning a possible motive to falsify. The jurors could not make an informed judgment without the benefit of hearing the defendant's theory.[115] The court did not declare the rape shield statute unconstitutional, since the Oregon statute unlike Illinois had provisions for a pretrial hearing to determine the relevancy of evidence of the rape victim's past sexual conduct.[116]

Another instance in which evidence of the victim's past sexual reputation may be relevant is when the defendant denies sexual conduct with the prosecutrix, but medical tests show evidence of recent sexual intercourse. In *State v. Cosden*,[117] the defendant tried to prove through the victim's own testimony, that she had engaged in sexual intercourse with another man prior to the alleged rape. The Washington Rape Shield Statute allowed evidence of prior sexual conduct on the issue of consent, under narrowly defined circumstances within the discretion of the trial judge.[118] Prior sexual behavior was rendered inadmissible under all circumstances to attack the credibility of the victim.[119]

The Washington Supreme Court considered the statute's prohibitions but concluded, "neither the prior case law nor the statute purports to establish a blanket exclusion where the purpose of the evidence is highly relevant to other issues which may arise in prosecutions of rape."[120] The court also determined that where medical tests show evidence of recent sexual

112. OR. REV. STAT. § 163.475 (1977) provides in part: "[I]n a prosecution for rape, evidence of previous sexual conduct of a complainant shall not be admitted and reference to that conduct shall not be made in the presence of the jury."

113. *See* notes 55-64 and accompanying text *supra*.

114. *See* notes 80-82 and accompanying text *supra*.

115. State v. Jalo, 27 Or. App. 845, 850-51, 557 P.2d 1359, 1362 (1976).

116. The Oregon Rape Shield Statute provided that the court could, upon motion of any party, hold a pretrial hearing at which the court could consider any matters which might facilitate the trial. The defendant in *State v. Jalo* did not invoke this procedure. The Illinois Rape Shield Statute does not have a similar procedure.

117. 432 Wash. 639, 568 P.2d 802 (1978).

118. WASH. REV. CODE ANN. § 9.79.150 (1978).

119. *Id.*

120. State v. Cosden, 432 Wash. 639, 641, 568 P.2d 802, 806 (1977).

intercourse, all recent sexual contacts that could account for those results become highly relevant on the issue of the defendant's responsibility for the crime. "[I]t would be unfair to deprive the defendant of the opportunity to show that the test results are necessarily inconsistent with the defendant's denial of sexual intercourse with the victim."[121]

The situations in which a rape victim's past sexual conduct will be relevant are undoubtedly limited. Yet, such evidence can be probative on the issue of consent and the court should have the discretion to determine relevancy on a case-by-case approach. The risk of unjust conviction[122] is simply too great for a defendant to be completely deprived of the opportunity to inform the court of the moral character of the prosecutrix when it is relevant to the issues being litigated at trial.

Prejudicial Effect of Prior Sexual Conduct Evidence

The determination of the probative value of the evidence in relation to its prejudicial effect requires delicate consideration, especially when compounded by questions of constitutional dimension. The trial court must weigh relevance against the prejudicial effect of such evidence, as well as the constitutional implications of denying the admissibility of such evidence.[123] The tenuous nature of this test is such that each court must be given the discretion to decide admissibility on a case-by-case approach. The rape shield statute precludes Illinois courts from exercising discretion regarding the admissibility of evidence of the victim's prior sexual conduct. Presently, an Illinois court cannot mandate that such evidence be allowed at a rape prosecution, even though its relevancy outweighs its prejudicial effect.[124]

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121. *Id.* at 642, 568 P.2d at 806.

122. Unjust conviction can result when a defendant has been denied the opportunity to introduce relevant evidence at trial or to thoroughly cross-examine adverse witnesses. The Court's philosophy regarding unjust conviction was recently reemphasized in *In Re* Winship, 397 U.S. 358 (1970): "[I]t is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372.

123. This balancing test encompasses both the Federal Rules of Evidence and the due process test. *See* notes 67-69 *supra*. At least one commentator has suggested that the defendant's rights under the sixth amendment go beyond the traditional laws of relevance, and that the defendant has the right to introduce any probative evidence regardless of its prejudicial effect. *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence For Criminal Cases*, 91 HARV. L. REV. 567 (1978).

124. The court is prohibited from exercising its discretion due to the exclusionary effect of ILL. REV. STAT. ch. 38, § 115-7 (1978). The statute, on its face prohibits all sexual conduct evidence from being admissible at a rape prosecution.

CONCLUSION

Our society has long accepted the fundamental value determination that "it is far worse to convict an innocent man than to let a guilty man go free."[125] Although under traditional rules of evidence there is a chance that some juries might acquit a guilty defendant in a rape prosecution because they were prejudiced against the complaining witness by evidence of her prior sexual conduct, this result seems preferable to convicting innocent men merely because the jury was misinformed.

Rather than advocate a return to undue harassment of rape victims at trial, this comment suggests a restructuring of the Illinois Rape Shield Statute. The statute should be rephrased to provide a defendant with an opportunity to present evidence of the victim's past sexual conduct at an *in camera* hearing.

Admission of sexual conduct evidence at trial would be conditioned on the defendant's preliminary showing of relevancy, less its prejudicial effect. A jury would be allowed to hear this type of evidence only if the court determined that such evidence was relevant and its probative effect outweighed its prejudicial nature.

A less restrictive statute designed to allow the defendant to make an offer of proof at an *in camera* session will satisfy the constitutional mandates of the sixth amendment. It will also protect rape victims from abuse on cross-examination by merciless defense attorneys. Both of these goals can be accomplished by the reformation of the existing rape shield statute within the suggested guidelines.

Colleen M. Loftus

125. Mullaney v. Wilbur, 421 U.S. 684, 687 (1975). *See also* 4 W. BLACKSTONE, COMMENTARIES (1698). "[T]he law holds it better that ten guilty persons escape than that one innocent party suffer." *Id.* at 358.