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Jennifer Burcham Coffman

University of Kentucky

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THE KENTUCKY RAPE SHIELD LAW: ONE STEP TOO FAR*

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.¹ Matthew Hale, once Lord Chief Justice of England, said that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."² More recently, Wigmore connected chastity and veracity in rape cases, again due to an overwhelming potential for false charges.³

The fundamental fear that women will "cry rape" is rooted in Biblical notions of female vengeance⁴ and in psychological propositions that women frequently fantasize about rape.⁵ Adopting the views of Hale and Wigmore, courts have typically presumed that the danger of falsification exists in all rape cases.⁶ As a result, courts have traditionally demanded three

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¹ S. BROWNMILLER, AGAINST OUR WILL 21-22, 676-78 (1975); IIIA J. WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1970).

² People v. Rincon-Pineda, 538 P.2d 247, 254, 123 Cal. Rptr. 119, 126 (1975) (quoting 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 635 (1st Am. ed. 1847)). In this case, the California Supreme Court repudiated the need for the following mandatory jury instruction, based on Hale’s words:

A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent.

Therefore, the law requires that you examine the testimony of the female person named in the information with caution.

Id. at 252, 123 Cal Rptr. at 124. The court reasoned that such an instruction is obsolete, due to the maturation of due process concepts in criminal law and to the empirical data on rape. Cf. Holland v. Commonwealth, 272 S.W.2d 459, 459 (Ky. 1954) ("Cases of this kind are so easily charged and difficult to disprove . . . ."); Neace v. Commonwealth, 62 S.W. 733, 734 (Ky. 1901) (in which the Court explicitly repeated Hale’s warning).

³ J. WIGMORE, supra note 1, at § 924a. Wigmore even advocated a compulsory psychiatric examination for the complainant in all rape cases. See also Mosley v. Commonwealth, 420 S.W.2d 679 (Ky. 1967).

⁴ S. BROWNMILLER, supra note 1, at 21-22.

⁵ Id. at 311-22; J. WIGMORE, supra note 1, at § 924a. Contra, People v. Rincon-Pineda, 538 P.2d 247, 123 Cal Rptr. 119 (1975).

⁶ See Mosley v. Commonwealth, 420 S.W.2d 679, 680-81 (Ky. 1967), in which the Court ignored the danger of falsification in that particular case, based on the testimony of the complainant’s psychiatrist; rather, reference was made to the existence of that danger in sex offense cases in general.
types of evidence in rape trials: proof of resistance or force,\textsuperscript{7} corroboration of the complainant's charge,\textsuperscript{8} and admission of evidence of the complainant's sexual activity prior to the alleged rape.\textsuperscript{9} The third of these has prompted widespread discussion and legislative action. The use of this "chastity evidence" in rape trials must be examined to understand the reasons underlying recent changes in rape laws.\textsuperscript{10}

As a preliminary matter, the reader should be aware that the danger of falsification does not exist in all cases. The danger is indeed real at a pretrial stage, as evidenced by the 15 percent of all reported rapes which prove to be unfounded.\textsuperscript{11} However, the police practice of "founding" rape reports\textsuperscript{12} should sufficiently reduce the number of rape trials so that courts will at least question whether a danger of falsification does indeed exist in a particular trial situation. At any rate, if chastity evidence is to be admitted in rape trials because of a fear of false charges, the threshold question of whether that hazard does exist should not be dismissed so readily.\textsuperscript{13}

However, it must be emphasized that despite claims to the

\textsuperscript{7} This requirement has never existed in Kentucky. However, in Bowman v. Commonwealth, 143 S.W. 47, 53 (Ky. 1912), while refusing to impose this standard, the Court noted that the lack of outcry or resistance was "difficult to understand and harmonize."

\textsuperscript{8} See generally S. Brownmiller, supra note 1, at 366-68, for an account of the manifestation of this corroboration requirement in the incipient stages of a rape prosecution. "Founding" is the term assigned to the preliminary investigation of the alleged rape by the police. This routine practice includes questioning the complainant in detail, perhaps more than once, to assess the validity of her account. Factors which prompt the "unfounding" of a rape report include: too much time between rape and report; insufficient evidence alone; lack of victim corroboration alone; and a combination of the second and third factors. National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration & U. S. Department of Justice, Forcible Rape, Police Volume 1 at 18 (1977).

\textsuperscript{9} Fed. R. Evid. 404 (a) (2).

\textsuperscript{10} See generally Lichtenstein, Rape Laws Undergoing Changes to Aid Victims, N.Y. Times, June 4, 1975, § A, at 1, col. 2.

\textsuperscript{11} Federal Bureau of Investigation, Uniform Crime Reports 24 (1975).

\textsuperscript{12} See note 8 supra.

\textsuperscript{13} A notable exception to the general failure of courts to reassess the basic fear of falsification is People v. Rincon-Pineda, 538 P.2d 247, 123 Cal. Rptr. 119 (1975). Having examined the bases for Matthew Hale's words, and the context in which they were uttered, the court declared: "[W]e find nothing in Hale's writings to suggest that, as a matter of course, juries should be instructed that those who claim to be victims of sexual offenses are presumptively entitled to less credence than those who testify as the alleged victims of other crimes." Id. at 256, 123 Cal. Rptr. at 128.
contrary, a rape victim is not the only victim of a crime whose character may be in issue at trial. Character evidence may also be introduced about the victim in a homicide case, when the defendant claims that he killed in self defense, in order to prove that the victim was the aggressor. Other arguments for and against the use of chastity evidence in rape trials have similar deficiencies, which this Comment will demonstrate.

I. BACKGROUND: THE CLAMOR FOR REFORM

The use of chastity evidence in rape trials should be governed by evidence law. The fundamental evidence admissibility requirements are materiality and relevancy. Even if both of these prerequisites are satisfied, however, evidence may be excluded for "auxiliary policy reasons." Although not all of the arguments against the use of chastity evidence have been presented in terms of evidence law, this Comment will examine them in that context.

Fundamental evidence admissibility requirements demand first that evidence be submitted to prove a material element of the case; second, the offer of proof must be relevant to the ultimate fact toward which it is directed. In rape cases, said Wigmore, consent is "a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent." Wigmore said, in effect, that chastity evidence is always relevant to prove consent, which is always material in a rape prosecution. Such evidence should be admitted, he further argued, even in cases where consent is not an issue, "not because it is logically relevant . . . , but because a certain type of feminine character

12 In the courtroom the terms relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for which the evidence is offered and the issues in the case [citations]. If the evidence is offered to prove a proposition which is not a matter in issue or probative of a matter in issue, the evidence is properly said to be immaterial.
C. McCormick, supra note 14, at § 185.
13 J. Wigmore, Evidence § 9 (3d ed. 1940).
14 See notes 37-40 infra and accompanying text.
15 C. McCormick, supra note 14, at § 185.
16 Id. § 62 at 464.
predisposes to imaginary or false charges.” In those cases, Wigmore seems to have said, the danger of false charges is material, and chastity evidence is relevant proof of whether the rape charge is false.

Despite Wigmore’s opinions having been based on psychological authorities written as long ago as 1915, 1930 and 1933, courts frequently have unblinkingly admitted chastity evidence at trial without reassessing either materiality or relevancy. Such automatic admissibility has in some cases engendered distorted relevancy standards. Recently, however, the admissibility of chastity evidence in all rape cases has been persuasively challenged.

This challenge has focused on the materiality and relevancy of chastity evidence. The mere existence of chastity evidence does not satisfy materiality requirements. “The chastity reputation of a complainant is not at issue in the sexual offense case because the chaste condition of the complainant is not an element of the offense. Rather, the reputation evidence is offered to show consent or lack of credibility.” To the extent of exactly which elements are material, then, Wigmore and the modern critics are in agreement. They diverge, however, on whether chastity evidence is always relevant to prove these material elements of consent and credibility.

It has been argued that sexual character evidence is always irrelevant. A more qualified approach was taken in a recent study of relevancy based on a statistical analysis of the average female’s sexual activities. Relevancy was assessed in terms of

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21 Id. at 466-67.
20 J. Wigmore, supra note 1, § 924a at 740-46.
2 See note 66 infra and cases cited therein.
21 E.g., in Adams v. Commonwealth, 294 S.W. 151 (Ky. 1927), evidence of prior consensual sexual intercourse between the defendant and the complainant was held to have been erroneously excluded, despite the fact that the defense was not consent, but falsification of charges. This ruling contradicted the prevailing Kentucky practice which admitted chastity evidence for substantive purposes only, not for impeachment purposes. See note 66, infra and accompanying text.
23 The respective views diverge also on whether credibility is always an issue in rape cases. See notes 6-13 supra and accompanying text.
25 Note, If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases, 10 Val. U. L. Rev. 127 (1975). Psychological and sociological data consulted for the purposes of this study include Kinsey, Pomeroy, Marlin & Gebhard,
the two issues considered to be material, consent and credibility. To the credibility issue, unchastity was said to be irrelevant because it has no logical connection with veracity\(^2\) and because credibility can be impeached in other ways.\(^3\) As for the consent issue, three classes of sexual activity were assessed for relevancy: acts with the defendant short of intercourse, prior intercourse with the defendant, and sexual activity with persons other than the defendant. Acts in the first category were termed irrelevant because of questionable statistical correlations between petting and intercourse.\(^3\) Prior acts of intercourse with the defendant were deemed relevant to the consent issue.\(^3\) The third category of sexual activity was called irrelevant, for two reasons: First, statistics indicate that sexual activity is far more widespread among females than it was in the past; second, statistics on the emotional ties which generally exist in sexual liaisons buttress the idea that sexual activity is a function of choice.\(^3\)

However persuasive these arguments may initially appear, one must cautiously scrutinize any attempt to list which evidence is relevant and which is not. Relevant evidence has been defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”\(^4\) Thus the absence of any such connection would make evidence irrelevant. However, contentions that other methods exist to prove the same fact, or that statistical correlations are imprecise, do not totally negate any tendency which the evidence may have to make the fact to be proved more or less probable. Some relevant evidence may not be particularly convincing, and some relevant evidence may be excluded for reasons which will be discussed below,\(^5\) but it must be remembered that evidence weighing even slightly

SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953) and Reiss, How and Why America’s Sex Standards are Changing, SEXUAL DEVELOPMENTS AND BEHAVIOR (Juhász ed. 1973).

\(^2\) Note, supra note 28, at 146-68.

\(^3\) Id. at 148. See also Caulfield, supra note 25, at 500-01.

\(^4\) Note, supra note 28, at 143-44.

\(^5\) Id. at 145-46.

\(^6\) Id. at 137-43.

\(^7\) Fed. R. Evid. 401.

\(^8\) See notes 37-40 infra and accompanying text.
upon a material fact is relevant. The very least connection between the proffered evidence and the fact to be proved is sufficient.

A second warning about "lists" of relevant evidence is in order. One judge may declare an item of proof relevant, whereas the same item would be termed irrelevant by another judge. "There is no precise test of relevancy, but it is a determination which rests largely in the discretion of the trial court . . . ."36 Inasmuch as a "list" prescribes what items of proof are universally relevant, it contradicts the notion that a relevancy determination is reserved to judicial discretion on a case-by-case basis.

Even if relevant, evidence may be deemed inadmissible because it prejudices or confuses the jury, wastes time, or unfairly surprises a party.37 Character evidence is generally inadmissible in any form,38 for just these reasons.39 According to Wigmore, these "auxiliary policy reasons" are applicable only to defendants, not to other witnesses.40 Thus, on historical precepts,41 evidence of rape complainants' prior sexual activity has been admitted in rape cases.

Recently, however, arguments have been made that the effects of admitting chastity evidence in rape cases should be considered.42 The overriding factors enumerated above, it has been argued, are equally applicable to rape victims. Courts have traditionally disregarded the humiliation and abuse suffered by a rape victim from the act of rape itself throughout trial.43 The plight of the rape victim has been recounted frequently and graphically enough44 that it need not be detailed

34 Glen Falls Ins. Co. v. Ogden, 310 S.W.2d 547, 549 (Ky. 1958) (dictum).
35 J. Wigmore, supra note 16, at § 42.
36 Character may be proved by three types of evidence: prior acts, opinion and reputation. Reputation generally is the preferred method. C. McCormick, supra note 14, at § 186. For a description of the use of character evidence in rape cases, see Comment, The Rape Victim: A Victim of Society and the Law, 11 Willamette L.J. 36 (1974).
37 C. McCormick, supra note 14, at § 188.
38 J. Wigmore, supra note 16, at § 62.
39 Wigmore cited cases decided in 1846, 1856 and 1895 to demonstrate his conclusion that a woman's "character . . . as to chastity is of considerable probative value" as evidence of consent or nonconsent. Id. (emphasis added).
40 Washburn, supra note 27, at 296-300; Note, supra note 28, at 149-61.
41 See note 66 infra and cases cited therein.
42 Comment, Rape and Rape Laws: Sexism in Society and the Law, 61 Cal. L.
here. Briefly, the victim typically is characterized as being on trial herself and as being at the mercy of jurors' prejudices. Due to these factors, and based on the high acquittal rates in rape cases, rape has been characterized as the most underreported crime. This undue humiliation and the resultant underreporting of rape, critics have urged, mandate the exclusion of chastity evidence in rape trials.

The most evident flaw in this argument is that the use of chastity evidence in rape trials is not the sole cause of rape victims' humiliation and their reluctance to report rapes. Rather, these may be a function of the brutal violation of privacy which characterizes rape. Moreover, much of the embarrassment of which rape victims and their protectors have complained has involved innuendoes by investigating policemen. The use of chastity evidence at trial has, at most, a remote causal relationship to such pretrial harassment. More importantly, excluding chastity evidence from rape trials would not by itself solve the problems of humiliation and underreporting of rapes.

More persuasive is another argument against admitting chastity evidence in rape trials, the contention that jurors' prejudices affect the outcomes of rape trials. Admission of

Rev. 919 (1973); Comment, Twice Traumatized: the Rape Victim and the Court, 58 Judicature 391 (1975); Comment, supra note 38.

"The inequities of rape trials have prompted the observation that [we] have on one hand harsh penalties for rape; on the other, however, we have few convictions and a myriad of laws and attitudes that tend to protect men from conviction except when the complainant is a chaste, mentally healthy woman who reports the attack promptly, and who is willing and able to undergo the horrors of a rape trial."

Comment, Rape and Rape Laws, supra note 44, at 938. See also Note, supra note 28, at 159-61.

a Bowman v. Commonwealth, 143 S.W. 47, 55 (Ky. 1912), reflects an oft-repeated belief "that the very fact that the appellant is charged with the crime of rape places him at a disadvantage." Such a notion was dispelled, however, by H. Kalven & H. Zeisel, The American Jury 193-218 (1966), where a study of American jurors indicated exactly the reverse.

"See Ky Dep't of Justice, Bureau of State Police, Uniform Crime Reports, Commonwealth of Kentucky 12, 26 (1975). The Federal Bureau of Investigation "estimates" that only one rape in five is reported. Lichtenstein, supra note 10, at 21, col. 4.

a See generally S. Brownmiller, supra note 1, at 364-66; D. Russell, The Politics of Rape (1975) (poignant narratives by rape victims).

a Kalven & Zeisel, supra note 45, at 149-59. Jurors are not the only persons who have displayed biases in rape trials. Recent statements by at least one judge, implying
evidence of a rape complainant's unchastity prompts some jurors to find victim precipitation of rape and to manipulate rape laws accordingly by incorporating the tort doctrine of assumption of risk. Consequentially, jurors will find defendants guilty of a lesser crime if they can interpret the chastity evidence as indicative of victim precipitation. "If forced to choose in these cases between total acquittal and finding the defendant guilty of rape, the jury will usually choose acquittal as the lesser evil." Defense attorneys are well aware of the advantage which a jury trial gives the rape defendant: Rarely is a jury trial waived in rape cases. Since jurors' prejudices can alter the outcome of a case, this may be sufficient basis for excluding some chastity evidence even if it is relevant. This argument is discussed in greater detail in terms of the Kentucky rape shield law.

In brief, opponents of the use of chastity evidence in rape trials have urged judges to find the evidence either not material or not relevant. Alternatively, they have argued, such evidence should be excluded because admitting it results in extreme degradation to rape victims and in underreporting of rapes. Exclusion of chastity evidence is additionally mandated, it has been claimed, because jurors' decisions are significantly affected by their prejudices regarding unchastity. It is against this background that the clamor arose for reform of the rape laws.

that skimpily dressed women get what they ask for when they are raped, indicate that prejudices as to victim precipitation of rape are not confined to persons without legal training. N.Y. Times, May 27, 1977, § A, at 9, col. 1; Time, Sept. 12, 1977, at 41.

26 Kalven & Zeisel, supra note 46, at 249-54.
27 Id. at 254.
28 Id. This jury practice was reflected in Sanders v. Commonwealth, 269 S.W.2d 208 (Ky. 1954). Intercourse was acknowledged and consent was the issue. On appeal, the jury instruction on a lesser offense than rape was held erroneous, and the defendant's conviction of the lesser charge was reversed.
29 Kalven & Zeisel, supra note 46, at 29. Prosecutors, too, have observed the effects of juror prejudices when evidence of unchastity is introduced. A recent study "indicated that most prosecutors felt that admission of such evidence was a major factor in jury deliberation. The impact was considerably reduced when cases were considered by the Court alone." National Institute of Law Enforcement and Criminal Justice, supra note 8, Prosecutors' Volume I at 27.
30 See notes 94-96 infra and accompanying text.
II. LEGISLATIVE RESPONSE: RAPE SHIELD LAWS

A. Generally

In response to advocates of rape law reform, state legislatures have passed rape shield laws. More than thirty states have passed such statutes. Generally, the laws recognize that a prior consensual act of sexual intercourse between a rape victim and the defendant presents different considerations under the law of evidence than such an act between a victim and a third person. As a result, some of the laws admit only victim-defendant chastity evidence. Others prohibit victim-third party chastity evidence unless it is relevant to an issue injected into the case by the complainant: the complainant's character, or origin of semen, pregnancy or disease.

In addition to the above categorization of chastity evidence, a majority of the laws require a hearing to determine the admissibility of such evidence. Moreover, most of the statutes specify the standard(s) by which admissibility is to be ascertained. Those statutes which establish this set of guidelines generally require that the proof be material and relevant and that its probative worth outweigh its inflammatory nature.

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55 The use of chastity evidence has not been the sole target for reform. See, e.g., Comment, Towards a Consent Standard in the Law of Rape, 43 U. Chl. L. Rev. 613 (1976).
56 "Rape shield law" is the designation popularly applied to statutes which limit the use of evidence of a victim's chastity in rape trials. See generally Lichtenstein, supra note 10.
57 Representative statutes include those cited in notes 59-62 infra. For a complete list of laws passed as of January 1977, see Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 32 nn.196, 197 (1977).
58 The rape shield law of each state was analyzed by a student writer in December 1976. G. Robinson, Independent Study—Rape "Shield" Laws (Dec. 17, 1976) (unpublished study at University of Louisville Law School, on file in Kentucky Law Journal office). The examination includes a chart, which divides chastity evidence into two essential categories: conduct with defendant and conduct with others. Each of these kinds of evidence is then further examined for the following three characteristics: admissibility; whether a hearing is required to determine admissibility; and what the court must find to deem proffered evidence admissible. Moreover, this study includes special features, if any, of the respective laws. Id. at Appendix.
61 Id.
63 Id.
64 Id. "Inflammatory nature" is a typical characterization applied to evidence
B. *In Kentucky*

The Kentucky rape shield law[^2] was enacted in 1976. Before assessing its merit, it is helpful to understand the case law which preceded it, the arguments advanced for and against it, and the particulars of the law itself. The 1976 law renounced almost a century of contrary decisions. Evidence of a rape complainant's sexual activity prior to the alleged rape was previously admissible at trial as probative of the consent issue.[^6] The evidence could be presented either in the form of reputation[^7] or specific acts.[^8]

Those who lobbied for a legislative overruling of these decisions argued that a shield law would protect rape victims from unnecessary humiliation at trial;[^9] that “the basic issue in a rape case should be consent, not a woman’s past sex history;”[^10] that rape frequently went unreported because of rape victims’ dread of embarrassment;[^11] and that the victim’s sex history should be excluded just as evidence of any rapes which the defendant had previously committed.[^12]

which will tend to confuse, mislead or prejudice the jury.

[^2]: Sanders v. Commonwealth, 269 S.W.2d 208 (Ky. 1954); Grigsby v. Commonwealth, 187 S.W.2d 259 (Ky. 1945); Bowman v. Commonwealth, 143 S.W. 47 (Ky. 1912). Although some courts distinguish between using chastity evidence for impeachment purposes and using it as substantively probative of consent, Kentucky has never employed the distinction. However, there is some language in Kentucky cases implying that veracity is a function of chastity in females. See Jones v. Commonwealth, 157 S.W. 1079, 1080 (Ky. 1913); Lake v. Commonwealth, 104 S.W. 1003, 1006 (Ky. 1907). These cases, as well as those cited by Wigmore, reflect 19th-century notions of female chastity. At any rate, the distinction may be academic in rape cases, wherein the issues of credibility and consent are functionally equivalent. J. Wigmore, *supra* note 16, § 62 at 467. For a suggestion that using chastity evidence to impeach females, while disallowing its use to impeach males, is a denial of equal protection, see Comment, *Rape in Illinois: A Denial of Equal Protection*, 8 J. MAR. J. PRAc. & PROC. 457 (1975).

[^11]: Gravitt v. Commonwealth, 212 S.W. 430 (Ky. 1919); Brown v. Commonwealth, 43 S.W. 214 (Ky. 1897).

[^12]: The Courier-Journal (Louisville, Kentucky), June 10, 1975, § A, at 9, col. 1. See also notes 43-46 *supra* and accompanying text.

[^13]: Interim Comm. on the Judiciary, Minutes 1 (June 19, 1975) (on file in Legislative Research Comm’n Library, Kentucky State Capitol).


[^22]: The Courier-Journal (Louisville, Kentucky), *supra* note 69.
The deficiencies in the arguments regarding humiliation and underreporting were discussed earlier. It is the final argument of those above, however, which is most troubling. Evidence of previous rape convictions is admissible against the defendant in a rape case, as an exception to the general prohibition against admitting evidence of previous crimes committed by the defendant. The theory underlying this exception is that sex offenders are likely to repeat their crimes.

In opposition to the proposed bill, it was argued that prior sexual activity is relevant when consent is a defense; that the danger of false allegations is prevalent in rape cases; and that the proposed rape shield law was unconstitutional because it "seriously diminishes an accused's right to cross-examine the prosecution's prime witness and his right to present witnesses on his own behalf." The humiliation of the rape victim, it was contended, must yield to a paramount consideration: That "only one person is on trial in a rape case and only one person can be imprisoned—the defendant."

Kentucky Revised Statutes § 510.145 (the Kentucky rape shield law) creates a blanket exclusion of chastity evidence, in the form of either reputation or specific acts, at rape trials. Carved from this exclusion are two categories of evidence which may be deemed admissible: (1) "evidence of the complaining witness' prior sexual conduct or habits with the defendant."

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73 See note 43-48 supra and accompanying text.
74 C. McCormick, supra note 14, at § 43.
75 But see Gregg, Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses, 6 Ariz. L. Rev. 212 (1965).
78 Id. at col. 3.
79 Id. at col. 1.
80 Id. See notes 110-24 infra and accompanying text for a discussion of the constitutionality of Kentucky's rape shield statute.
81 KRS § 510.145(2) (Supp. 1976). A Senate Committee amendment would have limited the scope of this prohibition to evidence of prior acts only. The amendment, however, was withdrawn before it was voted on by the Senate. 1976 JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY 1394 (Mar. 17, 1976).
82 KRS § 510.145(3) (Supp. 1976). The opponents of H.B. 143 sponsored an amendment which would have allowed the judge to hear evidence of all sexual activity
and (2) "evidence directly pertaining to the act on which the prosecution is based." Admissibility of either is contingent upon the defendant's filing a written motion with the court, and the judge's determination at a subsequent hearing that the proffered evidence is relevant and material and "that its probative value outweighs its inflammatory or prejudicial nature."

III. THE KENTUCKY RAPE SHIELD LAW: AN EVALUATION

The Kentucky rape shield law recognizes that separate standards should apply to admissibility of evidence of a victim's prior consensual sexual activity and admissibility of evidence of forcible rapes of which the defendant has previously been convicted. The most visible merit of the law is that it treats chastity evidence as ordinary character evidence and reminds judges that the evidence should be evaluated in terms of ordinary admissibility standards. In addition to these values, the Kentucky rape shield law has certain deficiencies. It allows some chastity evidence to be wrongly excluded. In those instances, the law violates the sixth amendment rights of the defendant. In effect, then, the Kentucky rape shield law is an unbalanced consideration of the interests of the victim and the defendant.

of the complainant prior to the alleged rape, before deciding which portions were admissible at trial. The Courier-Journal (Louisville, Kentucky), Jan. 24, 1976, § A, at 5, col. 1. Specifically, the amendment proposed to "delete [the] condition of evidence of prior sexual conduct with the defendant, making evidence of any such prior conduct admissible [sic]." 12 LEGISLATIVE RECORD 63 (Apr. 5, 1976). The amendment, however, was defeated. Id.

KRS § 510.145(3) (Supp. 1976). See also notes 104-05 infra and accompanying text.

KRS § 510.145(3)(a) (Supp. 1976). The motion must state that the defendant has "relevant evidence of prior sexual conduct or habits of the complaining witness." Id.

The motion must be filed at least two days before trial, unless the defendant shows good cause for abrogating this requirement. Id. As proposed, this period was two weeks, 76 B.R. 28. The change to two days was the result of an amendment proposed by the House Committee on the Judiciary and adopted on the floor of the House. 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY OF KENTUCKY 116 (Jan. 23, 1976).

KRS § 510.145(3)(b) (Supp. 1976). The evidence, if determined admissible, may be admitted in whole or in part, "in accordance with the applicable rules of evidence." Id.
A. In Terms of Evidence Admissibility Standards

The Kentucky rape shield law demonstrates that evidence of a victim's previous sexual activity is not comparable to evidence of rapes of which the defendant has been convicted. The evidence offered by each side in a rape trial is distinct: The prosecution attempts to prove the defendant's tendency to commit unlawful, forcible sexual intercourse, while the defense attempts to prove the complainant's tendency to have consensual sexual intercourse with the defendant. This distinction is ignored by persons who argue that rape shield laws keep out certain evidence which is in the defendant's favor while allowing in the same evidence to be used against the defendant. Quite simply, it is not the same evidence at all.

Rape shield laws, on the other hand, point out the distinction between consensual sexual intercourse and forced sexual intercourse by demanding scrutiny of evidence of the former on separate standards from evidence of the latter. Evidence of forced sexual intercourse (earlier rape convictions) is admitted because of notions that rapists tend to repeat their crimes. No such recurrent tendency has been demonstrated with respect to evidence of consensual sexual intercourse (chastity evidence). Absent any such proof, courts should apply established admissibility rules to chastity evidence. Rape shield laws require exactly that.

A second merit of the Kentucky rape shield law is that it serves a memory-jogging function: It reminds judges that chastity evidence is ordinary character evidence, to which ordinary admissibility rules should apply. Having repudiated the notions which made chastity evidence mechanically admissible as relevant to consent, the Kentucky legislature has reinstated chastity evidence into the category of character evidence. Since the use of such evidence rests upon the theory that traits control a person's behavior, evidence admitted in

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8 See notes 74-75 supra and accompanying text.
87 Kentucky has never allowed the use of chastity evidence to impeach a witness's credibility. See note 66 supra and cases cited therein.
88 The Federal Rules of Evidence, in contrast, retain the distinction between chastity evidence and other character evidence. See Fed. R. Evid. 404. The logic underlying this rule has been attacked; see Washburn, supra note 27, at 296-300.
89 Wigmore admitted that character evidence is "a feeble and petty class of evidence," and pointed out a modern trend to "abandon the old notion (a mark of a
a rape case where the defense is consent should tend to prove (1) the propensity of the complainant to engage in a pattern of indiscriminate sexual conduct;10 (2) the propensity of the complainant to have sexual intercourse with persons similar to the defendant, under similar circumstances; or (3) the propensity of the complainant to have sexual intercourse with the defendant himself. Of these three facts to be proved, the Kentucky rape shield law permits only evidence of the last, because of its blanket exclusion of evidence of sexual acts with any person other than the defendant. Evidence of sexual activity between the victim and persons other than the defendant does introduce additional issues into the trial, thereby confusing the jury to a degree. In some cases exclusion of such evidence is justifiable, since the prejudicial, confusing or misleading nature of chastity evidence frequently outweighs its probative worth.11 Yet the Kentucky law does wrongly exclude some evidence even when its probative worth outweighs its inflammatory nature. This criticism is discussed below. However, when chastity evidence is rightfully excluded, the most obvious merit of the Kentucky rape shield law is demonstrated: It applies established admissibility rules to chastity evidence just as to other character evidence.

To the extent that the Kentucky rape shield law reminds the courts that the concepts of relevancy, materiality and undue prejudice or confusion of issues apply to chastity evidence, it is fully defensible. Particularly important is the application of the concept of issue confusion. Several reasons man-

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10 A model rape shield law has been proposed which would require admissibility of chastity evidence to be based on, in addition to basic evidence law principles, a finding by the court that the evidence "shows such a relation to the conduct involved in the case that it tends to establish a pattern of conduct or behavior on the part of the prosecutrix that is relevant to the issue of consent." G. Robinson, supra note 58, at 13. In addition, two states' rape shield laws embody this "pattern of conduct" notion. FLA. STAT. ANN. § 794.022 (West Supp. 1976); TENN. CODE ANN. § 40-2445 (Supp. 1975).

11 See notes 37-40 supra and accompanying text.
date exclusion of evidence despite its relevance. As enunciated by Wigmore, those reasons are confusion of issues, unfair surprise and undue prejudice. According to the Federal Rules of Evidence: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."

Thus the concerns which exclude certain relevant evidence are not limited to evidence which will prejudice a jury against a defendant. The evil feared is, on a larger scale, that a wrong result will occur because the jury is confused or misled.

Viewing these exclusionary reasons from a broader perspective helps to answer one of the arguments generally advanced by opponents of rape shield laws: that the humiliation to which a rape victim is subjected at trial is of no legal consequence because humiliation is not the equivalent of undue prejudice. Undue prejudice, it is urged, is a concept properly applied only to situations in which the defendant may be prejudiced. It must be emphasized, however, that issue confusion and misleading the jury are of equal importance with undue prejudice. In light of recent jury studies which demonstrate significant juror confusion because of chastity evidence, the legally significant reason for which chastity evidence should sometimes be excluded is not that rape victims suffer humiliation, but that chastity evidence confuses the jury and makes jurors reach incorrect decisions or, at any rate, decisions based on faulty reasoning. Therefore, by excluding relevant chastity evidence when it tends to confuse or mislead jurors, the Kentucky rape shield law properly applies admissibility standards of evidence law.

Problems arise, however, when the Kentucky statute defines as unduly confusing or misleading all evidence of victim-third party sexual intercourse. Almost all of the rape shield laws attempt to give courts examples of unduly confusing or misleading evidence. The typical act has been characterized as

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92 J. WIGMORE, supra note 16, § 42.
93 FED. R. EVID. 403.
94 "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 (Advisory Comm.'s Note).
95 See J. WIGMORE, supra note 1, § 921; J. WIGMORE, supra note 16, § 62.
96 See notes 49-52 supra and accompanying text.
an exclusion of chastity evidence, with express exemptions. Any attempt to list relevant chastity evidence and to distinguish between that portion which is unduly confusing or misleading and that which should be admissible creates the very problem faced by the typical rape shield law — balancing the needs of the complainant with the rights of the defendant. Moreover, no statutory scheme can anticipate all situations which will arise in the courtroom context. However, some illustrations are in order at this juncture.

Examples of issues to which chastity evidence may be relevant include (1) chastity per se; (2) motive of the complainant in charging the defendant with rape; (3) a result of the act itself such as disease or pregnancy; and (4) consent. The Kentucky law’s absolute prohibition on victim-third party sexual activity clearly disallows use of such evidence to impeach a witness who proclaims herself chaste. In addition, the denial of such evidence precludes using proof of a victim-third person sexual liaison to establish a complainant’s bias against a defendant. As for the third example, the Kentucky legislature presumably had such evidence in mind when it deemed admissible “evidence directly pertaining to the act on which the prosecution is based.” However, “if broadly interpreted the clause could negate the whole purpose of the statute.”

The first three examples thus point out deficiencies in the Kentucky rape shield law. In those cases, relevant evidence is

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97 Berger, supra note 57, at 32-39.
98 "The term ‘relevant’ as applied to evidence means that the evidence tends to establish or disprove an issue in litigation.” O’Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891 (Ky. 1966). The Federal Rules of Evidence define relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.
99 Chastity would be at issue in a rape case if the applicable statute defined rape as “unlawful carnal intercourse with any unmarried person, of previous chaste character . . . .” Fla. Stat. Ann. § 794.05 (West 1976).
100 Bias of a witness may be established to impeach her credibility. C. McCormick, supra note 14, § 40.
101 See note 61 supra and accompanying text.
102 After a witness has put her own character in issue, it may be attacked by the defense. C. McCormick, supra note 14, § 187.
103 See note 24 supra.
104 KRS § 510.145(3) (Supp. 1976).
105 G. Robinson, supra note 58, at 5.
excluded although it is not unduly prejudicial. In each context, the need for the evidence and the unfair advantage enjoyed by the prosecution if it is excluded mandate its admissibility.

The fourth example, in contrast, was chosen to illustrate a strength of the Kentucky law: the memory-jogging function as to relevancy and materiality. Judges must be reminded that consent should truly be an issue in the case before evidence can be admitted as probative of consent. Consent may be eliminated as an issue in the case, for example, if the defendant illegally entered the complainant's home or used force on the complainant; if the defense is that no intercourse occurred; or if consent is disallowed as a defense. When consent is eliminated as an issue, the evidence should not be admitted.

B. *In Terms of the Sixth Amendment*

The confrontation clause of the sixth amendment also demands that certain considerations be weighed in determining whether relevant and material evidence is to be excluded. The importance of the use for which the evidence is desired must be balanced against the interest which the state has in excluding such evidence, together with alternative ways which can protect the same interest in the particular situation. This analysis was applied by the United States Supreme Court in *Davis v. Alaska*, in which, in assessing the use of a statute which shielded a juvenile offender's identity in light of the need to prove bias on the part of a witness, the Court held:

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of

104 See note 24 supra and accompanying text.
108 The right of a criminal defendant "to be confronted with the witnesses against him" includes the right of cross-examination. U.S. Const. amend. VI; Pointer v. Texas, 380 U.S. 400 (1965). Similarly, the Kentucky Constitution provides: "In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face . . . ." Ky. Const. § 11.
so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State’s interest in the secrecy of juvenile criminal records.\textsuperscript{113}

Weighing the importance of the use of the evidence prof-fered against the state interests protected by a rape shield law is essentially the same exercise as measuring the probative worth of evidence against the likelihood that it will confuse or mislead jurors if it is admitted. Therefore, the sixth amendment analysis and the resultant deficiencies of the Kentucky rape shield law are fundamentally the same as the analysis and deficiencies discussed in the preceding section of this Comment.

Two variations occur, however, in evaluating a rape shield law in terms of the sixth amendment. The first difference is that the constitutional analysis can properly include the humiliation suffered by rape victims at trial, and their resultant failure to report rapes, as legitimate state interests. As indicated earlier, these are not true legal concerns in an evidence admissibility analysis.\textsuperscript{114} Thus the case for excluding chastity evidence is stronger when viewed in terms of the sixth amendment than when assessed in terms of evidence admissibility standards.

The second distinction between the two analyses is that the constitutional test injects an element not present in the evidence admissibility test: alternative ways in which the state can protect the same interest in the same situation. Since the variable factor in the analysis—importance of the use for which the evidence is offered—cannot be anticipated, any attempt to list alternatives would be futile. Compulsory waiver of jury trial in rape cases, besides being unconstitutional,\textsuperscript{115} is not an alternative because it would make rape defendants bear too

\textsuperscript{113} Id. at 320.
\textsuperscript{114} See notes 94-96 supra and accompanying text. See also notes 43-48 supra and accompanying text.
\textsuperscript{115} U.S. CONST. amend. VII; KY. CONST. § 11.
much of the burden of preserving the state's interest. Such an undue burden was condemned by the court in *Davis*.

Finally, the *Davis* analysis does not require the absolute eradication of a shield law when it is found to violate the sixth amendment. Rather, the shield statute in *Davis* was recognized as a valid legislative declaration of public policy which was forced to yield in the face of a more compelling policy; the statute was merely held inapplicable because it conflicted with the sixth amendment in that particular case, instead of being ruled unconstitutional.116 Thus, the constitutionality of a rape shield law should depend upon the proposed use of evidence which the statute would otherwise exclude. Only when the importance of that use outweighs the state interests in applying the rape shield law should the law be made to yield.

As for the Kentucky law, some situations readily come to mind in which the statute will have to yield in the face of the more compelling policy evinced by the sixth amendment. The Kentucky rape shield law will have to yield to the sixth amendment if a complaining witness proclaims herself chaste; if evidence of some victim-third person sexual liaison exists which tends to prove a victim's bias against a defendant; or if a defendant seeks to prove that someone else is responsible for a consequence of the act, such as pregnancy or disease.117 In these contexts, the sixth amendment mandates admissibility of evidence of sexual activity between the victim and a third party.

C. **In Terms of a Proposed Model**

"The problem is to chart a course between inflexible legislative rules and wholly untrammeled judicial discretion: The former threatens the rights of defendants; the latter may ignore the needs of complainants."118 Kentucky's law is dangerously close to an inflexible legislative rule, since the only exemptions

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116 A concurring opinion in *Davis* emphasized that constitutionality of a shield statute will vary with the proposed use of the evidence which would otherwise be excluded. Justice Stewart stated that "the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." *Davis* v. Alaska, 415 U.S. 308, 321 (1974) (Stewart, J., concurring).


118 Berger, *supra* note 57, at 69.
from its ban on chastity evidence are prior victim-defendant sexual conduct and "evidence directly pertaining to the act on which the prosecution is based." As explained previously, those two categories of proof are insufficient to protect the rights of defendants under evidence admissibility standards and under the sixth amendment. The Kentucky rape shield law thus expresses a clear preference for the needs of complainants, with no concomitant concern for the rights of defendants.

However extreme the maltreatment of rape victims, the Kentucky rape shield law should not go to the other extreme by evincing a preference for victims and a prejudice against defendants. An argument that the Davis analysis will protect defendants' rights in the proper situations is not persuasive. A law which manifests a bias against criminal defendants runs counter to our system of criminal justice, which utilizes the presumption of innocence.

Some state legislatures have attempted to provide a balanced approach in the language of their rape shield laws. The key in finding that balance is to ascertain that "the categories of proof outside the act's automatic ban [on chastity evidence] are sufficiently inclusive to meet the rightful demands of defendants . . . ." Accordingly, a model statute which purports to establish the desired balance has recently been proposed.

The proposed statute does not contain the deficiencies which lie in the Kentucky rape shield law. For example, it would admit evidence tending to prove a rape victim's bias against the defendant, as well as evidence of a pattern of conduct which manifests a tendency to consent to intercourse with the defendant. On balance, the proposed law does what the Kentucky rape shield law fails to do: It recognizes the need for rape shield laws, while protecting the constitutional rights of defendants in rape cases.

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12 Id.
13 Berger, supra note 57, at 72.
14 Id. at 97-99.
15 Id.
16 Id.
CONCLUSION

Although rape shield laws have been attacked as a legislative invasion of the province of the judiciary, a re-evaluation of the crumbling legal and psychological foundations supporting the admissibility of chastity evidence at rape trials was clearly in order. As reminders of elementary evidence principles, then, rape shield laws perform a vital task. The courts have been informed that chastity evidence should be shorn of its uniqueness based on outmoded beliefs and evaluated merely as character evidence.

Recognizing that consensual sexual intercourse and forced intercourse are entirely separate occurrences, legislatures have passed rape shield laws to establish standards of admissibility of evidence of intercourse by consent. In essence, rape shield laws apply to chastity evidence the same admissibility standards of relevancy, materiality and issue confusion by which other proffered evidence is evaluated.

Clearly, then, Kentucky's rape shield law possesses the general attributes of all rape shield laws. Beyond this point, however, two deficiencies are apparent in the Kentucky statute. First, it excludes some relevant chastity evidence, the need for which outweighs its tendency to confuse or mislead jurors. Secondly, the law manifests an unequivocal preference for rape victims over defendants. Although a defendant's constitutional right to confrontation can be preserved by making the Kentucky rape shield law yield in particular situations, defendants should not be required to surrender their rights as the price of previous judicial bias against rape victims.

Judges have traditionally assessed evidence to determine relevancy and probative worth. Although they have not previously applied these standards to chastity evidence, it should be sufficient for legislatures to provide, via rape shield laws, a reminder that such standards should apply and should provide examples to guide the judiciary applying these standards.

125 Comment, Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?, 3 Hofstra L. Rev. 403 (1975).

126 Language in some recent cases indicates careful reappraisals of the relevance, materiality and probative worth of chastity evidence. See, e.g., State ex rel. Pope v. Superior Court, 545 P.2d 946 (Ariz. 1976); People v. Rincon-Pineda, 538 P.2d 247, 123
The legislature should not go so far, however, as to enact a law which is biased against defendants. The Kentucky rape shield law transcends this boundary, and its infirmity should be corrected. 127

Jennifer Burcham Coffman


127 For another criticism of the Kentucky rape shield law, see Memorandum from J. Vincent Aprile II, Chief, Appellate Branch, Office of Public Defender of Kentucky (undated) (on file at Kentucky Law Journal office).