1975

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?

Frederick Eisenbud

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol3/iss2/2

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
NOTES AND COMMENTS

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?

After considering the prior sexual history of the victim in a rape case, or her prior reputation for unchastity,\(^1\)

[w]ill you not more readily infer assent in the practiced Messalina in loose attire, than in the reserved and virtuous Lucretia?

Of course not, say some: a woman has the right to do with her body what she will, and the fact that she assented before has nothing to do with whether she consented today or will consent tomorrow.\(^2\)

Yes indeed, say virtually all of the courts in the United States which have considered such evidence.\(^3\)

\(^1\) People v. Abbott, 19 Wend. 192, 195 (N.Y. 1838).


Courts which have considered the question of whether the character of the complaining witness for chastity or unchastity is relevant to the issue of consent in forcible rape cases have answered it in the affirmative on the theory that it is more probable that an "unchaste" woman will assent to have intercourse than will a "virtuous" woman. See, e.g., Brown v. State, 280 So.2d 177, 179 (Ala. 1973) ("[A] person of bad moral character is less likely to speak the truth as a witness than one of good moral character, and . . . a woman who is chaste will be less likely to consent to an illicit connection, than one who is unchaste."); People v. Eilers, 18 Ill. App.3d 213, 309 N.E.2d 627, 630 (1974) ("The underlying thought with respect to reputation testimony in rape cases is that it is more probable that an unchaste woman would assent than would a virtuous woman . . . .").

The language of some of the earlier cases is a bit stronger. See, e.g., Lee v. State, 132 Tenn. 665, 179 S.W. 145 (1915) ("[N]o impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure."); Titus v. State, 68 Tenn. (7 Baxter) 132,

Published by Scholarly Commons at Hofstra Law, 1975
Sometimes yes, and sometimes no, say a small number of states.\footnote{133-34 (1874)("It would be absurd, and shock our sense of truth, for any man [I] to affirm that there was not a much greater probability in favor of the proposition that a common prostitute had yielded her assent to sexual intercourse than in the case of the virgin of uncontaminated purity."); People v. Benson, 6 Cal. 221, 223 (1856) ("[I]t must be obvious to all that there would be less probability of resistance upon the part of one already debauched in mind and body, than there would be in the case of a pure and chaste female."); Camp v. State, 3 Ga. (3 Kelly) 417, 422 (1847) ("[W]ho is more likely to consent to the approaches of a man, the unsullied virgin and the revered, loved and virtuous mother of a family, or the lewd and loose prostitute, whose arms are open to the embraces of every coarse brute who has money enough to pay for the privilege . . . ? [N]o evil habitue of humanity so deprives the nature, so deadens the moral sense, and obliterates the distinction between right and wrong, as common, licentious indulgence. Particularly is this true of women, the citadel of whose character is virtue; when that is lost, all is gone; her love of justice, sense of character, and regard for truth. She esteems herself as put to the ban of society, and as incapable of deeper degradation.").}  

I. INTRODUCTION

Not all trials for rape involve the issue of consent. In statutory rape cases, for example, the offense is the mere act of intercourse with a woman who is below a specified age, regardless of her consent. This article is limited to the law as it applies to forcible rape, i.e., the act of intercourse with a woman against her will. Two issues will be discussed. The first is whether the prior sexual history of a woman as it relates to people other than the defendant is relevant evidence from which an inference may be drawn as to whether she consented to have intercourse with the defendant. The second is, if such evidence is relevant, may it legitimately be kept out of the trial by the act of a state legislature or otherwise?

The issue of consent becomes clearest in the following type of situation:

A meets B in a singles bar. They are seen talking, drinking, and dancing together. Around midnight, they leave together and go to B’s apartment. Up to this point, their stories mesh. B claims that, once inside her apartment, A pulled a knife and threatened to kill her if she did not have intercourse with him. A admits having intercourse with B, but denies that he pulled a knife, or threatened her in any way. There is no physical evidence of violence.
At the trial, A wishes to show that B has met men in singles bars before, and has had intercourse with them, to show that it was not at all unlikely that she would consent to have intercourse with him. He also wishes to cross-examine her as to these prior acts of intercourse. The state is Michigan — the evidence is excluded.

It might be possible to dispose of the above fact pattern by saying that there is so little evidence that the district attorney would not even seek an indictment. Nevertheless, indictments are brought, and the verdict of the jury will often turn on its resolution of the issue of consent.

II. GENERAL BACKGROUND

It is impossible to know what percentage of the rapes committed are actually reported, but it is not generally thought to be a large figure. Any number of factors may account for this failure: desire to protect reputations; age of the victim; extent of physical injury to the victim; desire not to get involved in lengthy legal proceedings; fear of the offender; desire that husband or parents not know of the rape; the wish to protect the offender where a special relationship may have existed; and especially, the feeling that reporting the crime will accomplish nothing beyond having the victim humiliated by the police before trial and by defense counsel during trial as they pry into the complainant’s sexual past to show that she was not raped but rather, was “asking for it.”

5. See generally Note, Prosecutorial Discretion at the Complaint Bureau Level, 3 Hofstra L. Rev. 81 (1975).
7. Id. at 29.

Often, our notions of the who-what-where-and-when aspects of rape are far removed from reality. Compare Hibey, supra note 5, at 310, with Amir, supra note 6, at 336-37. Amir conducted a study based on all cases of forcible rape listed by the police in Philadelphia for the years 1958 and 1960. With the caveat that generalizations should not be made to non-urban areas and to different time spans, id. at 6, the study led him to make, inter alia, the following observations: rape is primarily intraracial (mostly between black men and women); rape frequency is spread out over the year (not just in summer); the victim and rapist knew each other as close neighbors or acquaintances in more than one-third of the cases; offenders and victims often met in the house of one and the rape took place there; alcohol was present in only one-third of the cases; 20 percent of the victims had police records (especially for sexual misconduct); almost three-quarters of the rapes were
Technically, proof of unchastity is not a defense to the crime of forcible rape. As Blackstone stated in the eighteenth century, the law holds it to be felony to force even a concubine or harlot, because the woman may have forsaken that unlawful course of life.

While the only issue in a forcible rape case other than the fact of intercourse should be whether the intercourse was consensual, at least one major study of the American jury concluded that: The jury . . . does not limit itself to this one issue; it goes on to weigh the woman’s conduct in the prior history of the affair. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.

It is this that outrages women and leads them to conclude that it is a waste of time to prefer charges against rapists. Rather than the assailant being on trial, the victim becomes the defendant, made to feel that somehow the rape was entirely her fault. This has motivated one commentator to suggest: Attempts to introduce evidence of unchastity into rape trials should be rejected altogether. The relationship between a woman’s chastity and whether or not she has been raped is

planned; over 50 percent of victims failed to resist attackers in any way; 43 percent were multiple rape cases. *Id.* at 336-37.

9. See, e.g., Humphreys v. State, 227 Md. 115, 175 A.2d 777, 780 (1961); State v. Dipietrantonio, 182 Me. 41, 122 A.2d 414, 418 (1956); Nickels v. State, 106 So. 479, 489 (Fla. 1925) (“The general rule is that, in prosecutions for rape, evidence of the prior unchastity of the prosecutrix, as a substantive defense, is not admissible, for rape may be committed upon a woman previously unchaste as well as upon any other female.” *Id.*). The court went on to say, however, that such evidence was admissible as “bearing upon the probability of her consent . . . .” *Id.*.

10. 4 W. BLACKSTONE, COMMENTARIES *213.

11. For a discussion of how far a defendant may excuse himself by showing that his victim made no opposition where it appears that the victim was laboring under a mistake or was deceived, see Puttkammer, Consent in Rape, 19 Nw. (U. Ill.) L. Rev. 410 (1925).

12. H. KALVEn & H. ZEISEL, THE AMERICAN JURY 249 (1966). The authors of the study found that in 12 percent of the cases of “aggravated rape” (defined to include those rapes in which there was extrinsic violence, multiple assailants, or defendants and victims who were complete strangers), juries acquitted where a judge would have convicted. Astoundingly, in cases of “simple rape” (defined to include all rape cases other than those categorized as aggravated rape), this figure rose to 60 percent! *Id.* at 252-53.

13. See Landau, The Victim as Defendant, TRIAL, July/August, 1974; Medea & Thompson, supra note 8, at 113.

simply too attenuated to warrant consideration as relevant evidence.

Rape victims and prosecutors must feel frustrated to the point of despair when a man, against whom there seemingly was an airtight case, is either found not guilty by a jury, or is convicted of a lesser included offense. This is especially so when the only possible explanation for the result is that the jurors discounted the defendant’s act because of how they perceived the character of the defendant’s victim.\(^1\)

Presumably to encourage rape victims to come forward, and to avoid prejudicing jurors against rape victims to the detriment of the state’s case, Michigan has recently enacted legislation which limits the admissibility of evidence at trial that pertains to a rape victim’s prior sexual history.\(^2\) Only evidence of the complaining witness’ prior sexual conduct with the accused or, if it is necessary to prove the source or origin of semen, pregnancy, or disease, evidence of prior sexual conduct with others, is admissible. All other “[e]vidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct” is inadmissible.\(^3\)

The desire to keep from the jury evidence of the victim’s prior sexual history is understandable. Nevertheless, to rule all or most such evidence inadmissible by legislative fiat flies in the face of a long and virtually undivided history of court decisions allowing in such evidence.\(^4\) It is the thesis of this paper that, unless proponents of Michigan’s statute, and others like it, are able to prove—not merely assert\(^5\)—that the evidence the statutes bar is not relevant to the issue of whether the complaining witness con-

\(^1\) See Kalven & Zeisel, supra note 12, at 250-51.
\(^3\) Id.
\(^4\) See note 3 supra.
\(^5\) In light of virtually unanimous court opinion that evidence of character for chastity or unchastity is relevant to the issue of consent in forcible rape cases, see note 3 supra, stare decisis should compel those people who wish to convince the courts otherwise to do more than simply assert that such evidence is not relevant. It is conceded that “[t]he rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.” Hertz v. Woodman, 218 U.S. 205, 212 (1910). Uniformity for its own sake is not a justification for the continuance of an established rule, especially if proponents of change can demonstrate that adherence to the past is no longer wise. This implies, however, that at least some burden of proof rests on those who seek change.
sented to have intercourse with her alleged assailant, the statutes will be found to be unconstitutional. This is so because, by excluding evidence that is relevant to their defense, the statutes deny defendants the right to confront witnesses against them, and to compel witnesses in their behalf.20

III. MATERIALITY, RELEVANCY, AND METHODS OF PROOF

To be admissible, evidence must first be shown to be material, i.e., it must be offered as being probative of some matter that is at issue at the trial.21 Materiality must be distinguished from relevancy, which is the tendency of the evidence to establish that issue.22

If Fact A is offered in evidence for the purpose of proving the existence of ultimate Fact B, but Fact B is not in issue in the case, Fact A will be excluded, not because it does not tend to prove Fact B, but because Fact B is not before the court for determination.23

It was noted earlier that the fact of the complainant’s lack of chastity is not available to the defendant as an affirmative defense.24 If her prior sexual history is offered into evidence for the sole purpose of proving that she was not chaste at the time of the alleged forcible rape, it would be properly excluded as immaterial. It is not introduced for this purpose alone, however.

The evidence is offered as being probative of the issue of whether the complaining witness consented to have intercourse with the defendant. Forcible rape is typically defined as sexual intercourse that is induced by forcible compulsion.25 As the prosecution must prove beyond a reasonable doubt that the intercourse was induced by forcible compulsion, evidence that is offered for

---

20. U.S. CONST. amend. VI states:
   In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the Witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . .
22. Id. at 435.
24. See notes 9-10 supra and accompanying text.
the purpose of raising the inference that the act was either forced or consensual is clearly material.26

More specifically, evidence of the complaining witness’ prior sexual history is deemed to be circumstantial evidence from which, courts sometimes state, her “character” for chastity or unchastity may be inferred.27 As “character” implies a somewhat permanent attribute of a person, however, it is suggested that it is more accurate to say that the evidence is admitted to show the complaining witness’ propensity to have consensual sexual intercourse, or more simply, propensity to have intercourse.28 Once her propensity to have consensual sexual intercourse is demonstrated, it is itself considered to be circumstantial evidence from which inferences may be drawn29 as to the probability that she consented to have intercourse with the defendant.30 By definition, the complainant’s propensity to consent to intercourse will have at least some tendency to make it more or less probable that she consented to have intercourse with the alleged rapist. Therefore, the question which must be answered is whether her prior sexual

28. “Character” may be defined as “[t]he aggregate of the moral qualities which belong to and distinguish an individual person; the general result of... one’s distinguishing attributes.” BLACK’S LAW DICTIONARY 294 (rev. 4th ed. 1968); see also WIGMORE § 52, at 448. Implicit in this definition is the notion that one’s character remains relatively constant. Because character is deemed to be somewhat unchanging, it is felt that predictions of behavior based on the knowledge of that character may be made. See Gregg, Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses, 6 AMER. L. REV. 212, 216 (1965).
29. Evidence of the complainant’s character for chastity or unchastity is introduced to aid the trier of facts’ attempt to resolve the issue of consent. To be of help, the complainant’s character for chastity or unchastity must convey information about the likelihood that she will consent to have sexual intercourse on any given occasion. As “character” is a trait of a person that is thought to be fairly constant over time, the use of this term in a discussion concerning the likelihood that a person will consent to intercourse is misleading.

The likelihood that a person will consent to have intercourse is dependent on the quality and quantity of experience preceding the moment of decision. See note 41 infra and accompanying text. At some point in a person’s life, subsequent sexual experience might be quantitatively and qualitatively insignificant in terms of its impact on the person’s attitude toward sex. At that point, the person’s “character” for chastity or unchastity might become a meaningful concept. But if it is true, as Amir found, that two-thirds of the victims of rape are between the ages of ten and twenty-nine, AMIR, supra note 6, at 52 table 8, a search for their “character” for chastity or unchastity, insofar as that term implies a permanent attribute, will be in vain.

30. For a thorough discrediting of the idea that it is impermissible to make an “inference upon an inference,” see WIGMORE § 41.
history in fact is probative of her propensity to consent to intercourse.

This issue must be distinguished from the separate matter of determining the proper method of proof employed to demonstrate the complainant's propensity. The majority position as to the proper method of proof is that only evidence of the complainant's general reputation in the community as it relates to her propensity to have intercourse, and of specific prior acts of intercourse with the defendant, is admissible. Evidence of prior specific acts of intercourse with men other than the defendant is excluded.

Typically, three reasons are given for excluding evidence of prior specific acts. First, while the prosecutrix comes to trial ready and expecting to defend her general reputation, and to be asked about her prior relationship, if one existed, with the defendant, she can not anticipate specific charges of acts "by men who perhaps have been suborned to testify that they have had such connection with her, so as to secure the acquittal for the accused." Second, the fact that the prosecutrix consented to have intercourse with one man does not imply that she assented in the case of another. And third, it is argued that the inclusion of specific acts evidence will raise collateral matters, such as the right to introduce rebuttal evidence, which will needlessly confuse the trial.

Proponents of specific acts evidence meet these arguments

---

31. See WIGMORE §§ 52-53; MCCORMICK § 186.
32. See, e.g., State v. Bird, 302 So.2d 589 (La. 1974); State v. Yowell, 513 S.W.2d 397 (Mo. 1974); Crawford v. State, 492 S.W.2d 900 (Ark. 1973); State v. Broussard, 217 La. 90, 46 So.2d 48, 50 (1950); WIGMORE § 200, at 684. For a collection of earlier cases, see Annot., 140 A.L.R. 364 (1942). Note, however, that if the prosecution in these jurisdictions seeks to introduce evidence of the prosecuting witness' chastity prior to the act of intercourse in dispute at the trial, the defense may impeach her testimony by introducing evidence of specific prior consensual acts of intercourse with men other than the defendant. See, e.g., Commonwealth v. McKay, Mass. 294 N.E.2d 213, 218 n.4 (1973).
33. "No question of evidence has been more controverted. The Relevancy of the fact is seldom doubted, but the arguments of Unfair Surprise, Undue Prejudice, and Confusion of Issues . . . are thought to form serious objections." WIGMORE § 200, at 682.
34. State v. Ogden, 65 P. 449, 454 (Ore. 1901); see State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959); Teague v. State, 208 Ga. 459, 67 S.E.2d 467 (1951).
35. See, e.g., Lynn v. State, 231 Ga. 559, 203 S.E.2d 221, 222 (1974). The courts which rely on this rationale do admit, however, evidence of the complainant's reputation in the community for propensity to have intercourse.
37. One of the better known of the early American cases to support the introduction of specific prior acts evidence is People v. Abbott, 19 Wend. 192 (N.Y. 1838)("It is most
in a number of ways. If the prosecutrix finds that she is not prepared to meet evidence of her prior sexual relations with men other than the defendant, but is able to show that she can if given more time, the problem of surprise may be remedied by the granting of a continuance. Further, suborning perjury is a problem in all trials, and short of this, it is unlikely that impartial witnesses will be selected to testify about the complainant’s reputation in the community. As to the fear that specific acts evidence will raise collateral matters that will needlessly confuse the trial, the fact that there are presently states which permit the introduction of such evidence is at least some indication that this problem is not insurmountable. Further, assuming arguendo that control of such collateral matters is a serious problem, due to the importance of specific acts evidence to the defendant and the fact, as will be shown, that general reputation evidence is usually going to be of little value to him, it is one which the courts must resolve.

If evidence is being offered to prove the complainant’s propensity to have consensual sexual intercourse, it is difficult to see the value of her general reputation in the community for this trait. It is suggested that propensity to have consensual sexual intercourse is a function of both the quantity and quality of prior sexual experience. As such, it is a characteristic that is con-strange that a reputation of a want of chastity should be preferred in evidence to direct proof.” Id. at 197.) See, e.g., Guy v. State, 1 Tenn. Cr. 373, 443 S.W.2d 520, 522 (1969); Sanders v. Commonwealth, 269 S.W.2d 208, 210 (Ky. 1954). See also Annot., 140 A.L.R. 364, 386-89 (1942), for a collection of earlier cases.


39. See McCormick § 44, at 91.

40. See notes 88-90 infra and accompanying text.

41. The quantity factor is self-explanatory. The term “quality” is used broadly to include all of the myriad factors which distinguish sexual experiences. It would include, for example, the number of different sexual partners one has had. Thus a woman who has had numerous acts of intercourse with many different men would have a greater propensity to consent to intercourse than would a woman who has had sexual intercourse on an equal number of occasions but with only one man — unless, of course, that man is the alleged rapist.

The quality factor might also include the physical type of sexual partner the complainant has had in the past. Thus a woman who has had intercourse with a substantial number of different men would not necessarily have a high propensity to consent to intercourse with the alleged rapist if he were, for example, short, dark and stocky and all her prior sexual partners were tall, fair and lean. See also note 55 and accompanying text and note 64 infra.

Which of these two factors will be more important will depend on the actual prior sexual history of the complaining witness. Regardless of the strategy employed, however,
stantly subject to change. Americans are becoming increasingly mobile; it is questionable whether most people stay in a community long enough to develop a reputation for anything. This is especially true, as Professor McCormick points out, "in modern, impersonal urban centers" where reputation "is often evanescent, fragile, or actually nonexistent." Further, if a woman is at all discreet about her sexual behavior, her reputation in the community, if she has one at all, will have nothing at all to do with her actual propensity to have consensual sexual intercourse.

If the complainant's propensity to have intercourse is dependant on the quality and quantity of her prior sexual experience, it must be concluded that specific prior acts evidence, obtained both by putting questions to the complainant and by the presentation of witnesses, is a far more reliable means of proving this trait than is evidence of her general reputation in the community. Of course, the method of proving the prosecutrix' propensity to have intercourse only becomes important when, as noted, it is first established that the evidence to be offered is in fact probative of that trait. If it is not, then evidence of the complainant's prior sexual behavior, regardless of the form it takes, will be properly excluded.

IV. EVIDENCE PERTAINING TO THE PRIOR SEXUAL HISTORY OF THE COMPLAINING WITNESS — IS IT PROBATIVE OF HER PROPENSITY TO CONSENT TO INTERCOURSE?

The Federal Rules of Evidence define relevant evidence to be that which has

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.

one thing is clear: the decision will be made at the expense of the complaining witness who must have her private life publicly explored. Unless some superseding intervening factor exists, however, which will render her sexual history prior to that event irrelevant, see notes 54-55 and accompanying text, and note 64 infra, there may be no remedy for this. See notes 68-90 infra and accompanying text.

42. McCormick § 44, at 91. See also Wigmore § 1616, at 591 (Chadbourn rev. 1974).
43. This issue conceivably has constitutional dimensions. See notes 87-90 infra and accompanying text.
45. Federal Rule 401 reflects what Professor Trautman calls "logical relevancy," Trautman, supra note 23, and rejects the "legal relevancy" concept supported by Dean Wigmore, Wigmore § 28.
Thus the question which must be resolved is whether the complainant’s prior sexual history in fact has any tendency to prove her propensity to consent to intercourse. 46

How is the actual determination of relevance to be made? Professor McCormick suggests that:

[t]he answer must filter through the judge’s experience, his judgment, and his knowledge of human conduct and motivation.

Or, as one court has noted:

[T]he rules of evidence are founded in the philosophy of nature, in the truths of history, and the experiences of common life.

The problem, of course, is that reasonable people may differ as to what history’s “truths” are, and what experiences, if any, are common to a highly differentiated society, and thus, as to what is relevant.

One argument which might be made for ruling evidence of

Professor Trautman takes the position that, once a fact is shown to be logically probative of a matter at issue in a trial, it should be admitted “unless a clear ground of policy or law excludes it.” Trautman, supra note 23, at 388, citing J. Thayer, Preliminary Treatise on Evidence 530 (1898). Thus “it is enough if Fact A ‘may tend, even in a slight degree, ... though remotely’ to prove Fact B.” Id. at 391, quoting Stevenson v. Stewart, 11 Pa. 307 (1849).

Dean Wigmore, on the other hand, suggests that the “required probative value is somewhat higher than it need otherwise have been, because the purpose is to select only such material as is worth laying before the jury. ...” Wigmore § 29, at 412. For a further description of Dean Wigmore’s position, and criticism of it, see Trautman, supra note 23, at 388-92.

Regardless of the position one adopts, the controversy is academic in the context of this article: virtually every court to have considered the question of whether evidence of the complaining witness’ propensity to consent is relevant to the issue of consent has concluded that it is relevant. See note 3 supra. Thus even if these courts were applying legal rather than logical principles to determine the admissibility of the evidence, they must have concluded that it had that “higher degree of probative value[necessary] for all evidence to be submitted to a jury.” Wigmore § 28, at 409.

46. While the Supreme Court has never directly considered this question, it is interesting to note that, in Giles v. Maryland, 386 U.S. 66 (1967), although ample opportunity existed for one of the justices who was so inclined to doubt its relevancy, none chose to do so. In Giles, the Court vacated a rape conviction of two brothers on three separate grounds, none of which commanded a majority. Four justices dissented. Each of the four opinions filed made passing reference to the fact that Maryland admitted evidence to prove character for chastity or unchastity on the issue of consent, and none of the justices expressed any disapproval of the practice. Id. at 75 n.6, 76, 83-84, 96, 98-99, 112.

47. McCormick § 185, at 438.

the complainant's propensity to have intercourse irrelevant is that the various courts' assumptions of relevancy are based on an antiquated, Victorian concept of women that bears no relation to the reality of today. In nineteenth century America, when society considered premarital sex by women to be an abomination, a woman who was willing to suffer the condemnation of society by having sexual encounters prior to marriage (or by having lovers while married) really might have been someone who was more likely than a virgin to consent to have intercourse on any given occasion. Today, the argument might continue, women realize that they are free to control their own bodies and to consent or not consent to sexual relations as they please. Each decision that is made is discrete and unaffected by past behavior. For women today, what they have done in the past has no bearing whatsoever on their future decisions.

The argument employed to reach the conclusion that evidence of a complainant's propensity to have intercourse was relevant in the nineteenth century to prove that trait essentially fits the following model: (1) society expects people to behave in a certain way; (2) there is a great deal of pressure placed on people to conform to that behavior; (3) thus one who is willing to act contrary to that expected behavior despite the pressure to conform is more likely to act in such nonconforming fashion than is one who normally adheres to the societal norm. This same model may be used to demonstrate that the complaining witness' propensity to have consensual sexual intercourse, as evidenced by her prior sexual history, is still relevant to the issue of consent today.

A study of sexual behavior in America, conducted in 1973, revealed that nearly three-quarters of single women between the ages of eighteen and twenty-four have had intercourse (as compared to a finding of one out of three by Kinsey in 1953). The societal norm today is for young women to have sexual encounters before they are married. If, despite peer pressure to conform to

49. See note 3 supra for examples of nineteenth and early twentieth century judicial attitudes toward "unchaste" women.

50. M. Hunt, Sexual Behavior in the 1970s 149 (1974). The survey was conducted by the Research Guild, Inc., an independent market-survey and behavioral-research organization. Their sample, collected in 24 cities, included 982 men and 1044 women over the age of seventeen; was 90 percent white and 10 percent black; 71 percent were married, 25 percent never married and 4 percent previously married and not remarried. Id. at 16.

Prior Sexual History

this norm, a woman chooses, for whatever reason, to remain a virgin, it is not unreasonable to infer that on any randomly selected occasion, she will be less likely to consent to intercourse than will a woman who is no longer a virgin. The inference to be drawn from such evidence will not be made in a vacuum. The jurors will determine the weight to give this information by viewing it in the context of everything they know about the events leading up to the alleged rape.52

Regardless of the value judgment made by society about premarital or extramarital sexual behavior, its characterization will not alter the fact that people who engage in a certain type of behavior are more likely to engage in that behavior at any randomly selected moment than are people who have never engaged in that behavior before.

This does not mean that the only inquiry that should be made is whether the complainant was a virgin or a nonvirgin at the time of the alleged rape. If propensity to have consensual sexual intercourse is a function of both the quality and quantity of prior sexual experience,53 then it cannot be a constant among women who are no longer virgins. Compare, for example, the woman who has only had intercourse with men she has dated for several months or more, with the woman who is willing to have intercourse with whomever interests her, regardless of how long she has known him. While the former woman would probably have a higher propensity to consent to have intercourse with the man she had been dating for a number of months than would the other woman, she would likely be less willing than the latter to consent to have intercourse with someone other than that man on any randomly selected occasion. In a trial where the complaining witness and the defendant are at variance on the issue of consent, knowledge of the complainant’s prior sexual history may well provide some indication of the likelihood that she would consent to have intercourse on any given occasion, and will therefore aid the trier of facts’ attempt to render more or less credible the stories the complainant and the defendant are telling at the trial as to the issue of consent.

It does not necessarily follow from this discussion that the complainant’s entire sexual history is relevant to the issue of


53. See note 41 supra and accompanying text.
consent. As one’s propensity to consent to intercourse constantly changes as variations in the quantity and quality of the person's prior sexual experience take place,\textsuperscript{44} intervening superseding factors, to analogize to the law of torts, may render sexual experience prior to a certain event irrelevant. For example, a woman who has had numerous sexual encounters with many different men prior to her marriage may choose thereafter to only have sexual relations with her husband. Assuming that defense counsel cannot disprove the fact of her marital fidelity, her marriage and subsequent change in behavior should sever the probative link between her sexual history prior to marriage and her propensity to consent to intercourse at the time of the alleged rape. Likewise, her prior sexual history may involve circumstances so dissimilar to that of the alleged rape that it will not be probative of consent at all.\textsuperscript{55} It is suggested that a hearing prior to trial might be held to explore the possibility of limiting the introduction of evidence pertaining to the complainant’s prior sexual history.

If the complainant really was raped, her prior sexual history admittedly would be of no importance — it would not change the fact that she was raped. If we could always be certain of events, we would not need trials. But we cannot, and as long as the possibility exists that the complainant is not telling the truth,\textsuperscript{56}

\textsuperscript{54} Id.

\textsuperscript{55} See note 64 infra. Query whether evidence that tends to show a propensity of the complainant to consent to intercourse only with her husband makes the evidence irrelevant as to her propensity to consent with the defendant. It might be argued that such evidence should only be admissible if introduced by the prosecution to demonstrate a lack of consent, and any attempt by the defendant to affirmatively use such evidence should be barred. It is not necessary for the purposes of this article to resolve this question. The point is, the discretion which judges presently have to determine the relevance of evidence in general must not and cannot be limited. See text accompanying notes 59-67 infra.

\textsuperscript{56} See J. MacDoNALD, PSYcHATRY AND THE CRmNAL LAw 239 (2d ed. 1969) (18-20 percent of rape complaints are unfounded).

Dean Wigmore is anything but neutral on this subject. For example, while he states that, in most cases, evidence of “bad character” for chastity should not be admitted to evidence a lack of veracity, Wigmore § 924 (Chadbourn rev. 1970), he goes on to say that an exception should be made in cases where a woman or young girl testifies as a complainant against a man charged with a sexual crime. \textit{Id.} § 924a, at 736. \textit{Accord,} Lee v. State, 132 Tenn. 655, 179 S.W. 145, 146 (1915); Garrard v. State, 113 Ark. 598, 167 S.W. 485, 486 (1914). \textit{Contra,} State v. Simmons, 59 Wash. 2d 381, 368 P.2d 378 (1962). He also takes the position that:

No judge should ever let a sex offense charge go to the jury unless the female complainant’s social history and mental makeup have been examined and testified to by a qualified physician.

\textit{Wigmore} § 924a, at 737 (Chadbourn rev. 1970). \textit{See} Ballard v. Superior Court, 64 Cal.2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966)(rejecting the inflexible rule suggested by
the defendant must be allowed to elicit evidence that is probative of his defense.

Knowledge of the complaining witness’ prior sexual history increases the trier of facts’ predictive ability to determine what her propensity to consent to intercourse was at the time of the alleged rape, and from this whether a key event at issue in the trial in fact happened: whether or not the complainant consented to have intercourse with the defendant. The weight to be given the evidence will depend on the actual facts leading up to the alleged rape. But regardless of the weight to be given the evidence of her prior sexual history, it is material evidence, and in many cases, relevant\(^{57}\) to the issue of consent. It remains to be seen whether relevant evidence may nevertheless be excluded from trial by reason of law or policy.\(^{58}\)

V. MAY A STATE MAKE A LEGISLATIVE DETERMINATION OF RELEVANCY THAT IS BINDING ON THE COURTS?

Michigan has passed a law excluding from trial most of the evidence of the alleged rape victim’s prior sexual history.\(^{59}\) By so doing, the intent of the legislature apparently was to make its own determination of the relevancy of such evidence. It is suggested that a legislature may not determine relevancy directly, but only indirectly by defining the crime of rape, and the defenses applicable to it. At trial, it is the function of the court to first determine whether a piece of evidence is being offered to prove either an element of the crime charged or the existence of a defense to it (materiality)\(^{60}\) and then whether the evidence is probative of that issue (relevancy).\(^{61}\)

For example, when intercourse with a woman who is below a specified age is deemed by the legislature to be rape, regardless

\(^{57}\)For possible exceptions, see note 55 supra and accompanying text and note 64 infra.

\(^{58}\)See Trautman, supra note 23, at 388.

\(^{59}\)See notes 16-17 supra and accompanying text.

\(^{60}\)See notes 21-25 supra and accompanying text.

\(^{61}\)See notes 44-46 supra and accompanying text.
of whether the woman consents, courts generally hold that evidence of prior acts of unchastity or reputation for the same are immaterial. By defining the crime so as to preclude the defense of consent, the legislature has directly limited the right of the court to find evidence of the prosecutrix' prior sexual history material, and by so doing, has indirectly limited the court's right to rule on the relevancy of such evidence.

62. See, e.g., N.Y. PENAL LAW § 130.35(3) (McKinney 1967):
A male is guilty of rape in the first degree when he engages in sexual intercourse with a female:

. . . .

(3) Who is less than eleven years old.


64. Courts generally also exclude such evidence when the defendant charged with forcible rape either raises an alibi defense, see, e.g., Esquivel v. State, 506 S.W.2d 613 (Tex. Ct. Crim. App 1974), or admits his presence at the time in question but denies having had intercourse, see, e.g., State v. Sims, 30 Utah 2d 357, 517 P.2d 1315 (1974).

At least one state's highest court has held, however, that a defendant charged with forcible rape may introduce general reputation evidence even when he does not place consent directly in issue:

Though an accused might deny intercourse, defend on the ground of mistaken identity, or plead an alibi, still he would be entitled to show general reputation for lewdness, as the jury might still disbelieve his defense, yet they must find that the act was without consent.

Teague v. State, 208 Ga. 459, 67 S.E.2d 467, 472 (1951). As the burden is on the state to prove all of the elements of the crime, and one of those elements is that the act of intercourse must have been committed by forcible compulsion, the holding in Teague seems correct. That this is so becomes clearer when the defendant exercises his right to remain silent, thus placing the burden of proof squarely on the state. Such a defendant does not waive his right to cross-examine the complaining witness as to her propensity to consent to sexual intercourse.

Teague suggests an interesting tactical problem. When the defense raised is alibi, and defense counsel cross-examines the complaining witness to probe the issue of consent, on summation counsel must argue that the defendant was not present at the time of the alleged rape, and whoever was did not force the complainant to have intercoursel See Hibey, note 3 supra, at 321-22.

But see State v. Warford, 293 Minn. 507, 200 N.W.2d 301 (1972), cert. denied, 410 U.S. 935 (1973), where the court held that, while the defendant could introduce evidence of specific prior acts of unchastity by the complaining witness, he could not cross-examine her as to those prior acts "when consent is not a serious issue, the corroborating evidence is strong, and the victim's chastity is not raised as part of the prosecution's case." 200
Under Michigan's new statute, criminal sexual conduct in the third degree is defined as the sexual penetration of another person by means of force and coercion.\textsuperscript{65} The statute does not limit the crime to forcibly induced intercourse by an attacker who has had sexual intercourse with his victim in the past. Nor does it limit the defendant's right to raise the defense that his alleged victim consented to have intercourse with him to the situation where he has had consensual intercourse with her in the past. Yet under section 750.520(j) of Michigan's new statute,\textsuperscript{66} the defendant may only elicit evidence about her prior sexual history as it may relate to former relations with him. As long as Michigan has chosen to allow defendants to raise a defense based on consent, they cannot limit the court's right to admit evidence that is relevant to that issue.\textsuperscript{67}

\textbf{VI. MAY RELEVANT EVIDENCE OF THE COMPLAINING WITNESS' PROPENSITY TO CONSENT TO INTERCOURSE BE EXCLUDED IN LIGHT OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AND COMPEL WITNESSES TO APPEAR IN HIS BEHALF?}

It is true that, at least when offered as part of the state's case in chief, certain clearly relevant evidence will be excluded because of its possible prejudicial effect on the defendant.\textsuperscript{68} For example, it is established that the prosecution may not introduce evidence of other criminal acts of the accused for the sole purpose of showing the defendant's propensity to commit the crime

\textsuperscript{N.W.2d at 303. In a footnote, while conceding that the issue was not before them, the court suggested that it might not have been error had the trial court not permitted the question of her chastity to be raised even as a part of the defendant's case in chief. \textit{Id.} at 303 n.2. If the court, by approving the exclusion of evidence seemingly relevant to the issue of consent, was implying that it would have been proper to direct a verdict on this issue, prior Minnesota law would have to be overruled. See State v. Corey, 182 Minn. 48, 233 N.W. 590, 591 (1930).}

\textsuperscript{It is more likely the court meant there are times when the act of intercourse at issue may have been done under circumstances so clearly dissimilar to those surrounding the complainant's prior acts of intercourse that her prior sexual history may be excluded as irrelevant to consent: in \textit{Warford}, the complainant was beaten nearly unconscious prior to intercourse. Whether or not this interpretation is correct need not be determined now. The essential point for this article is that the court must retain its discretion to decide the probative value of evidence. See also note 55 supra. }\textsuperscript{65. MICH. Comp. LAWS ANN. § 750.520 d(1)(b) (West's Mich. Leg. Serv., P.A. No. 266 1974).}

\textsuperscript{66. \textit{See text accompanying notes 16-17 supra.}}


\textsuperscript{68. \textit{See Michelson v. United States, 335 U.S. 469, 475-76 (1948); McCormick § 190, at 447.}}
The evidence, offered to show the character of the accused, is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury.

The fear, as Dean Wigmore has stated, is that:

The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court.

Dean Wigmore also suggests, however, that:

The reasons of Auxiliary Policy which affect the use of a defendant's character by the prosecution are peculiar to that use, and do not affect the use of character as against other persons in a criminal case wherever it may be relevant.

Dean Wigmore did not specifically address himself to the consti-

---

69. See Note, Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 78 Harv. L. Rev. 426, 435 (1964). The exclusionary rule only comes into effect when the sole purpose of the character evidence is to demonstrate a propensity to commit other crimes. So many exceptions to the rule have been developed, however, that its protective value has been all but destroyed. Id. at 436-43; McCormick § 190.

Of course, there are times when the defendant may want to waive the rule's protection: "[B]ecause character is relevant in resolving probabilities of guilt," the defendant may introduce affirmative testimony that the general estimate of his character is so favorable that he would not be likely to commit the offense charged." Michelson v. United States, 335 U.S. 469, 476 (1948). The prosecution may then fully cross-examine the defendant's witnesses, and present its own witnesses in contradiction. Id. at 479.

Of greater interest for the present discussion however, is the exception to the propensity evidence exclusionary rule that exists in the area of sex crimes. See McCormick § 190, at 448-51; Gregg, Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses, 6 Ark. L. Rev. 212, 216-21 (1955); Annot., Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses, 77 A.L.R.2d 841, 862-74 (1961). Originally, a narrow exception was developed which allowed into evidence proof of prior sexual offenses committed by the defendant against the complaining witness. Gregg, supra at 218. Apparently because of "the increasing belief that sexual psychopaths have a disposition to repeat their acts of aggression," Trautman, supra note 25, at 406, a broad exception to the propensity evidence exclusionary rule has developed in a minority of states that permits evidence to be admitted of prior rapes or attempted rapes committed against women other than the complaining witness. See Annot., supra at 864-65. For a strong criticism of this position based on the apparent disregard of the policy underlying the propensity evidence exclusionary rule by those advocating the exception to the rule in the area of sex crimes, as well as studies which indicate that the recidivism rate for most sex offenses is very low, see Gregg, supra at 231-36.

70. Michelson v. United States, 335 U.S. 469, 475-76 (1948).
71. Wigmore § 57, at 456.
72. Id. § 62, at 464.
tutional questions raised by prohibiting the introduction of evidence which, although possibly prejudicial to the prosecution, is relevant to the defense. An analysis of *Davis v. Alaska*,73 the Supreme Court’s most recent elucidation of the sixth amendment’s confrontation clause, as well as other cases construing the confrontation clause and the right to compel witnesses in one’s behalf, leads inevitably to the conclusion that Michigan’s statute impermissibly weakens the protection the Constitution provides for a defendant in a criminal trial.

The right of an accused in a criminal prosecution “to be confronted with the witnesses against him” is guaranteed by the sixth amendment to the Constitution. It was secured for defendants in state as well as federal proceedings by *Pointer v. Texas* where the Court held the right to confront witnesses to be fundamental.74

Confrontation does not mean simply that the witness is physically present in the courtroom. The primary interest secured by the confrontation clause is the right of the defendant to cross-examine the witnesses who testify against him.75 And while a trial judge has wide latitude in the control of cross-examination,76 this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.

In *Davis v. Alaska*,77 the state trial court granted a motion by the prosecution to issue a protective order which prohibited any questioning of Green, a key prosecution witness, as to his

75. The main and essential purpose of confrontation is to secure for the opponent the opportunity for cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers. Wigmore § 1395, at 150 (Chadbourn rev. 1974), quoted with approval in *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

[W]hile the scope of cross-examination is within the discretion of the trial judge, this discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment... [D]efense counsel should be permitted on cross-examination to disprove an element of the offense....
prior adjudication as a juvenile delinquent and his probationary status at the time of the occurrence he was to testify about. Counsel for the defendant hoped to show that Green, because of his probationary status, was vulnerable to pressure from the prosecution, and was therefore possibly biased. The grant of the protective order was based on state provisions protecting the anonymity of juvenile offenders. The Supreme Court of Alaska affirmed. The United States Supreme Court, with only two justices dissenting, reversed.\(^7\)

In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Further, they noted that:\(^9\)

\[\text{The State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records.}\]

The \textit{Davis} case is analogous to, and should control, the situation where the state, in a prosecution for forcible rape, must prove lack of consent as part of its case in chief. Whereas Green was the principal witness for the state in \textit{Davis}, no witness is more important to the state than the alleged victim in a trial for rape. Further, in both \textit{Davis} and the forcible rape situation, strong state interests are recognizable. In the former, the Court acknowledged the state's interest in protecting the anonymity of juvenile offenders;\(^8\) in the latter, the state has a strong interest in encouraging victims of rape to come forward. Finally, in \textit{Davis} it was recognized that disclosure of Green's juvenile record might result in embarrassment to Green and his family; one of the primary objections to the introduction of evidence of the complainant's prior sexual history is that she is often humiliated by the experience.

The defendant has a constitutional right to confront the witnesses against him. Without full and unimpeded cross-

\[^{78}\text{Id. at 319.}\]
\[^{79}\text{Id. at 320.}\]
\[^{80}\text{Id. at 319.}\]
examination, this right is rendered nugatory. This point was made clear in Davis:\textsuperscript{81}

While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased . . . .

Were the members of the Court to be confronted with a rape case in which the defendant was denied the right to inquire into the complaining witness' prior sexual history, they might well say:

While counsel was permitted to ask the prosecutrix whether she consented, counsel was unable to introduce evidence relevant to that issue so as to make a complete record from which to argue why she was likely to have done so.

It is true that the Court stated that "[s]erious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue" his line of questioning,\textsuperscript{82} and further, that the constitutional right of "the effective cross-examination for bias of an adverse witness" was involved.\textsuperscript{83} From this, it might be argued that Davis should be limited to cases involving both bias and the potential for the destruction of the state's case against the defendant.\textsuperscript{84} Additionally, it might be argued, the rape case is distinguishable from Davis, because the prior sexual history of the complaining witness has so little probative value toward the issue of consent that the state's interests — encouraging rape victims to come forward, and keeping inflammatory evidence which will prejudice the jurors against its case out of the trial — outweigh the probative value of the evidence.

Regardless of the weight a jury should give evidence of the complaining witness' propensity to have intercourse, the evidence should be admitted if relevant to the defense raised by the defendant.\textsuperscript{85}

\textsuperscript{81} Id. at 318.
\textsuperscript{82} Id. at 319.
\textsuperscript{83} Id. at 320 (emphasis added).
\textsuperscript{84} Indeed, one court has so held. See State v. Burr, 525 P.2d 1067 (Ore. Ct. App. 1974)(2-1 decision)(review granted, October 22, 1974). "We . . . interpret [Davis] as holding solely that the confidentiality of a juvenile offender's record must give way to the right of 'effective cross-examination for bias of an adverse witness.' (emphasis supplied)." Id. at 1068. In Burr, the juvenile records were sought solely to impeach the witness' credibility.
We cannot speculate as to whether the jury, as the sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof... of petitioner's act." [citation omitted]

As long as the evidence is relevant to a material issue, the court must yield to the jury the right to weigh the evidence against everything else known about the case, and to accept it or reject it. Certainly the issue of consent is "a crucial link in the proof... of [the defendant's] act." The Michigan statute then, insofar as it limits the defendant's right to make inquiries relevant to establishing his defense, unconstitutionally denies him the right to confront probably the only important witness that is testifying against him.

Because cross-examination of the complaining witness as to her prior sexual history causes the greatest trauma for her at trial, this article has concentrated on the confrontation clause to see whether the defendant's right to confront the prosecutrix could be limited in a manner consistent with the sixth amendment. The conclusion that was reached is that his right to confront the complainant could not be limited if the information sought is relevant to his defense, and further, that this information is generally relevant.86

Michigan's statute not only impermissibly restricts the defendant's right to confront witnesses against him, it also limits his sixth amendment right to call "witnesses in his favor." As Chief Justice Burger stated in United States v. Nixon:87

The right to the production of all evidence at a criminal trial... has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to

86. For possible limitations on the relevancy of such evidence, see notes 54-55 and accompanying text and note 64 supra.
accomplish that it is essential that all relevant and admissible evidence be produced.

It follows that those jurisdictions which only allow a defendant to introduce evidence of the complainant’s general reputation in the community to prove her propensity to consent to intercourse\(^8\) deny the defendant his right to confront the witness against him and to compel witnesses to testify on his behalf. This is so because, as was demonstrated earlier,\(^9\) evidence of the complainant’s general reputation in the community will often be a totally unreliable indicator of her actual propensity to consent to intercourse. The sixth amendment’s guarantees cannot be satisfied by limiting the defendant to the elicitation of useless testimony from persons other than the complainant when more reliable evidence is available.\(^8\)

**VII. CONCLUSION**

It may well be, as Kalven and Zeisel have suggested, that the American jury time and again gives evidence of the complainant’s prior sexual history weight and import well beyond its actual significance, and applies it to factors unrelated to the elements of the crime of rape.\(^9\) Nevertheless, a defendant in a criminal trial has a constitutional right to have a jury hear his case.\(^2\) Further, while the potential for psychological harm to the complainant from having to be cross-examined as to her prior sexual history is conceded, the defendant has a constitutional right to confront the witnesses against him.\(^3\) As for the state, the only

---

88. See notes 32-36 supra and accompanying text.
89. See notes 41-43 supra and accompanying text.
90. Professor Wigmore supports the position that the admission of specific acts evidence in rape trials is preferable:
   The better view is that which admits the evidence. Between the evil of putting an innocent or perhaps erring woman’s security at the mercy of a villain, and the evil of putting an innocent man’s liberty at the mercy of an unscrupulous and revengeful mistress, it is hard to strike a balance. But, with regard to the intensity of injustice involved in an erroneous verdict, and the practical frequency of either danger, the admission of the evidence seems preferable.
   
   Wigmore § 200, at 683.
91. Kalven & Zeisel, supra note 12, at 249-54.
92. U.S. Const. amend. VI:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .
93. See note 20 supra. The sixth amendment also guarantees the accused the right “to have the assistance of counsel for his defense.” In Coles v. Peyton, 389 F.2d 224 (4th
remedy it has for avoiding prejudice to its case from the introduction of evidence relating to the alleged rape victim’s prior sexual history is to request the court to give clear, concise limiting instructions to the jury—and this is so despite Justice Jackson’s famous dictum that:

[T]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . .

There is a way for statutes like Michigan’s to be upheld. If the proponents of these statutes can prove that all of the evidence that is excluded by the statutes is not relevant to the material issue of consent, then the statutes, while perhaps technically impinging on the domain of the courts, will in fact not deny defendants any protected right. So many factors, here unconsidered, may go into the actual decision to consent to sexual intercourse, that what appears to be probative may in fact not be probative at all. It is therefore urged that reliable, impartial social scientists be commissioned to conduct studies to determine whether the prior sexual history of a woman has any bearing on the probability that she will consent to have intercourse on any given occasion. Until such information is forthcoming, however, attempts via legislative fiat to remove discretion from the courts and to rule all such evidence irrelevant and inadmissible must fail.

Frederick Eisenbud

Cir. 1968), the court held that the petitioner, who had been convicted of forcible rape, was denied effective assistance of counsel at his trial because his court-appointed counsel failed to investigate, inter alia, the reputation of the complaining witness for chastity.


95. For a brief discussion of the possibility that some of the excluded evidence may indeed be irrelevant, see notes 54-55 and accompanying text and note 64 supra.

96. See notes 59-67 supra and accompanying text.