ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA ASSEMBLY SESSION

MINUTES

April 16, 1975

This meeting of the Assembly Judiciary Committee was called to order at 8:15 a.m. on Wednesday, April 16, 1975 by Chairman Barengo.

MEMBERS PRESENT: Messrs. BARENGO, BANNER, HEANEY, HICKEY, LOWMAN, POLISH, SENA, Mrs. HAYES and Mrs. WAGNER.

MEMBERS ABSENT: NONE.

Guests present at this meeting included R. Red Payne, Nevada State Commerce Department; Gino Del Carlo, Nevada Bankers Association; Michael Fondi, Carson City District Attorney; and Florence McClure, Community Action Against Rape. A Guest Register from this meeting is attached to these Minutes.

First to testify at this meeting was Mrs. Wagner, who testified on A.J.R.23. She told the Committee that she introduced A.B.106, and it is in the possession of the bill drafters. She has not seen the bill recently. This A.J.R.23 is not quite what she wants, but it is a start. A.J.R.23 memorializes Congress to look into and study laws and regulations in regard to access by government agencies to personal financial information in possession of banks and other financial institutions.

Mr. Gino Del Carlo commented that the Nevada Bankers Association fully supports this Resolution.

Mr. Wallie Warren commented from the audience that he wants his name on record as being in support of A.J.R.23, also.

Mr. Hickey moved DO PASS A.J.R.23, and Mr. Lowman seconded. A vote was had, which indicated 8 Committee members in favor of the motion. Mr. Heaney was absent for this vote. Form attached. MOTION CARRIED DO PASS A.J.R.23.

As to A.B.496, Pat Walsh, Deputy Attorney General, and Michael Fondi, Carson City District Attorney, testified. The reason for this bill was in light of a recent Nevada Supreme Court case, this bill would allow the Attorney General to prosecute criminal cases. An amendment was presented from the Attorney General's Office, a copy of which is attached to these Minutes.

Mr. Fondi testified that he is not sure exactly how this particular amendment will affect the bill, but he is appearing before this Committee in support of allowing the Attorney General to prosecute criminal cases in any court in the State of Nevada.

He is particularly interested in this situation in Carson City. The prosecutions for the Nevada State Prison inmates are handled through the District Attorney's Office. The State Prison matters involve a tremendous amount of the prosecutor's time. Mr. List and Mr. Fondi entered into an agreement where the Attorney General's Office will undertake the prosecution of criminal offenses occurring at the prison by inmates. In the past two or three years the District Courts ruled that the Attorney General does not have the authority to prosecute criminal cases in Carson City. These rulings are the result of a Nevada Supreme Court decision. Mr. Fondi said they want to obtain an amendment to this bill to allow the Attorney General to specifically prosecute criminal cases in Carson City, and he said he has no objection at all to this, particularly as to the prison cases, and in fact, he requests that the Attorney General do so. Mr. Fondi stated that the District Attorneys' Association would not really be affected by passage of this bill because the prison facility is only in Carson City.

Mr. Pat Walsh then testified in support of A.B.496. He said the Attorney General's Office has two proposed amendments to this bill. One regards inmates and state institutions and the other relates to the Attorney General's coverage. Mr. Walsh stated that not only is the prison population growing, but he feels the prisons are getting a different type of prisoner--people who do not have any qualms about doing anything at all. The Attorney General's Office already deals with the District Attorney's Office and the prison daily, and they are in a better situation to deal with the prison than the District Attorney. The current law says the Attorney General can intervene at any stage, and they prepare information and legal documents and conduct investigations. The District Attorney is available to review their preparations and sign papers. He then returns the information to the Attorney General. Mr. Walsh stated that one particular problem the prison has is that a lot of prisoners are armed. If the Attorney General were able to take care of these prosecutions, their office could give the prison more time, as they do not have the whole county to deal with as does the District Attorney.

Mr. Heaney suggested that perhaps "federal court" should be included, and the Attorney General should not be limited to appear in just "state courts" to prosecute. Mr. Walsh said he agrees with this.

Mr. Fondi stated that he spoke to Warden Pogue and he supports passage of the bill.

Testifying on A.B.447 was Corky Lingenfelter, Nevada Land Title Association. This bill could create a lot of cost and problems for the notary public. He believes that presently there are protections now for the notary who does not handle his job properly. Most notaries public do not charge, as it is a convenience service they perform.

Next to testify was Mrs. Florence McClure, Vice President of Community Action against Rape, Las Vegas. Her testimony was relative to S.B.222 and A.B.12. She gave the background of her organization. They are comprised of volunteer members and the Nevada Crime Commission pays for their office space and telephones. She stated that without changing the law, women are not going to continue to report rape and related crimes to the police, because the scales of justice are tipped in favor of the criminal. Attached to these Minutes is the complete statement of Mrs. McClure in regard to these two bills. "As to the merits of the two bills, we prefer S.B.222 over A.B.12 because S.B.222 amends NRS 50.085 (Line 20, Page 2) and places limits on introduction of opinion evidence as to the character of a witness. This is further protection for the victim and is very desirable." Mrs. McClure was questioned by this Committee. She said that in Clark County the conviction rate runs 75% to 80%. Out of 175 reported cases, 17 were unfounded and 48 went to trial. The average age of the rapist is 18 to 19.6 years. Their group has been able to make inroads and help people in Clark County, because they have had cooperation of hospitals, the District Attorney and the Police Department.

As to S.B.52, Mrs. McClure stated that this is not really her organization's bill, but they did submit to the Nevada Crime Commission a list of 20 points that they would like to see changed in the Nevada law, and apparently the Crime Commission gave approval to all of them and sent them over to the bill drafter. Therefore, a portion of S.B.52 is theirs. Apparently, a portion of the original S.B.52 was erroneous and not constitutional, and this is why the bill was revised. Mrs. McClure then read to this Committee her prepared statement relating to this bill, a copy of which is attached to these Minutes. Mrs. McClure referred to the definition of "sexual penetration", which was included in the original S.B.52. This definition went into effect in Florida this past October 1, and attached are letters to Mrs. McClure from the Florida Attorney General dated January 8, 1975 and from the Miami Beach Chief of Police dated February 4, 1975. Apparently, two groups opposing this definition are the Nevada Bar Association and the Nevada District Attorneys' Association. Mrs. McClure said they go on record as having very strong feelings about the definition, but they do not want this to jeopardize passage of any legislation.

Mrs. McClure stated that California passed legislation to the effect that if a husband or wife filed an action for separate maintenance or divorce, the crime of rape could be prosecuted if it occurred. Mrs. McClure stated that according to the F.B.I.'s figures, only one out of ten cases of rape is reported. As to the time it takes for rape cases to come to trial, Mrs. McClure stated that most often the defendants do not want a more speedy trial, but the victims, however, want to get these things over and done with.

Mrs. McClure stated that the most important part of S.B.52 is the part referring to the molestation of children. She said that she spoke to Tom Beatty, Clark County District Attorney's Office, and he said with S.B.52, any official failing to report any child

molesting case could be prosecuted.

Daisy Talbot commented from the audience on a recent situation where two young boys were severely assaulted. This situation was just as much of an emotional trauma for this family as where a rape of a young girl might have been involved. She mentioned several unrelated incidents which have occurred over the past few years which make legislation to protect children necessary, such as contained in S.B.52.

Mrs. McClure then presented to this Committee a copy of Willamette Law School's rape study, a copy of which is attached to these Minutes.

Lengthy Committee discussion ensued on possible amendment of the bills which Mrs. McClure was concerned with.

Chairman Barengo passed out to this Committee copies of the amendments to A.B.130. See attached copy. He suggested that the Committee pass the bill with the amendments incorporated and let the Assembly Commerce Committee further study the bill in that revised form. Mr. Lowman commented that he thinks these amendments make the bill much fairer. Mr. Sena moved DO PASS A.B.130 AS AMENDED, and Mrs. Wagner seconded. Legislation Action Form attached.
MOTION CARRIED DO PASS A.B.130 AS AMENDED.

As to A.B.447, Mrs. Hayes moved to INDEFINITELY POSTPONE, and Mrs. Wagner seconded. A vote indicated 9 in favor of this motion. Form attached.
MOTION CARRIED INDEFINITELY POSTPONE A.B.447.

As to S.B.222, Mr. Hickey moved DO PASS, and Mrs. Lowman seconded. It was pointed out that perhaps a cautionary statement should be given when it is warranted, and Chairman Barengo told this Committee that action would be taken at some other time.

It was also decided to take action on A.B.12 at some future date.

As to A.B.496, Mr. Lowman moved DO PASS AS AMENDED. This motion died for lack of a second. Chairman Barengo gave the Committee the background on this bill. He pointed out that the Attorney General already has the right to convene a statewide grand jury or to appear before local grand juries. He is prevented from jumping right into a case. Mrs. Hayes moved DO PASS A.B.496 AS AMENDED to limit the Attorney General's authority to prosecute cases involving inmates which arise out of the Nevada State Prison in Carson City only, and involving those inmates while they are inmates of the prison. Mrs. Wagner seconded Mrs. Hayes' motion. A vote was had, and it indicated that all 9 Committee members voted unanimously in favor of the motion. Form attached.
MOTION CARRIED DO PASS A.B.496 AS AMENDED.

There being no further business, Chairman Barengo adjourned this meeting after the appropriate motion and second.

ASSEMBLY JUDICIARY COMMITTEE

GUEST REGISTER

DATE: April 16, 1975

NAME	BILL NO.	SPEAKING	REPRESENTING
R. Red Payne	A.J.R. 23	No	Commerce Dept.
Gino Del Carlo	AJR 23	If Necessary	Nev. Bankers Assoc.
Michael Fondi	AB 496	Yes	Carson City District Atty.
Florence McClure	SB 222, AB 12 + SB 57	Yes	Community Action, Concerned Citizens for Equitable Rape

AMEND A.B.496, by adding the following sections:

1. Add a new subsection to NRS 228.120, to read as follows:

5. To prosecute all criminal offenses committed by any inmate or inmates of any state institution.

2. Amend NRS 173.035, subsection 2, to read:

2. If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the district attorney or the attorney general may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process shall forthwith issue thereon. The affidavit mentioned herein need not be filed in cases where the defendant has waived a preliminary examination, or upon such preliminary examination has been bound over to appear at the court having jurisdiction.

3. Amend 173.045, subsections 1 & 2, to read:

1. All informations shall be filed in the court having jurisdiction of the offenses specified therein, by the district attorney of the proper county or the attorney general as informant, and his name shall be subscribed thereto by himself or by his deputy.

2. He shall endorse thereon the names of such witnesses as are known to him at the time of filing the same, and shall also endorse upon such information the names of such other witnesses as may become known to him before the trial at such time as the court may, by rule or

otherwise, prescribe; but this shall not preclude the calling of witnesses whose names, or the materiality of whose testimony, are first learned by the district attorney or the attorney general upon the trial. He shall include with each name the address of the witness if known to him. He shall not endorse the name of any witness whom he does not reasonably expect to call.

4. Amend NRS 173.075, subsection 1, to read:

1. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the district attorney or the attorney general. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement.

5. Amend 173.145, subsections 1 & 2, to read:

1. Upon the request of the district attorney or the attorney general the court shall issue a warrant for each defendant named in the indictment or information.

2. The clerk shall issue a summons instead of a warrant upon the request of the district attorney or the attorney general or by direction of the court.

6. Amend NRS 173.205, subsections 1 & 3, to read:

1. The peace officer executing a warrant shall make return thereof to the court. At the request of the district attorney or the attorney general any unexecuted warrant shall be returned and canceled.

3. At the request of the district attorney or the attorney general made at any time while the indictment or information is pending, a warrant returned unexecuted and not canceled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to a peace officer or other authorized person for execution or service.

ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA SESSION

LEGISLATION ACTION

DATE April 16, 1975

BILL NO. A.J.R. 23

MOTION: _____

Do Pass ✓ Amend _____ Indefinitely Postpone _____ Reconsider _____

Moved By Mr. Hickey Seconded By Mr. Lowman

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

	MOTION		AMEND		AMEND	
VOTE:	YES	NO	YES	NO	YES	NO
Barengo	✓					
Banner	✓					
Hayes	✓					
Heaney	–					
Hickey	✓					
Lowman	✓					
Polish	✓					
Sena	✓					
Wagner	✓					

TALLY: Mr. Heaney absent for vote.

ORIGINAL MOTION: Passed ✓ Defeated _____ Withdrawn _____

Amended & Passed _____ Amended & Defeated _____

Amended & Passed _____ Amended & Defeated _____

Attach to Minutes April 16, 1975
Date

Mr. Chairman and Members of the Assembly Judiciary Committee, I am Mrs. Florence McClure, Vice President of Community Action Against Rape, located in Las Vegas.

Our organization came into existence at a meeting at the North Las Vegas Library in September of 1973. The staff of the library because of the rape of young girls on their way home from school set the meeting up and publicized the event. An attendance of no more than 80 was expected but nearly 400 showed up and it was necessary to take over the whole library. The organization is incorporated in the State of Nevada, nonprofit, and performs the services listed on the yellow cards I have given you.

Quite a number of goals have been accomplished in the 1½ years we have been active. One of the most important aspects has to be changes in the law; without changes women are going to continue not to report the crime to the police because she is well aware that the scales of justice are tipped in the favor of the offender, not only because of the constitutional guarantees given the defendant but because of the attitude of the public and the jurors. The jurors come from the community with their myths, biases, etc. and she realizes she is on trial as much as the defendant -- a former district attorney of Albuquerque stated that the ideal rape victim would be "Pricilla Goodbody, wearing a pinafore and pigtails, but 99.9% do not meet that specification.

The bills I am addressing myself to at this point are SB 222 and AB 12. They are very similar and based primarily on a law

enacted in California last year. However, we would like to recommend two changes:

(1) Provide for the prohibition of the use of a cautionary statement by the Judge when he gives the Instructions on the law to the jury; this statement often goes something like this: "The charge of rape is easily made and hard to disprove." This is just another slap in the face to the victim. The use by a Judge is not mandatory and comes from a case called the "May Decision." I know that Judges Paul Goldman and Keith Hayes do not use it in their court.

However, while observing at a "rape, 2nd deg kidnap and Infamous Crime Against Nature" trial, I saw a Judge give that instruction even though a doctor testified that when he examined the victim he found she had contusions, lacerations, bruises, etc. The victim weighed less than 100 pounds, was under 5 feet and the mother of 3 children. Further, if the jury had not found him guilty, he would have gone right to trial on the same charges involving a 17-year old girl. The jury, of course, was not permitted to know of the pending case.

No wonder a woman doesn't want to report the crime; she know she goes into that courtroom with the deck stacked against her. She has to prove her innocense and the prosecutor has to prove the defendant "guilty beyond a reasonable doubt." If he takes the stand in his own defense, the prosecutor can bring out certain prior convictions of the defendant, but nothing that is pending against him. Three cases I have covered in the past few months involved defendants who committed rape or Infamous Crime Against Nature while out on bail for the same felony.

The prohibition of that cautionary statement could go appropriately on line 46, page 2 of AB 12 and line 2, page 3 of SB 222. California Assembly Bill No. 3679, dated April 15, 1974, prohibiting such a statement has been furnished to Assemblywoman Karen Hayes.

(2) The other change recommended is on page 3 of both bills and pertains to the payment of hospital examination "for the purpose of gathering evidence for possible prosecution of the person who committed the offense...." The "evidence" the police and district attorney want is a smear from the vagina of the victim to determine the presence or absence of sperm. The victim is not now charged with this cost in Clark County; it is paid by the police entity involved. The cost is very low really. The victim is given a bill for the other expenses -- she has to see that cashier about paying before she is permitted to leave and go with the police for more questioning. Had two cases this past March:

> Nancy, a 22-year-old single woman, had a man force his way into her apartment; she got away and ran down the street and he ran after her bare from the waist down. This was downtown about daybreak -- just 5 blocks from the courthouse. She was yelling "Help, rape" over and over and a car swerved to avoid hitting her but the occupant would not stop to help her. She ran into the lobby of a motel but no desk clerk there. He apprehended her and dragged her back. She received many bruises from him to her head, legs where he dragged her on gravel, etc. The cashier at the hospital wanted $20 from her over and above the required police exam. She did not have it.
>
> Sandra, a 32-year-old mother, burned and raped, hit over the head with a rock, glass in her feet; he took her clothes when he ran because he saw two men who had responded to her cry for help. This is one of the most grotesque cases I have heard of and the cashier wanted money from her for treatment of injuries.

All expenses incurred at the Emergency Room at this point in time should be paid by the County. If the offender is apprehended and convicted and has the money to reimburse the County, he should be

made to do so. Reimbursement by an offender is one method that is being used to make the individual see that he/she has to pay for that action; he should also be made to reimburse the victim for lost wages and other medical treatment she may incur. If other "victim" bills introduced in this Legislative Session do not provide for future treatment of a victim of the crime of rape, it should be included in this one.

In Clark County many union people have insurance coverage BUT if they make a claim, the Personnel Office and Union Insurance personnel will know of the crime; the victim may not wish her predicament known because she realizes that the public attitude of rape, as concerns the victim, is: "She must have asked for it!" The victim's name is not published in the papers in Clark County and a victim could go through the whole process without her co-workers or family knowing of the crime -- some wish to handle this way or they will not sign a complaint.

As to the merits of the two bills, we prefer SB 222 over AB 12 because SB 222 amends NRS 50.085 (Line 20, page 2) and places limits on introduction of opinion evidence as to the character of a witness. This is further protection for the victim and is very desirable.

ASSEMBLY JUDICIARY COMMITTEE HEARING ON SB 52, 4-16-75

The present definition of "rape" as set forth in NRS 200.363 is: "Forcible rape is the carnal knowledge of a female against her will." What we are actually speaking of is "a crime of violence," and many people, because of the myths that have built up, do not see it in its true light -- "sexual battery." The original definition for "sexual penetration" in SB 52 reads as follows: "means sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion, however slight, of any part of the offender's body or any object manipulated by the offender into the genital or anal openings of the victim's body."

This definition went into effect in Florida this past October 1 and I have letters from the Chief of Police of Miami Beach and Mr. Shevin, the Attorney General, confirming that it is a great improvement as more apprehensions and convictions are being obtained. That new law consolidated previously fragmented sex crime laws and defined victims as "persons" to include both men and women, and established varying degrees of sexual assault. Florida also put into effect a law equivalent to SB 222. Sgt. Mike Gonzalez, a 20-year veteran of the Miami Police Department's rape investigations stated that the law will help police and prosecutors, as well as provide fairer treatment for both victims and offenders because it clarifies the description of rape. The degrees of sexual battery depend on the force used and the ages of victims and offenders, and range from second-degree felonies, punishable by not more than 15 years, to capital and life felonies, punishable by life imprisonment or not less than 30 years before parole. When rape was defined as

as "carnal knowledge," and it was a capital felony if the victim was 11-years or younger, and a life felony if the victim was older than 11. The confused definition of rape and the stiff penalties made prosecution difficult and convictions hard to obtain, according to the Florida Attorney General. State officials are now hoping that victims will report the crime to the authorities. Guidelines for police were made so that the victim would not fear their questions, which in the past even included such questions as, "What was the size of his penis?" "Did you reach a climax?" "How many times have you had intercourse before?"

You will note that the reprint of SB 52 drops the word "rape" and replaces it with "sexual battery," otherwise, we are back where we started. We have fragmented laws, just as Florida did. In a recent case Judge O'Donnell of Clark County threw out one of the charges against a defendant, even though bound over from Justice Court on "Infamous Crime Against Nature." He said that as far as he was concerned, "Fellatio, in and of itself, was not an infamous crime against nature." So the case went to trial with only 2 charges, Rape and 2nd degree kidnapping. A hung jury resulted (8 guilty, 2 not guilty and 2 undecided) so a mistrial was declared and it will go to trial again...hopefully before another Judge who recognizes case law that has been built up. The Judge would not even let the Prosecutor cite his case law for the charge. The D. A. is appealing, but what good will that do.

To the best of my knowledge, there are two groups that oppose our request for this aspect of the original SB 52; they are the District Attorneys' Assoc. of Nevada and the Nevada Bar Association.

Their contention is that they do not wish to abandon case law that has been built up over the years. We all get comfortable with the "old" and often do not wish to move on, even though the times demand that something be done.

Let's take a look at how good that present case law helps a victim. I have already spoken of Sandra, the rape-torture victim, relative to hospital charges in connection with AB 12 and SB 222. What I am going to tell you is not very pleasant but it is necessary in order to make my point. Last month this victim was getting a sandwich at Jack in the Box and taking it next door to a lounge to friends. En route back a young blond-headed boy stuck a knife in her back and forced her into desert land back of these buildings. Then insued the following: he put a rock on her chest and raped her; he made her commit fellatio; he raped her anally; and he held a knife up her vagina while he urinated into her mouth and said, "If you do not swallow every drop, I'll slit you clear to your navel." For that last offense, the most they could come up with for a charge if "Battery with a Deadly Weapon," which is a gross misdemeanor; the other two charges are Infamous Crime Against Nature and Rape. If Judge O'Donnell get the case, we'll probably only have 2 charges as he will knock out "fellatio" as he has done before. With that done no doubt he could come up for parole in a few years. If he is declared insane or found "not guilty by reason of insanity," Sparks would probably keep him only a couple of months as they did in the Clarence Mofford case.

We are late in the session and we do not wish to jeopardize the other portions of SB 52 that will help children, so we recognize the fact that our chances are very slim for getting a true re-

definition of the crime. I would like to state that Florida is not the only state that has passed this definition -- Michigan and New Mexico have; Wisconsin is redefining theirs as "sexual assault" and the Oregon Legislature has bills in. I look for the walls to come tumbling down each year.

Over the history of civilized man, myths have built up that have no place in our society today. It is because of these myths and the lack of good laws to protect the victim that we have only 1 out of 10 victims reporting the crime to the police. Undersheriff John Moran of Las Vegas Metro Police stated on television recently that the community should commend those women who will take a rape case through the court system; he said it takes courage. I feel that those who do go through with the procedure do so because they still have faith in the American Justice System; they do not want the offender to commit the crime on someone else; or they are so angry that a person would use their body for his devious and perverted ends. Actually, under present conditions -- the laws and the public's attitude being what they are, it would be less traumatic for the victim not to go through the system.

As it stands now, sometimes it takes 1½ years to get the case to trial. A mother of a young girl contacted me -- 1½ years ago her 15-year-old daughter was forced to commit infamous crime against nature (fellatio) -- she wasn't raped because she convinced the rapist she was having her period. However, this same man a couple of days later raped a young girl, so he had two cases pending and it was finally to go this past Monday in District Court and after plea bargaining, he pleaded guilty to the rape of the one girl and the case involving the call I got -- "Infamous Crimes Against Nature" was dropped. So for 1½ years that family had this

hanging over their heads, only to have it dropped. If found guilty on that charge, it would have automatically been "Life with the possibility of parole." Did this young girl receive justice? She is happy it is over and she does not have to testify in open court.

The American court system is so bogged down that justice is being denied the victim. For years we have been so concerned with the rights of the defendant that victims have been ignored. In the crime area we have under consideration, most often the defendant does not want a "speedy" trial. If trial delay ed, perhaps prosecution witnesses will leave the state, the victim will get disgusted and want to drop the "whole" thing.

It must be emphasized that our victim is only a "witness" for the prosecution at the tiral and does not control the situation to any great degree. When the defense attorney asks for a continuance, she has nothing to say about denying the request. In Clark County we are lucky because of the high quality of police office with Las Vegas Metro and the extremely competent staff in the D. A.'s Office. Whenever we find a bad situation, they listen to us and that is more than most organizations, such as ours, can expect.

A suggested remedy in areas of the country where the victim is neglected by the authorities, is that they hire a private attorney to watch out for their interest. For those women who cannot afford, a defense fund will be set up. Clark County does not present this problem. However, our problems can be remedied by the legislature by authorizing proper staffing of the Justice of the Peace and District Court. Clark County is growing so fast that present staff is no where sufficient. Something has to be done or our citizens will lose more respect for the system.

One of the main goals of Community Action Against Rape since it incorporated was to do something about the children that are being molested and no one taking the initiative to report to the authorities. We have a nurse on our board who spent 20 years as a school nurse in various parts of Nevada and she knows first-hand how the abuse of children was sluffed off by authorities. They do not want to get involved, indicating that it is a "family matter." Mr. Jay Miller, the Supt. of School for Girls at Caliente to me about 5 years ago that incest problems in the home started a number of the girls incarcerated there on to promiscuity; I saw him again a couple of months ago and he said the statement he made then still holds true.

Mr. Tom Beatty, Asst. D. A. for Clark County, tells me that with the changes included in SB 52 relative to child molestation, any official failing to report can be charged with a "misdemeanor." Maybe this will help -- the penalty for failure to report may be what we need.

I wish we could have done more about the mentally disordered sex offender but with the state of the economy in poor shape, budgets would be tight. There are 32 security units being built at Sparks; in the meantime, a number of the men housed at the prison but never tried for crimes, are incarcerated in California facilities. Jerome Ramsey falls in with this group. A number of years ago he was found not capable to stand trial, was placed in Camarillo State Hospital in California, came home for Christmas 1973 and while in Clark County Attempted to rape an 8-year-old girl, but her dog bit him; the next day he raped a 16-year-old and then rammed a broom stick up her. When

Federal Judge Thompson had the men released from the prison, they took them to Sparks and last month Ramsey tore the clothes off a mentally retarded girl. How the attendants could let that happen, knowing his background, is beyond me.

If the Legislature can do something about the laws that we are concerned with, we will be in a better position to counsel victims to prosecute by signing the required complaint. Also, we will keep tearing away the myths about the crime by speaking to groups. The crime is going up and the people know it. The higher rate is not just due to more reporting. In April last year, I visited the Atascadero State Hospital; the California Colony for Men, a prison; rape crisis centers and the California Legislature. The psychologists at the institutions told me that if unemployment goes up, look for a big jump in the crime, as this is one way people vent frustration. Further, they stated that legalized prostitution will not cut the crime rate on rape as a true rapist finds it degrading for him to pay for it -- many offenders are found with large sums of money on them and prostitutes available in the community.

During the next 2 years we will be gathering more information on which to base our requests. We'll keep speaking to groups to obtain backing and break down myths. Already this month we have spoken to Sororities, EG & G personnnel at training session at The Flamingo, The Lions Club and to 400 girls at J. D. Smith Jr. High School. A number of engagements are coming up this month and we hope to have a day-long seminar soon at the university with workshops in a number of areas.

Please do what you can -- it will make our job easier. None of us are paid staff, it is all volunteer.

ROBERT L. SHEVIN
Attorney General

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

January 8, 1975

Mrs. Florence McClure
Vice President
Community Action Against Rape
1212 Casino Center Boulevard
Las Vegas, Nevada 89104

Dear Mrs. McClure:

Thank you very much for your recent correspondence.

We, here in Florida, are proud of the recent steps that have been taken to modernize the laws, such as the one you mentioned in regard to Government in the Sunshine. I feel that the Legislature in 1974 helped Florida keep its place in the forefront in State's modernizing legislation when it passed Chapter 74-121, entitled involuntary sexual battery, which replaced the laws we had in regard to rape and dropped the use of the word rape from its title.

Again, thank you very much for contacting this office. I hope the enclosed information will be of value to you.

Sincerely,

Robert L. Shevin
Attorney General

RLS/Wm

Enclosure: Chapter 74-121, Laws of Florida

CHAPTER 74-120

Senate Bill No. 470

AN ACT relating to special elections; amending §100.111(1), Florida Statutes; providing that the dates fixed by the governor for special primaries and special elections be specific and not conditional or alternative; creating §100.102, Florida Statutes, providing for state reimbursement of counties for expenses incurred for special elections held pursuant to section 100.101; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 100.111, Florida Statutes, is amended to read:

100.111 Filling vacancy.—

(1) Whenever there is a vacancy in an elective office which may not be filled by appointment, and a special election is called by the governor to fill the vacancy in such office, nominees of recognized political parties under the primary laws of Florida shall be chosen in a special primary which shall be called by the governor who may fix the date of a primary election and if necessary a second primary election to select nominees of recognized political parties to become candidates in the special election above referred to. *The dates fixed by the governor shall be specific days certain and shall not be established by the happening of a condition or stated in the alternative.*

Section 2. *Section 100.102, Florida Statutes, 1973, is created to read:*

100.102 Cost of special elections to be incurred by the state.—Whenever any special election shall be held as required in §100.101, each county incurring expenses resulting from such special election shall be reimbursed by the state. Reimbursement shall be based upon actual expenses as filed by the supervisor of elections with the county governing body. The department of state shall verify expenses of special elections and authorize payment for reimbursement to each county affected.

Section 3. This act shall take effect upon becoming law.

Approved by the Governor May 31, 1974.

Filed in Office Secretary of State June 3, 1974.

CHAPTER 74-121

Committee Substitute for Senate Bill No. 959

AN ACT relating to involuntary sexual battery; repealing present Chapters 794, and 800, Florida Statutes, except sections 794.05, 800.02, 800.03 and 800.04; creating Chapter 794, Florida Statutes; providing definitions; establishing degrees of involuntary sexual battery; providing penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapters 794, and 800, Florida Statutes, except sections 794.05, 800.02, 800.03, and 800.04 are repealed.

Section 2. Chapter 794, Florida Statutes, is created to read:

794.011 Involuntary Sexual Battery.—

(1) Definitions:

(a) "Offender" means a person accused of a sexual offense.

(b) "Mentally Defective" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

(c) "Mentally Incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

(d) "Physically Helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.

(e) "Serious Personal Injury" means great bodily harm or pain, permanent disability or permanent disfigurement.

(f) "Sexual Battery" means oral, anal, or vaginal penetration by or union with the sexual organ of another; or the anal or vaginal penetration of another by any other object, provided, however, sexual battery shall not include acts done for bona fide medical purposes.

(g) "Victim" means the person alleging to have been the object of a sexual offense.

(h) "Consent" means intelligent, knowing, and voluntary consent, and shall not be construed to include coerced submission.

(2) The common law rule "that a boy under fourteen (14) years of age is conclusively presumed to be incapable of committing the crime of rape" shall not be in force in this state.

(3) No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast in any instrument or mass communication, the name, address or other identifying fact or information, of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in chapter 775.

(4) When in this chapter, the criminality of conduct depends upon the victim being below a certain specified age, ignorance of the age is no defense. Neither shall misrepresentation of age by such person, nor a bona fide belief that such person is over the specified age be a defense.

(5) The testimony of the victim need not be corroborated in prosecutions under section 794.021, however, the court may instruct the jury with respect to the weight and quality of the evidence.

(6) Specific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in prosecutions under section 794.021; provided, however, that when consent by the victim is at issue, such evidence may be admitted if it is first established to the court outside the presence of the jury that such activity 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 victim which is relevant to the issue of consent.

794.021 Involuntary Sexual Battery.—

(1) A person of the age of eighteen (18) years or older who commits sexual battery upon, or injures the sexual organs of a person eleven (11) years or younger in an attempt to commit sexual battery upon said person commits a capital felony punishable as provided in sections 775.082 and 921.141. If the offender is under the age of eighteen (18), that person shall be guilty of a life felony, punishable as provided in Chapter 775.

(2) A person who commits sexual battery upon a person over the age of eleven (11) years, without that person's consent and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury shall be guilty of a life felony, punishable as provided in section 775.082.

(3) A person who commits sexual battery upon a person over the age of eleven (11) years, without that person's consent, under any of the following circumstances, shall be guilty of a felony of the first degree, punishable as provided in section 775.082:

(a) When the victim is physically helpless to resist.

(b) When the offender coerces the victim to submit by threatening to use force or violence on the victim, likely to cause serious personal injury, and the victim reasonably believes that the offender has the present ability to execute these threats.

(c) When the offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute these threats in the future. Retaliation as used in this section includes but is not limited to threats of future physical punishment, kidnapping, false imprisonment or forcible confinement or extortion.

(d) When the offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance which mentally or physically incapacitates the victim.

(e) When the victim is older than eleven (11) but less than eighteen (18) years of age and the offender is in a position of familial, custodial, or official authority over the victim and uses this authority to coerce the victim to submit.

(f) When the victim is mentally defective and the offender has reason to believe this or has actual knowledge of this fact.

(4) A person who commits sexual battery upon a person over the age of eleven (11) years, without that person's consent and in the process thereof uses physical force and violence not likely to cause serious personal injury, shall be guilty of a felony of the second degree punishable as provided in section 775.082.

Section 3. This act shall take effect October 1, 1974.

Approved by the Governor May 31, 1974.

Filed in Office Secretary of State June 3, 1974.

CHAPTER 74-122

Committee Substitute for Senate Bill No. 219

AN ACT relating to health and rehabilitative services; amending subsection (1) of section 945.12, Florida Statutes, to provide for inmate transfers for rehabilitative treatment; amending subsection (1) of section 947.16, Florida Statutes, to provide, for purposes of parole eligibility, that the definition of "confined" includes persons transferred by the division of corrections to any appropriate treatment facility; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 945.12, Florida Statutes, is amended to read:

(Substantial rewording of subsection. See section 945.12(1), Florida Statutes, for present text.)

945.12 Transfers for rehabilitative treatment.—

(1) The division is authorized to transfer drug dependents as defined in chapter 397, Florida Statutes, retarded, addicted, tuberculous, mentally ill, or other prisoners requiring specialized services to appropriate public or private facilities or programs for the purpose of providing such specialized service or treatment for as long as such service or treatment is needed but for no longer than the remainder of the prisoner's sentence.

Section 2. Subsection (1) of section 947.16, Florida Statutes, is amended to read:

947.16 Eligibility for parole; powers and duties of commission.—

(1) Every person who has been, or who may hereafter be, convicted of a felony or who has been convicted of one or more misdemeanors and whose sentence or cumulative sentences totals twelve months or more, who is confined ~~in a jail or prison in this state~~ in execution of the judgment of the court, and whose record during confinement is good, shall, unless otherwise provided by law, be eligible for consideration by the commission for parole. An inmate who has been sentenced for a term of five years or less shall be interviewed by a member of the commission or its representative within six months after the initial date of confinement in execu-

City of Miami Beach

FLORIDA 33139

"VACATIONLAND U. S. A."

POLICE DEPARTMENT
ROCKY POMERANCE
CHIEF

120 MERIDIAN AVENUE
TELEPHONE: 673-7935

February 4, 1975

Ms. Florence McClure, Vice President
Community Action Against Rape
2432 Natalie
Las Vegas, Nevada 89121

Dear Ms. McClure:

I am writing this letter pursuant to our recent telephone conversation with regard to our newly implemented State Statute on Sexual Battery.

I understand that our attorney general has forwarded this new law to you so that you are familiar with its language. The law itself has been very valuable to our organization in our investigation of sex crime. Since it went into effect, October 1974, we have been able to initiate prosecution of sex crimes, the elements of which would not have been sufficient to sustain an actual RAPE charge. This is its greatest advantage, since the crime of RAPE has so many demanding elements which must be satisified for successful prosecution.

As we discussed on the phone, it is my considered opinion that any Sexual Battery laws enacted by your own legislature should be confined to the felony category. If a misdemeanor section is included, we find that it sorely tempts both prosecution and defense toward plea bargaining positions. In other words, if there is a lesser misdemeanor charge to drop to, it would seem that we are less likely to prosecute in the felony area and therefore, justice is not done.

Chief Pomerance again thanks you very much for your personal complimentary remarks and asks that you please be assured of our assistance and cooperation at all times in matters of mutual interest.

Very truly yours,

ROCKY POMERANCE
CHIEF OF POLICE

W. R. Philbin

By: W. R. Philbin,
Major
Comm. Off.-Det. Div.

WRP:lz

THE RAPE VICTIM: A VICTIM OF SOCIETY AND THE LAW

> There is no more personal a crime possible—for either men or women—than to have one's physical integrity violated against one's will.[1]

Forcible rape is the most frequently committed violent crime in America. The F.B.I. reports that a rape occurs every ten minutes.[2] In 1973, 100 out of every 100,000 female residents of major cities in the United States were victims of forcible rape.[3] Even more startling is the fact that rape has increased 119% in the last thirteen years and 10% during the first six months of 1974 as compared with the same period in 1973.[4]

The Pacific Northwest has not been immune from this rise in the incidence of rape. In Seattle, the number of reported rapes quadrupled from 72 in 1964 to 276 in 1973.[5] Through September of 1974, 327 rapes had been reported to the Seattle police.[6] In Portland, reported cases of rape and attempted rape increased from 144 in 1971 to 179 in 1972, a 24% increase.[7]

The statutory law of Washington and Oregon defines forcible rape as sexual intercourse with a female not the wife of the perpetrator without her consent, including situations where the woman is mentally incapable of consent, drugged, or unconscious.[8] Statis-

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1. Rape Statistics for 1971-1972, at 57, compiled by the District Attorney's office, Multnomah County, Portland, Oregon.

2. The Sunday Oregonian, Sep. 29, 1974, at 23, col. 1. Statistics for previous years can be obtained in FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES [hereinafter cited as UNIFORM CRIME REPORTS].

3. UNIFORM CRIME REPORTS 13 (1973).

4. The Sunday Oregonian, Sep. 29, 1974, at 23, col. 1. The violent crimes of murder and nonnegligent manslaughter increased 116% in the same thirteen-year period.

5. Forcible Rape in Seattle—1973, at 1, compiled by the Seattle Rape Reduction Program, 610 Arctic Building, Seattle, Washington.

6. The Seattle Times, Oct. 10, 1974, at H3, col. 1.

7. Portland Research, Advocacy, Prevention, Education ("R.A.P.E.") Project, Law Enforcement Assistance Administration Grant Application, at 8, submitted by the Multnomah County District Attorney, Portland, Oregon. The increase in forcible rape statistics may be due to increased reporting as well as to a higher incidence of the crime; however, the F.B.I. recognizes that rape is one of the most underreported crimes. UNIFORM CRIME REPORTS 15 (1973). And the media's recent emphasis on the futility of reporting and the horrors of a rape trial would seem to discourage, rather than encourage, reporting.

8. OR. REV. STAT. § 163.355-.375 (1973); WASH. REV. CODE § 9.79.010 (1973). The Washington statute includes sexual intercourse with a man not the husband of the perpetrator as well. This Comment will not deal with the crime of statutory rape.

tics show, however, that almost all reported rapes involve verbal threats of bodily harm, the use of a weapon, or physical injury.[9] Forcible rape is clearly a severe and violent crime with a dangerous potential for loss of life.[10]

Despite these facts, the conviction rate for forcible rape is the lowest for any violent crime. In 1973, arrests were made in only 51% of the reported cases in the United States; only 76% of those arrested were prosecuted; and only 36% of those prosecuted were found guilty. In other words, only one out of seven reported rapes resulted in conviction.[11] In the same year, seven convictions for rape were obtained in Portland[12] and eight in Seattle.[13]

One of the major reasons for the small number of forcible rape convictions, despite the burgeoning rate of the crime, is the lenient attitude toward the use during trial of evidence of the victim's character, an attitude which has been applied only to the crime of rape. No other evidentiary rules in our legal system are so oversolicitous of the defendant and so suspicious of the victim.

I. The Law in Theory

> Rape is the only crime in which the victim is doubly violated, first by the attacker, and then by society. It is the only crime in which social, religious, and cultural core attitudes of society turn upon the victim. In rape, society tends to blame or accuse the woman.[14]

Because the victim and the defendant are usually the only witnesses to a forcible rape, the rape case necessarily comes down to her word against his—or which witness the jury finds the most believable. For this reason, the defense seeks to go beyond the immediate facts of the case to the character and reputation of the victim in an attempt to discredit her testimony. The defense attorney may adopt either one of two lines of defense: he may deny that the act of rape occurred, or he may admit that his client and the victim engaged in sexual intercourse but assert that she consented to the act. In either case, the defense attorney may attempt

9. Rape Statistics for 1971-1972, *supra* note 1, at 84; Forcible Rape in Seattle—1973, *supra* note 5, at 21.

10. The F.B.I. Uniform Crime Classification ranks rape beneath only homicide and negligent homicide in terms of severity. Portland "R.A.P.E." Project, Grant Application, *supra* note 7, at 17.

11. Uniform Crime Reports 15 (1973).

12. Rape Statistics for 1971-1972, *supra* note 1, at 105.

13. Forcible Rape in Seattle—1973, *supra* note 5, at 23-24. It should be noted that the statistics for Seattle and Portland do not include convictions obtained for a lesser offense, such as assault.

14. M. Margolian, *Rape: The Facts*, 3 Women: A Journal of Liberation 21 (1972).

to use the following types of evidence in his attack: (1) the general reputation of the victim for chastity, (2) the victim's specific prior sexual activity with other men, or (3) the victim's specific prior sexual activity with the defendant. Where the defense has adopted the first line of attack, denying that a rape occurred, this evidence will be used to impeach the victim's credibility. Where the second line of attack—consent by the victim—has been adopted, the defense will attempt to introduce this evidence as substantive evidence bearing on the issue of consent.

A. *Character and Reputation of the Victim: Credibility*

When the defendant denies the allegation of the victim that the act of rape occurred, he seeks by cross-examination of the prosecutrix and by the testimony of his own witnesses to show that she has a bad moral character and, thus, would be likely to fabricate a story of rape. This evidence is not admitted as substantive evidence to prove or disprove the charges made, but rather is used as impeachment evidence which the jury may consider when judging the credibility or believability of the victim. Because, as Wigmore has noted, "[a]ttacking a witness' character is often but a feeble and ineffective contribution to the proof of the issue . . .,"[15] the defense is limited in the types of impeachment evidence which may be introduced. The decision on which types of evidence may be used lies essentially in the discretion of the trial judge, who uses the basic tenets of prior case law to aid him in balancing the relevancy of the evidence on the issue of truthfulness against the danger of undue prejudice to and humiliation of the victim.

1. *General Reputation*

Strict rules have developed governing the impeachment of credibility by evidence of bad reputation because of its tenuous connection with the capacity to tell the truth.[16] In an attempt to attain the highest possible degree of relevancy, the majority of jurisdictions in virtually all types of cases except rape prosecutions allow only evidence of the general reputation of the witness for truth and veracity in the community in which he lives.[17] Although some jurisdictions also allow evidence of "general character" or "general moral character," general reputation as to specific moral traits is inadmissible in all jurisdictions as having no connection with veracity.[18]

15. 3A J. WIGMORE, EVIDENCE § 922, at 728 (Chadbourn rev. ed. 1970).
16. *Id.* at 725-26.
17. C. MCCORMICK, EVIDENCE § 44, at 91 (1972).
18. *Id.*

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Despite this rule, however, evidence regarding the moral trait of chastity has been allowed in the past in rape prosecutions, as having a direct link with the victim's veracity.[19] One court, for example, has remarked, "It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman."[20] Similarly, Wigmore asserts a strong relation between the sexual experiences of the "unchaste mentality" and the propensity to tell lies.[21]

Some modern commentators still believe that the word of the prosecutrix "is very often false" and that stories of rape are frequently lies or fantasies,[22] and several recent cases have allowed evidence of the general reputation for chastity of a rape victim.[23] But the trend is to exclude this testimony as having no logical connection with "any issue in the case where the conduct of the parties is before the jury . . . ."[24] In line with this trend, Oregon and Washington hold that past conduct is irrelevant to the jury's understanding of the case, and that evidence of the victim's general reputation for chastity has no bearing upon the believability of her accusations: "Forcible rape at a given time and place need not require a background of previous conduct to make the act believable."[25]

2. *Specific Sexual Activity*

Because of the dangers of prejudice to the prosecutrix, a substantial number of states do not allow evidence of specific past sexual activity with men other than the defendant for the purpose of impeachment.[26] Not only is it difficult to know which acts are

19. 3A J. WIGMORE, EVIDENCE § 924a, at 736 (Chadbourn rev. ed. 1970).
20. State v. Sibley, 131 Mo. 519, 531-32, 33 S.W. 167, 171 (1895).
21. 3A J. WIGMORE, EVIDENCE § 924a, at 736-37 (Chadourn rev. ed. 1970). WIGMORE cites five case histories of mentally ill pathological liars who made false accusations against men. None of the accused were convicted of a sexual crime. *Id.* at 740-43.
22. Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967). But the author is unable to offer substantial evidence to support his belief. The evidence cited in this article consists of one Michigan case wherein the court found a possible motive for a false rape complaint.
23. Williams v. State, 51 Ala. App. 1, 282 So. 2d 349 (1973); Wilson v. State, 264 So. 2d 828 (Miss. 1972).
24. Shapard v. State, 437 P.2d 565, 601 (Okla. Crim. App. 1967). *See also* Haynes v. State, 498 S.W.2d 950 (Tex. Crim. App. 1973); State v. Sims, 30 Utah 357, 517 P.2d 1315 (1974).
25. State v. Kristich, 226 Or. 240, 245, 359 P.2d 1106, 1109 (1961); *accord*, State v. Allen, 66 Wash. 2d 641, 404 P.2d 18 (1965). See State v. Pierson, 175 Wash. 650, 27 P.2d 1068 (1933), for an application of the old rule allowing such character evidence.
26. United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973); Williams v. State, 51 Ala. App. 1, 282 So. 2d 349 (1973); Crawford v. State,

relevant to the victim's character for truthfulness, but also the potential for undue humiliation of the witness and for confusion of the issues by the asking of unfounded questions is great.[27] Washington and Oregon are among the states forbidding the use of specific sexual activity of the complaining witness in a forcible rape case.[28] The rationale, developed when evidence of the victim's general reputation for chastity was still allowed, is that, while a witness is supposed to anticipate defending her general reputation, she cannot be expected to be able to disprove charges of specific acts of intercourse made by men whom the accused has enlisted to testify against her.[29]

Evidence of prior sexual acts with the defendant, however, may be employed in almost all jurisdictions—including Oregon and Washington—to impeach credibility.[30] The theory, apparently, is that a woman who has had sexual relations with a man in the past is likely to be compelled by vindictive or other self-interested motives to assert a false rape charge.

B. *Character and Reputation of the Victim: Consent*

Because want of consent is an element of rape,[31] the crime cannot be committed where the woman consents to the act. Instead of denying the allegations of the victim that a rape occurred, the defendant may admit the fact of sexual intercourse, but attempt to legitimize the act by asserting that the alleged victim consented. In such a case, the defendant will seek to have character and reputation evidence admitted as substantive evidence going to prove or disprove consent as an element of the crime.

1. *General Reputation*

Courts, as a general rule, exclude general reputation for a par-

254 Ark. 253, 492 S.W.2d 900 (1973); Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974).

27. C. McCORMICK, EVIDENCE § 42, at 83 (1972).

28. State v. Ogden, 39 Or. 195, 65 P. 449 (1901); State v. Bell, 14 Or. App. 597, 514 P.2d 62 (1973) (statutory rape); State v. Allen, 66 Wash. 2d 641, 404 P.2d 18 (1965); State v. Ring, 54 Wash. 2d 250, 339 P.2d 461 (1959); State v. Severns, 13 Wash. 2d 542, 125 P.2d 659 (1942).

29. State v. Holcomb, 73 Wash. 652, 657-58, 132 P. 416, 418 (1913). *See also* State v. Ogden, 39 Or. 195, 65 P. 449 (1901). This reasoning is an attempt to discourage the "if she accuses me of rape, I'll get five other guys to testify" technique.

30. State v. Nab, 245 Or. 454, 421 P.2d 388 (1966) (statutory rape); Esquivel v. State, 506 S.W.2d 613 (Tex. Crim. App. 1974); State v. Holcomb, 73 Wash. 653, 132 P. 416 (1913).

31. State v. Bridges, 61 Wash. 2d 625, 379 P.2d 715 (1963). The state has the burden of proof of want of consent. *See also* State v. Chambers, 50 Wash. 2d 139, 309 P.2d 1055 (1957).

ticular moral trait from admission as substantive evidence because it is considered inadmissible opinion evidence.[32] Only with the crime of rape do the majority of jurisdictions, including Washington and Oregon, admit general reputation for chastity of the prosecutrix as substantive evidence going to the issue of consent.[33] The defendant who asserts a consent defense may examine the "chastity" of the victim in a broad manner, including probing deeply into all aspects of her past reputation and life style, either on cross-examination of the prosecutrix and the state's witnesses or during the presentation of his own case. The rationale behind this rule is a simple one: an unchaste female or one with a bad reputation is more likely to have consented to the act than her chaste sister.

2. *Specific Sexual Activity*

A much more controverted question is whether specific acts of unchastity with the defendant or with other men are admissible as substantive evidence from which to infer consent. The cases clearly hold that any prior acquaintance, dating, or sexual relations with the defendant are relevant, on the theory that they show a lack of serious opposition on the part of the victim.[34] Thus, a woman who has met a man once or twice is considered to have been willing to have sexual intercourse with him.

The courts disagree, however, at present as to the admissibility of prior acts with men other than the defendant. The inclusionary view supported by defense attorneys is that the jury must know of any specific prior act of consensual intercourse so that they can evaluate the act of intercourse on trial, which is likewise claimed to be consensual.[35] This position is based on the assumption that a jury which knows of the unchaste conduct of the prosecutrix will be less likely to believe her allegations of rape.[36] The exclusionary view, which prevails in a majority of jurisdictions, does not allow inquiry into specific prior acts, on the ground that they fail to evidence a character predisposed to intercourse.[37] The theory of these

32. C. McCormick, Evidence § 187, at 444 (1972).

33. Brown v. State, 291 Ala. 789, 280 So. 2d 177 (Crim. App. 1973); People v. Eilers, 18 Ill. App. 3d 213, 309 N.E.2d 627 (1974); Wilson v. State, 264 So. 2d 828 (Miss. 1972); State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973); Shapard v. State, 437 P.2d 565 (Okla. Crim. App. 1968); State v. Ogden, 39 Or. 195, 65 P. 449 (1901); State v. Simmons, 59 Wash. 2d 381, 368 P.2d 378 (1962).

34. Smiloff v. State, 439 P.2d 772 (Alas. 1968); Shapard v. State, 437 P.2d 565 (Okla. Crim. App. 1968); M. Amir, Patterns in Forcible Rape 23 (1971).

35. Burton v. State, 471 S.W.2d 817 (Tex. Crim. App. 1971).

36. Packineau v. United States, 202 F.2d 681, 685 (8th Cir. 1953).

37. Lynn v. State, 231 Ga. 559, 203 S.E.2d 221, 222 (1974) (citing Wig-

cases is that the fact that a woman has previously consented does not mean that she has lost her right of choice in the future to consent or not, according to her own will.[38]

Oregon and Washington case law is unclear as to whether these states restrict substantive evidence of character to general reputation for chastity or whether they allow testimony about specific incidents of sexual activity. Considering the decisions in these states on use of character evidence going to credibility, they would likely follow the exclusionary rule and keep out evidence of specific prior acts with men other than the defendant.

C. *Additional Considerations*

In accord with the general rules of evidence, neither the general reputation for chastity or unchastity nor specific prior sexual activity of the defendant are admissible as bearing on the believability of his story denying the rape or alleging the consent of the victim. Such evidence has always been considered incompetent and prejudicial[39] and is rejected to protect the rights of the accused.[40]

The accused, of course, has the right to appeal a rape conviction. The defendant usually claims that a trial judge who prohibited him from questioning the victim about her past sexual activities committed error, and a final decision on admissibility of this evidence is made at the appellate level. Because the state cannot appeal an acquittal,[41] however, the amount of character evidence let in at the trial level over the objection of the prosecution is unknown.

In summary, the modern trend is to exclude all evidence of general reputation or of specific acts of unchastity with other men to impeach the credibility of the complaining witness. The majority of the courts hold that general reputation is admissible as substantive evidence going to the issue of consent but that specific sexual activity with other men is inadmissible. Any evidence of prior association and acts with the defendant may be used either to impeach the victim's credibility or to establish the defense of consent. These nonstatutory rules as to the use of character and reputation evidence in a rape case are only guidelines for the trial judge to

MORE); State v. Jack, 285 So. 2d 204 (La. 1973); Shapard v. State, 437 P.2d 565 (Okla. Crim. App. 1968).

38. Commonwealth v. McKay, 73 Mass. Adv. Sh. 373, — Mass. —, 294 N.E.2d 213 (1973).

39. State v. Marselle, 43 Wash. 273, 86 P. 586 (1906).

40. State v. Thompson, 14 Wash. 285, 44 P. 533 (1896). The commission of similar sexual offenses against the same victim has, however, been admitted. People v. Eilers, 18 Ill. App. 3d 213, 309 N.E.2d 627 (1974).

41. OR. REV. STAT. § 138.060 (1973); Wash. Laws Ex. Sess. 1925, ch. 150, § 7 (repealed 1957).

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follow in his discretion. But these liberal rules, which were developed to protect innocent men from false rape charges, have such a far-reaching influence throughout the criminal justice system that they may actually result in setting many guilty rapists free.

II. The Law in Practice

> I think it is generally known that the woman becomes the defendant in a rape case. They get it from the police, they get it in court, they get it from the D.A., and then if there's a trial, they get it from the defense attorney. I can think of easier ways for a woman to get revenge.[42]

In balancing the believability of a rape victim against that of her assailant, the law favors the defendant by allowing an open attack on the character of the victim. As will be shown, these lenient rules make proof of the crime of rape difficult at trial. But their influence reaches far beyond the courtroom. Traditional moral and social attitudes about rape and rape victims, from which the law developed and which it reinforces, are brought to bear on the believability of the victim. From the moment a rape is committed, the victim's character and reputation come under close scrutiny throughout the criminal justice system.

The Federal Bureau of Investigation recognizes that rape is the most underreported crime.[43] An estimated 50% of rapes go unreported,[44] and some prosecutors have placed the figure as high as 75%.[45] The failure of most victims to report is due to their fear of probing and embarrassing questioning about their past history and experiences (as well as about the crime itself) by police, prosecutors, judges, and defense attorneys.[46] By this self-screening process, the victim reinforces the belief of society and the law that a woman who has a bad reputation cannot be raped—either she is lying or she consented.

A. *The Police*

> If I'm ever raped again, I wouldn't report it to the police because of all the degradation . . . .[47]

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42. P. Montgomery, *New Drive on in State to Ease Rape Convictions*, N.Y. Times, Nov. 13, 1973, at 90, col. 1-2, quoting Michael R. Juviler, head of appeals bureau in the Manhattan District Attorney's Office.

43. Uniform Crime Reports 14 (1972).

44. *Revolt Against Rape*, Time, Jul. 22, 1974, at 85.

45. KOIN-TV (CBS affiliate) News, Portland, Oregon, Oct. 14, 1974, 5:30 p.m., reporting on the new rape victim-advocate program of the Multnomah County District Attorney's Office.

46. *Revolt Against Rape*, Time, Jul. 22, 1974, at 85; H. Shaffer, *Crime of Rape*, 1 Editorial Research Reports 45 (Jan. 19, 1972); M. Lear, *Rape: The Law That Cheapens Every Woman*, Redbook, Sep. 1972, at 83; Uniform Crime Reports 15 (1973).

47. S. Griffin, *Rape: The All-American Crime*, Ramparts, Sep. 1971, at 26, 32.

The police who investigate the crime tend to believe that a woman who is not a chaste housewife or an unmarried virgin cannot be raped.[48] They ask the victim countless questions about her sexual mores and behavior to a degree that any man would consider unacceptable. A victim loses credibility if she uses profane language, is not well-groomed, or speaks too easily for an unmarried woman about sexual matters.[49] Police may actually investigate her reputation for chastity among neighbors and associates and even with the defendant himself![50] If she has not been physically bruised, they may suggest that she encouraged the encounter because she is not a "good" woman, and that she was not really raped.[51] Because of a common socio-economic orientation, they may see the situation from the offender's point of view rather than the woman's and infer consent where none was given.[52] Unless the victim was a virgin, the prevailing attitude is "what is the big deal?"[53] From the point of view of the police, the ideal victim is a respectable member of the community, obviously physically brutalized, repulsed by sex-related questions, and hysterical throughout the interview.[54]

The police have absolute discretion as to whether to pursue any action to obtain conviction, and they play an important part in screening the victim's credibility. In Portland, 18.8% of the reported cases in 1971-1972 were dropped before arrest because the victim's statement was not sufficiently credible to either the police or the district attorney.[55] No action was taken in another 22% because of victim distrust or dislike of the police, lack of confidence in the system, dislike of further involvement, or for "unspecified reasons."[56] It is unknown how many of these cases are directly related to overzealous application by the police of their own credibility test, which degrades the victim for speaking out. Clearly, however, the police play a major role in reinforcing the legal and

48. *Id.*
49. Rape Statistics for 1971-1972, *supra* note 1, at 77.
50. Comment, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277, 312 (1968).
51. Weiss & Borges, *Victimology and Rape: The Case of the Legitimate Victim*, 8 ISSUES IN CRIMINOLOGY 71, 103 (Fall 1973).
52. Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AMER. CRIM. L. REV. 335, 348 (1973).
53. M. Lear, *Rape, The Law That Cheapens Every Woman*, REDBOOK, Sep. 1972, at 83, 160. New York Police Detective Al Simon asks if the same man wouldn't be upset if he were jumped suddenly and forced to commit sodomy at the point of a gun.
54. Rape Statistics for 1971-1972, *supra* note 1, at 77.
55. *Id.* at 108-09. These statistics are taken from the 148 stranger-to-stranger rapes out of the 179 forcible rapes reported.
56. *Id.*

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social attitudes which correlate a victim's believability with her sexual reputation.

B. *The Prosecutor*

> There is a feeling among some prosecuting attorneys that rape cases are sticky at best and if the victim won't make a convincing witness and sound believable, then the probability of obtaining a conviction is very remote.[57]

Prosecutors agree that rape cases are the most difficult crime for which to obtain a conviction.[58] Because the defendant usually alleges that the victim consented, trial judges are liberal in admitting prior sexual conduct as substantive evidence, and they often fail to explain clearly to the jury that this evidence is not to be considered by them in determining the credibility of the witness. Once the "dirty linen" is out, the jury assumes it is all relevant. Prosecutors find a direct correlation between the admission of such evidence and the acquittal of the defendant; therefore, the prosecution usually will not prosecute a rape case involving a victim who has anything in her past which may be interpreted by the judge or jury as a "bad reputation."[59] By intensive, in-depth questioning of the victim about her past, the prosecutor screens out cases he knows will be unsuccessful, despite their genuineness. His goal in dropping these cases may also be to protect the victim from the attack on her character and reputation by the defense attorney. He is candid in telling her she will face a high degree of humiliation and degradation on the witness stand.[60]

C. *The Defense Attorney*

> Am I on trial . . . it is embarrassing and personal to admit these things to all these people . . . I did not commit a crime. I am a human being.[61]

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57. Portland "R.A.P.E." Project Grant Application, *supra* note 7, at 18.

58. Interview and group discussion with Harl Haas, Multnomah County District Attorney; Mary Lou Calvin, Research Assistant; Mary Ann Buchanan, Special Agent; and Bill Youngman, Deputy District Attorney, in Portland, Oregon, Sep. 19, 1974; telephone interview with Pat Aiken, Deputy Criminal Prosecutor with the King County Prosecuting Attorney's Office, Seattle, Washington, Sep. 20, 1974.

59. One tactic the district attorney may use is a *motion in limini* by which both attorneys make an offer of proof, and the judge rules prior to trial on the character evidence to be allowed. The defense attorney is admonished not to discuss during voir dire the evidence which is kept out or to make innuendos about it during trial to get it in the record. But the judge is unlikely to keep much more reputation evidence out by a *motion in limini* than he keeps out at trial. *Id.*

60. Interview with Donald Turner, Professor of Criminal Law and Procedure at Willamette University College of Law and former District Attorney for Wasco County, Oregon, in Salem, Oregon, Oct. 9, 1974.

61. *Rape: The All-American Crime*, *supra* note 47, at 30.

After her experiences with the police and the district attorney, the victim faces the defense counsel, whose goal is to destroy her waning confidence and make her less effective by a grueling personal attack. By skillful questioning fraught with innuendo, he suggests that she has been too free with her sexuality in the past, and that perhaps she consented or is guilty of seduction[62]: Had she had sexual intercourse before she was married? Has she had sexual intercourse outside of marriage since she has been married?[63] He builds tremendous psychological pressure by making inferences about her life style: Has she been divorced? Does she ever go to bars? Does she have any illegitimate children? The most complete abuse of the right of cross-examination comes when the defense attorney asks unfounded questions: Did you leave your employment after having sexual intercourse on a couch? Were you accused of having an affair with a man when working as an attendant in a health club? Are you living with a married man?[64]

Careful cross-examination is required in any criminal proceeding to protect the rights of the defendant. But accusatory, unfounded questioning of the victim is unwarranted, not only because it goes beyond the limits of relevant evidence,[65] but also because it places the victim in the position of the accused. The law's purpose is to deal with the act of rape and with the responsibility of the man who is on trial. By emphasizing the reputation and past history of the victim, the defense attorney suggests that she unconsciously set up the rape. This tactic confuses the law with the realm of psychiatry and its modern theories that criminals may be aided by their victims.[66] The task of the law is to protect against

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62. *Police Discretion and the Judgment that a Crime Has Been Committed*, *supra* note 50, at 290.

63. *I Never Set Out to Rape Anybody*, Ms., Dec. 1972, at 22.

64. *Rape: The All-American Crime*, *supra* note 47, at 30.

65. ABA CODE OF PROFESSIONAL RESPONSIBILITY 28 (1971), Disciplinary Rule 7-106(C), states:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
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> . . . .
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> (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

66. R. Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in SEXUAL BEHAVIOR AND THE LAW 54 (1965). The author uses the analogy that a defendant on trial for robbery is no less guilty of his crime because the victim left his money in plain view. Letty Cottin Pogrebin, in her article, *Do Women Make Men Violent?*, Ms., Nov. 1974, at 52, states this argument more emphatically:

> Blaming the victim is an old story. Supposedly, women inspire rape because we have breasts or wear skirts or walk "suggestively." (Does society blame the well-tailored man with the gold watch and Gucci loafers when he becomes a victim of robbery?) Women . . . should know better; "nice girls" have no business being out alone at night.

victimization, and psychological innuendos do not change the legal guilt of the attacker. Questions such as the above—despite their denial by the victim—are heard by the jury, and their innuendos surely have a prejudicial effect. The defense attorney stretches the liberal rules as to character evidence in rape cases beyond their limits and plays on the moral attitudes of the jury regarding the type of woman who is raped, in order to destroy the victim's believability.

D. *The Judge*

> You know, this is the male attitude: *Why* was she having a beer in that man's apartment? *Why* was she walking on the street at that hour? *She had it coming.* I've heard that from judges.[67]

The attitudes of the judge set the atmosphere of the courtroom. Because he is considered an objective source of authority, it is from his decisions on the use of character evidence and from his instructions to the jury that the victim would hope to obtain a balance against the bias of the police and the defense attorney. A recent study of judicial attitudes, however, shows that judges have a high level of skepticism about rape cases.[68] Although they feel sympathy for the "genuine victim"—the prosecutrix in a case where the facts of forcible rape are clearcut, they believe that a woman who, for example, has met a man in a bar and let him drive her home is clearly "asking for it."[69] This confusion of the moral and social values of the victim with the guilt of the defendant is reflected in the liberal attitude toward the use of character evidence and in the failure to distinguish between substantive evidence going to consent and impeachment evidence going to credibility. Judges know that abuse of discretion is often found by higher courts when the defendant claims the examination was unduly curbed,[70] and so it is easier and safer to let the evidence in rather than be reversed when the defendant appeals his conviction. Because the state has

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67. M. Weinman, Q. *If you rape a woman and steal her T.V., what can they get you for in New York? A. Stealing her T.V.*, N.Y. Times, Jan. 30, 1972, § 6 (Magazine), at 11, 60.

68. C. Bohmer, *Judicial Attitudes Towards Rape Victims*, 57 JUDICATURE 303 (Feb. 1974).

69. This attitude is common throughout the criminal justice system. The Seatle Police Department reports that 40% of the rape cases it handles are of the "classic" kind—with a man attacking his victim from behind bushes or pulling his victim into a car. The other 60% begin with the "socialization" process, with a woman meeting a man in a bar, for example, and being followed home. This division of types of rape cases was recently made to reassure the public that the rising rate of rape is not really serious. The Seattle Post-Intelligencer, Oct. 26, 1974, at A14, col. 2.

70. C. MCCORMICK, EVIDENCE § 29, at 59 (1972).

no right to appeal an acquittal, the judge need not fear reversal for letting in too much character evidence.

The judge's personal opinion of the worth of the victim's testimony is often conveyed in his instructions to the jury, either openly or by innuendo. Recently, the Washington State Court of Appeals affirmed a refusal to give the traditional jury instruction that the charge of rape is easily made and difficult to disprove, and that the testimony of the prosecutrix must be examined with caution, holding the instruction to be a prejudicial comment on the evidence.[71] No rule prohibits such jury instructions, however, and a recent Oregon case has reaffirmed that warning the jury about the quality of the victim's testimony is desirable.[72] Through his cautionary jury instructions and lenient attitude toward the use of character evidence, the judge encourages the jury to determine the defendant's guilt on the basis of the victim's reputation.

E. *The Jury*

> The law recognizes only one issue in rape cases other than the fact of intercourse: whether there was consent at the moment of intercourse. 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.[73]

Although the jury is supposed to consider evidence of the general character and reputation of the victim only in relation to her consent, they are unlikely, mentally or emotionally, to be able to separate the issue of consent from the question of the victim's credibility. The more evidence of the victim's bad character that they hear, the more lenient the jury is to the defendant. Jury sympathy is with the offender before the trial starts.[74] This feeling grows as questioning by the defense counsel reveals that the victim is the type of woman who might, by the jury's moral standards, have assumed the risk of rape. The jury, therefore, rewrites the law of rape in terms of their belief that a sexually "free" woman is more likely to have consented or provoked the crime, even though the sexual "innocence" of the woman technically has no legal standing.[75] This fact explains the impossibility of obtaining a conviction for a prostitute, as well as acquittals in some of the most savage

71. State v. Mellis, 2 Wash. App. 859, 470 P.2d 558 (1970).
72. State v. Yates, 239 Or. 596, 399 P.2d 161 (1965). *See also* State v. Fitzmaurice, 3 Or. App. 601, 475 P.2d 426 (1970).
73. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 249 (1966).
74. J. MACDONALD, PSYCHIATRY AND THE CRIMINAL 235 (1969).
75. H. Shaffer, *Crime of Rape*, 1 EDITORIAL RESEARCH REPORTS 45, 56 (Jan. 19, 1972).

cases of rape.[76] Juries have acquitted both a defendant who himself submitted the only evidence that he had had intercourse with the victim prior to the occurrence and a defendant who made the only claim that the victim was a prostitute.[77]

The ideal juror for obtaining a conviction in a rape case is obviously not the solid conservative citizen desired by the prosecution in most criminal cases. But the older members of the community, who are the most likely to have puritanical, accusatory attitudes, usually have the most time for jury duty. Male jurors identify with the assailant and the potential loss of his job, home, and family. Female jurors may ask to be excused because they cannot be objective; yet, when they are seated, they are unable to identify with a woman who has a "bad reputation."

A jury cannot make an enlightened judgment as to the legal guilt of the defendant when it is presented with evidence about the victim which offends their traditional stereotypic beliefs of how a woman should behave.[78] The result of a lenient attitude toward the use of the evidence of the victim's character is that the jury punishes the victim for her past sexual and social behavior.

III. Changing the Law

> Rape was not a word uttered in polite company 15 to 20 years ago. Now we are going to say it out loud, and we hope to alter attitudes by this openness.[79]

A. *Reasons for Change*

The case law governing the use of character evidence in forcible rape prosecutions is based on traditional moral and social attitudes about women and their sexual conduct, including the belief that a large number of women fabricate stories of rape and that many innocent men are convicted. Such fabrications and unjust convictions[80] have not, however, been documented. The commander of the Rape Analysis Squad in New York City has estimated that the number of false rape complaints is about 2%.[81] The few false re-

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76. The American Jury, *supra* note 73, at 251.
77. *Id.*
78. One example of the influence of restrictive stereotypes of women on jurors is that of the hitchhiking female. Most men and women believe that a woman who hitchhikes is explicitly seeking a sexual encounter and, therefore, deserves what she gets. This belief gives no consideration to the actual intentions of the female victim. The fact is that many young people —male and female—are hitchhiking today as a result of the fuel shortage and rising cost of living. Interviews, *supra* note 58.
79. Portland "R.A.P.E." Project Grant Application, *supra* note 7, at 12.
80. 3A J. Wigmore, Evidence, *supra* note 21; *Corroborating Charges of Rape*, *supra* note 22.
81. Portland "R.A.P.E." Project Grant Application, *supra* note 7, at 15.

ports are disposed of by police investigation and questioning, the prosecutor's interview and polygraph test, and the grand jury investigation. Prosecutors believe this screening process insures that no fabricated cases get to trial.[82] Instead, many bona fide cases are dropped during the screening process.

Despite the lack of factual underpinnings to support the theory of fabrication, the belief continues to exist, bolstered by several myths having their roots in our traditional sexual attitudes. The first myth is that all women secretly want to be raped and, thus, either provoke or consent to the crime. One author and researcher, who discussed sex fantasies with several dozen women, has noted the distinction between a sexual fantasy and a forcible rape:

> Better than half described rape; but it was always in the precise circumstances, and by the specific men, of their choice. It was absolutely clear from the nature of the material that these fantasies served no wish to be genuinely raped, but a wish to feel *guiltless*—"I can't blame myself, he made me do it"—in a desired sexual encounter. Still, the fantasy exists, and it feeds the myth.[83]

In reality, the Federal Commission on Crimes of Violence reports that only 4% of forcible rape cases involve victim precipitation.[84] Menachem Amir, in his comprehensive study of 646 rape cases in Philadelphia, puts the figure at 19%[85]; however, Amir includes not only cases of actual victim precipitation, but also those which the offender "interpreted" as victim-precipitated. How does the assailant "interpret" that a woman is agreeing to sexual relations? By the stereotyped belief that she means "yes" when she says "no"? The belief that a woman wants to be raped is in reality a reflection of the assailant's own desires.

The rapist is living up to the expectations of the second myth—that men have greater sexual needs, that their sexuality is more urgent than women's. In fact, Amir found that 58% of rapes are premeditated and planned events, rather than the result of a sudden sexual urge or need.[86] But this myth mirrors the double standard of sexual behavior, which tolerates sexual aggression in the male and is suspicious of sexual activity in the female. A woman who has violated this double standard and engaged in sexual activity is no longer to be protected by our laws—she deserves what she gets.[87] Amir discovered that 20% of rape victims had "bad rep-

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82. Interviews, *supra* note 58.
83. *Q. If you rape a woman and steal her T.V. . . ., supra* note 67, at 63.
84. *Rape: The All-American Crime, supra* note 47, at 28.
85. M. Amir, *Forcible Rape*, 31 FED. PROBATION 51 (Mar. 1967).
86. *Id.*
87. "The sexually active woman is not only regarded as a liar, she is considered fair game. Such a double standard, which considers male sexu-

utations",[88] although he does not define this term. Does the "bad reputation" of a woman give a man license to rape? Does the fact that she has had sexual relations in the past mean that she cannot be raped? Despite the fact that previous rape convictions and extramarital sexual activity of the defendant are considered irrelevant,[89] the sexual reputation of the victim is a crucial factor in a rape case.

This unrealistic treatment of the victim's chastity in court is not reflective of relationships between men and women in society today. In fact, the dichotomy of the "good" and "bad" woman has disappeared. Moral degeneration resulting in an inability to tell the truth can no longer be presumed from unchastity. Many women today have sexual relations outside the marital relationship, and to condemn a rape victim for unchastity places a significant number of women beyond the protection of the law.[90] Rape laws must be reformed to reflect today's social and moral values as well as to protect the right of a woman to physical integrity and freedom of movement without fear of sexual attack, regardless of her past sexual activities.

B. *Proposals for Reform*

The goal of reform in the use of evidence of the character and reputation of the prosecutrix in a rape case should be to abolish the distinctions between rape victims and victims of other crimes. Impeachment of the credibility of the witness should not be allowed by showing either specific acts of prior sexual conduct with other men or general reputation for chastity, as tending to show promiscuity or sexual mores considered adverse to traditional standards. Although use of such evidence is generally not allowed today, the admission of general reputation for chastity (and sometimes of specific acts) as substantive evidence going to the issue of consent frequently affects the jury's estimation of the victim's credibility.

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ality normal and female sexuality abnormal, serves to enhance the dichotomy between the 'good' woman, who is the sole sexual possession of one male, and the 'bad' woman who, lacking status as a sole possession, functions as the outlet for 'normal' male promiscuity and therefore cannot be raped." Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 938 (1973).

88. *Forcible Rape*, *supra* note 85, at 51.

89. State v. Poole, 161 Or. 481, 90 P.2d 472 (1939).

90. *Rape and Rape Laws: Sexism in Society and Law*, *supra* note 87, at 939; *see* Vener & Stewart, *The Sexual Behavior of Adolescents in Middle America: Generational and British-American Comparisons*, 34 J. OF MARRIAGE AND THE FAMILY 696, 699 (Nov. 1972); Luckey & Nass, *A Comparison of Sexual Attitudes and Behavior in an International Sample*, 31 J. OF MARRIAGE AND THE FAMILY 364, 375 (May 1969).

This character evidence should be inadmissible. It not only confuses the jury and prejudices the witness; it is irrelevant to the issue of consent as well. The fact that a woman has consented to sexual relations with a man in the past does not show consent to her assailant. Consent should be determined solely from the victim's testimony as to her conduct at the time of the rape, rather than from her reputation, character, and past sexual activity with other men.

Past sexual conduct or acquaintance with the accused is a more difficult problem because a substantial number of rape victims have a previous acquaintance of some sort with their attackers.[91] This information is invariably brought out in court to impeach the victim's credibility or as a basis from which to infer her consent. A prior relationship should be relevant only to show a bad-faith motive of the victim to falsify the charge, and its relevance should be determined in chambers by the judge. The jury should be instructed that the mere existence of a prior relationship should not undercut the victim's credibility or cause them to presume her consent. To suggest that consent to the defendant once infers consent to him in the alleged rape is to deny a woman her right to choose her sexual partner, her right to sexual self-determination.

The major argument against these reforms is that nondisclosure of evidence of the victim's character denies to the defendant constitutional due process and the right of confrontation.[92] In the case of *Giles v. Maryland*,[93] the United States Supreme Court sidestepped this issue by remanding the case to the Supreme Court of Maryland to determine if the prosecution had suppressed other evidence. The Court did agree with the lower court, however, that the defendant is not denied due process unless the evidence not disclosed is relevant and material to the issue of his guilt.[94] The reforms pro-

91. 32.4% in Portland, Rape Statistics for 1971-1972, *supra* note 1, at 61; 36.6% in Seattle, Forcible Rape in Seattle—1973, *supra* note 5, at 13.

92. The Washington Chapter of the American Civil Liberties Union, traditional guardian of the rights of the accused, has taken no official position in this matter because of the differing views of its membership. Its Women's Rights Committee, however, has proposed a policy statement similar to the reforms mentioned above, which accords a somewhat broader admissibility to the victim's relationship with the defendant, although confining to it "certain elements of the crime." ACLU Women's Policy Statement on Rape to the Board of Directors from the Women's Rights Committee, 2101 Smith Tower, Seattle, Washington, Mar. 1, 1974. Some ACLU members advocate changing rape from a sexual crime to a special form of physical assault. This change would eliminate consent as an issue and, thus, negate the argument for admitting character evidence of the victim. Telephone interview with Michele Pailthorpe, ACLU Attorney in Seattle, Sep. 20, 1974.

93. 386 U.S. 66 (1967).

94. *Id.* at 73, quoting from State v. Giles, 239 Md. 458, 469-70, 212 A.2d

posed above clearly meet this test.

Although prosecutors disagree as to the types of character evidence which should be admissible, they agree that statutory relief is the only effective way to change present law.[95] Four states have already enacted legislation which reduces the occasions on which evidence of reputation or prior sexual conduct may be employed. In Florida and Iowa, the testimony may no longer be introduced unless the judge determines in a closed hearing that the material is pertinent.[96] The laws in California and Michigan are much more restrictive, prohibiting such questioning in 98% of the cases.[97]

Five other states—Kansas, Nevada, Ohio, Pennsylvania, and Washington—are now considering similar legislation.[98] The proposed bill in Washington generally eliminates the use of evidence of the victim's sexual behavior, whether as impeachment evidence going to credibility or as substantive evidence going to consent. The evidence to be excluded includes, but is not limited to, the victim's marital behavior, divorce history, and general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards. Evidence of past sexual intercourse with the defendant is admissible, however, when that past behavior is material to the issue of consent.[99]

The Oregon Association of District Attorneys has proposed the contents of a bill which has not yet been drafted. The bill would allow no general reputation evidence whatsoever, nor would it allow evidence of specific sexual activity with other men occurring more than one year before. Although the distinction between impeachment evidence and substantive evidence is not made clear, specific acts committed within one year prior to the day of the al-

101, 108 (1965). Justice Harlan, in his dissent, condemns the majority for not affirming the convictions when they were unable to find a constitutional infirmity. He believes that the majority was discomforted by the rape victim's promiscuity and remanded the case on a different issue in the hope that the court below would discover a way to reverse the convictions.

95. Interviews, *supra* note 58.

96. L. Fosberg, The N.Y. Times News Service, Sep. 9, 1974.

97. *Id.* Michigan's legislation limits admissibility to evidence of the victim's past sexual conduct with the accused, in the form of specific instances of activity showing the source or origin of semen, pregnancy, or disease. If the defendant plans to offer such evidence, he must file a written motion and offer of proof within ten days of his arraignment. Admissibility is then determined by the judge alone or in a pre-trial hearing. (The Michigan statute includes all sexual crimes as "criminal sexual conduct," and the offense may be committed by any male or female on any other male or female.) Enrolled Senate Bill 1207, 77th Mich. Reg. Legis. Sess. § 520j (1974).

98. The N.Y. Times News Service, *supra* note 96.

99. Second Proposed Final Draft, S. 3173, § 2 (submitted by the Seattle Women's Commission and the Washington State Women's Council).

leged crime would be admissible only after application to the court by the defendant and an *in camera* hearing. The defendant would be required to establish by clear and convincing evidence that the probative value of such testimony outweighs "*social harm to the victim.*" Evidence of prior activities with the defendant at any time in the past, however, would be freely admitted.[100] The concern expressed for the well-being of the victim is a hopeful sign that attitudes about rape victims are changing from inherent suspicion to the protective attitude accorded the victims of other violent crimes.

Although these statutes approach the problem from different directions, their common orientation is that a victim's reputation and sexual activities with men other than her assailant are irrelevant. Unfortunately, they do not encompass the reforms proposed above as to evidence of past relations with the defendant. Nevertheless, the prevailing legal practice requiring that a woman's chastity be proved in order to convict her assailant of rape is slowly being abandoned. In the states which have adopted legislative reforms, juries may no longer imply the consent of an "unchaste" woman or allow her unchastity to influence their estimation of her believability, because they will never receive this information.

IV. Conclusion

The increasing incidence of rape has generated a rising level of fear among women. Present rape law makes successful prosecutions extremely difficult, as is evidenced by the disparity between the number of rapes reported and the number of convictions obtained. This fact contributes to the rising number of rape attacks by allowing potential rapists to believe that very little likelihood exists that they will be called to account for their attacks. Hopefully, new legislation will reduce the number of rape offenses committed, increase the number of successful prosecutions, and insure that there is justice for the victim as well as the accused during the trial process. Such legislation should have the effect of giving support to the victim throughout the criminal justice system as well as in the courtroom. When the attitudes of the police, prosecutors, defense attorneys, and judges toward the rape victim change, the legal system will no longer be upholding and reinforcing outdated

100. Proposed revision of Or. Rev. Stat. ch. 163 as it relates to the crime of rape and sodomy, submitted by the Oregon State District Attorney's Association, Phil Roberts. On Jan. 24, 1975, as this Comment went to press, Rep. Vera Katz introduced two measures—H.B. 2241 and H.B. 2242—in the Oregon legislature, directed to restricting use of evidence of past sexual conduct of rape victims. The Oregon Statesman, Jan. 25, 1975, at 3, col. 1.

social and moral attitudes. Perhaps then the feelings of society about women and the kind of women who get raped will change.[101]

Only when the rape victim is freed from the bias in the current system resulting from concentration on her character and reputation will she have established her right to sexual self-determination. The right of women to control their availability in the face of sexual aggression is, in essence, the right to be free.[102]

SALLY ELLIS MATHIASEN

101. Social attitudes towards rape and rape victims are beginning to change, as evidenced by such victim support facilities in Seattle as the 24-hour Rape Crises Telephone service, the Rape Relief Project of the University Y.W.C.A., the Sexual Assault Center at Harborview Medical Center, and the Seattle Rape Reduction Program. The Multnomah County District Attorney's Office in Portland has hired a rape victim "advocate" who will counsel the victim, act as a liaison between the victim and the police, attorneys, her own family and the community, and present public information and education programs and workshops. (One interesting sidelight is that defense attorneys in Portland have threatened to use the fact that the victim advocate worked with the prosecutrix as evidence inferring that she was encouraged to or coerced into bringing the charge!) Interview, *supra* note 58.

102. "Once in a Cabinet we had to deal with the fact that there had been an outbreak of assaults on women at night. One minister suggested a curfew; women should stay home after dark. I said, 'But it's the men who are attacking the women. If there's to be a curfew, let the men stay home, not the women.'" Golda Meir, quoted by Letty Cottin Pogrebin in her article, *Do Women Make Men Violent?*, Ms., Nov. 1974, at 55.

ASSEMBLY ACTION	SENATE ACTION	ASSEMBLY / SENATE AMENDMENT BLANK
Adopted ☐	Adopted ☐	682
Lost ☐	Lost ☐	Amendments to Assembly / Senate
Date:	Date:	Bill / Joint Resolution No. 130 (BDR 10-233)
Initial:	Initial:	Proposed by Committee on Judiciary
Concurred in ☐	Concurred in ☐	
Not concurred in ☐	Not concurred in ☐	
Date:	Date:	
Initial:	Initial:	

Amendment No. 7809

"Conflicts with Amendment Nos. 7915, 7933 and 5491."

Amend sec. 10, page 2, by deleting lines 12 and 13 and inserting:

"1. The landlord, whether or not he is the owner, lessor or sublessor of the dwelling unit or the building.".

Amend sec. 25, page 4, by deleting line 24 and inserting:

"(c) Agrees to pay the management's attorney fees if the management prevails in court; or".

Amend sec. 25, page 4, by deleting lines 29 through 32 and inserting:

"agreement, is unenforcible. If management deliberately uses a rental agreement containing provisions known by it to be prohibited, the resident may recover.".

Amend sec. 27, page 4, by deleting lines 36 through 38 and inserting:

"Sec. 27. 1. Any payment, deposit, fee or charge that is to be used for any of the following purposes is "security" and is governed by the provisions of this section:".

Amend sec. 27, page 4, by deleting lines 48 through 50 and inserting:

"3. Any security shall be held for 90 days by the management for the resident who is a party to the rental agreement.".

Amend sec. 27, page 5, by deleting lines 8 through 16 and inserting:

"6. Within 3 business days after the initial date of occupancy or upon delivery of possession, the management or its designated representative and the resident shall inventory the premises. A written record, detailing the condition of the premises and any furnishings or appliances provided, shall be prepared by the management and the resident. Duplicate copies of the record shall be signed by the management and the resident to indicate that the inventory was completed. The resident shall be given a copy of the inventory.".

Amend sec. 27, page 5, by deleting line 24 and inserting:

"rity to the resident no later than 2 weeks after the termination of his tenancy.".

Amend sec. 27, page 5, by deleting lines 30 through 33 and inserting:

"(a) Transfer the portion of the security remaining after any lawful

deductions made under subsection 7 to the management's successor in interest.".

Amend sec. 27, page 5, by deleting lines 39 through 43 and inserting:

"10. The bad faith retention by management or its transferee of security in violation of this section may subject the management or its transferee to the actual damages.".

Amend sec. 27, page 6, by deleting lines 1 through 3 and inserting: "in a justice's court if the damages claimed, whether ordinary or punitive or both, are within the jurisdictional amounts allowed by NRS 73.010.".

Amend sec. 31, page 6, by deleting lines 36 and 37 and inserting: "condition for human habitation and maintain this condition. The management shall:".

Amend sec. 31, page 6, by deleting line 50 and inserting: "times and reasonable heat when required by seasonal conditions, except".

Amend sec. 31, page 7, by deleting line 1 and inserting: "where the dwelling unit is so constructed that heat or cooling or hot water is gen-".

Amend sec. 31, page 7, by deleting lines 21 through 23 and inserting: "of evading the obligations of the management and resident as set forth in this act;".

Amend sec. 31, page 7, by deleting lines 28 through 30.

Amend sec. 34, page 7, by deleting line 50 and inserting: "notice to the resident of the conveyance.".

Amend sec. 34, page 8, by deleting lines 1 and 2.

Amend sec. 40, page 9, by deleting lines 37 through 48 and inserting:

"3. If the dwelling unit or premises are used or allowed to be used for any purpose other than that specified in paragraph (e) of subsection 2 within 1 year of the date of the notice of termination, the management which acts in bad faith is liable to the former resident for damages plus reasonable attorney fees, unless circumstances unexpected by and not within the control of the management defeat that intended use which caused the resident's removal.

4. The management shall specify to a resident the reason for any rent increase or other change of terms of the tenancy or notice of termination.".

Amend sec. 42, page 10, by deleting lines 28 through 50 and inserting:

"act. If the management's noncompliance is malicious, the resident may recover punitive damages plus reasonable attorney fees.

(b) Apply to the court for such relief as the court may deem proper under the circumstances.".

Amend sec. 42, page 11, by deleting lines 1 through 16.

Amend sec. 42, page 11, by deleting line 18 and inserting:

"ceeding brought for possession of a dwelling unit, the court may request an".

Amend sec. 43, page 11, by deleting lines 34 through 36 and inserting:

"and recover the damages sustained by him. If the management can prove that it has exercised due diligence within 5 days after the incoming resident's demand for possession, either to evict the holdover resident".

Amend sec. 44, page 12, by deleting lines 5 through 7 and inserting:

"the resident by court order issued only after a hearing wherein management has been duly notified may deduct from his rent the actual and reasonable cost or the fair and reasonable value of the work, not exceeding the amount specified in this subsection.".

Amend sec. 45, page 12, by deleting line 17 and inserting:

"for 1 day, not including a Saturday, Sunday or legal holiday, after it is received personally by management the resident may apply to the court for an order allowing him to:".

Amend sec. 46, page 12, by deleting lines 42 through 49 and inserting:

"accruing and shall determine the amount due to each party. During pendency of the action the court may, in its discretion, order the release of such funds to the management as may be necessary to meet its expenses and its obligations encumbering the subject rental property. If no rent remains due after application of the provisions of this subsection, judgment shall be entered for the resident in the action for possession. If the defense or counterclaim by the resident".

Amend sec. 46, page 13, by deleting lines 1 through 5 and inserting:

"is without merit and is not raised in good faith, the management may recover reasonable attorney fees.

2. In any action for rent where the resident is not in possession, the resident may counterclaim as provided in subsection 1 but is not required to pay any rent into court.".

Amend sec. 48, page 13, by deleting line 24 and inserting:

"dent from the premises or maliciously interrupts or causes the interruption".

Amend sec. 53, page 14, by deleting lines 44 through 48 and inserting: "Sec. 53. The management may dispose of personal property abandoned on".

Amend sec. 53, page 15, line 1, by deleting "(a)" and insert: "1.".

Amend sec. 53, page 15, line 4, by deleting "(b)" and insert: "2.".

Amend sec. 53, page 15, line 7, by deleting "(c)" and insert: "3.".

Amend sec. 53, page 15, line 10, by deleting "(d)" and insert: "4.".

Amend sec. 56, page 15, by deleting lines 25 through 30 and inserting: "may also recover the actual damages sustained by it plus reasonable attorney fees. If the management consents to the resident's continued occupancy, the tenancy is week to week in the case of a roomer who pays weekly rent, and in all other cases, month to month and such continued occupancy shall be on the same terms and conditions as contained in the existing rental agreement unless specifically agreed otherwise.".

Amend sec. 57, page 15, line 38, by deleting "or" after the ";".

Amend sec. 57, page 15, line 39, by deleting "." after "unit" and insert: "; or".

Amend sec. 57, page 15, inserting between lines 39 and 40:

"(d) When there has been noncompliance with a notice served under the provisions of NRS 40.253.".

Amend sec. 58, page 16, by deleting lines 6 through 8 and inserting: "The court may issue the writ only after a hearing where it appears to the court's satisfaction from the complaint and any affidavits filed or oral testimony taken that:".

Amend sec. 60, page 16, by deleting line 35 and inserting: "by reason of the following:".

Amendment No. 7809 to Assembly Bill No. 130 (BDR 10-233) Page 7

Amend sec. 61, page 17, by deleting lines 19 through 26 and inserting:

"Sec. 61. The provisions of this act shall not affect or impair existing contractual relations, either written or oral, entered into before the effective date of this act.".

Amend sec. 62, page 18, by inserting between lines 26 and 27:

"3. This section does not apply to dwelling units whose occupancy is governed by sections 2 to 61, inclusive, of this act.".

ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA SESSION

LEGISLATION ACTION

DATE April 16, 1975

BILL NO. A.B. 130

MOTION: _____

Do Pass ✓ Amend _____ Indefinitely Postpone _____ Reconsider _____

Moved By Mr. Sena as amended. Seconded By Mrs. Wagner

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

	MOTION		AMEND		AMEND	
VOTE:	YES	NO	YES	NO	YES	NO
Barengo	✓					
Banner	✓					
Hayes	✓					
Heaney	✓					
Hickey	✓					
Lowman	✓					
Polish	✓					
Sena	✓					
Wagner	✓					

TALLY:

ORIGINAL MOTION: Passed ✓ as amended. Defeated _____ Withdrawn _____

Amended & Passed _____ Amended & Defeated _____

Amended & Passed _____ Amended & Defeated _____

Attach to Minutes April 16, 1975
Date

ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA SESSION

LEGISLATION ACTION

DATE April 16, 1975

BILL NO. A.B. 447

MOTION: _____

Do Pass ____ Amend ____ Indefinitely Postpone ✓ Reconsider ____

Moved By Mrs. Hayes Seconded By Mrs. Wagner

AMENDMENT: _____

Moved By _____ Seconded By _____

AMENDMENT: _____

Moved By _____ Seconded By _____

	MOTION		AMEND		AMEND	
VOTE:	YES	NO	YES	NO	YES	NO
Barengo	✓					
Banner	✓					
Hayes	✓					
Heaney	✓					
Hickey	✓					
Lowman	✓					
Polish	✓					
Sena	✓					
Wagner	✓					

TALLY:

ORIGINAL MOTION: Passed ✓ Defeated ____ Withdrawn ____

Amended & Passed _____ Amended & Defeated _____

Amended & Passed _____ Amended & Defeated _____

Attach to Minutes April 16, 1975
Date

ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA SESSION

LEGISLATION ACTION

DATE April 16, 1975

BILL NO. A.B. 496

MOTION: _____

Do Pass ✓ Amend ___ Indefinitely Postpone ___ Reconsider ___

Moved By as amended Mrs. Hayes Seconded By Mrs. Wagner

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

	MOTION		AMEND		AMEND	
VOTE:	YES	NO	YES	NO	YES	NO
Barengo	✓					
Banner	✓					
Hayes	✓					
Heaney	✓					
Hickey	✓					
Lowman	✓					
Polish	✓					
Sena	✓					
Wagner	✓					

TALLY:

ORIGINAL MOTION: Passed ✓ Defeated ___ Withdrawn ___

as amended.

Amended & Passed _____ Amended & Defeated _____

Amended & Passed _____ Amended & Defeated _____

Attach to Minutes April 16, 1975
Date