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CALIFORNIA RAPE EVIDENCE REFORM:
AN ANALYSIS OF SENATE BILL 1678

Late one night in March 1955, while driving home from a part-time job, eighteen-year-old Donna Schurr was abducted at knife point by a man who had hidden behind the front seat of her car. After being driven to a remote area and forcibly raped, Donna was released by her abductor. She immediately reported the rape to the Orange County sheriff's office. About ten months later, while Donna was home alone, the same knife-wielding rapist broke into the house, confronted the young woman, and threatened to kill her if she continued to scream. She was then kidnapped from her home and driven to a tract development where she was beaten, threatened with death for attempting to escape, and raped again. Afterwards, Donna was driven back to a point near her residence and pushed from the car. Seeing her fiancé leaving her house, she called to him and he chased the rapist who was then speeding away. Shortly thereafter, the highway patrol apprehended both vehicles and took the rapist into custody following his roadside confession.

At trial, the defendant testified that the intercourse had been consensual, and the defense attempted to impeach Donna's denial of consent by cross-examining her on the subject of her prior sexual activity. Since lack of consent is an essential element of the offense, a common defense tactic is to discredit the alleged victim as a "loose" woman who probably consented to the intercourse. The trial judge, not wishing to subject Donna to the ordeal of a detailed inquiry into her sexual life, limited testimony to an admission that she had had intercourse prior to the first alleged rape; thus, her prior unchastity was established be-

2. 18 AM. JUR. Trials 341, 395-96 (1971).
3. "Unchastity" is a term of moral judgment generally used to describe any improper sexual activity of a female not in accord with virginity or marital fidelity. Criminal sex offenses usually combine a proscription of antisocietal actions as well as notions of sexual mores. In the case of rape, the offender is punished for what is basically a sexual assault. However, the case law also incorporates moral concepts prevalent at the time the law was being formulated. The moral code of the nineteenth century strongly condemned sexual relations outside of marriage. Women who had engaged in such relations were considered morally depraved and more prone to consent to intercourse again when given the opportunity. Hence, their unchastity was considered relevant to the issue of consent. Although society's sexual mores have changed considerably, the relevancy of a woman's unchastity in a rape prosecution has only recently been challenged and altered by legislation.
fore the jury. On appeal, one of the issues raised by the defense was that the trial court had unreasonably restricted the scope of cross-examination. Despite the considerable evidence of force and violence corroborating the prosecutrix's denial of consent and the defendant's valid confession, the appellate court held that it was error to deny a more thorough cross-examination of Donna's prior sexual conduct.

Although such a result may be offensive to one's concept of justice, the holding is far from unique. In fact, the decision is consistent with a long line of California cases. Nonetheless, the impropriety of subjecting a complaining witness to an investigation of her sexual life was recognized as early as 1899 when, in dissent, Justice McFarland wrote: "I think if counsel for the defendant . . . are allowed to even ask questions tending to prove that a prosecutrix had sexual intercourse with another man, great injustice and wrong will follow." Viewed from the victim's perspective, the doctrine which Justice McFarland opposed has a devastating impact. The rape victim not only experiences the mental and physical trauma of the offense itself, but, if she decides to report the crime, she must frequently risk degrading treatment by both medical personnel and investigating officers. The ultimate indignity occurs at trial when the prosecutrix is subjected to intense interrogation and unpleasant innuendo as though she were the defendant rather than the victim.

Recently, unfavorable publicity focused upon this situation has stimulated a critical review of society's treatment of rape victims. In 1974, the California Legislature enacted a series of laws and resolutions dealing with various aspects of rape and the laws relating to it.

4. The terms "victim," "complaining witness," and "prosecutrix" will be used interchangeably as all three are found in case and statutory law.
5. Presence of force and violence was supported in this case by wounds and bruises on the victim's body, the testimony of several witnesses, and the discovery of incriminating evidence in the defendant's automobile. People v. Walker, 150 Cal. App. 2d 594, 596-99, 310 P.2d 110, 112-13 (1957).
6. The court, however, did not consider the error to be prejudicial and the conviction was affirmed. Id. at 602, 310 P.2d at 115.
7. See note 93 infra.
9. See note 10 infra.
10. At a hearing in October 1973, members of the Assembly Criminal Justice Committee heard testimony calling for legislative action on several fronts, and the ultimate response of the legislature was the passage of four bills and five concurrent resolutions which became law on January 1, 1975. The testimony criticized both the efficacy of rape investigations and the attitude of police toward the victim. Many victims complain of little or no sympathy from the police when they report the rape. Some police seem to believe that no one gets raped unless she was more or less asking for it. As one rape victim stated, "[M]any women don't report their rapes because dealing with the police can often be as grueling an experience as the rape itself." Summary of the Hearing on Revising California Laws Relating to Rape Before the Assembly Criminal
One of these, Senate Bill 1678, was intended to make certain evidence of sexual conduct inadmissible on the issue of consent and thus to protect complaining witnesses, such as Donna Schurr, from unwarranted exposure of their private lives. Fashioning effective reform legislation in this area, however, is far more complex than might be expected. Thus, this note will first examine some of the problems associated with rape prosecutions and the way in which S.B. 1678 was intended to deal with those difficulties. The structure of the legislation will be studied to determine the consequences of the bill's sanctioning the admissibility of former sexual conduct as credibility evidence rather than substantive evidence.

The discussion will then focus upon the intricacies of the California Evidence Code which allow possible stratagems to circumvent the bill's restrictions. The potential success of such defense tactics will be tested by an analysis of opposing arguments. The doctrine of limited admissibility as it relates to the court's discretionary authority under section 352 of the Evidence Code will be the first argument to be scrutinized. Next, the countervailing argument of the defendant's right to a thorough cross-examination in sex cases will be reviewed. Finally, it will be concluded that S.B. 1678 fails to achieve the objective of effective rape evidence reform and, therefore, an alternative approach to the problem will be proposed.

Three of the concurrent resolutions addressed this problem. The Commission on Peace Officer Standards and Training is directed to develop a program to train specialists for rape investigations with special emphasis placed on the psychological and emotional effects on the victim. A. Con. Res. 217, res. ch. 219 (1974); A. Con. Res. 218, res. ch. 220 (1974). Additionally, local law enforcement agencies are encouraged to make more policewomen available to respond to rape cases since they may be more sensitive to the victim's needs. A. Con. Res. 219, res. ch. 235 (1974).

The hearings also produced testimony that rape victims are often "treated as a piece of evidence" during medical examinations and that the "crowning blow . . . comes in the mail a few weeks later when the woman receives a bill for emergency room 'services.'" Summary of the Hearings on Revising California Laws Relating to Rape Before the Assembly Criminal Justice Comm. and the California Comm'n on the Status of Women, Oct. 18, 1973, at 2-3. In response, the legislature prohibited charging the victim for the costs of an examination conducted to gather evidence for prosecution. CAL. GOV'T CODE § 13961.5 (West Supp. 1975). Additionally, all county or private governmental-contracting emergency medical facilities are directed to treat victims for emotional as well as physical trauma and to inform them of available post-rape counseling and medical services. A. Con. Res. 220, res. ch. 161 (1974).

Reasoning that if persons were better able to defend themselves, they would be less vulnerable to rape, the legislature's fifth resolution called for school districts to instruct students in nonaggressive self-defense. A. Con. Res. 221, res. ch. 221 (1974).

Two of the three remaining bills are concerned with jury instructions and are dealt with in note 19 infra. The third bill is S.B. 1678.
Public Policy Considerations Supporting Senate Bill 1678

Although the number of rapes brought to police attention is increasing, there is evidence that the vast majority of such attacks still go unreported. At hearings conducted by the Assembly Criminal Justice Committee, members heard testimony explaining this phenomenon and subsequently articulated the rationale for S.B. 1678:

Many times the rape victim is extensively questioned about her prior sexual history in open court, without a showing that such questioning is relevant to the innocence or guilt of the accused. The fear of such detailed examination about a very personal aspect of an individual's life may deter victims from bringing criminal complaints, and may be a significant factor in the low percentage of reported rapes.

Thus, in the interest of encouraging more women to report and aid in the prosecution of rape, the legislature has sought to protect victims by restricting the admissibility of sexual conduct evidence. The extent to which the new law will stimulate increased reporting will turn directly upon how often the defense is able to elude the restrictions and to question the complaining witness concerning her prior sexual conduct. Potential defense stratagems will be examined following a detailed study of the structure of S.B. 1678.

11. Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Calif. L. Rev. 919, 920 (1973) [hereinafter cited as Rape Laws]. This article contains an extensive analysis of rape statistics.

12. Id. at 921. Numerous theories have been advanced to account for this phenomenon. In the case of a young victim the parents may wish to avoid further ordeal, emotional injury or unpleasant publicity. A victim may also fear retaliation by the offender, adverse spousal reaction or damage to her reputation. Id. at 921-22.

13. See note 10 supra.


15. Interview with George S. Moscone, Cal. State Senator, in San Francisco, Cal., Oct. 24, 1974. Senator Moscone, a co-author of the bill, also pointed out that by requiring a screening process outside the presence of the jury, S.B. 1678 would prevent a defense attorney from asking questions concerning sexual conduct which are without foundation but which create an adverse impression in the mind of the fact finder. Id.

16. It is, of course, questionable whether victims will begin to report rapes in greater numbers solely because the legislature has attempted to protect them from exposure of their sexual lives, for they will remain vulnerable to the trauma of testifying in painful detail about the actual rape incident in addition to other considerations. See note 12 supra. The success of this legislation must be measured by a statistical survey at some date following its interpretation by the judiciary.

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Admissibility of Evidence Under Senate Bill 1678

In order to appreciate fully the potential consequences of the new restrictions on the admissibility of sexual conduct evidence, it is necessary to examine the inferences permissible under prior law. The defense would introduce evidence to show that the prosecutrix was unchaste, and the jury was allowed to infer that since the prosecutrix had previously consented to intercourse with others, she was likely to have consented in the case in question. Hence, a reasonable doubt on the crucial issue of consent17 was created, thereby exculpating the defendant.18 The legislature sought to alter this situation both indirectly, by prohibiting certain jury instruction,19 and directly, via S.B. 1678, by


CALJIC number 10.06 instructed that, "Evidence was received for the purpose of showing that the female person named in the information was a woman of unchaste character. A woman of unchaste character can be the victim of a forcible rape but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again. Such evidence may be considered by you only for such bearing as it may have on the question of whether or not she gave her consent to the alleged sexual act and in judging her credibility." New section 1127d has been added to the Penal Code expressly prohibiting instructing the jury that such an inference may be drawn from any evidence of sexual conduct with persons other than the defendant. Id. § 1127d (West Supp. 1975).

The new prohibition applies not only to rape offenses but also to prosecutions for unlawful sexual intercourse under Penal Code section 261.5, more commonly known as statutory rape. CAL. PEN. CODE § 261.5 (West Supp. 1975). CALJIC number 10.13 instructed that, "While neither the consent of a female under the age of eighteen years nor her unchaste character is a defense to a charge of statutory rape, yet when the female person named in the information testifies that the act was committed by force and without her consent, evidence of her prior unchastity as it affects the likelihood of her consenting to the act may be considered in judging the credibility of her testimony as to the manner in which the act was done and as to whether it was committed at all." The implicit inference embodied in this instruction is that a woman who has consented before is more likely to consent again and hence CALJIC numbers 10.06 and 10.13 appear to be prohibited by section 1127d.

Although it does not appear possible to reconstruct equivalent instructions, the legislature, as an added precaution, banned the use of the term "unchaste character" in any jury instruction by adding section 1127e to the Penal Code. Id. § 1127e. Although only the term "unchaste character" is specifically prohibited, and similar terms such as "unchastity" could theoretically be substituted, it is arguable that the legislative intent was to proscribe all such equivalent terminology.

Surprisingly, CALJIC number 10.22 has not been altered. This instruction embodies Lord Chief Justice Hale's often quoted statement that the charge of rape is "easily to be made and hard to be proved, and harder to be defended . . . ." 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1736). Consequently, the judge must continue to admonish the jury, sua sponte, to view the testimony of the prosecutrix with caution. E.g., People v. Putnam, 20 Cal. 2d 885, 129 P.2d 367 (1942).
effecting major changes in the Evidence Code, amending section 1103 and adding section 782.

Prior to its amendment, section 1103 permitted the defendant to introduce character evidence to prove the prosecutrix's conduct on a specific occasion; that is, evidence of unchastity was admitted to establish consent to the sexual act in question. The new amendment generally prohibits the use of character evidence to prove consent. There are, however, several exceptions which may vitiate the actual impact of the reforms. First, the amendment does not prohibit the defense from introducing evidence of the complaining witness's sexual conduct with the defendant. Additionally, the statue provides that

20. Character evidence is defined as evidence of a person's propensity or disposition to engage in a certain type of conduct. CAL. EVID. CODE § 1101, Law Rev. Comm'n Comment (West 1966). The three kinds of evidence that may be offered to prove conduct of the victim are: (1) evidence as to reputation; (2) opinion evidence as to character; and (3) evidence of specific acts indicating character. Id. § 1102, Law Rev. Comm'n Comment. It is interesting to note a double standard in this area of the code. When character evidence is offered to prove conduct of the defendant instead of the victim, only reputation and opinion evidence may be admitted since evidence of specific acts of the accused might result in confusion of the issues, unfair surprise, and prejudice. Id. In contrast, the defendant may use evidence of specific acts against the victim although he remains immune from such evidence being entered against himself.

21. Character evidence is generally inadmissible in criminal cases to prove conduct of the defendant. Id. § 1102. Nevertheless, in considering issues other than character, evidence may be admissible to prove other facts in issue such as motive, common scheme or plan, preparation, intent, knowledge, identity, or absence of mistake or accident. Id. § 1101(b), Law Rev. Comm'n Comment.

22. Subdivision (2) of the amendment provides: "Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, or 264.1 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any such section, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

"(b) Paragraph (a) of this subdivision shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.

"(c) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and such evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence introduced by the prosecutor or given by the complaining witness.

"(d) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.

"(e) As used in this section, 'complaining witness' means the alleged victim of the crime charged, the prosecution of which is subject to this subdivision." Id. § 1103(2) (West Supp. 1975).

23. Id. § 1103(2)(b). The legislature apparently believed that such prior sexual conduct could be relevant on the issue of consent and therefore should not be prohibited.
if the state introduces any evidence of the victim’s sexual conduct, the defense may cross-examine the witness who gave such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence. Most notably, the amendment does not preclude any evidence which is offered to attack the credibility of the prosecutrix. Thus, it is possible that evidence of sexual conduct with persons other than the defendant may be admitted as credibility evidence despite its inadmissibility to prove consent, the distinction resting solely on the manner in which such evidence is to be used.

Such a distinction is not unusual and arises because evidence may be separated into two broad categories depending upon the purpose for which it is admitted. Thus, substantive evidence is admitted to prove or disprove any disputed fact or issue that is of consequence to the determination of the action, while credibility evidence is that which supports or attacks the credibility of the witness. The importance of this distinction lies in the use to which the evidence may be put by the jury: substantive evidence may be used to prove or disprove an ultimate issue, whereas credibility evidence may be used only to bolster or to undermine the truthfulness of a witness’s testimony. For example, if the defense offers evidence to disprove the truthfulness of the complaining witness’s testimony and on that basis the jury disbelieves the witness, then the defense has not proven that the contrary is true, but only that the witness is not credible. Furthermore, even though the jury believes the impeaching evidence, it may still convict the defendant if it believed him to be guilty beyond a reasonable doubt. Thus, impeaching evidence is not offered to prove or disprove

24. An example of such evidence might be the victim’s virginity prior to the alleged rape.
25. Cal. Evid. Code 1103(2)(c) (West Supp. 1975). Manifestly, it is in the prosecution’s interest not to introduce any evidence whatsoever touching upon the victim’s sexual conduct so as to avoid opening the door for defense rebuttal evidence.
26. Id. § 1103(2)(d).
27. See B. Witkin, California Evidence § 335 (2d ed. Supp. 1974). For a discussion of qualifying evidence of unchastity for admission as an attack on credibility, see text accompanying notes 45-55 infra.
29. See authorities cited note 28 supra.
a specific fact or element of the crime but rather to attack the credibility of a witness in the hope of discrediting that witness in the eyes of the jury. The amendment to section 1103 incorporates this distinction by prohibiting the admission of substantive sexual conduct evidence to prove consent while permitting the admission of the same evidence for a credibility attack. Thus from the victim's standpoint, the protection which the law gives with one hand it may take away with the other.

Sexual conduct evidence offered to attack credibility may only be admitted pursuant to S.B. 1678's new section 782. This section augments the credibility chapter of the Evidence Code by providing a special procedure for the admission of sexual conduct evidence. Subject to the general rules of credibility evidence, section 782 requires the defendant to deliver to the court and the prosecutor a written offer of proof, supported by affidavit, showing the relevancy of the evidence. If the court finds the offer sufficient, a hearing is held out

33. CAL. EVID. CODE § 1103(2)(a) (West Supp. 1975). The language "to prove consent" in this section is somewhat misleading since the element of the crime which must be proven is lack of consent and the burden of proof is on the prosecution not the defense. People v. Degnen, 70 Cal. App. 567, 591, 234 P. 129, 139 (1925). The defendant need not prove consent any more than he need prove his innocence but rather he must raise a reasonable doubt in the mind of the factfinder on some element of the crime in order to negate his guilt.

34. CAL. EVID. CODE § 782 (West Supp. 1975): "(a) In any prosecution under Section 261, or 264.1 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in any section, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

"(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

"(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

"(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at such hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

"(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to section 780, and is not inadmissible pursuant to Section 352 of this code, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court."

35. Id. §§ 780-91 (West & Supp. 1975).

36. Id. § 780 (West 1966).

37. Id. § 782(a)(1)-(2) (West Supp. 1975). It is difficult to believe that the prosecutor would not inform the complaining witness of adverse evidence contained in the offer of proof. Hence, the prosecutrix will get a preview of the evidence with which the defense intends to confront her. This forced disclosure appears to differ from the general rule of Evidence Code section 769 which does not require that a witness be given
of the presence of the jury, and the complaining witness is questioned. If the evidence is relevant under section 780 and not inadmissible under section 352, an order may issue stating what evidence may be introduced and the nature of the questions to be permitted. The defense may then cross-examine within the limits set by the court. Prior to the enactment of this section, the defense could attack the credibility of the witness without any preliminary offer of proof, although the questioning was always subject to relevancy and section 352 objections.

Defense Strategy

The effectiveness of S.B. 1678 will depend upon the extent to which it prohibits the defense from delving into the victim's sexual history under the mantle of a credibility attack. Although the amendment to section 1103 appears to offer the rape victim protection from such an unwarranted intrusion into her sexual activities, it in fact provides the loophole through which a clever defense counsel can circumvent the general prohibition. In order to introduce evidence of sexual conduct, the defense must merely find an appropriate credibility use for the evidence under the provisions of section 780, which permits the factfinder to consider any matter that has any tendency in reason to

knowledge of evidence of inconsistent conduct prior to being confronted with it. The design of section 769 is to prevent a dishonest witness from being forewarned. Id. § 769, A. Comm. on Judiciary Comment (West 1966). The statute does not indicate what kind of showing is necessary for the offer of proof nor is there any indication of what form the supporting affidavit must take. The acceptable parameters must be shaped by the courts as the cases are decided.

38. Section 782 does not require that the hearing be in camera. Thus, while the jurors may be removed, it is possible that the hearing could take place before spectators in the courtroom.


40. See text accompanying notes 45-55 infra.

41. Cal. Evid. Code § 352 (West 1966). Section 352 grants the trial judge considerable discretion in excluding relevant evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice or confusion. E.g., Garfield v. Russell, 251 Cal. App. 2d 275, 279, 59 Cal. Rptr. 379, 382 (1967).

42. The permissive rather than mandatory language suggests that the court need not formally issue an order to comply with section 782.

43. This screening process will apply to all sexual conduct evidence to attack credibility even if such evidence relates to conduct with the defendant. Such a process creates an anomalous situation since evidence of sexual conduct with the defendant is admissible to prove consent without a screening procedure under the amendment to section 1103 of the Evidence Code. The defense should be able to avoid the screening process of section 782 under these circumstances by offering all the evidence of sexual conduct with the defendant to prove consent rather than to attack credibility.

44. See note 41 supra.

prove or disprove the truthfulness of a witness’s testimony.\textsuperscript{46} There are three lines of attack which the defense might utilize.

First, under section 780(e), character evidence\textsuperscript{47} may be introduced to attack the honesty and veracity of any witness.\textsuperscript{48} One commentator has argued that in sex cases the chastity of the complaining witness has a direct connection with her veracity.\textsuperscript{49} This notion was rejected by the California Supreme Court as early as 1895,\textsuperscript{50} however, on the ground that if unchastity affects the honesty and veracity of a complaining witness in a rape case, it would be equally admissible to attack the honesty or veracity of female witnesses in all cases.\textsuperscript{51}

Second, section 780(f) allows the defense to impeach a witness by proving the existence of bias, interest, or motive to fabricate.\textsuperscript{52} When the impeaching evidence involves some aspect of the witness’s sexual conduct, the courts have admitted it, if relevant, despite the sensitivity of the subject matter and the great potential for prejudice.\textsuperscript{53} Thus, depending upon the factual situation, the defense might be able to offer evidence of the complaining witness’s sexual conduct to show the existence of a bias, interest, or motive to fabricate even though the same evidence would be inadmissible to prove consent under amended section 1103.

Third, under section 780(i), the defense is entitled to impeach credibility by specifically attacking the witness’s direct testimony. Because the complaining witness in a rape case is required, by definition of the offense, to deny consent, the defense will be able to introduce evidence of former consensual sexual activity. The admission of such

\textsuperscript{46} Id.
\textsuperscript{47} See note 20 supra.
\textsuperscript{48} \textsc{Cal. Evid. Code} §§ 780(e), 786 (West 1966). Additionally, only opinion and reputation evidence, and not specific instances of conduct, may be used to attack or support a character trait of honesty or veracity. \textit{Id.} § 787.
\textsuperscript{49} 3A J. Wim\textsc{more}, Evidence § 924a, at 736 (rev. ed. 1970). \textit{But see} B. Wit\textsc{kin}, California Evidence § 1236, at 1141 (2d ed. 1966).
\textsuperscript{50} People v. Johnson, 106 Cal. 289, 39 P. 622 (1895).
\textsuperscript{51} \textit{Id.} at 294, 39 P. at 623. \textit{Contra}, Packineau v. United States, 202 F.2d 681 (8th Cir. 1953).
\textsuperscript{52} For example, suppose a woman's husband is away for a week on a business trip. During the first five days of the week she has been spending her evenings at a cocktail lounge and has gone home with a different man each night. Suppose that her husband came home a day early and she needed an excuse to explain her whereabouts and perhaps her physical appearance. She might fabricate a charge of rape against the last man, who would want to introduce evidence of her sexual conduct earlier in the week. The prosecution could argue that only the fact of the husband's early return is relevant and not the prior sexual conduct. However, such evidence would certainly tend to corroborate the defendant's version of the incident. The court would have to decide the merits of the opposing arguments pursuant to section 352 of the Evidence Code.
evidence is not, however, entirely logical. The prosecutrix is not required, and presumably would not voluntarily choose, to testify to prior sexual activity with persons other than the defendant, hence, it would seem to be beyond the scope of direct examination for the defense to attempt to impeach the prosecutrix's denial of consent in this instance by alleging consent on other occasions with other men. Nonetheless, as an examination of case law will reveal, prior sexual conduct is considered relevant and admissible to contradict the direct testimony of the prosecutrix who denies consent only to the defendant. Thus, the defense will be able to offer evidence of sexual conduct with others, not as substantive evidence to prove consent, which is prohibited by the amendment to section 1103, but rather as credibility evidence to impeach the truthfulness of her testimony on the issue of consent. Such a strategy, available in every rape prosecution, will effectively emasculate the protections offered by S.B. 1678.

Admissibility of Sexual Conduct Evidence to Impeach Denial of Consent

A review of California case law indicates that evidence of sexual conduct, specifically unchastity, has previously been admitted on the issue of consent as both substantive and credibility evidence. The Calif-

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54. Cross-examination is generally limited to matter within the scope of direct examination. CAL. EVID. CODE § 773 (West 1966).

55. It should be noted that this potential loophole results from the unusual language of S.B. 1678. Sexual conduct evidence is prohibited to prove consent rather than on the issue of consent. If the latter language had been used, it could be argued that both substantive and credibility evidence were barred by the section. However, substantive evidence to prove consent does not include credibility evidence on the issue of consent and thus such credibility evidence may be admitted if relevant. Id. §§ 1103(2)(a), (d) (West Supp. 1975).

56. It may be argued that the prior case law was developed under a different set of attitudes toward sexual conduct and is no longer controlling. There were statements in both the summary of the hearings (see note 10 supra) and the Findings and Recommendations (see note 14 supra) that evidence of prior voluntary intercourse is irrelevant to the question of consent in the instant case and that therefore no inference can be drawn on the issue of consent. Also, the legislature's prohibition of certain jury instructions relating to unchastity appears to have been based on the same rationale. See note 19 supra. However, it may be argued that the legislature was merely rejecting the general proposition that a woman who has consented before is therefore more likely to consent again in the future, while at the same time recognizing that certain factual situations may make evidence of prior sexual conduct relevant as to the particular prosecutrix's credibility. If the legislature believed such evidence were always irrelevant, it would never be admitted and hence there would be no reason to ban jury instructions which had become moot.

At any rate, S.B. 1678 does not appear to adopt this irrelevancy argument as a supporting rationale. It establishes a procedure under section 782 whereby the court will determine the relevancy of sexual conduct evidence as it affects credibility, which may also affect the issue of consent.
California Supreme Court in one of its earliest rape evidence cases\(^\text{57}\) held that evidence of unchastity was admissible not so much to impeach the prosecutrix’s testimony directly as to disprove the presumption that she had not consented.\(^\text{68}\) Evidence of unchastity was considered admissible primarily to prove consent and only secondarily to impeach the witness. Subsequent cases, while dealing with the question of admissibility, failed to delineate clearly the purposes for which the evidence was being admitted.\(^\text{59}\) In 1925, the court in \textit{People v. Degnen}\(^\text{60}\) forcefully stated that evidence of unchastity was admitted as a defense to the charge of rape because such evidence tended to prove that the prosecutrix had consented to the act.\(^\text{61}\) However, the court clearly did not ignore the use of such evidence for the collateral purpose of impeachment.\(^\text{62}\) Finally, in 1931, the purpose for which evidence of sexual conduct might be admitted was directly addressed by the California Supreme Court in \textit{People v. Pantages}.\(^\text{63}\) After extensively citing previous rape cases,\(^\text{64}\) the court concluded that such evidence was admissible because “previous acts of unchastity on the part of a woman . . . [tend] to discredit her testimony to the effect that force was used by the defendant . . . .”\(^\text{65}\) The court reasoned further that evidence of unchastity was similarly admissible in a “statutory” rape case where the prosecutrix had testified that the act was committed without her consent.\(^\text{66}\) The evidence in \textit{Pantages} was clearly not being admitted substantively to prove consent, because lack of consent is not an element of statutory rape; rather, it was admitted to impeach the credibility of the prosecutrix.\(^\text{67}\) Thus, under California case law, evidence of unchastity has long been considered relevant and admissible in rape and statutory rape

\(^{57}\) People v. Benson, 6 Cal. 221 (1856).

\(^{58}\) Id. at 223. This case deals primarily with the admissibility of evidence of specific acts of previous sexual intercourse in addition to reputation evidence. Such evidence was ruled admissible contrary to the weight of authority at that time.

\(^{59}\) People v. Shea, 125 Cal. 151, 57 P. 885 (1899); People v. Johnson, 106 Cal. 289, 39 P. 622 (1895).

\(^{60}\) 70 Cal. App. 567, 234 P. 129 (1925).

\(^{61}\) Id. at 590-91, 234 P. at 138.

\(^{62}\) “[T]he next question arising is whether, on the cross-examination . . . the defendant may put questions . . . tending to affect the credibility of [the victim’s] story . . . .” Id. at 591-92, 234 P. at 139.

\(^{63}\) 212 Cal. 237, 297 P. 890 (1931).

\(^{64}\) People v. Wilmot, 139 Cal. 103, 72 P. 838 (1903); People v. Shea, 125 Cal. 151, 57 P. 885 (1899); People v. Johnson, 106 Cal. 289, 39 P. 622 (1895); People v. Benson, 6 Cal. 221 (1856); People v. Biescar, 97 Cal. App. 205, 275 P. 851 (1929); People v. Degnen, 70 Cal. App. 567, 234 P. 129 (1925).

\(^{65}\) People v. Pantages, 212 Cal. 237, 263, 297 P. 890, 901 (1931) (emphasis added).

\(^{66}\) Id. at 264, 297 P. at 901. \textit{Pantages} was, in fact, such a case.

\(^{67}\) Id.
prosecutions to impeach the prosecutrix's direct testimony denying consent. Consequently, the defense has clear precedent for the introduction of evidence of sexual conduct, although several substantial barriers must still be overcome before such evidence can actually be introduced.

Admissibility of Specific Instances of Sexual Conduct

The Evidence Code differentiates between the admissibility of evidence of specific instances to prove conduct and to attack or support credibility. Due to the impact on the jury of credibility evidence of specific instances, its admissibility is subject to much greater restrictions than reputation or opinion evidence. Section 787 declares that specific instances of conduct that are relevant only as tending to prove a trait of character are inadmissible as credibility evidence. Consequently, the defense would be barred from introducing specific instances of sexual conduct solely to prove that the prosecutrix has a promiscuous character and thus is not credible. Nevertheless, this section does not completely bar the admission of specific instances of sexual conduct. If the evidence is relevant to attack credibility for a purpose other than or in addition to tending to prove a trait of character, then such evidence is admissible. For example, if the defense is offering evidence of specific instances of sexual conduct to prove a bias, interest, or motive under section 780(f) or to contradict the prosecutrix's testimony on

68. Although the court in Pantages confined its discussion to the issue of credibility, nothing in the opinion indicates that evidence of unchastity would not also be admissible as substantive evidence to prove consent where consent is an element of the crime. Section 1103, which became law in 1967, has never been specifically analyzed by an appellate court. The official comments to section 1103 refer only to cases supporting substantive use of the evidence. Later cases citing Pantages emphasize either a credibility use of the evidence or speak of disproving the allegation of force, i.e., a substantive use of the evidence. See People v. Brown, 262 Cal. App. 2d 378, 68 Cal. Rptr. 657 (1968); People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (1957); People v. Bumbaugh, 48 Cal. App. 2d 791, 120 P.2d 703 (1941); People v. Burnette, 39 Cal. App. 2d 215, 102 P.2d 799 (1940); People v. Foster, 117 Cal. App. 439, 4 P.2d 173 (1931). The failure of the courts to carefully examine the purposes for which evidence of unchastity was being admitted is quite understandable since prior to S.B. 1678 there was no requirement to distinguish between substantive and credibility use of the evidence.


70. Id. § 787. There is an exception for section 788 (West 1966) which deals with prior felony convictions.

71. Id. Such evidence would also be inadmissible because it involves a character trait other than honesty or veracity. Id. § 786.

72. B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 28.7, at 451 (1972) [hereinafter cited as JEFFERSON].

73. See text accompanying notes 52-53 supra.
the issue of consent under section 780(i)\textsuperscript{74}, such evidence is admissible despite its collateral effect of proving a trait of character.\textsuperscript{75}

Section 352 and the Doctrine of Limited Admissibility

Under new section 782 of the Evidence Code, the defense must not only establish the relevancy of specific acts of sexual conduct to attack credibility but must further demonstrate that such evidence is not inadmissible under section 352.\textsuperscript{76} The balancing test performed by the court under section 352 is complicated by an additional factor whenever the contested evidence is admissible for one purpose but not for another, as would be the case when evidence of sexual conduct is offered to attack credibility.\textsuperscript{77} Under the doctrine of limited admissibility the trial court must weigh the evidence that is admissible for a limited purpose against the policy considerations which supports its exclusion\textsuperscript{78} and determine whether the danger of undue prejudice, resulting from misuse of the evidence by the jury, outweighs the probative value of the relevant evidence.\textsuperscript{79} When the exclusionary rule represents a strong and salutary public policy and the limited admission of evidence creates a danger of circumventing that policy, admission “should be permitted only upon a \textit{persuasive} showing that the evidence sought to be introduced is of \textit{substantial} probative value.”\textsuperscript{80}

Thus, section 352 will become the chief weapon for the prosecutor attempting to rebut the defense’s introduction of sexual conduct evidence to impeach the prosecutrix’s denial of consent. The prosecution has several possible arguments. First, the state can attack the probative value of such evidence, arguing that the existing case law was de-

\textsuperscript{74} See text accompanying notes 54-55 supra.

\textsuperscript{75} \textit{JEFFERSON}, supra note 72, § 28.7, at 451.

\textsuperscript{76} \textit{CAL. EVID. CODE} § 352 (West 1966). It is noteworthy that section 782 is the only section of the Evidence Code which reminds the trial court to exercise its discretion under section 352.

\textsuperscript{77} Evidence of sexual conduct is admissible to attack credibility but is inadmissible to substantively prove consent. See text accompanying note 27 supra. The doctrine of limited admissibility applies when the same evidence is inadmissible pursuant to an exclusionary rule but is admissible when relevancy for another purpose is shown. \textit{JEFFERSON, supra} note 72, § 21.1, at 253.

\textsuperscript{78} \textit{Acosta v. Southern Cal. Rapid Transit Dist.}, 2 Cal. 3d 19, 26-27, 465 P.2d 72, 77, 84 Cal. Rptr. 184, 189 (1970).

\textsuperscript{79} \textit{Id.; JEFFERSON, supra} note 72, § 21.1, at 255.

\textsuperscript{80} \textit{Hrnjak v. Graymar, Inc.}, 4 Cal. 3d 725, 733, 484 P.2d 599, 604, 94 Cal. Rptr. 623, 628 (1971) (emphasis added). The evidence prohibited by the exclusionary rule involved collateral source payments to an injured plaintiff. Judge Jefferson sees the \textit{Hrnjak} court as having established a new test whenever a strong public policy is involved. \textit{JEFFERSON, supra} note 72, § 21.1, at 255-56. However, the principle has yet to be applied to other exclusionary rules by an appellate court. Furthermore, the test in \textit{Hrnjak} was not being applied against a criminal defendant.
veloped under a different set of attitudes and that the legislature has implicitly endorsed the more modern view that prior acts of unchastity simply are not relevant to the question of consent. The legislature, however, clearly left it to the court to decide the relevancy of sexual conduct evidence as it pertains to credibility, and the force of stare decisis will militate against finding such evidence to be irrelevant. Nevertheless, such evidence is certainly open to the attack that it is of very slight probative value.

The prosecution may also maintain that even if the evidence is relevant, it should be excluded under section 352 because admission of the evidence under section 782 would lead to precisely the type of embarrassing questioning which the amendment to section 1103 sought to avoid, thus circumventing a strong and salutary public policy of encouraging more women to report rape. It is questionable whether this test is applicable to a rape prosecution; however, it is clear that "the prosecution as well as the defendant is entitled to the protection of the court from prejudicial evidence." As a corollary to this argument, the prosecution might stress that the traditional safeguard of a jury instruction limiting the admitted evidence to the issue of credibility is inadequate since the public policy is concerned with the embarrassment of the complaining witness rather than with the prejudicial impact of the evidence on the jury. There does not appear to be a sound rebuttal argument on this point.

Defendant's Right to Cross-Examine in Sex Offense Cases

The preceding discussion illustrates the complexity and uncertainty created by the limited admissibility consequences of S.B. 1678. The bill produces a discretionary nightmare under section 352 which leaves the ultimate impact of the legislation dependent upon a judicial interpretation of the nature and strength of the public policy underlying it. Unfortunately, this uncertainty is exacerbated by a formidable body of case law recognizing the defendant's right to an extensive cross-examination in sex offense cases.

81. See note 56 supra.
82. See notes 57-68 & accompanying text supra.
83. See note 81 supra.
85. CAL. EVID. CODE § 355 (West 1966).
86. See also People v. Hamilton, 55 Cal. 2d 881, 896 n.1, 362 P.2d 473, 481 n.1, 13 Cal. Rptr. 649, 657 n.1 (1961), citing Adkins v. Brett, 184 Cal. 252, 258-59, 193 P. 251, 253-54 (1920). In Hamilton the California Supreme Court recognized the inadequacy of limiting instructions to keep the jury from misusing evidence of limited admissibility.
87. See note 93 infra.
The right of cross-examination is guaranteed to criminal defendants in this state by the Sixth Amendment of the United States Constitution and section 686 of the California Penal Code. A full and complete cross-examination is a matter of absolute right and not of privilege. Since the defendant in a rape case may be convicted on the uncorroborated testimony of the complaining witness, and since sex offenses usually are not witnessed by others, the courts have consistently held that the defendant is entitled to the broadest possible cross-examination in order to impeach the prosecutrix. The rules concerning permissible methods of impeachment have been construed liberally and have not been limited by a rigid application of Evidence Code provisions. This policy of granting the widest possible latitude on the issue of credibility has even been held to authorize the trial court's order of a psychiatric examination of the complaining witness, an examination which would subject the alleged victim to a far greater intrusion of privacy and much greater embarrassment than any in-court questioning concerning sexual conduct.

It is apparent then that case law endorses an extremely broad, albeit not limitless, latitude in attacking the credibility of the complain-

91. E.g., People v. Gidney, 10 Cal. 2d 138, 143, 73 P.2d 1186, 1190 (1937); 1 B. WITKIN, CALIFORNIA CRIMES § 284 (1963).
92. E.g., In re Ferguson, 5 Cal. 3d 525, 534, 487 P.2d 1234, 1240, 96 Cal. Rptr. 594, 600 (1971).
95. Ballard v. Superior Ct., 64 Cal. 2d 159, 173, 410 P.2d 838, 847, 49 Cal. Rptr. 302, 311 (1966). It should be noted that this case was concerned with the provisions of the Code of Civil Procedure prior to the codification of a separate Evidence Code.
96. Id. at 176, 410 P.2d at 849, 49 Cal. Rptr. at 313. According to Ballard, however, the defense must present a compelling need for a psychiatric examination order to issue.
97. Nothing in S.B. 1678 affects the discretionary authority of the trial court to order such an examination.
98. "While wide latitude to test the credibility of a witness is desirable, such latitude is not limitless and the trial court must exercise a measure of discretion in that respect." People v. Woodberry, 10 Cal. App. 3d 695, 709, 89 Cal. Rptr. 330, 340 (1970) (citation omitted).
ing witness. Consequently, since S.B. 1678 does not foreclose the admission of evidence of unchastity to impeach credibility the policy of extensive cross-examination in sex offense cases may well prove to be the decisive factor in the court's balancing process under section 352, thus tipping the scales in favor of admissibility.

The Failure of Senate Bill 1678

The preceding analysis exposes the rather puzzling structure of S.B. 1678. Although the legislation appears to be designed to impose the strictest possible bar to the introduction of evidence of sexual conduct without infringing on the defendant's constitutional right to cross-examination, the result is a body of law which serves neither the interests of the complaining witness nor the demands of public policy. As outlined earlier in this discussion, S.B. 1678 will probably not save the rape victim from the often grueling inquiry into the intimacies of her sexual life, since the prosecutrix is subject to impeachment as soon as she testifies that the act was committed without her consent. Although the defense must overcome the barrier erected by the doctrine of limited admissibility the weight of authority strongly supports both the relevancy of the evidence and the defendant's right to an extensive credibility attack.

Thus the bill, in a dubious distinction, makes evidence of sexual conduct inadmissible substantively to prove consent while simultaneously permitting admission of precisely the same evidence to attack the prosecutrix's credibility. Although the Evidence Code contains similar distinctions in permitting a limited admissibility of otherwise inadmissible evidence, the uniqueness of rape prosecutions demands that they be treated specially. The crucial fallacy of S.B. 1678 lies in its distinction between the issues of consent and credibility. Logically it is not possible to treat them differently for admissibility purposes because they are usually inexorably intertwined. The crime of rape contains

99. See notes 54-55 & accompanying text supra.
100. CAL. EVID. CODE § 780(i) (West 1966).
101. See notes 76-86 & accompanying text supra.
102. See text accompanying notes 63-68 supra.
103. See text accompanying note 93 supra.
104. For example, section 1151 of the Evidence Code provides that evidence of subsequent repairs is inadmissible to substantively prove negligence. Public policy encourages repairs and hence the law protects the repairer from the inference of admitted negligence. However, precisely the same evidence is admissible for impeachment purposes. CAL. EVID. CODE § 1151, Law Rev. Comm'n Comment (West 1966).
105. Whereas under section 1151 the party can avoid the admission of evidence of repairs by not placing the impeachable witness on the stand, no such option exists in rape prosecutions. The prosecutrix if available must take the stand, or the defendant will be denied his right of confrontation. Davis v. Alaska, 415 U.S. 308, 315 (1974).
only two major elements: the commission of the act and the lack of consent of the victim to its commission.107 If the defendant admits the former but denies the latter, the entire case will hinge solely, in the absence of corroborating evidence, upon the credibility of the complaining witness.108

Since evidence of sexual conduct is admissible to attack the credibility of the complaining witness on the issue of consent, it is meaningless to maintain that the same evidence is inadmissible substantively to prove consent. The complaining witness will not be saved the embarrassment of exposing her sexual life, and the public policy of encouraging more women to report rape will not be served. As for the effect on the trial, a limiting instruction to the jury109 will, in reality, serve little purpose. If the jury disbelieves the complaining witness’s denial of consent, the defense will have succeeded in raising a reasonable doubt, and it will be of small consequence that the evidence may not also be used to prove that in fact she did consent.

This credibility loophole renders the amendment to section 1103 virtually meaningless except as it supports section 782.110 Since the defense is limited to using such evidence for credibility purposes, and since such evidence may be admitted only after screening pursuant to section 782, the defense will be precluded from attempting to pose groundless questions111 on a very sensitive subject in order “to waft an unwarranted innuendo into the jury box.”112 Although section 782 serves a limited salutary purpose, its ultimate effect is minimal since the evidence of unchastity to attack credibility will nevertheless be admissible.

Conclusions and Recommendations

Since prior California case law has established that evidence of unchastity is relevant to impeach the prosecutrix’s denial of consent,113 S.B. 1678 guarantees its own ineffectiveness by not prohibiting the admissibility of such evidence. Thus, the intended reform fails to deal effectively with the most crucial aspect of the rape evidence laws, namely, the relevancy of prior sexual conduct to attack credibility on the issue of consent. Consequently, a serious problem remains with

110. See note 34 supra.
113. See text accompanying notes 63-68 supra.
which the legislature or the judiciary must deal in order to encourage more women to report and prosecute rape.

The sexual mores of society as a whole have changed vastly in recent years and apparently have advanced far more rapidly than the state judiciary. The only recent judicial reform in the rape evidence law is a 1970 ruling that the trial court may exclude evidence of unchastity where the defendant intends to present an alibi rather than a defense of consent. The exclusion was upheld on the basis of section 352, on the ground that the probative value of the evidence was very slight under the circumstances and therefore was outweighed by the potential prejudicial impact on the jury. The court specifically upheld the traditional admissibility of evidence of unchastity, however, as relevant to the issue of consent.

It does not appear that the courts have disapproved the reasoning of the cases upon which the admissibility of sexual conduct evidence rests. A sampling of such reasoning is instructive, if not startling:

Such evidence would seem to be highly proper, as it must be obvious to all that there would be less probability of resistance upon the part of one already debauched in mind and body, than there would be in the case of a pure and chaste female.

Although the moralistic tone may have faded from more recent cases dealing with the issue, the implicit value judgment that prior voluntary sexual intercourse is relevant to show consent in the case in question has not. The evidentiary relevancy of unchastity was developed by the courts, and a review of the subject in light of current mores is, therefore, within their purview.

In addition to judicial action, the legislature would do well to repeal S.B. 1678 since its attempted reform merely alters the legal labyrinth for introducing evidence without actually protecting the complaining witness. One alternative would be for the legislature to declare that all prior sexual conduct is irrelevant and hence inadmissible on the issue of consent. It has been suggested that "[t]he relationship between a woman's chastity and whether or not she has been raped is simply too attenuated to warrant consideration as relevant evidence."
It would, however, appear unwise to maintain that there could be absolutely no circumstances under which the prior sexual conduct of the prosecutrix with men other than the defendant would be relevant to the issue of consent. Sex offenses are unusual in that the cases often turn on one issue—credibility. In such a situation it is simply the complaining witness's word against the defendant's, and a minimal defense requires that the prosecutrix be accused of falsehood, spite, or delusion. California has long recognized the necessity of allowing conviction on the uncorroborated testimony of the prosecutrix and has balanced this by granting the defendant great latitude in cross-examination. The time has surely come to reject the automatic assumption that unchastity is relevant to the issue of consent, but in the laudable effort to minimize the trauma of trial for victims of rape, the pendulum should not swing so far as to shift basic due process concepts from protection of the accused to protection of the accuser.

Despite these arguments against declaring sexual conduct evidence irrelevant on the issue of consent for both substantive and credibility purposes, a study of the legislative history of S.B. 1678 indicates that the legislature originally intended to enact such a blanket prohibition. In the initial version of S. B. 1678, evidence of specific instances of sexual conduct was made inadmissible for any purpose. Subsequent amendments expanded the scope of the bill additionally to prohibit admission of opinion and reputation evidence of sexual conduct. It was not until the eighth version of the bill that a distinction was made to allow the admission of evidence of sexual conduct to attack credibility.

At least one state has recently passed a prohibitory rape evidence law which makes no distinction between substantive and credibility evidence. Nevertheless, in order to protect its bill from constitutional challenge, the California legislature apparently felt the distinction was

123. E.g., People v. Gidney, 10 Cal. 2d 138, 73 P.2d 1186 (1937). “[N]o corroboration of such testimony was necessary to support . . . conviction . . . .” Id. at 143, 73 P.2d at 1190.
124. See note 93 supra.
125. Opinion and reputation evidence were not affected in the original version dated February 5, 1974.
126. This prohibition was reflected in the bill as amended in the Assembly May 16, 1974.
127. The eighth version, as amended in the Assembly June 10, 1974, was essentially the same bill that became law.
required as a result of the United States Supreme Court's ruling in \textit{Davis v. Alaska}. In \textit{Davis} the Court had to balance the state's desire to protect its witness from the embarrassing disclosure of his sealed juvenile record against the defendant's need to use that record for impeachment purposes. Relying on the confrontation clause of the Sixth Amendment, the Court concluded that the defendant's right to a full cross-examination, including a complete probing of a potential bias, was paramount to the state's interest in sheltering the prosecution witness from a tarnished reputation. The Court reaffirmed an earlier pronouncement that the trial court has no obligation to protect a witness from being discredited on cross-examination unless the questions are propounded merely to harass, to annoy, or to humiliate the witness. Thus, the legislature apparently reasoned that if the public policy which protects witnesses from the exposure of their sealed juvenile records must fall before the right of a defendant to seek the truth on cross-examination, so too would a public policy to protect complaining witnesses from exposure of their private sexual lives.

Although \textit{Davis} caused the legislature to rewrite S.B. 1678, the case does not necessarily present a stumbling block to all restrictions on the admissibility of sexual conduct to attack credibility. The only question before the Court in \textit{Davis} concerned the trial court's authority to protect a witness, and the Court held that the Sixth Amendment will not permit a state policy of protecting a witness to preclude the defendant's right to an effective cross-examination. The case did not in-

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129. Letter from Legislative Counsel of California to Senator Alan Robbins, May 7, 1974 in \textit{Cal. S. Jour.} 9848-49 (May 16, 1974). Although the Legislative Counsel concluded that the May 14, 1974 version of S.B. 1678 was constitutional (\textit{id.} at 9849-51.), this conclusion was subsequently disputed. \textit{Assembly Comm. on Criminal Justice, Cal. Legis. 1973-74 Reg. Sess., Bill Digest of S.B. 1678, at 2} (May 1974).


131. \textit{id.} at 315.

132. \textit{id.} at 319.

133. \textit{id.} at 320. The prosecution might contend that defense questions concerning prior sexual conduct are being asked solely to humiliate the witness, but in view of the historical relevancy of such questioning the argument would appear to be without merit. See text accompanying notes 63-68 supra. The more fundamental query is whether such questions are relevant under the particular circumstances of the case.

134. See note 129 accompanying text \textit{supra}. It is quite possible that the legislature misinterpreted the impact of \textit{Davis}. The Court in \textit{Davis} specifically found that exploration of partiality is always relevant to discredit a witness's testimony. 415 U.S. at 316. Thus, \textit{Davis} stands for the proposition that a witness cannot be protected from a relevant attack on credibility. If the legislature believed that sexual conduct evidence is never relevant on the issue of consent, then \textit{Davis} would not be a barrier to prohibiting credibility evidence on that issue.

135. In \textit{Davis} the Court emphasized that the state could have protected its witness by refraining from using him to make its case. \textit{id.} at 319-20. That option is not available to the state in a rape prosecution and hence a restriction on admissibility of sexual conduct evidence to impeach might be distinguishable. Nevertheless, in view of the
volve, and the opinion did not address, the issue of the trial court's discretion to exclude relevant evidence which would detrimentally affect the jury. The California courts have considerable discretion in this area under section 352 of the Evidence Code, and nothing in the *Davis* opinion indicates that the trial court does not retain this type of discretion. The crucial distinction is that the jury, rather than the witness being cross-examined, is the beneficiary of the court's discretionary authority. Therefore, a policy limiting the admissibility of credibility evidence in order to keep highly prejudicial evidence from the jury would appear to be distinguishable from the *Davis* ruling.

As previously discussed, the relative strengths of prosecution and defense arguments indicate that impeachment evidence of unchastity would probably continue to be admitted under section 352, despite S.B. 1678. In order to tip the scales away from traditional admissibility and yet to stay within the constitutional restraints outlined in *Davis*, the legislature should give the trial judge specific guidelines for the section 352 weighing process whenever evidence of sexual conduct is offered on the issue of consent. Since the substantive issue of consent cannot reasonably be distinguished from the issue of credibility, these guidelines should apply to both substantive and credibility use of sexual conduct evidence. It would also be beneficial to retain a screening procedure similar to section 782 which would be applicable to any offer of evidence of sexual conduct.

The legislation should provide that whenever there is reasonably sufficient corroborating evidence of force and violence to support the prosecutrix's testimony denying consent, the probative value of the unchastity evidence is so diminished as to be inevitably outweighed by its prejudicial impact, hence, the evidence should be inadmissible. Thus, the admissibility of unchastity evidence would be limited to those cases in which the only significant incriminating evidence on the issue of consent is the testimony of the prosecutrix. One study has indicated that 85 percent of all reported rapes involve physical force and consequently, under the proposed guidelines the admission of evidence of prior sexual conduct should become the exception rather than the rule.

comprehensive language used by the Court, it is more likely that it would require the state to find some alternative method of encouraging women to report rape other than restricting the defendant's right to cross-examine.

137. See text accompanying note 98 supra.
138. See note 106 & accompanying text supra.
139. Examples of objective signs of a physical struggle could be bruises, scratches, torn clothing, traces of blood, overheard screams, or merely the general circumstances of the encounter.
140. Rape Laws, supra note 11, at 923.
As outlined above, the proposed guidelines should pass the constitutional criteria of *Davis* despite their indirect effect of protecting the prosecutrix from embarrassing questions. Furthermore, the exclusion of relevant evidence on the basis of the court's discretionary power, such as that provided by section 352, will rarely be reversed on appeal except for a showing of an abuse of discretion.\(^{141}\) Such a showing would seem to be particularly unlikely where the scope of the court's discretion has been set by statutory guidelines. Utilization of the proposed guidelines within the framework of section 352 will strike the needed balance between elimination of embarrassing evidence of questionable probative value and the defendant's right to an effective cross-examination.

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