Psychiatric Examinations of Sexual Assault Victims: A Reevaluation

This comment analyzes the use and merits of court-ordered psychiatric examinations of sexual assault victims and witnesses. It examines the reliability of and need for these examinations in light of the constitutional rights of both the victim-witness and the defendant. The comment particularly focuses on the recent California statute eliminating their use, and suggests that other states enact similar provisions.

INTRODUCTION

Most states now have laws that restrict the use of a victim's sexual history in a rape case.[1] The California legislature has gone even further to protect the rights of sexual assault victims by prohibiting a court-ordered psychiatric or psychological examination[2] of any victim or witness in a sexual assault case.[3]

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[1] These statutes, known as rape victim shield laws, help eliminate the defense strategy of trying the complaining witness instead of the defendant. State v. Williams, 224 Kan. 468, 470, 580 P.2d 1341, 1343 (1978). Forty-six states currently have this type of legislation. Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980). The most permissive statutes allow evidence of sexual history merely on a showing that relevance outweighs prejudicial effect. *See, e.g.*, TEX. PENAL CODE ANN. § 21.13 (Vernon Supp. 1981). The most restrictive statutes prohibit sexual history evidence, except in a few specifically defined situations and then only after a hearing to determine admissibility. *See, e.g.*, GA. CODE ANN. § 38-202.1 (1981). *See also* FED. R. EVID. 412, which similarly restricts the introduction of this type of evidence. The more moderate statutes give trial judges varying degrees of discretion to admit evidence of sexual history, after an admissibility hearing. *See, e.g.*, CAL. EVID. CODE § 782 (West Cum. Supp. 1981); CAL. EVID. CODE § 1103 (West Cum. Supp. 1981). *See also* Tanford & Bocchino, *supra* this note, app., for relevant state statutes.

[2] The terms psychiatric examination, psychological examination, and mental examination are used interchangeably in this comment.

[3] A similar protection, recently enacted by the California legislature prohibits any police officer or prosecutor from requesting or ordering a complaining

California Penal Code section 1112,[4] effective in January 1981, nullified the state's *Ballard* motion, which was a procedural tactic designed to place a victim's mental or emotional condition in issue, and thus attack the victim's credibility.[5] Trial courts had discretion to grant these motions and to appoint a psychiatrist to examine victims.[6] Since the adoption of section 1112, however, trial courts may no longer order these examinations.[7]

In enacting section 1112, California is at the forefront of the move to reassess the validity of court-ordered psychiatric examinations. This comment presents section 1112 as a possible approach for dealing with the outmoded practice of challenging a victim's credibility. Towards this end, Part I considers the historical basis for using mental examinations in sexual assault cases. This includes an analysis of the underlying considerations and practical application of the *Ballard* motion, a procedural device similar to that still used in a number of states.[8] Part II evaluates the validity of these psychiatric examinations, and discusses the power of courts to order their administration. The

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witness in a sex offense case to submit to a polygraph examination as a prerequisite to filing a complaint. CAL. PENAL CODE § 637.4(a) (West Cum. Supp. 1982). This section further provides a civil remedy for a person injured by violation of this provision. *Id.* § 634(b).

[4] "The trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility." CAL. PENAL CODE § 1112 (West Cum. Supp. 1981).

[5] A *Ballard* motion was a request to the court for the appointment of a psychiatrist to examine a victim. The defense would then use the subsequent psychiatric report as "proof" of impaired capacity to perceive and recollect, stemming from a mental or emotional condition. People v. Newton, 107 Cal. App. 3d 568, 571 n.1, 166 Cal. Rptr. 60, 62 n.1 (2d Dist. 1980).

[6] Foster v. Superior Court, 107 Cal. App. 3d 218, 222-23, 165 Cal. Rptr. 701, 704 (1st Dist. 1980) (trial court could grant the defense request if the circumstances of the case indicated it was necessary to do so).

[7] *See* note 4 *supra*.

[8] *See, e.g.*, State v. Morrow, 111 Ariz. 268, 528 P.2d 612 (1964); State v. Manning, 162 Conn. 112, 291 A.2d 750 (1971); McDonald v. State, 307 A.2d 796 (Del. 1973); Denkins v. State, 244 So. 2d 148 (Fla. Dist. Ct. App. 1971); State v. Kahinu, 53 Hawaii 536, 498 P.2d 635 (1972); People v. Glover, 49 Ill. 2d 78, 273 N.E.2d 367 (1971); Borosh v. State, 166 Ind. App. 378, 336 N.E.2d 409 (1975); State v. Whelan, 291 Minn. 83, 189 N.W.2d 170 (1971); State v. Maestas, 190 Neb. 312, 207 N.W.2d 699 (1973); State v. Boisvert, 119 N.H. 174, 400 A.2d 48 (1979); State v. Schweitzer, 84 S.D. 384, 171 N.W.2d 737 (1969); Forbes v. State, 559 S.W.2d 318 (Tenn. 1977).

focus then turns to the implicated constitutional issues: confrontation, privacy, and equal protection. Finally, the comment analyzes the evidentiary value of this type of examination. The comment concludes that abolishing the *Ballard* motion was a necessary decision, one that maintains the dignity of sexual assault victims without violating defendants' constitutional rights. We hope that other states will enact similar legislation.

I. Historical Analysis of Psychiatric Examinations in Sexual Assault Cases in California

A. Background

Courts have traditionally been skeptical of sexual assault allegations.[9] Most often, they have directed this skepticism at female accusers,[10] and justified the distrust as necessary to protect innocent men against false accusations by malicious women.[11] In 1630, Lord Chief Justice Matthew Hale stated that rape is "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[12] It was only a matter of time before this view was used to justify mental examinations of sexual assault victims.[13]

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[9] Kelly v. United States, 194 F.2d 150, 153 (D.C. Cir. 1952) (conviction reversed; testimony asserting sodomy must be subjected to most careful scrutiny). *See, e.g.*, Wilson v. United States, 271 F.2d 492, 493 (D.C. Cir. 1959).

[10] United States v. Dildy, 39 F.R.D. 340, 342 (D.C. Cir. 1966) (court lacked power to order mental examination of prosecutrix, notwithstanding courts' skepticism of accusations by female complainants in sex cases).

[11] Tanford & Bocchino, *supra* note 1, at 546.

[12] M. Hale, History of the Pleas of the Crown 634 (1st Am. ed. 1847).

[13] Two centuries later, Hale's remarks were indirectly introduced into California law in People v. Benson, 6 Cal. 221, 223 (1856). Referring to rape, the court stated: "There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance." *Id.* at 223. This language, in turn, became the basis of the mandatory California jury instruction in rape cases that stated:

> A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the accused is innocent. Therefore the law requires that you examine the testimony of the female person named in the information with caution.

California Jury Instructions, Criminal No. 10.22 (3d ed. 1970). Originally, this instruction was required only in cases involving forcible rape, People v. Benson, 6 Cal. 221 (1856), and upon a defendant's request, People v. Rangod, 112 Cal. 669, 672, 44 P. 1071, 1072 (1896). Later, however, the instruction was

The most influential proponent of these examinations was Professor Wigmore. In a frequently quoted passage, he stated that no judge should ever let a sex charge go to the jury unless the female complainant's social history and mental make-up had been examined by and testified to by a qualified physician.[14]

This reasoning, and the warnings of the psychiatric profession,[15] persuaded the American Bar Association to adopt a recommendation requiring that the prosecutrix in all sex cases undergo a psychiatric examination before trial.[16] In addition, it recommended that the results be presented in evidence.[17] Although no state has adopted a mandatory examination rule,[18] most states have upheld their trial courts' discretion to order the examinations.[19]

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held mandatory in all sex offense cases. People v. Merriam, 66 Cal. 2d 390, 395, 426 P.2d 161, 164, 58 Cal. Rptr. 1, 4 (1967).

In 1975, the California Supreme Court disapproved further use of this type of cautionary instruction. In People v. Rincon-Pineda, 14 Cal. 3d 864, 538 P.2d 274, 123 Cal. Rptr. 119 (1975), the court evaluated Hale's view in its proper context. It noted that seventeenth-century English law lacked the fundamental protections we know today — the concept of innocent until proven guilty, the right to present witnesses, and the right to counsel. The court found the instruction to have outworn its usefulness, and held that in modern circumstances it was no longer mandatory. *Id.* at 877, 538 P.2d at 256, 123 Cal. Rptr. at 178. In light of the court's determination, Hale's view would seem equally untenable as a justification for psychiatric examinations of sexual assault victims.

[14] 3A J. WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1970) [hereinafter cited as WIGMORE]. This proposition was examined by the California Supreme Court in Ballard v. Superior Court, 64 Cal. 2d 159, 171-77, 410 P.2d 838, 846-50, 49 Cal. Rptr. 302, 310-14 (1966).

[15] "The warnings of the psychiatric profession, supported as they are by thousands of observed cases, should be heeded by our profession." *Report of the Committee on Improvements in the Law of Evidence*, 63 REPORTS OF THE AMERICAN BAR ASSOCIATION 570, 588 (1938).

[16] Today it is *unanimously* held (and we say "unanimously" advisedly) by experienced psychiatrists that the complainant woman in a sex offense should *always* be examined by competent experts to ascertain whether she suffers from some mental or moral delusions or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases. . . .

Id. (emphasis in original).

[17] *Id.*

[18] Note, *Criminal Law*—State v. Looney: *Defendants' Need for Court-Ordered Psychiatric Evaluations of Witnesses' Credibility Outweighed by Witnesses' Right to Privacy*, 57 N.C.L. REV. 448, 453 (1979).

[19] *Id.* A number of commentators have suggested that psychiatric examina-

B. The Ballard *Decision*

The California Supreme Court established its position on the issue in 1966, in *Ballard v. Superior Court,*[20] in which it held that trial courts had discretion over defense requests that sexual assault victims submit to psychiatric examinations.[21] In so holding, the court confronted two problems: the propriety of the examinations themselves, and the use of psychiatric testimony to try to impeach witnesses.[22]

In resolving the first issue, the *Ballard* court was influenced by California law that allows conviction for sex crimes upon uncorroborated testimony of a prosecutrix.[23] The court, in keeping with historical prejudice, feared that innocent men would be convicted[24] solely on the testimony of women suffering from

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tions are appropriate. *See, e.g.,* Note, *Criminal Law—Psychiatric Examination of Prosecutrix in Rape Case,* 45 N.C.L. REV. 234, 240 (1966); Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach,* 48 CALIF. L. REV. 648, 676 (1960); Comment, *Pre-Trial Psychiatric Examination as Proposed Means for Testing the Complainant's Competency to Allege A Sex Offense,* 1957 U. ILL. L. F. 651, 654 [hereinafter cited as *Pre-Trial Exam*].

[20] 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966).

[21] *Id.* at 176-77, 410 P.2d at 849, 49 Cal. Rptr. at 313.

[22] *Id.* at 171, 410 P.2d at 846, 49 Cal. Rptr. at 310.

[23] *Id.* California follows the common law rule that a defendant may be convicted of rape solely upon the uncorroborated testimony of the prosecutrix. People v. Caudillo, 21 Cal. 2d 563, 576, 580 P.2d 274, 278, 146 Cal. Rptr. 859, 863 (1978) (testimony of sexual assault victim provided substantial evidence to support conviction); People v. Scott, 21 Cal. 3d 284, 296, 578 P.2d 123, 129, 145 Cal. Rptr. 876, 882 (1978) (rule that uncorroborated testimony of single witness is sufficient to sustain a conviction is applicable to sex cases); People v. Brown, 100 Cal. App. 2d 207, 209, 223 P.2d 60, 61 (2d Dist. 1950) (in rape prosecution, prosecutrix' testimony need not be corroborated).

[24] The *Ballard* court was concerned that a jury's sympathy for a sexual assault victim might result in the unwarranted conviction of an unattractive defendant. Ballard v. Superior Court, 64 Cal. 2d 159, 172, 410 P.2d 838, 846, 49 Cal. Rptr. 302, 310 (1966). Statistics indicate that this concern is unfounded. In an extensive study of the American jury system, researchers found that juries often acquit or find a defendant guilty of a lesser charge, even in cases where the situation is clearly aggravated. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 249-54 (1966). California crime statistics are consistent with the Zeisel study: In California, forcible rape has consistently had a low rate of conviction. CAL. DEPARTMENT OF JUSTICE, CRIME AND DELINQUENCY IN CAL., 1972, Adult Prosecution Reference Tables (1973). The California Supreme Court has noted that the "low rate of conviction of those accused of rape and other sexual offenses does not appear to be attributable to a high incidence of unwarranted accusations." People v. Rincon-Pineda, 14 Cal. 3d 864, 880, 538 P.2d

mental conditions that transformed "wishful biological urges into fantasy."[25] The court rejected both an absolute prohibition and an absolute requirement of psychiatric examination, instead placing the matter in the trial judge's discretion.[26] The court concluded that the examinations generally would be necessary only if little or no corroboration supported the assault charge, and if the defense raised the issue of the effect of the complaining witness' mental or emotional condition on her veracity.[27]

In considering the second problem, the evidentiary treatment of these examinations, the *Ballard* court acknowledged the flexible application of impeachment rules in sex violation cases.[28] The court stated that in cases not involving sex violations, courts have rejected psychiatric testimony regarding the mental or emotional condition of a witness when it was offered for impeachment purposes.[29] Here, however, the *Ballard* court gave

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247, 258, 123 Cal. Rptr. 119, 130 (1975).

[25] Ballard v. Superior Court, 64 Cal. 2d 159, 172, 410 P.2d 838, 846, 49 Cal. Rptr. 302, 310 (1966). The court stated:

> Some prominant psychiatrists have explained that a woman or girl may falsely accuse a person of a sex crime as a result of a mental condition that transforms into fantasy a wishful biological urge. Such a charge may likewise flow from an aggressive tendency directed to the person accused or from a childish desire for notoriety.

Id. (See authorities collected in 3 J. WIGMORE, EVIDENCE §§ 924a, 934a, 963 (1940); Juvilier, *supra* note 19, at 674; Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness,* 59 YALE L.J. 1324, 1338 (1950)).

Professor Wigmore warned of a dangerous form of mental abnormality occasionally found in female complainants in sex offense cases. WIGMORE, *supra* note 14, at § 924a. This condition, known as *pseudologia phantastica* is the "tendency to tell extravagant and fantastic falsehoods centered about one's self." DORLUND'S ILLUSTRATED MEDICAL DICTIONARY (24th ed. 1965). This condition was often considered the basis of alleged sexual assaults wherein "[g]irls assert that they have been raped, sometimes recounting as true a story they have heard, falsely naming individuals or describing them." 1 GRAY'S ATTORNEYS' TEXTBOOK OF MEDICINE 940 (3d ed. 1950). But the principles of psychiatry have changed, and this is no longer a valid diagnostic category. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUEL OF MENTAL DISORDERS (3d ed., 1980) (condition not recognized).

[26] Ballard v. Superior Court, 64 Cal. 2d 159, 177, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966).

[27] *Id.*

[28] *Id.* at 173, 410 P.2d at 847, 49 Cal. Rptr. at 313. *See also* People v. Johnson, 38 Cal. App. 3d 1, 7, 112 Cal. Rptr. 834, 837 (3d Dist. 1974).

[29] Ballard v. Superior Court, 64 Cal. 2d 159, 173, 410 P.2d 838, 847, 49 Cal.

trial courts the discretion to determine whether the psychiatric testimony should be admitted to impeach.[30]

The *Ballard* court recognized that a complaining witness neither could nor should be forced to submit to psychiatric examination, nor even to cooperate with a psychiatrist.[31] However, refusal brought a sanction: if a witness refused to cooperate, the court could permit a comment to the jury on this refusal.[32] A subsequent appellate court decision clarified the limitations on trial courts' power to punish an unwilling witness.[33] Although a trial court could order a victim to submit to an examination or face sanctions,[34] it could not invoke its contempt power to compel cooperation.[35]

1. Practical Application of the *Ballard* Motion

An inherent weakness of the *Ballard* decision was its language to the effect that a mental examination was necessary "only if little or no corroboration supported the sex charge."[36] The court did not address the degree of corroboration sufficient to override a defendant's request for an examination,[37] and the lack of a

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Rptr. 302, 311 (1966). Two years later, the same court detailed the criteria to be considered in permitting impeachment by psychiatric testimony. People v. Russel, 69 Cal. 2d 187, 443 P.2d 794, 70 Cal. Rptr. 210 (1968). The court suggested that trial judges should consider the relevance of this evidence on the credibility issue, the probability of its effective communication to the jury, the likelihood that the examination provided a basis for a reliable opinion, and the tendency of the evidence to decide rather than to inform. The court further suggested that judicial discretion to admit or to exclude such evidence should be exercised liberally in the defendant's favor. *Id.* at 198, 443 P.2d at 802, 70 Cal. Rptr. at 218.

[30] Ballard v. Superior Court, 64 Cal. 2d 159, 174-75, 410 P.2d 838, 847-48, 49 Cal. Rptr. 302, 311-12 (1966).

[31] *Id.* at 177, 410 P.2d at 849, 49 Cal. Rptr at 313.

[32] *Id.*

[33] People v. Mills, 87 Cal. App. 3d 302, 151 Cal. Rptr. 71 (1st Dist. 1978) (reversing trial court's dismissal of rape charges based on victim's refusal to submit to court-ordered psychiatric examination).

[34] *Id.* at 307-08, 151 Cal. Rptr. at 74. Appropriate sanctions included comment to the jury on the witness' refusal to cooperate, and perhaps even exclusion of her testimony. *Id.*

[35] *Id.* at 308, 151 Cal. Rptr. at 74.

[36] Ballard v. Superior Court, 64 Cal. 2d 159, 177, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966).

[37] Among the evidence that has been accepted in California to corroborate a sexual assault claim are: communication of assault to mother, who was the first

clear standard for the exercise of discretion[38] gave trial courts great latitude in ruling on *Ballard* motions.[39] This no doubt contributed to the lack of uniform rulings in California.[40]

Inconsistent use was a major problem with the *Ballard* motion. While there has been no complete analysis of the use of the *Ballard* motion, a three month study compiled by the Judicial

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person victim saw, People v. Benc, 130 Cal. 159, 62 P. 404 (1900); defendant seen coming from victim's room at 5 a.m., People v. Rangod, 112 Cal. 669, 44 P. 1071 (1896); officer saw defendant running along street with blood on cheek, and defendant was evasive and gave officer a false name, People v. Ozene, 27 Cal. App. 3d 905, 104 Cal. Rptr. 170 (1st Dist. 1972); testimony of victim that she was pregnant and had not had intercourse with any man other than defendant, People v. Schober, 204 Cal. App. 2d 459, 22 Cal. Rptr. 318 (2d Dist. 1962); evidence that victim reported incident immediately and testified regarding scratches on defendant's face, People v. Holguin, 48 Cal. App. 2d 551, 120 P.2d 71 (2d Dist. 1941).

[38] "[D]iscretion . . . means different things to different people and the problems were so apparent that there was a 20-point checklist of things that a judge should consider." *Hearing on Proposed Rape Legislation for 1979*, Cal. Senate Comm. on Judiciary, Subcomm. on Violent Crime 9, Feb. 19, 1979 (testimony of Armand Arabian, Los Angeles Superior Court Judge) [hereinafter cited as *Hearing*] (copy on file at U.C. Davis Law Review office). B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 28.5 (1972) set forth guidelines for exercise of a trial court's discretion in ordering psychiatric examinations. It suggested that in order to justify an examination there should be some facts in the record, such as unexplained inconsistencies in the witness' testimony or some evidence of mental or emotional disturbance. It stated that a judge's concerns should be: that the examination was probably needed, that it would be conducted under impartial and objective conditions, and that it would probably lead to helpful testimony on credibility. *Id.* However, the vague language of these guidelines provided little more direction than the *Ballard* opinion. Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966).

[39] Trial courts could apply widely differing standards since their rulings would not be reversed absent an abuse of discretion. *See, e.g.*, People v. Mills, 87 Cal. App. 3d 302, 308-09, 151 Cal. Rptr. 71, 74-75 (1st Dist. 1978) (trial court abused discretion by dismissing charges against defendant after witness refused to undergo court-ordered examination).

[40] For example, in People v. Lang, 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974), where the defendant was accused of molesting nine-year-old twins, the appellate court suggested that the failure of the defense attorney to request a psychiatric examination constituted inadequate representation at trial. *Id.* at 140 n.3, 520 P.2d at 397 n.3, 113 Cal. Rptr. at 13 n.3. In contrast, in a more recent child molestation case, the appellate court rejected the notion that the failure to make the *Ballard* motion denied the defendant the right to effective counsel. The court concluded that a psychiatric examination would have been nonproductive and time consuming. People v. Belasco, 125 Cal. App. 3d 974, 982, 178 Cal. Rptr. 461, 465 (2d Dist. 1981).

Council of California,[41] indicates the uneven application of the examination orders throughout the state.[42] Not only did such uneven use raise issues of general fairness[43] and questions regarding the motives behind such use,[44] but also indicated that, at least as it was applied, the *Ballard* motion was overinclusive,[45] and used in cases where the witness' credibility was not genuinely at issue.[46] These sorts of disparities argue persuasively

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[41] The study was made by the Council in consultation with the California Assembly Office of Research, at the request of the Speaker of the State Assembly. The data covered the final calendar quarter of 1978. The case files of the 16 largest superior courts in California were reviewed, reflecting approximately 85% of all superior court criminal filings in the state. Judicial Council of California, The Use of *Ballard* Motions to Compel Psychiatric Examination of Witnesses in the California Courts (Jan. 10, 1979) [hereinafter cited as Use of *Ballard* Motions] (copy on file at U.C. Davis Law Review office).

[42] *Id.* For example, in Alameda County, *Ballard* motions were granted in 50% of the cases in which the defense made the motion. *Id.* By comparison, in Orange County, in which the same number of motions were made, only 13% were granted. *Id.*

Moreover, experts in the field have indicated that the figures from the Judicial Council study may be substantially underrepresentative. Telephone interview with Jackie Connor, Head Deputy, Sexual Crimes Program, Los Angeles County District Attorney's Office (Mar. 25, 1982); telephone interview with T. Worthington Vogel, Chief Deputy, Sexual Assault Team, Fresno County District Attorney's Office (Mar. 16, 1982). For example, in Fresno County, the Judicial Council study covering the final quarter of 1978 reported that a *Ballard* motion was made in 9% of the sexual assault cases, and granted in none. Use of *Ballard* Motions, *supra* note 41. However, a study done by the Fresno County District Attorney's Office, which covered the entire year of 1979, showed that *Ballard* motions were made in 50% of all sexual assault cases, and granted 54.5% of the time. Fresno County District Attorney's Sexual Assault Team, *Ballard* Motions in Fresno County in 1979 (Spring, 1980) [hereinafter cited as Fresno Study] (copy on file at U.C. Davis Law Review office).

[43] Arguably, it is unfair to vary treatment of rights because of chance geographic location. That such fluctuation actually existed is evident from all available statistics. *See* note 42 *supra.*

[44] It has been suggested that the examinations were used to harass sexual assault victims. For example, the *Ballard* motion has been characterized as "akin to the use of a thumb screw." *Hearing on Rape Reform Legislation,* Cal. Senate Comm. on Judiciary, Subcomm. on Violent Crime 51, Feb. 18, 1980 (testimony of Douglas McKee, Los Angeles County District Attorney's Office) (copy on file at U.C. Davis Law Review office).

[45] *See* notes 85-87 & 96-97 *infra.*

[46] For example, cases reported in the Fresno County study presented facts which, by their nature, supported the victim's veracity. In several, there was independent corroboration by police. In one case, the victim called the police to report an intruder. When the police officers arrived, there was evidence of a

against the use of a *Ballard*-type motion where standards of application are unclear[47] and the possibility of abuse exists.

II. Validity of Motion to Compel Psychiatric Examination

A. Courts' Power to Order Psychiatric Examinations

The *Ballard* decision rested on the court's presumption of inherent power to conduct those inquiries necessary to ensure justice.[48] This doctrine of inherent judicial power has been used as the basis of trial courts' authority to order examinations in civil cases.[49] However, an extension of this doctrine to persons involved in criminal cases is unwarranted. Psychiatric examinations in criminal cases are not analogous to physical or mental examinations in civil cases.

The Federal Rules of Civil Procedure[50] and similar state statutes[51] authorize trial courts to order a physical or mental examination of a party[52] whose condition is in controversy.[53] However,

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break-in, and the defendant was in bed on top of the victim with a handgun next to him. In another case, the defendant took an eight-year-old boy into a school restroom. The boy reported this to the police, who followed the victim the next day. When the officers entered the restroom, the defendant was on his knees in the bathroom stall with the victim, unzipping the boy's pants. The defendant admitted to the officer that he "liked little boys." The defense motion for a psychiatric examination of the victim was granted in both cases. Fresno Study, *supra* note 42, at 4.

[47] *See* notes 36-40 and accompanying text *supra*.

[48] Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966). This doctrine of "inherent" or "implied" judicial powers has also been invoked to support a trial judge's power to summon witnesses, and to require bail to secure a witness' appearance in a criminal case. Juviler, *supra* note 19, at 664-65. *See generally* Annot., 18 A.L.R. 3d 1433 (1968 & Supp. 1980) for a collection of cases discussing whether and under what circumstances courts may order a psychiatric examination of a complaining witness in a sexual assault prosecution.

[49] Juviler, *supra* note 19, at 664. The basis of these orders now is primarily statutory. *Id.*

[50] Fed. R. Civ. P. 35.

[51] *See* Draper, *Medical Examinations of Adversary Parties*, 25 Rocky Mtn. L. Rev. 163, 164 nn.5-7 (1953) (extensive citations of relevant state statutes). *See, e.g.*, Cal. Civ. Proc. Code § 2032 (West Cum. Supp. 1982).

[52] In 1970, Fed. R. Civ. P. 35 was extended to provide for an order against the party for examination of a person in his custody or under his legal control. Thus, a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination. Fed. R. Civ. P. 35 notes of Advisory Committee on Rules. *See also* Cal. Civ. Proc. Code § 2032 (West Cum.

the victim in a criminal case is not a "party" to the action, but speaks for the state.[54] Moreover, credibility is a collateral issue[55] and, therefore, the victim's mental condition is not directly "in controversy."[56] Thus, the justification based on inherent power, which is used for ordering examinations in civil cases, is inapplicable to criminal cases.

A number of jurisdictions have rejected the inherent power argument and held that, without an authorizing statute, courts have no power to compel the prosecutrix in a sex case to submit to a psychiatric examination.[57] These decisions are premised on the belief that to allow these examinations is a fundamental change in policy, the power to effect which should vest in the courts only by statute.[58] The absence of any provision in the

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Supp. 1981) (court may order a party, or an agent or a person in custody or legal control of a party, to submit to examination).

[53] FED. R. CIV. P. 35.

[54] United States v. Dildy, 39 F.R.D. 340, 342 (D.C. Cir. 1966).

[55] Courts have declined to permit expert opinion testimony regarding witness credibility in criminal cases on the ground that it addresses a collateral matter and tends to obscure the real issues. People v. Williams, 6 N.Y.2d 18, 26, 159 N.E.2d 549, 555 (1959). *See also* State v. King, 88 Minn. 175, 92 N.W. 965 (1903) (opinion testimony regarding credibility excluded; jury can determine credibility by direct observation of witness); Abbott v. State, 113 Neb. 517, 204 N.W. 74 (1925) (exclusion of psychological opinion regarding witness' credibility is within court's discretion).

[56] FED. R. CIV. P. 35. "[Rule 35] probably does not include psychiatric examination as to credibility, especially of an ordinary witness, as credibility is not a matter directly 'in controversy'." Slovenko, *Witnesses, Psychiatry and the Credibility of Testimony,* 19 U. FLA. L. REV. 1, 21-22 (1966). *But see* Juviler, *supra* note 19, stating that it reasonably can be argued that credibility is in issue when a trial's outcome depends upon a party's credibility and there is substantial indication of a mental condition affecting credibility. *Id.* at 666. However, even this theory would not support the use of psychiatric examinations of victims in criminal cases, since victims are not parties to the proceedings. *See* text accompanying note 54 *supra.*

[57] United States v. Dildy, 39 F.R.D. 340, 342 (D.C. Cir. 1966) (court lacked power to compel prosecutrix to undergo mental examination absent statutory power); State v. Walgraeve, 243 Or. 328, 329, 412 P.2d 23, 24 (1966) (any such fundamental change should come from the legislature). *See, e.g.,* Allen v. State, 152 Ind. App. 284, 286, 283 N.E.2d 557, 558 (1972) (rule requiring prosecutrix in sex case to undergo examination to determine credibility or competency requires legislative mandate).

[58] *See, e.g.,* cases cited in note 57 *supra.* Indeed, in a prescient opinion, the appellate court in *Ballard* stated that "such a fundamental change in policy should come from the Legislature which has the investigative machinery to fully evaluate the proposal, specify its limits and its mode of operation." Bal-

Federal Rules of Criminal Proceedure or in state criminal codes authorizing courts to order the examinations[59] strongly indicates legislative refusal to condone these examinations.[60] Additionally, it can be argued that the courts' power should be based on more than mere implication. The nature of the examination and the involvement of constitutional rights give added importance to this evaluation of the courts' power to order psychiatric examinations of sexual assault victims.

B. Constitutional Issues Raised by Court-Ordered Psychiatric Examination

1. Defendants' Constitutional Rights

The right of a criminal defendant to confront opposing witnesses is secured by the United States Constitution.[61] However, this right cannot be extended to justify allowing a defendant to "confront" a prosecutrix by forcing her to undergo a mental examination. Moreover, the purposes of confrontation identified by the United States Supreme Court[62] are not served by ordering psychiatric examinations.

The first purpose served by the confrontation requirement is ensuring reliablity by means of an oath.[63] Traditionally, testimony given under oath has been considered more trustworthy because of the solemnity impressed upon the witness by the swearing-in ceremony and the danger of criminal punishment

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lard v. Superior Court, 44 Cal. Rptr. 291, 294 (4th Dist. 1965), *vacated*, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966).

[59] *See, e.g.*, United States v. Dildy, 39 F.R.D. 340, 342 (D.C. Cir. 1966). "The subpoena powers of the Federal Rules of Criminal Procedure fall significantly short of affording a defendant the right to mental examination of an important witness." *Id.*

[60] *See id.*

[61] "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . ." U.S. CONST. amend VI. This right of confrontation is secured in state as well as federal proceedings. Pointer v. Texas, 380 U.S. 400 (1965). In addition, the right is explicitly guaranteed by a number of state constitutions. *See, e.g.*, CAL. CONST. art. 1, § 15; FLA. CONST. art. 1, § 16; GA. CONST. art. 1, § 1, ¶ 11; N.J. CONST. art. 1, ¶ 10; TEX. CONST. art. 1, § 10.

[62] California v. Green, 399 U.S. 149, 158 (1970), *discussed on remand in* People v. Green, 3 Cal. 3d 981, 986, 479 P.2d 998, 1003, 92 Cal. Rptr. 494, 499 (1971).

[63] California v. Green, 399 U.S. 149, 158 (1970).

for perjury.[64] This purpose is not served by the use of psychiatric examinations since the victim-witness is not under oath when examined. Furthermore, the objective of ensuring reliability is defeated by using results of a mental examination conducted outside the judicial proceeding rather than relying on the victim's in-court testimony. Assuming, arguendo, that her veracity was questioned, a victim might be less reluctant to lie to a psychiatrist than to risk lying in a court of law.

The second purpose of the confrontation right is to permit the trier of fact to observe the witness' demeanor,[65] which it uses to evaluate the witness' credibility.[66] This purpose is not furthered by allowing mental examinations since only the examining psychiatrist, and not the trier of fact, is present to scrutinize the witness during the examination. In addition, since only the psychiatrist is on the witness stand reporting the examination results to the jury, the jury views the psychiatrist's demeanor rather than that of the witness. This may greatly influence the jury's view of the witness. Even when the witness testifies on other issues, the witness' demeanor has been lost on those subjects that only the psychiatrist observed, and testified about. Furthermore, a jury's evaluation of a prosecutrix' actual demeanor may be distorted by the jurors' perceptions of a psychiatrist. Rather than accepting a psychiatric opinion of a witness' demeanor, a jury can better judge the witness' demeanor for itself by direct observation in court.

The third and most essential purpose of confrontation[67] is to expose the witness to cross-examination.[68] Criminal defendants must be given the opportunity to cross-examine, and thus expose possible bias of any witness testifying against them.[69] Any

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[64] C. McCormick, Handbook of the Law of Evidence § 245, at 582 (2d ed. 1972).

[65] California v. Green, 399 U.S. 149, 158 (1970).

[66] C. McCormick, *supra* note 64, at § 245, at 582. *See* notes 99-111 and accompanying text *infra*, discussing a jury's role in evaluating demeanor and credibility.

[67] 5 J. Wigmore, Evidence § 1395, at 123 (3d ed. 1940), *quoted in* Davis v. Alaska, 415 U.S. 308, 315-16 (1974).

[68] California v. Green, 399 U.S. 149, 158 (1970).

[69] Davis v. Alaska, 415 U.S. 308, 315-18 (1974). In *Davis*, the defense sought to impeach the prosecution's main witness by cross-examination to reveal a possible bias. The Court stated that "the state's desire that [the witness] fulfill his public duty to testify free from embarassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the

bias that is exposed by the process can then be used to impeach the witness' credibility.[70]

The right to cross-examine adverse witnesses does not require that they submit to psychiatric evaluation. Psychiatric examination is clearly distinguishable from cross-examination. For example, though both may be used to protect a defendant, the difference between them may be seen in the protection each affords the individual being examined. Courts have a duty to protect a witness from cross-examination used merely to harass, annoy, or humiliate.[71] There are, however, no similar guidelines to protect a witness during a mental examination.[72] Therefore, there is no assurance that a mental examination will stay within the permissible bounds of witness examination.

The opportunity to cross-examine satisfies the constitutional right to confront adverse witnesses,[73] and frequently may reveal witnesses' mental disorders.[74] To disallow the use of mental examinations as impeachment evidence does not diminish a defen-

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process of defending himself." *Id.* at 320. Although this language has been used to support the use of psychiatric examinations of witnesses, such reliance is misplaced: *Davis* is a narrow holding speaking only to the use of cross-examination. *See also* Greene v. McElroy, 360 U.S. 474 (1959). Exposing a witness' motive for testifying is a proper and important function of the right of cross-examination. *Id.* at 496.

[70] C. McCORMICK, *supra* note 64, at § 40, at 78. "Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility." *Id.*

[71] Davis v. Alaska, 415 U.S. 308, 320 (1973); Alford v. United States, 282 U.S. 687, 694 (1931). Similarly, California law requires courts to exercise reasonable control over the mode of interrogation to protect witnesses from undue harassment or embarassment. CAL. EVID. CODE § 765 (West 1966).

[72] This lack of protection was recognized in State v. Looney, 294 N.C. 1, 240 S.E.2d 612 (1978), in which the court raised some unresolved questions regarding the lack of protections afforded a witness by those courts which allow mental examinations: Is the witness entitled to counsel at such an examination? Must counsel be afforded an indigent witness? What, if any, limitations are imposed upon the psychiatrist's questioning of the witness? If the defendant obtains an order for an examination, may the prosecution insist upon an examination by its expert? Where there are multiple defendants, is each entitled to an examination of the alleged victim by his own psychiatrist? *Id.* at 27, 240 S.E.2d at 626-27.

[73] *See* notes 67-70 and accompanying text *supra*.

[74] Cross-examination is permitted to expose a witness' sexual fantasy, People v. Blagg, 267 Cal. App. 2d 598, 73 Cal. Rptr. 93 (2d Dist. 1968); "sexual psychopathy," *id.;* and general paresis, People v. LaRue, 62 Cal. App. 276, 216 P. 627 (3d Dist. 1923).

dant's right to cross-examine or confront the witnesses against him.

2. Victims' Constitutional Rights

Using mental examinations as a means of attacking credibility infringes upon a victim's constitutional rights of privacy[75] and equal protection.[76] Submitting to an intrusive examination that probes personal thoughts and feelings is a profound invasion of personal privacy. This is exacerbated by having the results of the examination become part of the public record.[77] The substantial privacy interest in keeping confidential revelations made

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[75] The United States Supreme Court first explicitly recognized the right to privacy as a fundamental constitutional right in Griswold v. Connecticut, 381 U.S. 479 (1965) (use of birth control protected by marital right of privacy). Justice Douglas, writing for the majority, found the right to privacy emanated from the penumbras of the first, third, fourth, and fifth amendments to the Constitution. *Id.* at 481-86. Three other justices found the right preserved in the ninth amendment to the Constitution. *Id.* at 486-99. Although the right to privacy first gained acceptance by a majority of the Court in *Griswold*, the concept was not new. Justice Harlan had discussed it in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 550 (1961) (Harlan, J., dissenting), referring to an even earlier dissenting opinion by Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis found a "right to be let alone" in the protections of the fourth and fifth amendments, describing it as the "most comprehensive of rights and the right most valued by civilized men." *Id. See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 625-27 (1978) [hereinafter cited as NOWAK]; Comment, *Right of Privacy Challenges to Prostitution Statutes*, 58 WASH. U.L.Q. 439, 449-56 (1980) (discussing the development of the constitutional right to privacy). Several state constitutions explicitly provide a right of privacy. *See, e.g.*, ALA. CONST. art. 1, § 22; CAL. CONST. art. 1, § 1; HAWAII CONST. art. 1, § 6; LA. CONST. art. 1, § 5.

[76] The fourteenth amendment commands that no person shall be denied equal protection of the law by any state. U.S. CONST. amend. XIV, § 1. This provision governs all governmental actions which classify individuals for different benefits or burdens under the law. NOWAK, *supra* note 75, at 517-18. The equal protection guarantee also applies to federal government action under the due process clause of the fifth amendment. U.S. CONST. amend. V. Additionally, several state constitutions explicitly guarantee equal protection of the laws. *See, e.g.*, CAL. CONST. art. 1, § 7(a); N.Y. CONST. art. 1, § 11; S.C. CONST. art. 1, § 3; S.D. CONST. art. 4, § 18.

[77] Results of a psychiatric examination can become part of the public record because there is no doctor-patient privilege when a psychotherapist is appointed by court order to examine a victim or witness. *See, e.g.*, CAL. EVID. CODE § 1017 (West Cum. Supp. 1982).

to a psychiatrist safe from public purview has been given constitutional protection.[78] Indeed, several courts have specifically recognized the victim-witness' right to privacy in the context of court-ordered mental examinations.[79]

The United States Supreme Court has treated privacy[80] as a

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[78] In 1970, the California Supreme Court reasoned that the confidentiality of a psychotheraputic session falls within the zone of privacy that the United States Supreme Court found to be created by the Bill of Rights. *In Re* Lifschutz, 2 Cal. 3d 415, 431-32, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970), *citing* Griswold v. Connecticut, 381 U.S. 479 (1965). In *Lifschutz,* the court analyzed the litigant-patient exception to the physician-patient privilege, which permits compelled disclosure of a psychotherapist's records. *In Re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 559, 85 Cal. Rptr. 829 (1970). The court found no constitutional infirmity since the exception is carefully tailored to serve a legitimate state interest and since it compels disclosure only in cases in which the patient's own action initiates the exposure. *Id.* at 433, 467 P.2d at 568, 85 Cal. Rptr. at 840. This recognition that the "intrusion" into a patient's privacy remains essentially under the patient's control, *id.*, distinguishes the provision in *Lifschutz* from laws permitting court-ordered psychiatric examinations of sexual assault victims. It cannot be said that sexual assault victims choose to raise the issue of their mental conditions in litigation since they did not choose to be assaulted.

[79] *See, e.g.,* State v. Looney, 294 N.C. 1, 240 S.E.2d 612 (1978), in which the North Carolina Supreme Court held that the possible benefits to an innocent defendant flowing from a court-ordered psychiatric examination are outweighed by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crimes to report such offenses. *Id.* at 28, 240 S.E.2d at 627. *See also* United States v. Dildy, 39 F.R.D. 340 (D.C. Cir. 1966), which held that a prosecutrix in a sex case is forced to undergo formidable and embarrassing formalities, and that it would be insensitive to assert the minimal weight of one added burden. *Id.* at 343.

In Virgin Islands v. Scuito, 623 F.2d 869 (3d Cir. 1980), the court held that the trial court had properly exercised its discretion in refusing to order a psychiatric examination. It based its holding on the spirit of Federal Rule of Evidence 412, which forbids the use of reputation or opinion evidence of a rape victim's past sexual behavior. 623 F.2d at 875. The court stated that although the Rule does not apply directly, the principal purpose of Rule 412 was applicable to motions for psychiatric examinations of rape victims "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives." *Id.* at 875-76.

[80] The breadth of the concepts of privacy and individual freedom is illustrated by the wide variety of contexts in which the constitutional privacy analysis has been employed. *See, e.g.,* Carey v. Population Services, 431 U.S. 678 (1977) (contraception); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Stanley v. Georgia, 394 U.S. 557 (1969) (personal library); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital relationship); Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966) (Darr, J., concurring) (nudism in private); City of Carmel-

fundamental right.[81] In cases where fundamental rights or liberties are at issue, the Court reviews any infringement by using a strict scrutiny test.[82] Under this analysis, courts may not uphold laws that significantly interfere with the exercise of a fundamental right unless these laws are supported by sufficiently important interests,[83] and are closely-tailored to effectuate only those interests.[84] Since a court order for a mental examination of a prosecutrix in a sexual assault case does not require a showing of her unreliability,[85] it is overinclusive.[86] Therefore, it fails the re-

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by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970) (personal financial affairs).

[81] Nowak characterizes a fundamental right as "a specific type of civil liberty as defined by the court." NOWAK, *supra* note 75, at 382. These rights include: first amendment rights, the right to engage in interstate travel, the right to vote, the right to fair proceedings before a deprivation of personal liberty, the right to privacy, and the right to freedom of choice in sexual matters. *Id.* at 382-83 n.3. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 564-65 (1978) for an analysis of the "model of preferred rights." *See generally* G. Goodpaster, *The Constitution and Fundamental Rights,* 15 ARIZ. L. REV. 479 (1973) for a discussion of fundamental rights analysis and suspect classifications.

[82] Griswold v. Connecticut, 381 U.S. 479 (1965). This treatment of fundamental rights was expressly enunciated by the California Supreme Court in Hawkins v. Superior Court, 22 Cal. 3d 584, 592, 586 P.2d 916, 921, 150 Cal. Rptr. 435, 440 (1978). *See* NOWAK, *supra* note 75, at 382-83. *See also* TRIBE, *supra* note 81, at 1000-02, for a discussion of strict scrutiny.

[83] Zablocki v. Redhail, 434 U.S. 374 (1978). The Court focused on such factors as the importance of the rights involved, the extent to which the classification at issue interfered with their exercise, and the significance of the state interests advanced in support of the classification. *Id. as construed in* Hawkins v. Superior Court, 22 Cal. 3d 584, 599, 586 P.2d 916, 926, 150 Cal. Rptr. 435, 445 (1978) (Mosk, J., concurring).

[84] The state will be "required to bear the heavy burden of proving not only that it has a compelling interest" that justifies the law, but also that the law is *necessary* to promote that interest. Hawkins v. Superior Court, 22 Cal. 3d 584, 592, 586 P.2d 916, 921, 150 Cal. Rptr. 435, 440 (1978) (emphasis added).

[85] The standard established by the *Ballard* court allowed an examination if little or no corroboration supported the charge and if the defense raised the issue of the effect of the victim's mental or emotional condition on her veracity. Ballard v. Superior Court, 64 Cal. 2d 159, 177, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966). "Raising the issue" falls significantly short of showing unreliability.

[86] In 1974, the California Supreme Court implied that failure by defense counsel to request a psychiatric examination of the victim in a child molestation case was inadequate representation by counsel. People v. Lang, 11 Cal. 3d 134, 140, 520 P.2d 393, 397, 113 Cal. Rptr. 9, 13 (1974). The court stated that such an examination would seem a minimum protection and only in the rarest

quirement that laws impinging upon fundamental rights must be well-tailored.[87] Moreover, since the state's interest in permitting these examinations is protecting defendants' confrontation rights, and cross-examination offers a less restrictive alternative,[88] it cannot be said that psychiatric examinations are justified by a compelling state interest. Since neither the closely-tailored nor compelling state interest requirement can be satisfied by the use of these orders, they are unconstitutional.

Victim-witnesses may also be protected from examination by their right to equal protection under the law.[89] Since courts have required mental examinations almost exclusively in sexual assault cases,[90] sexual assault victims, male or female, as a class may be subjected to disparate treatment and thus denied equal protection of the law. Such a classification must be justified by a showing that, at a minimum, it is rationally related to a legitimate state purpose.[91] Since sexual assault victims as a class have

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of cases would counsel be excused from requesting one. *Id.* at 140 n.3, 520 P.2d at 397 n.3, 113 Cal. Rptr. at 13 n.3. This language created a potential for abuse of the *Ballard* motion. Unnecessary motions were no doubt made solely to avoid charges of incompetency or malpractice. "Although *Lang* was a child molestation case, the body of law builds upon what's been said before, as some defense counsel apply it to other sex cases." *Hearing, supra* note 38, at 10 (testimony of Armand Arabian, Los Angeles Superior Court Judge). For examples of the unnecessary, and therefore overinclusive, application of the motion, see note 46 *supra.*

[87] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

[88] *See* notes 61-74 and accompanying text *supra.*

[89] *See* note 76 *supra.*

[90] Use of *Ballard* Motions, *supra* note 41. For an example of courts' unwillingness to order a psychiatric examination of a witness in a non-sex case, see United States v. Klein, 271 F. Supp. 506, 508 (D.C. Cir. 1967). In a trial for conspiracy, housebreaking, and grand larceny, the court held that the "mere allegation of psychopathic personality, defective delinquency, or any lesser mental affliction characterized by a tendency to prevaricate is not in itself justification for grant of mental examination." *Id.*

[91] Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Hawkins v. Superior Court, 22 Cal. 3d 584, 595, 586 P.2d 916, 923, 150 Cal. Rptr. 435, 442 (1978) (Mosk, J., concurring), for a discussion of the similar equal protection guarantee in the California Constitution. Though equal protection "does not absolutely bar the state from distinguishing between groups of individuals and treating them differently, [it] requires that classifications be justified by legitimate state objectives." *Id. See, e.g.,* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); *In Re* King, 3 Cal. 3d 226, 474 P.2d 983, 90 Cal. Rptr. 15 (1970).

Moreover, since it is arguable that psychiatric evidence is not effective to

not been shown to be less truthful than other crime victims, this classification is not rationally related to the ostensible state purpose of ensuring accurate testimony. Therefore, under this analysis, the classification results in an impermissible violation of sexual assault victims' right to equal protection of the law.

If only women are subject to the examinations,[92] arguably, the law impermissibly discriminates against women as a class.[93] Such a classification is prohibited unless there is some adequate justification for dissimilar treatment. Gender-based classifications challenged under the United States Constitution are subject to an intermediate level of scrutiny: to withstand an equal protection analysis, they must bear a substantial relationship to an important governmental interest.[94] This clearly requires more than the rational relationship test. Since women as a class have not been shown to be untruthful, the classification is not substantially related to the governmental purpose of ensuring reliable testimony.

Under California law, it is firmly established that gender-

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prove or disprove veracity, *see* notes 102-105 and accompanying text *infra*, a plausible claim can be made that admitting the examination results does not further a legitimate state purpose, and so violates even traditional tests of equal protection. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 46 (1977).

[92] The *Ballard* motion was overwhelmingly applied to women. Use of *Ballard* Motions, *supra* note 41.

[93] A law can be discriminatory based on its application and impact, as well as on its face. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886); NOWAK, *supra* note 75, at 527.

The classification's "ultimate effect is the criterion of equal treatment." Boren v. Department of Employment Dev., 59 Cal. App. 3d 250, 257, 130 Cal. Rptr. 683, 686 (3d Dist. 1976), *citing* Reitman v. Mulkey, 387 U.S. 369, 373 (1967); Mulkey v. Reitman, 64 Cal. 2d 529, 534, 413 P.2d 825, 828, 50 Cal. Rptr. 881, 884 (1966). In California, this impact standard has been specifically applied in gender discrimination cases: A statute that affects a "disproportionate number of one sex is discriminatory and vulnerable to the strict scrutiny test; it is enough if statistics show that the [law] affects women only." *Boren*, 59 Cal. App. 3d at 257, 130 Cal. Rptr. at 687. *See also* Hardy v. Stumpf, 37 Cal. App. 3d 958, 962, 964, 112 Cal. Rptr. 739, 742, 743-44 (1st Dist. 1974).

[94] Orr v. Orr, 440 U.S. 268 (1979). *See also* Craig v. Boren, 429 U.S. 190 (1976). The standard of review, as articulated by the majority of the United States Supreme Court, requires that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977); Califano v. Webster, 430 U.S. 313, 316-17 (1977).

based classifications are inherently suspect, and subject to strict scrutiny.[95] Therefore, the means used to effectuate the purpose must be closely-tailored and necessary to promote a compelling state interest.[96] Treatment of sexual assault victims as inherently suspect fails to meet a strict scrutiny standard. It is overinclusive in that it requires mental examinations of truthful witnesses in sexual assault cases, and underinclusive in that it does not apply to witnesses in other types of criminal prosecutions, who also might be untruthful. Moreover, when the nature of the classification invokes strict scrutiny, and a less restrictive alternative exists, that alternative must be used.[97] Cross-examination offers this alternative.[98]

C. *Use of Psychiatric Examination to Determine Witness' Credibility*

In *Ballard,* the court allowed expert opinion regarding a sexual assault victim's mental condition because it thought the

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[95] Sail'er Inn v. Kirby, 5 Cal. 3d 1, 17, 485 P.2d 529, 557, 95 Cal. Rptr. 329, 339 (1971).

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classes is that the characteristic frequently bears no relation to ability to perform or contribute to society. (*See* Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1173-74). The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members.

Sail'er Inn, 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

[96] Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). A state cannot accomplish even a valid state interest by invidious discrimination between classes of its citizens. Shapiro v. Thompson, 394 U.S. 618, 633 (1969). When fundamental rights are involved, a class must be narrowly drawn to express only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[97] Dunn v. Blumstein, 405 U.S. 330 (1972). "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' " *Id.* at 343. *See* Sail'er Inn v. Kirby, 5 Cal. 3d 1, 21, 485 P.2d 529, 542, 95 Cal. Rptr. 329, 342 (1971). Where the evil the legislature seeks to prevent can be prevented through nondiscriminatory legislation, the law must be struck down as an invidious discrimination. *Id.*

[98] *See* notes 73-74 and accompanying text *supra.*

evaluation would help the jury to assess the victim's credibility.[99] Advocates of this theory argue that jurors must otherwise speculate about a witness' truthfulness, and that if the witness is capable of fabricating a story, she may be equally capable of convincing a jury that it is true.[100] However, it is the very purpose of the jury to judge the demeanor and believability of a witness, and to decide whether that witness is truthful.[101] A jury in a sex offense trial is no less able to assess credibility than is a jury in any other type of case. A psychiatrist's opinion regarding the witness' credibility has no inherent reliability, and is not by virtue of its origin superior to the conclusion of the jury.[102]

Severe doubts have been expressed about the reliability of psychiatric evaluations, based in part on a general skepticism of psychiatrists' ability to "postdict" a person's behavior.[103] In fact, there is no standard psychiatric examination to determine truth or veracity, particularly to find whether a person is telling the truth as it relates to a single incident.[104] The examination given

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[99] Ballard v. Superior Court, 64 Cal. 2d 159, 174, 410 P.2d 838, 847-48, 49 Cal. Rptr. 302, 311-12 (1966).

The issue of credibility can become the turning point of a trial. People v. Williams, 6 N.Y.2d 18, 26, 159 N.E.2d 549, 554 (1959). It has been stated that this is especially true in sex cases because a defendant's guilt or innocence often rests exclusively on the relative credibilities of the victim-witness and the defendant-witness. People v. Scott, 21 Cal. 3d 284, 296, 578 P.2d 123, 129, 145 Cal. Rptr. 876, 882 (1978). However, the likelihood of the trial turning on a credibility contest between the accused and his accuser is as great in a case of non-sexual assault as in a case of rape. People v. Rincon-Pineda, 14 Cal. 3d 864, 881-82, 538 P.2d 247, 259, 123 Cal. Rptr. 119, 131 (1975). *See also* KALVEN & ZEISEL, *supra* note 24, at 141-43.

[100] *See Pre-Trial Exam, supra* note 19, at 651.

[101] Davis v. Alaska, 415 U.S. 308, 318 (1974); United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973). CALIFORNIA JURY INSTRUCTION, CRIMINAL No. 2.20 (Rev. 1979) specifically addresses the credibility of witnesses: "Every person who testifies under oath is a witness. You are the sole judge of the believability of a witness and the weight to be given his testimony."

[102] Ballard v. Superior Court, 64 Cal. 2d 159, 174-75 n.10, 410 P.2d 838, 848 n.10, 49 Cal. Rptr. 302, 312 n.10 (1966). "A good poker player probably knows better than a psychiatrist whether a person is lying. A psychiatrist is a doctor, not a lie detector." Slovenko, *supra* note 56, at 21.

[103] Letwin, *"Unchaste Character," Ideology, and the California Rape Evidence Laws,* 54 So. CAL. L. REV. 35, 73 (1980-81). Letwin further notes that there is also "skepticism about whether psychiatrists (most of whom are males) enjoy even a relative immunity from the sexual stereotypes that prevail in the society at large." *Id.*

[104] Letter from George Deukmejian, California Attorney General, to Mem-

to victims of sexual assault is a mental status test. It is not designed to determine whether the victim is telling the truth, but solely to determine the state of the victim's mental condition at the time of the examination.[105]

Furthermore, a psychiatric opinion that a patient is subject to sexual delusions is insufficient to prove that she has not been the victim of a rape.[106] "If a psychiatrist's statement that a woman is subject to delusions creates a presumption that she has not been raped, then the law [may], in effect, license the rape of mentally disordered women."[107]

There is also the danger that the mere fact that sexual assault victims are subjected to mental examinations will taint their testimony or cause the jury to view them with suspicion. If truthful victims are so regarded, then mental examinations actually impair the jury's truthfinding function.

Even the *Ballard* court recognized that this type of psychiatric testimony creates many potential difficulties when used to aid the jury in assessing credibility.[108] For example, psychiatric

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bers of the Cal. Assembly (discussing comments of Dr. Elizabeth Harrison, psychiatrist and rape expert) [hereinafter cited as A.G. Letter] (copy on file at U.C. Davis Law Review office); *Hearing, supra* note 38, at 62-63 (testimony of Bruce Ebert, clinical psychologist). "In other words, a psychiatric examination could distinguish between someone who is severely disoriented and someone who isn't, but could not determine which one is lying. *Hearing, supra* note 38, at 63.

[105] A.G. letter, *supra* note 104; *Hearing, supra* note 38, at 62-63. Dr. Elizabeth Harrison gave examples of questions asked in psychiatric examinations of sexual assault victims. General questions are asked to elicit information regarding the victim's mood, thought processes, and orientation. Specific questions asked include general information questions (e.g., who were the last four United States presidents, who is the governor, and what is the capitol of California), questions regarding past sex life (this may be communicated to the jury although it is inadmissible in California if derived from in-court testimony), math questions, and questions regarding suicidal tendencies or drug misuse. A.G. Letter, *supra* note 104. Routine mental status examinations, of which these questions are a part, cannot necessarily be used to determine truth or veracity. Telephone interview with Dr. Elizabeth Harrison, psychiatrist and rape expert (July 2, 1982).

[106] Slovenko, *supra* note 56, at 16. "Certainly most women and most men have sexual fantasies, but that is unrelated to a person's veracity." Comment, *Rape and Rape Laws: Sexism in Society and the Law,* 61 CALIF. L. REV. 919, 934 (1973) [hereinafter cited as *Rape and Rape Laws*].

[107] *Rape and Rape Laws, supra* note 106, at 934.

[108] Ballard v. Superior Court, 64 Cal. 2d 159, 174-75 n.10, 410 P.2d 838, 848 n.10, 49 Cal. Rptr. 302, 312 n.10 (1966).

testimony may not be relevant to the issue of credibility.[109] Or, even if relevant, it may tend to obscure the real issues and to confuse the jury.[110] Furthermore, juries may overvalue expert testimony and, by giving it undue weight, allow it to replace their own collective judgment.[111] The risk of prejudice and the questionable effectiveness of psychiatric examinations suggest that assessment of a witness' credibility should be left to direct observation by the jury. To allow psychiatric testimony damages the jury's ability to evaluate independently the credibility of the witness.

CONCLUSION

In criminal cases other than sexual assault prosecutions, the rules of criminal procedure and evidence are considered sufficient to protect the defendant from false charges and unwarranted conviction.[112] Similarly, these same generally applied

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[109] *Id.*

[110] *Id.*

[111] *Id.* The court also warned of other potential dangers in admitting psychiatric testimony relating to a witness' credibility: the psychiatrist may not be in any better position to evaluate credibility than the jurors, the psychiatrist may have difficulty communicating with the jury, and the psychiatrist's techniques and theories may not be generally accepted.

In fact, the *Ballard* court authorized court-ordered psychiatric examinations without an evidentiary hearing as to the general acceptance of such examinations by the medical community. Letter from George Deukmejian, California Attorney General, to Edgar Kerry, Judicial Council of California (November 1, 1979) (discussing Use of *Ballard* Motions, *supra* note 41). This was contradictory to the general practice of courts in ruling on the admissibility of different types of scientific evidence. In Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), in which the results of a lie detector test were held inadmissible, the court stated that "[t]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. *See, e.g.*, Huntingdon v. Crowley, 64 Cal. 2d 647, 653, 414 P.2d 382, 388, 51 Cal. Rptr. 254, 260 (1966) (medical report on blood test in paternity suit rejected because there was insufficient foundation of medical acceptance).

[112] There are a number of safeguards that work to eliminate false charges and do away with many of the arguments used to justify psychiatric examinations. First, prosecutors themselves screen cases and prosecute only those which they feel are valid complaints that can be successfully prosecuted. Second, prosecutors must turn over to the defense any information that they have which would indicate the doubtful veracity of a material witness. Brady v. Maryland, 373 U.S. 83 (1963); People v. Ruthford, 14 Cal. 3d 399, 534 P.2d 1341, 121 Cal. Rptr. 261 (1975). Finally, if the evidence is insufficient, the charges

rules protect the complaining witness from harassment and invasion of privacy. Before a special rule for sexual assault cases can be justified, there must be an accurate and complete showing that these general truth-seeking tests are inadequate. If the law is to be fairly and equitably applied, psychiatric examinations of sexual assault victims should not be retained in any jurisdiction unless the same procedure is used in all crimes in which there is little or no corroboration, coupled with a strong showing of the witness' unreliability.

In California, defendants have been insulated from effective prosecution because sexual assault victims have had to be certifiably rational. By prohibiting court-ordered psychiatric examination of sexual assault victims, the California legislature has abolished an inequity in its criminal justice system which, unhappily, remains in effect in other jurisdictions. We hope that this step by the California legislature will influence other states to reexamine their laws and to make similar reforms.

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will be dismissed at the preliminary hearing. All three of these steps serve to eliminate not only cases of false charges, but also cases that merely appear to be falacious.