A Due Process Challenge To Restrictions On The Substantive Use Of Evidence Of A Rape Prosecutrix's Prior Sexual Conduct

I. INTRODUCTION

A person commits a forcible rape when he accomplishes an act of sexual intercourse with a woman without her consent.[1] In a rape trial, the prosecution must prove two crucial facts: first that sexual intercourse occurred, and second that the defendant acted without the prosecutrix's consent.[2] Thus, a man can defend himself against a rape charge either by denying that sexual intercourse occurred,[3] or by admitting that the intercourse occurred and contending that the prosecutrix consented to the act.[4]

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[1] *See* CAL. PENAL CODE § 261 (West 1972):

> Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:
> (1) Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent;
> (2) Where she resists, but her resistance is overcome by force or violence;
> (3) Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anaesthetic substance, administered by or with the privity of the accused;
> (4) Where she is at the time unconscious of the nature of the act, and this is known to the accused;
> (5) Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.

Only a man can be charged with committing forcible rape, but either a man or woman may be charged with acting in concert to aid and abet another person in committing a forcible rape. *See* CAL. PENAL CODE §§ 261, 264.1 (West 1972).

[2] People v. Degnen, 70 Cal. App. 567, 591, 234 P. 129, 139 (2d Dist. 1925).

[3] *See* People v. Schafer, 4 Cal. App. 3d 554, 84 Cal. Rptr. 464 (2d Dist. 1970) (defendant denied ever meeting the prosecutrix); People v. Byers, 10 Cal. App. 3d 410, 88 Cal. Rptr. 886 (4th Dist. 1970) (alibi defense).

[4] *See* People v. Murphy, 59 Cal. 2d 818, 382 P.2d 346, 31 Cal. Rptr. 306 (1963);

If the defendant admits that sexual intercourse occurred, the prosecutrix's consent becomes the crucial issue in the case. The fact of consent is, however, difficult to prove because consent, by its nature, is a state of mind.[5] Until recently, one method of proving the prosecutrix's consent was the introduction of evidence of the prosecutrix's prior consensual sexual conduct as circumstantial proof of her state of mind during the alleged rape.[6]

The admission of such evidence created two problems. First, disclosure of her sexual history embarrassed the rape victim. Critics charged that the rule allowing admission forced the victim to defend her choice of sexual partners.[7] They complained that the rule of evidence placed the victim, not the defendant, on trial.[8] Second, several studies concluded that the rule of evidence hampered effective enforcement of rape laws.[9] Because evidence of their prior sexual histories was admissible, victims were reluctant to report rapes.[10] Moreover, convictions were unusually difficult to obtain because juries were prone to acquit a defendant, whether or not the evidence clearly showed that the defendant had committed a rape,

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People v. Hurlburt, 166 Cal. App. 2d 334, 333 P.2d 82 (1st Dist. 1958); People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (4th Dist. 1957); People v. Battilana, 52 Cal. App. 2d 685, 126 P.2d 923 (3d Dist. 1942).

[5] Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L. J. 55 (1952) [hereinafter cited as *The Consent Standard*].

[6] *See* People v. Hurlburt, 166 Cal. App. 2d 334, 333 P.2d 82 (1st Dist. 1958); People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (4th Dist. 1957); People v. Battilana, 52 Cal. App. 2d 685, 126 P.2d 923 (3d Dist. 1942).

[7] *See Summary of the Hearing on Revising California Laws Relating to Rape Before the Assembly Criminal Justice Committee and the California Comm'n on the Status of Women*, October 18, 1973, at 2 [hereinafter cited as *Hearings*].

[8] *Id.* at 8.

[9] *See generally* Le Grand, *Rape and Rape Laws: Sexism in Law and Society*, 61 CAL. L. REV. 919, 929 (1973) [hereinafter cited as *Rape Laws*]; Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 347 (1973); M. AMIR, PATTERNS IN FORCIBLE RAPE 27-28 (1971) [hereinafter cited as PATTERNS]; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 97 (1967). Since the laws were not effectively enforced, the critics complained, the laws did not deter rape. In support of their conclusion, they pointed to statistics that showed the number of rapes continued to rise. *See Rape Laws, supra*, at 919. Statistics show a steady rise in rapes, but do not conclusively demonstrate that the number of rapes is increasing at a rate disproportionate to the increase in other crimes. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, Table 8 (1970), Table 6 (1971), Table 6 (1972), Table 8 (1973), Table 10 (1974).

[10] *Rape Laws, supra* note 9, at 929, 938; *Hearings, supra* note 7, at 2. Commentators have suggested that victims have other reasons for refusing to bring rape complaints. They want to prevent the attention and further ordeal caused by police investigation and appearance in court, and to protect their reputations. They may fear retaliation by the offender, husband or parents. *Rape Laws, supra* note 9, at 921-22; PATTERNS, *supra* note 9, at 29.

when they thought the prosecutrix was guilty of past immorality.[11]

The California Legislature recently responded to these problems by amending the Evidence Code to limit admission of evidence of the prosecutrix's prior sexual conduct.[12] Under the new law, a defendant generally cannot introduce evidence of the prosecutrix's prior sexual conduct to prove her consent to the incident charged as rape.[13] The new law provides three exceptions to this rule: the evidence is admissible (1) when it shows prior consensual intercourse with the defendant, (2) to rebut the prosecution's proof of the prosecutrix's prior sexual history, and (3) to impeach the prosecutrix.[14]

This article suggests that the new law may have gone too far in its blanket exclusion of evidence of the prosecutrix's prior sexual conduct for substantive purposes. Such evidence in many cases may be highly probative on the elusive issue of consent. If so, excluding the evidence for purposes other than impeachment may substantially impair the defendant's ability to defend himself against the rape charge. Recent United States Supreme Court decisions suggest that the new law may violate the defendant's due process rights.[15]

This article first discusses the previous rules that admitted evidence of the prosecutrix's prior sexual conduct to prove her consent. Then, it explains how the new law alters the previous practice. Next, the article shows how restricting use of evidence of the prosecutrix's prior sexual conduct for substantive purposes[16] may violate the de-

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[11]The jury considers such factors as the victim's assumption of the risk and precipitation of the intercourse in determining whether the intercourse was a rape. H. KALVEN AND H. ZEISEL, THE AMERICAN JURY 249-51 (1966). *See also Rape Laws, supra* note 9, at 929.

[12]CAL. EVID. CODE § 1103(2) (West Supp. 1976). For an explanation of the general legislative intent, *see Findings and Recommendations for Revising California Laws Relating to Rape*, Assembly Criminal Justice Committee, March 1974, Numbers 10 and 11 [hereinafter cited as *Findings and Recommendations*]; Comment, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HAST. L. J. 1551, 1554 (1975).

[13]CAL. EVID. CODE § 1103(2)(a) (West Supp. 1976), set forth in note 54, *infra*.

[14]*Id.* (b), (c), and (d).

[15]The defendant's due process rights are stated in the United States and California Constitutions. U.S. CONST. Amend. XIV, § 1 provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

CAL. CONST. ART. 1, § 7(a) (West Supp. 1976) provides:

> A person may not be deprived of life, liberty or property without due process of law.

See also, CAL. CONST. ART. 1, § 15 (West Supp. 1976):

> The defendant in a criminal cause has the right to . . . compel the attendance of witnesses in the defendant's behalf, . . . and to be confronted with the witnesses against the defendant.

[16]The article will not discuss the constitutional implications of the new law's limitation on the defendant's use of the evidence for impeachment.

fendant's due process rights. It concludes by suggesting an amendment of the statute that would restrict the use of evidence of the prosecutrix's prior sexual conduct in rape trials while still protecting the defendant's due process rights.

II. COMMON LAW TREATMENT OF EVIDENCE OF PRIOR SEXUAL CONDUCT

A. THE CONSENT REQUIREMENT

California's forcible rape laws[17] prohibit a man from sexually penetrating a woman against her will.[18] Courts have interpreted the law to allow a woman to claim lack of consent to sexual intercourse, even when she cannot present evidence of the defendant's use of physical force or violence. They have recognized that a woman does not consent when she submits to intercourse to avoid threatened bodily harm.[19]

Because the prosecutrix's consent is a state of mind, her consent may be difficult to prove. Consent is a self-perceived attitude: a woman consents when she thinks she does.[20] If, however, the defendant justifiably relied on the woman's apparent consent, unaware that he was acting against her will, he is not guilty of rape.[21] To show the prosecutrix's consent, the parties may introduce evidence of the prosecutrix's and defendant's statements and conduct at the time of the alleged rape. Consent or its absence may not, however, be verbally communicated, and non-verbal conduct is often ambigu-

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[17]CAL. PENAL CODE § 261, set forth in note 1, *supra*. The statutory definition of the crime of rape requires the prosecutrix to charge that she did not consent to the sexual intercourse.

[18]*See The Consent Standard*, *supra* note 5, at 55. In *Rape Laws*, *supra* note 9, at 924-26, the author suggests the laws are intended to preserve a man's exclusive right to a woman as his sexual possession. This interpretation is not inconsistent with the law's protection of the woman's right to choose who will enter her body.

[19]People v. Harris, 108 Cal. App. 2d 84, 238 P.2d 158 (2d Dist. 1951); People v. Kinne, 25 Cal. App. 2d 112, 76 P.2d 714 (2d Dist. 1938).

[20]*The Consent Standard*, *supra* note 5, at 65.

[21]The courts have protected the defendant's right to rely on the woman's conduct, whatever her subjective attitude may be, by requiring evidence of the defendant's criminal intent. People v. Mayberry, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975) (trial court erred in not giving jury instruction that would have required acquittal if the jury thought the defendant reasonably believed the prosecutrix had freely consented to the intercourse). The courts require the prosecution to show that the woman did not consent and that the defendant engaged in the intercourse "with utter disregard of, or in the lack of grounds for, a belief that the female" has consented. People v. Hernandez, 61 Cal. 2d 529, 534, 393 P.2d 673, 676, 39 Cal. Rptr. 361, 364 (1961) (defendant charged with statutory rape entitled to show that he reasonably believed prosecutrix was of age to give legal consent). Thus, if the defendant justifiably relied on the woman's apparent consent, unaware that he was acting against her will, he is not guilty of rape. *See also The Consent Standard*, *supra* note 5, at 74.

ous.[22] Unless the parties can produce evidence of violence or testimony of eyewitnesses, direct evidence of the prosecutrix's mental state may be difficult to find.[23]

As a result of the problems in proof, courts have liberally admitted circumstantial evidence, for otherwise the issue of consent would become merely a matter of the prosecutrix's word against the defendant's.[24] They have fashioned rules to admit all evidence which might possibly be relevant to proving the prosecutrix's consent.[25] Until the recent legislative amendment, as part of this liberal admission policy, the courts let the defendant use evidence of the prosecutrix's prior consensual sexual conduct as character evidence showing the prosecutrix's disposition to consent.[26]

B. WHEN THE DEFENDANT COULD USE THE EVIDENCE TO PROVE CONSENT

The courts admitted evidence of the prosecutrix's[27] prior sexual

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[22] *The Consent Standard, supra* note 5, at 65-69.

[23] *See In re* Ferguson, 5 Cal. 3d 525, 534, 487 P.2d 1234, 1240, 96 Cal. Rptr. 594, 600 (1971) (evidence of the prosecutrix's mental and emotional stability admitted because rules governing admissibility are liberal); People v. Baldwin, 117 Cal. 244, 249, 49 P.186, 187 (1897); People v. Delgado, 32 Cal. App. 3d 242, 250, 108 Cal. Rptr. 399, 405 (4th Dist. 1973). *But see* People v. Rincon-Piñeda, 14 Cal. 3d 864, 539 P.2d 247, 123 Cal. Rptr. 119 (1975), discussed in note 37, *infra.*

[24] *See generally The Consent Standard, supra* note 5, at 60.

[25] *In re* Ferguson, 5 Cal. 3d 525, 534, 487 P.2d 1234, 1240, 96 Cal. Rptr. 594, 600 (1971); Ballard v. Superior Court, 64 Cal. 2d 159, 171-74, 410 P.2d 838, 846-48, 49 Cal. Rptr. 302, 310-11 (1966); People v. Benson, 6 Cal. 221, 222 (1856); People v. Hurlburt, 166 Cal. App. 2d 334, 338, 333 P.2d 82, 85 (1st Dist. 1958); People v. Degnen, 70 Cal. App. 567, 594, 234 P. 129, 140 (2d Dist. 1925).

[26] *See generally* CAL. EVID. CODE § 1103(1) (West Supp. 1976); People v. Murphy, 59 Cal. 2d 818, 382 P.2d 346, 31 Cal. Rptr. 306 (1963); People v. Walker, 150 Cal. App. 2d 594, 601, 310 P.2d 110, 115 (4th Dist. 1957). *See generally The Consent Standard, supra* note 5,at 59-60.

[27] The courts did not generally admit evidence of the defendant's prior sexual conduct. CAL. EVID. CODE § 1102 (West 1968). A man was not to-be convicted because he may have previously raped another woman; he could be tried only for the offense charged. People v. Delgado, 32 Cal. App. 3d 242, 249-51, 108 Cal. Rptr. 399, 404-06 (4th Dist. 1973). *See generally* People v. Schader, 71 Cal. 2d 761, 772-73, 457 P.2d 841, 847-48, 80 Cal. Rptr. 1, 7-8 (1969). *See also* E. CLEARY, *et al.*, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE, § 190, at 447 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)], which states:

> The rule is that the prosecution may not introduce evidence of other criminal acts of the defendant . . . to show a probability that he committed the crime on trial because he is a man of criminal character.

The evidence could, however, be admissible, if relevant to some other issue in the case. CAL. EVID. CODE § 1101(b) (West 1968). For instance, when the evidence showed that the defendant had raped other women in ways strikingly similar to the attack described by the prosecutrix, it could be admitted to show a common design and criminal intent. People v. Ing, 65 Cal. 2d 603, 612, 422

conduct because they thought it relevant[28] to prove the prosecutrix's consent. In theory such evidence could create an inference that she consented to intercourse with the defendant because she had previously consented to intercourse with others.[29] At first, the inference was allowed because the courts thought a woman who consented to extramarital sexual intercourse was behaving deviantly. She acted in spite of societal pressures that condemned such activity. And, the courts reasoned, she was likely to deviate again, if she had previously withstood societal pressures and consented to extramarital intercourse.[30] More recently, courts have found the evidence relevant merely because it showed the prosecutrix's capacity to consent and increased the possibility that she would consent again.[31] One commentator explained:

> [P]eople who engage in a certain type of behavior [whether deviant or socially acceptable] are more likely to engage in that behavior at any randomly selected moment than are people who have never engaged in that behavior before.[32]

Because of the reasoning behind the rule, the courts usually let the rape defendant use evidence of the prosecutrix's prior sexual con-

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P.2d 590, 595, 55 Cal. Rptr. 902, 907 (1967); People v. Sullivan, 101 Cal. App. 2d 322, 225 P.2d 645 (1st Dist. 1950); People v. Cassandras, 83 Cal. App. 2d 272, 188 P.2d 546 (1st Dist. 1948).

[28] Relevant evidence is defined as evidence that has any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. CAL. EVID. CODE § 210 (West 1968). Under this definition, evidence is relevant if "the evidence offered renders the desired inference more probable than it would be without the evidence." MCCORMICK (2d ed.), *supra* note 27, § 185, at 435, 437. As one commentator explains:

> To be relevant, an item of evidence need not be capable of proving fully the existence of certain facts but must merely have a tendency to prove such facts or provide a basis for an inference as to the truth of the facts alleged. Thus, the degree of probative value required for admissibility is that the evidence change the probabilities that the fact at issue is true.

Comment, 8 GA. L. REV. 973, 979 (1974).

[29] People v. Murphy, 59 Cal. 2d 818, 382 P.2d 346, 31 Cal. Rptr. 306 (1963); People v. Johnson, 106 Cal. 289, 39 P. 622 (1895); People v. Benson, 6 Cal. 221 (1856); People v. Degnen, 70 Cal. App. 567, 234 P. 129 (2d Dist. 1925).

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> [I]t is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed.

People v. Johnson, 106 Cal. 289, 293, 39 P. 622, 623 (1895). *See generally* Comment, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process*, 3 HOFSTRA L. REV. 403, 414 (1975) [hereinafter cited as *Denial of Due Process*].

[31] *See generally* CAL. EVID. CODE § 1103 (West 1968); People v. Walker, 150 Cal. App. 2d 594, 601, 310 P.2d 110, 115 (4th Dist. 1957). *Accord* CALIFORNIA JURY INSTRUCTIONS 10.06 (3d ed. 1970) (now prohibited by CAL. PENAL CODE § 1127d (West Supp. 1976)).

[32] *Denial of Due Process*, *supra* note 30, at 415.

duct only when the woman's consent was in dispute.[33] When the defendant denied that the intercourse occurred, he could not cross-examine the prosecutrix about her previous sexual activities because the prosecutrix's prior sexual conduct was not relevant to his defense.[34] In this situation, such evidence was excluded to prove consent, but the defendant could use the evidence if he could show that it was relevant to impeach the prosecutrix.[35]

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[33]Only relevant evidence is admissible. CAL. EVID. CODE § 350 (West 1968). Generally, the evidence would be relevant only if the woman's consent was disputed. People v. Clark, 63 Cal. 2d 503, 505, 407 P.2d 294, 295, 47 Cal. Rptr. 382, 383 (1965); People v. Johnson, 106 Cal. 289, 293, 39 P. 622, 623 (1895).

[34]People v. Byers, 10 Cal. App. 3d 410, 88 Cal. Rptr. 886 (4th Dist. 1970) (alibi defense); People v. Schafer, 4 Cal. App. 3d 554, 84 Cal. Rptr. 464 (2d Dist. 1970) (defendant denied ever meeting the prosecutrix). Similarly, in statutory rape cases under CAL. PENAL CODE § 261.5 (West 1972), the defendant generally could not introduce evidence of the girl's prior sexual conduct to prove her consent because the defendant could be found guilty even if she had consented. People v. Vivian, 50 Cal. App. 2d 533, 123 P.2d 613 (1st Dist. 1942). *See also* People v. Hurlburt, 166 Cal. App. 2d 334, 333 P.2d 82 (1st Dist. 1958). Courts have, however, admitted the evidence in statutory rape cases when the defendant offers it to prove issues other than consent, *e.g.*, to mitigate the punishment, to impeach or to show that the offense never occurred. *See* People v. Pantages, 212 Cal. 237, 262-64, 297 P. 890, 901-02 (1931).

[35]The truthfulness of each witness's testimony is at issue in every case. *See* 3a J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 874 (Chadbourn rev. 1970). Thus, a rape defendant could use evidence of the prosecutrix's prior sexual conduct to impeach her credibility as a witness, if he could show the evidence was relevant to that issue. The courts concluded that evidence of the prosecutrix's prior sexual conduct did not tend to prove her general character for honesty or veracity, as her sexual conduct did not affect her tendency to tell the truth. Since the witness could only be impeached on the basis of her honesty and veracity, the evidence was inadmissible for general impeachment. *See* People v. Johnson, 106 Cal. 289, 294, 39 P. 622, 623 (1895); People v. Magnum, 31 Cal. App. 2d 374, 381, 88 P.2d 207, 211 (3d Dist. 1939). California courts did, however, let the defendant use the evidence when it showed that specific parts of the prosecutrix's testimony were untrue. *See* People v. Pantages, 212 Cal. 237, 259-66, 297 P. 890, 900-02 (1931) (prosecutrix who claimed she was a virgin testified that she had fainted and swooned during the alleged attack; because the court thought that only a virgin would have reacted in that way, defendant could introduce evidence of the girl's past sexual conduct to show that she had lied about her virginity or had described the incident falsely); People v. Clark, 63 Cal. 2d 503, 407 P.2d 294, 47 Cal. Rptr. 382 (1965) (prosecutrix had denied seeing naked men; held, defendant should have been allowed to cross-examine her about her previous sexual experiences to show inconsistency and propensity to fabricate stories); People v. Murphy, 59 Cal. 2d 818, 382 P.2d 346, 31 Cal. Rptr. 306 (1963) (prosecutrix testified that defendants had forced her to engage in sexual intercourse with specifically named men; evidence of prior prostitution admissible to show that the intercourse with the named men had occurred before she met the defendants); People v. Williams, 52 Cal. App. 609, 199 P. 56 (1st Dist. 1921) (evidence that defendant had discovered prosecutrix and another engaged in sexual intercourse; held, admissible to show prosecutrix had a motive to lie). In addition, two courts have suggested in dicta that the defendant could use evidence that the prosecutrix had consented to intercourse in the past simply because she now denied consent by charging the defendant with rape. People v. Pantages, 212 Cal. 237, 262, 297 P. 890, 901 (1931); People v. Degnen, 70 Cal. App. 567, 591-92, 234 P. 129, 139 (2d Dist.

When consent was at issue, California courts admitted evidence of the prosecutrix's prior sexual conduct on the basis of the defendant's need for the evidence, not because it was necessarily of high probative value.[36] They thought the defendant should be able to use all relevant evidence because rape charges were particularly difficult to defend[37] and because a criminal defendant should have every opportunity to raise a reasonable doubt in the minds of the jury. As one court explained:

> In this class of prosecutions [i.e., charges of rape] the defendant, owing to the natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence, that he should be given the full measure of every legal right in an endeavor to maintain his innocence.[38]

When the Law Revision Commission provided for admission of such evidence in the original version of the Evidence Code,[39] it expressly concurred in part of the courts' analysis. It did not address the particular difficulty of defending against rapes, but concluded that the rape defendant, like other criminal defendants, should have the right to use all relevant evidence of his victim's character to protect him-

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1925), *explained in* People v. Magnum, 31 Cal. App. 2d 374, 380-82, 88 P.2d 207, 210-11 (3d Dist. 1939).

[36] *See* People v. Murphy, 59 Cal. 2d 818, 831, 382 P.2d 346, 354, 31 Cal. Rptr. 306, 314 (1963); People v. Baldwin, 117 Cal. 244, 249, 49 P. 186, 187 (1897); People v. Hume, 56 Cal. App. 2d 262, 267, 132 P.2d 52, 54-55 (2d Dist. 1942).

[37] People v. Baldwin, 117 Cal. 244, 249, 49 P. 186, 187 (1897); People v. Benson, 6 Cal. 221, 222 (1856); People v. Degnen, 70 Cal. App. 567, 594, 234 P. 129, 140 (2d Dist. 1925). Recently, however, in People v. Rincon-Piñeda, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975), the California Supreme Court questioned the continued viability of this rationale and forbade a jury instruction, cautioning the jury to view the prosecutrix's testimony with caution, that was thought to presume the untruthfulness of the prosecutrix's charge and testimony. The court relied on Note, *The Corroboration Requirement*, 81 YALE L.J. 1365, 1378-84 (1972) and H. KALVEN AND H. ZEISEL, THE AMERICAN JURY (1966), to conclude that most rape cases use extrinsic evidence and that rape convictions are now difficult to obtain. People v. Rincon-Piñeda, 14 Cal. 3d at 879-82, 538 P.2d at 257-59, 123 Cal. Rptr. 129-31. Then, the court concluded that a special rule protecting the rape defendant from conviction made no sense. The rationale for admitting evidence of the prosecutrix's prior sexual conduct may still apply, notwithstanding the recent judicial statement. On the issue of consent, absent signs of force and violence, the parties may be unable to find circumstantial evidence. Moreover, the court's analysis was applied to a rule that gave favored treatment to defendants charged with rape. The court did not suggest that rape convictions are now so difficult to obtain that general rules allowing other defendants to use character evidence [CAL. EVID. CODE § 1101 (b) (West 1968)] should no longer be available to defendants charged with rape.

[38] People v. Baldwin, 117 Cal. 244, 249, 49 P. 186, 187 (1897).

[39] CAL. EVID. CODE § 1103 (West 1968). *See also* People v. Byers, 10 Cal. App. 3d 410, 414, 88 Cal. Rptr. 886, 888 (4th Dist. 1970).

self from conviction.[40]

C. METHODS OF INTRODUCING THE EVIDENCE

Evidence of the prosecutrix's prior sexual conduct was traditionally introduced in the cross-examination of the prosecutrix.[41] The rules for such cross-examination were unusually broad in rape cases.[42] Under these rules, courts limited the scope of the questioning only when its prejudicial effects far outweighed the probative value of the evidence that might be produced.[43] For instance, the court could limit the scope of the cross-examination when the defendant intended to use the evidence of the prosecutrix's prior sexual conduct only to degrade her in the minds of the jury.[44] Similarly,

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[40] 7 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES § 1102, at 213 (1965).

[41] *E.g.*, People v. Murphy, 59 Cal. 2d 818, 382 P.2d 346, 31 Cal. Rptr. 306 (1963); People v. Hurlburt, 166 Cal. App. 2d 334, 333 P.2d 82 (1st Dist. 1958); People v. Hume, 56 Cal. App. 2d 262, 132 P.2d 52 (2d Dist. 1942); People v. Degnen, 70 Cal. App. 567, 234 P. 129 (2d Dist. 1925). *C.f.* People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (4th Dist. 1957) (defendant able to question the prosecutrix about her sexual history; held, no error in excluding extrinsic evidence of specific sexual acts). Cross-examination served two important functions. First, it disclosed facts surrounding the alleged rape, including aspects of the prosecutrix's character, that had not been disclosed on direct examination. Second, cross-examination could expose specific inconsistencies in the prosecutrix's testimony or gaps in her knowledge about the alleged rape. *See* 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1368 (Chadbourn rev. 1974).

[42] For instance, because the evidence was also relevant to prove consent, a defendant could use specific act evidence to impeach the prosecutrix, notwithstanding the general common law rule codified in CAL. EVID. CODE § 787 (West 1968). People v. Clark, 63 Cal. 2d 503, 407 P.2d 294, 47 Cal. Rptr. 382 (1965); People v. Hurlburt, 166 Cal. App. 2d 334, 333 P.2d 82 (1st Dist. 1958). *See generally* People v. Murphy, 59 Cal. 2d 818, 382 P.2d 346, 31 Cal. Rptr. 306 (1963); People v. Hume, 56 Cal. App. 2d 262, 132 P.2d 52 (2d Dist. 1942); People v. Flores, 15 Cal. App. 2d 385, 59 P.2d 517 (2d Dist. 1936); People v. Degnen, 70 Cal. App. 567, 234 P. 129 (2d Dist. 1925).

[43] The courts exercised the discretion codified in CAL. EVID. CODE § 352 (West 1968). That section provides that a court may exclude evidence:

> .... [i]f its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury.

Most of the cases cited above, however, were decided before the Evidence Code was enacted. Today, courts may be more inclined to exclude the evidence under their § 352 discretion than they were before the Code was enacted, because the Code provides standards governing admissibility.

[44] *See generally* the cases that excluded evidence of the prosecutrix's moral delinquency, including People v. Merrill, 104 Cal. App. 2d 257, 231 P.2d 573 (1st Dist. 1951); People v. Williams, 52 Cal. App. 609, 199 P. 56 (1st Dist. 1921); People v. Burrows, 27 Cal. App. 428, 150 P. 382 (3d Dist. 1915). The court reasoned in People v. Magnum, 31 Cal. App. 2d 374, 381, 88 P.2d 207, 211 (3d Dist. 1939) that:

> In a case of this character the chastity of the prosecuting witness is not an issue. If it were, the legislature, in defining the crime, would

when the defendant had already obtained an admission by the prosecutrix that she was not a virgin, the court could forbid questioning about specific times when she consented to intercourse with others because the evidence was cumulative.[45]

The courts rarely used their discretion to limit the defendant's inquiry into the prosecutrix's prior sexual history.[46] Instead, they gave the defendant maximum opportunity to expose, question and contradict the prosecutrix's story,[47] without considering the impact of this broad cross-examination on the victim.[48] This judicial attitude led to complaints that often victims were subjected to unreasonably long and embarrassing cross-examination.[49] The critics contended that as a result of the potential cross-examination, victims were reluctant to report rapes,[50] and that rape convictions had become difficult to obtain.[51] Moreover, they argued that rules of evidence in rape trials should protect the prosecutrix and the prosecution, as well as the defendant, from prejudicial evidence.[52]

III. THE LEGISLATIVE SOLUTION

A. SUMMARY OF THE STATUTE

The California Legislature recently responded to the critics' com-

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> have so provided, and it would be incumbent upon the prosecution to prove that fact. Such, of course, is not the law. The protecting arm of the law is placed around the unchaste with as much potency as the chaste . . . .

[45] People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (4th Dist. 1957).

[46] *See* People v. Murphy, 59 Cal. 2d 818, 382 P.2d 346, 31 Cal. Rptr. 306 (1963); People v. Johnson, 106 Cal. 289, 39 P.622 (1895); People v. Degnen, 70 Cal. App. 567, 234 P. 129 (2d Dist. 1925).

[47] *See* People v. Murphy, 59 Cal. 2d 818, 831, 382 P.2d 346, 354, 31 Cal. Rptr. 306, 314 (1963); People v. Baldwin, 117 Cal. 244, 249, 49 P. 186, 187 (1897).

[48] As one court reasoned:

> Such examination could do no possible harm if the witness could stand the ordeal, and it might do a great deal of good if [s]he could not.

People v. Hume, 56 Cal. App. 2d 262, 267, 132 P.2d 52, 54-55 (2d Dist. 1942).

[49] *See* notes 7-8, *supra*, and accompanying text.

[50] *See* notes 9-10, *supra*, and accompanying text.

[51] *See* note 9, *supra*, and accompanying text.

[52] They may have found support in the reasoning in People v. Arline, 13 Cal. App. 3d 200, 205, 91 Cal. Rptr. 520, 523 (5th Dist. 1970). In *Arline*, the court held that it was not error to exclude evidence about another person who had robbed the same store that the defendant was charged with robbing to show that the other person had committed the crime. Although the evidence would have suggested the possibility that the other person had committed the crime, it did not show that the other had probably committed the crime. Thus, the evidence was of low probative value. In addition, the evidence could harm the prosecution's case by misleading the jury into examining the other's prior conduct rather than the defendant's conduct at the time of the alleged crime. Since the prejudicial effects of the evidence outweighed its probative value, it was properly excluded.

plaints[53] by passing a law limiting the admissibility of evidence of a rape prosecutrix's prior sexual conduct.[54] The new law contains a general rule: a defendant charged with forcible rape[55] or acting in concert to commit forcible rape[56] cannot use evidence of the prosecutrix's prior sexual conduct to prove her consent.[57] The statute then provides exceptions to this general rule. First, if the defendant can show the prosecutrix has previously consented to intercourse with him, he can use that evidence to prove the prosecutrix's consent to the alleged rape.[58] Second, if the prosecution introduces evidence of the prosecutrix's prior sexual conduct, the defendant may introduce additional facts about her past sexual conduct to rebut the prosecution's proof.[59] Under either exception, the defendant apparently may use the evidence substantively to prove the prosecutrix's consent,[60] and the jury may infer that because the prosecutrix

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[53]*See generally Findings and Recommendations, supra* note 12, Findings and Recommendations Numbers 10 and 11, for a general statement of the legislative intent.

[54]Cal. Stats. 1974, ch. 569 pp. 1723-24, which added CAL. EVID. CODE §§ 1103(2) and 782 (West Supp. 1976). CAL. EVID. CODE § 1103(2) provides:

> (2)(a) 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.

[55]CAL. PENAL CODE § 261 (West 1972), set forth in note 1, *supra.*

[56]CAL. PENAL CODE § 264.1 (West 1972). The Evidence Code section also applies in any prosecution for assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in CAL. PENAL CODE sections 261 or 264.1. CAL. EVID. CODE § 1103(2)(a).

[57]CAL. EVID. CODE § 1103(2)(a) (West Supp. 1976), set forth in note 54, *supra.*

[58]*Id.* (b).

[59]*Id.* (c).

[60]The language of the new section allows the defendant to use the evidence of prior consensual intercourse with others only to rebut the prosecution's proof. *Id.* (b). It does not clarify whether the defendant can only disprove the prosecu-

had previously consented to sexual intercourse, she would be likely to consent again.

The new law provides one other circumstance in which evidence of the prosecutrix's prior sexual conduct may be used: the defendant may use such evidence to attack the credibility of the prosecutrix.[61] This exception, however, is subject to a number of restrictions. The court must hold an in camera hearing prior to admitting the evidence. At that hearing the defendant must show that the evidence is relevant to the prosecutrix's credibility, and that its probative value outweighs its prejudicial effects. If the court finds the defendant's showing sufficient, it may issue an order stating the nature of the evidence and the permissible scope of the questioning. The defendant may then introduce the evidence of the prosecutrix's prior sexual conduct as limited by the court's order.

B. THE CONTINUED RELEVANCY OF THE EVIDENCE

Few have contended that evidence of the prosecutrix's prior sex-

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tion's evidence, or can use the evidence to prove the prosecutrix's consent. However, when the legislature uses comparable language, CAL. EVID. CODE § 1102(b), the words are interpreted to allow the rebutting party to use the evidence to prove the conduct of the witness.7 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES § 1102 (1965). When the evidence shows prior sexual conduct with the defendant, it is admissible to prove consent. CAL. EVID. CODE § 1103(2)(b) (West Supp. 1976).

[61] CAL. EVID. CODE § 782 (West Supp. 1976):

> (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 such 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.
>
> (b) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this section.

ual conduct is not relevant to prove her consent.[62] Evidence is relevant when it renders the desired inference more probable than it would be without the evidence.[63] When a person engages in a certain kind of behavior once, she is more likely to behave in that way again than is one who has never chosen to engage in that type of conduct.[64] Thus, even if a woman has engaged in consensual sexual intercourse only in certain circumstances,[65] the fact that she consents shows her ability to consent and increases the possibility that she may consent again, even in different circumstances. Her prior consent to sexual intercourse makes the inference that she consented to intercourse at a certain time thereafter more probable than if she had never consented before.[66]

Although the new law restricts the admissibility of evidence of the prosecutrix's prior sexual conduct, the legislature did not deny the relevancy of such evidence for establishing the prosecutrix's consent.[67] Indeed, the Committee that proposed the statutory revision[68] and the Legislative Counsel's analysis of the bill[69] assumed the evidence is relevant. The legislature also indicated that it thought the evidence still relevant by providing the exceptions to the general rule

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[62] Many do contend the evidence is of low probative value, and then confuse their conclusion by saying that the evidence is not relevant. As an example, one court recently stated:

> The relevance of past sexual conduct of the alleged victim of the rape with persons other than the defendant to the issue of her consent to a particular act of sexual intercourse with the defendant is slight at best.

People v. Blackburn, 16 Cal. App. 3d 685, 690, 128 Cal. Rptr. 864 (2d Dist. 1976). *See also Findings and Recommendations, supra* note 10, Finding and Recommendation Number 10. Few, however, would contend that people are not likely to engage in conduct again once they have done so in the past; in fact, that inference is the basis for most predictions of other people's actions in daily life.

[63] McCORMICK (2d ed.), *supra* note 27, § 185, at 435, 437. *See also* CAL. EVID. CODE § 210 (West 1968).

[64] *See generally Denial of Due Process, supra* note 30, at 415. *See also* text accompanying notes 28-32, *supra.*

[65] *See generally Denial of Due Process, supra* note 30, at 414.

[66] This argument does not deny that a woman may rebut the inference that she is more likely to consent again because she has consented in the past. For instance, the woman can show that she has engaged in consensual intercourse only in long-term romantic relationships to show that she is not likely to consent to intercourse with a casual acquaintance. Similarly, if the woman found her sexual experience to be unpleasant, she might be less likely to consent again than a woman who has never consented before and therefore has neither found sex pleasurable nor distasteful.

[67] *See* notes 28-32, *supra*, and accompanying text.

[68] *Findings and Recommendations, supra* note 12, Finding and Recommendation Number 10. The Committee expressly stated that the court should permit the jury to consider the evidence "if relevant . . . on the issue of whether the victim consented to the alleged rape."

[69] Letter "Evidence - 8747" from Ben E. Dale, Deputy Legislative Counsel, Legislative Counsel of California, to Alan Robbins, Senator, May 7, 1974; copy on file with the author.

of exclusion.[70] Thus the limitation on the use of such evidence apparently rests entirely on the prejudicial impact the evidence has on the prosecutrix.

The limitations on the admissibility of such relevant evidence, however, raise serious due process problems. Even though the defendant may be able to use the evidence to impeach the prosecutrix's testimony, excluding the evidence for substantive purposes denies the defendant use of the evidence on a material issue in the case. A defendant in such circumstances may contend that the statutory restriction impairs his ability to meet the state's charges and therefore violates his due process rights.[71]

IV. DUE PROCESS CHALLENGE TO THE NEW LAW

A due process challenge to the exclusion of evidence of the prosecutrix's prior sexual conduct proffered to prove the prosecutrix's consent arises because the new law may deny the defendant a fair opportunity to defend himself.[72] A defendant's right to a "fair opportunity to defend himself" has been interpreted to include the right to confront and cross-examine witnesses, and to offer evidence in his defense.[73] The defendant has a right to introduce evidence so the

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[70]The legislature shows it has not overruled the judicial determination that the evidence is relevant because the statute allows the defendant to rebut prosecution evidence of the prosecutrix's prior sexual conduct. The rule is similar to the rule of evidence that limits the prosecution's ability to introduce evidence of the defendant's character. CAL. EVID. CODE § 1102 (West 1968). That rule generally excludes such evidence not because the evidence is irrelevant but because it is unduly prejudicial. 7 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES § 1102 (1965). If the defendant assumes the risk of the possible prejudice by introducing the evidence first, the prosecution can introduce evidence on its own behalf to rebut the defendant's proof. Similarly, if the rape prosecutrix assumes the risk by letting the state introduce evidence of her prior sexual conduct, the defendant can introduce rebuttal evidence, and use the evidence to prove the prosecutrix's consent. If the evidence was not relevant to prove consent, it would not become relevant merely because one party introduced the evidence first.

[71]For a general statement of a defendant's due process rights, *see* note 15, *supra*.

[72]Chambers v. Mississippi, 410 U.S. 284, 294 (1973); Pointer v. Texas, 380 U.S. 400, 404 (1965).

[73]These rights are included in U.S. CONST. Amend. VI, which reads:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .

The rights are guaranteed to the criminal defendant in a state proceeding because the Supreme Court has found them essential to a fair trial. Pointer v. Texas, 380 U.S. 400 (1965) (right to cross-examine witnesses); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process for witnesses). The Court in *In re* Oliver, 333 U.S. 257, 273 (1947) said:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer

factfinders can accurately decide whether the prosecution has proven its case,[74] and to impeach those witnesses who have testified against him so that the factfinders can evaluate their truthfulness.[75]

The defendant's rights to cross-examine witnesses and present relevant evidence in his defense, however, are not absolute. A state may enact rules of evidence that restrict the admissibility of relevant evidence.[76] The constitutionality of such rules of exclusion[77] are measured by the due process balancing test set forth in a number of recent United States Supreme Court cases.[78] Under this test the court first identifies the interests affected by the rule of exclusion, and then compares the relative specificity[79] of each interest. The de-

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> testimony, and to be represented by counsel.

See also People v. Kilhoa, 53 Cal. 2d 748, 349 P.2d 673, 3 Cal. Rptr. 1 (1960) (California's Constitution held to guarantee the same rights).

[74]The Court explained the state's interest in giving the jury all information in United States v. Nixon, 418 U.S. 683, 709 (1974):

> The need to develop all relevant facts in an adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of facts. The very integrity of the system depend on full disclosure of all facts, within the framework of the rules of evidence.

[75]Chambers v. Mississippi, 410 U.S. 284, 295 (1973); Pointer v. Texas, 380 U.S. 400, 404 (1965). The Court in The Ottawa, 70 U.S. (3 Wall.) 268, 271 (1865), explained the importance of the right of cross-examination:

> Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and as a means of ascertaining the order of events as narrated by the witness in the examination in chief, and the time and place and when and where they occurred, and the attending circumstances, and of testing the intelligence, memory, impartiality, truthfulness, and integrity of the witness.

Since the defendant may use cross-examination to elicit additional facts about the incident, as well as test the prosecutrix's truthfulness, the right of cross-examination is not limited to a right to impeach the witness, notwithstanding dicta to the contrary in People v. Blackburn, 16 Cal. App. 3d 685, 128 Cal. Rptr. 864 (2d Dist. 1976).

[76]*See generally* Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

[77]This article will not discuss cases where the defendant has challenged a rule of evidence that allows the prosecution to offer testimony that the defendant says violates his right to confront and cross-examine the witnesses. *See, e.g.*, Nelson v. O'Neil, 402 U.S. 622 (1971); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Bruton v. United States, 391 U.S. 123 (1968). Barber v. Page, 390 U.S. 719 (1968). For a general discussion of the Court's analysis of what constitutes a sufficient opportunity to cross-examine, *see* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. LAW BULL. 99 (1972).

[78]*See generally* United States v. Nixon, 418 U.S. 683 (1974); Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967); Pointer v. Texas, 380 U.S. 400 (1965).

[79]The concepts "general" and "specific" were described in the case of United States v. Nixon, 418 U.S. 683, 713 (1974):

> A President's acknowledged need for confidentiality in the com-

fendant establishes that exclusion of evidence denies him due process if he can show that his need for the evidence is as great or greater than the state's interests in excluding it.

A. THE DUE PROCESS BALANCING TEST

1. IDENTIFYING THE INTERESTS

The first step in the court's due process balancing test is to identify the conflicting interests. The court will consider the reasons for the state's rule of exclusion. The state may have decided that the evidence is unreliable and that its exclusion will promote a fairer trial.[80] Alternatively, the legislature may believe the evidence is reliable and relevant, but exclude it to promote an overriding extrinsic social policy.[81] The court will also identify the defendant's interests. The court assumes that the defendant is interested in avoiding conviction[82] by establishing any defense, using all relevant evidence to rebut the prosecution's case, and impeaching the state's witnesses.[83]

> munications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

In a case challenging the exclusion of evidence, the specificity of each party's interest is measured by the extent to which the interest asserted will be furthered or impaired by the rule of exclusion. If the defendant can show that he needs a particular item of evidence, his interest is specific. Similarly, if the state can show that admitting the evidence will directly threaten a person its extrinsic policy is designed to protect, its interest is specific. If, however, the defendant wants to use the evidence because it is relevant and may aid in his defense, his interest is more general. Similarly, if the state can merely show that the witness is in the general class of persons it intends to protect but cannot show that the witness will in fact be harmed if the evidence is admitted, its interest is general.

[80] In Washington v. Texas, 388 U.S. 14 (1967), a statute prevented the defendant's use of testimony of an alleged co-conspirator because the state decided codefendants generally had reasons to lie in the defendant's behalf and the testimony was not trustworthy. In Chambers v. Mississippi, 410 U.S. 284 (1973), the rule of evidence excluded hearsay that was a declaration against penal interest; the state had apparently determined that such statements were often motivated by extraneous considerations and were therefore unreliable.

[81] In Davis v. Alaska, 415 U.S. 308 (1974), a statute prevented the use of evidence of a juvenile witness's criminal record against him; the state argued that revealing information about the witness's record would impair the rehabilitation of young offenders. Similarly, other states, including California, have determined that disclosing facts about informers may inhibit citizens from reporting crimes. CAL. EVID. CODE § 1041 (West 1968); *see generally*, ANNOT., 76 A.L.R. 2d 291 (1961).

[82] *See generally* Chambers v. Mississippi, 410 U.S. 284, 297, 300-02 (1973).

[83] *See generally* Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973); Smith v. Illinois, 390 U.S. 129 (1968).

2. STRIKING THE BALANCE

Having determined the interests of the state and the defendant, the court will balance the state's interest in excluding the evidence against the defendant's need for the evidence. If the defendant's need outweighs the state's interest, exclusion of the evidence violates the defendant's due process rights.[84] The state's interest may fail to justify the exclusion in one of two different ways. First, the state's interest that the rule of evidence is to promote may not apply to the particular evidence the defendant wants admitted. Second, the defendant's need for the particular evidence excluded may outweigh the state's interest because the defendant's interest is as specific[85] or more specific than the state's interest.

The case of *Chambers v. Mississippi*[86] demonstrates a court's use of the first method of analysis to determine whether exclusion of the proffered evidence will promote the state's interest. In *Chambers*, another person had confessed to the crime for which Chambers was charged. The trial court prevented Chambers from using the testimony of witnesses who heard the out-of-court confession, by applying a rule of evidence that excluded hearsay declarations against penal interest. The Court first identified the state's reason for excluding the evidence and concluded that the evidence was excluded under the general hearsay rationale as unreliable evidence.[87] However, the Court found that in this particular case the excluded statements were spontaneous, corroborated and self-incriminatory, and therefore reliable.[88] Because excluding the proffered evidence did not further the state's interest and Chambers needed the highly exculpatory evidence to prove his case,[89] the Court found that he

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[84] *E.g.*, Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973); Smith v. Illinois, 390 U.S. 129 (1968).

[85] For a general discussion of the concepts "general" and "specific" *see* note 79, *supra*.

[86] Chambers v. Mississippi, 410 U.S. 284 (1973).

[87] The Court discussed the general theory behind the hearsay rule and the declaration-against-penal-interest hearsay exception, apparently presuming that Mississippi had followed the general theory in excluding declarations against penal interest because it thought them unreliable. *Id.* at 299-300.

[88] In addition, the hearsay declarant was present in court; the prosecution could have cross-examined him to test the truthfulness of the testimony of the witnesses who would have testified about the hearsay declarations. *Id.* at 301.

[89] The defendant had offered the evidence for substantive purposes. He had been able to introduce other evidence about the out-of-court confession. When a rule of evidence excludes only certain kinds of evidence, the defendant, as in *Chambers*, will normally have other evidence available to prove the fact at issue. His right to offer testimony in his defense is not therefore completely denied. If no other evidence is available, a court may find the rule operates to totally deny the defendant's right to offer testimony in his behalf. The Court has held that a total denial of the right to defend oneself does violate the due process clause. *In re* Oliver, 333 U.S. 257 (1947).

[90] The Court did not hold that exclusion of the hearsay evidence alone would

was entitled to use it.[90]

Even when excluding the particular evidence does promote the state's interest, the rule of exclusion may still violate the defendant's due process rights if the defendant's interest in admitting the evidence is more specific than the state's interest in excluding it. This second tier of the due process balancing test is illustrated by *Davis v. Alaska.*[91] In *Davis*, the Court balanced the relative specificity of the parties' interests to determine whether excluding the evidence was constitutional. At his trial, the defendant Davis sought to ask a key prosecution witness about his juvenile criminal record to show that the witness was on probation and therefore had a motive to lie.[92] The trial court refused to allow the questioning because a state statute prohibited use of a criminal record to impeach a juvenile witness. The statute prevented public exposure of criminal records to promote the rehabilitation of juveniles. The Court recognized that the state's extrinsic policy was applicable to the facts in the case,[93] but decided that the defendant's need for the evidence outweighed the state's interest. The Court noted that the defendant had a particular need for the evidence; he did not merely want to probe generally into the witness's background.[94] He had shown the evidence was

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have been sufficient to violate the defendant's due process rights. It held that the joint effect of the hearsay rule and a rule forbidding the impeachment of a party's own witness (Chambers had called the declarant who had denied confessing) deprived the defendant of his due process rights. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The defendant could not impeach the person who confessed to the crime because of the rule forbidding impeachment of his own witnesses. As a result he could not cross-examine the declarant or introduce extrinsic evidence to prove the declarant had committed the crime. When the hearsay rule forbade use of the testimony of those who had heard the declarant's statements for substantive purposes, he could not use the testimony at all. The Court did not, therefore, need to address the issue of whether one exclusion alone would have violated the defendant's due process rights.

[91] 415 U.S. 308 (1974). *See also* Smith v. Illinois, 390 U.S. 129 (1968) (lower court had forbade defendant's cross-examination of key prosecution witness—an informer—to determine witness's correct name and address; held, violation of due process to restrict cross-examination when it might have opened countless avenues for impeachment).

[92] The defendant had been able to ask the witness about his contacts with the police. He had also asked the witness whether he had any reason to identify someone else as the participant to protect himself. But, the defendant had not been able to introduce evidence that showed the witness had a reason to identify someone else. The Court noted that to make the inquiry into the witness's motives effective, the defendant should have been able to introduce evidence that showed the reasons why the witness had a motive to lie. *Id.* at 318.

[93] The rehabilitation of the prosecution witness might be harmed if the defendant could on cross-examination force the juvenile to make his criminal record public. The Court did not question the validity of the state's interest as applied to the prosecution witness. 415 U.S. at 318.

[94] *Id.* at 319. The defendant's need was particularly strong because the witness had made statements at trial about his past conduct that suggested he had no criminal record; without cross-examination, the Court feared, witnesses might feel free to perjure themselves.

relevant to prove the witness had a reason to lie and that use of the evidence was the only way to make his inquiry into the witness's bias effective.[95] Against the defendant's specific need, the Court balanced the state's interest in rehabilitating juveniles in general.[96] The Court concluded:

> [T]he state's desire that [the prosecution witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of the petitioner to seek out the truth in the process of defending himself.[97]

Since the defendant's specific need outweighed the state's general interest, exclusion of the evidence violated the defendant's due process rights.[98]

B. THE DUE PROCESS BALANCING TEST AS APPLIED TO THE NEW LAW

Using the doctrines established by the recent Supreme Court decisions, a defendant charged with rape could challenge the new exclusionary rule on the ground that his need for the relevant evidence

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[95] *See* note 92, *supra.*

[96] The state had not shown the juvenile in fact needed its protection.

[97] Davis v. Alaska, 415 U.S. 308, 320 (1974).

[98] Even if the defendant cannot show a specific need for the evidence his interest may outweigh the state's general interest in promoting an extrinsic policy. If his need is as general or as specific as the state's interest, exclusion of the evidence will probably violate his due process rights. This conclusion is suggested in California Supreme Court cases that analyze the informer's privilege, found in CAL. EVID. CODE § 1041 (West 1968). *See generally* People v. Garcia, 67 Cal. 2d 830, 434 P.2d 366, 64 Cal. Rptr. 110 (1967); People v. Perez, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965); People v. Williams, 51 Cal. 2d 355, 333 P.2d 19 (1958).

Under the informer's privilege, the state can refuse to disclose the identity of an informer or prevent an informer from having to disclose information on the stand. The state's use of the privilege promotes a general interest in encouraging citizens to report crimes. People v. McShann, 50 Cal. 2d 802, 806, 330 P.2d 33, 35 (1958). The state's invocation of the privilege also limits the defendant's opportunities to present relevant evidence in his defense. The defendant cannot discover and attack the bases of the informer's knowledge to rebut the witness or the informer. In addition, he cannot call the informer in his behalf. *Id.* at 810, 330 P.2d at 37-38; Roviaro v. United States, 353 U.S. 53, 64 (1956).

The California Supreme Court has suggested that nondisclosure of the identity of an informer who is a material witness may violate the defendant's due process rights. People v. Garcia, 67 Cal. 2d 830, 842, 434 P.2d 366, 374, 64 Cal. Rptr. 110, 118 (1967). All the defendant need show is that the informer may be a material witness. Thus, even if the defendant cannot show a specific need for the evidence, his general need for all relevant evidence that may be helpful to his defense outweighs an equally general state interest in encouraging citizens to report crimes. If, however, the state can show that its interest will in fact be promoted if the evidence is excluded, and that its interest is therefore more specific than the defendant's interest in introducing all relevant evidence, the state's interest may prevail. People v. Patejdl, 35 Cal. App. 3d 936, 943, 111 Cal. Rptr. 191, 194 (5th Dist. 1973) (informer's testimony was not damaging to the defendant's case, and informer was threatened with actual harm; held, proper to exclude information about the informer's address).

outweighs the state's interests in excluding it. That the statute permits the use of evidence of the prosecutrix's prior sexual conduct for impeachment[99] is irrelevant to the defendant's due process challenge to the statutory bar to substantive use of the evidence. The defendant should be able to show that his need for the evidence to prove the prosecutrix's consent is different from his need for the evidence to attack the prosecutrix's credibility, and therefore that his need for the evidence for substantive purposes is not met when the evidence is admitted for impeachment.[100]

The thesis of this article is that when evidence of the prosecutrix's prior sexual conduct is highly probative to show her consent, a court should find that exclusion of the evidence violates the defendant's due process rights. Even if the evidence is not highly probative, the defendant may have a special need for the evidence that outweighs the state's interest if no other equally probative evidence is available and the case is a close one.

1. IDENTIFYING THE INTERESTS

A court reviewing a rape defendant's due process challenge must first divine the legislative purposes that the new law was intended to promote. In reviewing the legislative history,[101] the court is likely to find that the new statute represents two state interests.[102] First, the rule of exclusion may represent a legislative determination that use of the evidence in a rape trial is unfair to the prosecutrix and may unduly prejudice the prosecution's case. The rule is designed to prevent the jury from inferring that a prosecutrix who once consented to intercourse consented to intercourse with the alleged rapist.[103]

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[99] Evidence of the prosecutrix's prior sexual conduct may be admissible to impeach the prosecutrix, under CAL. EVID. CODE § 782 (West Supp. 1976), set forth in note 61, *supra*. For a discussion of the permissible bases for impeachment, *see* note 35, *supra*.

[100] Although the evidence may not strongly suggest the prosecutrix has been untruthful in a specific part of her testimony, it may strongly suggest that she is likely to consent in circumstances similar to the alleged rape. In addition, if the defendant is convicted even though the evidence is admitted for impeachment, an appellate court is unlikely to find that the jury considered the evidence substantively when it found the prosecutrix did not consent to the alleged rape. The court will not assume the jury disregarded instructions limiting the jury's use of the evidence. *See generally* People v. Odom, 71 Cal. 2d 709, 716, 456 P.2d 145, 149, 78 Cal. Rptr. 873, 877 (1969); People v. Burton, 55 Cal. 2d 328, 347-49, 359 P.2d 433, 441-42, 11 Cal. Rptr. 65, 73-74 (1961).

[101] *Findings and Recommendations, supra* note 12, Numbers 10 and 11.

[102] The statements in this report may not represent the full legislative intent at the time of enactment; the report was written before the bill was amended. In addition, the Committee does not contain all members of the Legislature. Nevertheless, the statements suggest the factors the Legislature considered when it passed the new law.

[103] *Findings and Recommendations, supra* note 12, Recommendation Number 10.

Since the legislature did not deny the relevance of the evidence,[104] it probably decided to exclude the evidence because it concluded that the probative value of the evidence when used to prove consent is always outweighed by its prejudicial effects.[105] Second, the legislature may have enacted the new law to increase the reporting of rapes.[106] Commentators had suggested that victims were reluctant to report rapes because they feared extensive questioning about their sexual histories.[107] In restricting use of the evidence of the prosecutrix's prior sexual conduct, the legislature may have intended to reduce the victims' fears and thereby increase the reporting of rapes.

A court reviewing the statute must also determine the defendant's countervailing interests in the admission of the evidence. Any exclusion of evidence of the prosecutrix's prior sexual conduct to promote the state's interests will limit the defendant's general interest in using all relevant evidence in his defense, but all defendants will not be harmed equally. The harm a particular defendant will suffer will depend upon the facts of his case. First, the extent of the harm suffered will vary depending on the probative value of the evidence on the issue of consent. The evidence is not highly probative when it merely shows that the prosecutrix had consented to intercourse prior to the alleged rape, but does not strongly suggest that she would be likely to consent in circumstances similar to the alleged rape.[108] Excluding the minimally probative evidence does not seriously harm the defendant's case because it may be insufficient to raise a reasonable doubt as to his guilt. When, however, the evidence strongly suggests that the prosecutrix would consent in circumstances similar to the

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[104] *See* notes 62-66, *supra*, and accompanying text.

[105] Generally, all relevant evidence is admissible. CAL. EVID. CODE § 350 (West 1968). Exceptions are made to this general rule when the legislature concludes that the evidence should not be admitted because of public policy or because the evidence is too unreliable. 7 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES § 351 (1965). *See generally* 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 11 (3d ed. 1940). The legislature may have based its determination to exclude the evidence of the prosecutrix's prior sexual conduct on one of two different premises. One premise is that evidence of the prosecutrix's prior sexual conduct is always of low probative value to show her consent. Then, the possible prejudicial effects will always outweigh its low probative value. The second premise is that even though the evidence may be highly probative to show the prosecutrix's consent, it is so prejudicial that the prejudicial effects will always outweigh its probative value.

[106] *Findings and Recommendations, supra* note 12, Finding Number 11.

[107] *See* note 10, *supra*, and accompanying text.

[108] For example, the defendant may offer evidence that shows the prosecutrix has consented to intercourse with men with whom she had long-term relationships. If the defendant had not had such a relationship with the prosecutrix prior to the alleged rape, his only use of the evidence will be to create a general inference that any woman who consents to intercourse once is likely to consent again. The evidence does not strongly suggest the prosecutrix's disposition to consent to intercourse with a casual acquaintance.

alleged rape,[109] excluding the evidence may prevent an effective showing that the prosecutrix consented to the alleged rape.[110]

Second, the defendant's need for the evidence will depend on what other evidence is available to prove the prosecutrix's consent. Since the crime of rape usually occurs in isolation, the defendant may not be able to find other evidence.[111] Even if he can find other evidence, that evidence may be much less probative than evidence of the prosecutrix's prior sexual conduct.[112] If other evidence is unavailable or not as probative, exclusion of the evidence of the prosecutrix's prior sexual conduct may seriously impair the defendant's ability to rebut the prosecution's case.

Third, the effect of the exclusion will differ depending on the closeness of the case on the issue of consent. For example, when the defendant can show the prosecutrix was not physically injured during the alleged rape and the prosecutrix cannot identify an instrument that was used to create fear in the prosecutrix, the case will be close on the issue of consent. If the defendant can use evidence of the prosecutrix's prior sexual conduct to show her general disposition to consent to intercourse, he may be able to show the prosecutrix consented to the alleged rape. If the defendant cannot use the evidence, the jury must rely on the uncorroborated statements of the defendant and the prosecutrix[113] and the case may become a battle of credibility.[114]

2. *STRIKING THE BALANCE*

To determine whether the defendant's need for the evidence outweighs the state's interest in excluding it, a court should measure the

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[109] For example, the defendant may offer evidence that the prosecutrix has consented to intercourse with casual acquaintances she has met at tennis courts, when she took each home after the match. If the defendant met the prosecutrix at the tennis courts, was invited to her house, and then was charged with rape, he can use the evidence to show the prosecutrix was likely to consent to intercourse in circumstances similar to those in which she consented in the past.

[110] It is arguable that the defendant's need for the evidence is greater when he can show the evidence is relevant to proving his case, and does not merely raise a reasonable doubt about the prosecution's proof.

[111] *See* notes 23 and 37, *supra*, and accompanying text.

[112] For example, the defendant may know of a person who was present near the alleged rape but heard no noise because his stereo was playing. If the evidence of the prosecutrix's prior sexual conduct shows the prosecutrix would consent in circumstances similar to the alleged rape, the evidence will be more probative than the testimony of the person who was present near the alleged rape.

[113] *See generally* Note, *The Corroboration Requirement*, 81 YALE L. J. 1365 (1972).

[114] In such a case, the defendant must rely on the sympathies of the jury and the attractiveness of his personality, rather than the merits of the case, to raise a reasonable doubt about the prosecution's case. In addition, he must try to destory the credibility of the prosecutrix by extensive cross-examination into her

impact of the new law on the defendant's ability to defend himself in the circumstances of the particular case. The defendant's need for the evidence will primarily depend on the probative value of the evidence excluded. If the proffered evidence is highly probative, excluding it is likely to violate the defendant's due process rights under the due process test suggested by the Supreme Court.[115] If the proffered evidence is of low probative value, exclusion of the evidence may be constitutional. In that situation, the state's valid interest will usually outweigh the defendant's general need for the evidence. If, however, the defendant cannot find equally probative evidence and the case is a close one, the defendant may be able to convince the court that his need for the evidence outweighs the state's interests in excluding it.

a. When the Evidence is of High Probative Value

A court should find a due process violation when the new law operates to exclude evidence of the prosecutrix's prior sexual conduct that strongly suggests the prosecutrix's consent to the alleged rape. Suppose the prosecutrix charges that the defendant raped her after she took him home from a bar. The defendant offers evidence showing that during the month prior to the alleged rape, the prosecutrix had met several men at bars, had taken each of them home, and had consented to sexual intercourse with each.[116] Such evidence shows the prosecutrix's disposition to consent to intercourse in circumstances similar to those surrounding the alleged rape.[117] Thus, the evidence is highly probative to show that the prosecutrix consented to intercourse with the defendant after she took him home from the bar. In such a case, excluding the evidence will seriously impair the defendant's ability to defend himself, and will not support a correspondingly important state interest.

Excluding the evidence will have two effects on the defendant's ability to defend himself. First, the defendant will be unable to use the evidence to prove the prosecutrix's consent.[118] He will not be able to cross-examine the prosecutrix or introduce witnesses in his behalf to show the prosecutrix's disposition to consent to inter-

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direct testimony and reputation for honesty or veracity. As a result, the prosecutrix, and not the defendant, may be placed on trial. *See generally Hearings, supra* note 7, at 8.

[115] *See* text accompanying notes 80-98, *supra*.

[116] The probative value will vary, however, depending on the frequency of the prosecutrix's activities and the similarity in details between the incidents. *E.g.*, if the prosecutrix has consented to intercourse with many men in the week prior to the alleged rape, the evidence will be more probative than if she has consented to intercourse with a few men in the month preceding the rape.

[117] *See generally Denial of Due Process, supra* note 30, at 415.

[118] The new law expressly forbids the defendant's use of the evidence to prove the prosecutrix's consent. CAL. EVID. CODE § 1103(2)(a).

course.[119] Second, the defendant will be unable to cross-examine the prosecutrix about her prior conduct to elicit information that might impeach the prosecutrix by showing a motive or bias for charging him with rape.[120] Thus, as a result of the exclusion of the highly probative evidence, the defendant will be unable to develop a line of reasoning that strongly suggests the prosecutrix's consent and to inquire into the prosecutrix's reasons for charging the defendant with rape. Thus, the defendant can show a specific need for the evidence to defend himself against her rape charge.

Against the defendant's need for the evidence, the court should balance the state's interests in excluding evidence that is more prejudicial than probative,[121] and its interest in increasing the reporting of rapes.[122] The court should use the *Chambers v. Mississippi* method of analysis[123] to determine whether exclusion of the evidence of the prosecutrix's prior sexual conduct will further the state's interests. It should find that excluding highly probative evidence will not further the state's interest in excluding evidence that is more prejudicial than probative.[124] A prosecutrix who is cross-examined about her prior sexual conduct will give the jury information about a material[125] fact: the prosecutrix's consent. The defense attorney will

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[119] As a result, the defendant cannot elicit facts surrounding the alleged rape that have not been disclosed previously. *See generally* 5 WIGMORE, *supra* note 41, § 1368 at 37. Since the defendant cannot introduce evidence in his defense or cross-examine witnesses, the defendant can show that the new law affects rights protected by the due process clause, notwithstanding dicta to the contrary in People v. Blackburn, 52 Cal. App. 3d 685, 128 Cal. Rptr. 864 (2d Dist. 1976). *See generally* notes 73-75, *supra*, and accompanying text.

[120] For a general discussion of the use of cross-examination to impeach a witness, *see* 5 WIGMORE, *supra* note 41, § 1368 at 37. If the defendant cannot elicit information about the prosecutrix's prior sexual conduct that provides a basis for attacking her credibility, he may be unable to take advantage of the provisions in the new law that let him use the evidence for impeachment. CAL. EVID. CODE § 782 (West Supp. 1976), set forth in note 61, *supra*. If the defendant cannot inquire into her sexual history, he may be unable to determine whether he has any grounds for requesting the in camera hearing allowed by statute.

[121] *Findings and Recommendations, supra* note 12, Recommendation Number 10.

[122] *Id.* at Finding Number 11.

[123] 410 U.S. 284 (1973), discussed in notes 86-90, *supra*, and accompanying text.

[124] *Findings and Recommendations, supra* note 12, Recommendation Number 10. The exact reason for assuming that evidence of the prosecutrix's prior sexual conduct is more prejudicial than probative is not clear from the legislative history. The legislature may have concluded that the evidence is never very probative, or that the prejudicial effects of the evidence are so probable and so serious that they will always outweigh the probative value of the evidence. If the legislature reached the latter conclusion, the balancing test provided by CAL. EVID. CODE § 352 (West 1968) and used in the discussion in the text following this note may not be applicable to the proffered evidence. In addition, excluding the evidence will probably serve the legislative purposes; if so, the court should balance the importance of the conflicting interests under the *Davis v. Alaska* approach discussed in text accompanying notes 137-141, *infra*.

[125] Materiality "looks to the relation between the propositions for which the evi-

not be using the cross-examination simply to sidetrack or inflame the jury,[126] but rather because the information he seeks is highly probative on the issue of consent.

A jury can use the highly probative evidence to infer that the prosecutrix consented in the instant case because she had consented in similar circumstances. Such an inference of consent made on the basis of the similar circumstances is more likely to be factually correct than an inference of consent based on the prosecutrix's non-virginity.[127] Although the jury may analyze the prosecutrix's prior sexual conduct, it may properly do so because the evidence is highly material. If the jury uses the evidence to find the prosecutrix's consent, it is probably not acting on its emotional biases, condemning the prosecutrix because she is promiscuous; it will be acting because the particular nature of the prosecutrix's prior conduct supports its findings. Further, in these days of increasing social tolerance of extramarital and premarital sex, the evidence may be unlikely to "unduly arouse the jury's emotions, hostility or sympathy."[128]

Thus, when evidence of the prosecutrix's prior sexual conduct is highly probative, admission of the evidence is helpful to the defense for proper reasons and not for its prejudicial effects. Exclusion of this evidence will not further the state's interest in excluding the evidence because it is more prejudicial than probative. Moreover, the exclusion will impair the defendant's ability to prove his case.[129] Applying the *Chambers* analysis,[130] the defendant should be able to use the highly probative evidence of the prosecutrix's prior sexual conduct in his defense.

The state may, however, still seek to justify the exclusion on the

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dence is offered and the issues in the case." McCORMICK (2d ed.), *supra* note 27, § 185, at 434.

[126]CAL. EVID. CODE § 352 (West 1968) says that one danger in certain types of evidence is that it may be unduly prejudicial. Undue prejudice may be described as "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." McCORMICK (2d ed.), *supra* note 27, § 185, at 439, n. 31.

[127]To protect against the jury's finding the prosecutrix consented merely because she was not a virgin at the time of the alleged rape, the court can instruct the jury to look to the circumstances surrounding the prosecutrix's consent. It can caution the jury against finding consent merely because the prosecutrix was not a virgin.

[128]*Id.* at 439. Because the crime of rape is a sex crime, any fact that may show the prosecutrix's sexual conduct may arouse the jury's emotions. Thus, questioning the prosecutrix about her sex life may be prejudicial, but may be necessary and due because the crime is a sex crime.

[129]The defendant is offering the evidence to rebut the prosecution's proof and show affirmatively that the prosecutrix consented to the alleged rape. He is not merely trying to attack the truthfulness of a prosecution witness, but attempting to establish an affirmative defense. In addition, the evidence shows the likely conduct of his victim. *See generally* text accompanying note 139, *infra.*

[130]*See* text accompanying notes 86-90, *supra.*

alternative ground that it has a general interest in promoting increased reporting of rapes.[131] Exclusion of evidence of the prosecutrix's prior sexual conduct that strongly suggests the prosecutrix's consent, however, may not promote the state's interest in reducing victims' fears and thereby increasing the reporting of rapes. The precise reason for assuming that excluding evidence of prior sexual conduct will increase the reporting of rapes is not clear from the legislative history. The legislature may have intended the new law to dispel all fears that rape victims may have about disclosure of their sexual histories. Instead, the new law may be intended to dispel only the fears that the defense might probe unnecessarily into their past conduct.[132]

If the legislature intended to end all fears about disclosure, any use of the evidence will thwart the state's objective. The exclusion statute is on its face ill-suited to serve this objective since it endorses the use of such evidence for impeachment of the prosecutrix.[133] If, however, the legislature merely intended to end the fears of unreasonable disclosure, such a rationale would not apply to evidence of the prosecutrix's prior sexual conduct when it is highly probative. The defendant would be using the evidence because it strongly suggests the prosecutrix's consent,[134] not because it may embarrass the prosecutrix.[135] In such a case, disclosure of the prosecutrix's sexual history is by very definition not unreasonable. Under the ruling of *Chambers v. Mississippi*,[136] the court should find that admission of such evidence is re-

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[131] *Findings and Recommendations, supra* note 12, Finding Number 11.

[132] *Id.* The Finding states:

> 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.

The Recommendation provides that once the defendant shows the evidence is relevant, it may be admitted.

[133] *See* CAL. EVID. CODE § 782 (West Supp. 1976). Thus a rape victim may still fear that her sexual history will be disclosed on cross-examination.

[134] *See* text accompanying notes 116-17, *supra*.

[135] A defense attorney who questions the prosecutrix about her prior sexual conduct will give the jury information about a material fact. As a result, he is not merely using the evidence to embarrass the prosecutrix or force her to defend her choice of sexual partners. In addition, if the court admits only highly probative evidence, most rape victims will not need to fear that their sexual histories will be disclosed. The only victims that will need to fear are those who have consented to intercourse in circumstances similar to the alleged rape. Because the crime of rape is a sex crime, any fact that may show the prosecutrix's disposition to act in a relevant way will show the prosecutrix's sexual conduct. Questioning the prosecutrix about her sex life may be embarrassing, but may be necesary because the crime is a sex crime.

[136] 410 U.S. 284 (1973). *See* text accompanying notes 86-90, *supra*.

quired under due process.

Even if it can be shown that either or both of these state interests are promoted, such general state interests may still not support the exclusion of highly probative evidence. Using the method of analysis employed in *Davis v. Alaska*,[137] the court should weigh the defendant's specific need for the evidence against the state's general policies. For example, in the above hypothetical, the evidence of the prosecutrix's prior sexual history strongly establishes a particular pattern of conduct that leads directly to an inference of consent on the occasion at issue.[138] As in *Davis*,[139] the defendant can show a specific need for the highly probative evidence to develop a material issue in his defense. The facts about the prosecutrix's pattern of conduct strongly suggest that because the prosecutrix has had consensual sexual intercourse with men she met at bars and took home, she would be likely to have consented to intercourse with the defendant after she took him home. The inference he wishes the factfinders to draw arises because of the particular type of conduct of the woman who has charged him with rape.

Weighed against this specific need for the evidence is the state's general policy of excluding the evidence to protect rape prosecutrices from embarrassment and fears, and thereby increase the reporting of rapes. By its very nature, the exclusion is designed to protect all rape prosecutrices, not any prosecutrix in particular.[140] To paraphrase the conclusion in *Davis*,[141] the state's general interest in protecting all rape victims from potential embarrassment and harm

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[137] 415 U.S. 308 (1974), discussed in text accompanying notes 91-98, *supra*.

[138] The defendant is not merely trying to create a general inference that once a woman consents to intercourse she is likely to consent again. Instead, he is trying to show the particular nature of the prosecutrix's consensual intercourse, to show her consent in similar circumstances.

[139] 415 U.S. at 319. The defendant Davis had tried to show the key prosecution witness had a motive to lie because he had a criminal record.

[140] All laws are of course designed to protect certain classes of people. The classes are, however, drawn with varying degrees of specificity. Some laws, like the informer's privilege, CAL. EVID. CODE § 1041 (West 1968), are designed to protect very broad classes. The informer's privilege is designed to protect all citizen informers from any potential threats to their lives and thereby increase the reporting of crimes; the class may include people who are not threatened or who do not care whether their identities are disclosed. The new rule of exclusion is designed to protect rape prosecutrices in general. It was enacted after the legislature heard testimony that rape victims had failed to report the crimes because they feared disclosure of their sexual histories. *See Hearings, supra* note 7, at 2. The law, by its terms, however, does not protect only victims who can show they would not have brought the charge if the evidence were to be admitted. In fact, the prosecutrix who has brought a complaint has done so even though her sexual history may be disclosed on cross-examination for impeachment, under CAL. EVID. CODE § 782 (West Supp.1976). In addition, the new law excludes all evidence of the prosecutrix's prior sexual conduct for substantive purposes, whether or not the particular prosecutrix may be embarrassed by its disclosure.

[141] 415 U.S. 308, 320 (1974).

to their reputations must fall before the defendant's specific right to pursue a particular line of inquiry.

In summary, when the proffered evidence of the prosecutrix's prior sexual conduct strongly suggests the prosecutrix's consent to the alleged rape, excluding the evidence is likely to violate the defendant's due process rights. The defendant can show a specific need for the highly probative evidence to prove the prosecutrix's consent. In contrast, the state cannot show that its interest in excluding unduly prejudicial evidence is furthered by excluding the highly probative evidence. Moreover, the state's interest in excluding the evidence to increase the reporting of rapes may not be furthered by excluding the evidence. Even if it is, such a general state interest will be outweighed by the defendant's specific need for the evidence.

b. When the Evidence is of Low Probative Value

When the new law operates to exclude evidence of the prosecutrix's prior sexual conduct that is of low probative value, it should withstand a due process challenge. Exclusion of such evidence will only slightly impair the defendant's interest in introducing all evidence relevant to his defense, and will promote a valid state interest that outweighs the defendant's need for the evidence. For example, when the evidence merely shows that the prosecutrix was not a virgin at the time of the alleged rape, or that she had consented to intercourse with men with whom she has had long-term relationships, such evidence will be of low probative value in proving consent to intercourse with a defendant she had just met. In such a case, the defendant is only using evidence of the prosecutrix's prior sexual conduct to create a general inference that any woman who has consented to intercourse once is like to consent again.[142] Because the evidence is relevant,[143] it may be enough to raise a reasonable doubt in the factfinders' minds concerning the prosecutrix's consent. However, the inference the defendant wants the factfinders to draw is weak. The evidence does not strongly suggest that the prosecutrix consented to intercourse in the circumstances of the rape, since such circumstances are entirely different from those in which she consented in the past. Thus, unless the defendant can show that under the particular facts of his trial he has a special need for the evidence,[144] his case will not be substantially harmed by its exclusion.

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[142] For the derivation of this general inference, *see* text accompanying notes 30-32, *supra*.

[143] *See* text accompanying notes 63-70, *supra*.

[144] The defendant will have a special need for the evidence when the case is a close one on the issue of consent and he cannot find equally probative evidence. *See* note 157, *infra*.

Furthermore, when the new law operates to exclude evidence of the prosecutrix's prior sexual conduct that is of low probative value, the exclusion will usually further the state's interests and will therefore withstand scrutiny under the method of analysis employed in *Chambers v. Mississippi.*[145] First, excluding the evidence will usually further the state's interest in eliminating the rape defendant's use of evidence that is more prejudicial than probative.[146] Since the inference created by the evidence is weak, the defendant will be likely to use the evidence to sidetrack the jury into evaluating the morality of the prosecutrix's prior sexual conduct and acquitting him because his victim was a non-virgin.[147] In addition, extensive questioning about the prosecutrix's prior sexual history when it is of low probative value is likely to be pursued more for its impact on the emotional biases of the jury[148] than for its legitimate benefit to the defendant's case.[149] Second, exclusion of the evidence to prove the prosecutrix's consent may further the state's interest in increasing the reporting of rapes.[150] If the state intended to increase rape reporting by eliminating rape victims' fears of unreasonable disclosure, exclusion of low probative evidence is likely to serve that policy. Disclosure may be unreasonable because the defendant has only a slight need for the evidence and the evidence is likely to be embarrassing to the witness.[151]

Balancing the defendant's slight need for the low probative evidence against the state's valid interests, a court should find in most cases that the state's interest in excluding the evidence is greater than the defendant's need for its admission. The state is interested in protecting rape prosecutrices against the particular prejudices caused by use of evidence of their prior sexual conduct.[152] The defendant's interest is general: he wants to use all relevant evidence in his defense.[153] Thus, the state's interest in excluding the evidence is more

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[145] 410 U.S. 284 (1973), discussed in text accompanying notes 86-90, *supra.*

[146] *Findings and Recommendations, supra* note 12, at Recommendation Number 10. *See generally* note 124, *supra.*

[147] For a general discussion of this criticism, *see* note 11, *supra,* and accompanying text.

[148] For a general discussion of the meaning of undue prejudice, *see* notes 126 and 128, *supra.*

[149] Because the evidence is of low probative value, it is not likely to create a reasonable doubt as to the defendant's guilt in the factfinders' minds.

[150] *Findings and Recommendations, supra* note 12, at Finding Number 11.

[151] The embarrassment to the victim may be the same whether the evidence is of high or low probative value. In either case, the prosecutrix will be forced to discuss her sexual conduct, which may be embarrassing. It is the weight of the defendant's need which varies between the two cases.

[152] Since the law is designed to meet a specific criticism that has been cited as a reason for the rape victim's failure to report the crime, it is more specific than the informer's privilege, discussed in note 140, *supra.*

[153] *See* Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S.

specific than the defendant's need for its admission. Therefore, under the established precedents, absent a defendant's special need for the evidence, the statutory exclusion will probably be upheld against a due process challenge.

When the defendant has a special need for the evidence, however, the due process challenge will be strengthened. For example, if the case against the defendant consists entirely of the prosecutrix's testimony and there is no evidence of violence or of any instrument used to create fear, the case may be very close on the issue of consent. If the defendant has no evidence other than his own testimony, the evidence of the prosecutrix's prior sexual conduct may be the only evidence available to bolster his position.[154] The presentation of evidence of prior sexual conduct in these circumstances presents all of the significant dangers of bias and sidetracking which form the basis for the exclusionary statute.[155] However, the trial court may be able to carefully circumscribe the scope and the tone of the cross-examination, and provide for limiting instructions that are sufficient to protect the prosecutrix.[156] If so, due process may arguably require its admission even when it is of low probative value.[157]

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284 (1973); Smith v. Illinois, 390 U.S. 129 (1968). The defendant's need for the evidence is comparable to that held by defendants in informer's privilege cases. *See* note 98, *supra*. The defendant can show that the evidence is relevant and may therefore aid in his case. The evidence does not, however, show that the prosecutrix is likely to have consented to the alleged rape because of the nature of her prior conduct. Thus, the defendant's interest is not very specific, because the facts he wants to use are not peculiarly applicable to the prosecutrix who charged him with rape.

[154]If the case is not a close one because the prosecutrix has presented a case that strongly suggests the prosecutrix did not consent, the defendant's need for the evidence is not great. Because the prosecution has available evidence that may include eyewitnesses or evidence of physical force or violence, admitting the evidence is not likely to help the defendant's case. In such a situation, admitting the evidence may impair the state's interest without advancing a correspondingly important need of the defendant.

[155]These prejudices and dangers include the potential embarrassment to the prosecutrix, the possibility that the jury will be misled into considering the morality of the prosecutrix's conduct rather than the defendant's guilt, and the likelihood that use of the evidence may deter the reporting of rapes. *See* notes 7-11, *supra*, and accompanying text.

[156]The court can caution the jury against finding consent merely because the prosecutrix was not a virgin. As another procedural safeguard, the court can hold an in camera hearing to receive the evidence and determine its admissibility before the evidence is admitted in court.

[157]The court may find admission of the evidence is compelled by the analysis employed in the informer's privilege, discussed in note 98, *supra*. The defendant can show a somewhat specific need for the evidence, because the circumstances of his case cause him to need the particular evidence that may be excluded. Similarly, the state's interest is somewhat specific: the state is apparently interested in eliminating certain types of prejudice that may arise when the particular evidence it seeks to exclude is admitted. If the court can conclude that the defendant's need for the evidence is as great as the state's interest, exclusion of the evidence may violate the defendant's due process rights.

In summary, when the evidence of the prosecutrix's prior sexual conduct is of low probative value, the court is likely to find that excluding the evidence is proper. Generally, the state's valid interests in excluding the evidence outweigh the defendant's slight need for the evidence. When, however, the defendant cannot find equally probative evidence to prove the prosecutrix's consent and the case is a close one on the issue of consent, the defendant's due process challenge will be strengthened. The court may find that his need for even low probative evidence is as great as the state's interests in excluding the evidence. Excluding the evidence in this latter situation will be unconstitutional.

V. CHANGING THE NEW LAW TO AVOID A DUE PROCESS VIOLATION

California's new statutory rule excluding evidence of the prosecutrix's prior sexual conduct in a rape trial presents serious due process problems when applied to certain defendants. To avoid the possibility that the law may be found unconstitutional or that the courts may construe the law[158] so as to destroy its impact,[159] the legislature should amend the statute. The amendment should permit the defendant to use evidence of the prosecutrix's prior sexual conduct when it is highly probative or especially needed. Instead of imposing a blanket restriction on substantive use of the evidence, the legislature should provide the courts with statutory guidelines on the admissibility of the evidence for any purpose.[160] The legislature can the

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[158]To avoid unconstitutionally excluding the evidence, the court can decide that the new law directs it to exclude the evidence only when the defendant offers it to show the prosecutrix's general disposition to consent. Then, the evidence will be admissible when the defendant offers it to prove some other fact. The court can support this construction by focusing on the new law's location in the Evidence Code section governing evidence of a victim's character to show conduct in conformity with that character. CAL. EVID. CODE § 1103 (West Supp. 1976). This section does not cover the use of evidence to prove another fact; the Code does not generally limit any use of character evidence to prove a fact other than the witness's conduct in conformity with her character. CAL. EVID. CODE § 1101(b) (West 1968). With this construction, the court can admit evidence of the prosecutrix's prior sexual conduct when offered to prove the prosecutrix's pattern of conduct or state of mind. Alternatively, the court can decide that the new law excludes the evidence only when the defendant introduces it to create the general inference that a woman who once consents to intercourse is likely to consent again. *See Findings and Recommendations, supra* note 12, Finding Number 10. If the evidence of the prosecutrix's prior sexual conduct creates a more specific inference about a particular prosecutrix's conduct, the court can admit the evidence because excluding it does not further the legislative purposes.

[159]The law expressly excludes evidence of the prosecutrix's prior sexual conduct for substantive purposes: "Notwithstanding any other provision of [the] code to the contrary . . ." CAL. EVID. CODE § 1103(2)(a) (West Supp. 1976).

[160]The legislature can provide such language as part of CAL. EVID. CODE § 1103 (2) (West Supp. 1976), specifying that use of evidence of the prosecutrix's character is to be limited. Alternatively, the legislature can add to the section

protect the prosecutrix from unnecessary intrusion into her sexual history, while it allows the defendant to use the evidence when he needs it for his defense.

The legislature can pursue one of two general approaches. One possible amendment would provide that ordinarily the evidence will be excluded, and then enumerate factors a trial court must consider before admitting the evidence. The statute can direct the court to examine the peculiar prejudices that arise when evidence of the prosecutrix's prior sexual conduct is admitted in a rape trial: the potential embarrassment to the prosecutrix,[161] the possibility that the jury will be misled into considering the morality of the prosecutrix's conduct rather than the defendant's guilt,[162] and the likelihood that use of the evidence may deter the reporting of rapes.[163] Then, the court will be able to admit the evidence only on the express finding that its probative value outweighs the specific prejudicial effects.[164]

Alternatively, the legislature can incorporate a due process balancing test into the statute and provide that evidence of the prosecutrix's prior sexual conduct will be excluded unless the defendant can show that exclusion of the evidence will violate his due process rights. The statute should state that the evidence will be admissible if the defendant can show that the proffered evidence is highly probative or that he has a special need for the evidence.[165]

In addition to providing general standards for determining when the court should admit the evidence, the legislature can also provide procedural safeguards to insure that evidence of the prosecutrix's prior sexual conduct will not be used indiscriminately. The amendment can provide that when the rape defendant wants to use the evidence, the evidence must first be heard in an in camera proceeding similar to that now required when the evidence is introduced to impeach the prosecutrix.[166] The amendment can state that the court must decide that the evidence is more probative than prejudicial before it can admit the evidence. If the evidence is more probative, the court can issue an order stating the nature of the evidence and the questioning that it will permit. Then, the defendant can introduce the evidence of the prosecutrix's prior sexual conduct as limited by

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that sets standards for the exclusion of evidence when it is more prejudicial than probative, specifying the particular prejudices inherent in a rape trial. CAL. EVID. CODE § 352 (West 1968).

[161] *See* notes 7-8, *supra*, and accompanying text.

[162] *See* note 11, *supra*, and accompanying text.

[163] *See* notes 10-11, *supra*, and accompanying text.

[164] For a general format, *see* CAL. EVID. CODE § 352 (West 1968).

[165] The section could be comparable to the section that codifies the informer's privilege. CAL. EVID. CODE § 1041 (West 1968).

[166] CAL. EVID. CODE § 782 (West Supp. 1976), set forth in note 61, *supra*.

the court's order. In addition, the legislature can require the trial court to give an instruction that forbids the jury to acquit the defendant merely because his victim is a woman who consented to intercourse prior to the alleged rape.

These suggested legislative amendments will direct the court to use caution in admitting evidence of the prosecutrix's prior sexual conduct, but will give the court discretion to admit the evidence when the defendant's need for the evidence outweighs the state's interest in excluding it. By enacting such a revised statute, the legislature can protect rape victims from prejudicial evidence and from unreasonable invasions into their sexual histories, yet let rape defendants enjoy their constitutional rights to use evidence essential for their defense.

VI. CONCLUSION

The new law that limits the admissibility of evidence of a rape prosecutrix's prior sexual conduct, as applied, may be unconstitutional. On its face, the law apparently excludes evidence of the prosecutrix's prior sexual conduct for substantive purposes without regard to a defendant's need for the evidence. The due process clause, however, compels a court to admit evidence when a defendant's need for it outweighs the state's interest in excluding it. When evidence of the prosecutrix's prior sexual conduct is highly probative, or the case is a close one and the defendant cannot find other equally probative evidence, the state's interests may fail to support the exclusion. As a result, unless the courts construe or the legislature amends the new law to let the defendant use the evidence in these situations, the new law may be found unconstitutional.

M. J. Wynn