Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform

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ON OCTOBER 4, 1989, a jury in Fort Lauderdale, Florida, acquitted a Georgia man of charges that he had kidnapped and sexually assaulted a Broward County woman at knifepoint.1 The acquittal itself might have had limited impact had it not been for the statement made by the jury foreman after the verdict was announced: “She asked for it,” he claimed; “[s]he was advertising for sex.”2 Another juror agreed: “We felt she was up to no good [by] the way she was dressed.”3

The “way she was dressed” at the time of the alleged assault included a short, white, lace skirt, a brief top, a leather belt, and no underwear.4 The blame-the-victim verdict received national attention.5 Outraged feminists decried the verdict and its sexist message.6 The alleged victim contended on national television that she was sexually assaulted by a stranger and then victimized by the criminal justice system.7 She became a symbol of the bias that exists against women who report that they have been raped only to feel doubly violated by a system that undermines their credibility and blames them for provoking the attack.

The acquittal, on what appeared to be the ground that the victim induced the assault by her provocative attire, sparked the passage of legislation during the 1990 session of the Florida Legislature to limit the admissibility of a victim’s manner of dress in a prosecution for sexual battery.8 The legislation amends section 794.022(3), Florida

2. Fort Lauderdale News-Sun Sentinel, October 6, 1989, at 1A, col. 4.
3. Id. at 1A, col. 4-6A, col. 1.
4. Id. See also Brecher, supra note 1, at 14.
6. Fort Lauderdale News-Sun Sentinel, supra note 1, at 1A, col. 4, 6A, col. 1; Brecher, supra note 1, at 18-19.
8. Ch. 90-40, 1990 Fla. Laws 48 (codified at FLA. STAT. § 794.022(3)).
Statutes, to preclude the admissibility in a prosecution for sexual battery of "evidence presented for the purpose of showing that [the] manner of dress of the victim at the time of the offense incited the sexual battery." 9

This Comment provides a brief overview of Florida’s Sexual Battery Statute, including its rape shield provision. The legislation enacted in 1990 is examined in light of its potential to deflect blame away from a sexual battery victim and to preclude the admissibility of irrelevant evidence in a prosecution for sexual battery. Sexual assault is discussed in terms of ongoing issues as well as those that will need to be addressed in the future. Finally, suggestions are made to strengthen Florida’s Sexual Battery Statute to insure that it is the offender, not the victim, who is held responsible for a sexual assault.

I. BACKGROUND

Florida stepped to the forefront of rape reform legislation by enacting the Sexual Battery Statute in 1974. 10 The reform legislation was indicative of the need perceived by feminists and law-and-order groups to redefine the offense of rape, the penalties involved, and the manner in which the crime was prosecuted. 11 Rape had long been a crime that placed the victim rather than the offender on trial. Florida’s Legislature, like those of other states, sought to correct this injustice.

A. Basic Provisions

Prior to October 1, 1974, Florida’s statute broadly defined rape in terms of having carnal knowledge of a person "by force and against his or her will." 12 The enactment of the Sexual Battery Statute abolished the offense of rape and replaced it with the crime of sexual bat-

9. Id. Section 90.404, Florida Statutes, was reenacted to incorporate the new provision into the Florida Evidence Code.


11. See Bienen, Rape III—National Developments in Rape Reform Legislation, 6 WOMEN’S RTS. L. REP. 170, 172-73 (1980); Battelle Memorial Institute Law and Justice Study Center, Forcible Rape: An Analysis of Legal Issues 1, 1-2 (1978) [hereinafter Battelle]; Largen, A Decade of Change in the Rape Reform Movement, 10 RESPONSE 4 (1987). Much of the literature on rape law reform deals with particular issues such as consent, definitions, and restrictions on admissible evidence. However, reform nationwide was a result of grassroots lobbying by coalitions of women’s rights activists working with existing lobbying groups and legislators who shared their concern about the need for rape law reform. Largen, supra, at 5-6.

12. FLA. STAT. § 794.01 (2) (1973).
tery defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object."\(^{13}\) The statute is gender neutral and describes varying degrees of the crime from a second degree felony to a capital felony depending upon the age of the victim and the amount of force used.\(^{14}\) Force is divided into degrees that define both the crime and the severity of the sentence.\(^{15}\) Penalties are now enhanced if the crime involves multiple perpetrators.\(^{16}\) The statute no longer speaks of the crime as being "against the will" of the victim, but instead focuses on consent, defining it as "intelligent, knowing, and voluntary consent" not to include "coerced submission."\(^{17}\) It recognizes that a victim might be physically unable to communicate unwillingness to participate in an act and establishes a first degree felony for a sexual assault upon such a victim.\(^{18}\)

**B. Rape Victim Shield**

The rape shield provision of the statute is particularly significant to a victim. It provides that the victim's testimony need not be corroborated, and that reputation evidence of the victim's prior sexual conduct is not admissible.\(^{19}\) In addition, the provision states:

Specific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in a prosecution under s. 794.011. However, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease; or, when consent by the victim is at issue, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.\(^{20}\)

This provision is intended to prevent a defense attorney from humiliating and harassing a victim by introducing evidence of the vic-

\(^{13}\) FLA. STAT. § 794.011(1)(f) (1975).
\(^{14}\) Id. at (2), (3), (4).
\(^{15}\) Id.
\(^{16}\) FLA. STAT. § 794.023 (1989).
\(^{17}\) FLA. STAT. § 794.011 (1)(a) (1989).
\(^{18}\) Id. at (4)(a).
\(^{19}\) FLA. STAT. § 794.022 (1), (3) (1989).
\(^{20}\) Id. at (2).
tim’s entire sexual history. Enforcement of the rape shield emphasizes that evidence of a person’s past consensual sexual encounters is not relevant to whether a victim consented to sexual conduct with the defendant unless a distinctive pattern of similar behavior is demonstrated. The significance of this provision lies in its potential to focus a trial on relevant issues rather than on the chastity of the victim. The rape shield law is considered to be among the most significant provisions of Florida’s Sexual Battery Statute.

1. Constitutional Implications of Rape Shield Laws

Introducing evidence of a rape victim’s past sexual conduct at trial is one of the most controversial issues in a rape prosecution and one that has received the most legislative activity. All fifty states have implemented some type of rape shield law, either through statute, rule of court, or judicial opinion.

Rape shield laws have been criticized as infringements upon a defendant’s sixth amendment right to confront adverse witnesses and to call defense witnesses. It is axiomatic that the right to confront a witness includes the right to cross-examine the witness. Critics of rape shield laws argue that precluding admissibility of a rape victim’s previous sexual activity denies a defendant a right to a fair trial if the de-


22. J. CHAPMAN, M. LARGEN & B. SMITH, SEXUAL ASSAULT LEGISLATION: AN ASSESSMENT FROM THE FIELD 19-20 (Center for Women Policy Studies 1986). This study to assess reform in sexual assault legislation was sponsored by the National Institute of Justice of the United States Department of Justice. The study surveyed professional personnel in the criminal justice systems in Florida, Georgia, and Michigan, and assessed the impact of reform legislation in those states. The rape shield law was found to be the most significant reform provision in Florida.


24. Comment, supra note 23, at 656-57, 691; see also Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. PA. L. REV. 544, 544-45, 556-60, 589 (1980); Farhat & Kraus, Michigan’s “Rape-Shield” Statute Questioning the Wisdom of Legislative Determinations of Relevance, 4 COOLEY L. REV. 545, 548-49 (1987); Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 MINN. L. REV. 763, 802-12 (1986) (discussing constitutional implications and proposing an alternative); Berger, Man’s Trial, Women’s Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1 (1977) (providing an in-depth analysis of rape and rape law and proposing a model statute). Constitutional issues regarding exclusion of evidence by use of rape shield laws involve both the sixth amendment and the fourteenth amendment. The sixth amendment to the United States Constitution provides in part: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... ” The confrontation clause of the sixth amendment was held to apply to the states through the due process clause of the fourteenth amendment in Pointer v. Texas, 380 U.S. 400 (1965). The fourteenth amendment to the United States Constitution provides, in part: “[N]or shall any State deprive any person of life, liberty, or property without due process of law ... ”
fendant is prevented from cross-examining a witness so as to introduce possibly exculpatory evidence.25

The suggestion that rape shield laws are constitutionally infirm derives support from the United States Supreme Court's decisions in Chambers v. Mississippi26 and Davis v. Alaska.27 In Chambers, the Court reversed a defendant's conviction, holding that the application of evidentiary rules which prevented the defendant from impeaching his own witness and introducing evidence in his own behalf rendered his trial unfair and denied him due process of law.28

In Davis, the Court set aside a shield law that protected the confidentiality of a juvenile's record when the shield ran afoul of a defendant's rights to confront witnesses against him.29 The Court emphasized that the defendant was not attempting to introduce evidence to attack the youth's credibility, but rather to develop a theory that the witness' testimony might have been motivated by fear of probation revocation.30 The Court held that the defendant's right of confrontation was paramount to the state's policy of protecting juvenile offenders, emphasizing that "[w]hatever temporary embarrassment might result to [the defendant] or his family by disclosure of his juvenile record . . . is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." The Court in Davis did not advocate a blanket prohibition against shield laws but instead applied a balancing test. It is significant that the justification for admitting the evidence was to prove possible bias, not to attack the credibility of the witness.

The debate about when a rape victim should be shielded from testifying about past sexual conduct centers on an attempt to define those situations in which a defendant's constitutional rights demand that

25. Tanford & Bocchino, supra note 24, at 555-56.
26. 410 U.S. 284 (1973). In Chambers, the defendant was charged with shooting a police officer. Another man, McDonald, admitted to defense attorneys and to friends that he had shot the officer. When called as a defense witness at trial, McDonald recanted his confession and denied that he committed the crime. Mississippi had a "voucher" rule that prohibited a party from impeaching his or her own witness. Additionally, Mississippi did not recognize an exception to the hearsay rule for declarations against penal interests. The defendant was convicted and sentenced to life imprisonment. The Supreme Court reversed and remanded. Id.
27. 415 U.S. 308 (1974). In Davis, the defendant was charged with breaking into a tavern and stealing a safe. The primary evidence against him was the testimony of Green, a juvenile, who was on probation. A court rule, intended to protect the confidentiality of juvenile adjudications, prevented the defendant from impeaching Green by showing that Green's testimony was motivated by fear of probation revocation. Id.
28. 410 U.S. at 302-03.
29. 415 U.S. at 317.
30. Id. at 311, 317-18.
31. Id. at 319.
such evidence be admitted. Statutes tend to include two types of evidence:

1) evidence of prior sexual relations with the defendant when consent is at issue; and 2) evidence of specific sexual activity with a third party to prove an alternate explanation for the physical indications of rape.

Admissibility of evidence depends upon its relevance. There is no constitutional right to admit irrelevant evidence. Opponents of rape shield laws argue that evidence of a complainant’s past sexual activity is particularly relevant to whether complainant consented to the sexual conduct being prosecuted. While that position itself is arguable, it must also be noted that not all relevant evidence is automatically admissible. Relevant evidence may be excluded when its probative value is outweighed by its prejudicial effect. The rationale behind rape shield laws is that a victim’s sexual history is of dubious probative value and that admitting such evidence is highly embarrassing and prejudicial.

Rape shield laws attempt to alleviate the tension that exists between a rape victim’s right of privacy and a defendant’s right to confront witnesses and present evidence. A victim rape shield is not intended to preclude admissibility of evidence of a victim’s sexual history that is relevant to prove bias or motive on the part of the complainant or to demonstrate that the complainant lied while testifying. However, when the evidence is being offered on the issue of consent, it is stretching the definition of “relevant” to suggest that a victim’s prior sexual conduct is automatically relevant to her consent to the sexual activity that is the subject of the prosecution.

2. Irrelevancy of a Victim’s Prior Sexual Activity

Chief Justice Matthew Hale pronounced more than three hundred years ago: “[Rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never

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32. Tanford & Bocchino, supra note 24 at 552-53. Florida’s rape shield law is typical of the type described by Tanford and Bocchino.


34. The rationale behind this argument is that if a victim consented previously to sexual conduct, she is more likely to have consented on the occasion in question. See generally Note, If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases, 10 Valpo. U.L. Rev. 127 (1976). See also L. Holmstrom & W. Burgess, The Victim of Rape: Institutional Reactions 177 (1978).


so innocent." For over a century, Lord Hale’s proclamation resulted in the rigid scrutiny of a complainant witness. It was assumed that a charge of rape was fabricated or was the vengeful response of a spiteful female.

The premise that a reported rape was the product of a woman’s overripe fantasies or the result of her having been spurned received substantial support from John Henry Wigmore. Dean Wigmore’s profound distrust of women who reported that they were raped is represented in his statement, “No judge should ever let a sex offense charge go to the jury unless the female complainant’s social history and mental makeup have been examined and testified to by a qualified physician.” Wigmore also advised:

Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.

Despite Wigmore’s lack of concrete evidence for his biased view, this unfounded suspicion and distrust provided justification for the

38. E.g., Mart v. State, 494 So. 2d 1139, 1140-41 (Fla. 1986) (recounting the original purpose for the Lord Hale instruction and its use in Florida). The Standard Jury Instruction in Florida was: “If the testimony of the female is not supported by other evidence her testimony should be rigidly examined, especially as it related to the nature and extent of the force used and as it related to the question of whether or not consent was ever finally given.” Id. at 1141. See, e.g., Tibbs v. State, 337 So. 2d 788, 790 (Fla. 1976); Paramore v. State, 238 So. 2d 604, 605 (Fla. 1970); Christie v. State, 94 Fla. 469, 472-73 (Fla. 1927); Coker v. State, 83 Fla. 672, 93 So. 176, 178 (Fla. 1922); Smith v. State, 362 So. 2d 417, 420 (Fla. 1st DCA 1978); Berezovsky v. State, 335 So. 2d 592, 593 (Fla. 3rd DCA 1976); but see Pendleton v. State, 348 So. 2d 1206, 1209 (Fla. 4th DCA 1977) (no abuse of discretion in refusing to give special instruction regarding weight of victim’s testimony); Williamson v. State, 338 So. 2d 873, 874 (Fla. 3rd DCA 1976) (trial court did not abuse discretion in refusing to specially instruct jury to rigidly examine prosecutrix’ testimony).
39. For an understanding of the foundation for the pervasive mistrust of women who report that they have been raped, see 3A WIGMORE, EVIDENCE § 924a, at 736 (Chadbourne rev. 1970).
40. Id. at 737 (emphasis in original).
41. Id. at 736.
42. For a detailed analysis of Wigmore’s own lack of credibility, see Bienen, A Question of Credibility: John Henry Wigmore’s Use of Scientific Authority in Section 924a of the Treatise on Evidence, 19 CAL. W.L. REV. 235 (1983); see also Note, The Victim in a Forcible Rape Case: A Feminist View, 11 AM. CRIM. L. REV. 335, 335-38 (1973).
defense to discredit the testimony of a complaining witness by introducing evidence of her prior consensual sexual activity. The underlying premise for this practice was that a woman who previously consented to sexual activity was more likely to have consented to the activity being prosecuted. The relevance of such evidence on the issue of consent was simply assumed. Thus, even if it were believed that a victim was not fantasizing that she was raped, evidence that she was unchaste was considered relevant to show that she consented to the assault. What was clearly a bias in favor of chaste women masqueraded for years as relevant evidence.43

Joint efforts of feminist and law-and-order groups during the 1970's heightened public awareness of the prevalence of rape and the difficulties inherent in prosecuting the crime.44 Rape shield laws were enacted to help insure that the defendant would be tried for the crime of sexual assault, and to end the practice of trying the victim for engaging in past consensual sexual behavior that proves little except that she is human.45

Bias against women who report that they have been raped has a deeply-rooted foundation that cannot be completely eliminated by legislation. Courts have, however, consistently upheld the constitutionality of rape shield laws,46 thus insuring that evidence of a rape victim's past sexual conduct is no longer routinely admissible evidence.

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43. Note, supra note 34, at 12.
45. Berger, supra note 24, at 12.
46. Meaders v. United States, 519 A.2d 1248, 1254 (D.C. 1986) (prejudice results when cross-examination probes into victim's private life); State ex rel. Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946, 950-51 (1976) (subject to certain exceptions, evidence of victim's chastity not admissible on issues of credibility and consent); People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978) (premise of rape shield is one of public policy); Roberts v. State, 510 So. 2d 885, 892 (Fla. 1987) (rape shield precludes admission of evidence regarding victim's alleged activities as prostitute, but such testimony might be relevant to the issue of consent); Young v. State, 562 So. 2d 370, 371 (Fla. 3rd DCA 1990) (victim's previous sexual encounters are irrelevant); Kaplan v. State, 451 So. 2d 1386, 1387 (Fla. 4th DCA 1984) (rape shield properly applied in limiting cross-examination); Winters v. State, 425 So. 2d 203, 204 (Fla. 5th DCA 1983) (evidence of specific sexual conduct between victim and others properly excluded); Blunt v. State, 397 So. 2d 1047, 1047 (Fla. 4th DCA 1981) (testimony regarding victim's past sexual conduct properly excluded); Hodges v. State, 386 So. 2d 888, 889 (Fla. 1st DCA 1980) (proffered testimony of victim's prior sexual activity failed to establish a pattern so as to be relevant to issue of consent); People v. Williams, 416 Mich. 25, 330 N.W.2d 823, 825, 829 (1982) (evidence of complainant's prior sexual relations with one of the defendants not admissible on consent or credibility); People v. Thompson, 76 Mich. App. 705, 257 N.W.2d 268, 272 (1977) (application of rape shield does not deny constitutional right); State v. Gardner, 59 Ohio St. 2d 14, 391 N.E.2d 337 (1979) (application of rape shield did not violate defendant's constitutional rights); Commonwealth v. Johnson, 389 Pa. Super. Ct. 184, 566 A.2d 1197, 1202 (1989) (rape shield law bars testimony of victim's prior sexual conduct unless it has probative value which is exculpatory to defendant).
II. 1990 Legislation

Responding to the outcry over the acquittal of a sexual battery defendant on the apparent ground that the victim provoked the attack by her manner of dress, House Bill 1393 was introduced during the 1990 legislative session to preclude admissibility of a victim's manner of dress in a prosecution for sexual battery. Cosponsored by Representatives Elaine Gordon and Anne MacKenzie, the initial bill stated: "the manner in which the victim was dressed at the time the crime was committed shall not be admitted into evidence in a prosecution under s. 794.011." Representative Gordon explained to the House Criminal Justice Subcommittee on Prosecution and Punishment: "The manner in which a person is dressed has no relevance to whether a crime has been committed." Charlene Carres, an attorney for the American Civil Liberties Union, expressed reservations about limiting admissibility of evidence that a judge or jury might need to consider, but stated that irrelevant evidence regarding the victim's manner of dress is often brought before the court even though it has no bearing on whether the victim consented. The bill was unanimously recommended by the subcommittee.

The bill received closer scrutiny when it came before the entire House Criminal Justice Committee. Concern was expressed over limiting judicial discretion as to what constitutes relevant evidence. A representative of the state public defender's office opposed the bill, claiming that it was being rushed into law based on one alleged abuse and that it potentially violated a defendant's right to due process. Ms. Carres, again representing the American Civil Liberties Union, countered that irrelevant evidence of how a victim was dressed is consistently introduced at sexual battery trials. She addressed constitutional concerns by proposing that the language of the bill be narrowed to preclude admissibility of evidence that is introduced to demonstrate that the victim provoked or incited the attack.

47. Brecher, supra note 1.
48. Fla. HB 1393 (1990) and Fla. SB 600 (1990) were identical.
49. Dem., Miami.
50. Dem., Fort Lauderdale.
53. Id.
54. Id.
55. Id. (Remarks of Rand Winter).
56. Id. (Remarks of Charlene Carres)
57. Id.
This proposal was incorporated into an amendment included when the Senate Judiciary-Civil Committee addressed a similar bill. Committee Substitute for Senate Bill 600, introduced by Senator Howard Forman, 59 narrowed the proposed “manner of dress” legislation to provide that evidence could not be presented for the purpose of showing that the manner of dress of the victim at the time of the offense incited the sexual battery. 60 This amendment was seen as addressing due process concerns while preventing admissibility of irrelevant evidence that blames the victim for the attack and detracts from the issue of whether the defendant committed a criminal act. The word “incited” was included to counter the tendency of judges and juries to perceive that the victim dressed in a way that provoked the attack. 61

With the adoption of the amendment, the House and Senate bills became identical. The Senate bill was laid on the table, while the House bill was unanimously approved by both the House 62 and the Senate, 63 and signed into law by Governor Martinez on June 1, 1990. 64 As of October 1, 1990, Florida’s Sexual Battery Statute no longer permits evidence to be admitted in a prosecution for sexual battery to show that the victim’s manner of dress incited the attack.

The effect of this legislation is speculative. It is commendable that the Florida Legislature attempted to step away from blaming the victim for provoking a sexual assault. However, the use of the word “incite” gives credence to the premise that a person’s clothing can, in fact, incite a sexual assault, and that it is uncontrollable behavior, not a violent assault, that has occurred. 65 This mixed-signal legislation attempts to preclude the admissibility of irrelevant evidence while simultaneously reinforcing the myth that the victim somehow caused the attack.

59. Dem., Pembroke Pines.
60. Fla. S. Comm. on Judiciary-Civil, tape recording of proceedings (May 2, 1990) (on file with committee).
61. Id.
64. Ch. 90-40, 1990 Fla. Laws 48 (codified at FLA. STAT. § 794.022(3)).
65. See Martin, Gender Considerations in the Prosecution of Sexual Assault Cases at 1A, paper submitted before the Tallahassee Public Hearing of the Gender Bias Study Commission, January 25, 1988. Dr. Martin discussed the widespread belief in society that people who are sexually molested somehow cause the attack. “Some action, some way of dressing, some place the victim went, something the victim said or did . . . is so powerful that [sic] it is [sic] completely overwhelms the will power of the assailant. . . .” Use of the word “incite” in the 1990 amendment lends credence to this myth. See also REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 141 (1990) (assuming that a victim’s dress or behavior causes the rape removes responsibility from the offender) [hereinafter COMMISSION].
Testimony in committee hearings addressed the issue of consent and the fact that a victim's manner of dress was not relevant to the issue of consent. However, the legislation passed does not speak to the issue of consent. It amends section 794.022(3), Florida Statutes, which precludes the admissibility of evidence of a victim's reputation. If the intent of the Legislature was to establish that a person's manner of dress does not imply consent to a sexual act, a better approach might have been to amend the definition of consent to provide that consent is not to be inferred from a victim's manner of dress. In their charge to juries, judges could instruct jurors to decide guilt or innocence based on the facts and relevant evidence presented rather than on an inference that the victim's manner of dress somehow provoked the attack.

It is doubtful that the 1990 amendment to Florida's Sexual Battery Statute will preclude admissibility at trial of evidence of a sexual assault victim's manner of dress. The law is narrowly drawn to preclude presenting evidence to show that the victim's manner of dress "incited" the attack. The language appears to be legislating against overzealous defense tactics. A defense attorney can, however, still attempt to introduce evidence of a complainant's manner of dress, not to show that the victim incited the attack, but to prove that the victim's manner of dress was part of the total circumstances that led the defendant to believe that the sexual conduct was consensual. Once this evidence is before the court, it matters little how it was introduced.

If the Legislature is concerned about preventing admissibility of irrelevant and possibly prejudicial evidence in a sexual battery prosecution, it should amend the rape shield law to provide that the relevance of a sexual battery victim's manner of dress be determined in a pro-

66. Supra notes 52-61.
67. Prior to the 1990 amendment, section 794.022(3), Florida Statutes (1989), provided: "Notwithstanding any other provision of law, reputation evidence relating to a victim's prior sexual conduct shall not be admitted into evidence in a prosecution under s. 794.011." This language was added to section 794.022 in 1983. Prior to the 1983 amendment, evidence of a rape victim's reputation for unchastity was routinely admissible. See Raulerson v. State, 102 So. 2d 281, 283 ( Fla. 1958) (evidence of chastity admissible on issue of consent); Adkins v. State, 448 So. 2d 1096, 1097 ( Fla. 4th DCA 1984) (reputation evidence as to unchaste conduct is admissible; specific evidence in this instance did not establish sufficient pattern to be admissible); McElveen v. State, 415 So. 2d 746, 748 ( Fla. 1st DCA 1982) (exclusion of evidence regarding victim's reputation constitutes reversible error); Edmundson v. State, 146 So. 2d 396 ( Fla. 1st DCA 1962) (evidence of victim's reputation for chastity is competent evidence).
68. Supra notes 52-61.
69. See Martin, supra note 65, at III B (suggesting that judges instruct jurors to decide guilt or innocence on the facts of the case not on the "appearance, manner, or character of the victim.").
ceeding in camera.\textsuperscript{70} The relevance would be determined on a case-by-case basis. This would protect both the defendant and the victim, and would eliminate statutory language that perpetuates the myth that the way a person is dressed can provoke a sexual assault.

The legislative attempt to limit admissibility of evidence introduced to show that a sexual assault victim provoked the attack underscores the bias that still exists against the victim in a prosecution for the crime of sexual battery.

### III. SEXUAL ASSAULT—ONGOING ISSUES

Sexual assault and the bias against its victims is not simply indicative of modern society. The rape\textsuperscript{71} of women has a lengthy and unpleasant background in both mythology and history.\textsuperscript{72} It has been discussed as a statement of the power of men relative to women,\textsuperscript{73} as a sexual act over which an offender has little control,\textsuperscript{74} and as a violent crime.\textsuperscript{75}

Rape law reform sought to ensure that the victim's interests would be respected in the criminal justice process and to increase the number of convictions.\textsuperscript{76} However, the new laws did little to address the fear women have of being raped. Women fear a sexual assault because women are still being sexually assaulted.\textsuperscript{77} The fear of being raped

\begin{itemize}
\item \textsuperscript{70} This procedure is used in Georgia to determine relevance of a rape victim's mode of dress. \textit{Ga. Crim. Code} § 24-2-3 (Supp. 1990).
\item \textsuperscript{71} Florida's Sexual Battery Statute does not use the term "rape." Throughout this Comment the terms rape, sexual assault, and sexual battery are used to mean the same thing: sexual conduct unwanted by the victim on the occasion in question.
\item \textsuperscript{72} See generally S. Brownmiller, \textit{Against Our Will} (1975); see also Gold & Wyatt, \textit{supra} note 36, at 695-701; Metzger, \textit{It Is Always the Woman Who Is Raped}, in \textit{The Rape Victim} 4 (D. Nass ed. 1977).
\item \textsuperscript{73} Metzger, \textit{supra} note 72, at 4; M.T. Gordon & S. Riger, \textit{The Female Fear} 45 (1989); S. Brownmiller, \textit{supra} note 72, at 5.
\item \textsuperscript{74} H. Feild \& L. Bienen, Jurors and Rape 55 (1980); Martin, \textit{supra} note 65, at IA.
\item \textsuperscript{75} Comment, \textit{Rape Reform and a Statutory Consent Defense}, 74 J. Crim. L. \& Criminology 1518, 1527 (1983).
\item \textsuperscript{76} Bienen, \textit{supra} note 11, at 171-73, 177 (grouping the principal goals of reform legislation); H. Feild \& L. Bienen, \textit{supra} note 74, at 153-54.
\item \textsuperscript{77} \textit{Commission, supra} note 65, at 140 n.107 (testimony that 98% of all rape victims are women). "Over ninety percent of all sexually battered victims are female, and one in nine females is likely to be raped during her lifetime." \textit{Id.} at 143. The Commission report cited figures for 1988 from the Florida Department of Law Enforcement which reported 6,524 cases of forcible sexual battery. \textit{Id.} Forcible sexual offenses reported in 1989 include: Forcible Rape—6,299; Forcible Sodomy—1,531; Forcible Fondling—3,367. \textit{Florida Dept. of Law Enforcement, Crime in Florida: 1989 Annual Report} 43 (1989) (available from the Florida Dept. of Law Enforcement). Nationally, the number of forcible rapes in 1989 was 94,504. National trends for five and ten years show an increase in forcible rape of 7% over 1985 and 14% above 1980. \textit{U.S. Federal Bureau of Investigation, Uniform Crime Reports: 1989}, at 14-15 (1989). See also \textit{Newsweek, supra} note 5 (citing data compiled by the Senate Judiciary Committee that also indicates sexual assaults against women are on the rise).
\end{itemize}
SEXUAL BATTERY

dramatically alters a woman’s sense of personal freedom and shapes the way in which she conducts her life. In short, it keeps her from fully participating in life.

When a woman is raped, she must first decide if she will report the violation. That a woman must give careful consideration to deciding if she will even report such a personal and profound violation reflects continued societal misunderstanding about the crime of rape and the bias inherent in a prosecution for the offense. The victim knows that attempts will be made to harass, humble, and discredit her. She understands that the key issue is not whether she was raped, but whether people believe that she was raped.

A. Blaming the Victim

The presumption that a woman somehow “asked” to be sexually assaulted and that, by inference, a rape did not actually occur is a deeply-entrenched societal view. Blaming the victim for a sexual assault completely negates the intent of the victim with respect to her actions and states clearly that the victim’s viewpoint is not the one that matters.

The doctrine of “victim precipitation” provides continued credence for the unreasonable notion that a victim has done or has failed to do something that provoked the attack. The theory posits “that in a particular situation the behavior of the victim is interpreted by the offender either as a direct invitation for sexual relations or as a sign that she will be available for sexual contact if he will persist in demanding it.” Such behavior may consist of acts of commission (she was hitchhiking, she agreed to have a drink with a stranger, she accompanied a man to his residence) or acts of omission (she failed to react strongly enough to sexual advances). “Thus, a ‘passive’ victim like an ‘active’ one, becomes a ‘mark’ if the offender’s interpretation leads him to exploit her.”

This position not only interprets the crime from the viewpoint of the offender, but it also renders rape virtually victimless in that the

78. A. MEDEA & K. THOMPSON, AGAINST RAPE 59-69 (1974). See also NEWSWEEK, supra note 5, at 24 (discussing the restrictions women live under relative to men); M.T. GORDON & S. RIGER, supra note 73, at 13-17 (coping strategies).
79. COMMISSION, supra note 65, at 140; Martin, supra note 65, at IA; Comment, Rape and Rape Laws: Sexism in Society and Law, 61 CALIF. L. REV. 919, 929-30 (1973); Note, supra note 42, at 338-43; Gold & Wyatt, supra note 36, at 709-13. See also T. BENEKE, MEN ON RAPE 30-32 (1982) (“So long as men project their own sexual desires onto women, they will blame women for rape.”).
81. Id. at 260-61.
82. Id. at 261 (emphasis added).
victim cannot effectively focus the blame on anyone other than herself. The message is that rape probably did not occur; but if it did, the victim wanted it, deserved it, and made the offender do it.\textsuperscript{83}

Research indicates that the majority of the public subscribes to the "victim precipitation" philosophy.\textsuperscript{84} It is especially embraced by members of the criminal justice system.\textsuperscript{85} This illuminates the claim of rape victims that they were not believed by the police when they reported that they were raped and that they felt they were the ones on trial when the crime was prosecuted.\textsuperscript{86}

The nature of the crime of rape is explained by Medea and Thompson:

Rape is not a special, isolated act. It is not an aberration, a deviation from the norms of sexual and social behavior in this country. Rape is simply at the end of the continuum of male-aggressive, female-passive patterns, and an arbitrary line has been drawn to mark it off from the rest of such relationships.\textsuperscript{87}

Drawing the line based upon the offender's viewpoint is a dangerous concept that allows rape to be perceived as a sanctioned, justifiable act. Defining rape from the male's viewpoint negates the crime by silencing its victim.

The view that the behavior of women leads to sexual their assault overlooks the socialization that resulted in such a concept. Men are socialized to be sexually aggressive.\textsuperscript{88} They have a vested interest in seeing their own sexual conduct as well as that of other men as some-


\textsuperscript{84} Placing the responsibility for an act of violence upon the victim serves to assuage the public's fear of random violence. If people can find something about a victim that caused the attack, they are comforted by the reasoning that such an attack could not happen to them. This "just world" theory is particularly harmful to a rape victim whose self-esteem is damaged not only by the attack but by the inference that she somehow deserved it. See Jones & Aronson, Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim, The Rape Victim 27, 27-28 (D. Nass ed. 1977); M.T. Gordon & S. Riger, supra note 73, at 120; Resick, The Trauma of Rape and the Criminal Justice System, 9 Just. Sys. J., 52, 57 (1984).

\textsuperscript{85} Klemmack & Klemmack, The Social Definition of Rape, in Sexual Assault, 135, 135-137 (M. Walker & S. Brodsky eds. 1976) (she was "asking for it;" it was a "friendly rape"); Feldman-Summers & Palmer, Rape as Viewed by Judges, Prosecutors, and Police Officers, 7 Crim. Just. & Behav. 19 (March 1980); Bohmer & Blumberg, Twice Traumatized: The Rape Victim and the Court, 58 Judicature 391, 396-99 (March 1975); Bohmer, Judicial Attitudes Toward Rape Victims, 57 Judicature 303, 303-07 (February 1974).

\textsuperscript{86} L. Holmstrom & W. Burgess, supra note 34, at 221-36.

\textsuperscript{87} A. Medea & K. Thompson, supra note 78, at 11.

\textsuperscript{88} Martin, supra note 65, at 1B. Klemmack & Klemmack, supra note 85, at 136.
thing other than rape. Additionally, it is to a male-dominated criminal justice system that a rape victim must turn for assistance. Judges, prosecutors, and law enforcement personnel must bear responsibility for dispelling the myth that a woman's behavior provides justification for a sexual assault. Society's perception of rape victims will not change until members of the criminal justice system cease blaming the victim and begin acknowledging that it is the offender who "causes" a criminal sexual assault.

B. The Consent Standard

"Under law, rape is a sex crime that is not regarded as a crime when it looks like sex." The difficulty lies in determining when sexual conduct is, in fact, rape and by whose definition. A finding that what occurred was a criminal act rests upon a belief that the victim did not consent. It is ironic that the law negates a woman's determination of her own sexuality by concluding that if she provoked the sexual assault, the attack is transformed into consensual activity, yet it simultaneously insists that a woman can and must enforce her lack of consent.

Proving lack of consent has always been problematic. A victim was once expected to resist an attack to her utmost physical ability if she expected her allegation of rape to be believed. Often her strug-
gles were not sufficiently convincing, and courts held that what occurred was possibly a form of seduction, but it was not rape. That it was rape to the victim was of little consequence. The cases of State v. Rusk and Goldberg v. State exemplify the "seduction is not rape" line of reasoning.

In Rusk, a strongly debated case, the victim met the defendant at a bar and agreed to give him a ride home. Upon reaching his residence, the victim declined his invitation to go inside with him. Rusk then reached over and removed her car keys. The victim accompanied him to his room where, through coercion and "light choking," the defendant forced sexual intercourse upon the victim. The case was heard by the trial judge, the Maryland Court of Special Appeals, and Maryland's highest court, the Court of Appeals, which reversed the defendant's conviction. A total of twenty-one judges reviewed the evidence. Ten concluded that Rusk was a rapist; eleven that he was not. The judges who concluded that Rusk was innocent focused not on his behavior but on that of the victim. They considered it to be less than significant that she was in an unfamiliar neighborhood without her car keys and in the company of a man who frightened her, "lightly" choked her, and led her to believe that he would use additional force if necessary. A dissenting judge acknowledged that a woman no longer must resist to her utmost, but maintained that "[s]he may not simply say 'I was really scared,' and thereby transform consent or mere unwillingness into submission by force."

In Goldberg, a young sales clerk was sold a story by the defendant that he was a modeling agent and that she was an excellent prospect to become a successful model. She accompanied him to his "temporary studio" where she engaged in sexual intercourse because she was afraid to resist. She told the defendant "no" but that was not sufficient for either the defendant or the court. She was alone with the defendant; there were no buildings nearby, and no one was available to help her if she resisted his advances. Additionally, the defendant
was much larger than the victim. The totality of these circumstances was apparently lost on the court. It found that the evidence was insufficient to sustain defendant’s conviction, observing that she did not resist “to the extent of her ability” and concluding that the evidence did not indicate that her lack of resistance was due to her fear of the defendant. Again the focus was not on what the offender did to the victim, but rather what the victim failed to do.

Modern legislation sought to avoid this outcome by refining the elements of criminal sexual assault. Some reformers specifically excluded the word “consent” from proposed legislation, electing instead to define rape in terms of the amount of force used. Other statutes redefined consent to require proof of affirmative communication on the part of the victim rather than allowing a court to draw its own inference.

Statutes that specifically exclude consent seek to focus on the behavior of the defendant rather than on that of the victim. Michigan’s Criminal Sexual Conduct statute does not mention the victim’s submission to a sexual act or lack of consent to same. The defendant’s use of “force or coercion” defines the crime. However, Michigan appellate courts have held that consent can still be raised as a defense. Omitting a statutory definition of consent gives rise to the possibility that a court will rely on implied consent if there is not adequate proof of force or coercion. Cases involving “light choking” or submission induced by fear could still be interpreted by a court as incidents of seduction rather than rape.

Washington followed the Michigan approach by not mentioning consent in cases where force is used or bodily injury is threatened or inflicted. A third-degree offense is established where “the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim’s words or conduct. . . .” This provision appears to criminalize non-consensual sexual conduct where there was no actual force, and the victim clearly

105. Id.
106. 41 Md. App. at 69, 395 A.2d at 1219.
107. Id.
111. People v. Hearn, 100 Mich. App. 749, 755, 300 N.W.2d 396, 398 (1980) (holding that eliminating need for proof of nonconsent did not preclude an accused from having the right to allege consent as a defense).
112. Rape Reform, supra note 92, at 1541.
communicated lack of consent. It has not been effective in that regard.115

The Illinois Legislature took a different approach to focusing on the conduct of the offender. Its legislative reform in 1984 redefined consent to mean the "freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent."116 By redefining consent rather than eliminating it from the statute, the drafters of the legislation sought to shift the focus from the victim’s state of mind to that of the accused.117 Thus, the defendant must demonstrate that the victim consented to the act. While the burden of proving consent appears to shift to the defendant, legislative history indicates that consent is intended to be a defense that the accused can raise by cross-examining witnesses, including the complaining witness.118

The Model Penal Code defines rape as an act of sexual intercourse committed by a male against a female not his wife.119 The most severe degree is reserved for those crimes in which the force or threat of death or injury is employed.120 The crime is considered to be of a lesser degree if the victim is a voluntary social companion of the offender upon the occasion of the crime and previously had consensual sexual contact with the offender.121 This approach fails to recognize that women are often forced into nonconsensual sexual conduct by husbands or social companions, and that such a relationship does not render the act less serious.

These varied approaches to the issue of consent underscore the difficulty that exists in determining what actually constitutes consent,122 and how it can be demonstrated in a court of law. Commentators have struggled with the concept of consent in trying to determine if it should be an element of the crime, and, if so, how it is best defined. A charge of rape is still as "hard to prove" today as it was in the time of Lord Hale. On the continuum of sexual conduct, rape is still a crime

118. Id. at 766-67.
120. Id.
121. Id.
122. Supra notes 92 and 93.
that is defined by "legal language"\textsuperscript{123} rather than by an acknowledgment that "no means no."

IV. Future Issues

During the last decade, rape law has focused primarily on legislative enactments designed to facilitate the reporting and prosecution of sexual assault. These enactments sought to exclude the admission of irrelevant evidence and to lessen the harassment of victims. Future issues will likely focus on what has long been tacitly acknowledged—that "rape is an aggressive act against women as women."\textsuperscript{124} The significance of legal reform to more effectively prosecute sexual assault cases cannot be underestimated, but attention is rightfully being focused on the reality that women are the predominate victims of sexual assault.\textsuperscript{125}

The United States Congress is currently considering legislation that creates a civil rights remedy for gender-motivated sexual assault. The "Violence Against Women Act of 1990"\textsuperscript{126} seeks to double federal penalties for sexual assault and to permit victims to sue in federal court for restitution.\textsuperscript{127} It further proposes to establish a national commission on violent crimes against women and allocate funds for local law enforcement.\textsuperscript{128} The proposed legislation signifies a national consciousness-raising.\textsuperscript{129} The principal sponsor of the bill, Senator Joseph Biden,\textsuperscript{130} emphasized the "need for the national psyche to acknowledge there's something horribly wrong and for the law to reflect that attitude."\textsuperscript{131} Efforts are long overdue to develop a national consensus that not only are violent attacks against women "horribly wrong," but also that women are not the architects of the assaults.

A. Acquaintance Rape

"Judicial procedures for handling 'acquaintance rape' promises to be one of the major upcoming issues with which the legal system must..."
learn to deal effectively and with fairness to the victim."\textsuperscript{132} The notion that rape is a crime in which the assailant is a stranger who “jumps out from the bushes” is outdated and untrue. Assailants are known to their victims in approximately one-half of reported cases, and an attack by an acquaintance tends to involve a greater degree of violence.\textsuperscript{133} Additionally, there is significant trauma that results from being sexually assaulted by a person that the victim knows and trusts.\textsuperscript{134}

A study of seventy-one self-disclosed acquaintance or date rapists\textsuperscript{135} reflected that two-thirds of the men conceded that they were guilty of rape in the legal sense, but contended that the fault for the rape resided with the female. They saw her sexual demeanor as literally absolving them of any guilt for what they admitted was forcible rape against a nonconsenting female.\textsuperscript{136}

This tacit acknowledgment that rape is justifiable is of particular concern on college campuses. Acquaintance rape in a college setting is likely to be in the form of gang rape.\textsuperscript{137} Gang rape has been described as an example of “male bonding [which] stems from a contempt of women.”\textsuperscript{138} It is particularly prevalent at fraternity parties where the rape victim has consumed too much alcohol or drugs.\textsuperscript{139} What she perceives to be “friendly persuasion” on the part of the fraternity brothers is part of a planned sexual assault. By the time she comprehends the situation, she can no longer escape. Her protests are ignored; she is raped by a group of fraternity brothers who do not consider their behavior to be rape.\textsuperscript{140} Their position is that “she asked for it.”\textsuperscript{141}

\textsuperscript{132} Schafran, Overwhelming Evidence: Reports on Gender Bias in the Courts, \textit{Trial} 28, 30 (February 1990) (quoting Wahl, J., chair of the Minnesota Task Force on Gender Fairness in the Courts). \textit{See also} M.T. Gordon \& S. Riger, supra note 73, at 27-29 (on acquaintance rape generally).

\textsuperscript{133} \textit{Commission}, supra note 65, at 144. M. Amir, supra note 80, at 234-35 (over half of the offenders studied knew their victim); \textit{id.} at 245 (the closer the relationship, the greater is the violence against the victim); H. Feld \& L. Bienen, supra note 74, at 76-77.

\textsuperscript{134} Battelle, supra note 11, at 15; C. Mackinnon, supra note 89, at 177. This is particularly true in the case of spousal rape where the victim has to “live with her rapist.” See Note, Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape, 35 Wayne L. Rev. 1219, 1222-1223 (1989) (justification that rape within marriage or marriage-like relationship causes less victimization has no foundation in fact).

\textsuperscript{135} Kanin, Date Rape: Unofficial Criminals and Victims, 9 Victimology 95, 96-97 (1984).

\textsuperscript{136} Id.

\textsuperscript{137} Gang Rape on College Campuses, 7 Response 1 (March/April 1984); M.T. Gordon \& S. Riger, supra note 73, at 128.

\textsuperscript{138} S. Brownmiller, supra note 72, at 211.

\textsuperscript{139} Ehrhart \& Sandler, Party Rape, 9 Response 2, 2-4; Martin \& Hummer, Fraternities and Rape on Campus, 3 Gender \& Society 457 (Dec. 1989) (studying fraternities as groups that encourage the sexual coercion of women).

\textsuperscript{140} Ehrhart \& Sandler, supra note 139, at 2.

\textsuperscript{141} Id.
That they fully planned the attack and treated the young woman as sexual prey is of no consequence. Sexual coercion, a felony crime, is viewed as sport. Evidence suggests that this practice is particularly pervasive among college athletes.\textsuperscript{142} College sports stars reportedly enjoy the privilege of readily attainable money, drugs, and sex. Transgressions are forgivable, and the victims are frequently pressured to drop charges.\textsuperscript{143} College gang rape and every other form of acquaintance rape must be recognized and prosecuted as a felony crime.

\textbf{B. Gender Bias}

The pronouncements of Lord Hale and John Henry Wigmore provided a foundation for bias against women that continues to permeate the court system. As of December 1989, thirty states\textsuperscript{144} had appointed task forces to study gender bias. The studies thus far completed indicate that gender bias is pervasive in the legal system and that women are most often its victims.\textsuperscript{145}

New Jersey was the first state to establish a task force to study gender bias in the courts.\textsuperscript{146} Its findings indicated that rape cases are "viewed from the wrong end of the telescope,"\textsuperscript{147} with the complainant being put on trial. The New Jersey report determined that a prosecution for rape focused on the victim's "dress, demeanor, conduct, associations, and lifestyle" rather than on the defendant's threats and use of force.\textsuperscript{148} Nonstranger rape was not actively prosecuted.\textsuperscript{149}

The Florida Supreme Court created a Gender Bias Study Commission to determine in what areas of Florida's legal system gender bias exists.\textsuperscript{150} The two-year study concluded that discrimination based on one's sex is a reality in the legal system.\textsuperscript{151} Testimony before the commission identified a virtual mythology surrounding the crime of

\begin{footnotes}
\textsuperscript{142} Sex and the Sporting Life, \textit{TIME}, August 6, 1990, at 76-77.
\textsuperscript{143} Id.
\textsuperscript{144} Schafran, \textit{supra} note 132, at 28. See also Schafran, Documenting Gender Bias in the Courts: The Task Force Approach, 70 JUDICATURE 280, 284 (February-March 1977); Singleton, Gender Bias Skews Justice for Women, \textit{TRIAL} 39, 43 (February 1990).
\textsuperscript{145} Schafran, \textit{supra} note 132, at 28.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 30.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Commission, \textit{supra} note 65, at 2.
\textsuperscript{151} Id.
\end{footnotes}
rape.\textsuperscript{152} "Real rapes" were those in which a virtuous person was attacked by a stranger. Before a "real rape" is believed to have occurred, there must be no circumstances indicating that the victim was wearing the wrong clothes, or was in the wrong place at the wrong time, or in some other manner precipitated the attack.\textsuperscript{153} If a woman had been drinking or otherwise put herself in a precarious position, the Commission heard testimony that she was considered to be "looking for it."\textsuperscript{154} Such rapes were seen to be prompted by the victim, and were not considered to be "real rapes."\textsuperscript{155}

Although acquaintance rape accounts for one-half of all rapes,\textsuperscript{156} prosecutors and law enforcement officials repeatedly testified in Commission hearings that convictions in such cases were virtually "impossible to obtain."\textsuperscript{157} State attorneys often did not even file charges in such cases due to the unlikelihood of a conviction.\textsuperscript{158} The Commission concluded that the myths and assumptions which surround the crime of rape serve "to deny victims of rape equal protection of the laws."\textsuperscript{159}

The gender bias task force movement is no longer in its infancy.\textsuperscript{160} As task forces throughout the country continue to complete their investigations and report their findings, courts will be forced to address the biased treatment of rape victims.

V. RECOMMENDATIONS

The 1990 amendment to Florida's Sexual Battery Statute signifies that the Legislature acknowledges the bias that exists against victims of sexual battery. It is the victim who is put on trial to prove that she did not consent to sexual conduct, to demonstrate that she did not "ask" to be assaulted, and to convince a judge or jury that even though she previously engaged in consensual sexual conduct with the defendant, she still maintained the right to say "no" at a later date.

\textsuperscript{152} Id. at 140. The Commission found that the mythology was reinforced by widespread notions about sexual assault. The Commission reported on a survey of sixth to ninth grade children in Rhode Island in which the majority of the children believed that "under certain circumstances" sexual abuse was okay. Some of the students believed that a seductively-dressed woman is "asking to be raped," that forcible sex was acceptable if a man has been dating a woman for more than six months, and that rape is permissible among married couples. Id. at 142.

\textsuperscript{153} Id. at 140.

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} Id. at 144.

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} Id. at 142.

\textsuperscript{160} Schafran, supra note 132, at 28.
Legislation alone cannot reform sexist notions about what constitutes appropriate behavior for a woman, but it remains a viable avenue for reforming a system that continues to put the victim on trial.

The definition of "consent" currently set forth in the Florida Sexual Battery Statute should be expanded beyond the concept of "intelligent, knowing, and voluntary." Consent should involve affirmative words or conduct on the part of the victim indicating that consent was freely given. It is suggested that section 794.011(1)(a) be amended to read: The term "consent" means intelligent, knowing, and voluntary consent evidenced by actual words or conduct indicating that consent is freely given and is not the result of coerced submission. Requiring an affirmative showing of "yes" might be the best means of insuring that a victim's "no" is properly interpreted.

Additionally, the rape shield section of the Sexual Battery Statute must be strengthened to insure that only evidence relevant to whether a crime has been committed is introduced in a sexual battery prosecution. The law currently allows evidence to be introduced regarding the victim's past sexual conduct with the offender. This allowance encourages an assumption that a victim's past sexual encounters with the defendant are automatically relevant to whether she consented to the conduct in question. Such evidence would not be relevant to the issue of consent if the past conduct were not reasonably contemporaneous with the current offense. A showing should be required that the past conduct was reasonably contemporaneous with the occasion complained of in the prosecution, and that it encouraged the defendant to reasonably believe that consent was freely given by the complainant. Relevance of the past conduct could be determined

at an in camera proceeding. If the past conduct is determined to be relevant, evidence of such conduct would be admissible, and the defendant’s rights would be protected. If the past sexual conduct is so remote in time that it is not relevant to the issue of consent, the evidence would not be admissible and the victim’s nonconsent would be effectuated.

The following language amending section 794.022(2) of the Sexual Battery Statute is suggested:

(2) In a prosecution for sexual battery under s.794.011, evidence of the victim’s prior sexual conduct is inadmissible except where consent is at issue, and it is first established to the court in a proceeding in camera that:

a. Evidence of prior sexual conduct between the victim and the defendant is reasonably contemporaneous with the date of the alleged crime to be relevant to the issue of consent,

b. Evidence may prove that the defendant was not the source of the semen, pregnancy, injury or disease,

c. Evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case being prosecuted that it is relevant to the issue of consent.

Evidence of the victim’s manner of dress at the time of the offense shall not be admitted into evidence in a prosecution under s.794.011 unless it is first determined in a proceeding in camera that it is relevant to the issue of consent.62

The suggested amendments would enable the defendant to present relevant evidence while insuring that a victim’s consent is not incorrectly inferred by a judge or jury. A defendant’s right to a full and fair defense is constitutionally protected. A victim’s right to dress in a particular manner or to say “no” on a given occasion should also be protected.

A stronger rape shield law should not only be enacted, but it should apply to any pretrial deposition taken of the victim. Florida is one of only a few states63 that allows the defense to depose a victim as a

162. The intent of the 1990 Legislature with respect to limiting the admissibility of a sexual battery victim’s manner of dress might be better effectuated by the proposed language. This would insure that relevance would be determined before the evidence was sought to be admitted at trial.

matter of right. A rape shield cannot sufficiently protect a victim from harassment and humiliation if it is not enforced throughout the proceedings. This position was recognized by the New Hampshire Supreme Court in \textit{State v. Miskell}.\textsuperscript{164} The court in \textit{Miskell} expressed its belief that the enactment of [New Hampshire's] rape shield law signified legislative intent to create a "testimonial privilege," the purpose of which was to protect the victim "from being subjected to unnecessary embarrassment, prejudice and courtroom procedures that only serve to exacerbate the trauma of the rape itself."\textsuperscript{165} The court determined that the underpinnings for the testimonial privilege "are grounded in [New Hampshire's] constitutional right to privacy."\textsuperscript{166} The holding in \textit{Miskell} acknowledged that the public policy served by prohibiting at trial irrelevant questions about a rape victim's past sexual conduct is also served by prohibiting such questioning during a victim's deposition.\textsuperscript{167} The court emphasized what rape victims have long known to be true: "the major harassment and embarrassment occurs because the victim must answer the questions, not because she must answer them in public."\textsuperscript{168}

Under the decision in \textit{Miskell}, "[t]he defendant must show, in a hearing before the trial judge, that there is a \textit{reasonable possibility} that the information sought will produce the type of evidence that due process will require to be admitted at trial."\textsuperscript{169} Mere speculation is insufficient. "A defendant must show that there is a reasonable likelihood that admissible information \textit{will} be obtained."\textsuperscript{170}

This approach recognizes that a defendant's rights can be protected without unduly harassing and embarrassing a person who has already been victimized. Of particular significance is the court's reliance on a state constitutional right to privacy. Such a right is expressly guaranteed in Florida's constitution,\textsuperscript{171} and should be enforced in the context of pretrial depositions of a rape victim.

\textsuperscript{164} 122 N.H. 842, 451 A.2d 383 (1982).
\textsuperscript{165} \textit{Id. at 385} (quoting \textit{State v. Howard}, 121 N.H. 53, 57, 426 A.2d 457, 459 (1981)).
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.} (emphasis added).
\textsuperscript{169} \textit{Id. at 386} (emphasis in original).
\textsuperscript{170} \textit{Id.} (emphasis in original).
\textsuperscript{171} Article I, section 23 of the Florida Constitution guarantees: "\textit{RIGHT OF PRIVACY—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.}" At least one trial court applied this guarantee in not allowing the defense to take pretrial depositions of young rape victims and witnesses. See \textit{State v. Hines}, No. 89-15331, 89-15534, 89-15708 (Fla. Davaul County Cir. Ct. 1989) (Fla. R. Crim. P. 3.220(h), as it allows for discovery depositions of young victims and witnesses of sexual battery, is an unconstitutional violation of the victims' and witness' right to privacy under Article I, Section 23, Fla. Const.).
It has been suggested that pretrial depositions be eliminated; however, the Florida Supreme Court has held otherwise. If pretrial depositions are to be taken, it should be with the goal of discovering truly relevant evidence, not with the purpose of harassing the victim. It is not constitutionally required that a defendant's rights be protected in a manner so solicitous as to further violate the rights of the victim.

Implementing the suggested amendments would help to insure that a prosecution for sexual battery would focus on the criminal conduct of the offender. Consent would not be subject to inference but would have to be affirmatively demonstrated. A victim would not be blamed for an attack by the introduction of irrelevant evidence as to the manner in which she was dressed. An individual would have the right to say "no" to an offender even if she had said "yes" at another time. Of primary significance is the additional protection that would be afforded a sexual battery victim by strengthening Florida's rape shield law and enforcing its provisions at a pretrial deposition of the victim. Providing such protection is both necessary and long overdue. Amending Florida's rape shield law to extend its application to pretrial depositions would insure that the offender, not the victim, is placed on trial. It would effectuate a convincing argument made by Judge Learned Hand in 1923:

Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

VI. CONCLUSION

Women are overwhelmingly the victims of sexual assault, yet historically men have determined whether a crime has been committed, if the victim is credible, and if the evidence sought to be admitted is relevant to the prosecution of the offense. Sexual assault is still defined by and perceived through a male viewpoint. Women are sexually assaulted and then publicly humiliated when they attempt to prosecute the offender. Legislatures have reformed the law to better facilitate the prosecution of sexual battery; however, the continued bias against

172. Tallahassee Democrat, November 12, 1989, at 1B, col. 6, 3B, col. 1.
female victims of sexual assault sends a clear message that women still do not have the right of self-determination accorded to men.

When the Florida Legislature reformed its rape law in 1974, it initiated a movement towards affirming a woman's right to say "no" to unwanted sexual conduct. In 1990, this same legislative body sought to correct the injustice that still prevails in a sexual battery prosecution. By amending the statute to limit admissibility of a sexual battery victim's manner of dress, the Legislature again attempted to state what should be obvious—the victim is not the proper person to blame in a prosecution for sexual assault.

Contrary to prevailing myth, women do not wish to be raped, nor do they "ask" for such an assault. When women are sexually assaulted, their physical and psychic injuries should not be compounded by a legal system that seeks to put their conduct on trial. The Florida Legislature has demonstrated an understanding of this simple premise, but it remains to be completely reflected in Florida's Sexual Battery Statute.