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THE MISSOURI SUPREME COURT CONFRONTS THE SIXTH AMENDMENT IN ITS INTERPRETATION OF THE RAPE VICTIM SHIELD STATUTE

*State v. Jones*¹

Nearly every jurisdiction in the United States has enacted a rape victim shield statute.² One state has reached the same result through judicial decision.³ Although the substance of these shield laws varies somewhat among

1. 716 S.W.2d 799 (Mo. 1986) (en banc).

2. FED. R. EVID. 412; ALA. CODE § 12-21-203 (1986); ALASKA STAT. § 12.45.045 (Supp. 1986); ARK. STAT. ANN. § 41-1810.1-.4 (1977); CAL. EVID. CODE § 1103 (West Supp. 1987); COLO. REV. STAT. § 18-3-407 (1986); CONN. GEN. STAT. ANN. § 54-86f (West 1985); DEL. CODE ANN. tit. 11, §§ 3508-3509 (1979); FLA. STAT. ANN. § 794.022 (West Supp. 1987); GA. CODE ANN. § 38-202.1 (Harrison Supp. 1986); HAW. REV. STAT. tit. 33, ch. 626, § 412 (1986); IDAHO CODE § 18-6105 (1979); ILL. ANN. STAT. ch. 38, para. 115.7 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-37-4-4 (Burns 1985); IOWA CODE ANN. § 813.2 (West 1979); KAN. STAT. ANN. § 21-3525 (Supp. 1986); KY. REV. STAT. ANN. § 510.145 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 15.498 (West 1981); ME. R. EVID. 412; MD. ANN. CODE art. 27, § 461A (1982); MASS. GEN. LAWS ANN. ch. 233, § 21B (West 1986); MICH. STAT. ANN. § 28.788(10) (Callaghan 1982); MINN. STAT. ANN. § 609.347 (West Supp. 1987); MISS. CODE ANN. § 97-3-68-70 (Supp. 1986); MO. REV. STAT. § 491.015 (Supp. 1987); MONT. CODE ANN. § 45-5-511(4)-(5) (1985); NEB. REV. STAT. § 28-321 (1985); NEV. REV. STAT. § 48.069 (1985); N.H. REV. STAT. ANN. § 632-A-6 (1986); N.J. STAT. ANN. § 2A-84A-32.1 (West Supp. 1987); N.M. STAT. ANN. § 30-9-16 (1984); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981); N.C. GEN. STAT. § 8C-1 R.412 (1986); N.D. CENT. CODE § 12.1-20-15 (1985); OHIO REV. CODE ANN. § 1907.02(D) (Baldwin Supp. 1986); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1979-80); OR. REV. STAT. § 40.210 R. 412 (1985); Pa. Cons. Stat. ANN. tit. 18, § 3104 (Purdon 1983); R.I. GEN. LAWS § 11-37-13 (1981); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-22-15 (1979); TENN. CODE ANN. § 40-17-119 (1982); TEX. PENAL CODE ANN. § 22.065 (Vernon Supp. 1986); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1986); VA. CODE ANN. § 18.2.67.7 (1982); WASH. REV. CODE ANN. § 9A.44.020 (Supp. 1987); W. VA. CODE § 61-8B-11 (Michie Supp. 1986); WIS. STAT. ANN. § 972.11 (West 1985); WYO. STAT. § 6-2-312 (1983).

3. State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976) (en banc).

jurisdictions,⁴ the basic policies behind them remain the same. The purpose of these laws is to restrict the admissibility of evidence of prior sexual conduct of rape complainants in order (1) to encourage rape victims to report the crime, (2) to reverse a long-enduring policy of admitting evidence of highly questionable relevancy to impeach rape complainants, and (3) to end the defense practice of "putting the victim on trial" in rape prosecutions.⁵ Placing such a restriction on a criminal defendant's ability to cross-examine a witness against him raises constitutional issues. Specifically, are rape shield

4. The most restrictive statutes declare any previous sexual conduct by the victim to be inadmissible unless it is conduct involving the defendant and consent is at issue in the case. *E.g.*, MONT. CODE ANN. § 45-5-511(4)-(5) (1985). Other statutes state a basic rule of relevance. If, at an *in camera* hearing, the proposed evidence is found to be relevant to a material fact at issue in the case, and its probative value is not substantially outweighed by its prejudicial effect, the judge may rule it admissible and define the limits of examination regarding the issue. *E.g.*, IDAHO CODE § 18-6105 (1979); N.M. STAT. ANN. § 30-9-16 (1984); *see also* S.D. CODIFIED LAWS ANN. § 23A-22-15.1 (1979) ("the testimony of the complaining witness in a trial for a charge of rape shall not, merely because of the nature of that charge, be treated in any different manner than the testimony of a complaining witness in any other criminal case"). Many jurisdictions, including Missouri, follow the approach of stating a general rule of inadmissibility or presumption of irrelevance, and then listing specific exceptions to the general rule. The exceptions vary among jurisdictions. *E.g.*, COLO. REV. STAT. § 18-3-407 (1986) (admissible to show alternative source of semen, pregnancy, or disease); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981) (any prostitution conviction within three years of the rape is admissible); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985) (allowing specific acts of adultery to impeach). *But cf.* Op. Att'y. Gen. S.C., No. 77-328 (1977) (provision may violate equal protection clause unless adulterers are more likely than other persons with a sexual history to have consented). For a helpful, although slightly dated, comparison of the laws in forty-six jurisdictions, see Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980).

5. The Missouri Supreme Court described the policy issues in the following manner:

The thinking behind the enactment of said section undoubtedly was three-fold. First, it redressed the faulty premise upon which evidence of prior sexual conduct traditionally had been admitted. Second, it is apparent that in most instances a rape victim's past conduct has no reasonable bearing upon the issue of consent or credibility. Introduction of such evidence serves only to humiliate and embarrass the witness in a public "fishing expedition" which puts the complainant on trial instead of the appellant. Section 491.015, thus, reflects a major public policy decision that "victims" not be subjected to unwarranted psychological and emotional abuse. Lastly, the statute demonstrates a reasonable and proper attempt to aid effective law enforcement by encouraging victims of rape to report and prosecute such crimes without a threat to expose intimate details of past sexual activity, if any, to the public.

State v. Brown, 636 S.W.2d 929, 933 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1212 (1983) (citation omitted).

laws generally violative of the sixth amendment⁶ right to confront and cross-examine one's accusers? If rape shield laws are not *per se* unconstitutional, are they ever so restrictive as to go beyond constitutional limitations on the right to confront and cross-examine witnesses?

This Note will discuss *State v. Jones*,⁷ and examine whether the Missouri Supreme Court's interpretation of the law in that case serves the policies behind the Missouri Rape Victim Shield Statute⁸ without violating the defendant's constitutional right to confront the witnesses against him.⁹ For purposes of comparison and analysis, the court's previous interpretation of the law in *State v. Brown*¹⁰ will be examined. The primary focus will be upon the effect of the changes in the law as a result of the holding in *Jones*.

The defendant, James Jones, was accused of rape and sodomy by a woman with whom he was acquainted. According to his version of the events, he was at a party across the street from the complainant's house. After Jones' wife went home, Jones went outside, saw the complainant, and engaged in a conversation with her. She asked him "why he had not paid attention to her lately," and he replied that "he was married now."¹¹ Jones and the complainant then went into her house where he claimed that she seduced him.¹²

The complainant, on the other hand, claimed that Jones entered her bedroom while she was sleeping, "grabbed her around the neck, pulled her out of bed, displayed a gun, and threatened to kill her and her children if she did not submit to him."¹³ She submitted to intercourse with the defen-

6. The sixth amendment of the United States Constitution states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Section 18(a), article I, of the Missouri Constitution similarly provides: "That in criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face. . . ." It appears that Missouri courts interpret section 18(a) coextensively with the sixth amendment rather than giving it a broader interpretation. *See, e.g., Sullivan v. State*, 617 S.W.2d 562 (Mo. Ct. App. 1981); *State v. Gray*, 616 S.W.2d 102 (Mo. Ct. App. 1981); *see also State v. Hicks*, 591 S.W.2d 184, 187 (Mo. Ct. App. 1979) (while the confrontation clauses of the state and federal constitutions are similar, the standards of the federal court decisions interpreting the sixth amendment must be met when determining the admissibility of hearsay testimony). Any discussion in this Note of the sixth amendment right to confront and cross-examine witnesses, U.S. CONST. amend. VI, will, therefore, apply equally to Mo. CONST. art. I, § 18(a).

7. 716 S.W.2d 799 (Mo. 1986) (en banc).

8. MO. REV. STAT. § 491.015 (Supp. 1987).

9. U.S. CONST. amend. VI; Mo. CONST. art. I, § 18(a).

10. 636 S.W.2d 929 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1212 (1983).

11. *Jones*, 716 S.W.2d at 803 (Blackmar, J., dissenting).

12. *Id.* (Blackmar, J., dissenting).

13. *Id.* at 801.

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 dant, engaged in a half-hour conversation with him, and again submitted to intercourse.¹⁴

Jones sought an *in camera* hearing in accordance with the rape shield statute¹⁵ in order to propose an offer of evidence regarding consensual sexual relations he had with the complainant three-and-one-half to four-and-one-half months before the alleged rape.¹⁶ Jones' theory was that the complainant had a motive to falsify rape charges after consensual intercourse because she was angry that the defendant had married and was jealous of his wife.¹⁷ There was evidence that the complainant and Jones' wife "were on very bad terms."¹⁸ Jones' sister testified that the complainant had asked her "why

14. *Id.* at 803 (Blackmar, J., dissenting).

15. Section 491.015 of the Missouri statutes provides:

1. In prosecutions under chapter 566, RSMO [sexual offenses] or prosecutions related to sexual conduct under chapter 568, RSMO [offenses against the family], opinion and reputation evidence of the complaining witness' prior sexual conduct or the absence of such instances or conduct is inadmissible, except where such specific instances are:

(1) Evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime; or

(2) Evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;

(3) Evidence of immediate surrounding circumstances of the alleged crime; or

(4) Evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution.

2. Evidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue.

3. If the defendant proposes to offer evidence of the sexual conduct of the complaining witness under this section, he shall file with the court a written motion accompanied by an offer of proof or make an offer of proof on the record outside the hearing of the jury. The court shall hold an *in camera* hearing to determine the sufficiency of the offer of proof. . . . If the court finds any of the evidence offered admissible under this section the court shall make an order stating the scope of the evidence which may be introduced. Objections to any decision of the court under this section may be made by either the prosecution or the defendant in the manner provided by law. The *in camera* hearing shall be recorded and the court shall set forth its reasons for its ruling. The record of the *in camera* hearing shall be sealed for delivery to the parties and to the appellate court in the event of an appeal or other post trial proceeding.

Mo. REV. STAT. § 491.015 (Supp. 1987).

16. *Jones*, 716 S.W.2d at 800.

17. *Id.* at 804 (Blackmar, J., dissenting).

18. *Id.* (Blackmar, J., dissenting).

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James had gotten involved with Yolanda [Jones' wife]."¹⁹ She also testified that the complainant "just told me that if it took all her life she was gone [sic] get James back."²⁰ The above testimony, along with testimony by an emergency room physician regarding the presence of a cervical tear and redness and bruising on the complainant's neck on the night of the rape²¹ constituted all the available evidence. The trial court denied Jones' offer of proof.²² Consequently, in what was characterized as a "swearing match" by the dissent,²³ the complainant's version of events was the only one fully put before the jury. Jones was convicted of rape and sodomy,²⁴ and the Missouri Court of Appeals affirmed his conviction.²⁵ On appeal to the Missouri Supreme Court, Jones argued that his proposed offer of proof was erroneously excluded by the trial court and that his conviction should therefore be reversed.²⁶ Jones relied upon subsection 1(1) of the rape shield law, arguing that the alleged consensual intercourse with the complainant was "reasonably contemporaneous with the date of the alleged crime."²⁷ He also relied upon subsection 2 of the law, arguing that the proposed evidence was independently admissible in that it was "relevant to a material fact or issue" in the case.²⁸ The majority of the court, in an opinion written by Judge Donnelly, disagreed with Jones and affirmed his conviction.²⁹

In holding that the evidence was not admissible under subsection 2 of the rape shield statute, the court overruled its previous holding in *State v. Brown*.³⁰ In *Brown*, the court had interpreted subsection 2 of the rape shield statute as a "catch-all" category:

Nevertheless, when read objectively it is clear that the challenged statute creates only a "presumption" that evidence of a victim's prior sexual conduct is irrelevant. Enumerated exceptions to the general presumption, as listed in § 491.015(1)-(5), retain the principle that *in limited circumstances* prior sexual conduct may be relevant. Further, the "catch-all" in subsection 2 of § 491.015 allows introduction of any evidence "the court finds . . . relevant to a material fact or issue" (quoting subsection 2 of the rape shield statute). Consistent therewith is the fact that no one suggests that due process requires the admission of irrelevant evidence. Reference [sic] the exercise of that duty by the trial court, some discretion must be allowed to forbid the

19. *Id.* (Blackmar, J., dissenting).

20. *Id.* (Blackmar, J., dissenting).

21. *Id.* at 801.

22. *Id.* at 800.

23. *Id.* at 803 (Blackmar, J., dissenting).

24. *Id.* at 800.

25. *State v. Jones*, No. 47227 (Mo. Ct. App. Nov. 13, 1984).

26. *Jones*, 716 S.W.2d at 800.

27. *Id.*

28. *Id.*

29. *Id.* at 802.

30. 636 S.W.2d 929 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1212 (1983).

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 admissibility of evidence which is found to have its *probative* value, if any,
 outweighed by its potential for prejudicial impact.³¹

The *Brown* court indicated that its reading of the statute as creating only a presumption of irrelevance was necessary in order for it to survive constitutional challenge: "In this light, the challenged statute suffers no constitutional infirmity and is not violative of any rights of confrontation and is, in our opinion, facially constitutional."³²

The *Jones* majority overruled the *Brown* holdings by stating:

On reexamination, we believe such statement of law is erroneous. Section 491.015 provides that evidence of specific instances of a victim's prior sexual conduct is inadmissible except as provided in (1), (2), (3) and (4). In our view, Subsection 2 is directed only at the exceptions set forth in (1), (2), (3), and (4). Evidence offered under (1), (2), (3), and (4) is admissible only "to the extent that the court finds . . . [it] relevant to a material fact or issue" (quoting subsection 2 of the rape shield statute) . . . If all "relevant" evidence were admissible, there would be no reason for (1), (2), (3) and (4).³³

After disposing of Jones' argument that the evidence of a prior consensual sexual relationship was independently admissible under subsection 2 of the rape shield statute, the court turned to his argument that the evidence was admissible under subsection 1(1). In holding that evidence of consensual sex that occurred three-and-one-half to four-and-one-half months before the date of the alleged rape was not "reasonably contemporaneous with the date of the alleged crime,"³⁴ the *Jones* majority discussed the cases of *State v. Crisp*³⁵ and *State v. Boyd*.³⁶

In *Crisp*, the Missouri Court of Appeals, Southern District, stated in dicta that consensual sex between the defendant and the victim that occurred three years before the date of the alleged rape was not "reasonably contemporaneous"³⁷ within the meaning of the rape shield statute. The ev-

31. *Id.* at 933-34 (emphasis in original).

32. *Id.* at 934.

33. *Jones*, 716 S.W.2d at 800. The majority apparently relied upon the rule that statutes should be construed as a whole. 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.05 (1984). They reasoned that the reading of subsection 2 as a "catch-all" category makes no sense when read with the enumerated restrictions.

The legislature may well have intended for the stricter construction to apply. Since there is no available legislative history, it is not clear what was intended. A basic presumption of statutory construction, however, is that "the legislature acted with integrity and with an honest purpose to keep within constitutional limits." *Id.* § 45-11. "As a corollary of the presumption favoring constitutionality, the fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another." *Id.*

34. *Jones*, 716 S.W.2d at 801.

35. 629 S.W.2d 475 (Mo. Ct. App. 1981).

36. 643 S.W.2d 825 (Mo. Ct. App. 1982).

37. *Crisp*, 629 S.W.2d at 479.

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idence, offered to prove consent, was at first excluded by the trial judge, but the prosecution later impliedly agreed to its introduction for the purpose of impeaching the complainant's testimony.³⁸ The defendant was convicted despite admission of the evidence.³⁹ In its discussion of the admissibility of the prior sexual conduct evidence, the court said:

We doubt if the evidence of Gina's voluntary sexual conduct with the defendant in 1976 in the state of Kansas was "reasonably contemporaneous" with the sexual intercourse between Gina and Crisp on October 5, 1979. Reasonably means within the bounds of common sense. Contemporaneous means originating, or happening, during the same period of time. It is not common sense to say that events that happened almost three years ago were reasonably contemporaneous.⁴⁰

The Missouri Court of Appeals, Eastern District, further defined the limits of reasonable contemporaneity in *Boyd*. The defendant in that case moved to introduce evidence of previous sexual encounters with the complainant as relevant to consent.⁴¹ At the *in camera* hearing held to rule on admissibility, the defendant testified that he and the complainant had consensual sex about six months before the date of the alleged rape and again about six days before the date of the alleged rape.⁴² The trial court ruled that evidence of the sexual relations that occurred six months before the alleged rape was inadmissible because those relations were not "reasonably contemporaneous" with the alleged rape.⁴³ The court also ruled, however, that the sexual encounter that allegedly occurred six days before the alleged rape was "reasonably contemporaneous" and therefore the evidence was admissible as relevant to consent.⁴⁴ The Missouri Court of Appeals agreed with the reasoning of the trial court and affirmed on that point.⁴⁵ After discussing *Crisp* and *Boyd* in a context that indicates approval of the "common sense" limits set forth in those cases, the *Jones* majority stated that "judicial review by the use of clocks or calendars is not enough."⁴⁶ The real test is whether, in light of United States Supreme Court opinions interpreting the right of a defendant to a fair trial,⁴⁷ the defendant was deprived of a fair trial under

38. *Id.*

39. *Id.* at 476.

40. *Id.* at 479.

41. *State v. Boyd*, 643 S.W.2d 825, 829 (Mo. Ct. App. 1982).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 830.

46. *Jones*, 716 S.W.2d at 801.

47. *See, e.g., Crane v. Kentucky*, 476 U.S. 683 (1986) (pretrial procedure to determine whether a confession is voluntary should not have precluded defendant from inquiring into the matter at trial; exclusion of evidence highly relevant to reliability and credibility of confession deprives defendant of fair trial); *California v.*

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the circumstances.⁴⁸ In particular, the court cited *Chambers v. Mississippi*⁴⁹ for the proposition that while the states have the right to establish their own rules of evidence and procedure, those rules cannot be applied mechanistically so as to deprive a defendant of the right to present a complete defense on his own behalf.⁵⁰

In finding that Jones was not deprived of a fair trial, the court noted the testimony of the emergency room doctor regarding the complainant's injuries the night of the alleged rape.⁵¹ Apparently, the fact that the doctor's testimony corroborated the complainant's testimony was enough for the court to find a fair trial under the circumstances. The court noted, "If this case involved merely a swearing match between the complaining witness and the accused on the issue of consent we would be inclined to reverse and remand for a new trial."⁵² The redness and bruising were sufficient indication of force for the court to find that justice had been done.⁵³

The dissenting opinion, written by Judge Blackmar and joined by Judge Welliver,⁵⁴ disagreed with the majority both in the overruling of *Brown* and in the holding that exclusion of the proposed evidence was proper under the

Trombetta, 467 U.S. 479 (1984) (standard of fundamental fairness in criminal trials means that the defendant should have a meaningful opportunity to present a complete defense); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (application of state hearsay rule combined with voucher rule, which prevented defendant from cross-examining a witness critical to his defense, denied defendant a fair trial conducted in accord with due process); *Morrisette v. United States*, 342 U.S. 246 (1952) (requirement that injury be intentionally inflicted in order to be a crime is not a mere whim, it is necessary for the proper functioning of our legal system).

48. *Jones*, 716 S.W.2d at 801.

49. 410 U.S. 284 (1973).

50. *Jones*, 716 S.W.2d at 801.

51. *Id.*

52. *Id.*

53. *Id.* at 801-02.

54. Judge Welliver has apparently never voted to affirm a conviction based on the rape shield statute. *See, e.g.*, *State v. Ray*, 637 S.W.2d 708 (Mo. 1982) (en banc) (voted to reverse conviction on the grounds that trial court improperly excluded sexual conduct evidence that was relevant to the issue of consent); *State v. Sherman*, 637 S.W.2d 704 (Mo. 1982) (en banc) (voted to reverse on the ground that evidence of immediate surrounding circumstances of the alleged crime was improperly excluded under rape shield statute); *State v. Gibson*, 636 S.W.2d 956 (Mo. 1982) (en banc) (voted to reverse on the ground that evidence of complainant's statement to the accused that she was having sexual problems with her boyfriend was relevant to the issue of a motive to falsify rape charges and was improperly excluded); *State v. Brown*, 636 S.W.2d 929 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1212 (1983) (dissented on the ground that a sexual relationship between the complainant and her boyfriend was relevant to the issue of a motive to falsify rape charges, and excluding the evidence violated the defendant's right to confront witnesses as defined in *Davis v. Alaska*, 415 U.S. 308 (1974)); *State v. Harris*, 620 S.W.2d 349 (Mo. 1981) (en banc) (dissented on other grounds).

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circumstances of the case.⁵⁵ According to the dissent, the overruling of *Brown* was unnecessary under the facts of the case and improper because of the constitutional problem it created:

Brown recognized, however, that there is a serious constitutional problem if a statute deprives a criminal defendant of the opportunity to introduce evidence which is relevant and material in his defense It is the sense of *Brown* that a rape defendant should be able to introduce evidence of prior sexual conduct of his accuser if the evidence has a reasonable and proper place in his defense, even though the evidence does not fall within one of the four exceptions in the first subsection of the statute. The state and federal constitutions undoubtedly require nothing less. If the evidence is relevant and material, the defendant is entitled to it even though the complainant may suffer embarrassment. It is one thing to balance the probative value and prejudicial effect of evidence against the defendant, but quite another to balance the value to the defendant and the possible embarrassment of a third person.⁵⁶

The dissent described the case as "a classic example of a swearing match."⁵⁷ Its concern was that there were two basically uncorroborated versions of the events that took place the night of the alleged rape. While the prosecution was able to fully present the complainant's version, the defendant was deprived of any opportunity to present evidence that may have tended to exonerate him. Under these circumstances, the dissent would have reversed the conviction and remanded for a new trial, this time admitting the evidence of the prior sexual relationship as relevant and probative on the issue of consent.⁵⁸

Analysis of the holding in *Jones* requires an understanding of the different types of sexual conduct evidence and the treatment each type was traditionally given by the courts before the advent of rape shield laws. There are three types of sexual conduct evidence, any one of which the accused may wish to utilize in his defense in a rape prosecution. First, the defendant may want to impeach the complainant's credibility as a witness by introducing opinion or reputation evidence of her unchaste character.⁵⁹ Second, the de-

55. *Jones*, 716 S.W.2d at 802 (Blackmar, J., dissenting).

56. *Id.* (Blackmar, J., dissenting).

57. *Id.* at 803 (Blackmar, J., dissenting).

58. *Id.* at 802, 804 (Blackmar, J., dissenting).

59. *E.g.*, *State v. Grant*, 79 Mo. 113 (1883) (female witness in a murder prosecution may be impeached by reputation evidence of unchastity); *State v. White*, 35 Mo. 500 (1865) (character of rape prosecutrix may be impeached by reputation evidence of unchastity).

Although the early decisions tended to link the traits of veracity and general moral character, *e.g.*, *Grant*, 79 Mo. 113, the Missouri courts eventually acknowledged the illogic of the reasoning that unchastity was relevant to truthfulness and began admitting the evidence as relevant to consent. *E.g.*, *State v. Ruhr*, 533 S.W.2d 656 (Mo. Ct. App. 1976); *State v. Williams*, 337 Mo. 884, 87 S.W.2d 175 (1935); *State v. Taylor*, 320 Mo. 417, 3 S.W.2d 29 (1928).

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defendant may want to introduce evidence of specific instances of sexual activity between the complainant and a person other than the defendant for impeachment purposes⁶⁰ or as relevant to a material issue in the case such as a motive to falsify rape charges.⁶¹ Third, the defendant may want to introduce evidence of specific instances of sexual activity between the complainant and the defendant as relevant to a material issue in the case, usually consent.⁶²

Historically, opinion and reputation evidence of prior sexual conduct on the part of the complaining witness was always admissible to impeach her credibility.⁶³ "Unchastity" was considered to be a character flaw indicative of a woman's propensity to lie as well as indicative of her propensity to engage in indiscriminate sex, permitting an inference that she consented to sex with the defendant as well.⁶⁴ This view was universally accepted by legal commentators⁶⁵ and was implemented in Missouri.⁶⁶

60. *E.g.*, *Packineau v. United States*, 202 F.2d 681, 684-86 (8th Cir. 1953) (overruled by *United States v. Kasto*, 584 F.2d 268 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979)); *State v. Wood*, 59 Ariz. 48, 122 P.2d 416 (1942) (overruled by *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976) (en banc)); *State v. Patterson*, 88 Mo. 88 (1895).

61. *E.g.*, *Commonwealth v. Joyce*, 382 Mass. 222, 415 N.E.2d 181 (1981) (complainant's previous arrests for prostitution under similar conditions were a motive to falsely claim the defendant raped her); *State v. DeLawder*, 28 Md. App. 212, 344 A.2d 446 (1975) (suspected pregnancy by boyfriend and fear of mother's anger was possible motivation to accuse defendant of rape); *State v. Salkil*, 659 S.W.2d 330 (Mo. Ct. App. 1983) (previous incidents where complainant had affairs after an argument with her husband claimed by defendant to be relevant in light of the fact that complainant had an argument with her husband prior to the alleged rape); *State v. Jalo*, 27 Or. App. 845, 557 P.2d 1359 (1976) (en banc) (complainant accused defendant of rape because he threatened to tell her mother that he caught complainant having sex with his son).

62. *E.g.*, *State v. Jones*, 716 S.W.2d 799 (Mo. 1986) (en banc) (defendant claimed that a previous sexual relationship with the complainant was relevant to consent and to a motive to falsify rape charges); *State v. Foulk*, 725 S.W.2d 56 (Mo. Ct. App. 1987) (accused claimed that previous consensual incestuous relationship with his mother was relevant to consent); *State v. Boyd*, 643 S.W.2d 825 (Mo. Ct. App. 1982) (defendant claimed that all instances of sexual relationships with complainant should be admissible); *State v. Crisp*, 629 S.W.2d 475 (Mo. Ct. App. 1981) (defendant claimed error in the exclusion of testimony about prior sexual activity with complainant); *see also United States v. Kasto*, 584 F.2d 268 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (rejected the argument that defendant should be allowed to impeach complainant's credibility with specific prior conduct evidence; acknowledged that evidence of specific prior sexual conduct between complainant and defendant may be relevant).

63. *E.g.*, *State v. Grant*, 79 Mo. 113 (1883); *State v. White*, 35 Mo. 500 (1865). *See generally* Tanford & Bocchino, *supra* note 4, at 546-51 (exploring the reasoning behind the common law rule of admissibility).

64. Tanford & Bocchino, *supra* note 4, at 549-50.

65. *E.g.*, 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a (Chadbourn rev. 1970).

66. *See supra* note 59.

Missouri followed the majority rule in not allowing evidence of specific sexual conduct on the part of the complainant for the purpose of impeaching her testimony. In 1865, the Missouri Supreme Court stated that the "character of the prosecutrix for chastity may be impeached, but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. . . ."67 Missouri courts eventually refused to allow reputation or opinion evidence of unchastity to be introduced for impeachment purposes and restricted its use to that of proving consent.⁶⁸

Evidence of specific sexual conduct on the part of the complainant was still admissible to prove or disprove a material fact or issue even though it was not admissible to impeach.⁶⁹ In 1960, the Missouri Supreme Court restricted this use of specific conduct evidence by holding that cross-examination of a rape complainant regarding specific prior sexual conduct with persons other than the defendant in order to prove consent was no longer admissible.⁷⁰ Evidence of prior consensual sex with the *defendant* was still admissible on the issue of consent.⁷¹

Missouri law immediately prior to the enactment of the rape shield statute, then, was that prior sexual conduct evidence was only admissible when it was relevant to a material issue such as consent. Only general reputation or opinion evidence was admissible unless the defendant sought to introduce evidence of prior consensual sex between himself and the complainant.⁷²

The constitutionality of prohibiting introduction of sexual conduct evidence which the accused seeks to introduce in his defense depends upon the relevancy of the evidence to a material fact or issue in the case. There is no recognized constitutional right to present irrelevant evidence at trial.⁷³ The test for relevancy is a two-part test. First, the evidence must tend to prove or disprove a material fact in issue in the case.⁷⁴ Second, the probative value of the evidence must not be substantially outweighed by its potential for prejudicial impact.⁷⁵

There is little evidence to support the notion that unchastity is logically relevant to the tendency to be untruthful. Support for such a view seemingly

67. *White*, 35 Mo. at 500-01. *Contra* *State v. Patterson*, 88 Mo. 88 (1895).

68. *State v. Taylor*, 320 Mo. 417, 8 S.W.2d 29 (1928).

69. *E.g.*, *State v. Lovitt*, 243 Mo. 510, 147 S.W. 484 (1912).

70. *State v. Kain*, 330 S.W.2d 842 (Mo. 1960).

71. *State v. Northern*, 472 S.W.2d 409, 410-11 (Mo. 1971) (dictum).

72. *See supra* notes 70-71 and accompanying text.

73. *E.g.*, *United States v. Kasto*, 584 F.2d 268 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *State v. Harris*, 620 S.W.2d 349 (Mo. 1981) (en banc); *State v. Thurber*, 625 S.W.2d 931 (Mo. Ct. App. 1981); *State v. Droste*, 115 Wis. 2d 48, 339 N.W.2d 578 (1983); *FED. R. EVID.* 402 (irrelevant evidence is not admissible).

74. *E.g.*, *State v. Ray*, 637 S.W.2d 708 (Mo. 1982) (en banc); *State v. Mercer*, 618 S.W.2d 1 (Mo.) (en banc), *cert. denied*, 454 U.S. 933 (1981); *FED. R. EVID.* 401.

75. *E.g.*, *Ray*, 637 S.W.2d 708; *FED. R. EVID.* 403.

came from prevailing social attitudes regarding the impropriety of women engaging in pre-marital and extra-marital sex.⁷⁶ As evidence of the illogical position taken by courts on this issue, there are many cases that stand for the proposition that women could be impeached for unchastity while men could not.⁷⁷

If there is no logical relationship between sexual activity and the tendency to be untruthful, there is no constitutional infirmity in completely prohibiting the use of this type of evidence to impeach a witness. Indeed, many jurisdictions have reached this conclusion by case law⁷⁸ or by statutory construction.⁷⁹ Prohibiting the use of reputation evidence of prior sexual conduct and evidence of specific conduct with third persons to impeach a rape complainant's capacity for truthfulness serves the basic policy goal of not allowing the outcome of a criminal prosecution to be influenced by irrelevant evidence.⁸⁰ The defense strategy of injecting into a rape trial the distracting collateral issue of a rape complainant's sexual activity, to thereby "put the victim on trial," is eliminated as serving no legitimate purpose in this context.

Evidence of character to prove conduct consistent with that character is generally inadmissible evidence.⁸¹ When such evidence is admissible, it is usually limited to reputation and opinion evidence.⁸² The reasoning behind this rule is twofold. First, the evidence tends to be given far too much weight in relationship to its probative value. Second, character is a collateral issue that may distract the jury from the central issues in controversy.⁸³

76. Tanford and Bocchino suggest that these attitudes stemmed from the view that women were property which men sought to protect from "damage," *i.e.*, loss of virginity or chastity. The severe penalties for rape at common law reflected this concern, and the severe penalties, in turn, led to the difficulty women experienced in proving a rape charge. Tanford & Bocchino, *supra* note 4, at 546 n.6. *See generally* S. BROWNMILLER, *AGAINST OUR WILL* (1975) (discussing social attitudes behind the treatment of rape, rapists, and rape victims).

77. *E.g.*, *State v. Sibley*, 131 Mo. 519, 531, 33 S.W. 167, 171 (1895) ("It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman.").

78. *E.g.*, *United States v. Kasto*, 584 F.2d 268 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976) (en banc).

79. *E.g.*, *State v. Leslie*, 14 Ohio App. 3d 343, 471 N.E.2d 503 (1984).

80. *See supra* note 5 and accompanying text. *But see infra* note 99.

81. *E.g.*, FED. R. EVID. 404; McCORMICK ON EVIDENCE § 188 (3d ed. 1984) [hereinafter McCORMICK].

82. *See cases cited supra* note 59. *But cf.* cases cited *supra* note 62; FED. R. EVID. 405(a) (relevant specific instances of conduct may be inquired into on cross-examination); FED. R. EVID. 405(b) (when character is an essential element of the crime charged, evidence may be offered of specific instances of conduct).

83. McCORMICK, *supra* note 81, § 188.

Although a weak argument can be made for the logical relevancy of opinion and reputation evidence of unchastity to the issue of consent,⁸⁴ this type of sexual conduct evidence fails the second part of the test for relevancy.⁸⁵ Defense attorneys have long recognized the inflammatory nature of such evidence and often sought to introduce reputation and opinion evidence of unchastity to impeach the complainant under the guise of it being relevant to a material issue in the case.⁸⁶ Juries tend to give far too much weight to such evidence in relationship to its very slight probative value,⁸⁷ and for this reason, it is proper under the ordinary rules of evidence to exclude reputation and opinion evidence of unchastity to prove consent.⁸⁸

Much of the above analysis applies with equal or greater force to the use of evidence of specific instances of prior sexual conduct on the part of the complainant to prove consent.⁸⁹ Specific conduct evidence of sexual ac-

84. The argument essentially is that once a person has consented to sexual intercourse, he or she is more likely to consent again. The problem with this argument is that there is no link from the previous acts of sexual intercourse to the specific one in question. There is only a suggestion that the person is more likely to consent to sex in general.

85. See *supra* note 76 and accompanying text.

86. See, e.g., *State v. McFarland*, 604 S.W.2d 613 (Mo. Ct. App. 1980) (defendant's theory was that the complainant falsified rape charges because she feared she was pregnant; court refused to admit evidence of complainant's sexual conduct which occurred three months before the alleged rape because in the interim, complainant experienced two menstrual cycles); see also cases collected in Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 114 n.136 (1977).

87. Tanford and Bocchino take issue with the interpretation given to a study by Kalven and Zeisel. The study of cases tried in the 1950's when sexual conduct evidence was admissible, showed that out of forty-two rape cases examined, there were thirty-seven acquittals. The implication is that the conviction rate should be similar to that of other violent crimes, and since prior sexual conduct evidence was admissible at the time, the low conviction rate must be attributable to the use of such evidence. Tanford and Bocchino point out that the cases examined were ones involving forcible rape where victim and accused knew each other and the victim not injured. They conclude that the study has been cited out of context and therefore does not support the proposition that admissibility of prior sexual conduct evidence will result in a disproportionate number of acquittals. Tanford and Bocchino cite figures from the study that show out of 64 aggravated rape cases, only 16 resulted in acquittal, a lower acquittal rate than that of many other crimes. Tanford & Bocchino, *supra* note 4, at 572-74 nn.136-43 and accompanying text (citing H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966)). *But cf.* U.S. DEPARTMENT OF JUSTICE, *RAPE GUIDELINES FOR A COMMUNITY RESPONSE* 175 (1980) (of the cases studied by Kalven and Zeisel, judges would have convicted in 22 cases, raising a possible issue of bias against rape victims by jurors); J. MARSH, A. GEIST & N. CAPLAN, *RAPE AND THE LIMITS OF LAW REFORM* 31, 83 (1982) (cited in Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1261 n.172.)

88. See *supra* notes 74-75 and accompanying text.

89. A description of a specific act will, in all likelihood, have a greater effect on a jury because of the addition of detail to the testimony.

tivity between the complainant and a third person may or may not be relevant to a material issue, depending upon the facts of the case. Clearly, the mere fact that a woman previously had sexual relations with a third person does not have any real bearing upon whether she consented to sexual relations in the situation in controversy. While at first glance, the argument that once a woman has consented to sex with one man she is more likely to consent with another may seem to carry some weight, the argument is less appealing on closer examination. Even if one accepts the logic of the argument that the evidence is relevant to consent,⁹⁰ the prejudicial effect of such evidence would, in almost every circumstance, far outweigh its probative value. Under the balancing portion of the two-part test for relevancy, then, the evidence would be properly excluded.⁹¹

On the other hand, a complete prohibition on evidence of specific prior sexual conduct between the complainant and men other than the defendant may deprive the defendant of the opportunity to present relevant exculpatory evidence.⁹² Such evidence may be relevant to show a motive to falsify rape charges.⁹³ For example, if the complainant was pregnant and wanted to hide from her parents the fact that she had engaged in illicit consensual sex, she may concoct a story of rape.⁹⁴ The same may be true of a woman whose

90. See *supra* note 84.

91. See *supra* notes 74-75 and accompanying text.

92. See *infra* notes 112-28 and accompanying text. Ordover advocates a six-prong test in determining whether to admit prior sexual conduct evidence as relevant to the defense in a rape prosecution: (1) a clear showing that the complainant committed the prior acts; (2) "the circumstances of the prior acts closely resemble those of the present case; (3) the prior acts are clearly relevant to a material issue such as [consent];" (4) the evidence is necessary to the defense; (5) "the probative value of the evidence outweighs its prejudicial effects;" and (6) only a pattern of similar behavior (as opposed to a single incident) should be admissible. Ordover, *supra* note 86, at 113-14.

Relevant exculpatory evidence will usually be probative on the issue of consent. Nonconsent is an element of the crime of rape. *E.g.*, *State v. Deckard*, 426 S.W.2d 88 (Mo. 1968); *State v. Patterson*, 569 S.W.2d 266 (Mo. Ct. App. 1978); MO. REV. STAT. § 566.030(1) (Supp. 1987). The evidence may be probative on the issue of identity. *E.g.*, *State v. Ervin*, 723 S.W.2d 412 (Mo. Ct. App. 1986) (defendant claimed that evidence that indicated the victim may have had gonorrhea at the time of the rape would tend to exonerate him since he did not contract the disease).

93. *E.g.*, *State v. Jalo*, 27 Or. App. 845, 557 P.2d 1359 (1976) (en banc); see also *State v. Jones*, 716 S.W.2d 799 (1986) (en banc); FED. R. EVID. 404(b).

94. MO. REV. STAT. § 491.015(1)(2) (Supp. 1987) provides for this scenario by permitting the admission of evidence to show an alternative source of pregnancy. This is a common provision in rape shield laws. *E.g.*, COLO. REV. STAT. § 18-3-407(1)(b) (1986); FLA. STAT. ANN. § 794.022(2) (West Supp. 1986).

The more difficult question arises when the defendant alleges that the complainant made false charges because she *thought* she was pregnant but subsequently turned out not to be pregnant. *E.g.*, *State v. McFarland*, 604 S.W.2d 613 (Mo. Ct. App. 1980). Under the interpretation given to the Missouri statute in *Jones*, 716 S.W.2d

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husband or lover caught her in the act of having an affair.⁹⁵ Evidence of prior sexual conduct with third persons may also be relevant to prove a plan to extort money. If a prostitute and her customer disagreed over her price or if the customer refused to pay her altogether, the prostitute may be motivated to accuse him of rape in order to get her price or to seek revenge for his refusal to pay.⁹⁶ The accused may want to introduce evidence of a similar pattern of conduct engaged in by the complainant which would necessarily include evidence of her sexual behavior. For example, a woman may have a history of filing false charges.⁹⁷ Similarly, she may have an emotional problem that leads her to engage in truly indiscriminate sex and to later accuse her lovers of rape because of a sense of guilt or self-loathing regarding her actions.⁹⁸ In very limited circumstances, the evidence may be relevant for

56, Missouri courts will not admit this evidence since (1) the prosecutrix was not really pregnant and (2) the alleged sexual activity was not between the defendant and the complainant and the evidence therefore could not be admitted under Mo. REV. STAT. § 491.015(1)(1) (Supp. 1987). The media have recently given a great deal of coverage to the case of Gary Dotson wherein Cathy Webb recanted after Dotson spent several years in prison for raping her. Webb claimed that fear of pregnancy caused her to claim she was raped. See *Rape and the Law*, NEWSWEEK, May 20, 1985, at 60.

95. *E.g.*, State v. Salkil, 659 S.W.2d 330 (Mo. Ct. App. 1983) (complainant had history of having affairs after arguments with her husband). This type of evidence may no longer be admissible in Missouri unless it falls within Mo. REV. STAT. § 491.015(1)(3) (Supp. 1987) (immediate surrounding circumstances of the alleged crime are admissible). The sponsor of the rape shield statute in the Missouri State Senate, Senator John Buechner stated that "this exception was intended to protect defendants from false claims of rape by prostitutes and young women who had participated in group sexual intercourse prior to the alleged rape." Comment, *Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims*, 22 ST. LOUIS U.L.J. 367, 376 (1978). The Missouri Supreme Court has broadened this interpretation slightly by comparing it to the concept of *res gestae*. State v. Sherman, 637 S.W.2d 704, 706 (Mo. 1982) (en banc). However, the interpretation is quite narrow. It may not apply, for example, if a rape complainant last had sexual intercourse with her lover three weeks before the alleged rape. See *infra* text accompanying note 104 (discussion of consensual sexual activity with the defendant as relevant to motive to falsify).

96. This evidence would not be relevant unless the defendant claimed consent as a defense and unless the circumstances were similar to a prostitution transaction. Cf. N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 1981) (any prostitution conviction within 3 years of rape is admissible).

97. See, *e.g.*, VT. STAT. ANN. tit. 13, § 3255(9)(3)(c) (Supp. 1986) (past false allegations of rape are admissible).

98. North Carolina is the only state to specify that psychiatric testimony regarding the complainant's mental state is admissible. N.C. GEN. STAT. § 8C-1 R.412(b)(4) (1986). Other jurisdictions may admit the evidence under the rule of relevance. Cf. J. WIGMORE, *supra* note 65, § 924a ("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.").

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 impeachment purposes.⁹⁹ Although evidence of this type of sexual behavior may be prejudicial in the sense that it tends to be inflammatory and juries tend to give it a great deal of weight, depending upon the facts of the case, its probative value in exculpating the accused may be great. The weighing process engaged in by a court in determining admissibility ought to be one of probative value versus prejudice to the *defendant* or to the integrity of the trial process itself, not one of probative value versus prejudice to the *witness*.¹⁰⁰

The relevancy of a rape complainant's prior consensual sexual relations with the defendant is generally recognized by the courts and in the provisions of the rape shield statutes themselves.¹⁰¹ Consensual sexual activity with the accused is obviously not conclusive as to guilt or innocence, but such activity may be highly probative on that issue.¹⁰² A woman who has previously consented to sex with the defendant can be said to be at least somewhat likely to have consented to sex with him again.¹⁰³ The evidence may also be relevant to some other issue such as a motive to falsify as was argued in *Jones*.¹⁰⁴

The Missouri rape shield statute limits the admissibility of evidence of prior sexual conduct between the complainant and the defendant to that which is "reasonably contemporaneous with the date of the alleged crime."¹⁰⁵ Rigid time limitations in this context do not make sense as a general rule. Rather, what is reasonably contemporaneous ought to be decided from the facts of the case.¹⁰⁶ Acts of intercourse occurring over a long time frame are not necessarily precluded from being consensual.

The Missouri Supreme Court, previous to its decision in *Jones*,¹⁰⁷ recognized that evidence of prior sexual conduct between the complainant and the defendant may be relevant to a material issue in the case despite its not having occurred at a time "reasonably contemporaneous with the date of

99. If the state introduces evidence regarding the complainant's sexual history, the defendant should be allowed to impeach the testimony with specific conduct evidence. *E.g.*, *State v. Williams*, 21 Ohio St. 3d 33, 487 N.E.2d 560 (1986) (after complainant testified on direct examination that she was homosexual, evidence of heterosexual sex held relevant to consent); *State v. Lantz*, 44 Or. App. 695, 607 P.2d 197 (1980) (en banc) (after complainant testified that she waited 3 days to report anal rape because she was embarrassed, evidence that she had been a prostitute held admissible to contradict her claim of embarrassment).

100. *Jones*, 716 S.W.2d at 802 (Blackmar, J., dissenting).

101. *E.g.*, Mo. REV. STAT. § 491.015 (Supp. 1987). For the text of the statute, see *supra* note 15.

102. *See, e.g.*, *State v. Foulk*, 725 S.W.2d 56 (Mo. Ct. App. 1987).

103. *But cf.* discussion, *supra* note 84.

104. 716 S.W.2d 799 (Mo. 1986) (en banc).

105. Mo. REV. STAT. § 491.015(1)(1) (Supp. 1987). For text of statute, see *supra* note 15.

106. *See, e.g.*, *Jones*, 716 S.W.2d 799; *Foulk*, 725 S.W.2d 56.

107. *Jones*, 716 S.W.2d 799.

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the alleged crime.”¹⁰⁸ The court did so by interpreting subsection 2 of the statute as a “catch-all” category for relevant evidence that did not otherwise fit into the exceptions listed in the statute.¹⁰⁹ Since the court has overruled that interpretation of the law, it may need to reconsider its interpretation of the term “reasonably contemporaneous.”¹¹⁰ Greater flexibility in applying subsection 1(1) of the statute may be necessary in order to preserve the defendant’s right to a fair trial. In other words, the courts may need to examine more closely what “reasonably contemporaneous” means as applied to the facts of individual cases rather than using strict time limitations in defining the term.¹¹¹

Assuming that relevant evidence is being excluded through the application of the rape shield statute, it becomes necessary to determine the appropriate standard of review to analyze the constitutionality of such an exclusion. In 1965, the United States Supreme Court extended to state proceedings the sixth amendment right to confront and cross-examine witnesses.¹¹² The Court said:

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in a criminal case. The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.¹¹³

The Supreme Court has indicated that when a state law or evidentiary rule conflicts with a criminal defendant’s need to present relevant evidence, a balancing of the state’s interests in prohibiting the use of the evidence against the defendant’s need to present a complete defense must take place. In *Davis v. Alaska*,¹¹⁴ a state law prohibited a criminal defendant from questioning a

108. MO. REV. STAT. § 491.015(1)(1) (Supp. 1987). For the text of the statute, see *supra* note 15.

109. See *supra* text accompanying note 31.

110. MO. REV. STAT. § 491.015(1)(1) (Supp. 1987). For the text of the statute, see *supra* note 15.

111. See, e.g., *Jones*, 716 S.W.2d 799; *Foulk*, 725 S.W.2d 56 (Mo. Ct. App. 1987).

112. *Pointer v. Texas*, 380 U.S. 400 (1965) (extending confrontation clause to states via the fourteenth amendment).

113. *Id.* at 404-05.

114. 415 U.S. 308 (1974).

prosecution witness regarding his being on probation for a juvenile offense. The defendant wanted to impeach the witness for bias, his theory being that the witness had an interest in testifying in a manner favorable to the state so as not to endanger his probationary status.¹¹⁵ The prosecution invoked a state rule of procedure prohibiting the disclosure of a juvenile's record in a non-juvenile court proceeding.¹¹⁶ The trial court granted the prosecution's request for a protective order prohibiting disclosure of the witness' juvenile record.¹¹⁷ The Supreme Court granted *certiorari* and reversed Davis' conviction on the grounds that the protective order violated Davis' sixth amendment right to cross-examine witnesses:

We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.¹¹⁸

The Court applied a similar analysis in *Chambers v. Mississippi*.¹¹⁹ Chambers was a defendant in a murder prosecution who was prohibited by the state's voucher rule¹²⁰ from cross-examining McDonald, a witness who had previously confessed to the murder and later repudiated his confession.¹²¹ Chambers was also prohibited from presenting witnesses who had heard McDonald confess to the shooting on the grounds that the testimony would be hearsay.¹²² In reversing Chambers' conviction, the Court stated:

115. *Id.* at 311.

116. *Id.*

117. *Id.*

118. *Id.* at 319.

119. 410 U.S. 284 (1973).

120. Chambers filed a motion requesting a court order compelling McDonald to appear as a witness in the case, and in addition, asked for a ruling that Chambers be allowed to examine McDonald as an adverse witness if the state did not call McDonald. A ruling that McDonald was an adverse witness was necessary for Chambers to impeach his testimony with McDonald's prior confession because Mississippi adhered to the rule that one could not impeach his "own" witness. *Id.* at 291.

121. *Id.* at 288.

122. *Id.* at 293.

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Chambers was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination. . . . The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." . . . Of course, the right to confront . . . is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.¹²³

The Supreme Court still adheres to the balancing test articulated in *Davis* and *Chambers*. In *Crane v. Kentucky*,¹²⁴ a 1986 case, the Court reversed Crane's conviction for murder and remanded the case for a new trial because Crane was not allowed to introduce testimony regarding the circumstances of his confession. The trial court granted the state's motion to exclude the testimony because the judge had already ruled that the confession was voluntary.¹²⁵ The Kentucky Supreme Court affirmed Crane's conviction, reasoning that state procedure prohibited relitigating a pretrial ruling on whether a confession was voluntary. Since the evidence Crane sought to introduce bore on the question of voluntariness, even though he wanted to introduce it to dispute the credibility of the confession,¹²⁶ the court held there was no error in disallowing the evidence.¹²⁷ The Supreme Court disagreed with the Kentucky court and held that under the circumstances of the case, the refusal of the trial court to admit the evidence deprived Crane of a fair trial:

[S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? . . .

[T]he Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." . . . That opportunity would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant

123. *Id.* at 294-95 (citations omitted).

124. 106 S. Ct. 2142 (1986).

125. *Id.* at 2144.

126. The trial court ruled that Crane could inquire into the inconsistencies of the confession, but could not introduce evidence regarding the duration of the interrogation or the number of persons present. *Id.*

127. *Crane v. Commonwealth*, 690 S.W.2d 753, 754 (Ky. 1985).

of the basic right to have the prosecution's case encounter and "survive the crucible of meaningful adversarial testing."¹²⁸

Although the United States Supreme Court has never ruled on the constitutionality of rape shield statutes, it has addressed a similar issue in *Globe Newspaper Co. v. Superior Court*.¹²⁹ In *Globe*, the Court balanced first amendment rights against the privacy interests of rape victims.¹³⁰ *Globe* is of interest because the Court used a balancing process similar to that articulated in *Davis* and *Chambers* to declare unconstitutional a state law intended to protect the privacy of minor rape victims in order to protect their emotional well being and to encourage the reporting of rape to the police.¹³¹

The plaintiff newspaper company tried to gain access to a trial which involved the rape of three minor girls.¹³² The controversy went to the Supreme Court where the Court stated that if "the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."¹³³

In striking down the statute, the Court noted that there was no evidence that the type of protection given by the statute would result in increased reporting of rape to the police.¹³⁴ The Court then stated:

[E]ven if [the law] effectively advanced the State's interest, it is doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward. Surely it cannot be suggested that minor victims of sex crimes are the only crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify. The State's argument based on this interest therefore proves too much.¹³⁵

The Court also did not give much weight to the interest of the state in protecting minor rape victims from the emotional distress of public trials. It concluded that the decision of whether to close the trial to the public should be made on a case by case basis taking into account several characteristics of the victim such as age.¹³⁶

128. *Crane*, 106 S. Ct. at 2146-47 (citations omitted).

129. 457 U.S. 596 (1982).

130. *Id.* at 598.

131. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981). The law provided that in trials concerning sex crimes involving minors, the judge shall only admit to the courtroom those having a "direct interest in the case."

132. *Globe*, 457 U.S. at 598.

133. *Id.* at 606-07.

134. *Id.* at 610.

135. *Id.*

136. *Id.* at 608-09.

The factual situation in *Globe* is sufficiently analogous to the problem presented in the application of rape shield statutes that the Supreme Court's holding in *Globe* must be considered in analyzing the statutes. The *Globe* holding indicates that the Supreme Court will not allow blanket infringements on constitutional rights. Decisions must be made on a case by case basis, and the state interest must be compelling to prevail over the constitutional right that is infringed upon. Any infringement on a constitutional right must be no broader than is necessary under the facts of the case.

Taking guidance from the Supreme Court's pronouncements on this issue, it is clear that in analyzing the competing interests of the state and the defendant, the state's interest in prohibiting the use of prior sexual conduct evidence must substantially outweigh the defendant's right to present evidence in his own defense. At the beginning of this Note, the policy interests behind rape shield laws were identified as (1) encouraging rape victims to report the crime, (2) eliminating the use of irrelevant evidence to impeach rape complainants, and (3) ending harassment of the complainant by the defense.¹³⁷ In order to constitutionally prohibit otherwise admissible evidence central to the defense, these policies must be of such paramount importance to the state that they overshadow the rights of the defendant.

Rape is a serious crime¹³⁸ and, according to the United States Department of Justice, it is one of the most under-reported crimes.¹³⁹ The state certainly has a compelling interest in encouraging the victims of a violent crime to report and prosecute the crime, particularly when there is a history of substantial under-reporting.¹⁴⁰ Rape shield laws are a rational response to the reluctance of rape victims to report the crime to law enforcement authorities.¹⁴¹ Rape shield laws also serve the policy goals of preventing harassment

137. See *supra* note 5 and accompanying text.

138. Rape is classified as a violent crime by the United States Department of Justice. U.S. DEPARTMENT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE (1983) [hereinafter REPORT].

139. A 1983 study by the Department of Justice indicated that 42% of all rapes went unreported in 1981. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1983 (1984). A 1977 report indicated a much higher percentage of unreported rapes, estimating 3.5 to 9 times more rapes occur than are reported. U.S. DEPARTMENT OF JUSTICE, FBI UNIFORM CRIME REPORTS, 1977, at 14 (1978).

140. See *supra* note 139 and accompanying text.

141. It is difficult to single out any one factor which has resulted in the increased reporting of rape. The government, in its surveys of crime victims, does not include fear of harassment by defense attorneys as a possible factor in not reporting rape to the police. About 21% of survey respondents report that the rape was too personal a matter to report to police. U.S. DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1983, at 99 (1985); cf. REPORT, *supra* note 138, at 6 ("It is widely believed by analysts that the rise in the number of rapes reported to police stems largely from the special programs established by many police departments to treat victims of rape more sympathetically.").

of the complainant and of preventing the introduction of irrelevant evidence.¹⁴²

In so far as the shield laws prohibit the use of irrelevant evidence, there is no constitutional problem because there is no constitutional right to present irrelevant evidence.¹⁴³ The state's interest in this context far outweighs that of the defendant because (1) the defendant's interest does not even rise to the level of a legitimate interest and (2) there is a definite, well-recognized public policy of preventing the outcomes of trials from being decided on an irrational basis.¹⁴⁴

Balancing the exclusion of *relevant* exculpatory evidence against the state interests enumerated above must be done on a case by case basis.¹⁴⁵ In a certain factual situation, the probative value of the evidence may be so slight that there would be no substantial harm to the defendant's case in excluding it.¹⁴⁶ In other situations, the evidence may be so compelling that its admission is required no matter how strong the countervailing interest.¹⁴⁷ The availability of other exculpatory evidence to the defendant may enter into the analysis.¹⁴⁸ If the legislature and courts issue a blanket prohibition on sexual conduct evidence, and in a specific case, the probative value of such evidence outweighs its prejudicial effect, the prohibition would violate the defendant's sixth amendment rights.¹⁴⁹

The case of *State v. Jones*¹⁵⁰ is similar to *Chambers v. Mississippi*,¹⁵¹ *Davis v. Alaska*,¹⁵² and *Crane v. Kentucky*¹⁵³ in that the defendant was precluded, through the application of a state procedural rule, from presenting

142. See *supra* note 5 and accompanying text. The *in camera* hearing may be the most useful feature of the shield laws in that it prevents jurors from hearing sexual conduct evidence before the relevancy of the evidence is ruled upon. There is, therefore, less chance of a verdict tainted by irrelevant evidence.

143. See *supra* note 73 and accompanying text.

144. See cases cited *supra* note 73.

145. See *supra* text accompanying note 136.

146. See sources cited *supra* notes 74-75.

147. *E.g.*, *Crane v. Kentucky*, 106 S. Ct. 2142 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

148. See, *e.g.*, *Davis*, 415 U.S. 308; *Chambers*, 410 U.S. 284.

149. These rights include the right to compulsory process extended to state proceedings in *Washington v. Texas*, 388 U.S. 14 (1967). See generally Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978). Because problems arising from the application of rape shield statutes usually arise in the context of cross-examination, discussion in this Note has centered upon the right to cross-examine witnesses. The constitutional analysis applies equally to compulsory process.

150. 716 S.W.2d 799 (Mo. 1986) (en banc).

151. 410 U.S. 284 (1973).

152. 415 U.S. 308 (1974).

153. 106 S. Ct. 2142 (1986).

his strongest (and perhaps only) defense argument. The dissent in *Jones* correctly pointed out that the case involved little more than a "swearing match" between the complainant and defendant.¹⁵⁴ In a close case such as *Jones*, the defendant's interest in presenting relevant, highly probative exculpatory evidence must outweigh the state's interest in prohibiting use of the evidence. Otherwise, the trial process comes dangerously close to being nothing more than trial by affidavit.

The Missouri Supreme Court's interpretation in *State v. Jones* of the rape shield statute invites unconstitutional applications of the law by Missouri courts.¹⁵⁵ The court's application of the law to the facts of *Jones* has resulted in a violation of Jones' sixth amendment right to confront and cross-examine witnesses.¹⁵⁶

Since the court is no longer willing to follow the more acceptable interpretation it gave to the rape shield statute in *State v. Brown*,¹⁵⁷ it should, at the very least, interpret the term "reasonably contemporaneous" in a manner that would allow introduction of relevant evidence that does not fall within the time limits delineated in *State v. Crisp*¹⁵⁸ and *State v. Boyd*.¹⁵⁹ To do otherwise is to do nothing less than to violate the constitutional rights of defendants in criminal proceedings.

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154. *Jones*, 716 S.W.2d at 803 (Blackmar, J., dissenting).

155. *Id.* (Blackmar, J., dissenting).

156. U.S. CONST. amend. VI.

157. 636 S.W.2d 929 (Mo. 1982) (en banc), cert. denied, 459 U.S. 1212 (1983).

158. 629 S.W.2d 475 (Mo. Ct. App. 1981). Although the court indicated it could not rely on "judicial review by the use of clocks or calendars," in light of its holding in *Jones*, it seems reluctant to interpret the term "reasonably contemporaneous" in a more flexible manner. *Jones*, 716 S.W.2d at 801; see also *State v. Foulk*, 725 S.W.2d 56 (Mo. Ct. App. 1987).

159. 643 S.W.2d 825 (Mo. Ct. App. 1982); see *supra* note 158.

