
# ANALYSIS OF CURRENT WISCONSIN LAWS RELATING TO SEXUAL ASSAULT

126156

***STAFF BRIEF 90-4***



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TABLE OF CONTENTS


Page

INTRODUCTION . . . . . 1

PART I - DESCRIPTION OF THE GENERAL SEXUAL ASSAULT LAW . . . . . 3

A. TEXT OF STATUTE . . . . . 3

B. DEFINITION OF "SEXUAL INTERCOURSE". . . . . 6

1. Vulvar Intercourse. . . . . 6
2. Fellatio and Cunnilingus. . . . . 7
3. Any Other Intrusion . . . . . 7
4. Intrusion by Body Part or Object. . . . . 7
5. Intrusion by the Defendant or Upon Defendant's Instructions. . . . . 8

C. DEFINITION OF "SEXUAL CONTACT". . . . . 9

1. Types of Touching Covered . . . . . 9
2. Touching Must Be Intentional. . . . . 10
3. Mental Purposes Required. . . . . 10
4. Prior Version of Definition Unconstitutional. . . . 12

D. CONSENT . . . . . 12

1. Consent by a Person Competent to Give Informed Consent . . . . . 12
2. Consent as a Freely Given Agreement . . . . . 13
3. Resistance Not Required . . . . . 14
4. Constitutional Challenges Relating to "Consent" Definition. . . . . 14
5. Knowledge of Nonconsent Not an Element. . . . . 15
6. Consent Issue: Mentally Ill Victim . . . . . 15
7. Consent Issue: Unconscious Victim. . . . . 17
8. Consent Issue: Age of Victim . . . . . 18
9. Consent Issue: Spousal Situation . . . . . 19
10. Consent Issue: Deception . . . . . 19

E. DESCRIPTION OF OFFENSES UNDER S. 940.225, STATS . . . . 19

1. First-Degree Sexual Assault: Sexual Contact or Intercourse Causing Great Bodily Harm . . . . . 20
2. First-Degree Sexual Assault: Sexual Intercourse or Contact Causing Pregnancy. . . . . 21
3. First-Degree Sexual Assault: Sexual Contact or Intercourse by Use or Threat of Use of a Weapon. . . . . 22

Page

4. First-Degree Sexual Assault: Sexual Contact or Intercourse by Use of Threat or Force While Aided or Abetted. . . . . 24
5. Second-Degree Sexual Assault: Sexual Contact or Intercourse by Use of Threat or Force or Violence. . . . . 26
6. Second-Degree Sexual Assault: Sexual Contact or Intercourse Causing Injury of a Sexual Reproductive Organ or Causing Mental Anguish. . . 27
7. Second-Degree Sexual Assault: Sexual Contact or Intercourse With a Person the Defendant Knows to Suffer From a Mental Illness or Deficiency . . 29
8. Second-Degree Sexual Assault: Sexual Contact or Intercourse With a Person the Defendant Knows is Unconscious . . . . . 30
9. Second-Degree Sexual Assault: Sexual Contact or Intercourse Without Consent While Aided or Abetted . . . . . 32
10. Second-Degree Sexual Assault: Sexual Contact or Intercourse With Patient of a Facility by a Facility Employe. . . . . 32
11. Third-Degree Sexual Assault: Sexual Intercourse Without Consent . . . . . 33
12. Fourth-Degree Sexual Assault: Sexual Contact Without Consent . . . . . 34

PART II - DESCRIPTION OF THE SEXUAL ASSAULT OF A CHILD LAW. . . . . 35

A. TEXT OF PERTINENT STATUTES. . . . . 35

B. DEFINITIONS . . . . . 36

C. DESCRIPTION OF OFFENSES UNDER S. 948.02, STATS. . . . . 37

1. First-Degree Sexual Assault: Sexual Contact or Intercourse With a Person Who Has Not Attained the Age of 13 Years . . . . . 38
2. Second-Degree Sexual Assault: Sexual Contact or Intercourse With a Person Who Has Not Attained the Age of 16 Years . . . . . 38
3. Failure to Act. . . . . 39

PART III - SPECIAL RULES OF EVIDENCE APPLICABLE TO SEXUAL ASSAULT CRIMES--THE RAPE SHIELD LAW . . . . . 41

A. TEXT OF RAPE SHIELD STATUTE . . . . . 41

B. BACKGROUND. . . . . 42

Page

C. OBJECTIVE OF WISCONSIN'S RAPE SHIELD LAW. . . . . 43

D. JUDICIAL INTERPRETATION OF THE WISCONSIN RAPE SHIELD STATUTE. . . . . 46

1. State v. Gavigan, 111 Wis. 2d 150, 330 N.W. 2d 571 (1983) (Wisconsin Supreme Court). . . . . 46
2. State v. Vonesh, 135 Wis. 2d 477, 401 N.W. 2d 170 (Wis. Apps. 1986) (Court of Appeals). . . . . 50
3. State v. Herndon, 145 Wis. 2d 91, 426 N.W. 2d 347 (Wis. Apps. 1988) (Court of Appeals). . . . . 54
4. State v. Mitchell, 44 Wis. 2d 596, 424 N.W. 2d 698 (1988) (Wisconsin Supreme Court). . . . . 59
5. State v. Pulizzano, ___ Wis. 2d ___, ___ N.W. 2d ___ (1990) (Wisconsin Supreme Court). . . . . 62

E. TYPES OF RAPE SHIELD LAWS . . . . . 66

1. The Michigan Approach . . . . . 67
2. Texas Approach. . . . . 67
3. California Approach . . . . . 68
4. Federal Approach. . . . . 69
5. Galvin and NCCUSL Proposals to Improve Rape Shield Laws . . . . . 70

PART IV - LIMITATIONS ON COMMENCING CIVIL ACTION WHERE PENDING SEXUAL ASSAULT CRIMINAL ACTION. . . . . 73

A. MICHIGAN LAW AND BACKGROUND TO THAT LAW . . . . . 73

B. PROPOSED MODEL STATUTE. . . . . 75

PART V - CLOSURE OF THE PRELIMINARY EXAMINATION IN SEXUAL ASSAULT CASES . . . . . 79

A. PURPOSE OF THE PRELIMINARY EXAMINATION. . . . . 79

B. JUDICIAL INTERPRETATION OF PROVISIONS OF THE PRELIMINARY EXAMINATION STATUTE AUTHORIZING CLOSURE . . 80

APPENDIX A - LETTER FROM GARY SCHUSTER, DISTRICT ATTORNEY, DOOR COUNTY, RELATING TO SEXUAL OFFENSES AGAINST CHILDREN STATUTES. . . . . 83

APPENDIX B - TABLES 1 TO 4 FROM APPENDIX TO GALVIN, "SHIELDING RAPE VICTIMS IN THE STATE AND FEDERAL COURTS: A PROPOSAL FOR THE SECOND DECADE," 70 MINN. LAW REV. 763 (1985-86) . . . . . 89

Page

APPENDIX C - GALVIN PROPOSED "RAPE SHIELD" RULE FROM GALVIN, "SHIELDING RAPE VICTIMS IN THE STATE AND FEDERAL COURTS: A PROPOSAL FOR THE SECOND DECADE," 70 MINN. LAW REV. 763 (1985-86). . . . . 101

APPENDIX D - RULE 412, NCCUSL UNIFORM RULES OF EVIDENCE (1986) . . . 105

Wisconsin Legislative Council Staff — Madison, Wisconsin

Special Committee to Review Sexual Assault Laws — July 24, 1990

STAFF BRIEF 90-4*

# ANALYSIS OF CURRENT WISCONSIN LAWS RELATING TO SEXUAL ASSAULT

## INTRODUCTION

This Staff Brief was prepared for the Legislative Council's Special Committee to Review Sexual Assault Laws. The Special Committee was established by the Legislative Council, on May 24, 1990, and directed:

> ...to review those statutes relating to criminal prosecutions for sexual assault, including issues relating to admissibility of evidence; the elements of offenses and definitions of terms; penalties; and the interrelationship of criminal prosecutions and the filing of civil suits by alleged offenders against alleged victims of sexual assault.

The purpose of this Staff Brief is to: (1) provide an analysis of current state criminal laws relating to sexual assault, specifically the general criminal sexual assault statute [s. 940.225, Stats.], the sexual assault of children statute [s. 948.02, Stats.], the so-called "rape shield" statute [s. 972.11 (2), Stats.] and the statute authorizing closure of the preliminary examination in sexual assault cases [s. 970.03 (4), Stats.]; and (2) discuss a recent Michigan law relating to the filing of civil suits by alleged sexual assault offenders against alleged victims during pending criminal sexual assault actions.

Part I of this Staff Brief describes the general sexual assault statute and discusses significant court decisions and other interpretations of the provisions of that statute.

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*This Staff Brief was prepared by Don Salm and Shaun Haas, Senior Staff Attorneys, Legislative Council Staff.

Part II of this Staff Brief describes the sexual assault of children statute and discusses significant court decisions and other interpretations of the provisions of that statute.

Part III of this Staff Brief describes selected procedural and evidentiary aspects of sexual assault criminal actions, including the preliminary hearing and the "rape shield" statute which limits the admissibility of evidence concerning a victim's prior sexual conduct in sexual assault cases.

Part IV of this Staff Brief describes a recent Michigan law that prohibits a defendant in a pending criminal sexual assault case to commence or maintain a civil action against the victim of the alleged sexual assault.

Part V of this Staff Brief describes (1) the current statute relating to closure to the public of preliminary examinations in sexual assault cases under certain circumstances and (2) a recent Wisconsin Supreme Court decision relating to that statute.

## PART I

## DESCRIPTION OF THE GENERAL SEXUAL ASSAULT LAW [s. 940.225, Stats.]

This Part of the Staff Brief discusses the general sexual assault crimes set forth in s. 940.225, Stats., and significant court decisions and other interpretations relating to those crimes. Most of Wisconsin's current "Sexual Assault Law" was created by Ch. 184, Laws of 1975 (effective March 27, 1976), which extensively changed state law relating to offenses formerly known as "rape." Chapter 184 repealed former separate statutes prohibiting rape, sexual intercourse without consent, sexual intercourse with a child and indecent behavior with a child and replaced them with a comprehensive statute, s. 940.225, Stats., prohibiting sexual assault (i.e., sexual intercourse or sexual contact). Sexual assaults were removed from ch. 944, Stats., dealing with crimes against sexual morality, and placed in ch. 940, Stats., with crimes against bodily security. The law distinguished four degrees of sexual assault with penalties ranging from up to 20 years imprisonment for first-degree sexual assault and up to nine months imprisonment for fourth-degree sexual assault.

1989 Wisconsin Act 332 (effective July 1, 1989) took those portions of s. 940.225, Stats., which related to sexual assault of children and placed them in ch. 948, Stats., the new Crimes Against Children chapter created by the Act. These provisions are discussed in Part II, below.

For each of the crimes in s. 940.225, Stats., this Part sets forth the text of the statute, discusses the definitions of key terms used in the statute and describes the offenses under the statute. Much of the commentary in Parts I and II of this Staff Brief is taken from Hammer and Donohoo, Substantive Criminal Law in Wisconsin, pp. 335-367 (Professional Education Systems, Inc., 1989).

### A. TEXT OF STATUTE

The general sexual assault offenses and relevant definitions and other provisions are set forth in s. 940.225, Stats., which reads as follows:

> 940.225 SEXUAL ASSAULT. (1) FIRST DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class B felony:
>
> (a) Has sexual contact or sexual intercourse with another person without consent of that person and

causes pregnancy or great bodily harm to that person.

(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.

(c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class C felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(f) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without the consent of that person.

(g) Is an employe of an inpatient facility or a state treatment facility and has sexual contact or sexual intercourse with a person who is a patient or resident of the facility.

(3) THIRD DEGREE SEXUAL ASSAULT. Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony.

(3m) FOURTH DEGREE SEXUAL ASSAULT. Whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.

(4) CONSENT. "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of sub. (2) (c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(5) DEFINITIONS. In this section:

(a) "Inpatient facility" has the meaning designated in s. 51.01 (10).

(b) "Sexual contact" means any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1).

(c) "Sexual intercourse" includes the meaning assigned under s. 939.22 (36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of

> any part of the person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.
>
> (d) "State treatment facility" has the meaning designated in s. 51.01 (15).
>
> (6) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.
>
> (7) DEATH OF VICTIM. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

B. DEFINITION OF "SEXUAL INTERCOURSE" [s. 940.225 (5) (c), Stats.]

With reference to the definition of "sexual intercourse" in s. 940.225 (5) (c), Stats., Hammer, supra, p. 339, notes:

> The sexual intercourse definition is descriptive of conduct only and does not include any mental state. The prosecution is not required to prove that the defendant engaged in the intercourse for the purpose of sexually gratifying or arousing himself, or for the purpose of degrading or humiliating the victim. These mens rea [wrongful mental state] elements must be established in cases involving alleged sexual contact, but need not be shown when the charge is sexual intercourse. The Wisconsin Supreme Court has recognized that sexual intercourse offenses under § 940.225 are strict liability crimes. See Hagenkord v. State, 100 Wis. 2d 452, 483, 302 N.W. 2d 421, 437 (1981) [emphasis added].

The following is a discussion of some of the key terms and phrases in the definition:

1. Vulvar Intercourse

The definition incorporates the definition of "sexual intercourse" found in s. 939.22 (36), Stats. (the definition generally applicable throughout the Criminal Code), which provides that intercourse requires only vulvar penetration. The term "vulva" refers to the entire structure

of external genital organs of the female. Thus, intrusion into the "vagina" is not necessary.

2. Fellatio and Cunnilingus

The definition states that "sexual intercourse" includes "fellatio" and "cunnilingus." There are no statutory definitions of these acts. However, the Wisconsin Criminal Jury Instructions Committee, which drafts the Instructions, has proposed that the following two explanations, from Webster's New Collegiate Dictionary, be used for the purpose of giving jury instructions in general assault cases: "Cunnilingus, the oral stimulation of the clitoris or vulva, is sexual intercourse. Fellatio, the oral stimulation of the penis, is sexual intercourse" [Wisconsin Jury Instructions--Criminal, No. 1200, Comment 1]. According to Hammer, supra, p. 340:

> It seems evident, however, that the phrase "oral stimulation" does not carry with it the requirement that the state show the victim (or defendant) was in fact stimulated.

In State v. Childs, 146 Wis. 2d 116, 430 N.W. 2d 353, rev. denied, 147 Wis. 2d 888, 436 N.W. 2d 29, certiorari denied, 109 S. Ct. 1154 (Ct. App. 1988), the Court of Appeals held that the offense of second-degree sexual assault through fellatio includes oral stimulation of the penis without penetration into the mouth.

3. Any Other Intrusion

The inclusion of the phrase "any other intrusion" broadens the definition to cover conduct not included within the meaning of vulvar intercourse, anal intercourse, fellatio or cunnilingus. The definition lists those four specific forms of intercourse and then proscribes "any other intrusion, however slight, of any part of a person's body or any object into the genital or anal opening." See, also, discussion of a Dane County circuit court case in item 5, below.

4. Intrusion by Body Part or Object

The various forms of intrusion described in the definition may be accomplished either by a body part (e.g., penis, finger, hand, mouth) or by any object (e.g., stick, gun or bottle) [State v. Harvey, 139 Wis. 2d 353, 407 N.W. 2d 235 (1987) (gun inserted in victim's anus and vagina)]. According to Hammer, supra, p. 341:

> The prosecution need not show any sexual intent, motivation, or arousal by the defendant. The voluntary performance of such an intrusion--the physical act itself--is all that is required

(together with proof of the other elements). See State v. Hagenkord, supra, p. 437.

5. Intrusion by the Defendant or Upon Defendant's Instructions

An act of intercourse may be accomplished by the defendant directly, as where he or she inserts a body part or object into the victim's anal or genital opening. However, the definition of sexual intercourse also includes those situations in which the defendant instructs another, or even the victim, to perform the intrusion (e.g., defendant directs a woman to insert a finger or other object into her vagina).

A 1987 Dane County circuit court case provides at least one interpretation of this phrase in the context of the entire definition of "sexual intercourse."

On January 30, 1987, in State v. Stevens, Dane County Circuit Court Docket No. 86-CF-866, a Dane County circuit court judge dismissed a criminal charge of second-degree sexual assault involving a consensual act of intercourse between a female defendant and a minor male victim. The second-degree sexual assault statute, s. 940.225 (2) (e), 1987 Stats., provided that it is a Class C felony to have "sexual contact or sexual intercourse with a person who is over the age of 12 years and under the age of 16 years" (emphasis added).

In the Stevens case, the district attorney elected to pursue the second-degree sexual assault charge based only on an allegation of sexual intercourse, omitting any allegation of sexual contact. The judge dismissed the case based on his interpretation of the definition of sexual intercourse provided in s. 940.225 (5) (b). The judge interpreted the language "either by the defendant or upon the defendant's instruction" as referring back to the entire definition of acts constituting sexual intercourse. As interpreted, the insertion of any body part or of any object into the genital or anal opening must be by the defendant or upon the defendant's instruction in order to come within the definition of sexual intercourse.

Applying this interpretation to the facts of the case, the judge held that a consensual act between a male victim (even a minor victim, where lack of consent is not an element of the crime of first- or second-degree sexual assault) and a female defendant, where the state is unable to prove that the defendant instructed the victim to engage in intercourse, would not constitute sexual assault involving sexual intercourse. Although the alleged act of intercourse involved in the Stevens case could be considered to be sexual contact, the district attorney did not allege that the defendant engaged in sexual contact with the victim. Thus, there was no alternative for the trial court but to dismiss the case.

C. DEFINITION OF "SEXUAL CONTACT" [s. 940.225 (5) (b), Stats.]

The definition of "sexual contact" is broad, but it has withstood a challenge that it is unconstitutionally vague because it "does not provide a standard to be used in determining whether contemplated actions are prohibited" [State v. Olson, 113 Wis. 2d 249, 335 N.W. 2d 433, 437 (Ct. App. 1983)].

The following is a discussion of some of the key elements of the definition:

1. Types of Touching Covered

The definition of "sexual contact" refers to two forms of intentional touchings: (a) the defendant touching the victim; and (b) the victim touching the defendant. In the latter situation, the defendant must "cause" the victim to touch the defendant by threats, intimidation or upon instruction.

The physical contact must be a touching of an intimate part of a human being, either directly or through the clothing. The touching may be accomplished either by a body part or any object. The phrase "intimate parts" is defined in s. 939.22 (19), Stats., to include the breast, buttock, scrotum, anus, groin, penis, vagina or pubic mound of a human being. The Court of Appeals construed "vagina" as used in this definition in State v. Morse, 126 Wis. 2d 1, 374 N.W. 2d 388 (Ct. App. 1985). In that case, the defendant was charged with touching the "vaginal area" of a 14-year old girl through her clothing. The defendant claimed that the state presented insufficient evidence that he touched the victim's vagina. He contended that the testimony that he placed his hand between the victim's legs on her "crotch" lacked sufficient specificity to establish that he touched her vagina. Relying upon principles of statutory construction, the Court stated that the statutory term "vagina" is broader than the medical one and includes the vulva, or external genitalia, consisting of the labia majora, labia minora, clitoris, vestibule of the vagina, vaginal opening and bulbs of the vagina. The Court noted, at p. 390:

> To define vagina according to its medical definition would permit a defendant to touch almost the entire female external genitalia without legal consequence. Such a construction is contrary to the legislature's intent that sec. 940.225, Stats., "broaden the protections afforded by what had previously been referred to as crimes against sexual morality" [citation omitted]. Moreover, it is absurd to construe vagina so

narrowly as to permit touching of the external female genitalia.

2. Touching Must Be Intentional

According to Hammer, supra, p. 343:

> The legislature employed the word "intentional" to describe the mental state which must attend the unlawful touch. It did not, however, utilize any of the mens rea [wrongful mental state] indicators which are precisely identified in § 939.23 [, Stats.,] to connote criminal intent. Significantly, the legislature did not specifically employ the word "intentionally" in the definition of sexual contact. When the latter term is incorporated in a Criminal Code offense definition, it operates to impart a knowledge requirement to all elements in the pertinent statute which follow the word "intentionally...." Its absence from the sexual contact definition means that any such knowledge requirement must come from the particular sexual assault crime charged.... In the opinion of the author, the phrase "intentional touching" means that the physical act of touching must be a product of the free will. This removes from the reach of the definition those touches which are accidental or that might otherwise be described as involuntary (i.e., the act does not represent the will exercising control over the bodily movement) [emphasis added].

3. Mental Purposes Required

In addition to the requirement that the touching be intentional, the definition of "sexual contact" identifies three mental purposes, at least one of which must accompany the act:

a. A purpose to degrade or humiliate the victim;

b. A purpose to sexually arouse or gratify the defendant; or

c. A purpose to inflict bodily harm.

Hammer, supra, p. 343, notes that:

> In some cases the actor may simultaneously harbor two or perhaps all three purposes. However,

> because the actus reus [wrongful act] of sexual contact is identified as the touch, the actor commits but one sexual contact even if it is accompanied by more than one of the unlawful purposes identified above. If there are multiple touches, the course of conduct may give rise to more than one charge. The issues then are ones of multiplicity and duplicity.

In State v. Drusch, 139 Wis. 2d 312, 325-326, 407 N.W. 2d 328, 334 (Ct. App. 1987), the Court of Appeals considered the mens rea [wrongful mental state] of sexual contact. Drusch was convicted of first-degree sexual assault for having had sexual contact with young children. On appeal, he claimed that the evidence was insufficient to prove that he acted for the purpose of sexual arousal or gratification. The Court of Appeals held that the intent to become sexually aroused or gratified may be inferred from the defendant's conduct and the surrounding circumstances. The Court concluded, at p. 335, that there was sufficient evidence to support the conviction where the evidence showed that:

> ...Drusch approached the girls while they were playing on the [monkey] bars, and uninvited, repeatedly lifted and carried them with his hand between their legs, sometimes squeezing them in the vaginal area, and that he lied about his identity to the children and about his contact with the children to the police.

Another type of mental purpose identified in the definition of sexual contact is an intentional touching with the intent to do bodily harm. The statute employs the following terminology: "...if the touching contains the elements of actual or attempted battery under s. 940.19." A comment to the Wisconsin Jury Instructions--Criminal, No. 1201, points out the problem of integrating the elements of battery with those of sexual assault and concludes that the only element that transfers from battery to sexual assault is the "intent to do bodily harm."

In State v. Olson, 113 Wis. 2d 249, 335 N.W. 2d 433, 437-438 (Ct. App. 1983), the Court of Appeals upheld the "battery" provision of the sexual contact definition in response to the defendant's claim that the statute was unconstitutionally vague. The defendant was convicted under s. 940.225 (1) (d), 1983 Stats., for having had sexual contact with a person under the age of 12. The conduct involved the pulling and twisting of the victim's penis. The defendant claimed that this charge violated due process by failing to distinguish battery from sexual assault. The defendant's complaint appeared to be that any battery that happens to involve an intimate part becomes a sexual assault. As such, he claimed that the statute supplied no "core meaning." The Court rejected this argument, finding the statute constitutional as applied to the defendant.

4. Prior Version of Definition Unconstitutional

In State v. Nye, 100 Wis. 2d 398, 302 N.W. 2d 83, 86, aff'd, 105 Wis. 2d 63, 312 N.W. 2d 826 (1981), the Wisconsin Supreme Court considered a prior version of the definition of "sexual contact" which was phrased in terms of an intentional touch that could "reasonably be construed as being for the purpose of sexual gratification" [s. 940.225 (5) (b) (1977 Stats.); emphasis added]. Based on that language, the Court held the statute unconstitutional because it diluted the burden of proof by permitting the state to convict upon a showing that the defendant possibly acted for the purpose of arousal or gratification. The Court noted that sexual contact crimes were otherwise specific intent crimes which required proof beyond a reasonable doubt that an accused acted for the purpose of arousal or gratification.

D. CONSENT [s. 940.225 (4), Stats.]

Section 940.225 (4), Stats., defines "consent" for purposes of the sexual assault law. The definition applies only to s. 940.225, Stats., offenses and not to any other crimes. The general Criminal Code definition of "without consent," found at s. 939.22 (48), Stats., does not apply to the sexual assault statute.

Consent is not an element of s. 940.225 (2) (c) [sexual assault of person defendant knows to suffer from mental illness or deficiency], (d) [sexual assault of person defendant knows is unconscious] and (g) [sexual assault of a patient of a facility by a facility employe], Stats.

The following is a discussion of some of the key elements of "consent" under the sexual assault statute:

1. Consent By a Person Competent to Give Informed Consent

According to Hammer, supra, pp. 346 and 347:

> The legislature volunteered no definition of competency and there are no published appellate cases construing the term in this particular context. The Wisconsin Criminal Jury Instructions Committee interprets competency as pertaining to the person's ability to understand the sexual act and its consequences. See Wis. JI-Criminal 1200 B comment 3 (1983). Without explanation, the Committee also concluded that the class of persons who may be incompetent to give consent is broader than those delineated in § 940.225 (4) (b) (persons suffering from a mental disease or defect

> which impairs capacity to appraise personal conduct) and (c) (persons unable to communicate unwillingness to act because of unconsciousness or physical inability). Id. The latter two categories of persons are presumptively incapable of consent, subject to rebuttal.... The Jury Instructions Committee thought that a separate instruction on incompetence was useful where the incapacitated victim's words or actions might otherwise indicate consent.... It seems, however, that such cases could be resolved by reference to the requirement that the words or actions indicate a freely given agreement without adding to the complexity by developing a diaphanously separate concept of competence. At any rate, it is expected that most of these cases will nevertheless fall within the presumptively incapable person categories of §§ 940.225 (4) (b) and (c). Separate emphasis on competence might be most useful where the victim is groggy or drowsy because of drugs or alcohol, but not quite unconscious. Cf. State v. Spanbauer, 108 Wis. 2d 548, 552-553, 322 N.W. 2d 511, 513 (Ct. App. 1982).

2. Consent as a Freely Given Agreement

Where the offense specifically sets forth nonconsent as an element of the offense, the prosecution is obligated to demonstrate beyond a reasonable doubt that there did not exist a freely given agreement between the victim and the defendant to engage in a sex act.

According to Hammer, supra, p. 347:

> Problems of proof are sometimes confused with this legal rule. Proof of nonconsent involves proof of the victim's state of mind at the time of the act. In the paradigm rape case where the victim is assaulted at gunpoint in her home by a burglar, the issue is straightforward. But often the victim's state of mind at the time of the assault is less clear.

As a comment to s. 213.1, Model Penal Code and Commentaries (drafted by the American Law Institute), pp. 302 and 303 (1980) notes:

> Searching for consent in a particular case, however, may reveal depths of ambiguity and contradiction that are scarcely suspected when the

> question is put in the abstract. Often the woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it, or may desire it but feel compelled to say "no." Her confusion at the time of the act may later resolve into non-consent. Some have expressed the fear that a woman who subconsciously wanted to have sexual intercourse will later feel guilty and "cry rape." It seems plain, on the other hand, that a barrage of conflicting emotions at the time of the assault does not necessarily imply the victim's consent, although it may lead to misperception by the actor. Further ambiguity may be introduced by the fact that the woman may appear to consent because she is frozen by fear and panic, or because she quite rationally decides to "consent" rather than risk being killed or injured.

3. Resistance Not Required

Consent or nonconsent is proven through a person's acts and words. Resistance by the victim is not required to prove nonconsent. In State v. Clark, 87 Wis. 2d 804, 275 N.W. 2d 715, 721-722, the Wisconsin Supreme Court: (a) held that "...failure to resist is not consent; the statute requires 'words' or 'overt acts' demonstrating 'freely given consent'"; and (b) stated that where the victim's acts are "arguably ambiguous or even demonstrative of consent," a jury might nevertheless find nonconsent if it concludes the victim "merely responded to directions" out of fear.

4. Constitutional Challenges Relating to "Consent" Definition

In Gates v. State, 92 Wis. 2d 512, 283 N.W. 2d 474, 477 (Ct. App. 1982), the Court of Appeals held that the definition of "consent" does not unconstitutionally shift the burden of proof to the defendant on the issue. The appellant had contended that this definition allows the state to submit no proof on consent and instead requires defendants to show words or overt acts indicative of a freely given agreement to have sex. Although the state does not have to show that the victim resisted the defendant, the Court indicated that the prosecution bears the burden of proving nonconsent beyond a reasonable doubt. There is no presumption of nonconsent. The Court in Gates held that the state met its burden where the victim testified she screamed and struggled for five minutes before fear and exhaustion led her to comply.

In State v. Lederer, 99 Wis. 2d 430, 299 N.W. 2d 456 (Ct. App. 1980), the Court of Appeals rejected an "overbreadth" challenge to the definition of "consent." The defendant claimed that the definition of nonconsent in the statute was so broad that it included what was in fact legal consensual sex. Citing the Gates and Clark cases, supra, the Court also

reaffirmed the position that the Legislature did not require the state to show resistance as a predicate for nonconsent, noting at p. 460:

> Defendant contends that two parties may enter into consensual sexual relations without freely given consent through words or acts. We reject this contention as we know of no other means of communicating consent.

5. Knowledge of Nonconsent Not an Element

According to Hammer, supra, pp. 348 and 349:

> Consent is an historical fact which the trier of fact must determine on the basis of all of the surrounding circumstances. The only concern is with the victim's state of mind; the defendant's state of mind is wholly immaterial. Whether the actor believed the victim agreed to have sex is not a defense. Similarly, any mistake by the defendant as to the existence of consent is not a defense. This conclusion follows from the absence of the word "intentionally" in any part of § 940.225, an omission rendering § 939.23 inapplicable. The latter section, where operative, imparts a knowledge requirement with respect to all material facts following the word "intentionally" in the offense definition.... The effect of the legislature's omission of the "intentionally" indicator is that knowledge of nonconsent is not an element of the § 940.225 offenses. Likewise, the defendant's claim of mistake regarding consent is not a defense because the error would not negate a state of mind essential to the crime. See Wis. Stat. § 939.43 (1) (1985-86) [emphasis added].

6. Consent Issue: Mentally Ill Victim

Section 940.225 (4), Stats., distinguishes two classes of persons who are presumed to be incapable of consent: (a) persons suffering from a mental disease or defect which impairs capacity to appraise "personal conduct"; and (b) unconscious victims discussed in item 7, below. The presumption is rebuttable. Section 903.03, Stats., specifies that this so-called presumption is, in effect, a permissive inference; that is, the jury may infer nonconsent from the fact of the mental illness (for instance), but it is not required to do so.

In addition to this presumption relating to consent, the Legislature created a parallel offense of second-degree sexual assault to have sexual intercourse or sexual contact with these mentally ill persons [s. 940.225 (2) (c), Stats.]. There are no Wisconsin cases construing the language in either of these provisions. The critical language in s. 940.225 (4) (b), Stats., provides that the mental disease or defect must impair the victim's capacity to appraise "personal conduct" at the time of the act. The same phrase is found in the Model Penal Code, s. 213.1 (2) (b) (1980). The commentary to that section notes:

> This language ["mental disease or defect which renders her incapable of appraising the nature of her conduct"] is intended to constrict the reach of this provision to instances of severe mental incapacity. By specifying that the woman must lack ability to assess the "nature" of her conduct, the statute is intended to avoid questions of value judgment and of remote consequences of immediate acts. Furthermore, Subsection (2) (b) [in the Model Penal Code]...does not include any provision for liability based only on conditions affecting the woman's capacity to "control" her own behavior. What those conditions might be is a murky question full of potential for debate and confusion, and the Institute thought that it would be dangerous to premise felony sanctions on the male's failure to discriminate between simple enthusiasm and diseased eroticism. Subsection (2) (b) therefore limits liability for intercourse with a mentally incompetent woman to cases of severe defect or impairment precluding ability to understand the nature of the act itself.

According to Hammer, supra, p. 350:

> Section 940.225 (2) (c) applies where consent is immaterial but the defendant knowingly engaged in a sex act with a person suffering from a mental illness or deficiency that rendered the person incapable of appraising conduct.
>
> Section 940.225 (4) (b), which employs the same standard of mental deficiency, applies only where nonconsent is an element of the offense. For instance, if a defendant allegedly has sexual intercourse with a severely mentally ill victim, the prosecutor could charge third-degree sexual assault [§ 940.225 (3)], relying on the § 940.225

> (4) (b) inference to meet the burden of proof on nonconsent. If the evidence demonstrates that the defendant knew of the victim's mental deficiency, the prosecutor alternatively could pursue a violation of § 940.225 (2) (c) in which nonconsent is not an element [emphasis added].

7. Consent Issue: Unconscious Victim

Under the general sexual assault statute, the second class of persons presumed incapable of consent includes those who are unconscious or physically unable to communicate unwillingness to engage in a sex act for any other reason [s. 940.225 (4) (c), Stats.]. This presumption is also rebuttable and amounts to no more than a permissive inference [s. 903.03, Stats.]. The following comments apply to this presumption:

a. According to Hammer, supra, pp. 350 and 351:

> Given the definition of consent as a freely given agreement which is manifest through words or acts, the subsection might appear superfluous.... "[U]nconsciousness is conclusively demonstrative of present inability to consent, and it renders more or less irrelevant any prior course of voluntary behavior by the female" [Model Penal Code and Commentaries, § 213.1 comment 5 (b), at 319 (1980)].

In Hagenkord v. State, supra, p. 459, the defendant beat the victim into unconsciousness before having an act of sexual intercourse with her. The Court observed that the intercourse was without consent, citing s. 940.225 (4) (c), Stats.

b. This provision does not require that the defendant be in any way responsible for the victim's unconsciousness. It is immaterial whether the unconsciousness is a product of injury, deep sleep, intoxication or drug use.

c. As it did with the mentally ill victim, the Legislature paralleled the consent provision for the unconscious victim with a separate and distinct offense. Section 940.225 (2) (d), Stats., makes it a second-degree sexual assault to knowingly have sexual contact or intercourse with an unconscious person. Nonconsent is not an element, but the state must prove the defendant was aware of the victim's unconsciousness. Hammer, supra, notes at p. 351:

> It will be observed that § 940.225 (2) (d) applies only to the "unconscious" victim, whereas the pertinent language in the consent definition is

> broader. The latter applies not only to those who are unconscious but to all those who are physically unable to communicate unwillingness to the act.

d. There is no statutory definition of "unconsciousness." The Wisconsin Criminal Jury Instructions Committee regards the word as self-explanatory [Wisconsin Jury Instructions--Criminal, No. 1200D]. According to Hammer, supra, p. 351, "other states have used alternative wording, such as 'incapable of consent by reason of impairment of cognition,' or 'unaware sexual intercourse is occurring' or 'physically incapable of resisting'."

e. Current law has no specific provision for the drowsy or groggy (but not unconscious) victim. Hammer, supra, p. 351, notes that "it appears that such cases should be scrutinized under the general definition of consent (i.e., a freely given agreement) and that all of the surrounding circumstances should be considered." According to Hammer, supra, p. 536:

> Since Wisconsin has not elected to make this a separate offense but rather chose to regulate such behavior under the general definition of consent, there is no requirement that the defendant be culpable in producing the drowsy or drugged state. This leaves for the jury the problem of voluntary intoxication by the victim causing drowsiness or stupefaction short of unconsciousness. Cf. Quinn v. State, 153 Wis. 573, 142 N.W. 510 (1913). It may be that the legislature had this in mind when it limited the § 940.225 (2) (d) second degree sexual assault offense to "unconscious" victims but defined presumptive nonconsent under § 940.225 (4) (c) as pertaining to those who are unconscious or otherwise physically unable to communicate unwillingness to an act.

8. Consent Issue: Age of Victim

Under current law, consent is immaterial if the victim is younger than 16 years. Nonconsent is not an element of either a s. 948.02 (1), Stats., offense or a s. 948.02 (2), Stats., offense. Together, these offenses discussed in Part II, below, make it a felony to have sexual contact or intercourse with a person younger than 16 years, regardless of whether the victim willingly participated in the act.

9. Consent Issue: Spousal Situation

Current law subjects a defendant who assaults his or her spouse to criminal liability under all pertinent offenses in ss. 940.225 and 948.02, Stats. The fact of marriage and the spousal relationship is something which may be material to the issue of consent where nonconsent is an element of the offense.

10. Consent Issue: Deception

Wisconsin law does not specifically address the status of a victim who willingly engages in a sex act, but only because of deception by the defendant.

According to Hammer, supra, p. 536:

> Traditionally, such deceptions as "rape" consisted of misrepresentations as to the nature of the act (e.g., the bogus medical case) or deception as to the fact of marriage.... The latter situation, if criminal at all, is best scrutinized under the bigamy (§ 944.05) or adultery (§ 944.16) statutes as appropriate.
>
> The definition of consent indicates that the victim must "freely agree" to the sex act. There is no requirement of "informed consent," only that the victim be a person "competent to give informed consent...." Wis. Stat. § 940.225 (4) (1985-86).

At one time, the statutes did contain a criminal provision covering deception. Section 944.02 (3), 1955 Stats., prohibited sexual intercourse where the victim submitted (a) because she was deceived as to the nature of the act or (b) where she believed that the intercourse was marital. The deception or belief had to be intentionally induced by the actor.

E. DESCRIPTION OF OFFENSES UNDER S. 940.225, STATS.

In the following listing of elements of the various sexual assault offenses under s. 940.225, Stats., it should be remembered that in those offenses in which sexual contact is an element, the definition of "sexual contact" requires that the contact be with:

1. Intent to cause bodily harm to the victim; or

2. Intent to become sexually aroused or gratified; or

3. Intent to sexually degrade or humiliate the victim.

Thus, in each of those offenses, one of the above must be proven as part of the sexual contact element of the offense.

1. First-Degree Sexual Assault: Sexual Contact or Intercourse Causing Great Bodily Harm [s. 940.225 (1) (a), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) The victim did not consent to the sexual contact or sexual intercourse.

(3) The defendant caused "great bodily harm" to the victim. "Great bodily harm" is defined, in s. 939.22 (14), Stats., to mean bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

b. Penalty

First-degree sexual assault causing great bodily harm is a Class B felony (punishable by imprisonment of not more than 20 years).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

(1) The element of nonconsent is linked to the act of sexual contact or intercourse, not to great bodily harm. If there is an act of consensual intercourse followed by a nonconsensual beating causing great bodily harm, there is no sexual assault offense under s. 940.225 (1) (a), Stats.

(2) Neither the sexual intercourse nor the sexual contact need cause the great bodily harm. In Hagenkord, supra, pp. 425-426, the accused beat the victim into unconsciousness and then committed an act of sexual intercourse. The Court upheld the conviction, noting that it was evident that the victim's injuries resulted entirely from the beating and not from the sex act. A defendant commits this offense whether the great bodily harm is inflicted before, during or after the nonconsensual sex act. According to Hammer, supra, p. 355:

> Although it is clear that there need not be a casual link between the sex act and the great bodily harm, the statute contemplates a nexus in space and time between the nonconsensual sex act and the infliction of great bodily harm. Beyond this, however, the language of the statute does not insist that the infliction of the great bodily harm cause the nonconsent or precede it. This may in fact happen, as it did in Hagenkord, but this sequence is not necessary to satisfy the offense definition.
>
> Perhaps the clearest way of resolving this question is simply to require that the great bodily harm occur during the same transaction as the nonconsensual intercourse. Cf. State v. Lomagro, 113 Wis. 2d 582, 335 N.W. 2d 583 (1983) [emphasis added].

2. First-Degree Sexual Assault: Sexual Intercourse or Contact Causing Pregnancy [s. 940.225 (1) (a), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) The victim did not consent to the sexual contact or sexual intercourse.

(3) The nonconsensual sexual contact or sexual intercourse caused the victim's pregnancy.

b. Penalty

First-degree sexual assault causing pregnancy is a Class B felony (punishable by imprisonment of not more than 20 years).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

(1) Even though one of the elements of this offense is that the defendant's act caused pregnancy, the statute allows a prosecutor to charge the offense as one of sexual contact or sexual intercourse. Proof that the defendant caused the pregnancy establishes the element of sexual intercourse or contact.

(2) The statute specifies that the sexual act must be nonconsensual. According to Hammer, supra, p. 356:

> Thus, where a defendant has a sexual relationship with a 15-year old who is a willing and voluntary participant, the defendant is certainly culpable under § [948.02 (2)] for having had sex with a person younger than 16, but he has not violated § 940.225 (1) (a) if she becomes pregnant. The act must be nonconsensual under the statutory definition of nonconsent.... A related point is that nonconsent is linked only to the sex act, not to the pregnancy.

3. First-Degree Sexual Assault: Sexual Contact or Intercourse by Use or Threat of Use of a Weapon [s. 940.225 (1) (b), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) The victim did not consent to the sexual contact or intercourse.

(3) The defendant used or threatened to use a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it was a dangerous weapon. For purposes of the Criminal Code, "dangerous weapon" is defined as any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in s. 941.295 (4), Stats.; or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm [s. 939.22 (10), Stats.]. "Reasonably believes" is defined to mean that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous [s. 939.22 (32), Stats.].

b. Penalty

Sexual assault by use or threat of use of a weapon is a Class B felony (punishable by imprisonment of not more than 20 years).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

(1) The statute provides that a defendant commits this offense where the nonconsensual sex act occurs by the use or threat of use of an article fashioned in a manner to lead the victim reasonably to believe it is a dangerous weapon. The key point is whether the victim could have reasonably believed the article, whatever it may have been in fact, was something calculated or likely to cause death or great bodily harm.

In State v. Price, 111 Wis. 2d 366, 330 N.W. 2d 779 (1983), the defendant took an "object" from his boot, told the victim it was a knife, and held it to her chin. She felt a sharp tip. Later, during a sexual assault, the defendant held it to her breast and threatened to cut it off. The victim never saw a "knife." The Wisconsin Supreme Court found sufficient evidence to sustain the defendant's conviction, concluding that he "at the very least" used an article fashioned like a dangerous weapon.

(2) Whether the defendant must actually display or use a dangerous weapon or a dangerous appearing article was resolved in State v. Hopson, 122 Wis. 2d 395, 401-402, 362 N.W. 2d 166, 168-169 (Ct. App. 1984). There the Court of Appeals interpreted identical language in the robbery statute [s. 943.32 (2), 1985-86, Stats.]. It concluded that Wisconsin follows the "subjective" view of armed robbery (i.e., the test is whether the victim reasonably believed that the actor was armed) and not whether the defendant actually displayed some physical object. In the Hopson case, the accused put his hand under his shirt and told the clerk he had a gun. There was a bulge under his shirt, caused by some luncheon meat that he had concealed. This was held sufficient proof of "armed" robbery.

(3) The statute does require that the defendant do or say something in regard to the weapon or object that constitutes use of the weapon or threat of its use; mere possession of the weapon does not satisfy the use or threatened use of a dangerous weapon element of this offense. See Hopson, supra, p. 170.

(4) Hammer, supra, p. 357, notes that:

> The language of the statute requires a nexus between the nonconsensual intercourse and the use or threatened use of the dangerous object. Nothing suggests, however, that this must be the sole or primary reason for the victim's submission. For example, a victim might be beaten and physically coerced by a defendant who displays a knife to the victim. The threat of the knife might be only one of a number of factors compelling the victim to submit.

4. First-Degree Sexual Assault: Sexual Contact or Intercourse by Use of Threat or Force While Aided or Abetted [s. 940.225 (1) (c), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) The victim did not consent to the sexual contact or sexual intercourse.

(3) The nonconsensual sexual contact or sexual intercourse occurred by the use or threat of force or violence.

(4) The nonconsensual sexual contact or sexual intercourse was aided and abetted by one or more other persons.

b. Penalty

Sexual assault by use of threat or force while aided or abetted is a Class B felony (punishable by imprisonment of not more than 20 years).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

(1) In State v. Thomas, 128 Wis. 2d 93, 381 N.W. 2d 567, 573 (Ct. App. 1985), the Court of Appeals held that "aider and abettor" under s. 940.225 (1) (c), Stats., has the same meaning as "aids and abets" in the general "parties-to-crime" statute [s. 939.05 (2) (b), Stats.] and is therefore not unconstitutionally vague.

(2) The Wisconsin Jury Instructions--Criminal, No. 1204 (1989) explains that:

> The defendant is aided and abetted when he is assisted by one or more other persons. Assistance may be rendered by words, acts, encouragement or support. A person assists if he knew that the defendant was having or intended to have sexual intercourse without consent and rendered aid to the defendant or was ready and willing to do so if needed and the defendant knew of the aid or the willingness to aid.

***

> [A person does not aid and abet if he is only a bystander or spectator, innocent of any unlawful intent, and does nothing to assist or encourage the commission of a crime.]

(3) A comment to the Wisconsin Jury Instructions--Criminal, No. 1204 (1989) notes that:

> [T]he use of the aiding and abetting concept in § 940.225 (1) (c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where he is aided by others. The usual situation, for example, Wis. Stat. § 939.05 (2) (b), Parties to Crime, involves defining the culpability of the aider and abettor.
>
> The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to "intentionally aid and abets," which has been interpreted as "acting with knowledge or belief that another person is committing or intends to commit a crime." The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

(4) Another issue under this offense relates to the liability of the aider: Is the aider guilty of first- or second-degree sexual assault? Wisconsin Jury Instructions--Criminal, No. 1204 notes that if aiding is established, the principal is guilty of the first-degree offense and that, usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a second-degree offense [sexual contact or intercourse without consent by use or threat of force or violence under s. 940.225 (2) (a), Stats.]. The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider?

The Wisconsin Court of Appeals held that it does increase the seriousness of the aider's offense in State v. Curbello-Rodriguez, 119 Wis. 2d 414, 351 N.W. 2d 758 (Ct. App. 1984). In that case, the defendant and others committed multiple sexual assaults against the victim. The defendant was charged and convicted of three counts of first-degree sexual assault under s. 940.225 (1) (c), Stats., and six counts of first-degree sexual assault as an aider and abettor under ss. 940.225 (1) (c) and 939.05, Stats. The Court held that: (a) the defendant was lawfully

convicted under s. 940.225 (1) (c), Stats., even though he only aided and abetted the six acts of intercourse in question; (b) the defendant's own aiding and abetting could supply the necessary element making what was otherwise a second-degree sexual assault (forcible nonconsensual intercourse) a first-degree sexual assault; and (c) it did not matter that the aiding and abetting by the defendant's cohorts had already elevated the offense to a first-degree sexual assault.

Thus, both the principal and the aider and abettor may be charged with first-degree sexual assault. That is, if A aids and abets B who has forcible sexual intercourse with the victim while A watches but never himself has any sexual contact with the victim, the state may nevertheless charge both A and B with first-degree sexual assault under an s. 940.225 (1) (c) offense.

5. Second-Degree Sexual Assault: Sexual Contact or Intercourse by Use or Threat of Force or Violence [s. 940.225 (2) (a), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) The victim did not consent to the sexual contact or sexual intercourse.

(3) The nonconsensual sexual contact or sexual intercourse occurred by use or threat of force or violence.

b. Penalty

Sexual assault by use or threat of force or violence is a Class C felony (punishable by a fine of not more than $10,000 or imprisonment of not more than 10 years, or both).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

(1) The "force or violence" component of the third element of this offense is satisfied whether the defendant uses force or violence or just threatens it. That component was construed in State v. Baldwin, 101 Wis. 2d 441, 304 N.W. 2d 742 (1981). The Wisconsin Supreme Court held that the jury is not required to agree on whether the defendant "used" or just "threatened" or whether "force" as opposed to "violence" was involved. The Court in Baldwin also stated that where only one sex act occurs, the

state cannot charge two counts, one alleging use of force and the other the threat of force.

(2) This offense refers to nonconsensual sexual contact or intercourse "by the use or threat" of force or violence. This implies the existence of a causal link between the force component and the sex act. The Wisconsin Supreme Court has characterized the third element as a "force component" which includes threatened and applied force "...directed toward compelling the victim's submission" [Baldwin, supra, p. 748].

(3) Where more than one actor is involved in what is otherwise a violation of this offense and at least one actor aids and abets the principal within the meaning of s. 939.05, Stats., [the "party to a crime" statute] then the actors have committed a first-degree sexual assault aiding and abetting [Curbello-Rodriguez, supra, p. 758].

6. Second-Degree Sexual Assault: Sexual Contact or Intercourse Causing Injury of a Sexual Reproductive Organ or Causing Mental Anguish [s. 940.225 (2) (b), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove that:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) The victim did not consent to the sexual contact or sexual intercourse.

(3) The defendant caused at least one of the following: (a) bodily injury to the victim; (b) illness to the victim; (c) disease or impairment of a sexual or reproductive organ of the victim; or (d) mental anguish requiring psychiatric care for the victim.

b. Penalty

Sexual assault causing injury of a sexual reproductive organ or causing mental anguish is a Class C felony (punishable by a fine of not more than $10,000 or imprisonment of not more than 10 years, or both).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

(1) There is no statutory definition of "sexual or reproductive organ." The definition of sexual contact in this statute uses the term "intimate part." A comment to the Wisconsin Jury Instructions--Criminal, No. 1210, concludes that the phrase "sexual or reproductive organs"

includes the organs, themselves and the immediate vicinity of the organs but does not include the breast.

(2) According to Hammer, supra, pp. 361 and 362, the wording of this statute suggests other problems as well:

> There is no definition of "injury," "illness" or "disease." Certainly the offense is committed where the defendant transmits venereal disease to the victim during an act of nonconsensual intercourse. "Injury" connotes actual physical damage to the human body, such a lacerations, bruises or contusions. The legislature did not use the broader phrase "bodily harm," which is defined at § 939.22 (4), Stats., and includes injury and illness as well as physical pain.
>
> Another unresolved issue is whether the injury, illness or disease must be of a sexual or reproductive organ, or whether the offense definition extends to injury to any part of the body. The Jury Instructions Committee concluded (apparently) that the "injury" or "illness" may be found in any part of the body, but that the disease or impairment is restricted to the sexual or reproductive organs. Wis. JI-Criminal 1210 (1983). There are no cases discussing this problem.

(3) The statute proscribes an act of nonconsensual sexual intercourse or contact which causes "mental anguish requiring psychiatric care for the victim." Hammer, supra, p. 362 notes that:

> Although advancing a laudable social policy, this statute creates nightmarish problems of proof. "Mental anguish" is not defined. The standard by which the jury or judge must assess whether the mental anguish "required" psychiatric care is not identified. Does treatment by a psychologist put the victim outside the statute? Since required psychiatric care is an element of the offense, is the defendant entitled to have the victim submit to a psychiatric examination by a defense expert?

7. Second-Degree Sexual Assault: Sexual Contact or Intercourse With a Person the Defendant Knows to Suffer From a Mental Illness or Deficiency [s. 940.225 (2) (c), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) At the time of the act the victim was suffering from a mental illness or deficiency.

(3) The mental illness or deficiency rendered that victim temporarily or permanently incapable of appraising his or her conduct.

(4) The defendant knew of the victim's condition at the time of the act.

Consent of the victim is not a defense.

b. Penalty

Sexual assault with a person the defendant knows to suffer from a mental illness or deficiency is a Class C felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

(1) The second element of this offense tracks the provisions of s 940.225 (4) (b), Stats., which creates a presumption of nonconsent where consent is an issue in a sexual assault case and the victim suffers from a mental illness or defect. For purposes of this offense consent is not an issue, although the defendant must know of the victim's condition.

(2) This language parallels language used in the the Model Penal Code [Model Penal Code and Commentaries, s. 213.1 comment 5 (c) (1980)]. According to Hammer, supra, p. 363:

> The commentary to the Model Penal Code provision stresses that this language extends only to severe mental incapacity. It was [, according to the commentary,] "...intended to avoid questions of value judgment and of remote consequences of immediate acts." In short, the second element of § 940.225 (2) (c) includes [, as the commentary

> notes,] only "...cases of severe defect or impairment precluding ability to understand the nature of the act itself."

(3) The knowledge element distinguishes this offense from third-degree sexual assault [sexual intercourse without consent] where the theory of nonconsent is the victim's mental illness. In a prosecution for third-degree sexual assault, the defendant's knowledge of the victim's mental illness, and the extent of his or her knowledge, are immaterial. But where a s. 940.225 (2) (c) offense is charged, the state must prove (a) the defendant had knowledge of the mental illness and (b) the mental illness rendered the victim incapable of appraising his or her conduct.

8. Second-Degree Sexual Assault: Sexual Contact or Intercourse With a Person the Defendant Knows is Unconscious [s. 940.225 (2) (d), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) The victim was unconscious at the time.

(3) The defendant knew that the victim was unconscious at the time.

Consent of the victim is not a defense.

b. Penalty

Second-degree sexual assault with a person the defendant knows is unconscious is a Class C felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

(1) According to Hammer, supra, pp. 364 and 365:

> This offense must be considered in light of the rebuttable presumption of nonconsent at Wis. Stat. § 940.225 (4) (c). The latter provision encompasses victims who are unconscious or physically unable to communicate unwillingness to act for any other reason. The § 940.225 (2) (d) offense includes only the unconscious. The distinction is unclear. It may be that the

> legislature intended the § 940.225 (2) (d) offense to apply only where the victim is unconscious in the sense of deep sleep or "passed out."
>
> Where the victim is drowsy or groggy because of alcohol or drugs, the legislature may have intended any prosecution to proceed as a third degree sexual assault [sexual intercourse without consent] relying on the rebuttable presumption of § 940.225 (4) (c).... This distinction, such as it is, would facilitate the analysis of difficult proof problems. Under the § 940.225 (2) (d) offense, consent is not an issue, but the state must prove the defendant knew the victim was unconscious at the time of the act. Where the victim is passed out or asleep, the proof is straightforward.
>
> In State v. Curtis, 144 Wis. 2d 691, 424 N.W. 2d 719, review denied 145 Wis. 2d 912, 428 N.W. 2d 558, (App. 1988), the defendant was convicted of second-degree sexual assault, under s. 940.225 (2) (d), Stats., for placing his hand under the breast of his girlfriend's 16-year old daughter while she slept. On appeal, the defendant argued that the legal definition of "unconscious" in s. 940.225 (2) (d), Stats., does not include loss of awareness due to sleep. Referring to the definition of the terms "unconscious" and "sleep" in Webster's Dictionary, the Court of Appeals concluded that "unconscious," as used in this provision, is a loss of awareness which may be caused by sleep.

(2) There is no requirement that the accused be culpable in producing the unconscious state (e.g., the defendant who has intercourse with a sleeping victim, who then awakens to find him engaging in the act with her).

(3) According to Hammer, supra, p. 365:

> Where a victim is drowsy or groggy, proof problems arise as to whether this is indeed unconsciousness (a matter of definition) and whether the defendant knew the victim was unconscious. It seems such cases are better scrutinized as third degree sexual assaults based on the § 940.225 (4) (c) presumption. This interpretation comports with the legislative decision not to include the "or

otherwise physically incapable" language in § 940.225 (2) (d).

9. Second-Degree Sexual Assault: Sexual Contact or Intercourse Without Consent While Aided or Abetted [s. 940.225 (2) (f), Stats.]

a. Elements of the Offense

In order to establish the commission of this crime, the state must prove all of the following:

(1) The defendant or principal had sexual contact or sexual intercourse with the victim.

(2) The victim did not consent to the sexual contact or sexual intercourse.

(3) The nonconsensual sexual contact or sexual intercourse was aided and abetted by one or more other persons.

b. Penalty

Sexual assault without consent while aided or abetted is a Class C felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both).

c. Comments

See the comments, above, under "4. First-Degree Sexual Assault: Sexual Contact or Intercourse by Use of Threat of Force While Aided or Abetted [s. 940.255 (1) (c), Stats.]."

10. Second-Degree Sexual Assault: Sexual Contact or Intercourse With Patient of a Facility by a Facility Employe [s. 940.225 (2) (g), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant was an employe of an inpatient facility or a state treatment facility. "Inpatient facility" means a public or private hospital or unit of a hospital which has as its primary purpose the diagnosis, treatment and rehabilitation of mental illness, developmental disability, alcoholism or drug abuse and which provides 24-hour care [s. 51.01 (10), Stats.]. "State treatment facility" means any of the institutions operated by the department for the purpose of providing diagnosis, care or treatment for mental or emotional disturbance,

developmental disability, alcoholism or drug dependency and includes but is not limited to mental health institutes [s. 51.01 (15), Stats.].

(2) The defendant had sexual contact or sexual intercourse with the victim.

(3) The victim was a patient or resident at the inpatient facility or state treatment facility.

Consent of the victim is not a defense.

b. Penalty

Second-degree sexual assault with a patient of a facility by a facility employe is a Class C felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

There are no significant appellate cases or commentaries discussing this offense.

11. Third-Degree Sexual Assault: Sexual Intercourse Without Consent [s. 940.225 (3), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual intercourse with the victim.

(2) The victim did not consent to the sexual intercourse.

b. Penalty

Sexual intercourse without consent is a Class D felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed five years, or both).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

The Wisconsin Court of Appeals has held that: (a) this statute is not unconstitutionally overbroad; and (b) the state need not prove that the victim resisted in order to prove consent [Lederer, supra, p. 460].

12. Fourth-Degree Sexual Assault: Sexual Contact Without Consent [s. 940.225 (3m), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact with the victim.

(2) The victim did not consent to the sexual contact.

b. Penalty

Sexual contact without consent is a Class A misdemeanor (punishable by a fine not to exceed $10,000 or imprisonment not to exceed nine months, or both).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

There are no significant appellate cases or commentaries discussing this offense.

## PART II

## DESCRIPTION OF THE SEXUAL ASSAULT OF A CHILD LAW [s. 948.02, Stats.]

This Part of the Staff Brief discusses the sexual assault of a child crimes as set forth in s. 948.02, Stats., and significant court decisions and other interpretations of these crimes. As noted in Part I, above, 1989 Wisconsin Act 332 took those portions of the general sexual assault law [s. 940.225, Stats.] which related to sexual assault of children and placed them, with certain revisions, in ch. 948, Stats., the new Crimes Against Children chapter created by the Act.

This Part sets forth the text of the statute and pertinent definitions in s. 940.01, Stats., discusses the definitions of key terms used in the statute and describes the offenses under the statute.

### A. TEXT OF PERTINENT STATUTES

The ch. 948 criminal offenses involving sexual assault of a child, and definitions relating thereto, read as follows:

> 948.01 DEFINITIONS. In this chapter, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction:
>
> (3) "Person responsible for the child's welfare" includes the child's parent; guardian; foster parent; an employe of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.
>
> (5) "Sexual contact" means any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.
>
> (6) "Sexual intercourse" means vulvar penetration as well as cunnilingus, fellatio or anal

intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

948.02 SEXUAL ASSAULT OF A CHILD. (1) FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.

(3) FAILURE TO ACT. A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class C felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

(4) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(5) DEATH OF VICTIM. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

B. DEFINITIONS

Chapter 948, Stats. (Crimes Against Children), has its own definitions of "sexual contact" and "sexual intercourse," which are

applicable throughout the chapter, including s. 948.02, Stats., relating to sexual assault of a child who has not attained the age of 16 years. These definitions are substantially the same as those applicable to s. 940.225, Stats., discussed in Part I, B, above, except:

1. The definition of "sexual contact" in s. 948.01 (5), Stats.: (a) does not contain the alternative element in s. 940.225 (5) (b), Stats., "if the touching contains the elements of actual or attempted battery under s. 940.19 (1)"; and (b) states more clearly than in s. 940.225 (5) (b), Stats., that the intentional touching must be either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

2. The definition of "sexual intercourse" in s. 948.01 (6), Stats., states clearly that the term means vulvar penetration. The definition in s. 940.225 (6), Stats., merely states that the term "includes the meaning" under s. 939.22 (36), Stats. (i.e., "'sexual intercourse' requires only 'vulvar penetration'").

Reference should be made to the discussion of the definitions of "sexual intercourse" and "sexual contact" in Part I, B and C, above, since, as noted above, these definitions are substantially the same as those applicable to the sexual assault of children statute.

## C. DESCRIPTION OF OFFENSES UNDER S. 948.02, STATS.

In the following listing of elements of the sexual assault offenses under s. 948.02, Stats., it should be remembered that in an offense in which sexual contact is an element, the definition of "sexual contact" requires that the contact be with either:

1. Intent to become sexually aroused or gratified; or

2. Intent to sexually degrade or humiliate the victim.

Thus, in each of those offenses, one of the above must be proven as part of the sexual contact element of the offense. As noted above, the definition of "sexual contact" applicable to s. 948.02, Stats., unlike the definition applicable to s. 948.225, Stats., does not include as an alternative that the contact be with the intent to cause bodily harm (i.e., that "the touching contains the elements of actual or attempted battery under s. 940.19 (1)").

1. First-Degree Sexual Assault: Sexual Contact or Intercourse With a Person Who Has Not Attained the Age of 13 Years [s. 948.02 (1), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) The victim was a person who had not attained the age of 13 years at the time of the sex act.

Consent of the victim is not a defense. Also, knowledge of the victim's age by the defendant is not required and mistake regarding the victim's age is not a defense [ss. 939.23 (6) and 934.43 (2), Stats.].

b. Penalty

Sexual contact or intercourse with a person who has not attained the age of 13 years is a Class B felony (punishable by imprisonment of not more than 20 years).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

There are no significant appellate cases or commentaries interpreting this offense.

2. Second-Degree Sexual Assault: Sexual Contact or Intercourse With a Person Who Has Not Attained the Age of 16 Years [s. 948.02 (2), Stats.]

a. Elements of the Offense

In order to establish commission of this offense, the state must prove all of the following:

(1) The defendant had sexual contact or sexual intercourse with the victim.

(2) The victim was a person who had not attained the age of 16 years.

Consent of the victim is not a defense. Also, knowledge of the victim's age is not required and mistake regarding the victim's age is not a defense.

b. Penalty

Sexual contact or sexual intercourse with a person who has not attained the age of 16 years is a Class C felony (punishable by a fine of not more than $10,000 or imprisonment for not more than 10 years, or both).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

This provision, created by 1987 Wisconsin Act 332, eliminated the lower age category of "over 12 years of age" in the prior statute relating to second-degree sexual assault against children of specified ages. According to the Legislative Council note to this provision in Act 332:

> This change is intended to afford the district attorney greater flexibility in his or her charging decision. That is, under the revised language, the district attorney is authorized to charge 2nd degree sexual assault in a case involving a victim who is not over the age of 12 years (the current lower age category), if the circumstances warrant.

3. Failure to Act [s. 948.02 (3), Stats.]

a. Elements of the Offense

In order to establish the commission of this offense, the state must prove all of the following:

(1) The defendant is a "person responsible for the child's welfare," which is defined, for purposes of ch. 948, Stats., to include:

> ...the child's parent; guardian; foster parent; an employe of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child [s. 948.01 (3), Stats.].

(2) The defendant has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child.

(3) The defendant is physically and emotionally capable of taking action which will prevent the sexual intercourse or sexual contact from taking place or being repeated.

(4) The defendant fails to take the action under item (3), above.

(5) The defendant's failure to act either (a) exposes the child to an unreasonable risk that sexual intercourse or sexual contact may occur between the child and the other person or (b) facilitates the sexual intercourse or sexual contact that does occur between the child and the other persons.

b. Penalty

Failure to act is a Class C felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both).

c. Discussion of Relevant Court Decisions and Other Interpretations of the Law

For a general discussion of some of the issues which have arisen since the enactment of the "failure to act" prohibitions in this and other parts of new ch. 948, Stats. [Crimes Against Children], see the letter from Door County District Attorney Gary J. Schuster, dated November 8, 1989, attached as Appendix A.

## PART III

## SPECIAL RULES OF EVIDENCE APPLICABLE TO SEXUAL ASSAULT CRIMES--THE RAPE SHIELD LAW

In an effort to protect the victims of sexual assault from undue embarrassment and emotional trauma and, thereby encourage their cooperation in reporting and prosecuting sexual assault crimes, statutory provisions have been enacted to limit the admissibility of certain evidence. The so-called "rape shield" law, which is the subject of this Part of the Staff Brief, substantially limits the admission of evidence of prior sexual conduct of the complaining witness in a sexual assault prosecution.

### A. TEXT OF RAPE SHIELD STATUTE

The rape shield law, set forth in s. 972.11 (2), Stats., reads as follows:

> 972.11 (2) (a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.
>
> (b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.05 or 948.06, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):
>
> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.

3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

(c) Notwithstanding s. 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b) 1, 2 or 3.

B. BACKGROUND

Chapter 184, Laws of 1975, which extensively modified the criminal offense known as "rape" and created Wisconsin's current general sexual assault statute [see Parts I and II of the Staff Brief] also created the so-called "rape shield" law [s. 972.11 (2), Stats.]. Wisconsin's rape shield statute provides that evidence of the complainant's prior sexual conduct is inadmissible in the prosecution of the crimes of sexual assault [s. 940.225, Stats.], sexual assault of a child [s. 948.02, Stats.], sexual exploitation of a child [s. 948.05, Stats.] and incest with a child [s. 948.06, Stats.], except when it is:

1. Evidence of past sexual conduct with the defendant;

2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, to determine the degree of assault or extent of injury; and

3. Evidence of the complainant's prior untruthful allegations of sexual assault.

As further discussed in Section C, below, the objective of the rape shield statute is to reverse the long-standing common law doctrine that permitted a defendant accused of rape to inquire into the complainant's "character for unchastity."

The recognized legal authority on the law of evidence, Dean John Henry Wigmore (1863-1943), was a strong proponent of full admissibility of evidence concerning the rape complainant's character and evidence of her prior sexual conduct [1 A. J. Wigmore, Evidence s. 62 (Tiller's Revised Edition 1983)]. This view was consistent with English rules of evidence and prevailed in this country until the mid-1900's [Soshnick, Andrew Z., "The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Individual Interpretation," 78 Journal of Criminal Law and Criminology, 644, 649 (Fall 1987)].

Over the past two decades, the views held by Dean Wigmore and men of his era have been dismissed by commentators as chauvinistic utterances in

light of the growing social awareness generated by the women's equality movement. Additionally, the media exposure of the mistreatment often accorded rape complainants by the criminal justice system led to an erosion of support for the Victorian myth that an unchaste woman is more likely to engage in indiscriminate sexual activity than a chaste women. As a consequence, most jurisdictions have repealed the automatic admission of character evidence and implemented rape shield laws [Soshnick, supra, p. 651].

Rejection of the attitude that an unchaste woman is more likely to engage in indiscriminate consensual sexual activity, is not the only reason for the reevaluation and revision of traditional rules of evidence concerning the relevancy and admissibility of evidence of a sexual assault victim's sexual conduct history. In general, it is likely that a combination of influences, including recognition of equal protection and privacy rights under the U.S. Constitution and criticism of the traditional view of the relevancy and admissibility of evidence of the sexual conduct history of a sexual assault victim have all contributed to the widespread enactment of rape shield laws [Haxton, David, "Rape Shield Statutes: Constitutional Despite Constitutional Exclusions of Evidence," Wisconsin Law Review, 1219, 1257 (1985)].

Most states currently have rules on admissibility of evidence, created by legislative enactment, judicial rule promulgation or court interpretation, which are designed to protect rape complainants from the psychological trauma associated with the public disclosure of the rape complainant's prior sexual activities and propensity for unchastity. Consistent with this pattern of state action, Congress, in 1978, enacted Rule 412 of the Federal Rules of Evidence. Rule 412 excludes from evidence all reputation and opinion testimony concerning a rape complainant's prior sexual conduct, while allowing for the limited admissibility of evidence of the complainant's specific prior sexual acts.

## C. OBJECTIVE OF WISCONSIN'S RAPE SHIELD LAW

In his analysis of Wisconsin's rape shield statute and various types of rape shield legislation enacted in other states, Court of Appeals Judge P. J. Moser recognized that Wisconsin's rape shield statute, like a comparable Illinois law, codifies a four-fold policy:

> First, the law prevents the defendant from harassing and humiliating the complainant with evidence of either her reputation for chastity or of specific prior sexual acts. Second, this type of evidence generally has no bearing on whether the complainant consented to sexual conduct with the defendant at the time in question. Third, exclusion of the evidence keeps the jury focused

> only on the issues relevant to the case at hand. Finally, the law promotes effective law enforcement because a victim will more readily report and testify in sexual assault cases if she does not fear that her prior sexual conduct will be brought before the public [State v. Herndon, 145 Wis. 2d 91, 426 N.W. 2d 347, 353 (Ct. Apps. 1988), citing People v. Ellison, 123 Ill. Apps. 3rd 615, 79 Ill. Dec. 37, 45-46, 463 N.E. 2d 175, 183-84 (1984)].

Legal commentators have suggested that rape shield laws are necessary to correct a criminal justice system that places the rape victim rather than the accused defendant on trial [Kello, Catherine L., "Shielding Rape Victims--Is It Time For Reinforcement?", 21 University of Michigan Journal of Law Reform, 317, 319 (Fall 1987)]. Ms. Kello supported her view that, prior to enactment of the rape shield statute in Michigan, the rape victim, rather than the accused defendant, was on trial with the following description of the early 20th Century judicial view of the crime of rape:

> At the beginning of the 20th Century, the Michigan Supreme Court required a rape victim to show that the attack was against her will by demonstrating that she:
>
> "...did everything she could under the circumstances to prevent the defendant from accomplishing his purpose. If she did not do that it is not rape...
>
> "...[The jury] must find that she was overcome and overpowered, and that resistance must have continued from the inception to the close, because if she yielded at any time it would not be rape" [id., p. 319; citing People v. Murphy, 145 Michigan 524, 528, 108 N.W. 1009, 1011 (1906) in which the Supreme Court cited the trial court jury instructions with approval].

Ms. Kello states that this early 20th Century viewpoint continued into modern times:

> Decades later, the lower [Michigan] courts also remained in the dark, maintaining that "[c]onsent or the failure to use the proper resistance at any time prior to penetration precludes conviction for rape" [citations omitted]. In addition, defense attorneys routinely harassed a rape victim in court by asking questions about her past

> consensual sexual activity to imply her lack of resistance to the current rape [id., p. 319].

Other legal scholars are not as convinced as Ms. Kello that the enactment of rape shield laws are necessary to prevent harassment of sexual assault victims at trial. David Haxton concludes, after a thoughtful analysis of the admissibility of sexual conduct evidence, that "...it is apparent that the only evidence excluded exclusively by rape shield statutes is sexual conduct evidence that is highly probative. Sexual conduct evidence that is irrelevant or marginally relevant is already excluded by standard rules of evidence" [Haxton, supra, p. 1254]. Although Mr. Haxton asserts that "...rape shield statutes are unnecessary from an evidentiary standpoint," he admits that they serve important functions:

> At a minimum, rape shield statutes communicate society's concern for sexual assault victims and legitimize the values underlying the statutes. Their most significant contribution has perhaps been the education of the judiciary. In those jurisdictions having rape shield statutes that make exceptions to a general rule of inadmissibility [e.g., Wisconsin], judges must be vigilant to recognize the rare occasions when proffered sexual conduct evidence excluded by the statute is so probative that the Constitution requires that it be omitted. The best method to determine whether admission is required by the Constitution is to apply the jurisdiction's standard rules of evidence to the proffered sexual conduct evidence. Because standard rules of evidence are premised on general principles developed over many years, exclusions of evidence under those rules are almost always constitutionally justified [Haxton, supra, pp. 1271-1272].

Although Mr. Haxton recognizes the prevailing judicial view that rape shield laws are constitutional, he suggests that rape shield statutes, such as Wisconsin's, "...that make exceptions to a general rule of inadmissibility can be unconstitutional as applied." Consequently, judges who apply rape shield statutes "mechanistically" will occasionally violate a defendant's constitutional rights [Haxton, supra, p. 1268].

## D. JUDICIAL INTERPRETATION OF THE WISCONSIN RAPE SHIELD STATUTE

This section of the Staff Brief will examine several judicial constructions of the Wisconsin rape shield statute that have led to a recent holding of the Wisconsin Supreme Court [State v. Pulizzano, infra] that the statute may be unconstitutional in its application to a particular case by denying the defendant's rights to confrontation and compulsory process (i.e., right to present relevant evidence).

### 1. State v. Gavigan, 111 Wis. 2d 150, 330 N.W. 2d 571 (1983) (Wisconsin Supreme Court)

#### a. Trial Court

Defendant Michael Gavigan was charged with and convicted of second-degree sexual assault in violation of s. 940.225 (2) (a), Stats. Prior to trial, the state advised the court that it intended to introduce evidence of the complainant's virginity. Specifically, the state intended to offer into evidence statements made by the complainant at the preliminary examination, and testimony of the examining physician that the complainant's hymen was torn to show that she was a virgin prior to the incident. Defense counsel objected to admission of such evidence on the ground that it involved the victim's prior sexual conduct and, therefore, must be excluded under the rape shield statute. Defense counsel also informed the court that, if the virginity evidence was admitted, it would seek to present evidence that the complainant had gonorrhea, but that Gavigan did not. Defense counsel argued that the gonorrhea evidence should be admitted because it refuted the complainant's claim of virginity.

The trial court ruled that the evidence of the complainant's virginity was relevant and admissible. In response to defense counsel's objection to the admissibility of this evidence under the rape shield statute, the court agreed to instruct the jury that the virginity evidence was not an opinion as to the victim's prior sexual conduct but, rather, was offered to prove only the complainant's physical condition and state-of-mind. The trial court refused to admit the gonorrhea evidence offered by the defendant on the ground that it involved the complainant's prior sexual conduct and, therefore, was required to be excluded under the rape shield statute. The court also ruled that although the gonorrhea evidence had probative value as to the complainant's credibility, that value was outweighed by its prejudicial effect. Thus, the gonorrhea evidence was required to be excluded under s. 904.03, Stats., a general rule of evidence that authorizes the exclusion of relevant evidence on grounds of prejudice, confusion or waste of time. Section 904.03, Stats., reads:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

b. Court of Appeals

On appeal of his conviction, defendant Gavigan argued that the trial court erred in admitting evidence of the complainant's virginity and excluding evidence of gonorrhea. The state conceded that admission of the virginity evidence violated the rape shield statute [specifically, s. 972.11 (2) (b), Stats.], but argued that the error was harmless. The Court of Appeals recognized that consent was a critical issue in the case and noted that the jury may well have inferred that because the admitted evidence showed that the complainant was a virgin, she was unlikely to consent to sexual intercourse. The Court of Appeals held that the error was not harmless and reversed the judgment of conviction. The state appealed that decision to the Wisconsin Supreme Court.

c. Wisconsin Supreme Court

(1) Opinion of the court. The issue presented to the Wisconsin Supreme Court was whether the trial court's admission of evidence relating to the complainant's virginity was error and, if so, whether the error was harmless.

Upon review of the record, the Court determined that there was sufficient evidence, independent of and uninfluenced by the evidence of the complainant's virginity, to convict Gavigan of second-degree sexual assault beyond a reasonable doubt. Thus, the Court ruled that although it was error to admit such evidence, the admission was harmless and the decision of the Court of Appeals was reversed.

In deciding the issue of the admissibility of evidence of the complainant's virginity, the Court recognized that the Legislature enacted the rape shield statute to reject the historic view that evidence of a victim's reputation for chastity and prior sexual conduct was admissible in a sexual assault case on the grounds that it was relevant to her creditability and to the likelihood of her consent. The Court specifically recognized the modern view that:

> A complainant's consent or lack of consent to sexual intercourse with third parties on other occasions is not a reliable indicator as to whether she consented to have intercourse with the defendant. Furthermore, evidence of a complainant's prior sexual conduct is generally

> prejudicial and there is no logical correlation to the complainant's creditability. Therefore, such evidence should ordinarily be excluded at trial [330 N.W. 2d at 575].

Although recognizing that the purpose of the rape shield statute is to preclude the use of evidence of the complainant's prior sexual conduct to prove consent or lack of consent to sexual intercourse or sexual contact with the defendant, and to specify only three exceptions to the rule of inadmissibility, the Court held that the rape shield statute did not preclude admission of prior sexual conduct evidence for another purpose. At the time of the Gavigan decision, sub. (2) (c) of the rape shield statute, which precludes the admission of prior sexual conduct evidence for a purpose not recognized in the three statutory exceptions [s. 972.11 (2) (b) 1 to 3, Stats.], had not been enacted. Specifically, the Court held that:

> Evidence relating to a complainant's prior sexual conduct may be admitted in a sexual assault case only if the following conditions are met: First, the evidence must serve to prove a fact independent of the complainant's prior sexual conduct which is relevant to an issue in the case. Second, the probative value of the evidence must outweigh any prejudice caused by its relation to the complainant's prior sexual conduct. The burden of establishing these criteria is on the party offering the evidence. Third, upon request a jury's consideration of the evidence must be limited to the purpose for which it was admitted in accordance with s. 901.06, Stats.,...[relating to limited admissibility] [330 N.W. 3d at 576].

The Court held that admission of testimony of the examining physician that the complainant's hymen was torn as evidence of force, relevant to the issue of consent, as well as virginity, would have been proper with the appropriate jury instruction. The court ruled that the jury should have been instructed that the evidence could be considered only for this limited purpose and that the jury should not consider the evidence as indicating the complainant's prior sexual conduct (i.e., that she was a virgin).

(2) Dissenting opinion by Judge Heffernan. The reasoning of the majority was criticized in a dissenting opinion written by Justice Heffernan. In particular, Justice Heffernan criticized the majority view that evidence relating to a complainant's prior sexual conduct could be admitted if it served to prove a fact (e.g., use of force) independent of the complainant's prior sexual conduct which is relevant to an issue in

the case (e.g., consent), provided that it is not excessively prejudicial. He suggested that:

> The majority's pronouncement is contrary to the language of s. 972.11 (2) (b), Stats., which provides that evidence concerning the complainant's prior sexual conduct shall not be admitted. The acceptance of this unfounded standard, created out of whole cloth by the majority, will defeat the very purposes of the rape shield law [330 N.W. 2d at 580].

Elaborating on his concern that the new standard of admissibility will defeat the purpose of the rape shield statute, Justice Heffernan explained:

> Under the majority's formulation, evidence of prior sexual conduct can once again be admitted by trial courts at the request of the state or, as the majority fails to perceive, at the request of the defendant. This substantially nullifies the protection which the legislature intended to afford rape victim complainants. It will also result in the admission of evidence which tends "to afford the trier of fact an opportunity for distraction that suggests abandoning the duty to consider the evidence" [330 N.W. at 581; citation omitted].

d. Legislative Response to Gavigan Decision

The Wisconsin Legislature reacted to the Gavigan case by promptly enacting 1983 Wisconsin Act 449, creating s. 972.11 (2) (c), Stats., which reads:

> Notwithstanding s. 901.06, the limitation on the admission of evidence of or the reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission of reference unless the admission is expressly permitted under par. (b) 1, 2 or 3.

As explained by the Legislative Reference Bureau analysis to the legislation which became Act 449, the purpose of the legislation was to change the effect of Gavigan:

> In State v. Gavigan, 111 Wis. 2d 158 [, 330 N.W. 2d 571] (1983), the Wisconsin supreme court authorized the admission of evidence of the

> victim's prior conduct if the evidence serves to prove a fact independent of the prior sexual conduct, if the probative value of the evidence outweighs its prejudicial effect and if the jury's consideration of the evidence is for limited purposes.
>
> This bill provides that the 3 statutorily recognized exceptions are the only exceptions to the general rule prohibiting admissibility of prior sexual conduct of an alleged sexual assault victim. A court may not allow other exceptions regardless of the purpose for the consideration.

The impact of the Legislature's creation of s. 971.11 (2) (c), Stats., in response to Gavigan, was explored extensively by the Wisconsin Court of Appeals in State v. Vonesh, 135 Wis. 2d 477, 401 N.W. 2d 170 (Wis. Apps. 1986), described below.

2. State v. Vonesh, 135 Wis. 2d 477, 401 N.W. 2d 170 (Wis. Apps. 1986) (Court of Appeals)

a. Trial Court

In Vonesh, the state moved to exclude from evidence two notes written by the 11-year old sexual assault complainant. The trial court denied the state's motion.

b. Court of Appeals

(1) Opinion of the court. On appeal, the Wisconsin Court of Appeals affirmed the decision of the trial court to admit the complainant's notes. The Court of Appeals held that "...the act of writing about sexual desires or activities is not itself prior sexual conduct shielded from admission into evidence by Wisconsin's rape shield statute" [401 N.W. 2d at 170].

The Vonesh decision was decided following the 1983 Legislature's effort to alter the interpretation given to the rape shield statute by the State Supreme Court in the Gavigan case [supra]. In its analysis of the legislative intent in enacting s. 972.11 (2) (c), Stats., which provides that the three statutorily-recognized exceptions to the rule against the admissibility of evidence of prior sexual conduct are the only permissible exceptions, the Court of Appeals declared:

> The alacrity with which the legislature acted makes quite clear that the legislature disagreed with the Gavigan majority that evidence of prior sexual conduct is admissible to prove a fact independent of the conduct. See In Re Estate of

> Haese, 80 Wis. 2d 285, 294, 259 N.W. 2d 54, 58 (1977) (a court interpretation of a statute becomes part of that statute; it is the duty of the legislature to act if it disagrees).
>
> While the militancy of the Wisconsin legislature is obvious, that militancy has been confined to shielding evidence tending to show the extent or nature of the complainant's actual sexual experiences. We have not been admonished by the legislature to construe "sexual conduct" so broadly as to include all activity or conditions having a sexual connotation, e.g., reading, writing and talking about sex and sexual desires, or observing or describing the sexual activity of others. More importantly, we must assume, to the extent that the legislative history permits, that the legislature used the terms "sexual conduct" in a constitutional way...[citations omitted].
>
> ...In view of a legislative history of Wisconsin's rape shield law, we cannot construe the statute to allow the admission of evidence having relevance and probative value, even significant value, if that evidence includes prior sexual conduct of the complainant. We may approve admission of the [complainant's] notes only if we are satisfied that they do not contain evidence of, nor do they constitute, sexual conduct, unless we are prepared to hold that the rape shield law is unconstitutional in its application to the facts of this case. We are faced with the delicate task of construing the rape shield law to save its constitutionality, if we can, without doing violence to the legislature's intent [401 N.W. 2d at 175].

The opinion continues with an analysis of the complainant's notes. It concludes that "...the act of writing about sexual desires or activities is not itself prior sexual conduct." The Court explains:

> Cross-examination of the complainant as to whether she composed or copied the notes would not constitute an inquiry into the complainant's "character for unchastity." An eleven-year-old girl may suffer embarrassment through admitting publicly that she authored or copied writings, sexual in nature, but that is not the kind of activity that the law is intended to shield. We

> conclude that the acts of composing or copying the notes are not prior sexual conduct [401 N.W. 2d at 176].

(2) Concurring Opinion by Judge Gartzke. In a concurring opinion, Judge Gartzke expressed agreement with the result reached on the admissibility of evidence at issue. However, Judge Gartzke disagreed with the majority's reasoning. In particular, Judge Gartzke expressed the view that the reasoning and precedent established by the majority opinion "...unnecessarily and disastrously affects the scope of Wisconsin's rape shield statute" [401 N.W. 2d at 181].

Judge Gartzke's opinion is significant because he discusses, at length, the potential conflict a rape shield statute has on the defendant's constitutional right of confrontation. As expressed by Judge Gartzke:

> I conclude that the trial court properly held that the [complainant's] notes are relevant because they tend to show the complainant had a motive to falsify her accusation and to show she had knowledge of sexual matters. I disagree with the holdings by the trial court and the majority [of the Court of Appeals] that the notes are not evidence of sexual conduct within the meaning of s. 972.11 (2) (a), Stats. [the rape shield statute]. I conclude the notes are such evidence and to exclude them from evidence would deprive the defendant of his constitutional right of confrontation and that in this particular case, that right overrides the state's policy of exclusion. Consequently, s. 972.11 is unconstitutional in its application to the defendant [401 N.W. 2d at 177].

Judge Gartzke cited several cases from courts of other states and two relevant law review articles to support his position that "...evidence of prior sexual conduct is relevant if it tends to show that the complainant has a motive to falsely accuse a defendant of a sexual assault" [p. 178]. The Judge also observed that:

> Evidence of a child's prior sexual conduct may be relevant to the child's knowledge about sexual contact and therefore to the question of whether the contact occurred. The evidence tends to counter a natural inference that the charged assault occurred because a child complainant is not expected to know about sexual matters [401 N.W., 2d at 178; citations omitted].

After concluding that sexual conduct, for purposes of the rape shield statute, includes the complainant's statements, written or oral, describing or expressing the complainant's sexual desires or fantasies, Judge Gartzke analyzed whether or not the Constitution required the admission of such evidence, despite its inadmissibility under the rape shield statute [i.e., s. 972.11 (2) (b), Stats.].

Judge Gartzke first observed that "[E]very defendant has a sixth amendment right 'to be confronted with the witnesses against him.'" He also observed that the 6th Amendment to the U.S. Constitution is applicable to the states, citing Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 1109 (1974). Judge Gartzke also cited Davis for the following rule of law:

> The primary right secured by the confrontation clause is the opportunity to test the truth of testimony by cross-examination [Davis, 415 U.S. at 316, 94 S. Ct. at 1110]. This includes cross-examination "directed to revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Id. The right of confrontation must, however, be balanced against the state's interest in prohibiting [by application of the rape shield statute] the use of evidence for purposes of cross-examination. If confrontation is paramount to the state's policy, then a statute prohibiting the use of evidence is unconstitutional [id. at 320, 94 S. Ct. at 1112].
>
> Because a constitutional right is involved, the court of appeals should determine whether the state's interest in its rule of evidence is paramount to defendant's right to confront the witness with the notes [401 N.W. 2d at 180].

Judge Gartzke concluded that "[d]efendant's right to use the notes his daughter made far outweighs the state's interest in its 'prior sexual conduct' evidentiary rule." The Judge concluded that the rape shield statute "...is unconstitutional as applied to this defendant, because it violates his right to confront her with the evidence." Judge Gartzke emphasized that his conclusion regarding the constitutionality of the rape shield statute "...is limited to its application to the defendant" and that was not concluding that "s. 972.11 (2) is unconstitutional on its face or under all circumstances" [401 N.W. 2d at 181].

The clash between the state policy to exclude evidence of the sexual assault complainant's prior sexual conduct under the rape shield statute and the defendant's fundamental right to confront his or her accuser was

the primary focus of the majority opinion of the Wisconsin Court of Appeals in State v. Herndon, 145 Wis. 2d 91, 426 N.W. 2d 347 (Wis. Apps. 1988).

3. State v. Herndon, 145 Wis. 2d 91, 426 N.W. 2d 347 (Wis. Apps. 1988) (Court of Appeals)

a. Trial Court

In his trial for third-degree sexual assault, the trial court denied the defendant the opportunity to cross-examine the complainant, who was a juvenile, about her prior arrest for prostitution. The defendant was subsequently convicted and he appealed his conviction.

b. Court of Appeals

Defendant Herndon appealed his conviction on the grounds that he was denied his right to confrontation under the 6th Amendment to the U.S. Constitution and art. I, s. 7, Wis. Const. The defendant argued that cross-examination was necessary to test the complainant's credibility and to show her motive to fabricate the charge. The defendant also claimed that he was denied his constitutional right to present witnesses in his own behalf.

The Court of Appeals agreed with the defendant's argument that he had been denied his constitutional right to confrontation and right to present witnesses in his own behalf and reversed the judgment of the trial court.

Defendant Herndon's theory of defense at the trial was that all acts of sexual intercourse between him and the complainant were consensual as acts of prostitution. Also, part of the theory of his defense was that the complainant was falsely accusing him of sexually assaulting her in order to explain the swelling and bruising on her face which resulted from slaps administered by the defendant. The defendant admitted slapping the complainant, not to compel her to engage in sexual intercourse, but in response to her attacking him and biting his finger. The defendant alleged that the complainant was falsely accusing him so that the complainant's mother would not punish her for continued prostitution activities of which she had previously expressed her disapproval.

The trial court, relying on the rape shield statute, refused to allow any testimony or reference to the complainant's prior sexual conduct, regardless of the purpose of such evidence.

On the question of constitutionality of the rape shield statute as applied to prevent the admission of relevant evidence of prior sexual conduct by the complainant, the Court of Appeals explained:

> Statutes are presumed constitutional and will be struck down only if it appears a statute is unconstitutional beyond a reasonable doubt.... If there is any reasonable basis upon which the legislation may constitutionally rest, courts must assume that the legislature had such basis in mind and passed the act accordingly.
>
> ...This deference given to the legislature is especially strong in a case like this. There is a strong state policy interest in foreclosing defendants from interrogating witnesses about the prior consensual sexual conduct of a complainant in a sexual assault case. Both the common law and the legislatively created rape shield laws have rejected the ignoble, outmoded and unfounded prior belief that an unchaste woman is more likely to consent to sex than a chaste woman. The courts and the legislature have determined that this outdated rule distracted the fact-finder from its goal of determining what actually occurred in the specific case before the court. Rather, juries were relying on wholly irrelevant evidence to punish the complainant, whose character was besmirched by evidence of prior consensual sexual encounters.
>
> Another strong policy interest which the rape shield law seeks to protect is the encouraging of complainants to come forward without fear that their private lives may be open to public scrutiny. By making evidence of prior sexual conduct inadmissible, complainants will be more likely to come forward and law enforcement will be made easier. In most cases, the social policy considerations established by both the legislature and our courts far outweigh any claimed relevance of prior sexual conduct in establishing consent as a defense. We therefore hold that Herndon has failed to prove that s. 972.11 (2) (a) and (b), Stats., is unconstitutional [420 N.W. 2d at 362].

The Court of Appeals held, however, that defendant Herndon had met the burden of proving the unconstitutionality of s. 972.11 (2) (c), Stats., which provides that, regardless of the purpose of admission, evidence of prior sexual conduct may be admitted only if it falls within the three statutorily-recognized exceptions to the rape shield law. Specifically, the Court held that:

> A refusal to allow...evidence [of prior sexual conduct which is probative of the complainant's bias or prejudice, shows that she has a motive to fabricate or shows a continuing pattern of conduct] in all cases based solely on an evidentiary rule is a violation of the defendant's sixth amendment rights to confront adverse witnesses and present witnesses in his own behalf [426 N.W. 2d at 362].

In arriving at its decision, the court noted that the Court of Appeals had previously recognized an exception to the general rule that character evidence, such as evidence of chastity reputation, is generally irrelevant and inadmissible because it is of slight probative value and may be very prejudicial because it distracts the fact-finder from its goal of ascertaining what actually happened on a particular occasion [Milenkovic v. State, 86 Wis. 2d 272, 272 N.W. 2d 320 (Ct. Apps. 1978)]. The exception to the general rule, which was recognized by the court in Milenkovic, is that:

> ...[evidence of] other crimes, wrongs and acts may be introduced as evidence to prove intent, plan or motive despite the fact that its use may impinge on normal evidentiary opposition to general character evidence. Such evidence must first be presented to the trial court by an offer of proof so that the court may weigh its probativeness against any possible prejudice in accordance with...[the decision of the U.S. Supreme Court in Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974)] [426 N.W. 2d at 360].

The Court of Appeals noted that, in Davis, the U.S. Supreme Court applied a balancing test to determine the defendant's right to cross-examine a key prosecution witness regarding his delinquency record, which was recognized as a confidential record protected by state statute. Defendant Davis argued that the attempted cross-examination was not a general attack on the witness' character but, rather, was aimed at revealing "possible biases, prejudices or ulterior motives of the witness as they may relate directly to the issues or personalities in the case at hand" [citations omitted]. The Supreme Court concluded that, while a trial court normally has a duty to protect witnesses from cross-examination that serves to harass, annoy or humiliate, that protection does not extend to cross-examination intended solely to discredit the witness.

The Court of Appeals summarized the balancing test applied in Davis as follows:

> The balancing test enunciated in Davis and analyzed and applied in many jurisdictions...requires that where the evidence to be admitted is probative of the complainant's bias and prejudice, shows that she has a motive to fabricate, or shows a continuing pattern of conduct, the trial court must balance the probativeness of the evidence against its prejudicial nature. A refusal to allow this evidence in all cases based solely upon an evidentiary rule [rape shield statute] is a violation of the defendant's sixth amendment rights to confront adverse witnesses and present witnesses in his own behalf [426 N.W. 2d at 362].

The Court emphasized that the constitutional defect in s. 972.11 (2) (c), Stats., is the absolute nature of this evidentiary rule:

> We note that we are forced by Davis and its progeny to declare s. 972.11 (2) (c), Stats., unconstitutional because its prohibition is absolute. It does not allow a court to balance the competing interest as it is required by Davis. Since the rights granted by the constitution are not couched in absolute terms, no statute which apparently abridges those rights may be absolute and still pass constitutional scrutiny in every case [426 N.W. 2d at 363].

The Court of Appeals reversed Herndon's conviction and remanded the case to trial court with instructions to hold a hearing pursuant to s. 971.31 (11), Stats., to determine whether the facts alleged by Herndon in his offer of proof could be shown. If those facts could be shown, the Court directed the trial court to analyze the evidence using a six-part test which is applied by federal courts, in criminal cases, to test the admissibility of evidence of other crimes, wrongs or acts to show intent, plan or motive. This test states that:

> Evidence of these acts is admitted only if:
>
> (1) [T]here is a clear showing that the defendant [complainant] committed the prior acts;
>
> (2) [T]he circumstances of the prior acts closely resemble those of the present case;
>
> (3) [T]he prior act is clearly relevant to a material issue, such as identity or intent [or bias];

> (4) [T]he evidence is necessary to prosecution's [defendant's] case;...
>
> (5) [T]he probative value of the evidence outweighs its prejudicial effect; [and]
>
> (6) [That] a single past act is not probative of present acts; only related patterns of behavior should be admissible [420 N.W. 2d at 360].

In dicta, Judge Moser, writing for the Court, recommended that the Legislature consider the enactment of legislation that might alleviate the problem confronted in the Herndon case. In this regard, the Judge stated:

> The Legislature should note that one method to alleviate this problem [conflict between the protection of the victim's privacy versus the defendant's right to confrontation] has been used by Congress and by the Oregon Legislature. Federal Rule of Evidence 412 and Oregon Revised Statute s. 40.210 (1987) both generally prohibit evidence of prior sexual conduct or reputation. However, both provisions also allow for this type of evidence to be admitted when it is "constitutionally required to be admitted." Virginia and California also provide for the admission of evidence which is directly relevant to a complainant's credibility or motive to fabricate the charge [Virginia Code Annotated, s. 18.2-67.7b (1982); California Evidence Code, s. 782 (West Supplement 1988)]. These provisions allow for the fulfillment of the general policy against such evidence, while giving the courts the power to determine constitutional issues of inadmissibility on a case-by-case basis [420 N.W. 2d at 363].

Under this interpretation by the Wisconsin Court of Appeals, the balancing test mandated by Davis, supra, applies when exclusion of evidence of sexual conduct under the public policy of the rape shield statute conflicts with the defendant's right of confrontation. In contrast, the balancing requirement appears to be inapplicable when the state seeks the admission of evidence excluded under the rape shield statute--that is, where a fundamental right of the defendant is not asserted. At least this appears to be a reasonable interpretation of the State Supreme Court's ruling in State v. Mitchell, 44 Wis. 2d 596, 424 N.W. 2d 698 (1988).

4. State v. Mitchell, 44 Wis. 2d 596, 424 N.W. 2d 698 (1988) (Wisconsin Supreme Court)

a. Trial Court

The trial court permitted the complainant and her mother to testify at trial that the complainant was a virgin prior to her alleged first degree sexual assault under s. 940.225 (1) (d), 1987 Stats. (sexual intercourse with a person 12 years of age or younger). The defendant was subsequently convicted and appealed.

b. Court of Appeals

The Court of Appeals, in an unpublished decision, reversed the defendant's conviction, concluding that the trial court's decision to admit the testimony about the complainant's virginity was based on an erroneous interpretation of the rape shield law [specifically, s. 971.11 (2), Stats.], and constituted prejudicial error.

c. Wisconsin Supreme Court

On appeal to the Wisconsin Supreme Court, the state argued that, under the rape shield statute, it was not error, or at most harmless error, for the complainant and her mother to testify at trial that the complainant was a virgin prior to the assault. The state also argued that if the rape shield statute bars this testimony, the statute was unconstitutional as a violation of separation of powers (i.e., a legislative invasion of the powers of the judiciary). The Wisconsin Supreme Court held that admitting testimony about the complainant's prior sexual conduct (i.e., that the complainant was a virgin prior to the assault) contravenes the rape shield statute and that the statute does not violate separation of powers.

The state further argued that the Court must interpret that statute to effectuate the purpose and intent of the Legislature. The state advanced the position that the rape shield statute was designed to protect the complainant by prohibiting two uses of prior sexual conduct evidence:

> (1) [T]o show that because of prior sexual conduct the complainant was or was not more likely to consent to sexual activity with the defendant when consent is an issue; and
>
> (2) To show the complainant is of unchaste character and therefore more likely to lie, or to show the victim is of chaste character and therefore more likely to be truthful [424 N.W. 2d at 703].

The state asserted that, since the evidence of a complainant's lack of prior sexual conduct did not fall within either of the prohibited uses, but was admitted to show the identity of the complainant's assailant, the admission of the evidence did not violate the rape shield statute.

The Court rejected the state's interpretation of the rape shield statute. In particular, the Court stated that the state's interpretation of s. 972.11 (2) (b) 2, Stats., ignored the phrase "for the use in determining the degree of the assault or the extent of the injury suffered" which limits the use of evidence admitted under that subdivision [p. 703]. The Court observed that this phrase was intended, for example, to allow the use of such evidence in "...cases where pregnancy or contraction of a disease is an element of the offense."

The Court also stated that the state's reading of the rape shield statute was contrary to the Legislature's intent. The Court said that s. 972.11 (2) (c), Stats., specifies that the limitation on the admission of evidence of prior sexual conduct of the complaining witness applies "...regardless of purpose of the [evidentiary] admission or reference unless the admission is expressly permitted under..." [s. 972.11 (2) (b) 1 to 3]. The Court noted that the enactment of s. 972.11 (2) (c) was an unfavorable legislative response to the Supreme Court's decision in State v. Gavigan, supra.

The state also argued that the Court must interpret the rape shield statute to avoid absurd results and suggested that the exclusion of evidence in this case would lead to the absurd result that "...highly probative, minimally prejudicial evidence on identity will be excluded in this case and in other cases" [424 N.W. 2d at 704].

In rejecting this argument, the Supreme Court observed that numerous statutes and rules of evidence exclude evidence which may be probative and relevant to the prosecutor's case:

> The statutes and rules exclude evidence because the rule-making body concludes that public policy mandates the exclusion: the need for evidence is outweighed by the public policy justifications for excluding the evidence.... While the statutes of nonadmissibility may render relevant evidence inadmissible, this result is not absurd, as the state contends [424 N.W. 2d at 704-705].

Lastly, the state argued that the Court must interpret the rape shield statute to avoid rendering the statute unconstitutional. In particular, the state argued that if the Court construed the rape shield statute to preclude the admission of evidence of virginity in this case, the Court must hold the statute [specifically, s. 972.11 (2) (c), Stats.] to be "...an unconstitutional invasion of the province of the judiciary,

violating the doctrine of separation of powers under the state constitution" [424 N.W. 2d at 705].

Although the Court agreed with the state that the rape shield statute touches upon a judicial function (i.e., the function of ruling on the admissibility of evidence at trial), the Court recognized that the rape shield statute "...falls within the Legislature's power to adopt laws for the public welfare." The Court took judicial notice of the public policy justifications for the rape shield statute:

> ...[t]he statute represents a major public policy decision of the state legislature regarding sexual assault cases. The statute is one aspect of a broader legislative program to deal more effectively with the serious crime of sexual assault. Thus, while cast in evidentiary terms, the basic purpose of the rape shield statute is to protect sexual assault victims from embarrassing public exploration into their past sexual conduct unless the evidence elicited is relevant to select specified issues. The statute represents one means to overcome the reluctance of sexual assault victims to report the crime and to help prosecute the alleged offender [424 N.W. 2d at 706].

The Supreme Court recognized the difficulty of constructing a general rule regarding the inadmissibility of certain evidence which would not, in some instances, result in the exclusion of relevant evidence, but rejected the argument that general exclusionary statutes are unconstitutional. In this regard, the Court observed:

> It is impossible to construct a general rule classifying evidence as inadmissible that will not on occasion result in the exclusion of relevant evidence, just as it is impossible to devise exceptions, however numerous, that will prevent relevant evidence from being excluded. By adopting the rape shield law, the legislature has balanced the advantages of a general classification of evidence for purposes of exclusion and the disadvantages that any such general rule creates [citation omitted]. We are unwilling to conclude in this case that the balance the legislature has made in adopting the rape shield law so lacks legitimacy and rationality. The rape shield must be declared unconstitutional as materially impairing or practically defeating the proper functioning of the judicial system [424 N.W. 2d at 706; citing

People v. McKenna, 1966, 367, 585 P. 2d 275 (1978)].

The Court concluded that because the evidence sought to be admitted was evidence of prior sexual conduct that did not fall within the three exceptions enumerated in the rape shield statute, the evidence was inadmissible.

It should be noted that the Mitchell case can be distinguished from the Herndon case in that the evidence sought to be admitted in Mitchell was offered by the state. Therefore, the opinion of the Mitchell Court contains no analysis of the defendant's confrontation and presentation of evidence rights which were successfully asserted in Herndon.

5. State v. Pulizzano, ___Wis. 2d___, ___N.W. 2d___ (1990) (Wisconsin Supreme Court)

a. Trial Court

At the defendant Pulizzano's first-degree sexual assault trial under s. 940.225 (1) (d), 1987 Stats., the trial court refused to allow her to question her nephew (one of the complainants) regarding a prior sexual assault for which he was receiving therapy. Pulizzano sought this testimony for the purpose of explaining to the jury how the complainant had gained explicit knowledge of sexual matters. Specifically, Pulizzano wanted to offer this evidence to rebut the state's assertion that the complainant had gained his sexual knowledge as a result of Pulizzano's sexual assault on him. The trial court determined that this evidence was being offered solely to circumvent the rape shield statute. Further, the trial court found that the relevance of the complainant's testimony was outweighed by considerations of "...unfair prejudice, confusion of the issues and misleading the jury."

The defendant was subsequently convicted of four counts of first-degree sexual assault under s. 940.225 (1) (d), 1987 Stats.

b. Court of Appeals

On appeal, the defendant argued that she was denied her constitutional rights to confrontation and compulsory process. The right to confrontation grants defendants the right to "effective" cross-examination of witnesses whose testimony is adverse [Davis v. Alaska, supra, at 318]. The right compulsory process grants defendants the right to admit "favorable" testimony [citing Chambers v. Mississippi, 410 U.S. 284, at 302 (1973)].

Citing Herndon, supra, the Court of Appeals recognized the need to balance the competing interests, as required by Davis, supra. The Court also cited the six-part test used in Herndon to facilitate the balancing

of interests relating to the admissibility of prior conduct evidence in a sexual assault case where consent was an issue. Because consent was not at issue in this case, the Court of Appeals held that the six-part test required by Herndon need not be applied. Instead, the Court held that the balancing test prescribed in Davis, supra, as described in Herndon, must be used. That test requires: "...where evidence to be admitted is probative of the complainant's bias and prejudice, shows that she has a motive to fabricate, or shows a continuing pattern of conduct, the trial court must balance the probativeness of the evidence against its prejudicial nature."

Applying the Davis balancing test, the Court of Appeals held that, the defendant must be allowed limited inquiry into the prior sexual assault of the complainant for the purpose of negating the inference that the complainant's sexual knowledge was gained from the alleged assault by the defendant.

c. Wisconsin Supreme Court

On appeal by the state, the Wisconsin Supreme Court affirmed the decision of the Court of Appeals. The Supreme Court concluded that the defendant was denied her constitutional rights to confrontation and compulsory process when the trial court applied the rape-shield statute to preclude the introduction of sexual conduct evidence (evidence of a prior sexual assault) for the limited purpose of establishing an alternative source for the complainant's sexual knowledge.

In reaching its decision, the Supreme Court reviewed the history of the Wisconsin rape shield statute. The Court said that a primary objective of the statute was to reject the historic view that a woman's prior sexual conduct was relevant to the issue of consent and general credibility. The Court also observed that the Legislature did not intend that the rape shield statute should be applicable only to those two issues, citing the Legislature's enactment of s. 972.11 (2) (c), Stats., in response to the decision of the Supreme Court in Gavigan, supra. As explained by the Court:

> [T]he legislature's response to Gavigan makes it plain that the purpose for which admission was sought was not the crux upon which the legislature determined that such evidence should be excluded. Rather, the statute was intended to reflect the more recent view that generally evidence of a complainant's prior sexual conduct is irrelevant or, if relevant, substantially outweighed by its prejudicial effect [citations omitted]. The exceptions enumerated in sec. 972.11, Stats., are those limited circumstances in which evidence of a complainant's prior sexual conduct is generally

> viewed as probative of a material issue without being overly prejudicial. Other than in those limited instances, the plain language of sec. 972.11 (2) (b), Stats., makes no distinction so far as the purpose for which the proponent of the evidence seeks its admission [citation omitted]. Consistent with the legislature's intent, that fact has no bearing upon the admissibility of evidence under the statute [p. 9].

The Court recognized that its plain language interpretation of the rape shield statute [i.e., s. 972.11 (2) (b), Stats.,] had the effect of overruling the Court of Appeals decision in Herndon, supra, that s. 972.11 (2) (c), Stats., is unconstitutional on its face because it violates a defendant's right to present evidence.

In its analysis of the constitutional right to present evidence pursuant to the confrontation and compulsory process clauses of the State and Federal Constitutions, the Court held that "[c]onfrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect" [p. 11]. The Court concluded that because the rape shield statute is not unconstitutional on its face, to withstand a constitutional challenge "...[the rape shield statute] need only be rationally related to a legitimate state interest" [p. 12]. In this regard, the Court recognized four state interests served by the rape-shield statute:

> First, it promotes fair trials because it excludes evidence which is generally irrelevant, or if relevant, substantially outweighed by its prejudicial effect. Second, it prevents a defendant from harassing and humiliating the complainant. This is particularly important where, as here, the complainant is a child. Cross-examination has been recognized as one of the most potentially damaging aspects of a child's participation in a trial...[citation omitted]. Third, the statute prevents the trier of fact from being misled or confused by collateral issues and deciding a case on an improper basis. Fourth, it promotes effective law enforcement because victims will more readily report such crimes and testify for the prosecution if they do not fear that their prior sexual conduct will be made public [p. 13].

Although recognizing the virtue of a rule that prior sexual conduct is generally inadmissible, the Court acknowledged that circumstances of a particular case may require the admission of evidence of prior sexual conduct. That is, in a particular case:

> ...[E]vidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected. Section 972.11, Stats., as applied may in a given case impermissibly infringe upon a defendant's rights to confrontation and compulsory process [p. 13].

The Court determined that the first five of the six tests recognized in Herndon, supra, must be satisfied to establish the constitutional right to present evidence otherwise excluded by the rape shield statute. In recognizing the applicability of the six-part test, the Supreme Court rejected the Court of Appeals' opinion that the test was not applicable in a sexual assault case if consent is not an issue. As summarized by the Court, the six-part test requires the defendant to show:

> ...that the prior acts clearly occurred; that the acts closely resembled those of the present case; that the prior act is clearly relevant to a material issue; that the evidence is necessary to the defendant's case; that the probative value of the evidence outweighs its prejudicial effect; and that there was a related pattern of behavior [p. 17].

The Court determined that the defendant's offer of proof had satisfied the first five Herndon tests and that evidence of the prior sexual assault was probative of a material issue; i.e., to show an alternative source for the complainant's sexual knowledge. Therefore, the Court said that it was necessary to determine "...whether the State's interests in prohibiting the evidence nonetheless require that it be excluded" [p. 20]. The Court held that there must be a "compelling state interest" to overcome the defendant's constitutional rights, rejecting the view that only a "general balancing" between the interest of the defendant and the state is required. "A general balancing would be proper [, the Court held] only if the state's interests, like the defendant's were constitutionally required" [p. 21]. Since the evidence of prior sexual assault was determined to be a necessary and critical element of the defendant's defense, the Court found the defendant's right to present evidence "paramount."

The Court emphasized that its conclusion that the rape shield statute was "unconstitutional as applied affects the validity of the statute only in this particular case." The Court held that the question of the constitutionality of the statute as applied in other instances must "...be resolved on a case-by-case basis" [p. 12].

The opinion of the Court concludes with a summary of the process and principles the trial court should apply when it is necessary to resolve a

conflict between the evidentiary restrictions of the rape shield statute and the defendant's right to present evidence in the interest of a fair trial:

> ...[T]o establish a constitutional right to present otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge, prior to trial the defendant must make an offer of proof showing: (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect. If the defendant makes that showing, the circuit court must then determine whether the State's interests in excluding the evidence are so compelling that they nonetheless overcome the defendant's right to present it. In making that determination, the state's interests are to be closely examined and weighed against the force of the defendant's right to present the evidence, as measured by the first five Herndon factors. In this case, we conclude Ms. Pulizzano's offer of proof was sufficient and that her right to present the evidence is paramount to the state's interests in excluding it. Accordingly, we affirm the court of appeals [pp. 23-24].

The Court also held that an "in camera" (i.e., private) examination of the admissibility of the evidence was not necessary in this case. The Court recognized that the decision on whether to conduct an "in camera" examination was a matter appropriately left to the Court's discretion.

## E. TYPES OF RAPE SHIELD LAWS

In Herndon, supra, the Court of Appeals recognized the four categories of rape shield legislation adopted by Professor Harriet R. Galvin in her survey of the rape shield laws [see Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade," 70 Minn. Law Rev. 763 (1985-86)]. In her Minnesota Law Review article, Professor Galvin specifically describes and evaluates the approaches of Michigan, Texas, California and the Federal Rules of Evidence. Professor Galvin's analysis of each of these four approaches is described in this section of the Staff Brief.

For information on statutory exceptions and procedural provisions of all state laws, see Appendix B which contains Tables 1 to 4 from the Galvin survey.

1. The Michigan Approach

Wisconsin's rape shield statute is similar to the Michigan statute. Rape shield laws which follow this approach contain general prohibitions on the admission of prior sexual conduct or reputation evidence but have very specific exceptions allowing for this evidence to be admitted if it is determined by the Court, usually in an "in camera" (i.e., private) proceeding, that the evidence is highly relevant and material to the presentation of the defense and, therefore, its admission is constitutionally required.

The objective of the Michigan rape shield approach, according to Professor Galvin, is to "...legislatively control the sexism of common law judges by stripping them of the discretion to determine the relevancy and admissibility of sexual conduct evidence on a case-by-case basis" [Galvin, supra, p. 873]. Twenty-five states have rape shield laws which follow this approach.

Professor Galvin suggests that the Michigan approach to rape shield legislation is unsuccessful, concluding that:

> ...the flaw in the Michigan approach is its attempt to legislatively predetermine the relevancy of an entire category of evidence without regard to the factual setting of the case or the purpose for which the evidence is offered.... [The trial court is not authorized] to admit unaccepted sexual conduct evidence simply because its probative value outweighs its prejudicial effect in a particular case or because the court finds the evidence to be essential to the accused's right to present a defense.

2. Texas Approach

At the opposite end of the spectrum from the Michigan "inflexible legislative approach," is the Texas "untrammeled judicial discretion approach." The rape shield laws which follow the Texas approach are purely procedural in nature [Galvin, supra, p. 876]. Eleven states have adopted this approach.

Under the Texas approach , the accused is permitted to introduce any form of sexual conduct evidence for any purpose upon a judicial determination of relevancy according to the traditional standard. That

is, the evidence is admissible if its probative value outweighs its prejudicial effect [Galvin, supra, p. 877].

In order to protect the victim's privacy, Texas requires the relevancy determination to be made at an "in camera" proceeding prior to offering the evidence. If the court finds the evidence irrelevant, it may not be referred to in any manner at trial.

Professor Galvin is critical of the Texas approach because it can "...easily be manipulated by judges to penalize 'undeserving' complainants" [Galvin, supra, p. 905]. Professor Galvin suggests that without substantive restrictions on the admissibility of sexual conduct evidence, judges can admit evidence on the same basis as under common law, that is, to show that an unchaste victim is more likely to have consented. According to one legal scholar, the Texas rape shield statute "represents nothing more than a codification of prior law" [Galvin, supra, at 878].

3. California Approach

The key feature of the California approach to rape shield protection is the separation of sexual conduct evidence into two broad categories depending on the purpose for which it is offered. Evidence is categorized as either (a) "substantive" evidence, offered to prove consent by the complainant, or (b) "credibility" evidence, offered to attack the complainant's credibility. The statute precludes the admission of evidence to prove consent, unless it relates to prior sexual conduct with the defendant. Sexual conduct evidence is admissible to attack the complainant's credibility. A separate statutory provision grants the defendant the right to rebut any evidence of sexual conduct introduced in the state's case [Galvin, supra, at 894]. Two other states have rape shield statutes modeled after the California approach.

Professor Galvin criticizes the California approach for its ambiguity and resulting danger that admissible evidence can be prohibited merely by attaching to it a different label. As explained by Professor Galvin:

> There are several problems with...[the California approach]. Although this approach admirably recognizes that a single item of sexual conduct evidence may have multiple uses, considerable confusion exists regarding where to draw the line between permissible and impermissible uses. The primary difficulty stems from the ambiguity which inheres in the term "credibility." On its face the subsection that freely allows evidence bearing on credibility appears to resurrect the common-law rule that admitted evidence of unchastity to impeach the rape complainant's general

> credibility. Because California was among the majority of jurisdictions at common law that rejected the notion that "promiscuity imports dishonesty," the drafters probably did not intend to reverse that trend in the context of a rape reform statute. Nevertheless, the imprecision in the statutory language is unfortunate [Galvin, supra, at 894-895].

4. Federal Approach

According to Professor Galvin, the federal approach is "...designed to avoid the underinclusiveness of the Michigan approach and the overinclusiveness of the Texas approach..." [Galvin, supra, at 883]. Three key features, combined from both models, are: (a) a general prohibition of sexual conduct or reputation evidence; (b) exceptions allowing for this evidence in circumstances where the evidence is undeniably relevant to an effective defense; and (c) a general "catch-basin" provision allowing for the introduction of relevant evidence on a case-by-case basis. This catch-basin provision authorizes limited admissibility of evidence of the complainant's specific prior sexual acts where "...constitutionally required to be admitted" [Federal Rule of Evidence, 412 (b) (1)].

Professor Galvin has criticized the federal approach as requiring courts to grapple with constitutional issues and ever-changing notions of equity. She explains:

> The federal approach to the problem of restricting the use of sexual conduct evidence is far from perfect. By making provision for evidence that is "constitutionally required," or "relevant and admissible in the interests of justice," the approach avoids the underinclusiveness and rigidity of the Michigan approach. The federal approach is flawed, however, in that it grants courts the needed flexibility to determine the admissibility of sexual conduct evidence without providing any guidance as to when and under what circumstances such evidence should be admitted. In this sense it does not differ significantly from the Texas approach, which sets no substantive restrictions on the use of the evidence and grants judges total discretion to admit sexual conduct evidence on a case-by-case basis. Finally, the absolute prohibition on reputation evidence may in certain cases deny the accused his constitutional right to present the best available evidence in

> support of a legitimate defense theory [Galvin, supra, at 893].

5. Galvin and NCCUSL Proposals to Improve Rape Shield Laws

a. Galvin Proposal

To address the weaknesses she has identified in existing types of rape shield laws, Professor Galvin has proposed an alternative legislative solution. She asserts that her legislative approach is less radical than the Michigan approach, and she expects that it "...will preserve the gains of the past decade but bring about a more satisfying resolution of the various interests at stake." Professor Galvin explains how her proposed revision of Federal Rule of Evidence 404, dealing with character and other crimes evidence, will address the weaknesses in existing rape shield laws:

> Unlike the overly restrictive and constitutionally suspect Michigan approach, [my proposed rape shield law] is not limited in applicability to specific defense theories. Unlike the Texas approach, it cannot easily be manipulated by judges to penalize "undeserving" complainants. Unlike the federal approach, it does not require courts to grapple with constitutional issues and ever-changing notions of equity. Finally, unlike the California approach, it is unambiguous and does not create the danger that admissible evidence can be prohibited merely by attaching to it a different label. By prohibiting only those uses of evidence that the rape shield laws were designed to prevent, the proposed solution is a functional and workable approach that can serve as a useful model for rape shield legislation in the second decade [Galvin, supra, p. 905].

The Galvin legislative proposal, which would amend Federal Rule of Evidence 404, is contained in Appendix C. Under section (c) of the Galvin proposal, prior sexual conduct evidence is "...not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason more likely to consent to the sexual conduct with respect to which sexual assault is alleged." Evidence of consensual sexual conduct on the part of the victim may, under the Galvin proposal, be admissible for "other purposes." Examples of evidence that may be admitted under the "other purpose" exception are set forth in section (c) (1) (A) to (F) of the proposal. A specific procedure, which requires an "in camera" (i.e., private) hearing, is prescribed in section (c) (2) of the proposal to resolve the issue of evidence admissibility.

b. NCCUSL Proposal

Another rape shield model, based on Federal Rules of Evidence, was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) as one component of 1986 amendments to the NCCUSL's Uniform Rules of Evidence.

The rape shield rule of the NCCUSL (Rule 412) is patterned after Federal Rule of Evidence 412. Under section (a) of the proposed rule, evidence of reputation or opinion concerning the sexual behavior of an alleged victim of a sexual offense is not admissible under any circumstances, due to its low probative value and risk of great prejudice. Prior sexual conduct evidence is admissible under the specific exceptions enumerated in section (b) of the proposed rule for the specific purposes and circumstances detailed in that provision. Section (b) of the proposed rule states:

> (b) Exceptions. This rule does not require the exclusion of evidence of (i) specific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of semen, pregnancy, disease, injury, mistake, or the intent of the accuse; (ii) false allegations of sexual offenses; or (iii) sexual behavior with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.

Rule 412 of the NCCUSL Uniform Rules of Evidence is contained in Appendix D.

## PART IV

## LIMITATIONS ON COMMENCING CIVIL ACTION WHERE PENDING SEXUAL ASSAULT CRIMINAL ACTION

In recent years, advocates for sexual assault victims in Michigan have been concerned that the civil justice system was being used to circumvent the rape shield law and obtain evidence regarding the victim's sexual conduct history that would be inadmissible in criminal court. This concern led to the recent enactment of legislation in Michigan to address this potential problem. This Part of the Staff Brief describes this legislation and the events which triggered its enactment. It also discusses possible weaknesses in the Michigan law and offers suggestions for improvement.

### A. MICHIGAN LAW AND BACKGROUND TO THAT LAW

Act 28 of the Michigan Public Acts of 1990 prohibits a defendant in an action for criminal sexual conduct, or assault with intent to commit criminal sexual conduct, from commencing or maintaining a civil action against a victim of the crime, under the following circumstances: (1) a criminal action is pending in trial court; and (2) the civil action is based on statements made by the sexual crime victim.

Specifically, s. 600.1902 (2) to (6), Michigan Compiled Laws, created by Act 28, provides that:

1. A defendant in a criminal action for criminal sexual conduct in any degree or assault with intent to commit criminal sexual conduct may not commence or maintain a civil action against the victim of the crime for which the defendant is charged if both of the following circumstances exist:

   a. The criminal action is pending in a trial court of this state, of another state or of the United States.

   b. The civil action is based upon statements or reports made by the victim that pertain to an incident from which the criminal action is derived.

2. The court must dismiss with prejudice the civil action commenced or maintained in violation of item 1, above.

3. The period of limitations for the bringing of a civil action described in item 1, above, is tolled for the period of time during which the criminal action is pending in a trial court of this state, of another state or of the United States.

4. These provisions do not apply if the victim files a civil action based upon an incident from which the criminal action is derived against the defendant in the criminal action.

5. These provisions apply only if the criminal action against the defendant is based upon a crime allegedly committed after the effective date of the amendatory act that created these provisions.

This statute is a legislative response to events which occurred in 1987, as reported by Catherine L. Kello in "Rape Shield Laws--Is It Time for Reinforcement?," 21 University of Michigan Journal of Law Reform (Fall 1987).

In 1987, a woman filed a police report, stating that she had been raped at a local fraternity house. After a routine investigation, the prosecutor filed criminal sexual conduct charges against a man living in the fraternity house. Just two weeks after the preliminary examination, the defendant in the rape case filed a civil lawsuit against the woman. The suit alleged defamation, intentional infliction of emotional distress and abuse of process.

According to Ms. Kello, the defendant's attorney claimed that the civil suit was filed before resolution of the criminal proceedings because of the three-year wait for a civil trial date. Rape counselors and other women's rights advocates charged that the civil suit was a blatant attempt to compel the rape victim to drop the criminal charges. This accusation was denied by the defendant's attorney. The defendant's attorney asserted that the woman had fabricated her story concerning the alleged rape. The prosecutor expressed concern that if these types of civil suits are successful, it will be harder for prosecutors to convince victims to file charges. The prosecutor also expressed concern that the civil action might sidestep the protections granted under Michigan's rape shield statute.

In the civil action, the attorney representing the rape victim attempted to seek a postponement of discovery proceedings until after the criminal proceedings were resolved. Just 10 days before the scheduled criminal trial date, the judge in the civil case issued a stay barring discovery until after completion of the rape trial. After a six-day criminal trial, the jury found the defendant not guilty of criminal sexual conduct. Subsequently, the civil suit was dropped by the defendant.

Ms. Kello also reports that in the Fall of 1987, a criminal defense attorney filed a civil suit for slander against the alleged rape victim while criminal sexual conduct charges were pending against his client. A few months later, the judge dismissed the criminal charges on the grounds of insufficient evidence. Again, concern was raised by members of the community over the use of civil suits as "...creating a dangerous

correlation between the [civil] suits and unsuccessful criminal prosecutions" [id., p. 325]. Ms. Kello suggests that these cases:

> ...show the development of a new defense strategy that intimidates rape victims. Whether the outcomes in the two criminal cases were influenced by the civil suits or merely resulted from weak criminal cases is unimportant. Rather, the significance rests on the impact potential civil suits may have on rape victims contemplating initiating criminal complaints. At least one rape counselor reported that the civil suits caused women to hesitate in filing criminal complaints. Because of the obvious threat these suits pose to the protections afforded under the rape shield law, possible legislative remedies must be considered and evaluated [id., p. 326].

Ms. Kello further suggests:

> The additional exposure caused by the threat of a civil action will cause some women who are already reluctant to report their rape to reconsider initiating any proceeding. These civil actions also eliminate the guarantee that rape victims will not face questions about their sex lives. For these reasons, legislative reform is necessary to reinforce the protections provided by the current [Michigan] Rape Shield Law [id., p. 329].

## B. PROPOSED MODEL STATUTE

Ms. Kello offers several possible legislative approaches to reinforcing the rape shield protection:

> [a.] The legislature could simply abolish the causes of action alleged in these civil suits. [b.] Another remedy would be to prohibit any criminal defendant from bringing a civil suit prior to the termination of the criminal proceedings. [c.] A narrow solution would apply specifically to a defendant in a criminal sexual conduct case, limiting his ability to file a civil action against his accuser until after the criminal trial has ended [id., p. 330].

After analyzing each of these legislative alternatives, Ms. Kello concludes that the third option--limiting the ability of the defendant in

a criminal sexual conduct case to file a civil suit against his or her accuser until after the criminal trial has ended--is the best approach. She suggests that this approach could best be achieved by restrict[ing] the court's jurisdiction to hear and decide civil actions brought by rape defendants against complainants in the civil sexual conduct case.

> This method assures continuation of rape shield protections for the duration of the criminal trial while still preserving a citizen's right to file a civil action [id., p. 331].

Ms. Kello recommends the following model statute as a means to restrict a court's jurisdiction to hear and decide civil actions brought by rape defendants against complainants in sexual conduct cases:

> [1.] In any civil action, commenced by a defendant in a criminal action for criminal sexual conduct or assault with intent to commit criminal sexual conduct, that is filed against a victim of the crime for which the defendant is charged, the circuit court shall have no jurisdiction to hear or decide the matter during the period of time in which the criminal trial proceedings are pending, provided that the civil action is based on statements, reports, or other references to any incident from which the criminal action is derived.
>
> [2.] The period of limitations for bringing a civil action described in Section 1 is tolled for the period of time during which a criminal action is pending in a trial court of this state, another state or the United States [id., p. 331].

Ms. Kello advises that implementation of the model statute will require modification of current court administrative procedures. For example, she suggests that "...cases covered by the statute must be identified at the time of filing so that no rape victim will face a suit initiated prior to the statutory filing date" [id., p. 333]. Essentially, this requires every civil proceeding to include a statement by the plaintiff's attorney "...that there is no pending criminal action related to allegations forming the basis of the civil complaint" [id., p. 334].

Ms. Kello suggests that a second possible administrative safeguard would be to create a system for civil actions to alert the clerk of courts that the case relates to a rape allegation.

Commenting on the Michigan legislation which was subsequently enacted as 1990 Act 28, Ms. Kello suggests that the proposal is deficient because it:

> ...does not specifically remove the court's jurisdiction over the criminal defendant's suit against the rape victim. Instead, the bill would entitle the woman to dismissal of the action upon motion of a party or the court.
>
> ...In the days of crowded dockets and overworked clerks, it is unrealistic to expect the court, on its own initiative, to determine immediately if the case comes under the terms of...[the proposed legislation] by reviewing the contents of the complaint. Therefore, to enforce her rights under the bill, the rape victim would need to hire a lawyer to respond to the civil action and file a motion for dismissal. This statutory approach forces the woman to participate in the civil litigation until the court grants the dismissal [id., p. 336].

Ms. Kello also complains that the legislation "...does not eliminate the intimidation factor presented by the initiation of the civil action itself." She notes that while preparing for the criminal trial, the rape victim will be served a civil complaint, summons and discovery request in a suit filed in violation of the law proposed by the bill. The victim then must seek legal assistance to address the new problem created by her filing of the rape complaint.

Ms. Kello suggests that these problems are addressed in the model statute she has proposed. In particular, the administrative procedures she recommends would allow the court to determine "instantly" that it has no jurisdiction over the matter based on the face of the complaint and the case would not be filed.

## PART V

## CLOSURE OF THE PRELIMINARY EXAMINATION IN SEXUAL ASSAULT CASES

In order to protect the victim of a sexual assault from undue embarrassment and emotional trauma that may occur early in the criminal justice process, courts are authorized to order closure of the preliminary examination. Under some circumstances, the court is required to order closure. This Part of the Staff Brief describes the purpose of the preliminary examination, the closure provisions and judicial reaction to the closure mandate.

### A. PURPOSE OF THE PRELIMINARY EXAMINATION

The preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant [s. 970.03 (1), Stats.]. In State v. Dunn, 121 Wis. 2d 389, 359 N.W. 2d 151 (1984), the Wisconsin Supreme Court used the following quote from a 1922 Wisconsin Supreme Court decision to explain the purpose of the preliminary examination:

> The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based [Thies v. State, 178 Wis. 98, 109 N.W. 539 (1922)].

If the defendant is accused of sexual assault and certain other sensitive crimes, closure of the preliminary examination is discretionary with the court. If the complaining witness in a sexual assault case requests closure, the court is required to exclude from the hearing persons who are not officers of the court, members of the witness's or defendant's families or others deemed by the court to be supportive of them or otherwise required to attend. Section 970.03 (4), Stats., reads:

> If the defendant is accused of a crime under s. 940.225, 948.02, 948.05 or 948.06, the judge shall, at the request of the complaining witness, exclude from the hearing all persons not officers

> of the court, members of the witness's or defendant's families or others deemed by the court to be supportive of them, or otherwise required to attend. The judge may exclude all such persons from the hearing in any case where the defendant is accused of a crime under s. 940.225, 948.02, 948.05 or 948.06 or a crime against chastity, morality or decency.

B. JUDICIAL INTERPRETATION OF PROVISIONS OF THE PRELIMINARY EXAMINATION STATUTE AUTHORIZING CLOSURE

Pursuant to s. 970.03 (4), Stats., at the request of the complaining witness, the Manitowoc County Circuit Court entered an order closing the preliminary examination in a sexual assault case to members of the general public, except for representatives of news media. On appeal to the Wisconsin Supreme Court, the defendant objected to the closure, claiming it violated his 6th Amendment right to a "public trial." In State v. Circuit Court for Manitowoc County, 141 Wis. 2d 239, 414 N.W. 2d 832 (1987), the Wisconsin Supreme Court agreed with the defendant. The Court held that:

> ...[T]he portion of section 970.03 (4), Stats., which mandates closure of sexual assault preliminary examinations solely upon the request of the complaining witness, does not comport with the defendant's public trial right if the defendant objects to closure [414 N.W. 2d at 838].

The Court upheld the discretionary closure feature of s. 970.03 (4), Stats.

In reaching its decision, the Court specifically overruled a portion of an earlier Supreme Court holding that a right to a public preliminary examination is not constitutionally guaranteed [State ex rel. Kennon v. Hanley, 249 Wis. 359, 24 N.W. 2d 832, 836 (1946)].

The opinion of the Court gives guidance to trial courts regarding the factors that must be established to create a reasonable basis for discretionary closure at the request of the complaining witness in a sexual assault case:

> When a complainant seeks closure under section 970.03 (4) , Stats., the state must first advance a compelling interest which would be likely to be prejudiced absent closure, such as the need to protect a sexual assault victim from undue embarrassment and emotional trauma. Where the

> circuit court finds this or any other appropriately compelling basis for closure, it must narrowly tailor its closure order. In determining the breadth of the order, the circuit court must consider reasonable alternatives to full closure of the entire preliminary examination. In addition, the circuit court must articulate specific findings adequate to support closure. Factors such as those suggested by [the U.S. Supreme Court in] Globe, 457 U.S. at 607-09, 102 S. Ct., at 2620-22, including the victim's age, psychological maturity and understanding, the nature of the crime, and the desires of the victim and the victim's family, may provide guidance in making these findings. The circuit court should give great, but not exclusive, weight to the desires of the victim, since this is clearly shown to be proper public policy as evidenced by the enactment of sec. 970.03 (4), Stats. [414 N.W. 2d at 839].

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# APPENDIX A

## LETTER FROM GARY SCHUSTER, DISTRICT ATTORNEY, DOOR COUNTY, RELATING TO SEXUAL OFFENSES AGAINST CHILDREN STATUTES

OFFICE OF

Gary J. Schuster
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November 8, 1989

RE: Crimes Against Children - Chapter 948 of the Wisconsin Statutes.

AN OPEN LETTER TO STATE LEGISLATORS

I've been a prosecutor for almost nine years and I've prosecuted more than my share of child abuse and child sexual assault offenses. Our office was responsible for the prosecution of State v. Williquette, the first case in the State of Wisconsin in which a mother was charged with failing to prevent grotesque sexual and physical abuse upon children in her care by her husband.

Apparently, in response to the Supreme Court case of Williquette, the Legislature adopted Crimes Against Children (Chapter 948) which is seen as perhaps codifying common law rules and clarifying duties owed by certain classes of people to children, and perhaps strengthening the ability of the state to protect children from harm. I believe that that is false promise and that Chapter 948 substantially undermines and confuses child abuse and related prosecution in the State of Wisconsin.

Under traditional theories of liability, before criminal liability may be imposed for failure to act, a duty must be found. [That duty is generally based on relationships, (parent/child; or contract,(nursing home-patient), or (babysitter-child), or creation of the peril.] In addition, before a person can be held accountable they must be able to act in such a way as not to endanger their physical safety. For example: a person may have the responsibility to save his son or daughter from a burning building provided that the person can do so without seriously endangering his own life. What the Legislature has done by Chapter 948 is to create two additional defenses not available in the common law or statutes: the "treatment through prayer defense" and the "emotionally incapable of taking action" defense. I will not dwell on the treatment through prayer defense but suffice it to say it is my considered opinion that children should not be martyrs to their parents' religious beliefs. The emotionally incapable of acting defense is a legal quagmire. Does this mean that a woman who unreasonably believes that if she reports abuse to social services that she herself may be beaten or harmed has a built-in defense? Does this mean if someone's own self image is so poor that they value the attentions of the abuser more than they do.

the necessity of protecting their children from harm? Is this a defense? I would think most people would agree that the duty of protecting your children is the overwhelming value to be supported. Furthermore, the Legislature has deemed it the State's responsibility to prove that the prospective defendant is emotionally capable of acting. Instead of what traditionally would be considered as an affirmative defense and placing the duty to go forward on the defendant to show he or she was not capable of acting, the responsibility is instead placed on the state. The State must delve into morass of what was going on in the defendant's head.

Furthermore, the defenses are not consistent. There is a pervasive illogic that emanates when one compares 948 of other types of crimes in which children could be victims. The treatment through prayer defense and the emotionally incapable of acting defense is seemingly not available if death results to the child, such as: If a person was charged with first or second degree reckless homicide in allowing a child to die of malnutrition or failing to seek medical care for an obvious serious illness. Furthermore, the defenses are not available under the Child Neglect statute - 948.21, which states that any person who is responsible for a child's welfare, who through his or her actions or failure to take action and intentionally contributes to the neglect of a child, is guilty of a Class A Misdemeanor or, if death is a consequence, a Class C Felony. This seems to set up the following possible scenario: The child lives with his step-mother and father and has a very serious infection. The father believes in treatment through prayer and refuses to take the child to the doctor and instructs the step-mother not to take the child to the doctor and even though she watches the child get progressively worse she does not take the child to the doctor. In one scenario the child gets very sick and undergoes alot of pain and recovers. In a second scenario the child suffers permanent brain damage, and in a third scenario the child dies. In the first scenario if the step-mother was charged with recklessly causing bodily harm by a person who had a duty to act, she may have the defenses of treatment through prayer or not being emotionally capable of acting. If she was charged with the simple misdemeanor of child neglect those defenses would not be available. In the second scenario if a person was charged under reckless causation of bodily harm - failure to act - felony, the defenses would be available. If, however, the person was charged with reckless injury the defenses would not be available. And finally in the last scenario, if a person was charged with some form of homicide the defenses of treatment through prayer or emotionally incapable of acting would not be available.

The point of this is that many of the offenses that are charged under 948 might also be charged in the general criminal statute under previous theories of either accomplice liability or ommission failure to act under the common law. What the Legislature has really done in many of those offenses is really create new defenses for child abusers that would not exist if the victim were an adult. For example: If one was the manager of a nursing home and had knowledge that one of the employees was sexually abusing one of the elderly patients and then took no steps to prevent that sexual abuse, one would not have the defense of being not emotionally capable of acting. However, if the victim instead is a five-year-old at a day care center, that defense is available. This disparity is ludicrous!

There is simply no need for the defense of emotionally incapable of acting because the statutory affirmative defense of coercion would always be available to someone who is realistically and imminently threatened with harm if he or she reported abuse.

I believe the Legislature should immediately act to rectify the problems associated with Chapter 948.

Yours truly,

Gary J. Schuster
District Attorney
Door County, Wisconsin

GJS/sb

pc: Milwaukee Journal
Milwaukee Sentinel

# APPENDIX B

## TABLES 1 TO 4 FROM APPENDIX TO GALVIN, "SHIELDING RAPE VICTIMS IN THE STATE AND FEDERAL COURTS: A PROPOSAL FOR THE SECOND DECADE," 70 MINN. LAW REV. 763 (1985-86)

Tables 1 to 4 from Appendix to Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade," 70 Minn. Law Rev. 763 (1985-86)

Table 1
Rape-Shield Statutes Listed By Approach

A. MICHIGAN APPROACH:

Alabama: ALA. CODE § 12-21-203 (Supp. 1985)
Florida: FLA. STAT. ANN. § 794.022(2)-(3)(West Supp. 1985)
Georgia: GA. CODE ANN. § 24-2-3 (1982)
Illinois: ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1985)
Indiana: IND. CODE ANN. § 35-37-4-4 (Burns 1985)
Kentucky: KY. REV. STAT. § 510.145 (1985)
Louisiana: LA. REV. STAT. ANN. § 15:498 (West 1981)
Maine: ME. R. EVID. 412
Maryland: MD. ANN. CODE art. 27, § 461A (1982)
Massachusetts: MASS. ANN. LAWS ch. 233, § 21B (Law. Co-op. 1985)
Michigan: MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1985)
Minnesota: MINN. R. EVID. 404(c)
Missouri: MO. ANN. STAT. § 491.015 (Vernon Supp. 1986)
Montana: MONT. CODE ANN. § 45-5-511(4) (1985)
Nebraska: NEB. REV. STAT. § 28-321 (Supp. 1984)
New Hampshire: N.H. REV. STAT. ANN. § 632-A:6 (Supp. 1983)
North Carolina: N.C.R. EVID. 412
Ohio: OHIO REV. CODE ANN. § 2907.02(D) (Page Supp. 1984)
Pennsylvania: 18 PA. CONS. STAT. ANN. § 3104 (Purdon 1983)
South Carolina: S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985)
Tennessee: TENN. CODE ANN. § 40-17-119 (1982)
Vermont: VT. STAT. ANN. tit. 13, § 3255 (Supp. 1985)
Virginia: VA. CODE § 18.2-67.7 (1982)
West Virginia: W. VA. CODE § 61-8B-11 (1984)
Wisconsin: WIS. STAT. ANN. §§ 972.11(2), 971.31(11) (West 1985)

Table 1 (cont.)

B. TEXAS APPROACH:

Alaska: ALASKA STAT. § 12.45.045 (Supp. 1985)
Arkansas: ARK. STAT. ANN. § 41-1810.1-.4 (1977 & Supp. 1985)
Colorado: COLO. REV. STAT. § 18-3-407 (1978)
Idaho: IDAHO CODE § 18-6105 (1979)
Kansas: KAN. STAT. ANN. § 21-3525 (Supp. 1984)
New Jersey: N.J. STAT. ANN. § 2A:84A-32.1-.3 (West Supp. 1985)
New Mexico: N.M.R. EVID. 413
Rhode Island: R.I. GEN. LAWS § 11-37-13 (1981)
South Dakota: S.D. CODIFIED LAWS ANN. § 23A-22-15 (1979)
Texas: TEX. PENAL CODE ANN. § 22.065 (Vernon Supp. 1986)
Wyoming: WYO. STAT. ANN. § 6-2-312 (1983)

C. FEDERAL APPROACH:

Federal: FED. R. EVID. 412
Military: MIL. R. EVID. 412
Connecticut: CONN. GEN. STAT. ANN. § 54-86f (West 1985)
Hawaii: HAWAII R. EVID. 412
Iowa: IOWA R. EVID. 412
New York: N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981)
Oregon: OR. REV. STAT. ANN. § 40.210 (1984)

D. CALIFORNIA APPROACH:

California: CAL. EVID. CODE §§ 782, 1103(b) (West Supp. 1986)
Delaware: DEL. CODE ANN. tit. 11, §§ 3508, 3509 (1979)
Mississippi: MISS. CODE ANN. §§ 97-3-68, 97-3-70 (Supp. 1985)
Nevada: NEV. REV. STAT. §§ 48.069, 50.090 (1983)
North Dakota: N.D. CENT. CODE ANN. §§ 12.1-20-14 to -15 (1985)
Oklahoma: OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1985)
Washington: WASH. REV. CODE ANN. § 9A.44.020 (West Supp. 1986)

## Table 2

## Statutory Exceptions Under the Michigan Approach— Permissible Uses of Sexual Conduct Evidence

| States | With the Accused | Physical Consequence(s) Evidence | Bias/Motive to Fabricate |
|---|---|---|---|
| ALABAMA<br>ALA. CODE § 12-21-203 (Supp. 1985) | X | | |
| FLORIDA<br>FLA. STAT. ANN. § 794.022(2)-(3)<br>(West Supp. 1985) | X | X<br>Semen, pregnancy, injury, disease | |
| GEORGIA<br>GA. CODE ANN. § 24-2-3 (1982) | X | | |
| ILLINOIS<br>ILL. ANN. STAT. ch. 38, § 115-7<br>(Smith-Hurd Supp. 1985) | X | | |
| INDIANA<br>IND. CODE ANN. § 35-37-4-4<br>(Burns 1985) | X | X<br>All physical consequences | |
| KENTUCKY<br>KY. REV. STAT. § 510.145<br>(1985) | X | | |
| LOUISIANA<br>LA. REV. STAT. ANN. § 15:498<br>(West 1981) | X | | |
| MAINE<br>ME. R. EVID. 412 | X<br>Only on consent | X<br>Semen, injury | |
| MARYLAND<br>MD. ANN. CODE art. 27, § 461A (1982) | X | X<br>Semen, pregnancy, disease, trauma | X |
| MASSACHUSETTS<br>MASS. ANN. LAWS ch. 233, § 21B<br>(Law. Co-op. 1985) | X | X<br>All physical consequences | |
| MICHIGAN<br>MICH. COMP. LAWS ANN. § 750.520j<br>(West Supp. 1985) | X | X<br>Semen, pregnancy, disease | |
| MINNESOTA<br>MINN. R. EVID. 404(c) | X<br>Only on consent | X<br>Semen, pregnancy, disease | |
| MISSOURI<br>MO. ANN. STAT. § 491.015<br>(Vernon Supp. 1986) | X<br>Only on consent | X<br>Semen, pregnancy, disease | |
| MONTANA<br>MONT. CODE ANN. § 45-5-511(4)<br>(1985) | X | X<br>Semen, pregnancy, disease | |
| NEBRASKA<br>NEB. REV. STAT. § 28-321<br>(Supp. 1984) | X<br>Only on consent and must be pattern | X<br>All physical consequences | |
| NEW HAMPSHIRE<br>N.H. REV. STAT. ANN. § 632-A:6<br>(Supp. 1983) | X | | |

| Pattern of Conduct | Reasonable Belief in Consent | Rebuttal Evidence | Prior False Rape Charges | Basis of Expert Opinion That Complainant Fantasized | Immediate Surrounding Circumstances | Other |
|---|---|---|---|---|---|---|
| | | | | | | |
| X | | | | | | |
| | X | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | X | |
| | | | | | | |
| | | | | | | |
| | | X | | | | |
| | | | | | | |
| | | | | | | |
| X | | | | | | |
| | | | | | X | X<br>Previous chastity, when required to be proved by prosecution |
| | | | | | | |
| | | | | | | |
| | | | | | | |

Table 2 (cont.)

Statutory Exceptions Under the Michigan Approach—
Permissible Uses of Sexual Conduct Evidence

| States | With the Accused | Physical Consequences Evidence | Bias/Motive to Fabricate |
|---|---|---|---|
| NORTH CAROLINA<br>N.C.R. EVID. 412 | X | X<br>All physical consequences | |
| OHIO<br>OHIO REV. CODE ANN. § 2907.02(D)<br>(Page Supp. 1984) | X | X<br>Semen, pregnancy, disease | |
| PENNSYLVANIA<br>18 PA. CONS. STAT. ANN. § 3104<br>(Purdon 1983) | X<br>Only on consent | | |
| SOUTH CAROLINA<br>S.C. CODE ANN. § 16-3-659.1<br>(Law. Co-op. 1985) | X | X<br>Semen, pregnancy, disease | |
| TENNESSEE<br>TENN. CODE ANN. § 40-17-119 (1982) | X | | |
| VERMONT<br>VT. STAT. ANN. tit. 13, § 3255<br>(Supp. 1985) | X | X<br>Semen, pregnancy, disease | |
| VIRGINIA<br>VA. CODE § 18.2-67.7 (1982) | X<br>Only on consent | X<br>Semen, pregnancy, disease, injury | X |
| WEST VIRGINIA<br>W. VA. CODE § 61-8B-11 (1984) | X<br>Only on consent | | |
| WISCONSIN<br>WIS. STAT. ANN. §§ 972.11(2),<br>971.31(11) (West 1985) | X | | |

| Pattern of Conduct | Reasonable Belief in Consent | Rebuttal Evidence | Prior False Rape Charges | Basis of Expert Opinion That Complainant Fantasized | Immediate Surrounding Circumstances | Other |
|---|---|---|---|---|---|---|
| X | | | | X | | |
| | | | | | | |
| | | | | | | |
| | | | | | | X<br>Adultery, when admissible to impeach credibility |
| | | | | | | X<br>With any person, only on consent |
| | | | X | | | |
| | | X | | | | |
| | | X | | | | |
| | | | X | | | |

## Table 3

## Procedural Provisions of the Texas Approach

| States | Condition Precedent to Offering of Evidence | Procedure for Determination of Admissibility | Criteria for Admissibility |
|---|---|---|---|
| ALASKA<br>ALASKA STAT.<br>§ 12.45.045(a)-(b) (Supp. 1985) | "Application" anytime before or during trial | In camera hearing | Relevant; probative value outweighs possibility of prejudicial effect, of confusion of issues, or of unwarranted invasion of privacy; rebuttable presumption of inadmissibility if sexual activity occurred more than one year before date of offense |
| ARKANSAS<br>ARK. STAT. ANN.<br>§ 41-1810.2 (1977 & Supp. 1985) | Written motion and offer of proof, anytime prior to defense resting | In camera hearing (written record for interlocutory appeal by state) | Probative value outweighs prejudicial effect |
| COLORADO**<br>COLO. REV. STAT.<br>§ 18-3-407(2)(a)-(c) (1978) | Written motion and offer of proof 30 days before trial (unless good cause shown) | In camera hearing | Relevancy |
| IDAHO<br>IDAHO CODE<br>§ 18-6105 (1979) | "Application" before or during trial | Hearing out of presence of jury | Relevancy |
| KANSAS<br>KAN. STAT. ANN.<br>§ 21-3525 (Supp. 1984) | Written motion and offer of proof 7 days before trial (unless waived by court) | In camera hearing | Relevant and not otherwise inadmissible |
| NEW JERSEY<br>N.J. STAT. ANN.<br>§ 2A:84A-32.1-.2 (West Supp. 1985) | "Application" anytime before or during trial | In camera hearing | Relevant; probative value outweighs possibility of prejudicial effect, of confusion of issues, or of unwarranted invasion of privacy; rebuttable presumption of inadmissibility if sexual activity occurred more than one year before date of offense |
| NEW MEXICO<br>N.M.R. EVID. 413 | Written motion prior to trial (unless good cause) | In camera hearing | Probative value outweighs prejudicial effect |
| RHODE ISLAND*<br>R.I. GEN. LAWS § 11-37-13 (1981) | "Notice" and offer of proof | In camera hearing | Court rules on admissibility |
| SOUTH DAKOTA<br>S.D. CODIFIED LAWS ANN.<br>§ 23A-22-15 (1979) | "[P]roposes to offer evidence" | In camera hearing | Relevancy |
| TEXAS<br>TEX. PENAL CODE ANN.<br>§ 22.065(a)-(b) (Vernon Supp. 1986) | "[I]nform the court out of the hearing of the jury prior to asking such question" | In camera hearing | Probative value outweighs prejudicial effect |
| WYOMING*<br>WYO. STAT. ANN.<br>§ 6-2-312(a) (1983) | Written motion and offer of proof ten days before trial | In camera hearing | Probative value substantially outweighs prejudicial effect |

* Statutes do not apply to evidence of sexual conduct with the accused

** Statute does not apply to evidence of sexual conduct with the accused and physical consequences evidence

## Table 4

## Procedural Provisions and Statutory Exceptions Under the Federal Approach

| Jurisdiction | Written Motion | Offer of Proof | Hearing | Reputation or Opinion Evidence Absolutely Prohibited | With the Accused | Physical Consequences |
|---|---|---|---|---|---|---|
| FEDERAL<br>FED. R. EVID. 412 | X<br>15 days before trial (unless good cause) | X<br>Written | X<br>In camera | X | X<br>Only on consent | X<br>Semen or injury |
| MILITARY<br>MIL. R. EVID. 412 | "Notice" | X | X<br>May be in camera | X | X<br>Only on consent | X<br>Semen or injury |
| CONNECTICUT<br>CONN. GEN. STAT. ANN. § 54-86f (West 1985) | X<br>Optional | X | X<br>May be in camera | | X<br>Only on consent | X<br>Semen, disease, pregnancy or injury |
| HAWAII<br>HAWAII R. EVID. 412 | X<br>15 days before trial (unless good cause) | X | X<br>In camera | X | X<br>Only on consent | X<br>Semen or injury |
| IOWA<br>IOWA R. EVID. 412 | X<br>15 days before trial (unless good cause) | X<br>Written | X<br>In camera | X | X<br>Only on consent | X<br>Semen or injury |
| NEW YORK<br>N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981) | | X<br>Only for evidence under catch-all | X<br>Only for evidence under catch-all | | X | X<br>Semen, disease, or pregnancy |
| OREGON<br>O.R. REV. STAT. ANN. § 40.210 (1984) | X<br>15 days before trial (unless good cause) | X<br>Written | X<br>In camera | X | | X<br>To rebut or explain scientific or medical evidence |

| Bias or Motive | Rebuttal Evidence | Evidence of Prior Conviction for Prostitution Within 3 Years of Alleged Rape | Standard of Admissibility in Catch-all Provision | Standard for Admissibility for Excepted Evidence | Judge Determines Question of Conditional Relevancy |
|---|---|---|---|---|---|
| | | | Constitutionally required | Probative value outweighs prejudice | X |
| | | | Constitutionally required | Probative value outweighs prejudice | |
| | X | | Constitutionally required | Probative value outweighs prejudicial effect on victim | |
| | | | Constitutionally required | Probative value outweighs prejudice | X |
| | | | Constitutionally required | Probative value outweighs prejudice | X |
| | X | X | Relevant and admissible in the interests of justice | No standard enunciated ("determined by the court") | |
| X | | | Constitutionally required | Probative value outweighs prejudice | X |

# APPENDIX C

## GALVIN PROPOSED "RAPE SHIELD" RULE FROM GALVIN, "SHIELDING RAPE VICTIMS IN THE STATE AND FEDERAL COURTS: A PROPOSAL FOR THE SECOND DECADE," 70 MINN. LAW REV. 763 (1985-86)

## Galvin Proposed "Rape Shield" Rule from Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade," 70 Minn. Law Rev. 763 (1985-86)

Assume a code of evidence modeled on the Federal Rules of Evidence. To flesh out the alternative legislative solution proposed earlier in this Article, I would amend Rule 404,[662] dealing with character and other crimes evidence, as follows:

Rule 404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes; *Sexual Conduct of Victim of Rape.*

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim *of a crime other than rape.* Evidence of a pertinent trait of character of the victim of the crime, *other than in a prosecution for rape,* offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*(c) Sexual conduct of victim of rape. In a prosecution for rape, evidence that the victim has engaged in consensual sexual conduct with persons other than the accused is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason more likely to consent to the sexual conduct with respect to which rape is alleged. Evidence of consensual sexual conduct on the part of the victim may, however, be admissible for other purposes.*

*(1) By way of illustration only, and not by way of limitation, the following are examples of evidence admissible under this section:*

*(A) Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;*

*(B) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the victim;*

*(C) Evidence of a pattern of sexual conduct so distinctive and so closely resembling the accused's version of the al-*

*leged encounter with the victim as to tend to prove that the victim consented to the act charged or behaved in such a manner as to lead the accused reasonably to believe that the victim consented;*

*(D) Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused reasonably believed that the victim was consenting to the act charged;*

*(E) Evidence tending to rebut proof introduced by the prosecution regarding the victim's sexual conduct;*

*(F) Evidence that the victim has made false allegations of rape;*

*(2) Evidence of consensual sexual conduct on the part of the victim may not be offered or referred to except pursuant to the following procedure:*

*(A) The party seeking to offer such evidence shall make a written motion accompanied by an affidavit stating an offer of proof of the relevance of such evidence;*

*(B) If the court deems the offer of proof sufficient the court shall order an in camera hearing to determine the admissibility of the evidence;*

*(C) At the conclusion of the hearing, if the court finds that the evidence is relevant to a material issue and that its probative value is not substantially outweighed by the danger of unfair prejudice, the court shall make an order stating the extent to which such evidence is admissible.*

Rule 608, dealing with the character of witnesses as it bears on credibility, would be amended by adding the following subsection:

*(c) Credibility of rape victim. In a prosecution for rape, evidence that the victim has engaged in consensual sexual conduct is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason less worthy of belief as a witness.*

# APPENDIX D

## RULE 412, NCCUSL UNIFORM RULES OF EVIDENCE (1986)

Rule 412, NCCUSL Uniform Rules of Evidence (1986)

RULE 412. SEXUAL BEHAVIOR.

(a) When inadmissible. In a criminal case in which a person is accused of a sexual offense against another person, the following is not admissible:

(1) Reputation or opinion. Evidence of reputation or opinion regarding other sexual behavior of a victim of the sexual offense alleged.

(2) Specific instances. Evidence of specific instances of sexual behavior of an alleged victim with persons other than the accused offered on the issue of whether the alleged victim consented to the sexual behavior with respect to the sexual offense alleged.

(b) Exceptions. This rule does not require the exclusion of evidence of (i) specific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of semen, pregnancy, disease, injury, mistake, or

the intent of the accused; (ii) false allegations of sexual offenses; or (iii) sexual behavior with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.

COMMENT

Congress added a "rape-shield" provision to the Federal Rules of Evidence when it adopted Rule 412 in 1978. A great majority of states have also added similar provisions to their rules of evidence or criminal codes. Unfortunately, the rules and statutes vary greatly in detail and in basic structure. The committee reviewed a number of the state provisions as well as the federal version and opted for a concise rule of evidence rather than a rule of criminal procedure. No provision is made for notice or in camera hearings as do many of the state, as well as the federal, versions. This omission is not intended to preclude such procedures. It was felt that existing rules of criminal procedure and the inherent power of the court to conduct criminal proceedings in an orderly and fair manner already provide adequate protection to the parties. The prosecutor may move for an in camera proceeding to determine the admissibility under Rule 403 of highly prejudicial evidence concerning the sexual behavior of a prosecuting witness. The court should seriously consider granting any such motion.

The rule applies only to criminal cases and then only to cases where a person is accused of a sexual offense against another person. Evidence of reputation or opinion concerning sexual behavior of an alleged victim of the sexual offense is not admissible under any circumstances. The low probative value when weighed against the risk of great prejudice is thought to justify a per se rule. The rule does not preclude the introduction of expert testimony regarding, for example, mental or emotional illness of the victim, subject to the provisions of Rule 403 and Article VII..

With regard to the issue of consent to the sexual offense alleged, evidence of specific instances of sexual behavior of the alleged victim with persons other than the accused is not admissible. This obviously raises serious constitutional questions with regard to a defendant's right to adduce evidence and to cross-examine witnesses. Although certainly not free from doubt, it would seem that notice and/or an in camera hearing would not cure any constitutional defect in this regard. The U.S. Supreme Court has yet to rule on the matter.

It matters not that the sexual behavior took place after the alleged offense but before trial rather than before the alleged offense.

The rule provides that the evidence is admissible on other issues and details those situations in subdivision (b).

Earlier law left the subject of this rule to other more general rules such as those relating to the credibility and character of victims generally. Thus, some clarification is in order concerning the relationship between Rule 412 and other rules which may also seem to cover the evidence. Examples of these other rules might be Rules 403, 404-406, 608-609, and Article VII. Such other rules may on occasion be either more restrictive or less restrictive than Rule 412. It is intended that the restrictions in Rule 412 apply notwithstanding more permissive provisions of other rules. However, provisions of Rule 412 which appear to permit evidence are meant to be read as exceptions only to Rule 412's ban. They are therefore subject to any more restrictive provisions in other rules that may apply. This is consistent with the scheme of most of the Uniform Rules of Evidence and the relationship among them.

In the administration of Rule 412, the court should have due regard for the mandate of Rule 611(a)(3), which applies to evidence sought to be admitted pursuant to a provision of Rule 412.