Criminal Law

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CRIMINAL LAW

Rape Reform in South Carolina

Following a trend that has been gathering momentum across the United States, the 1977 South Carolina General Assembly enacted a comprehensive law on criminal sexual assault. The legislature repealed the old statute, which embodied the common-law definition of rape, and substituted three degrees of criminal sexual conduct. The enactment also replaces the South Carolina statutory rape provisions with a section on criminal sexual conduct with minors. To complement its blanket revision of the substantive elements of the preexisting crimes of rape, assault with intent to ravish, and statutory rape, the General Assembly enacted provisions covering matters that previously had been left to judicial development. These provisions include rules governing culpability when the victim is the legal spouse of the defendant, providing that the testimony of the victim need not be corroborated, eliminating the common-law rule that a boy under fourteen is presumptively incapable of rape, and excluding most evidence of the victim’s prior sexual conduct. These changes in the South Carolina law of sexual assault are dramatic. Some provisions will undoubtedly be controversial. This survey section will evaluate the statute by comparing it with the previous law in South Carolina and with the law as it is developing.

5. Id. § 16-3-650 (1976) (repealed 1977).
6. Id. § 16-3-655 (Cum. Supp. 1977). Assault with intent to commit criminal sexual conduct with a minor is punishable as if the conduct had been committed. Id. § 16-3-656.
7. Id. § 16-3-658.
8. Id. § 16-3-657.
9. Id. § 16-3-659.
10. Id. § 16-3-659.1.
in other jurisdictions. Where the change is especially drastic an effort will be made to explore possible ramifications, including the possibility that some sections of the new legislation may be unconstitutional under the state or federal constitutions.

I. CRIMINAL SEXUAL CONDUCT UNDER THE ACT

Rape is nonconsensual intercourse. South Carolina’s repealed statute read: “Whosoever shall ravish a woman, married, maid or other, when she did not consent, either before or after, or ravisheth a woman with force, although she consent after, shall be deemed guilty of rape.” The South Carolina Supreme Court has traced the origin of this statute back to an English statute enacted in 1285. Because of the statute’s antiquity and lack of definition, the courts necessarily developed a judicial gloss covering the elements of the crime—force, lack of consent and penetration. The courts also developed a comprehensive scheme of defenses and evidentiary requirements. This hodgepodge of statutory and decisional law was capped with a sentencing provision that granted the judge discretion to confine the defendant “for a term not exceeding forty years or less than five years . . . .” This system had a number of possible deficiencies. By definition a male could not be a victim. Whether the statute reached other kinds of nonconsensual sexual conduct that might be equally as offensive to the victim as nonconsensual intercourse

11. Id. § 16-3-630 (1976) (repealed 1977).
17. Id. § 16-3-630 (repealed 1977).
was uncertain.\textsuperscript{18} The sentencing provision was highly discretionary and could produce extreme results at both ends of the spectrum. The severity of the sentences depended upon the judge who happened to be presiding.\textsuperscript{19} The new sexual assault law, however, has partially rectified these problems.

The concept of the 1977 law is to divide criminal sexual conduct into three varying degrees in a descending order of seriousness.\textsuperscript{20} All three degrees focus on what the statute terms "sexual battery."\textsuperscript{21} Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."\textsuperscript{22} The purpose of the statute is to proscribe all kinds of offensive nonconsensual sexual conduct that intrude upon the body of the victim and to bring this conduct within the confines and penalty provisions of the statute. For instance, the statutory definition of "victim" as a "person alleging to have been subjected to criminal sexual conduct . . ."\textsuperscript{23} makes it clear that sexual battery can be perpetrated upon a male or a female. Consequently, a case of sexual assault upon a male can now be prosecuted without resort to the South Carolina buggery statute.\textsuperscript{24} A novel application of the statute, and a completely possible one, would be the prosecution of a female for sexual assault upon a male. Similarly, a female who commits a lesbian assault upon another female could be prosecuted under the Act.

Criminal sexual conduct in the first degree is the most serious offense under the Act. Section 16-3-652 provides:

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proved:

\begin{itemize}
\item \textsuperscript{18} Compare S.C. Code Ann. § 16-3-630 (1976) (repealed 1977) with the definition of "sexual battery" in § 16-3-651(h) (Cum. Supp. 1977).
\item \textsuperscript{19} See L. Toliver, Sentencing and the Law and Order Syndrome in South Carolina (1974).
\item \textsuperscript{21} Id. and § 16-3-651(h).
\item \textsuperscript{22} Id. § 16-3-651(h).
\item \textsuperscript{23} Id. § 16-3-651(i).
\item \textsuperscript{24} Id. § 16-15-120 (1976).
\end{itemize}
(a) The actor uses aggravated force to accomplish sexual battery.

(b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.  

Subsection (b) needs no elaboration. To understand subsection (a), however, resort to the definitions section 26 of the statute is necessary. "Aggravated force" is defined as the use of "physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon."  

To sustain a conviction under this section something more than a mere threat of harm to the victim must be proved. If only a threat is made, it must be a threat to use a deadly weapon. Whether a conviction could be obtained when the actor threatens the use of a deadly weapon but does not actually have one in his possession is not clear. An answer is suggested by the South Carolina law providing enhanced penalties for possession of a firearm during the commission of rape, assault with intent to ravish and other crimes.  

An argument against an absolute requirement that the defendant actually have possession of a weapon in all cases is that the relevant factor should be whether the actor behaved in a manner that gave the victim reason to believe he was armed. A threat to kill someone with a false but realistic weapon is just as coercive as one in which a real weapon is utilized.  

Second degree criminal sexual conduct, unlike first degree sexual assault, does not require the use of violence or a threat of the use of a deadly weapon to sustain a conviction.  

An actor is guilty of the offense if "aggravated coercion" is used "to accomplish sexual battery."  

"Aggravated coercion" as defined in the statute means that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the

26. Id. § 16-3-651.
27. Id. § 16-3-651(c).
28. Id. § 16-23-490 (1976).
29. Id.
31. Id. § 16-3-653.
present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person.\textsuperscript{32}

Because the crime is complete once a threat of force and a sexual battery occurs, the victim could come into the courtroom with no more than her testimony and a medical examiner's report showing the existence of recent sexual activity. Because no actual violence is required, indicia of force such as bruises or lacerations will not necessarily be found. The absence of this kind of material evidence sets the stage for the classic face-to-face confrontation between the victim and the defendant. The outcome will turn on the relative credibility of complainant and defendant. An indictment under this section will therefore frequently raise the thorny issues of consent, corroboration and credibility. Discussion of these problems is reserved until later to accompany other relevant portions of the new law.

Third degree criminal sexual conduct is the lowest magnitude offense under the statute.\textsuperscript{33} The Act provides:

(1) A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses' force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.\textsuperscript{34}

"Aggravating circumstances" is not defined in the statute. This omission is puzzling in light of the drafters' care in defining many key words and phrases that are used throughout the statute.\textsuperscript{35} Without a definition, one can only surmise that the General Assembly intended that subsection (a) be a lesser included offense of first and second degree sexual assault. This interpretation is suggested by the language used in the definitions of "aggravated force"\textsuperscript{36} and "aggravated coercion."\textsuperscript{37} In first degree sexual assault

\textsuperscript{32} Id. § 16-3-651(b).
\textsuperscript{33} Compare id. § 16-3-654 with § 16-3-652 to 16-3-653.
\textsuperscript{34} Id. § 16-3-654(1).
\textsuperscript{35} See id. § 16-3-651.
\textsuperscript{36} Id. § 16-3-651(c).
\textsuperscript{37} Id. § 16-3-651(b).
the force used must be "of a high and aggravated nature" and in second degree a threat "to use force or violence of a high and aggravated nature..." in the coercion of the victim must occur. If the force used or threatened is not "high and aggravated" the conviction could not be in the first or second degree but instead would properly be in the third degree under subsection (a).

Under the statute first degree criminal sexual conduct is punishable by a term of imprisonment not exceeding thirty years. This reduces by ten years the maximum penalty that may be imposed; unlike the former statute, however, the present statute sets no minimum term. The elimination of a minimum sentence means that a defendant convicted of first degree criminal sexual conduct might escape imprisonment altogether and suffer nothing more than probation. The irony of this situation is that the legislature, which so carefully delineated the differences between first, second, and third degree criminal sexual conduct regarding both the type of conduct involved and the maximum penalty accessible, could see its intent thwarted by statutory provisions that allow sentencing that ignores the spirit of the new law, which is to sentence according to the severity of the offence. The same problem also applies to second and third degree criminal sexual conduct, which are punishable by maximum sentences of twenty and ten years, respectively. In neither case is a minimum set. As a result, those who have applauded the advent of rape reform legislation in South Carolina may be unpleasantly surprised when some offenders are back on the street sooner than they would have been under the former statute, which had a five year minimum sentence provision. Perhaps the best argument in favor of the omission of a minimum sentence provision is that the legislature, while trusting trial judges to impose severe sentences when they are warranted, wanted to give the judges flexibility to consider factors mitigating against the imposition of lengthy prison sentences.

38. Id. §§ 16-3-652, 16-3-651(c).
39. Id. §§ 16-3-653, 16-3-651(b).
40. Id. § 16-3-652(2).
42. Id. § 16-3-653(2), 16-3-654(3) (Cum. Supp. 1977).
43. Id.
44. Id. § 16-3-640 (1976) (repealed 1977).
II. Reform of the Statutory Rape Law

The statutory rape provision of the 1977 Act drastically changes the law in South Carolina. This change, when examined in light of South Carolina’s unusual constitutional provision on minors’ consent to intercourse, creates several thorny issues that must be examined.

The South Carolina Constitution, in article three, section thirty-three, states that “[n]o unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years.” This provision, which is highly unusual, has caused great difficulty for the courts when they have been confronted with cases involving intercourse with minors. The statutory law as it existed prior to the 1977 Act made carnal knowledge of a woman under the age of sixteen a criminal act regardless of whether she consented. The penalties for the crime, known as “statutory rape,” varied according to the age and sexual past of the victim and the age of the criminal.

The relationship between this statute and the constitutional provision was discussed in several cases by the South Carolina Supreme Court. In *State v. Smith* the court held that the statutory rape provision was not unconstitutional. The decision was based almost entirely upon the earlier case of *State v. Haddon*, in which the court held that the constitutional provision did not, of itself, create a criminal offense. By its own operation there did not spring into existence such crime as the carnal knowledge and abuse of an unmarried woman under the age of fourteen years. . . . The constitutional provision operated only on the question of consent to sexual intercourse, creating a new rule of evidence in the proof of consent, declaring certain persons incapable of consenting.

The court in *Smith*, relying upon the *Haddon* decision, held that the constitutional provision related only to common-law rape and that the legislature could therefore pass a law making sexual intercourse with a woman under sixteen a criminal act.

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46. S.C. Const. art. 3, § 33.
48. *Id.*
50. 49 S.C. 308, 27 S.E. 194 (1897).
51. *Id.* at 314, 27 S.E. at 196 (emphasis in original).
In *State v. Whitener* 53 the supreme court gave its fullest exposition of the relationship between statutory rape and the so-called common-law rape. *Whitener* involved an incident of sexual intercourse between an adult and an eleven-year-old girl. The indictment contained counts alleging both common-law and statutory rape. Defendant excepted to this and claimed that the common-law rape count should not have been submitted to the jury. His contention was that proof of force was necessary to prove the common-law rape of a girl under fourteen years old. 54 The court rejected this argument, holding that the constitutional provision made proof of force unnecessary. 55 Of greatest relevance to the present discussion is the court's recognition that a man having sexual intercourse with a girl under fourteen could be convicted of either statutory rape or common-law rape. 56 This result leads to the conclusion that, even if no statute dealt with intercourse with minors, the constitutional provision, combined with the common-law rape section, would make criminal any intercourse with a girl under fourteen.

Under the statute enacted in 1977, the law is changed to a great degree. Section 16-3-655 provides:

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age and the actor is at least three years older than the victim.

(2) A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is fourteen years of age or less but is at least eleven years of age and the actor is at least three years older than the victim.

(3) A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is more than fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit. 57

The relative age provisions of subsections (1) and (2) are novel, in that they make noncriminal certain acts of intercourse with girls fourteen and under. They require close attention, particu-
larly in light of the South Carolina constitutional provision.

Under subsection (1), if a twelve-year-old boy engages in consensual sexual intercourse with a ten-year-old girl, he will not be guilty of first degree criminal sexual conduct.\textsuperscript{58} Under subsection (2), if a fifteen-year-old boy has intercourse with a thirteen-year-old girl, who consents to the act, he will not be guilty of second degree sexual conduct.\textsuperscript{59} These examples demonstrate that under the 1977 statute, sexual intercourse may at times take place with a girl under fourteen without the male partner being criminally culpable. At first glance this result might appear to violate the constitutional provision, which specifically states that an unmarried girl under fourteen cannot legally consent to intercourse. The analysis that follows suggests a rationale by which any attempt to circumvent the statutory rape provision enacted in 1977 could be defeated.

The supreme court held in \textit{Haddon} that the constitutional provision merely created a conclusive presumption that a girl under fourteen is not capable of consent to sexual intercourse.\textsuperscript{60} This is a rule of evidence. If lack of consent is not an element of a crime, the provision will have no legal effect. Under the statutory rape provision enacted in 1977, the activities proscribed are criminal whether the victim consents or not.\textsuperscript{61} For instance, a thirteen-year-old girl could actively seduce a seventeen-year-old boy, and he would be guilty of second degree criminal sexual conduct. There is, therefore, no conflict between the constitutional provision and the 1977 statutory rape law.

A prosecutor might attempt to prosecute a boy, not culpable under the statutory rape section, for first, second, or third degree criminal sexual conduct. This attempt might arise in any case in which a girl under fourteen and a boy less than three years older than she engage in sexual intercourse. The prosecutor’s rationale would be that, under \textit{Whitener}, force need not be shown to prove the common-law rape of a girl of less than fourteen, as she is conclusively incapable of legal consent.\textsuperscript{62} This argument, however, falls under its own weight. The sections of the 1977 Act

\textsuperscript{58} Id. § 16-3-655(1).
\textsuperscript{59} Id. § 16-3-655(2).
\textsuperscript{60} 49 S.C. at 314, 27 S.E. at 196.
\textsuperscript{61} Of course, if the victim did not consent to the act, the indictment would likely be for criminal sexual conduct of the first, second, or third degree. The lack of consent would be strong evidence that the sexual act was accomplished through the use of force or coercion.
\textsuperscript{62} See notes 53-56 and accompanying text \textit{supra}. 

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describing first, second, and third degree criminal sexual conduct generally make the criminality of an act dependent upon the use of force or coercion; these sections do not mention consent at all. Unless the prosecutor can prove force, coercion, helplessness of the girl, or that the act took place when the girl was also the victim of a crime, he will not be able to convict the boy of any offense at all under the 1977 Act.

One or two other legal theories might be tried to convict the boy of a crime. First, a prosecutor could seek to bring an indictment for common-law rape against the boy. Rape was a crime at common law, and lack of consent was undoubtedly an element of that crime. Therefore, the boy would have no defense to a common-law indictment. The prosecutor’s chances of successfully maintaining the common-law action would be very slim, however. Defense counsel would be able to argue persuasively that the 1977 Act shows the legislative intent to abrogate completely the common law relating to rape. While the ordinary rule is that statutes in derogation of the common law are to be construed narrowly, when, as here, the legislature has thoroughly dealt with a subject the legislative intent ought to be respected.

The prosecutor’s last effort might be to seek an indictment for battery. Battery is generally defined as an “unauthorized touching.” Because the constitutional provision makes a girl of under fourteen incapable of consent to sexual intercourse, the prosecutor might argue that sexual intercourse with any girl under that age is an unauthorized touching and, therefore, a battery. Although this argument has a good degree of logical consistency, the legislative intent to make noncriminal certain acts should not be defeated by simply changing the name of the crime. The constitutional provision was obviously designed to operate in the sphere of rape law, and its effect should not be felt outside of that realm.

64. See 4 W. Blackstone, Commentaries 210-14.
65. The old South Carolina statute was a precise statement of the common-law rule, and it specifically referred to acts “when she [the victim] did not consent . . . .” S.C. Code Ann. § 16-3-630 (1976) (repealed 1977).
66. Because the ancient statute was clearly a codification of the common law, its repeal should serve as conclusive evidence of the legislative intent to abrogate the common law.
68. See Trogun v. Truchman, 58 Wis. 2d 569, 207 N.W.2d 297 (1973) (where a battery is defined as “an intentional contact with another which is unpermitted.” Id. at 594, 207 N.W.2d at 310).
The 1977 statutory rape provision is a great improvement over the prior law. It is based upon the proposition that, while children who consent to sexual activity with those older than they are frequently being exploited, when both partners to an act are of approximately the same age and degree of maturity, the policing of these activities can be better performed by the families than by the criminal justice system. The statute should withstand any attempt to utilize the unusual South Carolina constitutional provision to negate its effect.

III. THE NO-CORROBORATION RULE

A number of states have enacted laws eliminating the requirement of corroboration in rape prosecutions. South Carolina, as part of its sweeping reform of the law of rape, has likewise incorporated a provision in its sexual assault law stating that "[t]he testimony of the victim need not be corroborated in prosecutions . . ." under the statute. To understand why a corroboration requirement would be imposed at all or why it should not be required, it is helpful to explore briefly the reasoning behind corroboration requirements, whether imposed by statute or case law.

The rationale for a corroboration requirement is probably caught up in the notion expressed three centuries ago by Lord Hale that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." Indeed one court suggested that the only reason corroboration is required is the danger of a fabricated story. Another reason given for requiring corroboration is that it is in the nature of the crime that eyewitnesses are seldom available. Concern has also been expressed that the public outrage over the indecency of the act may overbear the presumption of innocence. One court stated that "[p]ublic sentiment seems inclined to believe a man guilty of any illicit sexual offense he may be charged with. . . ."

The arguments against requiring corroboration, on the other
hand, are based on the possibility that these requirements can raise barriers to the successful prosecution of sexual assailants. Corroboration of the victim's testimony is not required in prosecutions for other crimes, such as robbery or assault. The experience in New York State is a good example of the problems that can be caused by corroboration requirements. At one time the legislature there imposed a corroboration requirement for cases of rape. Because of the statute, the courts thrashed about in an effort to elucidate just what was required in the way of corroboration. Finally, the prosecutors themselves began bringing rape cases as assault with intent to rape cases and foregoing the greater charge for the lesser included offense because of the lack of a corroboration requirement in that state for assault with intent to rape. The New York courts eventually closed this loophole in the statute. Since then, however, the New York corroboration statute has been repealed. Perhaps the most powerful argument against having a requirement of corroboration is that the costs of having a strict requirement far outweigh the benefits gained by it. The Constitution erects two barriers to wrongful convictions: crimes must be proved beyond a reasonable doubt, and no conviction may be obtained without evidence that a crime has been committed. These two rules should adequately protect rape defendants without causing the problems associated with strict corroboration requirements.

A number of states have judicially imposed corroboration requirements but these requirements are often limited to situations in which the testimony of the prosecutrix appears in some way unreliable. The courts appear to apply these requirements on a case-by-case basis, when the particular circumstances seem to warrant it. Corroboration has been required when the prosecutrix has failed to make a prompt complaint, her testimony is contra-

75. N.Y. Penal Law § 130.15 (McKinney) (repealed 1974).
77. See Note, supra note 76.

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dictory or improbable," or her testimony was physically impossible or incredible.\(^8\) A list of corroborative circumstances may be found in *Allison v. United States*:\(^9\)

(1) medical evidence and testimony, (2) evidence of breaking and entering the prosecutrix’ apartment, (3) condition of clothing, (4) bruises and scratches, (5) emotional condition of prosecutrix, (6) opportunity of accused, (7) conduct of accused at time of arrest, (8) presence of semen or blood on clothing of accused or victim, (9) promptness of complaints to friends and police, (10) lack of motive to falsify.\(^10\)

The court in *Allison* further indicated that “[t]his list, of course, is not exhaustive, and the corroboration in each case ‘must be evaluated on its own merits.’"\(^11\)

Despite the arguments mentioned previously in favor of a corroboration requirement and the various statutory and case law adaptations of a requirement, no requirement existed at common law.\(^12\) The general rule in South Carolina prior to the adoption of the sexual assault law was that the testimony of the prosecutrix did not need to be corroborated to establish the guilt of the defendant.\(^13\) Therefore, the provision in the Act is not revolutionary.

In one case, however, *State v. Francis Le Blanc*,\(^14\) the Constitutional Court of South Carolina\(^15\) seemed to suggest that corroboration may be required when the complainant is a child.\(^16\) The court in *Le Blanc* did not meet the issue head on, however. It stated that “[t]he commission of the act on so young a subject, is in a great measure susceptible of proof from other circumstances. And in the present case, the testimony of the child is strongly corroborated by circumstances, both as it relates to the person and the fact.”\(^17\) The precedential value of the *Le Blanc*

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84. State v. Haston, 64 Ariz. 72, 166 P.2d 141 (1946).
85. 409 F.2d 445 (D.C. Cir. 1969).
86. Id. at 448 n.8.
87. Id.
88. 7 J. WAGMORE, EVIDENCE § 2061, at 342 (3d ed. 1940).
90. 5 S.C.L. (3 Brev.) 392, 6 S.C.L. (1 Tread. Const.) 394 (1813).
91. For a discussion of the Constitutional Court, which corresponds to the present Supreme Court in South Carolina, see State v. Floyd, 174 S.C. 288, 320, 177 S.E. 375, 388 (1934).
93. Id.
decision is probably minimal in view of the constitutional court’s power to review the sufficiency of the evidence and to grant a new trial if the verdict was clearly against the weight of the evidence. The South Carolina Supreme Court does not have this power today. The court in Le Blanc could examine the adequacy of the proof, in effect imposing a corroboration requirement as circumstances demanded, whereas the current supreme court cannot substitute its judgment for that of the jury in a rape case. Appeal in a criminal case is only for errors of law in South Carolina, not for factual issues. This raises interesting questions concerning the effect of the no-corroboration requirement imposed by the legislature.

The absoluteness of the no-corroboration rule applies both to the sexual assault and statutory rape provisions of the new statute. While good arguments for not requiring corroboration of the testimony of adult complainants can be made, the case for no corroboration when the complainant is a child stands on shakier ground. In United States v. Wiley a twelve-year-old girl alleged that she had been sexually assaulted by two men. The corroboration evidence “consisted of testimony of the two officers to the effect that (1) the complainant was crying and upset, (2) her clothing was disheveled, (3) she had no coat even though it was a cold day, and (4) the complainant’s prompt report of the alleged incident to the officers.” The government had gone to trial without having secured the testimony of the examining physician. The United States Court of Appeals for the District of Columbia said that “[t]he most effective corroboration of the complainant’s testimony would have been medical evidence.” With no medical report and only the evidence above as corroboration, the court observed that “[a]lthough this evidence may corroborate the occurrence of some event, it does not corroborate sexual intercourse.” Furthermore, the court indicated that “scrutiny must be exercised where, as here, the complainant is a young girl. Courts have exhibited a ‘traditional skepticism’ towards accusa-
tions of children."\textsuperscript{102} Considering these factors the court felt compelled to reverse the conviction:

As a practical matter, the Government's case rested almost exclusively on the testimony of the child. Any inference that sexual intercourse or penetration occurred must be based on her bare accusation. In these circumstances, the traditional purpose of the corroboration requirement—avoidance of fabricated charges—requires reversal of the defendant's conviction.\textsuperscript{103}

If Wiley were tried today in South Carolina the conviction would have to be sustained for two reasons. First, no corroboration at all is required. Second, as mentioned previously, on appeal the South Carolina Supreme Court would not have the power to review the sufficiency of the evidence. If no errors of law took place at the trial, the conviction would have to stand so long as the complainant produced any evidence from which a jury could reasonably infer guilt.\textsuperscript{104}

A Wiley situation within the context of South Carolina law would pose a serious dilemma for the reviewing court. Because of the statute requiring no corroboration for a conviction and the limitation on the court's powers of review, the court, if it felt the proof to be plainly inadequate, would have to either bend the statute or its reviewing power. Neither is a highly palatable alternative. If defense counsel moves for a directed verdict, the supreme court will not have to face this problem. Under those circumstances the trial judge has the "duty to submit the case to the jury if there is evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced."\textsuperscript{105} By reviewing the trial court's disposition of a defense motion for directed verdict, the supreme court can determine indirectly the inadequacy or insufficiency of the evidence. This solution gives a South Carolina court some flexibility in a case such as Wiley, in which the verdict seems to be against the great weight of the evidence.

Another problem posed by the no-corroboration rule relates to the behavior of the prosecution. For example, if the prosecution has only two pieces of evidence, the testimony of the victim and an ambiguous medical report, it probably would not put the med-

\textsuperscript{102} Id. at 550.
\textsuperscript{103} Id. at 551.
\textsuperscript{104} Thompson v. Louisville, 362 U.S. 199 (1960).
ical report in evidence in the absence of a corroboration requirement. On the other hand, if such a requirement were in force, the prosecution would probably have to use the medical report to satisfy the requirement and get the case to the jury. At the same time, the ambiguity in the report would be helpful to the defense by helping to create a reasonable doubt about the defendant’s guilt. This raises the question whether the prosecution can use the no-corroboration rule as a shield to fend off defense requests for evidence casting doubt on the state’s case. It is already difficult to obtain pretrial discovery in criminal cases in South Carolina; the lack of a corroboration requirement by statutory mandate could make it even more difficult for the defense to uncover exculpatory evidence or to explore weaknesses in the state’s case.

The state is not free, however, to withhold evidence that casts doubt upon the guilt of the defendant. In Brady v. Maryland the United States Supreme Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” The Court held in United States v. Agurs that nondisclosure by the prosecution of evidence that raises a reasonable doubt about the guilt of the accused is a ground for a new trial even though the defense did not request disclosure. The defense is, therefore, not completely without recourse if the prosecution attempts to withhold evidence on the grounds that the statute requires no corroboration.

As previously indicated, the statutory provision of a no-corroboration requirement does not materially change the law on that subject in South Carolina. It is, however, interesting that the legislature felt a need to codify the rule requiring no corroboration when that rule already existed in the case law of South Carolina. The statutory mandate introduces inflexibility in the law when corroboration is concerned and removes from the courts the liberty of examining the matter on a case-by-case basis should that need arise, as it would in a case like Wiley. Undoubtedly the debate over the necessity for a corroboration requirement will continue.

108. Id. at 87.
110. Id. at 112.
IV. EVIDENCE OF THE VICTIM’S PRIOR SEXUAL CONDUCT

Of all the provisions of the 1977 sexual assault law perhaps the most controversial will be the section on evidence of the victim’s sexual conduct.\textsuperscript{111} Section 16-3-659.1 provides:

\begin{itemize}
\item (1) Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct and reputation evidence of the victim’s sexual conduct shall not be admitted in prosecutions under §§ 16-3-652 through 16-3-656; \textit{provided, however}, that evidence of the victim’s sexual conduct with the defendant, or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy or disease about which evidence has been previously introduced at trial shall be admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh [sic] its probative value. \textit{Provided, however}, that evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness shall not be excluded.
\item (2) If the defendant proposes to offer evidence described in subsection (1), the defendant, prior to presenting his defense shall file a written motion and offer of proof. The court shall order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).\textsuperscript{112}
\end{itemize}

The net effect is to strictly restrain the use of this type of evidence. Because of the complexity of this provision, each type of evidence and the various exceptions available will be explored in the order of appearance in the statute.

The evidence provision of the law generally prohibits introduction of evidence of specific instances of the victim’s sexual conduct with two limited exceptions. First, any evidence of the victim’s prior sexual conduct with the accused is admissible. Second, evidence of specific instances of sexual conduct with third persons is admissible to show the source or origin of semen, pregnancy, or disease. This latter exception applies only when the

\textsuperscript{112} Id.
prosecution has introduced evidence relating to semen, pregnancy, or disease.¹¹³ This rule is not extraordinary. It is a restate-
ment of the majority rule that evidence of specific sexual activity with persons other than the defendant is not admissible.¹¹⁴ One of the reasons often given for the rule is that consent with one individual does not imply consent with another.¹¹⁵ A second argu-
ment for the rule is that allowing this type of testimony would encourage subornation of perjury; defendants would presumably seek persons willing to testify falsely to sexual acts with the prose-
cutrix.¹¹⁶ Perhaps the strongest argument against this type of tes-
timony is that allowing its admission would create problems of unfair surprise, prejudice, and confusion of issues. While these arguments are valid for acts involving third parties, they have no bearing when the specific acts involve the defendant. In that instance the problems of suborned testimony, unfair surprise, and confusion of issues are not present. Moreover, if the victim has consented to sexual activity with the defendant in the past, it may be more likely that the victim consented on the occasion that is the subject of the trial. The same inference is not so readily drawn when the activity was with a third party.

The semen, pregnancy and disease exception applies only if evidence has been previously introduced at trial on the matter for which the evidence is introduced.¹¹⁷ The exception is very narrow. If, for example, a medical report showed the presence of semen on the person of the victim, it is unlikely that the semen was present for more than a day; therefore, activity with a third party, if it is going to be shown at all, must have occurred within a short time period surrounding the alleged assault. The time frame, of course, for pregnancy or disease is considerably greater. Prosecu-
tors will probably avoid introducing testimony about pregnancy

¹¹³. Id.
¹¹⁵. "The fact that a woman consented to sexual intercourse on one occasion is not substantial evidence that she consented on another, but in fact may indicate the con-
or disease if they know the prosecuting witness has engaged in recent sexual activity with third persons. If no evidence on one of these matters is introduced, the defense will be unable to introduce evidence of specific acts of sexual conduct with third parties.\textsuperscript{118}

Even when the evidence of specific sexual activity falls within the exceptions to the general rule, it still must survive the hurdle of an in camera hearing in which the court must determine that the "evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not out-weight [sic] its probative value."\textsuperscript{119} To survive the in camera hearing the evidence must first meet the normal South Carolina standard of relevancy recognized in Ellison v. Simmons:\textsuperscript{120} "All that is required to render evidence admissible is that the fact shown thereby legally tends to prove, or make more or less probable, some matter in issue and bear directly or indirectly thereon."\textsuperscript{121} This is not a particularly high standard in and of itself. But the statute requires more. The court must see that the probative value of the evidence is not outweighed by its potential for prejudice.\textsuperscript{122} The courts will probably decide the question by determining if the evidence, if admitted, would confuse the issues or mislead the jury.\textsuperscript{123} The interesting aspect of this standard for admissibility is that the court is engaged in a simple balancing test: probative value versus prejudice. The federal rule on the exclusion of relevant evidence requires that the probative value of the evidence be "substantially outweighed" by the danger of prejudice before it can be excluded.\textsuperscript{124} The federal rule is in line with case law in South Carolina holding that "where there is serious doubt as to the admissibility of evidence, the doubt should always be resolved in defendant's favor."\textsuperscript{125} The statute's balancing test does not allow for any weighting of the scales in favor of the defendant. If the potential prejudice to the state's case is determined to outweigh the probative value of the evidence at all, the evidence is to be excluded.

The evidentiary provision also excludes "opinion evidence of

\textsuperscript{118} Id.
\textsuperscript{119} Id. § 16-3-659.1(1)-(2).
\textsuperscript{120} 238 S.C. 364, 120 S.E.2d 209 (1961).
\textsuperscript{121} Id. at 368, 120 S.E.2d at 211.
\textsuperscript{124} Fed. R. Evid. 403.
\textsuperscript{125} State v. Lyle, 125 S.C. 406, 437, 118 S.E. 803, 814 (1923).
the victim's sexual conduct."\textsuperscript{120} Although it is difficult to differentiate between opinion evidence and reputation evidence\textsuperscript{127} the rule in South Carolina has been that reputation evidence is admissible while opinion evidence is not.\textsuperscript{128} The general rationale for this rule is well stated in McCormick's treatise:\textsuperscript{129}

The second consideration is the manner of proof, \textit{i.e.}, the distinction between different types of proof which may be offered as evidence of character. These types are (a) testimony as to the conduct of the person in question as reflecting his character, and (b) testimony of a witness as to his opinion of the person's character based upon observation, and (c) testimony as to his reputation. These are listed in the order of their pungency and persuasiveness. In the same order, they differ in their tendency to arouse undue prejudice, to confuse and distract, to engender time-consuming side issues and to create a risk of unfair surprise. Modern common law doctrine makes the neutral and unexciting reputation evidence the preferred type . . . .\textsuperscript{130}

Besides opinion evidence, however, the new law excludes "reputation evidence of the victim's sexual conduct."\textsuperscript{131} This exclusion of reputation evidence represents a major change in the law of sexual assault in South Carolina.

As set forth in \textit{State v. Taylor},\textsuperscript{132} the rule in South Carolina on the admissibility of reputation testimony prior to the passage of the sexual assault law was that "the reputation for chastity of the prosecutrix was a legitimate subject of inquiry, as bearing on the issue whether she consented to the act . . . . The evidence

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    \item \textsuperscript{127} The confusion is illustrated by the following quote from \textit{State v. Lyle}, 210 S.C. 87, 41 S.E.2d 625 (1947):
        \begin{quote}
        In the eye of the law the character of a person is to be ascertained by an inquiry as to what is generally said or thought of him in the community where he resides. Hence when a witness has testified on his examination in chief that the person, as to whose character the inquiry is instituted, bears a good character, his opinion and the value of it may be tested by asking the witness on his cross-examination whether he has ever heard that the person whose character is in question, has been accused of doing acts wholly inconsistent with the character which he has attributed to him.
        \end{quote}
    \item \textsuperscript{128} Id. at 91, 41 S.E.2d at 627 (quoting \textit{State v. Merriman}, 34 S.C. 16, 38-39, 12 S.E. 619, 627 (1891)).
    \item \textsuperscript{129} \textit{State v. Taylor}, 57 S.C. 483, 35 S.E. 729 (1900); \textit{contra}, \textit{State v. Turner}, 36 S.C. 534, 15 S.E. 602 (1892).
    \item \textsuperscript{130} Id. \textsuperscript{\textsection} 186, at 443 (emphasis in original).
    \item \textsuperscript{132} 57 S.C. 483, 35 S.E. 729 (1900).
\end{itemize}
\end{footnotesize}
as to reputation must be confined to what is said of her."\textsuperscript{133} The quotation states that the prosecutrix' reputation is relevant to her propensity to consent to intercourse on a given occasion. This issue of relevance to the issue of consent creates doubts about the validity of the rule. The rule is applicable only when the defense is consent.\textsuperscript{134} When consent is a defense, a testimonial contest between complainant and defendant almost always takes place. The defendant undoubtedly has the right to confront the complainant and attack her credibility.\textsuperscript{135} The General Assembly has decided, however, that the defendant's right of confrontation stops short of the introduction of reputation testimony about the sexual conduct of the prosecuting witness.\textsuperscript{136} Whether this statute will withstand constitutional attack is open to doubt and deserves reflection.

The legislature, by enacting the evidentiary portions of the statute,\textsuperscript{137} has made the prior sexual conduct of the complainant legally irrelevant. A reason frequently given to justify the adoption of these statutes is that

the State has a "legitimate interest" in encouraging the prosecution of rapists by protecting witnesses from harassment and humiliation on the witness stand. The Legislature is validly concerned with ensuring that complainants are not unnecessarily subjected, and that complainants know they will not be unnecessarily subjected, to the traumatic experience of having their private lives paraded before them in the court room.\textsuperscript{138}

Standing alone, however, this rationale would not justify the exclusion of the evidence if the evidence was probative of and relevant to the victim's consent; otherwise, the courts would be in the

\textsuperscript{133} Id. at 485, 35 S.E. at 729.

\textsuperscript{134} "Where consent is not an issue, neither evidence of general unchastity on the part of the prosecutrix nor evidence of specific instances of unchastity, except with the defendant, is admissible." Esquivel v. State, 506 S.W.2d 613, 616 (Tex. Crim. App. 1974); See Roper v. State, 375 S.W.2d 454 (Tex. Crim. App. 1964); State v. Sims, 30 Utah 2d 357, 517 P.2d 1315 (1974); Powell v. Commonwealth, 179 Va. 703, 20 S.E.2d 536 (1942); contra Teague v. State, 208 Ga. 459, 67 S.E.2d 467 (1951) (wherein it was stated that "[f]though an accused might deny intercourse, defend on the ground of mistaken identity, or plead an alibi, still he would be entitled to show general reputation for lewdness . . . .") 208 Ga. at 466, 67 S.E.2d at 472.

\textsuperscript{135} See, Davis v. Alaska, 415 U.S. 308 (1974) (interpreting U.S. Const. amend. VI); see also S.C. Const. art. 1, § 14.


\textsuperscript{137} Id.

\textsuperscript{138} People v. Dawsey, 76 Mich. App. 741, 753, 257 N.W.2d 236, 244 (1977) (Kaufman, J., dissenting in part, concurring in part).
awkward position of suppressing evidence crucial to the defense only for the convenience and comfort of the prosecuting witness.

The foregoing concern that the witness be protected from unnecessary harassment is bound up with another idea, "that a woman consented to sexual intercourse on one occasion is not substantial evidence that she consented on another, but in fact may indicate the contrary." 139 If this proposition is sound, the validity of the statute cannot be questioned. The state's interest in encouraging rape prosecutions reinforces this validity. On the other hand, if the proposition that consent on one occasion is not substantial evidence of consent on another is unsound, or not always sound, then the problem is of a different dimension and constitutional rights of the defendant are in jeopardy.

The evidentiary portions of the new South Carolina statute are virtually identical to provisions enacted earlier in Michigan. 140 The appellate courts there, accordingly, have already had the opportunity to examine the effect of the statute's pervasive exclusion of evidence of prior sexual conduct. In People v. Dawsey 141 an attack was made on the constitutionality of the new law as adopted in Michigan, but the

[d]efendant did not attempt to produce witnesses to testify about the complainant's reputation for chastity. Had he done so, and been denied, a serious question about the statute's constitutionality would have to be faced . . . . But here, where defendant only complains of his inability to attack the complainant's veracity with cross-examination about her sexual history, there is no basis for holding the statute unconstitutional. 142

While the majority of the court did not indicate what position it would take were it directly faced with the question, Justice Kaufman, in a separate opinion, expressed his own reservations about the efficacy of the statute:

My concern over the statute is not its objective, in a broad sense the encouragement of rape prosecutions, but its absoluteness. So while I can agree in any single instance that the proposed evidence is more prejudicial than probative, I remain convinced that trial courts, with proper guidelines and under appropriate

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142. Id. at 753, 257 N.W.2d at 241.
procedures, should be able to make that determination on a case-by-case basis. I cannot believe that in all cases the evidence would be more prejudicial than probative, the assumption the majority makes to avoid the constitutional issue.\footnote{143. Id. at 763 n.2, 257 N.W.2d at 245 n.2 (Kaufman, J. dissenting in part, concurring in part).}

At the root of Justice Kaufman's concern, as well as the cutting edge of any attack on the constitutionality of the statute, is the confrontation clause of the federal and various state constitutions.\footnote{144. U.S. Const. amend. VI; S.C. Const. art. 1, § 14.}

"Where a constitutional right is involved, a statutory declaration that certain evidence can never be legally relevant demands close scrutiny."\footnote{145. 76 Mich. App. at 762-63, 257 N.W.2d at 244 (Kaufman, J. dissenting in part, concurring in part).}

The sixth amendment guarantees the right of a defendant in a criminal case "to be confronted with the witnesses against him."\footnote{146. U.S. Const. amend. VI.}

This right is secured for the accused in state as well as federal criminal prosecutions.\footnote{147. Pointer v. Texas, 380 U.S. 400, 407 (1965).}

"Confrontation means more than being allowed to confront the witness physically."\footnote{148. Davis v. Alaska, 415 U.S. 308, 315 (1974).}

The principal interest secured is the right to cross-examine witnesses called against the defendant.\footnote{149. Id. at 315-16.}

In Davis v. Alaska\footnote{150. 415 U.S. 308 (1974).} the Supreme Court dealt with the impact of the confrontation clause on a state law protecting the anonymity of juvenile offenders. A juvenile with a criminal record was a crucial identification witness for the prosecution. The defendant attempted to impeach or discredit the witness by drawing out his prior offenses on cross-examination, but the line of questioning was disallowed. The Court concluded that

\[\text{[o]n these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."}\footnote{151. Id. at 318.} \]
The Court reasoned that the defendant’s right to confront a hostile witness was “paramount to the State’s policy of protecting a juvenile offender”152 for its desire that the witness “fulfill his public duty to testify free from embarrassment and with his reputation unblemished”153 could not outweigh the defendant’s right “to seek out the truth in the process of defending himself.”154

At a minimum, Davis v. Alaska demonstrates that protection of a witness from embarrassment and humiliation as a matter of state policy, however well founded in logic and reason, is not sufficient grounds to foreclose exploration of a witness’ character by the accused when it is crucial to his defense. The validity of the evidentiary provisions of the new statute must therefore turn on the remaining proposition underlying the law: that consent to sexual acts on one or more occasions is not “substantial evidence” of consent on another. The statute is not absolute in this sense. It does allow, subject to strict requirements,155 evidence of complainant’s prior sexual conduct with defendant.156 Admittedly, that is an obvious case for an exception to an otherwise hard and fast rule, as discussed previously. The problem is that under other circumstances an exception to the rule of non-admissibility may be justified. For instance, proof that the prosecutrix is a prostitute would seem to be relevant to the issue of consent. The inflexibility of the statute could hamstring an effort to deal with these circumstances as they arise. If evidence of prior sexual conduct is relevant to the issue of consent in some cases, the statute, by making it inadmissible except for in a few limited situations, may infringe upon the sixth amendment rights of defendants in trials for criminal sexual conduct.

Despite the possible unconstitutionality of some sections of South Carolina’s sexual assault law, the statute, on balance, remains a welcome modification of antiquated rape statutes that unduly limited the scope of prosecutable sexual conduct. Only time will tell if the new statute has the effect of increasing the number of victims who come forward to complain. If the statute has this effect, and it survives attack in the courts, it will represent a strong addition to the criminal law of South Carolina.

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152. Id. at 319.
153. Id. at 320.
154. Id.
155. See discussion accompanying notes 119-25 supra.