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Elizabeht Lottman Schneider

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NOTE

SEXUAL Assault LAW REFORM IN COLORADO—An Analysis of House Bill 1042

INTRODUCTION

On July 1, 1975, with the signing into law of House Bill No. 1042, Colorado joined the vanguard of a nationwide movement toward reform of laws regulating unlawful sexual behavior. This reform movement has been directed primarily toward achieving two results: The elimination of distinctions in terminology based on gender in order to deal with both heterosexual and homosexual assaults in accordance with the level of violence involved; and the protection of the victims of such assaults from undue harassment and humiliation in order to encourage reporting of sexual assaults and to facilitate the prosecution and conviction of sexual offenders.


3 A Michigan article noted the purposes of that state’s new law, Mich. Comp. Laws Ann. §§ 750.520 to .520-1 (Supp. 1975):

The new law acknowledges that criminal sexual conduct is generally a premeditated crime of violence rather than a crime provoked by the victim’s behavior.

It should also be noted that the new law can be described as “sex-neutral”—extending protection to men as well as to women. Legislative Note, Michigan’s Criminal Sexual Assault Law, 8 U. Mich. J.L. Reform 217, 220 (1974) [hereinafter cited as Michigan’s Sexual Assault Law].

4 Michigan’s Sexual Assault Law 236. H.B. 1042 was drafted primarily by Richard Wood of the Denver District Attorney’s office and Representative Ted Bendelow of the Colorado House of Representatives. Mr. Wood states the following purposes for the changes in the law: To erect barriers for the defense in order to make the crime easier to prosecute; to simplify the prior law; and to eliminate offensive terminology. Interview with Richard Wood, Deputy District Attorney, in Denver, June 27, 1975. Denver District Attorney Dale Tooley expects the new law to produce more “just results,” if not more
The states which have already enacted reformed sexual assault statutes have attempted to achieve the desired results in varying ways. By far the most significant and potentially troublesome step taken by the legislatures which have enacted reformed sexual assault laws has been the limitation which they have placed on cross-examination of the victim concerning his or her prior or subsequent sexual conduct. This limitation has been imposed with varying degrees of severity by the legislatures which have adopted it.

This note analyzes in depth the Colorado legislature's response to the demand for reform of sexual assault laws. It begins with an examination of the Act's changes in terminology and

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Many states have also eliminated the requirement that the victim resist to the utmost. See, e.g., Mich. Comp. Laws Ann. § 750.520h (Supp. 1975); ch. 374, § 8, [1975] Minn. Sess. Laws 1088. The elimination of the resistance requirement is reflected statutorily through the adoption by many states of provisions such as sections 402(1)(b) and (c) of the new Colorado law, in which threats of force are given the same weight as actual use of force in determining whether a crime has been committed. The resistance requirement is analyzed and criticized in Note, The Resistance Standard in Rape Legislation, 18 Stan. L. Rev. 680 (1966).

* See text accompanying notes 49-175 infra.

7 The author has chosen to use the pronoun "her" throughout the remainder of this note when referring to a sexual assault victim, based on the empirical fact that the majority of sexual assault cases involve a female victim.

* See C.R.S. § 407. See also the laws of Michigan, California, and Iowa cited in note 3 supra.
reclassification of offenses to determine whether the legislature has achieved a coherent, rational result from a criminal law standpoint. Next, the note considers constitutional issues raised by H.B. 1042, focusing on two questions. The first, in the area of separation of powers, is whether the legislature may have exceeded its constitutional authority in enacting the evidentiary procedures of the new law. The second, in the area of sixth amendment rights, is whether the legislature’s evidentiary restrictions and procedures may impermissibly interfere with an accused sex offender’s right to confront the witnesses against him. Furthermore, this note suggests throughout that the response of the Colorado legislature, and that of other state legislatures which have enacted similar laws, may be delusive in its proposed solution to the problems inherent in the prosecution of sexual assaults.

I. TERMINOLOGY AND CLASSIFICATION OF OFFENSES

H.B. 1042 repeals and reenacts part 4, article 3, title 18 of the Colorado Revised Statutes, 1973. The title of part 4 remains the same—Unlawful Sexual Behavior—but the new terminology emerges immediately thereafter in the definition section. Gender distinctions have been replaced by the use of the terms “actor” and “victim.” This permits the consolidation of offenses formerly known as “rape” and “deviate sexual intercourse by force” into one category, “sexual assault,” which is then graduated in relation to the amount or type of force or violence employed.

Outstanding in the new terminology is the distinction drawn between sexual penetration and sexual intrusion. When H.B. 1042 was originally introduced, sexual intrusion was included within the definition of sexual penetration. The house of repre-

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9 C.R.S. § 401.
10 C.R.S. § 401(1).
11 C.R.S. § 401(7).
13 Id. § 18-3-403.
14 C.R.S. § 401(6).
15 C.R.S. § 401(5).
16 The submitted bill contained the following sections:
18-3-401. Definitions. As used in this part 4, unless the context otherwise requires:
sentatives committee on the judiciary, however, apparently determined that sexual intrusion should be segregated and treated differently, and so amended the definition to read as it now does. The effect of this determination will be discussed in relation to the classification of offenses.

The definition of the term “sexual contact” is changed from prior law to include the intentional touching of the actor’s intimate parts by the victim, and, also, to add the qualification that the contact must be reasonably construed “as being for the purposes of sexual arousal, gratification, or abuse.” This qualification is also a part of the definition of sexual intrusion, discussed above. It would appear that in both definitions this qualification is excess verbiage, when considered in light of part 4’s built-in medical exception together with the “intentional” mens rea requirement for sexual contact.

The new crime of sexual assault is classified into three degrees. Sexual assault in the first degree includes the former crimes of rape and deviate sexual intercourse by force, with the notable exception of “statutory rape,” which, reflecting the modern trend of classifying offenses in accordance with the level of force or violence involved, is now classified as sexual assault in

(5)(a) “Sexual penetration” means:
(1) Sexual intercourse, cunnilingus, fellatio, anal intercourse; or
(II) 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.
(b) Emission need not be proved as an element of any sexual offense.

The submitted bill is on file at the Colorado Supreme Court library.

17 House Journal, Mar. 21, 1975, at 748-55. This amendment also added the act of “analgingus” to the definition of sexual penetration.
18 Text accompanying notes 40-45 infra.
19 C.R.S. § 401(4).
21 C.R.S. § 401(4).
22 C.R.S. § 410.
23 Other than where the sexual contact is not inadvertent and where the sexual intrusion is not performed for bona fide medical purposes, it is difficult to conceive of a situation in which the contact or intrusion could not reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.
24 C.R.S. § 402.
26 Id. § 18-3-403(1).
27 Telephone interview with Ted Bendelow, supra note 4. See also note 3 supra.
the second degree. A new section has been added to include, as first degree sexual assault, instances where submission of the victim is caused by the actor's "threatening to retaliate in the future," provided that the victim reasonably believes that the threat will be executed. Similar language has been added to the section on submission of the victim caused by present threat—the victim must believe that the actor has present ability to execute the threat. One can only speculate as to the problems of proof that the use of this type of language in a criminal statute may create.

Sexual assault in the first degree is a class 3 felony, as were rape and deviate sexual intercourse by force. However, a rape conviction can no longer be reduced to a class 4 felony if the victim "was a voluntary social companion of the offender upon the occasion of the crime and had previously voluntarily engaged in sexual intercourse or deviate sexual intercourse with him." In fact, the new law has included aggravating factors which can raise the offense to a class 2 felony. This reclassification comports well with the legislative purpose to punish an offender in accordance with the amount of force or violence involved and to eliminate irrational reliance on the victim's prior conduct.

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28 C.R.S. § 403(e). It should be mentioned here that the new law narrows the marital exception to sex crimes. Under prior law, the exception was inoperative as to conduct between "spouses living apart under a decree of judicial separation." COLO. REV. STAT. ANN. § 18-3-411(2) (1973). The new law provides that the exception does not apply to "spouses living apart, with the intent to live apart, whether or not under a decree of judicial separation." C.R.S. § 409(2). It has been suggested by one author that a similar differentiation in Michigan's new law between married couples living apart and those living together may constitute a denial of equal protection of the laws. That author commented on the law's failure to protect married persons from sexual assault by a spouse: "[T]he legislature decided to avoid bringing this difficult evidentiary and social problem within the scope of the Act." Michigan's Sexual Assault Law 233.

29 C.R.S. § 402(1)(c).
30 C.R.S. § 402(1)(b). Note that the word "reasonably" is not used in this section.
31 It was apparently the intent of the legislature in using this particular language to control situations where the victim might be of superior strength. Telephone interview with Ted Bendelow, supra note 4.
32 C.R.S. § 402(2).
33 COLO. REV. STAT. ANN. § 18-3-401(2) (1973).
34 Id. § 18-3-403(2).
35 Id. § 18-3-401(2).
36 C.R.S. §§ 402(2)(a)-(c). This provision was added to the submitted bill by the house of representatives committee on the judiciary. HOUSE JOURNAL, Mar. 21, 1975, at 749-50.
Sexual assault in the second degree includes the former crimes of gross sexual imposition, deviate sexual intercourse by imposition, corruption of minors and seduction, and statutory rape. Also included in second degree sexual assault is sexual intrusion, discussed previously. It should be noted that prior Colorado criminal law did not deal with the behavior now defined as sexual intrusion. The distinction drawn between sexual penetration and sexual intrusion is that the former refers to the actor's use of the penis, mouth, or tongue to perform a sexual act, whereas the latter refers to the use of some other part of the body or an object to perform the sexual act. It is when this distinction is considered that the differing treatment given the two categories begins to appear irrational.

The legislature has made sexual intrusion a second degree offense, and thus a class 4 felony, unless extreme force or threat is used, in which case sexual intrusion becomes a class 3 felony. At first glance, this provision appears to make it possible to punish an offender who has violently committed sexual intrusion as severely as one who has violently committed sexual penetration. But further inquiry reveals the fact that first degree sexual penetration can be elevated to a class 2 felony when certain additional aggravating factors are present; sexual intrusion cannot. This

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37 C.R.S. § 403.
39 Id. § 18-3-404.
40 Id. § 18-3-410. Corruption of minors and seduction was formerly a class 5 felony; the new law raises the offense to a class 4 felony.
41 The sections of H.B. 1042 dealing with statutory rape and sexual assault on a child went through several changes in committee before attaining their final form. See House Journal, Mar. 21, 1975, at 749-50; id., Mar. 27, 1975, at 824. Apparently, a prosecutor now has the option in a case where, for example, a 19-year-old actor causes a 14-year-old victim to submit to sexual penetration by means of extreme force or threat, to proceed under sections 402(1)(a), (b), or (c), or under section 403(1)(e), or under section 405. Presumably, where extreme force or threat is present, the offender will be charged with first degree sexual assault if there has been sexual penetration, but with sexual assault on a child if there has been only sexual contact or sexual intrusion. See text accompanying notes 41-47 infra. Where the activity is consensual, the offender can be charged under either section 403(1)(e) or section 405, which are both class 4 felonies. This reflects the legislature's effort to reduce the criminal sanctions imposed on consensual activity. Telephone interview with Ted Bendelow, supra note 4.
42 C.R.S. § 403(1)(b).
43 C.R.S. § 403(2). This provision was added to the submitted bill by the house of representatives committee on the judiciary. House Journal, Mar. 21, 1975, at 750.
44 See note 35 supra and accompanying text.
distinction is without rational basis if the purpose of the reclassification of the offenses is to punish offenders in accordance with the level of force or violence involved. Surely an offender who causes the victim to submit to a sexual act accomplished by use of an object (sexual intrusion) and who causes this submission by use of a deadly weapon has committed as violent and reprehensible a crime as the offender who causes the victim to submit to a sexual act accomplished by use of the offender's mouth or penis (sexual penetration). And yet, the first offender, under the new law, cannot be punished as severely. Apparently, the legislators were unable to rid themselves completely of the historical tendency to view sexual assaults as crimes of passion or lust, rather than as crimes of violence; reflecting this tendency, the Colorado legislature determined to punish a sexual assault accomplished by sexual means more severely than a sexual assault accomplished by use of an object or a part of the body not commonly associated with sexual acts.

Sexual assault in the third degree is quite similar to the offense referred to under prior law as sexual assault. However, one significant change is that, under the new law, third degree sexual assault can be elevated from a class 1 misdemeanor to a class 4 felony if extreme force or threat is used to cause submission to the sexual contact. Under prior law there was no elevating factor. Sexual assault in the third degree can be read to

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45 Use of a deadly weapon is one of the aggravating factors which can raise sexual penetration to a class 2 felony. C.R.S. § 402(2)(c).
46 See Michigan's Sexual Assault Law 223-24. The note discusses the "mythology of rape" which has affected sex crimes legislation over the years, including society's tendency to view rape as a crime of passion. See also Smith, History of Rape and Rape Laws, 60 Women Law. J. 188 (1974).
47 C.R.S. § 404.
49 A possible explanation for the fact that the class 5 felony was skipped over in providing for elevation is that there is little difference in sentencing between a class 5 felony and a class 4 felony. A class 4 felony is punishable by imprisonment from 1 day to 10 years and/or a fine of $2,000 to $30,000, and a class 5 felony is punishable by imprisonment from 1 day to 5 years and/or a fine of $1,000 to $15,000. COLO. REV. STAT. ANN. § 18-1-105 (Supp. 1975). With this type of "indeterminate" sentencing, any given offender will probably serve the same number of years whether sentenced for a class 4 or a class 5 felony, since his release date will depend primarily on individualized factors.
50 C.R.S. § 404(2).
51 COLO. REV. STAT. ANN. § 18-3-407(2) (1973).
include almost totally innocuous behavior; apparently, the legislators were confident that police and prosecutorial discretion will be exercised reasonably when bringing charges under this section.

II. EVIDENTIARY PROCEDURES AND JURY INSTRUCTION

The most outstanding feature of H.B. 1042, and of similar laws being enacted in many states, is the attempted exclusion from trial of evidence of the victim’s prior or subsequent sexual conduct. Colorado’s new law creates a presumption that opinion evidence, reputation evidence, or evidence of specific instances of the victim’s prior or subsequent sexual conduct is irrelevant and, therefore, inadmissible at trial. There are two types of such evidence which are excepted from this presumption: (1) Evidence of the victim’s prior or subsequent sexual conduct with the defendant; and (2) evidence of specific instances of sexual activity showing the source of any semen, pregnancy, or disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act charged was or was not committed by the defendant. In short, the latter two types of evidence will be freely admitted at trial, but any other evidence of the victim’s prior or subsequent sexual conduct will be inadmissible, unless the statutory presumption of irrelevance can be overcome.

To rebut this presumption, the defendant must follow a special procedure created by the legislature. First, the defendant must file a written motion, accompanied by an affidavit, stating that he has an offer of proof of the relevancy of evidence of the victim’s sexual conduct or of evidence of the victim’s history of false reporting of sexual assaults. If the court finds the offer of proof sufficient, it must set an evidentiary hearing to be held in

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52 See note 2 supra.
53 C.R.S. § 407(1).
54 C.R.S. §§ 407(1)(a), (b).
55 See C.R.S. § 407.
56 C.R.S. § 407(2).
57 C.R.S. § 407(2)(b).
58 C.R.S. § 407(2)(a). A problematical situation is created by the fact that section 407(2) describes the procedure to be followed if the defendant seeks to introduce evidence of the victim’s prior or subsequent sexual conduct or of the victim’s “history of false reporting of sexual assaults,” yet section 407(1) does not extend the presumption of irrelevance to any matters other than the victim’s prior or subsequent sexual conduct. There is, thus, some confusion as to whether a victim’s history of false reporting is presumed irrelevant or not.
camera prior to trial. At the conclusion of this hearing, if the court finds that the evidence proposed to be offered is “relevant to a material issue to the case,” the court must order that such evidence may be introduced at trial.

A concomitant provision of the new law prohibits the jury instruction known as the “Lord Hale” instruction. The judge in a sexual assault trial is now statutorily prohibited from instructing the jury “to examine with caution the testimony of the victim solely because of the nature of the charge,” or that “such a charge is easy to make but difficult to defend against”; nor may the judge give “any similar instruction.”

The purpose of these statutory restrictions on evidence and jury instructions is clear. The primary purpose is to diminish personal harassment of the victim by controlling the introduction of evidence of the victim’s past sexual behavior. Further desired results are the encouragement of reporting of sexual assaults and the facilitation of conviction of offenders.

However, it should be noted that all of the evidentiary restrictions and procedures which have been enacted in the name of equal rights for women and reform of antiquated and offensive methods of prosecuting sexual assaults may fail to accomplish the lofty goals set for them. A recent, exhaustive study of rape victims indicates that the prospect of being cross-examined by a defense attorney concerning their prior sexual conduct is not a highly significant factor influencing sexual assault victims to refrain from reporting or prosecuting the incident. Much more influen-
tial in such a decision are victims' fears concerning: Repeating
the details of the assault to police officers, prosecuting attorneys,
and all those who will be present in the courtroom; submitting
to physical and psychological examinations; facing and living
with the unknown reactions of family and friends or the possibil-
ity of reprisals by the accused; and surviving cross-examination
by the defense attorney (which can be a devastating experience
whether or not inquiry into prior sexual conduct is permitted). 66

Any attempted solution to the complex social problems in-
herent in the prosecution of sexual crimes which relies on statu-
tory evidentiary restrictions may prove to be illusory at best, and,
at worst, an unconstitutional infringement on the rights of a crim-
inal defendant. The Colorado Supreme Court will not concern
itself with the "wisdom" of such legislation, 67 but will undoubt-
edly be called upon to examine the constitutionality of the legis-
lature's enactments. The following sections deal with the consti-
tutional issues which will undoubtedly arise.

A. Constitutionality—Separation of Powers—Did the Colorado
Legislature Exceed its Constitutional Power in Enacting These
Provisions?

There are two aspects of H.B. 1042 which create concern in
relation to the separation of governmental powers. The first to be
resolved is whether the legislature may enact a procedural provi-
sion such as that embodied in section 407(2) without encroaching
on the Colorado Supreme Court's rulemaking power. It will be
argued herein that the Colorado constitution vests the rulemak-
ing power in the supreme court, thereby removing this power from
the legislative sphere. If the section in question may be consid-
ered procedural, it may also be unconstitutional and void because
enacted without authority by the legislature. But an inquiry into

66 See generally id. But see contra, J. Bellacose, Practice Commentary, 11A N.Y.
This is not merely a bow to women's rights objectives, but a salutary protec-
tion of the rights of victims of crime. It further serves the public interest
because it should eliminate one of the psychological deterrents . . . which
caused victims of sex offenses not to report them. These changes should now
encourage such victims to do so and to see the prosecutions through to a just
conclusion.

Id. at 76-77.

67 See 16 C.J.S. Const. Law § 154 (1956) and cases cited therein.
the Colorado Supreme Court's historical reaction to legislative encroachment on the rulemaking power of the judiciary reveals that the court has long permitted such encroachment and acquiesced in the legislature's actions. The conclusion to be drawn is that, although the legislature may have exceeded its authority in creating procedural rules, the Colorado Supreme Court will not strike down this legislation on that ground, primarily because the court itself has not yet exercised its rulemaking power in this particular area.

A second point which raises separation of powers questions is the more general problem of legislative invasion of territory which is inherently judicial. It will be argued herein that the legislature in sections 407(1) and 408 has done more than create an evidentiary presumption (in itself an act within the legislature's power), but instead has attempted to legislate the relevancy of certain evidence in a criminal trial. Also, in prohibiting certain jury instructions, the legislature has attempted to limit statutorily the power of a judge to instruct a jury. It will be suggested, however, that since the presumption of relevancy is rebuttable, and the limitation on jury instructions is not total, the provisions will be construed by the court to allow the judiciary to exercise its constitutional powers, and will not be stricken as an unconstitutional encroachment on the judiciary.

1. The Rulemaking Power

   a. Development of the rulemaking power in Colorado

   The Colorado constitution embraces the concept of separation of governmental powers. In 1965 the constitution was amended to vest judicial rulemaking power in the supreme court. The effect of this amendment was analyzed in depth in a

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**Colo. Const. art. III.** The clause not only separates governmental powers into three departments, but also forbids the exercise of powers of one department by any person charged with exercising powers of another department, except as expressly permitted in the constitution.

**Colo. Const. art. VI, § 21.**
1966 article by Professor Courtland H. Peterson,\(^7\) in which he traced the convoluted history of the rulemaking power in Colorado.\(^7\)

The Colorado Supreme Court apparently made no effort at rulemaking until the legislature passed the Enabling Act of 1913, which mandated that the supreme court would create rules of practice and procedure for all courts of record, which rules would then “supersede any statute in conflict therewith.”\(^2\) The court then adopted such rules, “supplementary to the existing Code of Civil Procedure,”\(^2\) which had been created legislatively. In cases concerning the rulemaking power which emerged during the subsequent period, the supreme court took a strong position overall in protection of its rulemaking function.\(^4\)

The clearest picture of the court’s position on rulemaking emerged through the events surrounding the 1931 case of *Kolkman v. People.*\(^5\) The supreme court had adopted a rule permitting trial judges to comment on the evidence in jury trials, patterned after the federal rule. The rule was challenged in *Kolkman* and the court, in upholding the rule, stated:

> The judicial power of the state is vested in the courts; the legislative and executive departments are expressly forbidden the right to exer-

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\(^1\) According to Peterson, Colorado became a territory during a time “when legislative dominance in the field [of rulemaking] was taken for granted.” *Id.* at 140. Prior to this time, during the eighteenth century and earlier, rulemaking was presumed to be an inherently judicial function. But legislatures had intervened in this area in order to reform a system of elaborate and rigid pleadings which had reached “a point where formalism seemed as often to impede the administration of justice as to expedite it.” *Id.* at 138. Shortly after Colorado attained statehood, the legislature enacted a Code of Civil Procedure, which was in effect until the enactment of the Colorado Rules of Civil Procedure in 1941.

\(^2\) *Id.* at 141-42 & nn.30-31. Prior to the 1913 Enabling Act, conflicts between statutes and rules of inferior courts were invariably resolved in favor of the legislature. *Id.* at 142.

\(^3\) *Id.*

\(^4\) See, e.g., *Walton v. Walton,* 86 Colo. 1, 278 P. 780 (1929), wherein the court said:

> We seriously question the power of the Legislature to make any rules or to enact any laws relative to procedure in courts. It is doubtful if the Legislature in Colorado could have enacted any law with reference to procedure in courts of record unless that power had been expressly or tacitly surrendered to it by the judiciary.

*Id.* at 21, 278 P. at 786-87.

\(^5\) 89 Colo. 8, 300 P. 575 (1931).
cise it, and the courts, charged with the duty of exercising the judicial power, must necessarily possess the means with which to effectually and expeditiously discharge that duty; this duty can be performed and discharged in no other manner than through rules of procedure, and consequently this court is charged with the power and duty of formulating, promulgating, and enforcing such rules of procedure for the trial actions as it deems necessary and proper for performing its constitutional functions.  

Before the Kolkman opinion was released, the Colorado legislature amended the Enabling Act of 1913 by adding the provision that the supreme court shall not make any rule permitting trial judges to comment on the evidence in a trial. As Peterson noted, this amendment "was a direct assault on the Court's assertion of inherent or constitutional powers . . . ." The legislature reiterated this prohibition in the Enabling Act of 1939. When the supreme court issued the current Colorado Rules of Civil Procedure and Colorado Rules of Criminal Procedure pursuant to that Act, it retreated from its hard-line language in the Walton and Kolkman opinions and included prohibitions against trial judges' commenting on the evidence. The schizophrenia exhibited by the court in relation to the Kolkman case has not been resolved in the intervening years.

The passage of the 1965 constitutional amendment, vesting the rulemaking power in the supreme court, at least altered the method of approaching the problem. Peterson noted: "No longer can the problem be approached as one of statutory construction, or through speculation about the historically inherent powers of courts; it has instead become a question of basic constitutional law."

He felt that this constitutional provision resolved the

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16 Id. at 33-34, 300 P. at 584-85.
18 Rule Making in Colorado at 146.
19 Ch. 80, § 1, [1939] Colo. Sess. Laws 264.
20 Rule Making in Colorado 147 & n.50.
21 In 1966 Professor Peterson drew four significant conclusions concerning the development of the rulemaking dilemma: (1) There had been no case involving a true conflict between a statute and a court rule in which the court rule was held to override the statute; (2) the legislature had continuously and confidently passed statutes of procedural content; (3) the court had consistently enforced such procedural statutes without objection and, thus, conceded to the legislature at least a concurrent power to regulate procedure; and (4) the court had, as in the Kolkman situation, acquiesced in the legislature's overriding rulemaking power. Id. at 148-49.
22 Id. at 149.
problem of supremacy between court rule and statute in favor of the court, and concluded that the constitutional provision gave *exclusive* rulemaking power to the supreme court by construing article III and article VI, section 21 of the Colorado constitution.  

Peterson noted that a strict interpretation of the amendment would require invalidating the innumerable statutory procedural rules on the books—"an absurd and unjust result." His suggestion was that the supreme court "issue a general rule immediately, adopting the existing statutory rules in their entirety" as a stopgap measure until such rules could be revised and reissued by the supreme court.

The court has not acted on Peterson's suggestion. The Colorado legislature has continued, since the constitutional amendment of 1965, to enact statutes of procedural content, and the supreme court, on the infrequent occasions when it has been squarely confronted with the issue, has not chosen to enforce strictly its exclusive rulemaking power. The "crisis" heralded by

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*By applying the *expressio unius, exclusio alterius* maxim, Peterson concluded that the last phrase of article VI, section 21, excepting from the court's rulemaking power the promulgation of simplified procedures for county courts, indicated that all other rulemaking power was thereby vested in the supreme court. He supported his conclusion by reference to the last phrase of article III of the Colorado constitution, which prohibits anyone charged with exercising powers belonging to any one of the three branches of government from exercising any powers belonging to either of the other branches of government "except as in this constitution expressly directed or permitted." This phrase requires that the *expressio unius, exclusio alterius* maxim be applied in interpreting and construing other sections of the constitution. On the basis of this analysis, Peterson stated: "Except with respect to simplified procedures for county courts... general rule-making power for the courts must... be taken to be excluded from legislative competence." *Id.* at 151-52 & n.59.

*Rule Making in Colorado* 154-55. He stated:  
In view of the fact that there are literally hundreds of statutes still on the books in Colorado, dealing with details of practice and procedure and not in any way duplicated by existing rules of court, the withdrawal of legislative power in this area presents a potential crisis of major proportions.

*Id.* at 154.

*Id.* at 155.

*We find no specific constitutional limitation that bears upon the question of the form or type of procedure which must be employed to challenge an annexation, and this court has not yet exercised its rulemaking power under Colo. Const. art. VI, § 21... [The court cites *Rule Making in Colorado.*]
Professor Peterson has been ignored so effectively that, in at least one instance, court rule and statute now coexist contentedly in spite of the fact that their provisions conflict. Title 16 of the 1973 Colorado Revised Statutes is replete with procedural provisions created, presumably without any power or authority, by the legislature.

Despite this impressive evidence that the court is unconcerned about legislative encroachment into territory explicitly ceded to the court by the constitution, it is still necessary to consider what the court's reaction might be when it is squarely presented with the issue in relation to H.B. 1042. How might the court react to a challenge to the statute based on the argument that the procedural provisions are unconstitutional and void because the legislature lacked the constitutional authority to enact them?

The legislature rather than arrogate unto itself the right to establish a review procedure has adopted a specific procedure from the rules promulgated by this Court. The statute, although providing for procedure, created a right which is substantive in nature. The matter of who may challenge the validity of an annexation involves a substantive right. Consequently, it is a proper matter for legislative action. Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 83, 482 P.2d 986, 988 (1971).

See also Smith v. Johns, 532 P.2d 49 (Colo. 1975), in which the court held that rule 35(a) of the Colorado Rules of Criminal Procedure, allowing the court to correct an illegal sentence or a sentence imposed in an illegal manner, and COLO. REV. STAT. ANN. § 16-11-303 (1973), providing that an improper sentence to the Colorado State Reformatory will be automatically corrected, do not conflict irreconcilably. The trial judge had corrected the improper sentence pursuant to rule 35(a), and the defendant sought a writ of prohibition to prevent the judge from resentencing him to the state penitentiary. The supreme court found that the trial judge acted without jurisdiction in altering the original sentence on the theory that, since the statute corrects the improper sentence automatically, it removes jurisdiction to change the sentence from the trial court. The court cited The Rubaiyat of Omar Khayyam:

"The [legislative] Moving Finger writes; and, having writ,
Moves on: nor all your Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all your Tears wash out a Word of it."

532 P.2d at 51. The Colorado Supreme Court apparently feels helpless in the face of the legislature's indelible power.

67 COLO. REV. STAT. ANN. § 16-6-103 (1973), as enacted by the legislature, allows change of venue in a criminal case to another county within the same judicial district if it is shown that the offense was committed in more than one county within the same judicial district. On the other hand, rule 18(b)(1) of the Colorado Rules of Criminal Procedure allows such a change of venue if the offense was also committed or an act in furtherance of the offense occurred in the county where the case is to be transferred.
b. H.B. 1042’s evidentiary procedures and the rulemaking power

The threshold question is whether section 407(2) embodies principles of substantive or of procedural law. It has been held in cases of this type that any legislative attempt to create rules of procedure constitutes an intrusion on the power of the supreme court and, thus, would be in violation of the doctrine of separation of powers, unless the enactment were substantive in nature. The distinction between substantive and procedural matters has been drawn fairly clearly: Substantive law creates and regulates rights, whereas procedural law prescribes the method of enforcing and implementing those rights and regulates the steps by which one who has violated the rights of others may be punished. Nevertheless, in many instances it can be extremely difficult to define a given provision as substantive or as procedural; some statutes, such as H.B. 1042, are of mixed substantive and procedural content.

It appears evident on the face of section 407(2) that it is procedural in nature. Thus the basis exists for a legal challenge on the ground that the legislature exceeded its authority in enacting it. However, one significant factor militates against the supreme court’s striking down section 407(2), the fact that there is currently no court rule in effect which would control the matters encompassed in that section. The statute thus creates no actual

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90 Rule Making in Colorado 163-64.
91 Section 407 reads in pertinent part:
(2) In any criminal prosecution under sections 18-3-402 to 18-3-405 ... if evidence [of the victim’s prior sexual conduct] ... is to be offered at trial, the following procedure shall be followed ... .
(Emphasis added.) At this writing, at least one Colorado district court has held section 407 to be procedural. Brief for Defendant in support of Motion to Dismiss at 2, People v. Madrigal. Crim. No. 3965 (Denver Dist. Ct., filed July 8, 1975).
92 The closest parallel which can be drawn between currently used procedure and the newly created evidentiary hearing procedure is the motion in limine (literally, “motion at the outset”). This motion is frequently utilized prior to trial or during trial when a party
conflict with an extant rule of court. A study of decisional law in various states whose constitutions vest the rulemaking power in their supreme courts indicates clearly that, in those cases in which a procedural statute has been successfully attacked on grounds of legislative encroachment on the power of the judiciary, the statute in question has been in conflict with an existing court rule on the same subject. A Colorado case dealing with similar issues was Denver Bar Association v. Public Utilities Commission. In that case the court was called upon to consider the validity of a legislative directive to the public utilities commission to adopt rules and regulations for the conduct of commission hearings. The separation of powers issue involved in the case related to the supreme court's exclusive power to regulate the practice of law and the possibility that the legislative directive constituted an infringement of the judicial prerogative. The court, by "presuming that the Legislature had no intention of infringing upon the court's authority," managed to construe the directive in such a way as to preclude any interference with the power to regulate the practice of law. In doing so, the court said:

In the determination of the qualifications for admission of persons to practice law, and in the regulation and discipline of those licensed to practice law, this Court is vested by the people through the Constitution with the sole power to act. Legislation in any of these areas does not add to or detract from the exclusive authority of this Court. Wherever legislation conforms to our authority, it is gratuitous. Legislation tending to limit the scope of that which constitutes the practice of law would be abortive.

wants to limit or prevent the introduction of evidence on a certain point (for example, cross-examination of a criminal defendant concerning prior felony convictions which defense counsel contends are too remote in time to be admissible). The motion in limine is a creation of the common law; there is no court rule (or statute) in Colorado providing for the procedure.

See, e.g., Johnson v. State, 308 So. 2d 127 (Fla. Dist. Ct. App. 1975) (supreme court rule concerning presentence reports indicates that the matter is within the court's power and any legislative enactment on the subject violates the separation of powers; a rule of procedure promulgated and adopted by the supreme court cannot be amended or preceded by an act of the legislature); Lawrence R. McCoy Co. v. S.S. Theomitor III, 133 N.J. Super. 308, 336 A.2d 80 (N.J. Super. Ct. L. Div. 1975) (court rules extending to matters of practice, procedure, and administration are not subject to overriding legislation).


ld. at 277, 391 P.2d at 470.
It is possible to analogize between the supreme court's exclusive power to regulate the practice of law and its exclusive power to promulgate rules of court procedure. The last two sentences of the above quotation are indicative of the court's probable reaction to a constitutional challenge to section 407(2). There being no preexisting rule of court on the procedure to be followed in a motion to admit evidence presumed inadmissible, the legislation will in all likelihood be found not "tending to limit the scope of" the court's rulemaking power, and will not be struck down on this ground.

2. Legislative Encroachment on Inherently Judicial Functions

a. The evidentiary restrictions

It is a well established principle in Colorado that the power of the state legislature is plenary and only limited by restrictions imposed by the state constitution. In questioning the validity of a state statute, the constitution is examined only to determine whether its passage is prohibited therein. In keeping with this principle, it has been held that the legislature acts within its power when it enacts substantive rules of evidence or when it declares one fact to be presumptive evidence of another. So at first glance it would appear that, in creating by statute the presumption that evidence of a victim's prior sexual conduct is irrel-

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96 See note 92 supra.

97 See 16 C.J.S. Const. Law § 128 n.68.5 (Supp. 1975) and accompanying text. Another approach the court might take in upholding the procedural provisions is that taken by the Maryland Supreme Court in Bowie Inn, Inc. v. City of Bowie, 274 Md. 230, 335 A.2d 679 (1975). There, it was noted that "courts are under a special duty to respect the legislative judgment where legislation is attempting to solve a serious problem in a manner which has not had an opportunity to prove its worth." Id. at 684.


99 See cases cited note 98 supra.


evant in a sexual assault trial, the Colorado legislature is acting within its authority.

However, it must be noted that in H.B. 1042 the legislature has created more than a simple evidentiary presumption; it has attempted to legislate the relevancy of certain evidence in a criminal trial. Does the fact that the key word is "relevancy" require a finding that the legislature is encroaching on the judicial function?102

Determination of the relevancy of evidence in a judicial proceeding is generally considered to be a judicial, rather than a legislative, function.103 It has been suggested that "a legislature may not determine relevancy directly, but only indirectly by defining the crime of rape, and the defenses applicable to it," and that "attempts via legislative fiat to remove discretion from the courts and to rule all such evidence [of a victim's prior sexual conduct] irrelevant and inadmissible must fail."104

In Colorado, determination of the relevancy of this type of evidence in a sexual assault trial was formerly left entirely to the discretion of the trial court. In Olguin v. People105 and Struna v. People106 objections to such questions of the victim as, "Have you ever had any sex experience prior to this time?" were held pro-

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102 16 C.J.S. Const. Law § 104 (1956): "Constitutional government in the United States is distinguished by the care that has been exercised in committing the legislative, executive, and judicial functions to separate departments, and in forbidding any encroachment by one department on another in exercise of the authority so delegated. . . ."

103 16 C.J.S. Const. Law § 104 (1956): "Generally, investigation of the facts involved in a controversy and the determination of their relevancy are matters for the judiciary, and not the legislature . . . ."

104 Note, Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process? 3 Hofstra L. Rev. 403, 418, 426 (1975) [hereinafter cited as Limitations on Evidence]. The quoted material refers to the new Michigan sexual assault law, supra note 2, which conclusively presumes such evidence to be irrelevant except in two limited situations.

105 115 Colo. 147, 170 P.2d 285 (1946).

perly sustained because the questions were so general that any answer would be improper and irrelevant.107

Thus, it would appear that any exercise by the legislature of the power to determine the relevancy of evidence would constitute an encroachment on an inherently judicial function. But the separation of powers in this area has not been strictly enforced. While it has been said that the legislature may exercise judicial powers which are “incident and essential to the discharge of legislative functions”108 and that the legislature may determine that certain evidence is inadmissible in certain cases,109 it has also been held that the legislature cannot wipe out basic and fundamental rules governing the competency of evidence110 and that the legislature may not act in such a way as to prevent the judiciary from exercising its powers.111

Obviously, the law is not clear or precise on this point. Two aspects of the issue are clear, however. One is that it is within the power of the legislature to declare the public policy of the state.112 Clearly, the legislature intends to establish the policy that victims of sexual assaults should be protected from inquiry into their past lives. But the legislature may not implement its policy in a manner which is unconstitutional, e.g., by encroaching on the power of the judiciary.

The other significant aspect of this issue is that the presump-
tion created in section 407(1) is rebuttable. Section 407(2) lays out the procedure for rebutting the presumption of irrelevancy. It is widely agreed that, although the legislature may create an evidentiary presumption, it cannot create a presumption which is conclusive.\textsuperscript{113} The Colorado case of \textit{Garcia v. People}\textsuperscript{114} held that the power vested in the legislature to create presumptions in criminal cases is subject to the qualification that the presumption cannot be made a conclusive one.\textsuperscript{115} Since the presumption of irrelevancy created by the legislature in H.B. 1042 is explicitly made rebuttable, the bill permits the judicial branch to exercise a modicum of discretion and, thus, may narrowly escape being an unconstitutional encroachment by the legislature on this inherently judicial function.

b. \textit{The jury instruction prohibition}

A similar encroachment problem is encountered in relation to the abolition of the Lord Hale instruction in section 408. Does the legislature encroach on judicial territory when it determines what instructions may or may not be given to a jury? Unfortunately, the law is not clear or precise on this point either. It is generally accepted that the determination of the jury instructions which may or may not be proper in a given case is an inherently judicial function.\textsuperscript{116} While the legislature “may regulate the procedure of trial courts with respect to instructions to juries, it cannot abridge the power of the judge to charge the law.”\textsuperscript{117}

While there is apparently no precedent in Colorado for a statutory limitation on the court’s power to instruct the jury, a study of California’s new sexual assault law\textsuperscript{118} may provide some insight into this problem. By amendment of the Penal Code, the California legislature made significant statutory changes in the type of instructions which may be given to the jury in sexual

\textsuperscript{113} 16 C.J.S. \textit{Const. Law} § 128d (1956).
\textsuperscript{114} 121 Colo. 130, 213 P.2d 387 (1950).
\textsuperscript{115} \textit{Id.} at 134, 213 P.2d at 389.
\textsuperscript{116} \textit{See} 16 C.J.S. \textit{Const. Law} § 166 (1956).
\textsuperscript{117} \textit{Id.} § 128g.
\textsuperscript{118} \textit{See} CAL. \textit{PENAL CODE} §§ 1127(d)-(e) (West Supp. 1975). Minnesota’s new law also abolishes a number of formerly used jury instructions, including the Lord Hale instruction and any cautionary instruction concerning the victim’s testimony. Ch. 374, § 8, [1975] Minn. Sess. Laws 1088.
assault cases. One amendment\(^1\) prohibits the giving of former California Jury Instruction 10.06, which stated that the jury could draw the inference that a woman who had previously consented to sexual intercourse would be more likely to consent again. Under the new amendment to the Penal Code, a judge may not instruct that any such inference may be drawn except where there is evidence of prior sexual conduct with the defendant. This amendment also forbids any instruction that prior sexual conduct in and of itself may be considered in determining the credibility of the witness. Another amendment\(^2\) banned the use of the term "unchaste character" in any jury instruction. It is interesting to note, however, that California's Lord Hale instruction was not eliminated or otherwise affected by the recent amendments to the Penal Code.\(^3\)

As of this writing, there has been no reported challenge to the California legislature's power to enact these amendments. In Colorado, the changes wrought by section 408 affect only the Lord Hale instruction,\(^4\) which has operated in the manner of a cautionary instruction: Where the testimony of the victim was largely uncorroborated by other evidence, trial judges often deemed it necessary to "remind" the jury that it is easy to accuse someone of rape, yet difficult to defend against such a charge, and, thus, the testimony of the victim should be viewed with caution.\(^5\) Section 408 prohibits the giving of such an instruction or "any similar instruction."

It is in the interpretation and construction of the word "similar" that the constitutional salvation of this section may lie. The objections which have been voiced to this section center on the proposition that in certain cases, admittedly a small minority, a cautionary instruction regarding the testimony of the victim may be appropriate.\(^6\) Such instructions are frequently given where accomplice testimony or eyewitness testimony is involved.\(^7\)

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\(^2\) Id. § 1127e.
\(^3\) For a thorough analysis of the evidentiary provisions of the new California law, see Note, California Rape Evidence Reform: An Analysis of Senate Bill 1678, 26 Hastings L.J. 1551 (1975) [hereinafter cited as California Rape Evidence Reform].
\(^4\) For explanation of the Lord Hale instruction, see note 60 supra.
\(^5\) Interview with Rollie Rogers, note 107 supra.
\(^6\) Interview with Sherry Seiber, note 107 supra.
\(^7\) Id. See also United States v. Lee, 506 F.2d 111 (D.C. Cir. 1974).
this objection is considered valid, a court may construe the prohibition against "any similar instruction" very narrowly in order to allow an instruction that the jury should "examine with caution the testimony of the victim," as long as the words "because of the nature of the charge" are not used. Thus, if the courts are still permitted, under section 408, to give a cautionary instruction in an "appropriate" case, the judicial function can still be performed, and any legislative encroachment which has occurred may be considered harmless.

B. Constitutionality—the Sixth Amendment—Do the Evidentiary Provisions Violate a Criminal Defendant's Right to Confront the Witnesses Against Him?

If H.B. 1042 survives the constitutional challenges based on the separation of powers, it must face yet another challenge, which may prove insurmountable. In the 1973 case of People v. Smith the Colorado Supreme Court held that the legislature has the power to prescribe new rules or to change existing rules of substantive evidence, "so long as they do not violate constitutional requirements or deprive any person of constitutional rights." 

The evidentiary provisions of H.B. 1042 impose limitations on the defendant's opportunity to cross-examine the victim concerning her prior sexual conduct. In order to do so, the defendant must first submit an affidavit and offer of proof as to the relevancy of such evidence, and the court must find these to be "sufficient" before allowing in camera cross-examination of the victim on the issue of her prior sexual conduct. An inquiry into the constitutional propriety of such a limitation must begin with a

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128 The quoted excerpts are from C.R.S. § 408.

127 At least one state supreme court has concurred in the abolition of the Lord Hale instruction. In State v. Fedderson, 230 N.W.2d 510 (Iowa 1975), the court specifically disapproved the Lord Hale instruction, saying that the jury should not be asked to apply a stricter test of credibility to the victim of a sexual assault than to other witnesses or to victims of other crimes. The court said: "It is a subject for jury exhortation by the defendant's lawyer but not a postulate for instruction by the court." Id. at 515. The "wisdom" of section 408 is apparent; it is only the method of affecting the change which is subject to constitutional attack.


127 Id. at 234, 512 P.2d at 272 (emphasis added).

128 C.R.S. § 407.
close look at the nature and scope of the right to confrontation of witnesses.

1. The Right to Confrontation—*Davis v. Alaska* and Bias Evidence

The sixth amendment to the United States Constitution, made applicable to the states through the fourteenth amend-ment,\(^131\) states:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . \(^132\)

It is established law that the object of the confrontation clause of the sixth amendment is to ensure to a criminal defendant the right of examination and cross-examination of witnesses against him.\(^133\) But how broad is the right to cross-examine adverse witnesses? Is it totally unbridled, or is its scope limited?

The recent Supreme Court decision in the case of *Davis v. Alaska*\(^134\) sheds considerable light on the question of the scope of the right to confrontation. The parallel between the nature and purpose of the limitations on cross-examination involved in that case and the nature and purpose of the limitations imposed by section 407 is evident from the Supreme Court’s opening remarks:

> We granted certiorari in this case to consider whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness’ probationary status as a juvenile delinquent when such an impeachment would conflict with a State’s asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.\(^135\)

The juvenile witness in that case testified that he had seen the defendant at a location near the witness’ own home, where stolen property was found. Defense counsel wanted to introduce the witness’ juvenile record and probationary status solely for the

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\(^132\) U.S. CONST. amend. VI.

\(^133\) Morse v. Wilson, 500 F.2d 1264 (10th Cir. 1974). Wigmore has said:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination . . . which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.


\(^135\) Id. at 309.
purpose of showing the possibility of "hasty and faulty identification of petitioner [the defendant] to shift suspicion away from himself [the witness] . . . ." The trial court refused to permit the introduction of such evidence, thus allowing the juvenile witness' testimony, on cross-examination, that he had never before been interrogated by law enforcement officers, to stand unchallenged. The Alaska Supreme Court upheld the trial court's ruling. In reversing, the Supreme Court said:

We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased . . . . In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender . . . .

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. . . . [T]he State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. In Davis the Supreme Court clearly delivered the message that the right of a defendant to confront and cross-examine adverse witnesses cannot be made to yield to a state's policy interests, at least where a significant issue such as bias is involved. In order to fall directly within the scope of the Davis holding, a limitation on cross-examination must first be an expression of the public policy of the state. Clearly, section 407 was enacted in furtherance of the state's policy interest in protecting victims of sexual assaults from unwarranted probing into their prior sexual activities. Secondly, such a limitation must operate so as to preclude a showing of potential bias on the part of an adverse witness. It is the Court's reliance on characterization of the evidence sought as "bias" evidence that makes the Davis holding difficult to pin down.

136 Id. at 311.
137 Id. at 318-20.
138 See note 112 supra and accompanying text. See also text accompanying note 4 supra.
If the *Davis* holding is to be limited to cases involving bias, it is necessary to consider whether evidence of a victim's prior sexual conduct can be considered to be evidence showing bias on the part of the victim. Bias on the part of a witness has been defined as: "A ground of impeachment; near relationship, sympathy, hostility or prejudice." It includes "[p]artiality, or any acts, relationships or motives reasonably likely to produce it" as well as various types of "self-interest." It is certainly conceivable that, in some sexual assault cases, evidence of the victim's prior sexual conduct might be introduced to show bias on the part of the victim/witness. It follows from the holding in *Davis* that if a defendant in a sexual assault trial seeks to introduce evidence of the victim's prior sexual conduct in order to show the victim's bias, then the state's policy of protecting the victim from unwarranted questioning must yield.

2. The Right to Confrontation—Other Areas of Cross-Examination

In many sexual assault cases bias of the victim per se may not be the issue. Cross-examination concerning the victim's prior sexual conduct in these cases may be for the purpose of showing consent by the victim or to discredit her testimony on direct examination. The question remains whether the right to con-

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111 In order to determine whether section 407 will produce just results in all cases arising under it, it is necessary to hypothesize a case in which the victim is fabricating the charge and the defendant is in fact not guilty. The law must not operate in such a way as to prevent an innocent defendant from being acquitted. If a case arises in which the victim has a history of extramarital sexual relations unknown to her husband and the victim charges her "discovered" partner with sexual assault in order to prevent her husband from learning of her activities, introduction of evidence of her prior sexual conduct would be authorized under *Davis*, in order to "make a record" from which to argue why the victim might have been testifying from motives of self-interest.
142 More impressive considerations than a state's policy interests have been required to yield to sixth amendment demands, e.g., United States v. Nixon, 418 U.S. 683 (1974), in which executive privilege and presidential confidentiality were held to be subordinate to a criminal defendant's sixth amendment rights to confrontation of witnesses and compulsory process.
143 The California law specifically prohibits the use of prior sexual conduct evidence for the purpose of proving consent; the only potential use for such evidence in California is for impeaching credibility. Cal. Evid. Code § 1103 (West Supp. 1975). The laws of Florida and Minnesota specifically permit introduction of such evidence, after an eviden-
frontation extends beyond the area of bias evidence, as enunciated in Davis, to other areas of cross-examination.\textsuperscript{144}

As Justice Stewart's concurring opinion in Davis indicates, the right to confrontation has never been considered to be unlimited:

I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.\textsuperscript{145}

However, at least one case applying Davis has extended its holding considerably. In Ohio v. Cox\textsuperscript{146} the court held:

[A legislative] enactment may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense.\textsuperscript{147}

\textsuperscript{145} 327 N.E.2d 639 (Ohio 1975).
\textsuperscript{146} Id. at 642.
Applying this reasoning, the right to cross-examine a witness concerning certain matters may depend on a judicial determination of materiality of the evidence sought.

It has been argued that evidence of the victim's prior sexual conduct is never material to the issues of consent or credibility.\footnote{See Limitations on Evidence, supra note 104, which takes the position that unless it can be proved that prior sexual conduct is not material to the issue of consent, sexual assault laws such as Michigan's (which completely bars any evidence of prior sexual conduct with two narrow exceptions, see note 149 infra) will be found to be an unconstitutional restriction of a criminal defendant's sixth amendment rights. The question is raised whether a victim's prior sexual history is "probative of her propensity to consent to intercourse." Limitations on Evidence, supra note 104, at 412. That author argues that reputation evidence in today's society cannot be considered to be of any probative value in this regard. Specific prior sexual acts may be a more reliable form of evidence if the complainant's "propensity to have consensual intercourse is dependent on the quality and quantity of her prior sexual experience," id. at 415, but he argues that today such a conclusion cannot be drawn: "For women today, what they have done in the past has no bearing whatsoever on their future decisions." Id. at 414. The author's conclusions are, however, somewhat tentative; he seems to feel that there may be cases in which such evidence might be material to the issues raised.}

Apparently, the Michigan legislature was of this opinion when it enacted its new sexual assault statute. The evidentiary restrictions contained therein require the exclusion of all evidence relating to the victim's prior sexual conduct, with a possible exception made for evidence of the victim's prior sexual conduct with the defendant or evidence of prior acts of intercourse to show the source of any pregnancy, semen, or disease.\footnote{See Michigan's Sexual Assault Law: "[S]tudies indicated that juries are strongly influenced by the behavior of the victim. Despite instructions by the judge, juries often respond as though they were applying the legal theory of assumption of risk." Id. at 225.} Even if a modicum of materiality is granted to such evidence by proponents of laws such as Michigan's, its probative value is said to be clearly outweighed by the prejudicial effect of the evidence on the jury.\footnote{Michigan's Sexual Assault Law 229. The author of the Michigan note compares the exclusion of evidence of the victim's prior sexual conduct to the exclusion of evidence} And, of course, the policy considerations prompting the evidentiary restrictions are given great significance. It is argued that, even though such evidence could be "logically relevant," it may not be "legally relevant."\footnote{MicH. COMP. LAWS ANN. § 750.520j (Supp. 1975).}
On the other side of the issue, it has been argued just as fervently that evidence of the victim’s prior sexual conduct is always material to the issue of consent,\textsuperscript{152} or, even if the defense is not consent, to impeach the credibility of the victim/witness.\textsuperscript{153} There is no clear resolution to this debate. The most reasonable approach would appear to be the individualized approach: The court must view each case in its own factual setting, and then determine whether the probative value of evidence of the victim’s prior sexual conduct is of such potential magnitude that its prejudicial effect on the jury must be considered to be subordinate to a defendant’s right to refute the case against him.\textsuperscript{154} This is the

\textsuperscript{152} Clearly, evidence of a prosecutrix’s past consensual sexual conduct is illustrative of her capacity to consent and at least changes the probability, no matter how slightly, that she might have consented on the occasion in question.

\textsuperscript{153} See generally \textit{California Rape Evidence Reform}. The author recognizes the opinion that unchastity has no bearing on honesty or veracity, but points out that such evidence may be used to prove bias, interest, or motive to fabricate, or to contradict the direct testimony of the victim. See also \textit{Teague v. State}, 208 Ga. 459, 67 S.E.2d 467 (1951), and Hibey. \textit{The Trial of a Rape Case: An Advocate’s Analysis of Corroboration, Consent, and Character}, 11 \textit{Am. Crim. L. Rev.} 309, 328 (1973) [hereinafter cited as \textit{Trial of a Rape Case}].

\textsuperscript{154} The “individualized” approach has gained more support than the two extreme views.

The time has surely come to reject the \textit{automatic} assumption that unchastity is relevant to the issue of consent, but in the laudable effort to minimize the trauma of trial for victims of rape, the pendulum should not swing so far as
approach which should have been taken by trial judges under prior Colorado law, but it has been open to considerable abuse. It was to curb such abuse that H.B. 1042 was enacted.

If the evidence of the victim’s prior sexual conduct is material to an issue in the case, whether its purpose be to show bias, to show consent on the part of the victim, to contradict the victim’s testimony on direct examination, or to prove any other specific and relevant matter, the sixth amendment clearly requires that the defendant be permitted to bring out the evidence on cross-examination. If the value of the proposed evidence is not known, and if the inquiry itself may be highly prejudicial if conducted before the jury, it may be necessary to conduct the cross-examination in camera to make a preliminary determination of the relevancy of the evidence. But it is clear that at least this preliminary determination must be permitted:

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory. . . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.

The clearest expression of the scope of the right to confronta-
tion as it may apply in Colorado is found in *United States v. Jorgenson*, a Tenth Circuit case, in which the court said:

The right to confrontation extends to *areas* of cross-examination. An area which is properly subject to cross-examination cannot be denied the accused. A limitation which prevents cross-examination into an area which is properly subject to cross-examination does constitute reversible error. The characteristic feature in this situation is the complete denial of access to an area which is properly the subject of cross-examination; the *extent* of cross-examination is discretionary with the trial judge [citing cases]. This distinction has long been recognized by this Court.143

Assuming that there are at least *some* sexual assault cases in which the “area” of the prior sexual conduct of the victim will be material to the issues of the case, the inquiry must now be directed toward section 407 in order to determine whether a defendant’s “access” to such evidence is impermissibly restricted.

3. The Right to Confrontation—The Evidentiary Restrictions of Section 407

Section 407(1) creates a presumption that evidence concerning the victim’s prior or subsequent sexual conduct is irrelevant in a sexual assault trial.144 The presumption itself does not necessarily interfere with the defendant’s constitutional rights because it is rebuttable.145 There are two types of prior sexual conduct evidence which are excepted from the presumption and, thus, apparently admissible at trial.146 Any proposed evidence of the victim’s prior sexual conduct which does not fall within these narrow exceptions must first be filtered through the procedures outlined in section 407(2)147 if it is to be admitted at trial.

The threshold requirement for a determination of the relevancy of such evidence is the submission of a motion by the defendant accompanied by an affidavit stating an offer of proof that the evidence of the victim’s prior sexual conduct sought to be introduced is relevant and material to the case.148 This means

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143 451 F.2d at 519-20. See also *Snyder v. Coiner*, 510 F.2d 224 (4th Cir. 1975).
144 See Appendix.
145 See notes 113 & 114 supra and accompanying text.
146 C.R.S. § 407(1).
147 See Appendix.
148 C.R.S. §§ 407(2)(a), (b).
that the defendant must know specifically what that evidence is before being given an opportunity to question the victim about it.\textsuperscript{169} Such knowledge is often difficult, if not impossible, to gain.\textsuperscript{170} For example, if the victim has a history of false reporting of sexual assaults\textsuperscript{171} and if this information is not available through local police or court records (as in cases where no charges were filed or if the false reporting occurred in another state), the defendant may have no other “access” to this “area” of cross-examination than questioning the victim directly under oath. But under section 407(2), the defendant may not question the victim (at trial or in camera) on this subject unless he has first submitted an offer of proof stating the nature of the evidence of which he has no present knowledge! The discovery burden placed on the defendant may be insurmountable, and the evidence left “undiscovered” may be of significant materiality.

Submission to the court of such a motion and affidavit, even if it is possible, does not lead automatically to an in camera confrontation with the victim. Under section 407(2)(c), the court must find that the offer of proof is “sufficient” before setting an in camera hearing.' There are no standards set out for a determi-

\textsuperscript{169} It is possible through a narrow reading of section 407 to interpret it as permitting the questioning of the victim about such evidence at trial, but prohibiting the introduction of extrinsic evidence to show prior sexual conduct. This was not the intention of the legislature—its purpose was to prevent any inquiry concerning prior sexual conduct unless such inquiry had first been ruled admissible by the court. Telephone interview with Ted Bendelow, supra note 4. Furthermore, since the evidence is presumed irrelevant, it can be expected that an objection to any line of questioning in the area of prior sexual conduct would be sustained by the trial judge in the absence of a prior ruling of admissibility.

The new sexual assault laws of Iowa and Minnesota state that no reference may be made to the victim’s prior sexual conduct in the presence of the jury except as their evidentiary hearing procedures permit. IOWA CODE § 782.4 (1975); ch. 374, § 8, [1975] Minn. Sess. Laws 1088.

\textsuperscript{170} Interviewing witnesses, especially the complainant, is not without difficulties, for the prosecutor may insist that defense counsel (or his investigator) identify himself and explain the purpose of the interview. Defense attorneys complain that this introduction permits the witness the choice of refusing to discuss the case, thus depriving them of a most critical means of discovery.

\textit{Trial of a Rape Case} 317 n.33. In practice it has been found that it is often impossible to gain crucial information prior to the time of cross-examination itself. Interview with Sherry Seiber, supra note 107.

\textsuperscript{171} See note 57 supra.

\textsuperscript{172} See Appendix.
nation of sufficiency. Until the Colorado Supreme Court can effectively define by decision the meaning of "sufficient," it may well be that trial judges will differ considerably in determining the sufficiency of the offer of proof, thus producing a serious situation of unequal justice.

The legislatures of Colorado, Michigan, California, and other states have, in enacting their reformed sexual assault laws, erected formidable and unprecedented barriers to a criminal defendant's ability and opportunity to confront and cross-examine the witnesses against him. A few states have taken a more reasoned approach by providing for a pretrial in camera hearing to determine the relevancy of proposed evidence of the victim's prior sexual conduct, without requiring the submission of an affidavit and "sufficient" offer of proof as a prerequisite to such a hearing. In this way the purpose of sex crimes law reform—the protection of the victim from harassing and humiliating questioning directed more toward swaying the jury by insinuation than toward exposing relevant evidence—is achieved, and the defendant's right to confront and cross-examine the witnesses against him is protected. The Colorado approach, however, because of its affidavit and offer of proof provisions, may fail to satisfy sixth amendment requirements.

173 See California Rape Evidence Reform where, in discussing California's new law, the author also points out the lack of indication of what kind of showing is necessary for the offer of proof or of the form of the supporting affidavit. Id. at 1558. The author also notes an additional problem with the affidavit procedure: The prosecutor may reveal the contents to the victim and she "will get a preview of the evidence with which the defense intends to confront her." Id. Certainly in some cases, no matter how few, this will only compound the defendant's difficulties in discovering relevant evidence.


175 In view of the comprehensive language used by the Court [in Davis], it is . . . likely that it would require the state to find some alternative method of encouraging women to report rape other than restricting the defendant's right to cross-examine. California Rape Evidence Reform 1571-72. The Colorado legislators may have been unwittingly drawn into this error by basing the Colorado law partially on Michigan's law. Interview with Richard Wood, supra note 4. As has been noted, the Michigan law requires an affidavit and offer of proof prior to a hearing on the admissibility of evidence of the victim's prior sexual conduct with the defendant or evidence of specific instances of sexual activity for the purpose of showing the source of pregnancy, semen, or disease. See note 149 supra. The Colorado law requires the affidavit and offer of proof prior to a hearing on the admissibility of other types of evidence of prior sexual conduct of the victim. C.R.S.
CONCLUSION

A well-conceived criminal law must achieve the desired result in all cases arising out of the behavior which the law regulates. This means that the law must operate to acquit the innocent as well as convict the guilty. Although it is agreed that changes in the present treatment afforded victims of sexual assaults are urgently needed, state legislatures must not act beyond their constitutional authority and in derogation of constitutional rights in attempting to effect such changes.

H.B. 1042 accomplishes much in the area of reclassification of sexual offenses and elimination of offensive and antiquated terminology. And the effort toward protection of victims from unnecessary humiliation, while it may fall short of legislative expectations in its effect on the reporting rate of sex crimes, does represent an attitudinal change which is long overdue.

It is hoped, however, that the legislature will act as soon as possible to correct the infringement of constitutional rights embodied in section 407 by eliminating the affidavit and offer of proof requirements. By doing so, the legislature could prevent an extended period of uncertainty and case-by-case adjudication concerning the method and extent of permissible limitation on introduction of evidence in a sexual assault trial of the victim's prior sexual conduct.

Elizabeth Lottman Schneider

§ 407. The difference is a significant one: The types of evidence covered by the Michigan procedure would be known to the defendant or discoverable by normal discovery methods; the types of evidence covered by the Colorado procedure would not necessarily be known to the defendant or discoverable by him through any method other than cross-examination of the victim.
APPENDIX

House Bill No. 1042

SECTION 1. Part 4 of article 3 of title 18, Colorado Revised Statutes 1973, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

PART 4

UNLAWFUL SEXUAL BEHAVIOR

18-3-401. Definitions. As used in this part 4, unless the context otherwise requires:

(1) "Actor" means the person accused of criminal sexual assault.

(2) "Intimate parts" means the external genitalia or the perineum or the anus or the pubes of any person or the breast of a female person.

(3) "Physically helpless" means unconscious, asleep, or otherwise unable to indicate willingness to act.

(4) "Sexual contact" means the intentional touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

(5) "Sexual intrusion" means any intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

(6) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration, however slight, is sufficient to complete the crime.

(7) "Victim" means the person alleging to have been subjected to a criminal sexual assault.

18-3-402. Sexual assault in the first degree. (1) Any actor who inflicts sexual penetration on a victim commits a sexual assault in the first degree if:

(a) The actor causes submission of the victim through the actual application of physical force or physical violence; or

(b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or

(c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes the actor will execute this threat. As used in this paragraph (c), "to retaliate" includes threats of kidnapping, death, serious bodily injury, or extreme pain; or

(d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission; or
(e) The victim is physically helpless and the actor knows the victim is physically helpless, and the victim has not consented.

(2) Sexual assault in the first degree is a class 3 felony, but it is a class 2 felony if:
   (a) In the commission of the sexual assault the actor is physically aided or abetted by one or more other persons; or
   (b) The victim suffers serious bodily injury; or
   (c) The actor is armed with a deadly weapon and uses the deadly weapon to cause submission of the victim.

18-3-403. Sexual assault in the second degree. (1) Any actor who inflicts sexual penetration or sexual intrusion on a victim commits sexual assault in the second degree if:
   (a) The actor causes submission of the victim to sexual penetration by any means other than those set forth in section 18-3-402, but of sufficient consequence reasonably calculated to cause submission against the victim's will; or
   (b) The actor causes submission of the victim to sexual intrusion by any means of sufficient consequence reasonably calculated to cause submission against the victim's will; or
   (c) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or
   (d) The actor knows that the victim submits erroneously, believing the actor to be the victim's spouse; or
   (e) At the time of the commission of the act, the victim is less than fifteen years of age, and the actor is at least four years older than the victim; or
   (f) At the time of the commission of the act, the victim is less than eighteen years of age and the actor is the victim's guardian or is responsible for the general supervision of the victim's welfare; or
   (g) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless the sexual intrusion is incident to a lawful search, to coerce the victim to submit; or
   (h) The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.

(2) Sexual assault in the second degree is a class 4 felony, but it is a class 3 felony if the actor inflicts sexual intrusion on a victim by use of such force, intimidation, or threat as specified in section 18-3-402(1)(a), (1)(b), or (1)(c).

18-3-404. Sexual assault in the third degree. (1) Any actor who subjects a victim to any sexual contact commits sexual assault in the third degree if:
   (a) The actor knows that the victim does not consent; or
   (b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or
   (c) The victim is physically helpless and the actor knows that the victim is physically helpless, and the victim has not consented; or
   (d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission; or
(e) At the time of the commission of the act, the victim is less than eighteen years of age and the actor is the victim's guardian or is otherwise responsible for the general supervision of the victim's welfare; or

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless incident to a lawful search, to coerce the victim to submit; or

(g) The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.

(2) Sexual assault in the third degree is a class 1 misdemeanor, but it is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402(1)(a), (1)(b), or (1)(c).

18-3-405. Sexual assault on a child. (1) Any actor who subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.

(2) Sexual assault on a child is a class 4 felony, but it is a class 3 felony if the actor commits the offense on a victim by use of such force, intimidation, or threat as specified in section 18-3-402(1)(a), (1)(b), or (1)(c).

18-3-406. Criminality of conduct. (1) If the criminality of conduct depends on a child's being below the age of eighteen, and the child was in fact at least fifteen years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older.

(2) If the criminality of conduct depends upon a child being below the age of fifteen, it shall be no defense that the defendant did not know the child's age or that he reasonably believed the child to be fifteen years of age or older.

18-3-407. Victim's prior history - evidentiary hearing. (1) Evidence of specific instances of the victim's prior or subsequent sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall be presumed to be irrelevant except:

(a) Evidence of the victim's prior or subsequent sexual conduct with the actor;

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.

(2) In any criminal prosecution under sections 18-3-402 to 18-3-405, or for attempt or conspiracy to commit any crime under sections 18-3-402 to 18-3-405, if evidence, which is not excepted under subsection (1) of this section, of specific instances of the victim's prior or subsequent sexual conduct, or opinion evidence of the victim's sexual conduct, or reputation evidence of the victim's sexual conduct, or evidence that the victim has a history of false reporting of sexual assaults, is to be offered at trial, the following procedure shall be followed:

(a) A written motion shall be made at least thirty days prior to trial, unless later for good cause shown, to the court and to the opposing parties stating that the moving party has an offer of proof of the relevancy and materiality of evidence of specific instances of the victim's prior or subsequent sexual conduct,
or opinion evidence of the victim's sexual conduct, or reputation evidence of the victim's sexual conduct, or evidence that the victim has a history of false reporting of sexual assaults which is proposed to be presented.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall notify the other party of such and set a hearing to be held in camera prior to trial. In such hearing, the court shall allow the questioning of the victim regarding the offer of proof made by the moving party and shall otherwise allow a full presentation of the offer of proof including, but not limited to, the presentation of witnesses.

(d) An in camera hearing may be held during trial if evidence first becomes available at the time of the trial, or for good cause shown.

(e) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim is relevant to a material issue to the case, the court shall order that evidence may be introduced and proscribe [sic] the nature of the evidence or questions to be permitted. The moving party may then offer evidence pursuant to the order of the court.

18-3-408. Jury instruction prohibited. In any criminal prosecution under sections 18-3-402 to 18-3-405, or for attempt or conspiracy to commit any crime under sections 18-3-402 to 18-3-405, the jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given.

18-3-409. Marital exception. (1) The criminal sexual assault offenses of this part 4 shall not apply to acts between persons who are married, either statutorily, putatively, or by common law.

(2) The criminal sexual assault offenses of this part 4 shall apply to spouses living apart, with the intent to live apart, whether or not under a decree of judicial separation.

18-3-410. Medical exception. The provisions of this part 4 shall not apply to any act performed for bona fide medical purposes provided that such act is performed in a manner which is not inconsistent with reasonable medical practices.

(Conforming amendments, effective date and safety clause omitted.)