The following issues are suggested by the two newspaper articles reproduced below:

I) Should the prosecution in a rape case be permitted to offer evidence of prior rapes committed by the defendant? II) Should the defendant be permitted to offer evidence of prior sexual activity by the victim? And III) is there any basis for answering these two questions differently?

A principal hurdle to a prosecutor's efforts to pursue the path suggested in I above are statutes of the type set forth in footnote 2 of the Tassell case (Cal.Evid.Code § 1101) reproduced below. A principal hurdle to efforts to pursue the path suggested in II above are the rape shield laws, one form of which is found in Fed. Rule of Evid. 412, reproduced below.

Tassell presents a debate between then-judges Kaus and Reynoso on the admissibility of evidence offered by the prosecution of prior rapes by the defendant, in light of Cal.Evid.Code § 1101. Who do you think wins the debate?

Please read the material by next Tuesday (Sept. 3) and, by 10:00 a.m. of that day, deposit in my mailbox, with your name, one or two suggested problems, issues, or questions about Tassell that you think warrant discussion.
Prosecutors say Smith victimized three women earlier.

The three women were listed as "additional witnesses," but a spokesman for the Palm Beach County prosecutor's office would not say whether the women would be called to testify or would merely file statements. Citing the judge's restrictions, prosecutors also declined to elaborate.

What Florida Law Allows

Legal experts not connected with the case said that they regarded the new filing as an attempt by the prosecution to bolster its case by establishing that Mr. Smith had a history of similar offenses. Under Florida law, "similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue."

Whether the accusations contained in today's filing would be permitted at the trial would normally be determined at a hearing, whose date has not yet been set.

Neil Sonnett, a prominent Miami lawyer who is former president of the National Association of Criminal Defense Lawyers, said Florida courts had been strict about allowing use of evidence of the type presented today because it "is fraught with the danger of convicting the accused, not of the crime of which he is charged but of a perceived criminal propensity or bad character."

In addition, he said, "even relevant evidence can be excluded if a judge rules it is unduly prejudicial."

In the absence of any formal charges filed at the time of the alleged attacks, it was not clear how the prosecution intends to document the allegations. At a hearing early this month, Ms. Lasch had dismissed as "irrelevant" the question of whether Mr. Smith had engaged in "prior misconduct."
Testimony on Defendants' Past Actions Stirs Disputes

Such evidence about alleged sex-crime victims is often restricted.

By PAUL RICHTER
TIMES STAFF WRITER

WASHINGTON—The revelation that women alleging previous sexual attacks may testify in the William Kennedy Smith rape trial underscores a dramatic shift in criminal law. U.S. courts are becoming far more permissive in allowing evidence about defendants' past actions, while growing ever more restrictive on the histories of alleged sex-crime victims.

Increasingly, judges are allowing juries to consider allegations of past criminal activity by defendants—in some cases even if the accusations were never proved, were never brought to police or involve events that occurred decades earlier.

At the same time, states have moved ever more strongly to bar evidence involving the past actions of alleged sex-crime victims. Now, more than 40 states bar such evidence in most cases; some states, such as Florida, prohibit descriptions of clothing worn by the victims.

The admissibility of such evidence is an explosive issue, for talk about past actions can quickly turn juries against defendants or victims.

In the case of defendants, "They start to think, 'This is a bad guy, we're going to punish him,' even if the acts were committed years ago," says Paul H. Rothstein, law professor at Georgetown University and a specialist in sex-crime law. "This is very controversial. . . . We argue about it all the time."

While few argue that the restrictions on evidence about victims' histories are not well-founded, some lawyers contend that the growing disparity in admissibility of evidence is tilting the tables too far against defendants in sex-crime cases.

John F. Banzhaf III, a law professor at George Washington University, says that the consequences may become apparent in the Smith case. Smith, the nephew of Sen. Edward M. Kennedy (D-Mass.), is accused of raping a 29-year-old woman at the Kennedys' Palm Beach estate March 30.

If Smith's defense team is barred from introducing evidence about the alleged victim's past, while the prosecution is permitted to take evidence from the three women who claim he once assaulted them, "an issue of fairness, or even sex discrimination, could be raised," said Banzhaf.

At this point, it is not at all clear how Florida state court Judge Mary Lupo will rule on the testimony of the three women, one of whom claims to have been raped by Smith, and two of whom say that Smith attacked them sexually.

Hearings on whether to admit the evidence are expected to be lengthy and have yet to be scheduled. The judge is expected to hold a separate hearing on the key issue of what evidence the defense can introduce on the alleged victim's past.

But even if one or two of the witnesses are allowed to testify, it could have a decisive effect on the case, says Rothstein. "The evidence is so powerful that if the judge lets it in, Smith might see the handwriting on the wall" and seek to plead guilty to a misdemeanor charge of battery, Rothstein says.

Federal law bars using evidence of past crimes to illustrate the defendant's "character or propensity." But it permits the use of such evidence if the past deeds were closely similar to the alleged act and shed light on the defendant's "motive, intention, or plan," Rothstein said. The essence of the federal law has been adopted by most states, including Florida.

Over the past several decades, judges have been increasingly lenient in interpreting this rather vague language to allow all sorts of past accusations to be brought before juries.

So while the Smith case is by no means decided, "there are now so many exceptions to the rules that a clever prosecutor can almost always get the evidence admitted," Rothstein said.

The growing tendency to admit such evidence is based in part on the longstanding legal supposition that a person who has committed one crime is at least slightly more likely to commit more.

In contrast, the increasing reluctance to admit information on the histories of sex crime victims is based on a legal supposition that a woman is not more likely to consent to a sex act simply because she has consented to earlier ones.

The tightened laws also reflect public concern that a victim's character should not be attacked in the course of a sex-crime trial. They are also intended to encourage more sex-crime victims to file charges.

Many lawyers say that judges have become more lenient in admitting evidence about defendants in recent years, partly because of rising concern about crime.

"The philosophy is to leave it to the jury to decide whether the stuff has any merit," Banzhaf said.

The courts' tendency to allow evidence about allegations of past offenses by sex-crime defendants, violates their clients' Sixth Amendment guarantee to a fair trial, many defense lawyers contend. "This is one of the ways that the entire judicial system is moving away from the rights of the accused," said Richard Sharpstein, a Miami criminal defense attorney.