1973

Comments

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation
Comments, 64 J. Crim. L. & Criminology 56 (1973)
In 1957 the United States Supreme Court abrogated the absolute nondisclosure privilege of a government informer. Roviaro v. United States held that a defendant is entitled to disclosure of an out-of-court informer’s identity when his identity or the contents of his communication is relevant and helpful to the defense or necessary to a fair determination of the cause. The Court applied a balancing test, rather than stating a rigid requirement of disclosure. Roviaro’s balancing test was subsequently applied regardless of whether the informer appeared as a state witness.

Then in 1968, Smith v. Illinois presented the Court with a witness-informer who refused to give his true name or address at trial. The Court held that the failure to disclose, where the informer was a principal prosecution witness, his testimony uncorroborated, and his credibility at issue, denied the defendant his sixth amendment right to confrontation. Roviaro, stated the Court, does not apply where the informer appears as a state witness. Since then, the Smith test of credibility has been increasingly applied in place of the Roviaro balancing standard. The new Federal Rules of Evidence go further still and require absolute disclosure whenever an informer appears on the witness stand. This comment examines the recent history of the informer privilege, focusing on the conflicting interests of public policy in effective law enforcement and protection of the rights of the accused. This comment argues for a return to the Roviaro balancing test: such a test is appropriate to apply to the informer privilege whether or not the informer appears as a state witness.

INTRODUCTION

The role of the government informer has been recognized since common law times. Private citizens or paid police employees whose contacts with the underworld provided access to information about crimes were encouraged to report their information to the authorities. As a result of this practice, a privilege developed to prevent the disclosure of government informers in a criminal trial. The privilege belongs to the government, not the informer, and the policy behind the privilege is to protect the informer and thus encourage private citizens to report crimes to police.

"Informer" as used herein means any person who discloses information of violations of the law to police, and is used interchangeably with "informant."


What is usually referred to as the informer’s privilege is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance of the public interest in effective law enforcement.

In Roviaro v. United States, 353 U.S. 53, 59 (1957), the Court stated the Court, does not apply where the informer appears as a state witness. Since then, the Smith test of credibility has been increasingly applied in place of the Roviaro balancing standard. The new Federal Rules of Evidence go further still and require absolute disclosure whenever an informer appears on the witness stand. This comment examines the recent history of the informer privilege, focusing on the conflicting interests of public policy in effective law enforcement and protection of the rights of the accused. This comment argues for a return to the Roviaro balancing test: such a test is appropriate to apply to the informer privilege whether or not the informer appears as a state witness.

2 Id. at 60–61.
3 Id. at 62.
4 See cases cited note 33 infra.
5 390 U.S. 129 (1968).
6 Id. at 131. "In all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.
7 390 U.S. at 133 n.8.
8 See cases cited note 54 infra.
At common law the privilege of nondisclosure was absolute. Early cases, both English and American, prevented the defendant from ascertaining an informer’s identity, often recognizing a governmental right to withhold his production at trial if the informer was not necessary to prove the state’s case. Recently several jurisdictions have upheld this right. As a result of the nondisclosure cited as WIGMORE). Professor Wigmore comments favorably on the public policy need for nondisclosure of informers:

A genuine privilege, on ... fundamental principle..., must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged if the informer’s identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social relations and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.

That the government has this privilege is well established, and its soundness cannot be questioned.

8 WIGMORE § 2374.

See also C. McCORMICK, EVIDENCE § 148 (1954); J. MOORE, FEDERAL PRACTICE 1584–86 (2nd ed. 1963).


11 In Rex v. Akers, 170 Eng. Rep. 850 (1790), Lord Kenyon held that “the defendant’s counsel have no right nor shall they be permitted to inquire the name of the person who gave the information of the smuggled goods.”

12 See, e.g., Scher v. United States, 305 U.S. 251, 254 (1938) (a federal officer who has made an arrest following a tip as to a violation of a federal law may not in a prosecution for such violation be required to reveal the identity of his informant, where this is not essential to the defense); Cannon v. United States, 158 F.2d 952 (5th Cir. 1946), cert. denied, 330 U.S. 839 (1947); United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945); McNes v. United States, 62 F.2d 180 (9th Cir. 1933), cert. denied, 288 U.S. 616 (1933); Gootz v. United States, 39 F.2d 903 (5th Cir. 1930); Mitrovich v. United States, 15 F.2d 163 (9th Cir. 1926); Ely to Moss, 728 F. 123 (4th Cir. 1921); People v. Gonzalez, 141 Cal. App. 2d 504, 297 P.2d 56 (1956) (failure to disclose the identity of out-of-court police informant was proper where identity could not have proved the accused innocent and might have had adverse effect on public policy.)

13 See, e.g., Williams v United States, 273 F.2d 781 (9th Cir. 1959), cert. denied, 362 U.S. 951 (1959); privilege, the use of government informers in enforcing laws—particularly liquor, vice, and narcotics—became widespread.

Prior to 1957, many jurisdictions upheld the common law nondisclosure privilege, except where the defendant was able to show undue prejudice. For example, in United States v. Li Fat Tong, the Second Circuit affirmed a conviction for wilfully transporting and concealing opium. The trial court’s refusal to disclose the name of the informer who provided information leading to the defendant’s arrest was held not to constitute error absent a defense showing of necessity. In Cannon v. United

United States v. Gray, 267 F.2d 105 (7th Cir. 1959); Eberhart v. United States, 262 F.2d 421, 422 (9th Cir. 1958); Washington v. United States, 258 F.2d 696 (D.C. Cir. 1958); People v. Aldridge, 19 Ill. 2d 176, 166 N.E.2d 563 (1960), cert. denied, 364 U.S. 873 (1960); People v. Brown, 73 Ill. App. 2d 243, 219 N.E.2d 534, 535 (1966) (state has no duty to offer the testimony of a witness whose existence the state denies.) But see United States v. Oropeza, 275 F.2d 558 (7th Cir. 1960).

17 See Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 YALE L.J. 1091, 1093 (1951). Police informers are most often used in narcotics prosecutions. Apprehension of narcotics offenders is a major concern of law enforcement officers, especially when such offenders may supply information which might lead to the arrest of large-scale dealers and distributors. Many possessors and sellers of narcotics are arrested on the basis of information supplied the police by informers. Such informers, usually convicted criminals, often drug addicts themselves, are paid for their information or given immunity from prosecution or lesser sentences for their own offenses. See M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT (1960); Gutteman, The Informer Privilege, 58 J. CRIM. L. & C.J. 32, 33 (1967); Comment, An Informer’s Tale: Its Use In Federal and Administrative Proceedings, 63 YALE L.J. 206 (1953). The informer privilege protects the informer from possible harm and also insures a continuous source of information to the police.

The most sophisticated method of acquiring information necessary for arrest and prosecution of a suspected narcotics offender is the police-initiated “controlled buy.” See Gutteman, supra, at 54, 35–36. In a typical controlled buy, a paid police informer is thoroughly searched, given marked money, and followed to the pre-arranged location where the sale is to take place. Upon police surveillance, the informer purchases narcotics with the marked bills. The police immediately test the narcotics, arrest the defendant, and recover the marked money. Generally, both the informant and the corroborating police officer testify at trial for the state.


18 152 F.2d 650 (2d Cir. 1945).
Sorrentino v. United States, although the defendant was entitled to disclosure, his conviction for sale and possession of narcotics was affirmed, since he knew the informer’s identity and failure to disclose was thus harmless error. In Partomene v. United States, the Fifth Circuit held disclosure to be essential to the defense and reversed a conviction for illegal sale of narcotics. And in United States v. Conforti, the Seventh Circuit held that where the informer is a transactant in the possession of counterfeit notes and his credibility is at issue, his identity must be disclosed; however, the conviction was affirmed because the defendant had not properly inquired into the matter.

WHEN THE INFORMER DOES NOT TESTIFY: ROVIARO

The use of police informers and the extensive invocation of the informer privilege generated an outcry from defense lawyers which reached the ears of the Warren Court. In Roviaro v. United States, the Supreme Court held that when the identity of an informer or the contents of his communication is relevant and helpful to the defense or is essential to a fair determination of the cause, the state’s privilege must give way.

In Roviaro, the defendant was convicted of knowingly possessing and transporting heroin which was unlawfully imported. The informer, “John Doe”, purchased narcotics from the defendant while a police officer was hidden in the trunk of the informer’s car and listening to the transaction. John Doe was never produced at the trial.

The Supreme Court reversed Roviaro’s conviction, holding that the failure of the trial court to require disclosure was reversible error where the informer was a transactant in the crime, did not appear to testify at trial, and might have been a material defense witness on the issue of guilt. The Court invoked a balancing test to determine when denial of disclosure violated fundamental fairness: if the informer’s identity or his communication is material to the defense or essential to determine the defendant’s innocence or guilt, disclosure is required. But,

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors.

Thus, under the Roviaro test, if the informer was a participant in the crime or if he is the primary state witness, his disclosure is material and will be compelled upon such a motion by the defense.

19 158 F.2d 952 (5th Cir. 1946), cert. denied, 330 U.S. 839 (1947).
20 163 F.2d 627 (9th Cir. 1947).
21 221 F.2d 582 (5th Cir. 1955).
22 200 F.2d 365 (7th Cir. 1952), cert. denied, 345 U.S. 925 (1953); See also United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); United States v. Blich, 45 F.2d 627 (D. Wyo. 1930); Smith v. State, 169 Tenn. 633, 90 S.W.2d 523 (1936).
24 The courts have determined that this refers to the question of the defendant’s guilt or innocence. See, e.g., McCray v. Illinois, 386 U.S. 300, 305 (1967); Ruggendorf v. United States, 376 U.S. 528 (1964); United States ex rel. Coffey v. Fay, 344 F.2d 625, 633 (2d Cir. 1965).
25 353 U.S. at 60–61. Accord, Jencks v. United States, 353 U.S. 657, 672, 681 (1957) (“A criminal action must be dismissed when the Government on the ground of privilege elects not to comply with an order to produce for defendant’s inspection and admission in evidence relevant statements or reports in its possession of government witnesses relevant to their trial testimony . . . . The government has the burden to decide whether to produce state secrets or dismiss the prosecution.”)
Roviaro places the burden of showing materiality on the defendant. In attempting to implement the decision, both state and federal courts sought to balance the interests of the state and the accused. Little uniformity was achieved. Roviaro often has been limited to its facts and disclosure has been denied unless the informer was a participant in or witness to the transaction. However, the privilege disclosure to the defendant as a controlling variable which would tip the balance toward requiring disclosure.

The decision was based upon a fourteenth amendment due process notion of fairness, not the sixth amendment confrontation right. However, the Court noted that John Doe was the only witness material to the defense under the circumstances, and that he was needed at least for the opportunity of cross-examination, since his testimony might have disclosed entrapment of the defendant. 353 U.S. at 64.

Although the holding dealt with disclosure rather than disclosure, not production of a witness, Roviaro has been applied to compel production of an available informer which the state does not desire to call as a witness. People v. Scott, 259 Cal. App. 2d 268, 66 Cal. Rptr. 257 (1968); Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958); People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958). Once the Roviaro standard of materiality has been met, only disclosure is required to avoid dismissal of the prosecution's case.

In California, for example, the privilege was upheld in People v. Perez, 189 Cal. App. 2d 526, 11 Cal. Rptr. 456 (1961) (rev'd on other grounds); People v. Hernandez, 188 Cal. App. 2d 248, 10 Cal. Rptr. 267 (1961); People v. Williams, 175 Cal. App. 2d 774, 1 Cal. Rptr. 44 (1959); disclosure was required in cases cited in note 32 supra. The courts attempted, however, to decide each case on the issue of materiality of disclosure to the defense.


Federal decisions upholding the informant privilege after Roviaro include: Lewis v. United States, 385 U.S. 206, 210 (1966) (rule virtually prohibiting the use of informers would "severely hamper the Government" in enforcement of the narcotics laws); Lammon v. United States, 381 F.2d 858, 861 (9th Cir. 1967) cert. denied, 389 U.S. 1041 (1968) (mere speculation that the informer might possibly be of some assistance is not sufficient to overcome the public interest in the protection of the informer); Ruiz v. United States, 380 F.2d 17 (9th Cir. 1967), cert. denied, 389 U.S. 993 (1967); Ramsey v. United States, 332 F.2d 875, 879 (8th Cir. 1964); Bass v. United States, 326 F.2d 884, 890 (8th Cir.), cert. denied, 377 U.S. 905 (1964); Bruner v. United States, 293 F.2d 621 (5th Cir.), cert. denied, 368 U.S. 947 (1961); Miller v. United States, 273 F.2d 279 (5th Cir. 1959), cert. denied, 362 U.S. 928 (1960); Peleg v. United States, 267 F.2d 781 (6th Cir. 1959); United States v. Rich, 262 F.2d 415 (1959); United States v. Carminati, 247 F.2d 640 (2d Cir.), cert. denied, 355 U.S. 883 (1957).

Protecting the informer's identity usually gives way when the defense of entrapment is at issue.34

When The Informer Testifies: Smith

Although Alford v. United States35 had held in 1931 that the right to cross-examination included the "identification of the witness with his environment" and that refusal of the court to require a witness to divulge his address might be prejudicial error,36 prior to 1968 no court had applied Alford to the situation when an informer testified as a state witness.37 In Pointer v. Texas38 the Supreme
Court laid the groundwork for such an extension of Alford by holding that the sixth amendment right to confrontation, which includes the right of cross-examination, is a fundamental right essential to a fair trial and is made obligatory on the states through the fourteenth amendment.\(^{39}\)

In Smith v. Illinois\(^{40}\) the Supreme Court was faced with a situation where a police informer testified for the state at trial, but refused to divulge his true name or address to the defense.\(^{31}\) Without reference to Roviaro,\(^{42}\) the Court further limited the informer privilege, holding that where the informer’s credibility is the main issue in dispute, the right of confrontation requires the disclosure of the witness-informer’s true name and address.\(^{43}\) In Smith the defendant was convicted of the unlawful sale of narcotics.\(^{44}\) The informer, “James Jordan”, purchased a bag of heroin from the defendant with police-marked money.\(^{45}\) He testified at trial as the principal prosecution witness, giving a false identity.\(^{46}\) Because his testimony was uncorroborated, the accounts of the transaction by the defendant and the informer were substantially different, and the relative credibility of the defendant and the informer were at issue, the defense moved for disclosure of the informer’s true identity.\(^{47}\)

Citing its decision in Alford v. United States and in Pointer v. Texas, the Supreme Court reversed the conviction, holding that the defendant was deprived of his confrontation right under the sixth and fourteenth amendments.\(^{48}\) In broad language, Justice Stewart stated,

[When the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross examination must necessarily be to ask the witness who he is and where he lives. The witness’ name and address open countless avenues of in-court examination not bound to allow what on its face had no bearing on the witness’s credibility; the question was not inevitably and patently material. The situation was thus quite different from that in Alford . . . .

\(^{57}\) F.2d at 166.
\(^{38}\) 380 U.S. 400 (1965).
\(^{39}\) Id. at 403.
\(^{40}\) Id. at 419 (1968).
\(^{41}\) Id. at 30-31.
\(^{42}\) Id. at 133 n.8. The Court stated that Roviaro was inapplicable, since in that case the government informer was not a witness for the prosecution, a position with which this author disagrees.

Mr. Justice White, joined by Mr. Justice Marshall, concurring, argued that inquiries which would endanger the witness are not within the bounds of proper cross-examination. However, in Smith, the prosecution had not carried its burden of showing such danger.\(^{50}\)

The result of the Smith decision was to extend Roviaro’s disclosure requirement as to an informer’s identity beyond transactants and witnesses of the crime to any informer whose credibility was in question, regardless of the materiality of his testimony to the defense. No longer was it necessary for the defense to show the materiality of the disclosure; it had only to request identification when the testimony was uncorroborated.

The credibility requirement of Smith approaches one of absolute disclosure for the witness-informer. For example, no informer’s testimony in a controlled narcotics buy\(^{51}\) can be completely corroborated by the police. Thus, the Court uses the disclosure requirement either to bar testimony which would otherwise reach the jury or to break the informer’s cover.

While the facts in Smith were not substantially different from those in Roviaro, the Court’s holding was broader: the balancing test of materiality was abandoned for one of the informer’s credibility. Since a portion of the informer’s testimony was uncorroborated—that of the illegal sale itself—there is little doubt that, applying the Roviaro test, disclosure would have been required. Yet the Court went beyond the Roviaro standard to reverse the conviction. Thus, the burden on the defense to show materiality, established in Roviaro, has shifted to the state to show a reason why disclosure should be refused.\(^{52}\)

\(^{49}\) Id. at 131.
\(^{50}\) Id. at 133.
\(^{51}\) See note 17 supra.
\(^{52}\) 390 U.S. at 130 n.3.
\(^{53}\) Mr. Justice White, concurring, stated:

In Alford v. United States, 282 U.S. 687, 694 (1931), the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness. 390 U.S. at 133. Mr. Justice Harlan, dissenting, was of the opinion that the appellant’s writ of certiorari was improvidently granted, and that the record raised doubts that the appellant was denied information he did not already have. Id. at 134.
SHOULD THERE BE A DIFFERENT RULE?

State and federal courts have generally followed Smith, requiring disclosure of informers unless the government can show a danger to their personal safety.\(^6\) The Second and Seventh Circuits are notable exceptions, however. These circuits favor application of the Roviario balancing test.

The Second Circuit, in five cases since Smith was decided, has refused to overturn convictions in all five where disclosure of a government witness’ identity or address or both were denied the defendant at trial.\(^6\) The decision in United States v.


\(^5\) See the following federal cases:


\(^6\) United States v. Kaufman, 429 F.2d 240 (2d Cir.), cert. denied, 400 U.S. 925 (1970); United States v. Persico, 425 F.2d 1375 (2d Cir.), cert. denied, 400 U.S. 869 (1970); United States v. Marti, 421 F.2d 1263 (2d Cir. 1970), rev'd on other grounds; United States v. Baker, 419 F.2d 83 (2d Cir. 1969), cert. Persico\(^5\) typifies the court’s reasoning in all five decisions. The defendant, convicted of robbery of interstate merchandise, argued that the court’s refusal to allow disclosure of the addresses of two government witnesses violated his sixth amendment right to confrontation under Smith v. Illinois and Alford v. United States. The Second Circuit held that no violation of the defendant’s confrontation right had occurred where (1) the informers’ lives had been threatened, (2) the witnesses were well-known to the defendant who had an adequate opportunity to inquire into their background on cross-examination and (3) the defense showed no particularized need for disclosure.\(^7\)

The Seventh Circuit has dealt with the witness-informer question in eleven cases,\(^8\) and has upheld the informer privilege in nine of them. Following the Seventh Circuit’s affirmation of the defendant’s conviction for possession and sale of narcotics,\(^9\) the Supreme Court vacated and remanded United States v. Garafalo,\(^6\) in light of Smith; on remand the Seventh Circuit reversed.\(^1\) Since then, that court has refused to extend Smith, consistently applying Justice White’s exception when the informer’s life appears to be in danger.\(^2\)

\(^7\) The Fifth
Circuit may also be returning to the Roviaro approach.

In a recent decision, United States v. Alston, the Fifth Circuit affirmed a conviction for the illegal sale of heroin, holding that the trial court properly refused a defense request for disclosure of a government agent-witness' present address, when his life and his family's safety might have been in danger.

...[I]t appears to us that the purpose of Alford/Smith was to safeguard the opportunity for a meaningful and open cross-examination, not to require that a witness always divulge his or her home address. Alford and Smith do not erect a per se requirement that a witness's home address be divulged upon demand.64

Nonetheless, some states have enacted the Smith rationale into their criminal discovery procedures, and the Federal Rules of Evidence abolish the privilege of an informer by requiring absolute disclosure when he testifies as a witness.65

The Supreme Court's distinction between Roviaro and Smith—that one decision involves an out-of-court and the other an in-court informer—seems hollow, since in each case the issue was the same: weighing the government's privilege against the defendant's need for disclosure of the informer's identity and address. Many courts have applied a uniform rule to both situations, but they disagree upon which rule should be applied. Some apply the sixth amendment confrontation requirement addressed in Smith to achieve disclosure of informers in all cases.66 Others, recognizing the need to protect the informer have continued to apply Roviaro's balancing standard whether or not the informer testifies.67 These Courts argue that uncorroborated testimony is not by itself inadmissible, but should go to the trier of fact for determination of its credibility. Uncorroborated testimony of a witness-informer should not require absolute disclosure in cases where such disclosure is not material to the defense; the burden should remain on the defense to establish a minimum level of materiality before disclosure is allowed.68

In two cases dealing with the sixth amendment right to confrontation, the Supreme Court has recognized exceptions for admitting hearsay testimony. California v. Green held that the confrontation clause is not violated by admitting a declarant's out-of-court statements as long as the declarant is testifying as a witness and subject to full and effective cross-examination. Dutton v. Evans held that a Georgia statute which admitted a co-conspirator's out-of-court statement inculpating the defendant did not violate the right to confrontation. A state may enact a co-conspirator hearsay exception different from the federal standard. Perhaps a similar exception to the confrontation right is necessary where disclosure might subject the informer to harm, but would not be material to the defense.

Mr. Justice Harlan, concurring in both Green and Dutton, argued that the sixth amendment right to confrontation does not necessarily include the right to cross-examination, but only requires that the government produce its available witnesses. He would apply a fourteenth amendment due process standard to cases involving the defendant's right to cross-examination. Irrespec-

64 See cases cited note 54 supra.
65 See cases cited note 33 supra.
69 Id. at 83.
70 399 U.S. at 172.
71 400 U.S. at 93.
72 The confrontation clause of the sixth amendment reaches no farther than to require the prosecution...
tive of whether the confrontation clause includes the right of cross-examination, many courts have since suggested that a broad, effective cross-examination may be had by the defendant without ordering disclosure of the informer’s identity or address.27

The Competing Interests

In balancing the public interest in law enforcement against the defendant’s right to prepare an adequate defense, two competing dangers are involved: danger to the informer and danger to the defendant. The danger of disclosure to the safety of the informer was recognized by Mr. Justice White in his concurring opinion in Smith.29 He would limit nondisclosures to inquiries which tend to endanger the witness and are not within the bounds of proper cross-examination. Many juris-

dictions, by court decision or by statute, employ an in camera hearing to determine the probable danger to the informer by requiring his disclosure. Under the Roviaro standard the possible danger to the informer is a factor to be considered in the balancing test and must be weighed against the materiality of disclosure to the defense.

The primary danger which the privilege poses to the defendant is the absence of protection from entrapment by police and informer.30 Entrapment may be induced by the informer without the police’s knowledge or consent; thus the need exists for absolute police surveillance and corroboration of the informer’s testimony as required by Smith. Disclosure has little practical effect on either impeachment in the courtroom or investigation outside when there has been extensive cross-examination of the informer as to his background and association with the accused, but it is necessary to support a defense of entrapment. If properly carried out, police surveillance of an informer to establish a complete chain of custody of the evidence and provide absolute corroboration of an informer’s testimony could render his identification useless to the defense. Unfortunately, such intensive police surveillance is uncommon, and entrapment may occur against innocent defendants.31

The Return To Roviaro: Exceptions To Smith

An exception to the Smith requirement of disclosure for a failure of corroboration is People v. Smith v. Illinois, 300 U.S. 129, 133 (1966) (White and Marshall, J., concurring); United States v. Alston, 460 F.2d 51 (6th Cir. 1972); cases cited notes 55 and 58 supra.

Proponents of Smith might ask if production of the informer at trial does not reveal his identity to the defense and subject him to possible harm regardless of whether his true name and address are disclosed. In a public trial in a small town such production might aid a venal defendant in determining the informer’s whereabouts. In the smaller community, the narcotics informer may be used only once—to facilitate a mass arrest. He is the transactant and chief witness, and often identifiable to all defendants. No anonymous undercover agents exist to corroborate his testimony or protect his privilege. Production alone may reveal his identity. Although the need for informers is not as great in small towns, the state ought to be permitted both to refrain from disclosure where 1) the witness-informer’s life is in danger and 2) the defendant cannot show the materiality of his disclosure, and to refrain from production at all when the informer’s testimony is not necessary to the prosecution’s case.

In large cities, where the interest in the informer privilege is arguably greater, the privilege coupled with police protection prevents the defendant or his associates from locating the informer outside of the courtroom. Thus, the denial of disclosure of his true name and address is important, notwithstanding production at trial. Another question half-seriously raised is whether a mask or bag placed over a witness-informer’s head violates the defendant’s right to confrontation.
brief at 6-10.
nied.
undercover policeman by feigning sickness and with-
that the informer had induced him to sell drugs to the
Brief for Defendant at 10-11. The defendant aigued
unreported opinion of April 25, 1972.
United States
Appeals for the Seventh Circuit affirmed the denial,
corpus. On March 27, 1972, the United States Court of
District of Illinois denied a petition for a writ of habeas
denied,
The defense also argued that the trial judge had
entered without an
name and address for his own safety. The order was
erroneously ordered the informer not to divulge his
The defense argued that such disclosure was necessary to its
affirmative defense of
mony was, therefore, subject to impeachment."
entrapment
The defendant was introduced by the informer,
plain clothes policeman, who made three subsequent
controlled purchases from the defendant and
and was the state’s primary witness. The defense ar-
that the informer was in any
entry right and the dictates of
mony was corroborated by another witness.9 The
former to disclose his true name and address vio-
defendant’s argument that the failure of the in-
their was not the principal prosecution wit-
ien to form an opinion as to his credibil-
The jury was adequately informed about the in-
and current address, was known to the defendant.

The defendant's knowledge of and association with
Abbott.1
here the defendant’s conviction for illegal
sale of heroin was affirmed, notwithstanding the
defendant’s argument that the failure of the in-
former to disclose his true name and address viol-
ated the defendant’s sixth amendment confronta-
tion right and the dictates of Smith v. Illinois.87
The defendant was introduced by the informer,
Harry Schwartz, a known addict, to “Danny”, a
plain clothes policeman, who made three subse-
quent controlled purchases from the defendant and
was the state’s primary witness.88 The defense
argued that such disclosure was necessary to its
affirmative defense of entrapment89 since the pros-
cection and defense accounts of the facts concerning
the transaction differed, and the informer’s tes-
imony was, therefore, subject to impeachment.90
The defense also argued that the trial judge had
erroneously ordered the informer not to divulge his
name and address for his own safety. The order was
entered without an in camera showing by the state
that the informer was in any danger.91
The state argued that Smith did not apply where
the informer was not the principal prosecution wit-
ness, his credibility was not at issue, and his testi-
mony was corroborated by another witness.92 The
Illinois appellate court held that:
[T]he extent of cross-examination of the informer
with respect to his correct name and address was
within the sound discretion of the trial court, and
the court exercised reasonable judgment in sustain-
ing the objection of the State. The informer’s
background, with the exception of his true name
and current address, was known to the defendant.
The jury was adequately informed about the in-
former so as to form an opinion as to his credibil-
ity.93
86 Id. at 468-69, 249 N.E.2d at 678. On April 9,
1971, the United States District Court for the Northern
District of Illinois denied a petition for a writ of habeas
corpus. On March 27, 1972, the United States Court of
Appeals for the Seventh Circuit affirmed the denial,
United States ex rel. Abbott v. Twomey, 460 F. 2d 400
(7th Cir. 1972). The Seventh Circuit subsequently de-
 nied appellant’s petition for rehearing en banc in an
unreported opinion of April 25, 1972.
87 110 Ill. App. 2d at 466, 249 N.E.2d at 677.
88 Id. at 464, 249 N.E.2d at 676.
89 See notes 82-84 supra.
90 110 Ill. App. 2d at 469-70, 249 N.E.2d at 678-79.
Brief for Defendant at 10-11. The defendant argued that
the informer had induced him to sell drugs to the
undercover policeman by feigning sickness and with-
drawal symptoms, an allegation which the state de-
ed.
91 Brief for Defendant at 16.
92 110 Ill. App. 2d at 468, 249 N.E.2d at 678. State’s
brief at 6-10.
93 110 Ill. App. 2d at 469, 249 N.E.2d at 678.

The court stated that the defendant was ade-
quately informed about the informer’s background
to explore the avenues of in-court examination and
out-of-court investigation described in Alford v.
United States, and upheld the trial court’s deter-
mination that the informer’s life was in danger.94
The court found that disclosure of the informer’s
true name and address would not add to the de-
fense when it had already established on cross-ex-
amination that the informer was an addict and a
convicted felon.95 These disclosures, reasoned the
court, were sufficient background to establish the
question of his credibility in the minds of the jury.96
The defendant’s knowledge of and association with
the informer were sufficient to identify him with
his environment for the purpuse of investigation,
cross-examination and impeachment.97
While noting the factual differences between
Smith and Abbott,98 the decision did not discuss the
three distinctions posed by the prosecution—that
the informer was not the primary state witness,
that his credibility was not at issue, and that his
testimony was corroborated. The court cited Smith
v. Illinois, but decided the case on the basis of ade-
quate available evidence to reach the jury on the
issue of the informer’s credibility, without requiring
disclosure. Implicit in the court’s opinion, although
it did not discuss Roviaro, is the notion that, in
Abbott, disclosure of the informer’s identity was not
material to the defense.99 Thus, disregarding the
Supreme Court’s distinction of the two cases on the
basis of whether the informer appears as a state
witness, the reasoning of the decision is closer to
the rationale of Roviaro than that of Smith. The
Illinois appellate court in effect applied the
Roviaro test by basing the disclosure requirement
not on the credibility of the informer’s testimony,
but rather on the materiality of who he is or what
he may say.100 The court shifted the burden of proof

94 I think that the question of his address is not ma-
terial and would only subject the witness to a pos-
sible disclosure as to his whereabouts, and for inform-
ing and testifying in this case, his life
definitely would be in jeopardy and it is because
of the fact his life would be in jeopardy in disclos-
ing his address, the Court would refuse to permit
the information-to be divulged at this time.
95 Id.
96 110 Ill. App. 2d at 469, 249 N.E.2d at 678.
97 110 Ill. App. 2d at 464, 469, 249 N.E.2d at 676,
678.
98 110 Ill. App. 2d at 468, 249 N.E.2d at 678.
99 110 Ill. App. 2d at 469-70, 249 N.E.2d at 679.
100 Roviaro v. United States, 353 U.S. 53, 61 (1957);
See also cases cited note 34 supra.
from a state showing of why the informer’s identity should not be disclosed to a defense showing of why it should.\(^{101}\)

In denying appellants’ petition for habeas corpus relief, the Seventh Circuit stated:

Since Schwartz was not a principal prosecution witness and since his testimony was not crucial to the defense, the real issue at the trial was not the credibility of Schwartz. We hold that the Smith ruling on disclosure of the witness-informer’s true identity is not applicable to the case at bar.

In a situation somewhat analogous to the case at bar concerning suppression of an informer’s true identity, the Supreme Court has decided that the identity of a non-witness narcotics informer need not always be disclosed to the defendant. [Citing Roviaro v. United States]…[W]here an informer is not the principal witness testifying against an accused, a trial judge must weigh the policy considerations for nondisclosure of identity of said informer so aptly stated by the Supreme Court in Roviaro…We are of the opinion that the Smith rule should not be extended to reveal every informant’s true identity where the informer is not the principal witness against the accused …\(^{102}\)

CONCLUSION

The Abbott case is but an example of the reasoned refusal of some state and federal courts to extend the Smith requirement to one of absolute disclosure. Though the number of such decisions is not large, it may represent a turn away from Smith and back to Roviaro. The court’s decision in Abbott raises again the question posed by the dissenters in Roviaro and Smith\(^{103}\)—how vital is disclosure to the defendant in each case? The Abbott court held that this question can best be answered by applying the balancing test elicited in Roviaro, and rejected an absolute rule.\(^{104}\) The disclosure requirement depends upon the circumstances of the case and the materiality of the informant’s testimony to the defense. Identification ought to be required only when it will aid the accused in securing a fair trial.

The public policy need to protect informers is arguably great, especially where their safety is in jeopardy.\(^{105}\) However, the trend of both the judiciary and legislatures after Smith v. Illinois has been to treat disclosure as a near-absolute component of the right to confrontation.\(^{106}\) New criminal discovery rules in some jurisdictions have followed the Smith rationale, thus limiting the informant privilege.\(^{107}\)

Rule 510 of the new Federal Rules of Evidence, promulgated by the Supreme Court on November 20, 1972, and effective in all federal courts of appeals and district courts on July 1, 1973, codifies the common law government privilege to withhold an informer’s identity; however, the rule also provides the following exception to the informant privilege:

No privilege exists under this rule…if the informer appears as a witness for the government.\(^{108}\)

Thus, the rule requires absolute disclosure in all federal courts of a witness-informer, regardless of materiality to the defense. The committee comments do not provide adequate support for this clear extension of the Smith holding.\(^{109}\)

Until now, many courts have been unwilling to

\(^{101}\) Cf. United States v. Palermo, 410 F.2d 468, 472 (7th Cir. 1969), and United States v. Varelli, 407 F.2d 735, 750 (7th Cir. 1969), where the state established a threat to the informer’s life and the defense was required to show materiality of disclosure, per Justice White’s concurring opinion in Smith.

\(^{102}\) United States ex rel. Abbott v. Twomey, 460 F.2d 400, 402-04 (7th Cir. 1972).


\(^{104}\) United States ex rel. Abbott v. Twomey, 460 F.2d 400, 402-04 (7th Cir. 1972).

\(^{105}\) See 8 Wigmore § 2374; M. Harney & J. Cross, supra note 17; Donnelly, supra note 17. In Guttenman, supra note 17, at 63, the author states: Any defense of the informant privilege must unquestionably accept the view that the informant is vital in society’s constant effort to combat crime. Once this view is accepted, the assured anonymity of the informant appears as the only effective method of preserving the informant system and of protecting those individuals who have participated in the process.

\(^{106}\) See cases cited note 54 supra.


\(^{109}\) The Advisory Committee’s Note states: If the informer becomes a witness, the interests of justice in disclosing his status as a source of bias are believed to outweigh any remnant of interest in nondisclosure which then remains.


The Committee cites Harris v. United States, 371 F.2d 365 (9th Cir. 1967) as authority for this proposed statutory exception to the informant privilege. However, in Harris the issue was not disclosure of the informer’s identity or address, but only a wide latitude of cross-examination concerning the witness-informer’s background and his relationship with the government—an issue addressed by the Supreme Court as early as Alford v. United States. Thus, Harris provides inadequate support for Rule 510(c)(1).
extend the Smith rule to this extreme. Within a very few months these courts must determine whether to abandon the established Roviaro balancing test or to disregard the absolute disclosure requirement of the Federal Rules. The resolution of the vital, though competing interests involved in disclosure decisions requires a balancing approach and a case-by-case analysis, not an absolutely rigid rule. Thus, even if the federal courts are bound by the new Federal Rules of Evidence to require disclosure of the identity of every informer who testifies for the government, they ought still to refuse disclosure of his address when the government can show potential danger to the informer and the defense fails to show materiality. On the other hand, state courts are not bound by the Federal Rules and ought to reject absolute disclosure in favor of the Roviaro balancing test.
COMPLAINANT CREDIBILITY IN SEXUAL OFFENSE CASES: A SURVEY OF CHARACTER TESTIMONY AND PSYCHIATRIC EXPERTS

INTRODUCTION

Courts and commentators have found that sexual offense accusations are oftentimes false and frequently are made by psychologically disturbed individuals. Corroborative proof of a sex crime is an inappropriate safeguard against a conviction based on a possibly false accusation because the secluded nature of most sexual offenses makes the occurrence and discovery of such evidence a near impossibility. To protect the falsely accused, while avoiding the prosecutorial burden of corroboration, the courts have admitted a wide range of character testimony concerning a complainant's sexual reputation. Such testimony is intended either to impeach the credibility or to corroborate the testimony of the complainant.

A preferable safeguard for the falsely accused is the use of psychiatrists to examine a complainant and then testify to the various factors relating to the complainant's credibility in making a sex assault charge. The detection of personality traits which lead one falsely to accuse another of a sexual offense is uniquely within the province of psychiatry. The courts have admitted such testimony, but only when a judge believes a complainant may be perjuring himself. This limitation denies expert testimony when it is most needed. If the complainant's credibility appears doubtful to a judge, a jury would probably also detect and appropriately weigh it. However, in a particularly subtle case, dangerous because of a complainant's "normal" appearance, a psychiatrist is not used because the judge is unable to detect the complainant's untruthfulness. It is in this latter class of cases where a psychiatrist is most helpful; for he is equipped to discover those psychological factors which are indicative of a falsifying but outwardly truthful complainant and which are unknown and unrevealed to a judge.

This comment is addressed to the inadequacy and impropriety of using complainant character evidence to protect the falsely accused in sexual offense cases. It will also analyze the bases for admitting expert psychiatric testimony to reveal those traits in a complainant which may have prompted a false accusation in a sexual offense case.

THE CORROBORATION REQUIREMENT

Empirical evidence supports the courts and commentators' beliefs that many sex offense complaints are false. In one study of sexual offense assaults, nineteen percent of the complaints were discovered to be unfounded. Even in those cases where the complainant showed physical injury supposedly inflicted during an assault, seven percent: 3 United States v. Terry, 422 F.2d 704, 705 (D.C. Cir. 1970); Coltrane v. United States, 418 F.2d 1131, 1134-35 (D.C. Cir. 1969); Ballard v. Superior Court, 64 Cal. 2d 159, 170-71, 410 P.2d 838, 846-47, 49 Cal. Rptr. 302 (1966); People v. Hurlburt, 166 Cal. App. 2d 334, 338, 333 P.2d 82, 85 (1958); Burton v. State, 232 Ind. 246, 249-50, 111 N.E.2d 892, 893-94 (1953).

This comment applies broadly to all felonious forcible sexual offenses. However, the discussion often focuses on forcible rape because it has been the subject of the most empirical study and commentary. This is particularly true when the discussion turns to character impeachment. See text accompanying notes 22 et seq., infra.

13 J. WIGMORE, EVIDENCE § 924(a) (3d ed. 1940) [hereinafter cited as WIGMORE].
cent of the complaints were found to be untrue, and another fifteen percent questionable.6 In a Philadelphia rape study, twenty percent of the cases were concluded to be unfounded after investigation.7 It is difficult to insure that a defendant is not wrongly convicted on the basis of a false accusation because of the problems with material corroboration in sex offense cases.

Material corroboration8 in sexual offense cases is extremely difficult to obtain.9 Requiring corroboration is evidence, other than the complainant’s testimony, that a sexual offense took place, and from which a trier of fact could infer guilt, or evidence which adds sufficient weight to the complainant’s testimony so that the danger of false accusation is removed. Cases illustrative of the presence or absence of material corroboration are: United States v. Terry, 422 F.2d 704 (D.C. Cir. 1970) (bruises on prosecutrix face and thigh corrobative proof); Coltrane v. United States, 418 F.2d 1131 (D.C. Cir. 1969) (corroboration need not be direct, may be circumstantial; however, finding an empty vaseline jar in wastebasket in defendant’s room similar to the jar described by the complainant insufficient); People v. Scott, 407 Ill. 301, 95 N.E.2d 315 (1950) (evidence that the complainant had gone willingly to the defendant’s apartment, and voluntarily though reluctantly consented to sexual relations impeached the prosecutrix); People v. Thompson, 121 Ill. App. 2d 163, 257 N.E.2d 197 (1970) (spermatozoa in vaginal secretions in the mouth of complainant sufficient to corroborate complainant’s identification of defendant, whom complainant only saw for ten seconds); People v. Radunovic, 21 N.Y.2d 186, 234 N.E.2d 212, 287 N.Y.S.2d 33 (1967) (bruises on thigh and recently broken hymen insufficient corroboration); People v. Masse, 5 N.Y.2d 217, 150 N.E.2d 452, 182 N.Y.S.2d 821 (1959) (complainant’s testimony that she threw jewelry box at the defendant was corroborated by broken window and defendant’s retrieving box); Note, Corroborating Charges of Rape, supra note 8; Comment, The Corroboration Rule and Crimes Accompanying A Rape, supra note 3; Note, Criminal Law—Corroboration Held Necessary to Prove Sexual Abuse in the Third Degree Where the Underlying Act Is Rape—People v. Doyle, supra note 8. Both of those commentators discuss the 1967 New York rape law which had a vigorous corroboration requirement, N.Y. PENAL LAW § 130.15 (McKinney 1967). Since that time New York has revised its rape laws, N.Y. PENAL LAW § 130.15 (McKinney Supp. 1972). The comments following the new statute indicate an intention to modify the strict requirements for corroboration of the older law. Whether they actually will is not clear at this time. For a comment on the new law, see Note, The Rape Corroboration Requirement: Repeal Not Reform, 81 YALE L. J. 1365 (1972).

Because of the difficulty of obtaining material corroboration in New York, see note 9 supra, New York prosecutors at one time followed the practice of reducing the charge against an accused to an offense not requiring corroboration when corrobative proof was not available. Ludwig, supra note 9. See Note, Corroborating Charges of Rape, supra note 3; Note, Criminal Law—Corroboration Held Necessary to Prove Sexual Abuse in the Third Degree Where the Underlying Act is Rape—People v. Doyle, supra note 8; Comment, The Corroboration Rule and Crimes Accompanying Rape, supra note 3, at 462–63. The New York courts then specifically prohibited the practice. See People v. Radunovic, 21 N.Y.2d 186, 234 N.E.2d 212, 287 N.Y.S.2d 33 (1967); People v. English, 16 N.Y.2d 719, 209 N.E.2d 722, 262 N.Y.S.2d 104 (1965); People v. LoVerde, 7 N.Y.2d 114, 164 N.E.2d 102, 195 N.Y.S.2d 835 (1959). The New York legislature codified the actions of the court of appeals in N.Y. PENAL LAW § 130.15 (McKinney 1967) (Practice Commentary at 278–79). That high burden of corroborative proof made obtaining a conviction for rape in New York practically impossible. According to Ludwig, supra note 9, at 386, between the time the 1967 statute went into effect and the time he wrote his article in 1970, not a single conviction for a sexual offense felony in Queens County, New York was obtained. Lear, supra note 7, noted that, while the national conviction rate for rape was 36%, in New York the rate was 3.9%. Lear also attributed the low conviction rate to the stringent corroboration requirement. The effect of the new statute, N.Y. PENAL LAW § 130.15 (McKinney Supp. 1972), is unclear but in the opinion of at least one commentator, Note, The Rape Corroboration Requirement: Repeal Not Reform, supra note 9, at 377–78, the new statute is more a “tactical retreat from an extreme form of corroboration” than an elimination of the corroboration requirement altogether. That is, under the new statute it is still very conceivable that the amount of corroboration the statute demands would often be unavailable.

Amir, Victim Precipitated Rape, 58 J. CANN. L.C. & P.S. 493, 500 Table I (1966), noted that in approximately 50% of the rape cases he studied, the victim and the offender knew each other prior to the offense.
event, the only evidence as to what actually occurred is the testimony of the involved parties.

Even when the crime does not involve a background of familiarity, sexual offenses are often not witnessed and other forms of corroborative evidence are lacking. Evidence may be lost because the crime is not immediately reported. Often no witnesses are available because the victim, out of fear for his or her life, makes no outcry. Since such an assault is so often emotion-charged, a legitimate victim's story may become confused and of little investigatory use to the police who must obtain the corroborative evidence.

Often, therefore, the only evidence of a sex crime is the complainant's testimony. Because of this, the majority of states follow the common-law rule that the uncorroborated testimony of a complainant is sufficient to support a conviction if the complainant's testimony is credible. Other jurisdictions require so little corroboration that the result is virtually the same as the common-law rule.

Because corroboration is not mandatory, a trier of fact must convict an accused when presented with a complainant who has a credible and irrefutable story. Given the likelihood of undetected false accusations, without some form of safeguards innocent persons might be convicted. Since such a dilemma arises because the complainant's apparently credible story may actually be false, protective devices other than material corroboration have arisen.

Character Evidence

The danger of wrongful conviction in sexual offense cases arises because the possibility of false accusation is acute and the defendant may be unable to disprove such falsehoods. To mitigate that danger, courts in sexual offense cases admit a wider range of character testimony to impeach or corroborate a complainant than is normally allowed. In most criminal cases, character evidence is limited to the witness' general reputation for truthfulness. In sexual offense cases, the complainant is often both the chief witness and the victim. Consequently, evidence is admitted concerning both the complainant's general reputation for truthfulness and for past sexual activity.

Because consent is often the issue in sexual offense cases, it is the primary focus of the character evidence offered by a defendant. Such evidence frequently attempts to show that the complainant has a general reputation for sexual promiscuity, the inference being: "If she's done it once, she'll do it again." Such evidence is considered relevant as circumstantial evidence corroborating the defense that the complainant consented to the sexual act. The underlying justification for

13 H. Kalven & H. Zeisel, The American Jury 142 (1966). Table 40 shows that eyewitnesses were present in only 4% of the rape cases studied.
14 Comment, supra note 7, at 282-86. The author noted that investigators of rape reports consider the promptness with which an alleged offense is reported as highly important in determining whether a crime actually took place.
15 In the author's interviews with investigators from the Chicago Police Department Criminal Investigation Unit, 6th Area, on May 10, 1972, they indicated their belief that this factor was common in rape cases.
16 Id.
18 See Wigmore § 2061; Note, Psychiatric Examination of Prosectrix in Rape Case, 45 N.C.L. Rev. 234, 237 (1966).
19 See 3 Wigmore § 424(a); Juveler, supra note 3, at 674; Comment, The Corroboration Rule and Crimes Accompanying Rape, supra note 3, at 459-61.
admitting such testimony is that a person is likely to act in conformity with past actions and that a person’s general community-wide reputation is a good indication of what a person’s past actions have been.24

Admitting evidence concerning a complainant’s general reputation for sexual activity is ill-advised on several grounds. Assuming that such evidence is relevant, it is doubtful that a complainant’s general reputation in the community is the most reliable index of a complainant’s past sexual proclivities.25 Such evidence is limited to general community-wide reputation on the belief that it reflects a broad spectrum of community knowledge and is less subject to prejudice and distortion than the opinion of one person or a small group of persons.26 However, because of the complexity, anonymity, and sheer size of modern society, it is difficult to determine not only in what community a complainant may belong, but also what a complainant’s genuine community reputation for any particular trait may be.27 Consequently, opinion evidence of individuals and evidence of specific acts by the complainant are more accurate and reliable.28

Whether character evidence is presented as general reputation, personal opinion, or specific acts, it is admissible because the complainant’s past conduct is considered relevant in an evidentiary sense to the issue of consent to a particular act committed.29 The underlying presumption of relevance is that an unchaste complainant is more likely to have consented to a sex act than to have been coerced.30 Theoretically, this presumption leads to an inference that the complainant has falsified his or her accusation of forcible assault.31 Hence, in admitting such character evidence,

26 Ladd, supra note 24, at 514–18.
27 Id.
28 While specific acts of unchastity are generally inadmissible, evidence of certain types of other conduct are. In People v. Hurlburt, 166 Cal. App. 2d 334, 333 P.2d 82, 67 (1958), the court took great pains to point out that while specific prior sexual acts may not be admissible, specific instances of the prosecutrix having made false accusations before were. See also 3A Wigmore § 963; Note, Impeaching Witnesses by Showing Specific Wrongful Acts, 11 Hastings L. Rev. 74 (1959).
30 See note 23 supra.

courts are presuming that an individual with a libertine past is likely to make false accusations.

Just why the courts have made such a presumption is unclear.32 Of the many possible reasons a person may have of falsely accusing another of a sexual offense, for courts to presume that the unchaste are more likely to falsely accuse than the chaste seems highly unsound. One example of the presumption’s invalidity would be the case of a “virtuous” woman who consents to intercourse, regrets it the next day, and, to cover her guilt, accuses her seducer of rape.33 The present evidentiary rules might well lead to such a defendant’s conviction.

Rather than creating a safeguard for the falsely accused, whereby the reasons for a complainant’s present statements are disclosed, these evidentiary rules hinge conviction or acquittal on the complainant’s past reputation and conduct. Thus, the intelligent sexual offender should confine his activities to prostitutes.34 Because the prejudicial

32 An early case advocating the admission of evidence of the prosecutrix’ reputation for chastity as a collateral attack on her credibility was People v. Abbort, 19 Wend. 195 (N.Y. 1838), where the court made the oft quoted statement: [T]hat triers should be advised to make no distinction in their minds between the virgin and a tenant of the stew?—between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex? ... And will you not more readily infer assent to the practised Mes-salina, in loose attire, than the reserved and virtuous Lucretia?

33 In this author’s interviews with police investigators, supra note 14, and interviews with Assistant State’s Attorneys in Cook County, Illinois, on May 4, 1972, and May 9, 1972, the interviewees expressed several possible reasons why a complainant might make a false accusation. Among them were: a young woman’s father finding out about her daughter’s sexual involvement with a man and forcing a prosecution to preserve the daughter’s reputation; a woman regretting a previous “indiscretion”; and revenge by a scorned lover. While the author’s police interviews, supra note 14, revealed that the police almost automatically disbelieve any rape accusation brought by a prostitute. The reason is that the police believe that such accusations are made in an effort to force a recalcitrant “customer” to pay. Amir, supra note 11, at 493, writes that rape is more likely to take place if the attacker believes that the victim is precipitating the incident, i.e., if the victim is “asking” for it. A factor in the precipitating process is
effects of character evidence so outweighs its logical relevance, its use in sexual offense cases should be abandoned.

**Psychiatric Experts**

A more rational, scientific solution in determining the question of witness credibility in sexual offense cases centers on the use of psychiatrists. Falsification of sexual matters, real or imagined, is particularly within the province of psychiatry. A court appointed psychiatrist can study a complaint's background, thoroughly examine the complainant, and then testify as an expert concerning those psychological factors that might influence the complainant's credibility relative to the alleged criminal act. The value in the use of such experts is that while psychological factors that contribute to a complainant's falsifying would be apparent to a psychiatrist, they would go unnoticed or be misunderstood by a lay trier of fact.

Initially, it should be clearly understood that psychiatrists do not draw the ultimate conclusion that a complainant should or should not be believed; that is the province of the jury. The court in *People v. Francis* recognized this fact. The trial judge in *Francis* demeans the use of psychiatric testimony to impeach a complainant's credibility and stated:

> You folks [giving the jury their instructions] listened to this boy [the complainant] for a day and a half and I have faith in the jury system and I feel that by listening to the boy for a day and a half you are in a better position to determine whether or not he is telling the truth than a psychiatrist examining him for half an hour who comes in here and tells us what he thought of it.

In reversing the trial judge, the court said that the purpose of such expert testimony was to eluc-
date for the jury those psychological traits of a
courts should not adopt one school of thought or particular terms of art. However, they should

not ignore psychiatry altogether. If the courts are
the same time guarantee that such testimony reflects well-reasoned scientific conclusions, certain safe-

The major objection to the use of such expert
testimony is based on the inexactitude of the
science of psychiatry. Expert scientific evidence
is generally admissible if it consists of matter
beyond the normal scope of a layman’s knowledge
and if such testimony is founded on good scientific
practice. While psychiatry is a developing science
and sometimes a controversial one, it presents a
valuable tool for the courts. As one group of com-

Because of psychiatry’s developing nature, the
courts should not adopt one school of thought or particular terms of art. However, they should

Rather than try and maintain the tenuous distinc-
tion the court suggests in Francis, i.e., that the expert
is testifying as to his results but not testifying as to the
ultimate conclusion, a better-conditioned position seems
That rule suggests allowing opinions that might
embrace one or more of the ultimate issues to be de-
cided; here, the credibility of the complainant. Such a
rule is founded on a belief that the lay jury or judge is
well able to determine the weight to be given the expert’s testimony. See note 40 supra.

Rather than try and maintain the tenuous distinc-
tion the court suggests in Francis, i.e., that the expert
is testifying as to his results but not testifying as to the
ultimate conclusion, a better-conditioned position seems
That rule suggests allowing opinions that might
embrace one or more of the ultimate issues to be de-
cided; here, the credibility of the complainant. Such a
rule is founded on a belief that the lay jury or judge is
well able to determine the weight to be given the expert’s testimony. See note 40 supra.

However, they should

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The evidentiary

One guard against the dangers of hearsay is a psy-
chiatrist’s courtroom testimony will
focus clearly on the issue of a complainant’s credi-

One difficulty in using narrative testimony,
which fully discloses all of the expert’s sources and
the contents of his interviews, is that such testi-
mony often contains hearsay. Obviously, an
expert’s testimony as to what a third party said
about the complainant’s youth would be hearsay.
One guard against the dangers of hearsay is a psy-
chiatrist’s detailed discussion of the nature of his
sources and its effect on his opinion. See generally
Goldstein, Psychoanalysis and Juris-
prudence, 77 Yale L.J. 1053 (1968); Kaplan, An Aca-
demic Lawyer Plays Armchair Analyst: Some Specula-
tion on the Relevance of Psychoanalysis to the Law, 46 Neb. L.
Rev. 759 (1967).

See generally Goldstein, Psychoanalysis and Juris-
prudence, 77 Yale L.J. 1053 (1968); Kaplan, An Aca-
demic Lawyer Plays Armchair Analyst: Some Specula-
tion on the Relevance of Psychoanalysis to the Law, 46 Neb. L.
Rev. 759 (1967).

See note 52 supra.

One guard against the dangers of hearsay is a psy-
chiatrist’s detailed discussion of the nature of his
sources and its effect on his opinion. See generally
Goldstein, Psychoanalysis and Juris-
prudence, 77 Yale L.J. 1053 (1968); Kaplan, An Aca-
demic Lawyer Plays Armchair Analyst: Some Specula-
tion on the Relevance of Psychoanalysis to the Law, 46 Neb. L.
Rev. 759 (1967).

by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.

The law must recognize that the usefulness of
psychiatric evidence is not determined by the
exactness or infallibility of the witness science.
Rather, it is measured by the probability that
what he (the psychiatrist) has to say offers more
information and better comprehension of the hu-
man behavior which the law wishes to understand.
fact should be instructed that evidence concerning a psychiatrist's sources is offered to demonstrate the validity of the psychiatrist's conclusions and not for its truth. Of course, the greatest safeguard against the dangers of hearsay in this situation is a vigorous cross-examination because it will highlight any inherent weaknesses of the testimony and clearly show that such evidence is relevant only to the issue of the complainant's credibility.

Another objection to the use of psychiatric testimony is the so-called shocking invasion of a prosecutrix' privacy and the belief that such examinations will discourage reporting of sexual offenses. It is unlikely, however, that psychiatric examinations pose a greater discouragement to reporting sexual offenses than the physical examinations that are often required in such cases or the complainant's eventual experience on the witness stand.

Psychiatric testimony concerning complaining witnesses' credibility was admitted as early as 1929. In People v. Cowles two doctors testified that the prosecutrix was a "pathological falsifier, a nymphomaniac, and a sexual pervert." United States v. Hiss marked the major breakthrough for the admission of a psychiatrist's testimony concerning witness credibility. In the celebrated trial of Alger Hiss, Judge Goddard admitted the testimony of a psychiatrist who had observed Whitaker Chambers in court. While the result was certainly not that which the defense had hoped for, it marked the real emergence of psychiatrists for the purpose of impeaching a witness' credibility.

Many courts have recognized the value of psychiatry and, under certain circumstances, have admitted psychiatric testimony. The court in Burd...
arises from the judiciary’s inherent power to initiate and order procedures which are necessary to insure a just result in judicial proceedings. Although the prevailing judicial opinion is that courts do have the inherent power to order psychiatric examinations in sexual offense cases, the availability of these orders is limited.

There is some question as to when courts will order psychiatric examinations of complainants in sexual offense cases. The prevailing view is that ordering such examinations is within the discretion of the trial judge and an examination will only be ordered following a motion by the defense and in the face of “compelling need.” While the definition of “compelling need” is somewhat obscure, a recent series of California cases gives some insight into the developing parameters of the “compelling need” test.

Extensive dicta in **Ballard v. Superior Court** emphasizes that sexual offense cases are an exception to the general rule that psychiatric opinions cannot be used to impeach witnesses. The court in **Ballard** stated that psychiatric examinations would be ordered in sexual offense cases where there was a “compelling need” for them. The court stated that “compelling need” was determined by the totality of the circumstances of each case. While the absence of material corroboration alone did not establish compelling need, its lack was one element necessary to meet the compelling need test.

The California supreme court in **People v. Russell** expanded on the compelling need criterion. In reversing a lower court’s decision refusing to order a psychiatric examination, the court in **Russell** held that a trial judge, when deciding whether to order an examination, must look to those mental or emotional conditions of the complainant which might affect his or her credibility.

The court held that examinations should be ordered liberally and that the examination results should be presented so as not to usurp the province of the jury to make the ultimate finding of the complainant’s credibility. The compelling need test that seems to have developed in California is two-pronged. One requires a lack of material corroboration. The other prong, which also must be met, requires the trial judge to detect reasons to doubt the complainant’s credibility.

The major objection to this two-pronged test is its denial of psychiatric examinations and testimony when they are most needed. When material corroboration is available, a sex offense victim’s story is presumably made more credible. Thus, the possibility of conviction by a false accusation is somewhat reduced. However, where material corroboration is absent, psychiatric examinations and the admission of such expert testimony should not be limited as they presently are. The rationale behind the use of psychiatric evidence is that it will reveal those personality traits and psychological factors which influence a complainant’s credibility, but cannot be detected, understood, or appreciated by laymen. In limiting the use of psychiatrists to those circumstances where a judge detects falsehood in a complainant, the courts have mistakenly rejected the whole premise for admitting such testimony; for it is in those cases where psychological factors which contribute to falsehood are undetected by laymen that the psychiatrist is needed.

As exemplified by the California experience, the current standard for ordering psychiatric examinations in sexual offense cases is therefore inappropriate for two reasons. First, if the examination is ordered only where the complainant appears to be of doubtful credibility, then the examination really is not necessary. The purpose for such examinations—to protect an accused from false accusations—is to a degree eliminated by a complainant’s and defendant’s own testimony. Second,
ordering examinations only where the complainant appears to be falsifying eliminates that whole group of cases where the psychiatrist is most helpful and most necessary in protecting a falsely accused defendant—where the complainant has a credible and irrefutable story which psychiatric evaluations and evidence could prove to be the product of psychological disorders.

**CONCLUSION**

In recognizing the disturbing frequency of false accusations in sexual offense cases, the courts have tried to provide some safeguards for an accused. Unfortunately, these protective devices are insufficient. Character evidence, while purporting to protect an accused, is actually a ruse whereby a jury's attention is diverted from the particulars of a defendant's actions at the time of an alleged sexual assault to the complainant's past life and conduct.

The credibility of a complainant in a sexual offense case is better impeached by psychiatric testimony. Rather than obfuscating a sex crime trial with torpid and frequently irrelevant episodes from a victim's past, psychiatric evidence discloses those factors which influence the credibility of what a complainant says. Such evidence is more relevant than character testimony. It is focused on and addressed to the reasons for and foundations of a complainant's accusations and present conduct, whereas character evidence is concerned with a complainant's past conduct.

However, while the courts are beginning to recognize that psychiatric evidence is preferable to character evidence to impeach a complainant's credibility, they have failed to appreciate its significance and utility when it is most needed. Until the courts realize that psychiatric testimony is needed most where it is not available, the unsatisfactory predicament of the falsely accused will not be assuaged.
REMOVAL OF STATE CRIMINAL PROSECUTIONS TO FEDERAL COURT UNDER 42 U.S.C. § 1443

Despite the ever-expanding panoply of constitutional and statutory federal rights, effective remedies are not always available to protect their exercise. One method by which the exercise of federally protected rights has been delayed and deterred is through abuse of the state criminal process. Among the abuses are mass arrests for crimes which are never tried, selective prosecutions under statutes which are either unconstitutional on their face or as applied, biased judges, juries that do not represent the population of the community, and totally baseless arrests and prosecutions.

The effect of many of these abuses could be lessened by an expansive judicial reading of the civil rights removal provision, 28 U.S.C. § 1443, a century old remedy. In certain situations, § 1443 permits a defendant to remove a pending state court proceeding to the federal district court before trial has commenced. Once removal is accepted, the federal district court assumes complete jurisdiction of the matter, with power to either proceed with trial or to dismiss the case.

Removal of a state criminal prosecution to federal court provides a much quicker adjudication of federal issues, shortening by months or years the prejudicial consequences a defendant suffers while under indictment or in prison. Immediate resolution of a federal issue by means of removal also avoids the expensive and time consuming burden of appealing a state conviction through the state courts. Furthermore, removal may diminish the chilling effect an illegal local prosecution can have on federally guaranteed rights.

Enacted as § 3 of the Civil Rights Act of 1866, 3


4 See, e.g., Alexander v. Louisiana, 405 U.S. 625 (1972) (21% black population in the parish; 7% of eligible juror pool black, one on petitioner's venire, none on the grand jury which indicted him). See also LA. CODE CRIM. PRO. Art. 402 (1967), exempting women from jury service unless they volunteer.


Other methods that have been used to suppress federal rights are described in U.S. COMMISSION ON CIVIL RIGHTS, ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH (1965) and W. KUNSTLER, DEEP IN MY HEART (1966).

Although the statute also provides for removal in civil cases, it has been most often utilized by criminal defendants.

7 See City of Greenwood v. Peacock, 384 U.S. 808, 845-46 (1966) (Douglas, J., dissenting). In NAACP v. Button, 371 U.S. 415, 433 (1963), the Supreme Court stated that "[t]he threat of sanctions may deter... almost as potently as the actual application of sanctions." 8

8 Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.
the removal statute provided for original and removal jurisdiction in federal courts in civil and criminal cases “affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State” any of the rights enumerated in § 1 of the act. It also applied in cases in which any “officer . . . or other person” was prosecuted for “any arrest or imprisonment, trespasses or wrongs done” under “color of authority” of the act or “for refusing to do any act upon the ground that it would be inconsistent with” the statute. The removal provisions then became § 641 of the Revised Statute of 1875, at which time the reference to rights secured by § 1 of the 1866 Act was replaced by “any law providing for the equal civil rights of citizens.”

The removal provision has been carried forth substantially unchanged since 1875, and is now § 1443 of the Judicial Code. It reads:

§1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

Subsection (2) applies in very few cases. By its language, this subsection could apply to private citizens exercising federal rights who derive “color of authority” for their activities from any statutory or constitutional provision. However, subsection (2) has been held not to apply to private citizens, but only to federal officers, and those assisting them, who are acting pursuant to their duties under a federal law providing for equal civil rights.

Most of the confusion and most of the cases have arisen under subsection (1). There are two requirements for removal to federal court: The defendant must claim a right under a federal law providing for equal civil rights; and he must claim that he is unable to enforce this right in the state courts.

The First Requirement: “Any law providing for the equal civil rights of citizens . . .”

The federal rights protected by the original civil rights removal provision were listed in § 1 of the same 1866 statute. In the 1875 revisions, however, the specific reference to “rights secured . . .”

10 Section 1 provided:
That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right, in every State and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary not notwithstanding.

11 Rev. Stat. § 3.


15 Color of authority exists when a person is clothed with authority of law or when he is acting under pretense of law. United States v. Jones, 207 F.2d 785, 786-87 (5th Cir. 1953); People v Plesniarski, 22 Cal. App. 3d 108, 112, 99 Cal. Rptr. 196, 199 (1971). Color of authority may be derived from an election, however irregular or informal, In re Krickbaum's Contested Election, 221 Pa. 321, 70 A. 852 (1908), or from an arrest warrant, even though void. Screws v. United States, 140 F.2d 662, 665 (5th Cir. 1944). However, simply because a person has a valid defense under a law in a criminal case does not mean that in committing the offense he was acting under color of authority. Cochran v. City of Eufaula, 251 F. Supp. 981, 984 (M.D. Ala. 1966).

16 The original language of the Civil Rights Act of 1866, which referred to “officers . . . and other persons” acting or refusing to act, seems to support this argument. For an in-depth analysis of the history of the statutory language, and arguments for and against applying subsection (2) to ordinary citizens, see Judge Friendly's opinion in New York v. Galamison, 342 F.2d 255, 262-65 (2d Cir. 1965). See also Amsterdam, supra note 13, at 874-75.


18 See note 10 supra.
by the first section" of the Civil Rights Act of 1866 was deleted in favor of the more general phrase "any right secured to him by any law providing for the equal civil rights of citizens of the United States . . . ." 19

The defendants in Georgia v. Rachel 20 and City of Greenwood v. Peacock 21 petitioned for removal under § 1443, alleging that they were being prosecuted for civil rights activities which were protected by the first amendment, as well as the due process, privileges and immunities, and equal protection clauses of the fourteenth amendment, the Civil Rights Act of 1864, 22 the Civil Rights Act of 1875, 23 and 42 U.S.C. § 1981. 24 Mr. Justice Stewart, writing for the Court in both cases, held that the substitution in 1875 of the phrase "any right secured to him by any law providing for the equal civil rights of citizens" was not intended to greatly expand the kinds of laws to which the original removal section referred, 25 and therefore § 641 of the Revised Statutes of 1875 applied only to laws which were similar to the Civil Rights Act of 1866. Justice Stewart noted that the 1866 act enumerated certain rights which were to be exercised by all citizens "as [they are] enjoyed by white citizens." 26 He therefore concluded that "any law providing for the equal civil rights of citizens" meant only laws which granted specific civil rights stated in terms of racial equality. 27 The Court held that the Civil Rights Act of 1864, 28 invoked by the Rachel defendants, was such a law, noting that it guaranteed access to facilities of public accommodation "without discrimination . . . on the ground of race . . . ." 29 The Court also indicated that the Peacock defendants met the first requirement for removal, but held that they failed to establish the second requirement. 30

The Court, by way of dictum, stated in Peacock that the broad guarantees of the first amendment and the due process clause of the fourteenth amendment were not laws providing for specific civil rights in terms of racial equality, because they were phrased in terms of general applicability to all persons. The Court, however, did not say that the equal protection clause, relied on heavily by the defendants, would not support removal. 31 Although

24 See note 12 supra.
25 Justice Stewart noted, 384 U.S. at 790 n.13, that prior to 1875 Congress had not made removal applicable to the rights guaranteed by the fourteenth amendment, the fifth amendment, the Civil Rights Act of May 31, 1870, 16 Stat. 140, as amended by Act of February 28, 1871, 16 Stat. 433, or the Civil Rights Act of April 20, 1871, 17 Stat. 13. He infers that since Congress did not make removal applicable to these provisions at the time they were enacted, it did not intend to do so in 1875 by broadening the language of the removal provision. Justice Stewart also noted that the removal provision of the Revised Statutes of 1875 was cross-referenced to the new sections which contained the rights that had been protected by § 1 of the Civil Rights Act of 1866. Finally, he argued that limiting § 641 to laws comparable to the 1866 act comported with the relatively narrow mandate to the revising commissioners "to revise, simplify, arrange and consolidate all statutes of the United States . . . ." Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74.

However, Professor Amsterdam points out numerous instances in which this "narrow mandate" was exceeded and various laws were expanded. Amsterdam, supra note 13, at 870.

26 See note 10 supra.
the equal protection clause applies to "any person within [the United States'] jurisdiction," and therefore does not grant rights in terms of racial equality, certain essential rights of racial minorities are guaranteed by the clause. There appears to be no reason for denying these rights the protection of the removal statute. Certainly the right to non-segregated public schools, protected directly by the constitutional amendment, is entitled to the same protection clause. There is no substantive difference between the two rights to warrant one having lesser protection.

**THE SECOND REQUIREMENT:** "IS DENIED OR CANNOT ENFORCE [THE RIGHT] IN THE COURTS OF SUCH STATE . . ."

The Strauder-Rives cases, nine decisions by the United States Supreme Court between 1880 and 1906, narrowly construed the second requirement terms of racial equality, and did not specifically treat the defendant's claim of rights under the equal protection clause.


The Strauder-Rives doctrine has been criticized as establishing an arbitrary distinction, since a decision from the highest court in a state has as great a value as legislation in predicting what a lower court will do. The Supreme Court, 1965 Term, 80 Harv. L. Rev. 91, 229 (1966). In this respect, Gibson v. Mississippi, 162 U.S. 565 (1896), expanded the Rives decision, stating that if the supreme court of a state interpreted the state constitution or laws to deny a federal right, the denial might be said to have arisen primarily from the state enactments. Id. at 582. However, under Strauder-Rives, neither judge-made law nor local traditions and customs which perpetuate racial discrimination provide a firm indication that a defendant's federal rights are being or will be denied in the state courts.

**RACHEL AND PEACOCK**

After the Strauder-Rives line of cases, the removal statute was not considered again by the United States Supreme Court between 1880 and 1906. The two murder defendants' allegations of strong racial prejudice against them and their argument that blacks had never been allowed to serve on juries in cases in which a black was involved, were held not to state grounds for removal. Justice Strong, writing for the Court in both cases, felt that it was fair to presume that a state court would enforce a state statute even though it was discriminatory on its face and abrogated a federal right. When such a statute existed, he contended, a defendant could predict that his federal rights would be denied in the state court. However, the Court determined that absent a discriminatory state statute, it could not be presumed that a state judge would fail to redress the alleged wrong, and therefore a removal petitioner could not firmly predict that his rights would be denied.

United States Supreme Court until 1966, when an exception to the *Strauder-Rives* doctrine was recognized. In *Georgia v. Rachel*, civil rights demonstrators were charged with trespass under a Georgia statute making it a crime to refuse to leave premises when requested to do so by the owner or person in charge. The defendants petitioned the federal district court for removal, alleging that they had attempted to obtain service at restaurants in Atlanta, Georgia, and that their arrests were effected for the purpose of perpetuating a policy of racial discrimination in public accommodations. Mr. Justice Stewart, writing for the Court, held that § 201 of the Civil Rights Act of 1964 protects the right of equal access to public restaurants without regard to race. However, the Georgia trespass statute applied to all persons regardless of race, and therefore defendants' rights were not being infringed by a state enactment discriminatory on its face, as traditionally thought to be required for removal under the *Strauder-Rives* doctrine. Nevertheless, the Court concluded that any criminal proceedings against the defendants were prohibited if their allegations were true. Mr. Justice Stewart noted two events critical to the Court's holding, both of which occurred while the case was pending in the court of appeals. The first was the passage of the Civil Rights Act of 1964. Section 203 (c) of that act makes it illegal "to punish or attempt to punish" any person for exercising the rights guaranteed by § 201. Secondly, in *Hamm v. City of Rock Hill*, the Supreme Court construed this language to prohibit prosecutions for peaceful attempts to be served in public accommodations and also applied the act to prosecutions pending at its passage. Justice Stewart concluded that the defendants had a federal right not to be prosecuted for remaining in the restaurant if they were asked to leave solely because of their race. Therefore, the very pendency of the prosecutions was a denial of their rights.

Two cases were consolidated in *City of Greenwood v. Peacock*. In the first, defendants were charged with obstructing the public streets of Greenwood, Mississippi. They alleged in their removal petition that they were members of a civil rights group which had been engaged in a drive to encourage blacks to register to vote. In the second case, defendants, charged with a variety of offenses, denied that they had been engaged in any conduct prohibited by valid laws and alleged that the prosecutions were solely for the purpose of harassing them and deterring them from exercising their right to protest the conditions of racial discrimination and segregation in Mississippi. Justice Stewart, again writing for the Court, rejected defendants' claims for removal under both subsections of § 1443. He first determined that the history of subsection (2) demonstrated that it referred only to federal officers and persons assisting such officers in the performance of their official duties.

In handling the subsection (1) claim, the Court reaffirmed the *Strauder-Rives* doctrine. As in *Rachel*, there was no state enactment that was discriminatory on its face. Consequently, the question was whether § 1443 (1) prohibited state prosecution for petitioners' alleged attempts to exercise their federal rights. The five-Justice majority held that it did not, distinguishing *Rachel* on two grounds.

Justice Stewart pointed out that despite a state law making it a crime to do so, the defendants in *Rachel* had a federal statutory right to remain in a restaurant when ordered to leave because of their race. He reasoned that the federal law "substitut[e] a right for a crime." However, the defendants in *Peacock*, Justice Stewart argued, had no absolute right to perform the destructive and

---

43 Remand orders were not reviewable after 1887. Act of March 3, 1887, ch. 373, § 2, 24 Stat. 553, as amended Act of Aug. 13, 1888, ch. 866, 25 Stat. 435. Denial of a removal petition was appealable through the state courts, but added nothing to whatever federal claim formed the basis for the removal petition. As a result of the *Strauder-Rives* doctrine, removal was seldom granted, and the Supreme Court did not consider the statute between 1906 and 1966. In 1964, remand orders in § 1443 cases were made appealable. 28 U.S.C. § 1447 (d) (1964).


48 379 U.S. 306 (1964). The facts in *Hamm* were quite similar to those in *Rachel*. Black civil rights demonstrators were convicted on state trespass charges for participating in lunch counter sit-ins. The Court held that § 203 (c) prohibited the State from attempting to punish defendants by prosecuting them for exercising their federal rights under § 203 (a). 379 U.S. at 310-11. Thus, the state convictions were reversed.

49 379 U.S. at 312-17.


51 Various defendants were charged with assault, interfering with an officer in the performance of his duty, disturbing the peace, creating a disturbance in a public place, inciting to riot, paradiging without a permit, assault and battery by bing a police officer, contributing to the delinquency of a minor, operating a motor vehicle with improper license tags, reckless driving, and profanity and use of vulgar language. 384 U.S. at 813 n. 5.

violent acts with which they were charged. Furthermore, the Court stated that no federal law conferred immunity from prosecution for this conduct, as did § 203 (c) of the Civil Rights Act of 1964 which Hamm held prohibited attempts to punish the right of access to public accommodations.

Justice Douglas, joined by Chief Justice Warren and Justices Brennan and Fortas, dissented in Peacock. Justice Douglas contended that two distinct situations were envisioned by the "is denied or cannot enforce" clause, one referring to a present denial of rights and the other based on a prediction of what state tribunals will do in the future. In Justice Douglas' view, the Strader-Rives doctrine was derived from cases in which defendants claimed they would not be able to enforce their federal rights in state courts. If the defendant could demonstrate a firm prediction that the state court would not make a good faith effort to enforce a federal law pertaining to equal civil rights, then, Justice Douglas reasoned, the federal court should accept the removal and try the case on its merits.

He argued that the Peacock respondents, however, alleged a present denial of rights, so that the case was governed by the "is denied" clause. If a federal district judge determined that the state misused the criminal process to suppress the present exercise of civil rights, the proper remedy would be dismissal of the case.

The majority, perhaps to justify its narrow construction of the statute, emphasized that even if there is no right of removal in a particular case, there may be other federal remedies. Justice Stewart referred to direct review by the Supreme Court, injunction against prosecution, post-conviction habeas corpus relief, federal court review, and civil and criminal sanctions against persons violating civil rights. The minority responded that the removal remedy was not co-extensive with other remedies. It pointed out that an objective fact finding process is often indispensable to the enforcement of federal guarantees, and that swift enforcement is frequently essential. Justice Douglas also cautioned against the chilling effect an illegal prosecution can have. He noted, too, that the habeas corpus right, civil sanctions under 42 U.S.C. § 1983, and the criminal statutes prohibiting conspiracy against the rights of citizens were enacted shortly after the removal statute, so that they should be coordinate with it, not preemptive of it.

Furthermore, the remedies suggested by the Court are largely designed to insure an after the fact vindication of rights rather than to protect their present exercise. Federal appellate and habeas corpus relief, while possibly eventually exonerating those convicted of trumped-up crimes, is costly and time-consuming. The prospect of future civil or criminal actions against persons interfering with guaranteed rights is small consolation to someone concerned only with exercising rights at that time and place on an equal basis with others. The primary goal of the law in the area of civil rights should be to develop ways to make rights that were granted years ago a practical reality. The removal remedy aids this goal by shortening the time during which a criminal defendant is under indictment or in prison, by reducing the chilling effect of an illegal prosecution, and by affording an impartial fact-finding process. A federal injunction against state prosecution would not have many of the short-

---

58 See note 55 supra.
59 The removal statute was enacted in 1866. See note 9 supra. The extension of the federal habeas corpus remedy to state prisoners was passed by the same Congress in 1867. Act of Feb. 5, 1867, ch. 27, 14 Stat. 385. The criminal statutes referred to in note 56, supra, were enacted in 1870. Act of May 31, 1870, ch. 114, § 6, 16 Stat. 141 (conspiracy to interfere with federal rights); Act of May 31, 1870, ch. 114, § 17, 16 Stat. 144 (deprivation of federal rights under color of state law).
61 See text accompanying notes 1-4 supra.
comings of the other remedies suggested by Justice Stewart. However, concepts of federalism and the specific prohibitions of the anti-injunction statute have largely cut short the potential of this remedy. In any event, the possible cumulativeness of certain remedies in some situations should not undermine their usefulness. This is especially true where, as with removal, the supposedly cumulative remedy has been authorized by Congress.

The Peacock majority set forth a further reason for its narrow construction of § 1443 (1). Referring to the phenomenal increase in removal petitions in

...28 U.S.C. § 2283 (1948) provides:
A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Traditionally, federal court injunction of state criminal proceedings has been limited to cases in which plaintiffs can show irreparable injury that is both great and immediate. Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943); Fenner v. Boykin, 271 U.S. 240, 243 (1926); Ex Parte Young, 209 U.S. 123 (1908). Dombrowski v. Pfister, 380 U.S. 479 (1965), seemed to make an exception to the strict historical prerequisites for federal injunctive relief in cases in which an overbroad state criminal law is shown to have a chilling effect on first amendment rights. Id. at 485. However, in Younger v. Harris, 401 U.S. 37 (1971), the Court, while acknowledging that there was language in Dombrowski that could lead to this interpretation, id. at 50, explained its earlier decision on the ground that the prosecution was in bad faith and had been brought to harass the defendants. The Court held that absent extraordinary circumstances, bad faith and harassment are prerequisites to a showing of irreparable injury. Id. at 53.

The question is still open whether the anti-injunction statute, see note 61 supra, entirely bars a federal injunction while a state prosecution is pending. In Dombrowski the state indictment had been dismissed before the case reached the United States Supreme Court, so the relief granted pertained only to future threatened prosecutions. Of course, if it is decided that pending state prosecutions cannot be enjoined, the federal injunction remedy will in no way overlap with removal, which is available only if a prosecution is pending.

Justice Stewart himself alludes to the various remedies that might have been available to the Peacock respondents. See text accompanying notes 35–56 supra. The fact that there may be grounds for a federal injunction against a threatened state prosecution does not preclude individuals from seeking damages under § 1983, or any of the other remedies to which he refers. Similarly, the existence of these remedies should not preclude removal.

Although the removal statute was enacted over a century ago, see text accompanying note 9 supra, it was reconsidered as recently as 1964, at which time remand orders in § 1443 cases were made appealable. See note 43 supra. Thus, there is a relatively recent Congressional intent to retain removal as a viable remedy.

1964 and 1965, Justice Stewart warned of the devastating effect on the federal court system that a broad reading of the statute would have. He felt that a vast number of cases would require a federal court hearing, followed by trial in the federal court or an appealable remand order. Justice Stewart foresaw immense delay in bringing cases to trial resulting from overcrowded federal court dockets.

The minority was not as concerned with holding state trials in federal courts when federal rights are involved. Justice Douglas contended that the historical purpose of the dual court system was based upon a distrust of the ability of state courts to resolve certain federal issues. The very purposes of removal laws, he contended, were to insure objective fact-finding and swift enforcement of federal rights. In any event, Justice Douglas felt that his reading of § 1443 (1) would result in few state criminal trials being conducted in federal courts.

Interpretation of the Supreme Court Cases

Rachel indicates that the Court was recognizing a general exception to the Strauder-Rives doctrine. Justice Stewart noted that the Rives case itself refers to a denial of federal rights which "is primarily, if not exclusively, a denial . . . resulting from the Constitution or laws of the State." 66 Justice Stewart added that removal should be available whenever there is "an equivalent basis . . . for an equally firm prediction [that is, equivalent in predictive value to a discriminatory state enactment, as in Strauder-Rives] that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court." 67 However, the Peacock case limited the far reaching implications of Rachel. The two cases must necessarily be read together.


Virginia v. Rives, 100 U.S. 313, 319 (1880) (emphasis supplied by Justice Stewart).

384 U.S. at 804.
and there has been some confusion in determining the extent of the remedy.

The federal circuits have struggled mainly with two questions, each involving one of the grounds on which Justice Stewart distinguished Peacock from Rachel. The questions are: (1) In what circumstances does an individual have an absolute federal statutory right to commit a crime? and (2) What language in a federal law prohibits the State from prosecuting a person for exercising certain federal rights?

A Federal Right to Commit A Crime

The first question arises because the Peacock opinion did not analyze the elements of, nor the conduct underlying, some of the supposed crimes. It seems apparent, as Justice Stewart stated, that there is no federal right "to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman." However, petitioners were charged with other offenses. Creating a disturbance in a public place, disturbing the peace, and some of the other charges may have resulted from federally protected conduct, such as the attempted exercise of the right to vote. Unfortunately, the Peacock opinion did not analyze the conduct underlying the alleged crimes or the range of conduct which could be encompassed by the definitions of these crimes.

As a result, Peacock did not answer the question of whether removal could be avoided at the whim of the local prosecutor simply by altering the criminal charge. In other words, would the result in Rachel have been different if the crime charged had been disorderly conduct rather than trespass? The issue was presented in Walker v. Georgia, when the defendant was prosecuted for trespass, riot, malicious mischief, and other offenses against the public order, allegedly resulting from her attempts to gain service in a restaurant. Although the same conduct was the basis for all the offenses, the federal district court to which defendant removed dismissed only the trespass charge on the authority of Rachel, and remanded the others on the authority of Peacock.

The Court of Appeals for the Fifth Circuit reversed the remand order, emphasizing that the label which the state attaches to the supposed criminal conduct should not affect federally protected rights. Judge Tuttle, writing for the court, held:

It is what the movant was actually doing with respect to the exercise of his statutory federally protected right... that controls and not the characterization given to the conduct in question by a state prosecutor.

The Fifth Circuit has also held that removal is available in cases charging assault, aggravated burglary, vagrancy, acts against the public order, and perjury. This result does not seem to comport with Justice Stewart's admonition that the federal law "substitute a right for a crime," there being no federal right, for instance, to commit assault or perjury. Nor does this result solve the problems of federalism to which Justice Stewart adverted. Every case would require a hearing on allegations by defendants that they did not commit supported by any additional evidence. The court therefore concluded that the other charges were only "thimly veiled trespass charges." Id. at 5.

Appellant alleged that he was charged with assault for trying to be served in a public accommodation covered by the Civil Rights Act of 1964. The Fifth Circuit held that a federal forum should determine in the first instance whether he was engaged in non-peaceable conduct. Id. at 1192. If the state charges that a defendant committed an assault, and the charge is denied, then a federal district court must conduct a full evidentiary hearing to determine whether grounds exist for the charge. Such a hearing amounts to a preliminary trial to determine what court will conduct the actual trial of the charges.

Wyche v. Louisiana, 394 F.2d 927 (5th Cir. 1967). LA. REV. STAT. § 14.60 (1950), defines aggravated burglary as:

- the unauthorized entering of any inhabited dwelling... with the intent to commit a felony... if the offender... commits a battery upon any person while in such place, or in entering or leaving such place.

An element of the offense is unlawful entry of premises. Since the premises involved, a truck stop, was a public accommodation within the meaning of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964), there was a conflict between the black petitioner's federal right not to be denied entry on account of race and the state crime.

Achtenberg v. Mississippi, 393 F.2d 468 (5th Cir. 1968).

Walker v. Georgia, 417 F.2d 5 (5th Cir. 1969).

Davis v. Alabama, 399 F.2d 527 (5th Cir. 1968).

City of Greenwood v. Peacock, 384 U.S. at 831.

Id. at 832-34. See text accompanying note 65 supra.
the crime charged and that they are being prosecuted solely for reasons relating to race.

At the other extreme, some courts require that the crime charged conflict directly with a federal equal civil rights law providing for racial equality, i.e., even though the removal petitioner alleges that he did not do the acts charged, the indictment itself is tested against the federal rights. This interpretation avoids the necessity of a protracted evidentiary hearing on the merit of the prosecution, which in effect would be a trial of the defendant in federal court. However, this view contravenes the language in *Rachel* indicating a broad exception to the *Struder-Rives* doctrine. Furthermore, it permits the prosecutor to avoid removal by carefully choosing the charge on which he indicts.

Between these extremes, the Supreme Court cases can be read to permit removal if the definition of the alleged crime is broad enough to encompass the federally protected activities in which petitioners allege they were engaged. This was true in *Rachel*, where the crime of trespass, defined as refusing to leave the premises when requested to do so by the owner or person in charge, conflicted with the federal right to remain. However, the conflict between the state crime and the federal right may not always be this clear. In *Walker v. Georgia*, for instance, the defendants were charged with various offenses against public order statutes, including riot. The Georgia Criminal Code defines riot as:

> Any two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner....

This statute could perhaps be construed to make illegal a particularly vehement refusal to leave a restaurant when ordered to do so because of race. While there is no federal right to commit riot, there is a right not to be punished for attempts to exercise the federal right to service in public restaurants covered by the 1964 Civil Rights Act.

When removal is requested, the federal court should determine the definition of the state offense, relying on the statutory elements and the state court construction. If the conduct in which a petitioner alleges he was engaged is in fact protected by a "law providing for the equal civil rights of citizens" and at the same time could have violated the local penal code, a hearing should be granted.

This interpretation of the removal statute would dispose of the possibility that a local prosecutor might manipulate the state charge in order to avoid a direct conflict with the federal right (for example, by indicting for disorderly conduct or riot rather than trespass). If the state offense charged is so broad that it might conceivably encompass the federally protected activities in which a removal petitioner alleges he was engaged, a federal court hearing would be necessary to determine the truth of his allegations. On the other hand, if the conduct charged is clearly not protected by any federal law, no hearing would be necessary.

Such an interpretation of the removal remedy would not prevent a local prosecutor from proceeding on a wholly trumped-up charge. However, it
would alleviate the concern expressed by Justice Stewart in *Peacock* that a federal court hearing would be required whenever a defendant alleges that he is being prosecuted because of his race, that he is innocent, and that he cannot obtain a fair trial in the state court. Furthermore, by limiting discriminatory enforcement of broad criminal statutes, the suggested reading of *Rachel* and *Peacock* would eliminate some of the possible abuses of the state criminal process without thoroughly dislocating the traditional jurisdiction of state courts to try state crimes.

**Language Prohibiting Prosecution**

The second feature which distinguished *Peacock* from *Rachel* was the language of § 203 (c) of the Civil Rights Act of 1964 prohibiting anyone from punishing or attempting to punish persons exercising their right of access to restaurants under § 201. The Court held that § 203 (c), as construed in *Hamm v. City of Rock Hill*, prohibited the state from prosecuteing the *Rachel* petitioners for activity protected by a federal law. Unfortunately, the majority in *Peacock* did not distinguish similar language from an applicable statute. Section 131 (c) of the Civil Rights Act of 1957, which provides that “[n]o person . . . shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce” persons exercising their right to vote, could be construed to prohibit prosecution for the *Peacock* petitioners’ voter registration activities. Certainly, the Voting Rights Act of 1965, which extended this protection to anyone “urging or aiding any person to vote or attempt to vote,” covered petitioners’ conduct.

The *Peacock* majority did not attempt to explain its distinction between the language of the voting rights provisions and that of the public accommodations section of the Civil Rights Act of 1964.

---

statute. Even if he were not concerned about the damage to his reputation from such a complete abuse of his powers, he would certainly be more likely to incur civil or criminal penalties under federal law. See notes 55 & 56 *supra.*


* 90 Judge Sobeloff of the Court of Appeals for the Fourth Circuit contends that the right to encourage others to vote is implicit in the right to vote, and, therefore, the 1937 act protects voter registration activities. *North Carolina v. Hawkins*, 365 F.2d 559, 561 (4th Cir. 1966) (concurring opinion).


Judge Tuttle of the Court of Appeals for the Fifth Circuit suggests two possible reasons why the voting rights acts were not held applicable to the *Peacock* petitioners. First, the 1957 Act did not expressly extend to persons who were aiding others to exercise their right to vote. Although the 1965 Act would clearly have covered the petitioners’ activities, it may not have applied since the remand orders in *Peacock* were entered prior to its effective date.

If this is what the *Peacock* majority had in mind, it did not make it clear. The 1957 Act, although not explicitly applying to persons assisting others registering to vote, is amenable to such a construction. Justice Stewart nowhere indicates that the 1965 Act does not protect the defendants. On the contrary, the majority refers to the 1965 Act in a footnote, without in any way indicating that it is inapplicable.

Secondly, Judge Tuttle proposes that the similarity of the provisions may not have been urged upon the Court. However, the Supreme Court was surely aware of the similarity of the prohibition against attempts to punish in the 1964 Act and the prohibition against attempts to intimidate, threaten, or coerce in the voting rights acts. In fact, the majority in *Peacock* quoted § 131 (c) of the Civil Rights Act of 1957 and referred to § 11 (b) of the Voting Rights Act of 1965, and Justice Douglas relied on the latter. Obviously, the Court was aware of the relevance of these provisions.

A third possibility is that the Supreme Court did not regard the prohibition against attempts to “intimidate, threaten or coerce” as prohibiting state prosecution. However, if the Court were drawing this fine distinction between the effect of this language and the effect of a prohibition against “punish[ing] or attempt[ing] to punish,” it is likely
that there would be some discussion of the point in the majority opinion. Furthermore, § 131 (c) of the Civil Rights Act of 1957 and § 11 (b) of the Voting Rights Act of 1965 specifically refer to persons “acting under color of law or otherwise,” which bolsters the conclusion that these sections were intended to apply to local officials, including prosecutors and police.

None of the three reasons for the distinction between Rachel and Peacock is convincing. As a result, the two Supreme Court cases fail to establish standards for judging whether language in a federal law prohibits prosecution for exercising protected rights.

In addition to the Civil Rights Act of 1957 and the Voting Rights Act of 1965, a federal provision which arguably could immunize persons exercising rights under it from state prosecution is § 101 (a) of the Civil Rights Act of 1968, which makes it a crime if anyone “by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with” persons exercising certain listed rights. It was contended in Hill v. Pennsylvania that Congress must have intended that persons exercising rights under § 101 (a) would not be violating any state laws since it would be irrational to make it a federal crime to interfere with those committing a state crime. The Third Circuit rejected this argument because of the absence of the prohibition against punishing or attempting to punish.

By doing so, it restricted the applicability of the Rachel doctrine to rights arising under the public accommodation section of the Civil Rights Act of 1964.

**Conclusion**

Despite the broad language of the civil rights removal provision and its potential for remedying many possible abuses of the state criminal process, the United States Supreme Court has very narrowly construed the statute. Although § 1443 (1) applies to “any person” who is denied a right under a federal civil rights law, the Rachel and Peacock decisions make it clear that only laws stated in terms of racial equality will invoke its protection. Thus, aliens, women, students, religious sects, and other members of non-racial classifications, are denied a remedy which could be useful in realizing long-enacted federal rights. Persons, including members of racial minorities, are not immune from state prosecution while trying to exercise rights guaranteed by broad constitutional amendments. Furthermore, only when a discriminatory state statute on its face abrogates a federal right, or when a federal law immunizes state defendants from prosecution for the acts with which they are charged, are defendants able to firmly predict that their federal rights will be denied in the state courts, and thereby attain removal.

In some instances, federal courts have gone beyond the Supreme Court in restrictively applying the removal provision. Perhaps, as one author has suggested, the civil rights removal statute should be broadened by Congress. Unless and until this happens, federal courts should liberally construe the ambiguous portions of the Rachel and Peacock opinions, giving the benefit of the doubt to persons petitioning under § 1443. The rights granted under the federal constitution and laws are frequently clear-cut. However, these rights are meaningless without provision for enforcement.

---

100 18 U.S.C. § 245 (b) (1968).
101 The listed rights include, among others, the rights to vote, campaign for elective office, attend public schools, serve on juries, travel or use any facility of interstate commerce, and enjoy the benefit of any government program. 18 U.S.C. § 245 (b) (1968).
102 430 F.2d 1016 (2d Cir. 1970).
103 Id. at 1020. The court's alternate reason for denying removal was that the crime charged, inciting to riot, was not itself protected, as was the Rachel petitioners' right to trespass. See New York v. Davis, 411 F.2d 750 (2d Cir.), cert. denied, 396 U.S. 856 (1969), discussed in note 80 supra.