CHICKEN-HAWK![1]

EVIDENCE OF A COMPLAINANT'S HOMOSEXUALITY UNDER VERMONT'S RAPE SHIELD LAW

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INTRODUCTION

Vermont is a small green state of farms, villages, and forested mountains. The citizenry is relatively homogenous, and renowned for its fiercely independent nature. The crime rate is remarkably low.[2]

In the late 1970s, Vermont joined a nationwide trend of adopting statutes aimed at preventing a rape victim's character from being put on trial.[3] As

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1. The term "chicken-hawk" is, in Vermont, street slang for a male prostitute providing sexual services to other males. Other areas use the term to indicate a "john," or customer, of a homosexual prostitute. Vermont's regional meaning for chicken-hawk can be contrasted with the definition in RICHARD A. SPEARS, SLANG AND EUPHEMISM 72 (1982): "a male homosexual who is particularly attracted to teenage boys . . . ."

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2. *See West Virginia Ranked Fifth in Study on Crime, Safety Company's Survey Says Vermont Safest, Nevada Has Most Crime*, CHARLESTON DAILY MAIL, June 28, 1996, at 2c ("Vermont is the safest.").

3. The Vermont rape shield law reads:

> (a) In a prosecution for a crime defined in this chapter and in sections 2601 and 2602 of this title or for abuse of an elderly or disabled adult under subsection 6913(d) of Title 33:
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> (1) Neither opinion evidence of, nor evidence of the reputation of the complaining witness' sexual conduct shall be admitted;
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> (2) Evidence shall be required as it is for all other criminal offenses and additional corroborative evidence heretofore set forth by case law regarding rape shall no longer be required;
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> (3) Evidence of prior sexual conduct of the complaining witness shall not be admitted; provided, however, where it bears on the credibility of the complaining witness or it is material to a fact at issue and its probative value outweighs its private character, the court may admit:
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> (A) Evidence of the complaining witness' past sexual conduct with the defendant;
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> (B) Evidence of specific instances of the complaining witness' sexual conduct showing the source of origin of semen, pregnancy or disease;
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> (C) Evidence of specific instances of the complaining witness' past false allegations of violations of this chapter.
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> (b) In a prosecution for a crime defined in this chapter and in a prosecution pursuant to sections 2601 and 2602 of this title or for abuse or exploitation of an elderly or disabled adult under subsection 6913(d) of Title 33, if a defendant proposes to offer evidence described in subsection (a)(3) of this section, the defendant shall prior to

women emerged into a new, prominent, and decidedly vocal role in society, sexual assaults became more openly reported and discussed.[4] Still, before Vermont enacted the rape shield law, a woman who accused a man of raping her often had her own character attacked. At that time, a defendant could examine the accuser's prior sexual history.[5] The focus of such trials was on branding the complainant with a scarlet letter rather than admonishing the behavior of the defendant. By doing so, courts failed to determine whether that behavior rose to the level of an unlawful sexual assault.[6]

Rape shield laws were intended to refocus sexual assault trials on the case against the defendant.[7] Vermont joined states having the tightest restrictions on using extraneous evidence about the complainant, the so-called Michigan-style states. Michigan-style statutes enumerate extremely limited circumstances under which evidence of the complainant's sexual past may be presented.[8]

Twenty years of litigation have passed since Vermont joined the Michigan-style states in adopting its restrictive rape shield law.[9] Today, social perceptions have changed.[10] While the sexual revolution has slowed, and AIDS is leading new generations to think twice before engaging in the

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> the introduction of such evidence file written notice of intent to introduce that evidence, and the court shall order an in camera hearing to determine its admissibility. All objections to materiality, credibility and probative value shall be stated on the record by the prosecutor at the in camera hearing, and the court shall rule on the objections forthwith, and prior to the taking of any other evidence.
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> (c) In a prosecution for a crime defined in this chapter and in sections 2601 and 2602 of this title, if the defendant takes the deposition of the complaining witness, questions concerning the evidence described in subdivisions (a)(1) and (3) of this section shall not be permitted.

VT. STAT. ANN. tit. 13, § 3255 (Supp. 1997).

4. *See* Vivian Berger, *Man's Tribal, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 2, 3 (1977).

5. *See* State v. Patnaude, 140 Vt. 361, 372, 438 A.2d 402, 406 (1981) (discussing defendant's ability, prior to rape shield law, to inquire into accuser's prior sexual history).

6. *See id.*

7. *See id.* at 373-74, 438 A.2d at 407.

8. *See* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 773 (1986).

> At the restrictive end of the statutory spectrum are . . . the . . . rape-shield laws . . . modeled on the Michigan statute. These statutes prohibit the introduction of sexual conduct evidence subject to certain enumerated exceptions. The statutory exceptions are highly specific, reflecting legislative efforts to anticipate precisely those circumstances in which sexual conduct evidence will be critical to the presentation of a defense.

Id.

9. Vermont's rape shield law was enacted in 1977. *See* VT. STAT. ANN. tit. 13, § 3255 (Supp. 1997); *Patnaude*, 140 Vt. at 373, 438 A.2d at 407.

10. *See* Berger, *supra* note 4, at 2.

carefree encounters of the days before MTV, empirical data suggest that most Vermonters are unlikely to think that a person who has engaged in physical relationships outside of marriage is inherently an immoral person.[11]

These trends have had at least one negative side effect: Accused rapists have been left in some situations without the ability to present a fair defense. Given the long sentences imposed for sex crimes[12] and listings on public sex offender registries,[13] persons accused of sexual assault (some falsely accused[14]) are rightly justified in wishing to exercise that most fundamental aspect of our judicial system—the right to tell their side of the story.[15] Though the aims of rape shield laws are generally defensible, the enthusiasm that engendered them painted with too broad a legal brush.

In states following the most restrictive form of rape shield laws, courts have been retreating from the absolutist legislative position.[16] For example, in *State v. Lund*, the Vermont Supreme Court recognized that the enumerated exceptions in Vermont's rape shield law are not all-inclusive; constitutional rights of the defendant may require other exceptions.[17] *Lund*, and similar cases in other states, are moving these restrictive Michigan-style rape shield laws toward the style of the federal rape shield law,[18] which contains a catch-all provision allowing admission of other relevant evidence when required by the defendant's constitutional rights.[19]

Unlike Vermont, most states' large volume of case law ensures that a shift in policy, such as that from Michigan policy to federal rape shield policy, occurs with some reasonable speed and clarity. The absence of case law in

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11. *See infra* text accompanying notes 23-33.

12. Sexual assault in Vermont carries a maximum sentence of 20 years, a maximum fine of $10,000, or both. *See* VT. STAT. ANN. tit. 13, § 3252(a) (Supp. 1997).

13. Vermont has a sex offender registry. *See* VT. STAT. ANN. tit. 13, §§ 5401-5413 (Supp. 1997). It is significantly more restricted and private than the registries of many other states. It applies to persons convicted of felony sex crimes, *see id.* § 5401(10), is generally only accessible to law enforcement agents, *see id.* § 5405(f), and remains in effect until ten years after the registered person is successfully released from probation. *See id.* § 5405(f).

14. There is no data supporting what percentage of accusations made to law enforcement authorities are false. In Vermont, cases that prosecutors determine to be false or unsupportable tend to be not pressed, so the conviction rate does not reflect the number of false accusations.

15. Rape shield laws may actually protect complainants making false accusations. *See* John Gibeaut, *Shield a Prosecution Sword: Rape Laws Can Protect Accuser Who Has Reason to Lie*, 83 A.B.A. J. 36 (Dec. 1997).

16. *See, e.g.*, Commonwealth v. Pearce, 681 N.E.2d 296 (Mass. 1997) (holding that evidence that defendant was not the father of a child should be admitted to support his defense of denial of the rape); State v. Lund, 164 Vt. 70, 664 A.2d 253 (1995).

17. *See Lund*, 164 Vt. at 71-72, 664 A.2d at 254 (stating that the United State's Constitution's Confrontation Clause may override the rape shield law's prohibitions).

18. *See* FED. R. EVID. 412.

19. *See* Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1249-50 (1989).

Vermont leaves us awaiting either a legislative reaction, or the unlikely possibility that the Vermont Supreme Court will hear a case directly on point.

Part I of this Article hypothetically posits just such a case involving a man named Charlie. However, the reader should be advised that it is my experience that this situation is not as unlikely as many Vermonters might believe. The hypothetical will demonstrate the primary conundrum that a jury will indulge in an invisible presumption that the victim is heterosexual. If the defense is arguing consent, but the rape shield law prevents evidence of the victim's homosexuality, an absurd situation arises. The defense would have to argue, without evidence, that the victim did something that the jury believes he could not have done. Before analyzing how the law creates this predicament, I will review the general legal issues generated by admitting such evidence, including relevance and materiality, and the defendant's right of confrontation.

Part II briefly examines the four general approaches that state and federal jurisdictions have taken regarding rape shield laws. First, I review the treatment of homosexuality under the rape shield laws in federal, Arkansas, and California-style states. The Article then turns more specifically to a case law survey of the plurality of the states which have enacted the Michigan-style rape shield laws.

Part III discusses Vermont's rape shield law. First, I examine its legislative history for any indication of legislative intent that the statute should apply to issues that implicate the defendant's constitutional rights of fair trial and confrontation. Second, although the Vermont Supreme Court has not yet addressed the issue of homosexuality under the rape shield law, I survey the Vermont rape shield case law for indications of how the statute is likely to be applied.

Finally, I conclude where I began, with a man named Charlie, and whether or not he will spend his life in jail for want of admissible evidence regarding his complainant's homosexuality.

A. Charlie and the Chicken-hawk

The following hypothetical situation serves as an aid for discussing numerous issues. Charlie is a large, handsome, young man, fond of trendy clothing and ostentatious jewelry. Charlie's life has a harsh edge to it, apparent in the twitching around the edges of his mouth and the defensive coldness of his eyes. He has been unable to maintain a job. His family's home has been spray-painted with slurs, and his mother has been taunted at her workplace because Charlie is gay. He moves to a Vermont community, where he is unknown, to start life over. He listens carefully when his new neighbors tell him which bars to avoid because the *faggots* hang out there;

these are precisely the locations he will go to find the company of other gay men.

One of these bars, nestled in the middle of a predominantly Catholic mill town, is known as a place where businessmen go on their lunch hour to rendezvous with a chicken-hawk, a young male prostitute willing to engage in a quick round of sexual activity in exchange for cash or drinks. Charlie, a new face in this small community, wears gold jewelry and flashes a wad of cash. This cannot help but attract the notice of the furtive young men clustered in the dark corners of the bar. One approaches, clad in tight black jeans and a t-shirt that reveals his wiry frame. After some conversation, some cigarettes, and a number of drinks, they talk about money. They are seen leaving together in the direction of Charlie's apartment.

At the apartment, they share more liquor and begin to engage in sex. The chicken-hawk is tentative, familiar only with quick back alley encounters; he is unwilling to engage in the more involved sexual games suggested by his client. He does not want to spend the night so he comments about the length of time which has passed. Charlie tells him to get lost. The chicken-hawk requests payment. Charlie, temper fueled by alcohol, refuses. The thwarted prostitute grabs a kitchen knife and demands payment in cash or jewelry. Charlie is larger, and years of being harassed have left him sophisticated at street fighting. He disarms the young fellow and blackens his eye. Charlie then helps him back into his clothes and kicks him out the door.

Charlie awakens to a gun barrel in his face and the prod of a policeman's boot. He is under arrest for aggravated sexual assault, a crime which, like murder, carries a potential sentence of life imprisonment.[20] The police had found the complainant sleeping in a doorway, and knew him because he is on probation for a number of minor alcohol offenses. On the drive downtown to write up his violation of probation for being out after curfew and drinking alcohol, the complainant had broken into sobs and told how he was made to drink, then raped, by an evil gay man. Instead of the lockup, the chicken-hawk is taken to the victim-witness office and given a blanket, a warm cup of tea, and several professional shoulders to cry on.

The cops laugh out loud at Charlie's protests and the suggestion that there are gay prostitutes in their town. At arraignment, defense counsel does not laugh, but delivers the bad news: because of the protections afforded to persons claiming to be victims of sexual assaults, evidence of the chicken-hawk's willingness to engage in homosexual activity cannot be used in court. The chicken-hawk's girlfriend and their baby have shown up in court for the arraignment. No one will believe that this freshly scrubbed family man

20. See *infra* note 37 for the relevant text of Vermont's sexual assault statutes.

engages in gay sex for hire. In the absence of information to the contrary, Charlie is portrayed as a perverse monster.

Charlie is told that, unless some way can be found to get around the rape shield protections so that a defense can be presented, he better be prepared to serve a life sentence.

B. Rebutting the Invisible Presumption: Nobody Says It, But We All Know It's There

The most critical piece of evidence in Charlie's defense—that the complainant does in fact consent to homosexual acts—is hidden behind an invisible presumption that any witness in a criminal trial is heterosexual. For example, jurors have been instructed to bring their common sense and life experiences to bear in their deliberations.[21] In Vermont it is common for the judge to advise the jury: "In your consideration of the evidence, you are not limited solely to the statements of the witnesses. You may also draw reasonable inferences that you believe are justified from the facts which have been proved, given the light of your past experiences," and, "in weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience, and common sense gained from day to day living."[22]

Many, if not most, Vermont jurors relying on life experiences will probably assume, absent evidence to the contrary, that any man who appears before them is heterosexual.[23] This is especially true where the complaining witness presents an aspect of leading a "normal" heterosexual life, such as having a wife, girlfriend, or children.[24] This assumption becomes an inextricable part of the framework of evidence in the prosecution's case because the complainant's very appearance corroborates the lack of consent to the alleged incident.

Jurors also are instructed that the assessment of the witnesses' credibility is wholly within their purview. Jurors are instructed that:

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21. Vermont does not have any published pattern jury instructions. These jury instructions are pulled from numerous files accumulated throughout the author's ten years of criminal litigation.

22. These jury instructions are typical in Vermont District Court criminal cases.

23. "Homosexuals are, of course, present in every walk of life and work as effectively as any other person." D.J. West, *Homophobia: Covert and Overt*, *in* MALE VICTIMS OF SEXUAL ASSAULT 13, 17 (Gillian C. Mezey & Michael B. King eds., 1992).

24. "Men who prostitute themselves to other men, but who do not class themselves as homosexuals, seem able to pursue their trade indefinitely without losing their basic heterosexual drive." *Id.* at 16.

> In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the manner and conduct of the witness while testifying; any interest, bias, or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in the light of all the evidence in this case.[25]

If the complaining witness was a woman, the jury would be able to consider the common social knowledge that women ordinarily engage in sexual relations with men. The jury could then weigh that factor in relation to other evidence and testimony. If the complaining witness was a nun appearing in habit, the jury could observe and weigh those obvious character traits indicating that the complaining witness would not consent to engage in sexual activity with any person.[26] The jury also could consider the style and nature of testimony.

When the complainant is a woman who asserts that she would never consent to sex with men because she is lesbian, at least one state supreme court has held admissible evidence of the complaining witness' sexual encounters with other men.[27] However, unlike the current hypothetical, in the situation of a testifying nun or a complainant asserting that she is lesbian, the character trait of sexuality has been made visible, and placed into controversy by the witness for the prosecution.[28]

While homosexuality is becoming more openly discussed and recognized, it remains far from the norm of behavior in our society.[29] A gay man sitting in the witness box will appear no different than any heterosexual man. In the absence of admission of evidence of one's character as a homosexual, a

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25. Henderson v. State, 686 N.E.2d 911, 914 (Ind. 1997).

26. It is interesting to consider in this situation whether the defense would be permitted to present evidence of the nun's other sexual encounters, to counterbalance the obvious implications of her habit; or whether the defense might win a motion in limine preventing the nun from testifying in attire so heavily laden with implication.

27. *See* State v. Williams, 487 N.E.2d 560, 562-64 (Ohio 1986).

28. Contrary to the common perception of gay men exhibiting a feminine affect, it is not possible to positively identify a homosexual from any particular mannerism or phenotype. However, in various locations and social circles, certain affectations are undertaken to make it known to other homosexuals that a person is gay and available—a fashion statement of sorts. It would be interesting to try to find any visible sign of the chicken-hawk's homosexuality. Charlie's lawyer should question Charlie carefully as to whether the complaining witness had any tattoos, clothing, jewelry, hairstyle, or other characteristic which is locally considered to be a visible sign of homosexual availability.

29. Homosexuality is addressed inconsistently by national laws. Sodomy and buggery between consenting adult males remains criminalized in most states, carrying sentences as long as those provided for rape. *See, e.g.*, MASS. GEN. LAWS ch. 272, § 34 (1997). In apparently naive contradiction, many states also protect their residents from discrimination on the basis of sexual orientation. *See, e.g.*, VT. STAT. ANN. tit. 21, § 495 (Supp. 1997).

typical jury would likely presume that there is no possibility whatsoever that a male complainant would consent to a sexual act with another male, whether or not for monetary compensation.[30] The jury will be missing information important to an accurate assessment, much as they would were they not told that a key witness in a fraud case suffers from a brain tumor causing mental confusion, or that a witness to an industrial accident is illiterate and cannot read warning signs.[31] It would be inconceivable that the defense would not be able to bring this type of information, critical to the juror's assessment of the witness' credibility, into evidence.[32] The exercise of the constitutional rights of confrontation and cross-examination would guarantee it.

Defendants in Vermont are entitled to a jury instruction on the presumption of innocence. A typical instruction would be similar to the following: "[T]he presumption of innocence 'is a piece of evidence that should be considered with all the other evidence.'"[33] Without the ability to admit into evidence indications of the complaining witness' homosexuality, jurors' inferences from personal experiences will undoubtedly lead to the conclusion that the purported chicken-hawk is really just another rooster in life's barnyard, preening to impress the hens.

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30. The United States Military's "Don't Ask, Don't Tell" policy, 10 U.S.C. § 654 (1994), codifies society's supposed position that a person is considered heterosexual until proven otherwise. If a serviceman or servicewoman does not explicitly, spontaneously, and voluntarily state that he or she engages in homosexual acts, he or she is presumed to be heterosexual, and thus presumed to be in compliance with military laws. Unlike the civilian statutes referred to *infra*, notes 81-84, the military equivalents appear to be enforced regularly. The necessity for and impact of such enforcement has been hotly contested.

31. Lest anyone doubt the existence of homosexual prostitution, the phenomenon has been well documented in much of the world. For example, an article by Dr. Richard Hillman of St. Mary's Hospital, London, presents the case study of a "23 year old unemployed bisexual male prostitute" who was "referred from an outreach agency specifically set up to provide help for men involved in selling sex." R.J. Hillman et al., *Sexual Assault of Men: A Series*, 1990 GENITOURINARY MED. 247, 248 (1990). Gay prostitution is common enough to be used as a cover for those who prey upon gay men.

> Forensic psychiatrists are all too familiar with mitigating pleas put forward by men who, having murdered and robbed a homosexual, plead that they were driven to desperation by the victim's disgusting behaviour. Most masquerade as male prostitutes and accompany their victim home with the intention to extort, by threat or force, much more than the proposed price of their sexual favours.

West, *supra* note 23, at 13.

32. A similar issue is the corroborative effect that occurs when an extremely youthful complainant uses sexually explicit language or describes sexual acts with descriptive detail and candor on the stand. Absent evidence presented by the defense that the complainant had prior sexual experiences as the basis for his or her knowledge, the unspoken message of such testimony is that the defendant's attack is the only way the complainant could have developed such sophisticated sexual knowledge. This situation is discussed at length in Tuerkheimer, *supra* note 19, at 1253. However, in the situation of a complainant so young that the source of his or her sexual vocabulary is questioned, statutory rape charges are likely to apply, so issues of consent are moot.

33. State v. Joy, 149 Vt. 607, 616, 549 A.2d 1033, 1039 (1988).

C. Legal Considerations in the Admission of Evidence of the Complainant's Homosexuality

Before Charlie's lawyer can argue that evidence of the complainant's homosexuality is admissible under Vermont's rape shield law, the evidence must pass the basic evidentiary threshold of relevance and materiality. The evidence will then have to undergo a balancing test, weighing the prejudicial impact of the evidence on the chicken-hawk's privacy rights against Charlie's rights to fair trial and confrontation.

1. Relevance and Materiality: The First Steps Toward Admissibility

Setting aside for the moment any specific considerations necessitated by a state's rape shield laws, Charlie's lawyer must first show that any evidence she may have to present in Charlie's defense is otherwise admissible under the applicable rules of evidence. This consists initially of whether the evidence is relevant and material.[34] Offered evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[35] A fact is "of consequence" or "material" when it "is essential to the case, defense, application, etc., and without which it could not be supported."[36]

The primary essence of the charge of aggravated sexual assault is a nonconsensual sexual act.[37] Consent is therefore not only a material issue to the defense, but the primary issue for the defense. Consent is the single most

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34. "[Defendants] are not entitled to a weighing of their interests against those of the State unless their evidence passes the tests of logical and then of legal relevancy." State v. Patnaude, 140 Vt. 361, 370, 438 A.2d 402, 405 (1981).

35. VT. R. EVID. 401.

36. BLACK'S LAW DICTIONARY 881 (5th ed. 1979).

37. VT. STAT. ANN. tit. 13, § 3252 (Supp. 1997) reads in pertinent part:

> A person who engages in a sexual act with another person and
> (1) Compels the other person to participate in a sexual act:
> (A) Without the consent of the other person; or
> (B) By threatening or coercing the other person; or
> (C) By placing the other person in fear that any person will suffer imminent bodily injury; or
> (2) Has impaired substantially the ability of the other person to appraise or control conduct by administering or employing drugs or intoxicants without the knowledge or against the will of the other person . . . .
> (4) . . . shall be imprisoned for not more that 20 years, or fined not more than $10,000.00 or both.

VT. STAT. ANN, tit. 13, § 3252 (Supp. 1997).

"'Consent' means words or actions by a person indicating a voluntary agreement to engage in a sexual act." VT. STAT. ANN, tit. 13, § 3251(3) (Supp. 1997).

significant factor in the determination of guilt or innocence on the charge of aggravated sexual assault for a defendant like Charlie.

Incidents leading to a criminal charge of sexual assault generally lack eyewitnesses.[38] This is predominantly the case in any charge of sexual impropriety which, by its nature, tends to occur in nonpublic locations.[39] Other than the defendant's own testimony, the defense is usually left without direct testimony or any other direct evidence of the complaining witness' consent to the sexual acts.

Any discussion of the admissibility of evidence of the complaining witness' homosexuality is predicated upon the defense actually having such evidence. The Vermont rape shield law bars counsel from inquiring directly about the complaining witness' past sexual practices through deposition or other discovery methods. However, the defendant may question any other potential witness, during a deposition, about the complainant's homosexuality.[40] Potential evidence for Charlie might include the following: a man willing to testify that he engaged in sex with the complaining witness;[41] statements from people with whom the complaining witness has discussed homosexuality; or testimony from others whom the chicken-hawk tried to recruit into homosexual sex for hire. Evidence commonly encountered is testimony that the complainant hangs out in gay bars, is seen in the company of known homosexuals, or has a general reputation in his *community* as a chicken-hawk.[42]

Evidence of a pertinent character trait of a crime victim, offered by the accused, is admissible under the Vermont Rules of Evidence.[43] Such character

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38. Vermont case law reflects sexual assaults occurring in isolated or private locations. *See, e.g.*, State v. Bruyette, 158 Vt. 21, 24, 604 A.2d 1270, 1271 (1992) (in victim's home at early hours of the morning); State v. Hooper, 151 Vt. 42, 42, 557 A.2d 880, 880 (1989) (in a car on a "little used side road"); State v. Patnaude, 140 Vt. 361, 366, 438 A.2d 402, 403 (1981) (at a "secluded cabin").

39. The exception is lewd and lascivious behavior, which, by definition, must be open in nature. *See* VT. STAT. ANN. tit. 13, § 2601 (Supp. 1997).

40. *See* VT. STAT. ANN. tit. 13, § 3255(c) (Supp. 1997).

41. Counsel should exercise caution and restraint in investigating these issues, even with witnesses other than the complainant. "Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." ABA STANDARDS FOR CRIMINAL JUSTICE, Prosecution Function and Defense Function Standard 4-4.3(a) (3d ed. 1993).

42. It may be difficult to find a definition of "community" that is acceptable to the court in this context. Many gay or bisexual individuals are not so known to their friends, family, or co-workers. Unless other members of the gay community are willing to come forward and attest that the complainant is "one of them," evidence of reputation may be unattainable.

43. VT. R. EVID. 404(a)(2). The rule reads, in pertinent part: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: . . . (2) Evidence of a pertinent trait of character of the victim of the crime offered by an accused . . . ." *Id.*

traits include the following: untruthfulness;[44] propensity to consume alcohol;[45] threatening or argumentative behavior;[46] and assaultive and violent behavior.[47] This rule is inapplicable when "knowledge of character is offered as a basis for actions by another party."[48] This exception is asserted correctly when the defendant's knowledge of the complainant's homosexual character led him to pursue the complainant's sexual favors.[49] For example, if Charlie had been advised by other gay bar patrons that the complainant was available for lunch hour flings, and acted on the basis of this information, this exception applies. Generally, however, evidence of a complaining witness' homosexuality *should* be considered a "pertinent character trait" for purposes of admissibility.[50]

While the politics and propriety of doing so will no doubt be criticized, evidence of the complainant's homosexuality may also be offered under Rule 404(b) as a prior bad act.[51] The illegality of homosexual acts in many

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44. *See, e.g.*, State v. Blair, 155 Vt. 271, 273-74, 583 A.2d 591, 592 (1990). The Court applied Rule 608, which states:

> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
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> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
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> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

VT. R. EVID. 608.

45. *See, e.g.*, State v. Hedding, 114 Vt. 212, 213-14, 42 A.2d 438, 440 (1945).

46. *See, e.g.*, State v. Averill, 85 Vt. 115, 119, 81 A. 461, 462 (1911).

47. *See, e.g.*, McQuiggan v. Ladd, 79 Vt. 90, 97, 64 A. 503, 504 (1906).

48. VT. R. EVID. 404 reporter's note (citing EDWARD W. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 193, at 461-62 (2d ed. 1972); JOHN HENRY WIGMORE ON EVIDENCE § 53, at 448-49 (3d ed. 1940)).

49. In *State v. Giroux*, 151 Vt. 361, 561 A.2d 403 (1989), the prosecution utilized this portion of Rule 404, presenting evidence that the defendant was aware that the complaining witness was sexually active, claiming this went to the defendant's state of mind, making it more likely that he would attempt sexual interactions with the teenage girl. The Vermont Supreme Court ruled that evidence of the victim's prior sexual conduct when offered by the prosecution is not within the purview of the rape shield law. *See id.* at 367, 561 A.2d at 407.

50. For the text of VT. R. EVID. 608, see *supra* note 44.

51. *See* VT. R. EVID. 404(b). The rule reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of

jurisdictions, and the lack of the state's stamp of approval to homosexual relationships, should qualify the complainant's homosexual acts as "bad" *for purposes of the rule*. The complainant's prior incidents of leaving a bar with males to engage in sexual activity would seem to indicate a lack of mistake and a particularized intent in finding himself alone with Charlie.

A pertinent character trait of the complainant may be proved by reputation[52]—unless otherwise prohibited, such as by a rape shield law—and by specific instances of conduct.[53] The proffer of reputation and specific instance evidence of homosexual activity is overwhelmingly relevant, material, and critical to the defense on the issue of consent, because it so clearly has a "tendency to make the existence of any fact"—*i.e.*, consent—"more probable . . . than it would be without the evidence."[54]

The proffered evidence is also relevant and material to the complaining witness' credibility in instances where the complaining witness has made prior statements indicating that he did not consent to the charged act because he is not homosexual.[55] It does not matter that the statements arose from conversations with the police or other witnesses, or during discovery. The chicken-hawk's tearful allegation against Charlie, made in the back of a police cruiser on the way to be charged with legal infractions of his own, should be carefully scrutinized for phrases critical of Charlie's homosexuality. Such outbursts may be used as evidence of his own purported heterosexuality. Evidence of the complaining witness' character as a homosexual directly impeaches such testimony. "The use of character evidence for purposes of impeachment is well established."[56] Impeachment is not restricted to the parameters of reputation and specific instances of conduct but can be developed through other means. For example, if the complainant underwent

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> a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id.

52. *See* VT. R. EVID. 405(a).

53. *See* VT. R. EVID. 405(b).

54. VT. R. EVID. 401.

55. In *State v. Parker*, 149 Vt. 393, 545 A.2d 512 (1988), the Vermont Supreme Court upheld the trial court's introduction of evidence that the defendant had sexually molested his older son at a trial of his sexual assault upon his younger son. The evidence of the prior bad act was admitted in rebuttal to the defendant's statement, "I am not perverted." *Id.* at 396, 545 A.2d at 514. The case dealt with acts of the defendant, rather than the complaining witness, and thus the rape shield statute was not implicated. However, the trial court had warned the defendant that "if defendant put his character in issue . . . or, specifically, as the trial judge phrased it, if he claimed 'I'm not that kind of guy' it would 'open the door' for further rebuttal testimony of his [prior bad acts]." *Id.* The same reasoning would seem to apply to a complainant who similarly opened the door by testifying that he would not consent to homosexual activities because he is not perverted, not gay, or other similar testimony.

56. VT. R. EVID. 404 reporter's note.

a rape-kit examination after the alleged incident, the physician's testimony might be used to impeach testimony that the complainant had not previously engaged in homosexual activity.[57]

Allegations of homosexual sex should undergo heightened scrutiny because the complaining witness has a substantial motivation to lie. That one is a homosexual prostitute may cause embarrassment and emotional distress in relationships with family, friends, employers, or community.[58] Charlie's accuser may not want his girlfriend and child, nor his probation officer, to know that he supports his continued alcohol or drug habit through cash-and-carry homosexual liaisons. Even absent the overtones of sexuality, the existence of illegal and untaxed income is something most people would rather not disclose. And, since prostitution is unlawful in Vermont,[59] as in most other states, fear of prosecution for this crime also provides the complaining witness a motive to lie.

Credible evidence of the complainant's homosexuality is relevant, material, and critical to the defense. Therefore, absent more explicit prohibition by other statutes, such evidence is admissible under Vermont's rules of evidence.

2. Rape Shield Laws, the Balancing Act, and the Right of Confrontation

Charlie is likely to feel a justifiable sense of injustice upon hearing that, although the rest of his life is on the line, he is not lawfully allowed to present his version of the facts in his defense. Rape shield laws, which are in effect in almost every state as well as the federal jurisdictions,[60] restrict the nature of the evidence which a criminal defendant charged with certain types of

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57. Medical literature identifies recognizable physical characteristics in males who have repeatedly engaged in anal sex, including anal scarring, skin tags, and a relaxed anal sphincter. *See, e.g.*, ELIJAH THOMAS SPROLES III, M.D., NATIONAL CENTER FOR PREVENTION AND CONTROL OF RAPE, THE EVALUATION AND MANAGEMENT OF RAPE AND SEXUAL ABUSE: A PHYSICIAN'S GUIDE 34-35 (1985).

58. *See supra* note 30 (discussing the "Don't Ask, Don't Tell" policy as circumstances where an individual will not wish for others to be aware of his homosexual activity).

59. *See* VT. STAT. ANN. tit. 13, § 2632 (Supp. 1997). The statute states: "A person shall not . . . [e]ngage in prostitution, lewdness, or assignation . . . ." *Id.* § 2632(a)(8). Prostitution is defined as "the offering or receiving of the body for sexual intercourse for hire and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire." *Id.* § 2631.

60. The federal government, forty-eight states, and the military all have a rape shield statute. Arizona regulates and restricts the admission of evidence in sexual assault cases through case law. *See, e.g.*, State *ex rel.* Pope v. Superior Court, 545 P.2d 946 (Ariz. 1976). Utah relies on Rules 404 and 405 in such cases. *See* Richard W. Miller III, Note, Stephens v. Miller: *Placing Rape Shield Statutes Between Rock and a Hard Place*, 27 U. TOL. L. REV. 217, 219 n.14 (1995) (citing Jack Morgan, Note, Michigan v. Lucas: *Rape Shields, Criminal Discovery Rules, and the Price We Pay in Pursuit of the Truth*, 1993 UTAH L. REV. 545, 545 nn.4-5).

prohibited sexual activity[61] may discover or present in the course of his defense.[62] Prior to rape shield laws, past sexual acts of the complainant were admissible based on the reasoning that unchaste women are immoral, thus more likely to consent to any given sexual act, and more likely to lie.[63] Rape shield laws arose out of social policy designed to protect the victims of rape, or other unlawful or untoward sexual behavior, from scrutiny regarding moral or lifestyle characteristics which are properly within the realm of protected privacy.[64] By enacting rape shield laws, legislatures have determined that, as a matter of law, a rape victim's promiscuity, or reputation for unselective sexual liaisons, are not relevant to the issue of consent to any particular incident of sexual interaction.[65] Accordingly, such evidence is not admissible in a court of law.[66] Due to their restrictiveness, rape shield laws function as a legislative pretrial ruling on the relevance, and resultant admissibility, of certain evidence.[67]

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61. An unresolved legal conundrum is the issue of rape shield evidence in a trial regarding two criminal charges: one that implicates the rape shield (e.g., aggravated sexual assault) and one that does not (e.g., kidnapping). If Charlie had been charged only with kidnapping, the rape shield would not bar Charlie from presenting evidence of the complainant's homosexual behavior to explain why the complainant was in Charlie's apartment relative to the kidnaping charges. Thus, evidence admissible in the context of one charge would be inadmissible in the context of the other charge. I have found no case law that specifically addresses this issue. However, it bears an interesting similarity to *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* concerns the prejudice that arises when a codefendant's confession implicates another defendant in a multiple defendant trial. *See id.* at 135-37. The non-confessing defendant has a right to exclude the confession, to a redacted confession, or to severance because introduction of a non-redacted confession violates the non-confessing defendant's Sixth Amendment confrontation rights. *See id.* at 134 n.10. In Charlie's case, it is hard to see how a court could deprive Charlie of his lawful confrontational rights to present certain evidence relevant to the kidnapping charge, even though the evidence is deemed not legally relevant for purposes of a sexual crime charge under the rape shield. In that situation, the defense would be justified in arguing for two severed trials or for the dismissal of any nonsexual charge which would, by association, face evidentiary restrictions due to the rape shield.

62. *See* JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE § 193, at 350 (4th ed. 1992).

63. *See* State v. Patnaude, 140 Vt. 361, 372, 438 A.2d 402, 406 (1981).

64. The Nevada Supreme Court has held Nevada's rape shield law did not apply to acts of prostitution, reasoning that acts of prostitution are not "intimate details of private life" but publicly solicited acts with total strangers. Drake v. State, 836 P.2d 52, 55 (Nev. 1992). The legislature did not intend to afford special protection to unlawful acts of prostitution merely because they involve sexual conduct. *See id.* One cannot help but notice that this case arises in the one state which has a legalized prostitution business, and the government therefore has a strong economic interest in prohibiting unlawful, and untaxable, prostitution. A California court has held that solicitation indicates the speaker's willingness to participate in sexual acts and thus is included within the expression "sexual conduct" in the rape shield portion of the state's evidence code. *See* People v. Casas, 226 Cal. Rptr. 285, 289 (Ct. App.), *cert. denied*, 479 U.S. 1010 (1986).

65. Some commentators have discussed whether the rape shield laws actually function as a legislative determination of relevance or a guarantee of privilege to the complainant. *See, e.g.*, Tuerkheimer, *supra* note 19, at 1250-58.

66. It is worth considering whether, in those states where homosexual sexual activity such as sodomy are criminalized, such acts warrant state privacy protections.

67. *See Patnaude*, 140 Vt. at 374, 438 A.2d at 407 (stating: "The Vermont rape victim shield law

Defendants frequently challenge rape shield laws on grounds that they infringe on federal[68] and state[69] constitutional rights to confront accusers; prevent the cross-examination of prosecutorial witnesses as to their credibility, bias, or motive to lie; and deny the defendant the opportunity to present and compel evidence in their own defense.[70] Courts often comment that "no legislation, however salutary its purpose, can be so construed as to deprive a criminal defendant of his Sixth Amendment right to confront and cross-examine his accuser and to call witnesses."[71] However, rape shield laws are almost universally facially upheld.[72]

The Sixth Amendment right of cross-examination, applicable to the states through the Fourteenth Amendment,[73] "is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process by revealing any possible biases, prejudices or ulterior motives of the witness."[74] However, the "right to cross-examine is not absolute and may, in appropriate cases, have to accommodate other legitimate state interests in the criminal trial process."[75]

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merely standardizes the law of evidence. It brings the rules governing the admissibility of past act evidence in rape cases into conformity with the evidentiary rules in effect for the rest of the law.").

68. *See* U.S. CONST. amend. VI. The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id.

69. *See* VT. CONST., ch. I, art. 10. Chapter I, Article 10 of the Vermont Constitution reads:

> That in all prosecutions for criminal offenses, a person hath a right to be heard by oneself and by counsel; to demand the cause and nature of the accusation; to be confronted with the witnesses; to call for evidence in the person's favor, and a speedy public trial by an impartial jury of the country.

Id.

70. *See, e.g.*, Michigan v. Lucas, 500 U.S. 145 (1991); David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1255-56 (1985); Joel E. Smith, Annotation, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R.4th 283 (1980).

71. Winfield v. Commonwealth, 301 S.E.2d 15 (Va. 1983).

72. *See supra* note 70.

73. *See* U.S. CONST. amend XIV, § 1.

74. State v. Herndon, 426 N.W.2d 347, 350 (Wis. App. 1988) (quoting Chambers v. Mississippi, 410 U.S. 284 (1973)).

75. *Id.* at 351.

This accommodation takes the form of a balancing test.[76] Evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[77] The controlling rule of evidence omits the privacy rights of the complainant, or any other private right, as a factor to consider in the balance. The Vermont Supreme Court, however, has chosen to weigh the probative value of legally relevant rape shield evidence against the relative invasion of the complainant's privacy.[78] Though criminal defendants charged with sexual offenses in Vermont often face the potential of life imprisonment, case law almost uniformly holds that the invasion of the complainant's privacy "substantially outweighs" the defendant's constitutionally guaranteed right of confrontation.[79]

In a criminal trial, the state presents its case against the defendant. It is axiomatic that the burden of proof never shifts to the defendant. In a typical case not involving sexual assault, the rights of the defendant are weighed against the state's interests in pursuing a just resolution of harms done to the social fabric. The complainant's other interests and rights are left to civil remedies. The prosecutor does not represent the complainant in any personal dispute with the defendant. Rape shield laws turn this basic, fundamental structure of criminal proceedings on its head. The complainant becomes a party, and the privacy rights of the complainant are weighed against the constitutional rights of the defendant. To some degree, this effectively melds the civil and criminal actions into one proceeding, blurring the lines between the criminal law role of the state as accuser and the civil action position of the complainant as accuser. As Charlie sits behind bars, tormented by a jail system custom-made to abuse gay inmates, the full import of this decay of the traditional roles of the state, the accused, and the witnesses, has yet to be seen.

II. FOUR APPROACHES TO RAPE SHIELD LAWS

Charlie, accused of gay rape and languishing in Vermont's jails waiting for his lawyer to come up with admissible evidence to support his defense of consent, would find himself in a similar state of suspended animation in any

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76. *See* VT. R. EVID. 403. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

77. *Id.*

78. The balancing test to be applied by a trial judge in considering relevance is whether the probative value of the proffered evidence is "outweighed by the danger of unfair prejudice, confusion of the issues, or by . . . undue delay." VT. R. EVID. 403. There is no mention of to whom such prejudice is to be considered. *See id.*

79. *See infra* Part III.B.

jurisdiction in the United States. Rape shield laws are in effect in almost every state as well as federal jurisdictions.[80] While the provisions of such statutes vary, legal scholars have divided the types of statutory approaches into four categories reflecting the statutes of Michigan,[81] Arkansas,[82] California,[83] and the federal jurisdictions.[84] Michigan's approach is the most restrictive as well as the most common, serving as the model for twenty-six

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80. *See* STRONG ET AL., *supra* note 62, at 350.

81. The Michigan approach is the most restrictive of the four patterns of rape shield statutes. *See* Miller, *supra* note 60, at 219. The Michigan-style statutes require "automatic exclusion of all the victim's sexual conduct evidence unless the text of the rape shield statute expressly provides for its admission." *Id.* at 219-20.

Including Michigan and Vermont, Michigan-style rape shield laws have been adopted in the following: ALA. CODE § 12-21-203 (1996); COLO. REV. STAT. ANN. § 18-3-407 (West 1997); FLA. STAT. ch. 794.022(2), (3) (1997); GA. CODE. ANN. § 24-2-3 (1997); 725 ILL. COMP. STAT. 5/115-7 (West 1998); IND. CODE. § 35-37-4-4 (1997); KY. R. EVID. 412; LA. CODE EVID. ANN. art. 412 (West 1997); ME. R. EVID. 412; MD. ANN. CODE, art. 27, § 461A (1997); MASS. GEN. LAWS ch. 233, § 21B (West 1997); MICH. COMP. LAWS § 750.520(j) (1997); MINN. R. EVID. 412; MINN. STAT. § 609.347 (1997); MO. REV. STAT. § 491.015 (1997); MONT. CODE ANN. § 45-5-511(2), (3) (1997); NEB. REV. STAT. § 28-321 (1997); N.H. REV. STAT. ANN. § 632-A:6 (1996); N.C. R. EVID. 412; OHIO REV. CODE ANN. § 2907.02(D) (Banks-Baldwin 1997); OKLA STAT. tit. 12, § 2412 (1997); 18 PA. CONS. STAT. § 3104 (1997); S.C. CODE ANN. § 16-3-659.1 (Law Co-op. 1997); VA. CODE ANN. § 18.2-67.7 (Michie 1997); W. VA. CODE § 61-8B-11 (1997); WIS. STAT. §§ 971.31(11), 972.11 (1997).

82. The Arkansas approach simply requires all rape shield evidence to be placed before the judge in an *in camera* hearing to balance its probative value against its prejudicial effect. No particular evidence is explicitly prohibited by the statute, and the rape shield requirement varies from the standard rules of evidence only in that it requires the preliminary determination of admissibility to be made *in camera*. *See* Miller, *supra* note 60, at 220-21. The Arkansas approach has been codified in the following states: ALASKA STAT. § 12.45.045 (Michie 1997); ARK. CODE ANN. § 16-42-101 (Michie 1997); IDAHO CODE § 18-6105 (1997); KAN. STAT. ANN. § 21-3525 (1996); N.J. STAT. ANN. §§ 2A:84A-32.1 to 32.3 (West 1997); N.M. R. EVID. 11-413; R.I. GEN. LAWS § 11-37-13 (1996); S.D. CODIFIED LAWS § 23A-22-15 (1997); TENN. R. EVID. 412; WYO. STAT. ANN. § 6-2-312 (Michie 1997).

83. The California approach states that sexual conduct evidence is admissible if offered to prove consent or credibility, but is otherwise inadmissible. *See* CAL. EVID. CODE §§ 782, 1103(b) (West 1997). This would seem to admit all evidence of prior sexual activity offered except that which was purely intended to illustrate that the complainant acted in conformity with a certain character. The California approach has also been codified in the following state codes and rules of evidence: DEL. CODE ANN. tit. 11, §§ 3508, 3509 (1997); MISS. CODE ANN. §§ 97-3-68 to 70 (1997); NEV. REV. STAT. §§48.069, 50.090 (1997); N.D. CENT. CODE §§ 12.1-20-14 to 15 (1997); WASH. REV. CODE § 9A.44.020 (1997).

84. The federal approach lists enumerated exceptions to the rape shield prohibition, much like the Michigan-style statutes. *See supra* note 81. However, one of the exceptions is a "catch-all" provision that permits the admission of evidence of prior sexual activity if it is constitutionally required or is relevant and admissible in the interests of justice. *See* Miller, *supra* note 60, at 221.

Numerous jurisdictions have codified the federal approach: CONN. GEN. STAT. § 54-86f (1997); CONN. R. EVID. 412; HAW. R. EVID. 412; IOWA R. EVID. 412; MINN. R. EVID. 412; N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1997); OR. REV. STAT. § 40.210 (1996); TEX. R. CRIM. EVID. § 412. *See also* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 773 (1986).

states.[85] Vermont's rape shield law was patterned after Michigan's.[86] Thus, an evaluation of how Michigan-style states have interpreted homosexuality under the rape shield law is likely to be the most predictive for Vermont. However, given the trend among Michigan-style states of shifting their approach toward that of the federal jurisdictions, and also given the general paucity of cases explicitly addressing homosexual sexual assault, the analysis undertaken by non-Michigan courts is also worth reviewing. Additionally, because there is little case law explicitly addressing homosexual rape, it is helpful to turn for advisory guidance to the multitude of other jurisdictions that have addressed the related question of admissibility of evidence of prostitution. While relatively few jurisdictions have addressed the admissibility of evidence of homosexuality,[87] a large number of jurisdictions have considered whether evidence of common prostitution should be admissible.[88]

Subpart A first introduces the consideration of homosexuality by courts in the Arkansas, California, and federal rape shield law jurisdictions. Then, Subpart B turns to a state-by-state case survey of Michigan-style jurisdictions that have considered the admissibility of evidence of homosexuality, and

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85. See *supra* note 81 for a listing of Michigan-style states. *See also* State v. Herndon, 426 N.W.2d 347, 352 (Wis. App. 1988).

86. *See* State v. Patnaude, 140 Vt. 361, 373, 438 A.2d 402, 407 (1981); *see also* Lawrence Berger, Note, *Criminal Law Reform in Vermont: The Proposal to Exclude Evidence of the Victim's Character in Forcible Rape Cases*, 1 VT. L. REV. 215, 215 (citing *Hearings on H.419 Before the Vermont House Comm. on the Judiciary*, at 11 (1975)).

87. As of this writing, the following cases have addressed admission of evidence of homosexuality: Latzer v. Abrams, 602 F. Supp. 1314 (E.D.N.Y. 1985); Laughlin v. State, 872 S.W.2d 848 (Ark. 1994); Logan v. State, 776 S.W.2d 341 (Ark. 1989); People v. Murphy, 919 P.2d 191 (Colo. 1996); People v. Sandoval, 552 N.E.2d 726 (Ill. 1990); People v. Kemblowski, 559 N.E.2d 247 (Ill. App. Ct. 1990); Kelly v. State, 586 N.E.2d 927 (Ind. Ct. App. 1992); People v. Hackett, 365 N.W.2d 120 (Mich. 1984); People v. Covich, 661 N.Y.S.2d 369 (App. Div. 1997); State v. Hart, 678 N.E.2d 952 (Ohio Ct. App. 1996); State v. Williams, 487 N.E.2d 560 (Ohio 1986); State v. Lang, 403 S.E.2d 677 (S.C. 1991); State v. Whaley, No. 03C01-9101-CR-00025, 1992 WL 167342 (Tenn. Crim. App. July 21, 1992); State v. Rodgers, No. 01-C-019011CR00312, 1991 WL 155715 (Tenn. Crim. App. Aug. 16, 1991); Johnson v. Commonwealth, 385 S.E.2d 223 (Va. Ct. App. 1989); State v. Marston, 478 N.W.2d 68 (Wis. 1991) (unpublished decision). The list may not be exhaustive, because additional cases, like many of these cases, may be unreported.

88. *See* Jeffries v. Nix, 912 F.2d 982 (8th Cir. 1990); State *ex rel.* Pope v. Superior Court, 545 P.2d 946 (Ariz. 1976); People v. Varona, 143 Cal. App. 566 (1983); People v. Casas, 226 Cal. Rptr. 285 (Ct. App.), *cert. denied*, 479 U.S. 1010 (1986); State v. Clinkscales, 574 A.2d 243 (Conn. App. 1990); Demers v. State, 547 A.2d 28 (Conn. 1988); Huffman v. State, 301 So. 2d 815 (Fla. Dist. Ct. App. 1974); State v. Blue, 592 P.2d 897 (Kan. 1979); Johnson v. State, 632 A.2d 152 (Md. 1993); Commonwealth v. Joyce, 415 N.E.2d 181 (Mass. 1981); People v. Slovinski, 420 N.W.2d 145 (Mich. App. 1988); State v. Roberts, 393 N.W.2d 385 (Minn. App. 1986); Drake v. State, 836 P.2d 52 (Nev. 1992); State v. Romero, 606 P.2d 1116 (N.M. Ct. App. 1980); People v. Conyers, 86 Misc. 2d 754, 382 N.Y.S.2d 437 (Sup. Ct. 1976); Johnson v. State, 598 S.W.2d 803 (Tenn. Crim. App. 1979); Haynes v. State, 498 S.W.2d 950 (Tex. Crim. App. 1973); League v. Commonwealth, 385 S.E.2d 232 (Va. App. 1989); State v. Green, 260 S.E.2d 257 (W. Va. 1979); State v. Herndon, 426 N.W.2d 347, 350, 351 (Wis. App. 1988); Hagins v. United States, 639 A.2d 612 (D.C. 1994).

concludes with an analysis of the Michigan-style case law and the trends that may impact Vermont courts.

A. Consideration of Homosexuality Under Non-Michigan-Style Rape Shield Laws

As previously noted, scholars have divided rape shield laws into four representative types: Arkansas, California, Michigan, and federal. Generally, the Arkansas approach sends the evidence sought for admission straight to the judge for *in camera* review.[89] The California approach permits admission of rape shield evidence relevant to consent or credibility.[90] The Michigan approach allows admission of evidence only according to narrowly enumerated exceptions, such as evidence showing the source of pregnancy or disease.[91] Finally, the federal approach follows Michigan, but it also contains a catch-all provision permitting the admission of evidence when the defendant's constitutional rights so require.[92]

Suggesting the possibility of future federal rulings on the issue of preclusion of otherwise appropriately admissible evidence, the Eastern District of New York took the remarkable step of granting a federal habeas corpus petition.[93] There, the court had precluded the defendant from inquiring into the minor male complainant's sexual contact with other adult males to support a defense of misidentification.[94] Engaging in the extended discussion of constitutional confrontation rights which has become the pattern in such cases,[95] the federal court noted that "state evidentiary rules which unduly restrict or prohibit cross-examination may deprive a criminal defendant of his rights under the confrontation clause, even if the evidentiary rules serve otherwise valid state interests."[96]

Under this reasoning, if Charlie is convicted in Vermont district court, and the conviction is upheld by the Vermont Supreme Court,[97] he could apply

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89. *See* Miller, *supra* note 60, at 220-21.

90. *See supra* note 83.

91. *See* Miller, *supra* note 60, at 219-21.

92. *See supra* note 84.

93. *See* Latzer v. Abrams, 602 F. Supp. 1314, 1321 (E.D.N.Y. 1985).

94. *See id.* at 1314.

95. *See id.* at 1317.

96. *Id.* at 1318 (citing Davis v. Alaska, 415 U.S. 308, 319 (1974)). A New York appellate court recently held, without discussion, that the trial court properly applied the state's rape shield law to exclude remote evidence of a murder victim's homosexuality when the defendant argued justifiable homicide and alleged that the victim was the sexual aggressor. *See* People v. Covich, 661 N.Y.S.2d 369, 370 (App. Div. 1997). The case is unique because the court applied the rape shield to protect the alleged sexual aggressor, though a homicide victim. *See id.* at 370.

97. Vermont has no intermediate court of appeals.

to the federal courts for a writ of habeas corpus. At the federal level, he could argue illegal imprisonment on the basis of a conviction in violation of his federal constitutional rights of confrontation and fair trial.[98] If the Vermont federal district court were to follow the Eastern District of New York, Charlie might win a new trial. As a practical matter, Charlie probably would have served a decade of incarceration by the final disposition of this federal action.

In 1989, Arkansas faced the proffer of evidence of a mildly retarded male complainant's homosexuality, and declined to admit the evidence while specifically not "deciding whether the rape shield statute prohibits mention of this evidence."[99] In 1994 the issue tangentially arose again. The Arkansas Supreme Court, without answering whether such evidence might ever be admissible, ruled that defense counsel at trial had not followed the proper notice procedure to admit evidence of the complainant's homosexuality.[100] Thus, the Arkansas courts appear to be taking a cautious approach. Were he in Arkansas, Charlie's lawyer would be well advised to have solid answers ready for alternative challenges to the admission of the needed defense evidence, before getting to the rape shield arguments.

A Tennessee court reversed a defendant's conviction, holding that the trial court improperly excluded evidence of the complainant's homosexual activities, which was offered to impeach direct testimony that the complainant was not a homosexual.[101] This case involved homosexual contact within a prison.[102] In a later Tennessee case, the trial court refused to admit reputation evidence of a male inmate's homosexuality, not based on any statutory principles, but simply because the proffer of proof of reputation was insufficient.[103]

None of these non-Michigan-style rape shield states have indicated that evidence of the complainant's homosexuality is inadmissible, provided such evidence is legally sufficient, relevant, material, and offered for appropriate defense purposes in advancement of the defendant's constitutional right of fair trial. In a non-Michigan-style jurisdiction, Charlie would stand a chance of having evidence of the reputation or specific instances of his complainant's prior homosexual activities entered at trial. The propriety of impeaching the

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98. *See, e.g.*, Richardson v. Marsh, 481 U.S. 200, 205 (1987).

99. Logan v. State, 776 S.W.2d 341, 344 (Ark. 1989).

100. *See* Laughlin v. State, 872 S.W.2d 848, 853 (Ark. 1994).

101. *See* State v. Rodgers, No. 01-C-019011CR00312, 1991 WL 155715, at *2 (Tenn. Crim. App. Aug. 16, 1991).

102. *See id.* at *1.

103. *See* State v. Whaley, No. 03C01-9101-CR-00025,.1992 WL 167342, at *6 (Tenn. Crim. App. July 21, 1992). The reputation evidence consisted of the testimony of a deputy sheriff who was not familiar with the complainant's community and had merely "heard some talk at the jail," and a cell mate who had overheard conversations discussing the possibility of complainant's homosexuality. *Id.* at *5.

complainant's claims of heterosexuality in non-Michigan-style states is virtually unquestionable.[104] Provided that the evidence is otherwise admissible, Charlie is in a reasonable position to present his defense in non-Michigan-style jurisdictions. Conversely, the explicit statutory restrictions of the Michigan-style states leave Charlie mercilessly exposed to the chicken-hawk's fatal plummet.

B. Admissibility of the Complainant's Homosexuality Under Michigan-Style Rape Shield Laws

The Michigan approach is the most restrictive, permitting the admission of rape shield evidence only in narrowly enumerated circumstances. The specific exceptions vary somewhat from state to state, but the unifying characteristic historically has been the staunch refusal of Michigan-style jurisdictions to admit any evidence not on the enumerated exceptions list. The following survey of cases catalogs the present considerations of evidence of homosexuality in defense of gay rape charges in Michigan and the Michigan-style states of Colorado, Massachusetts, Ohio, South Carolina, Virginia, and Wisconsin. Because no useful thematic organization presents itself, the cases are grouped by state. Three other Michigan-style states—Illinois,[105] Indiana,[106] and Maryland[107]—have addressed issues that contribute to a more

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104. *See supra* text accompanying note 101.

105. The Appellate Court of Illinois, in what can only be described as unique circumstances, reversed the conviction of a male sexual assault defendant. The State had evinced on direct examination of the female complainant evidence that the complainant was a lesbian who had never sexually consummated her marriage to a homosexual male. *See* People v. Kemblowski, 559 N.E.2d 247 (Ill. App. Ct. 1990). Over the defendant's objection, the State presented the evidence to bolster the complainant's testimony of lack of consent to the charged heterosexual incident. *See id.* The court determined that the trial evidence was unduly prejudicial to the defendant on the issue of consent. *See id.* In the inverse circumstances to Charlie's invisible presumption, the court noted that the complainant's "avowed preference for sexual activities with women necessarily affected the jury's assessment of whether [complainant] agreed to sexual activities with defendant." *Id.* at 251.

106. The Court of Appeals of Indiana refused to admit evidence of a complainant's homosexuality in support of a defense theory that defendant struck complainant in response to a sexual advance that complainant made towards defendant. *See* Kelly v. State, 586 N.E.2d 927 (Ind. Ct. App. 1992). The court refused to find any flexibility in the state's rape shield law because "the legislature has made the determination that evidence of prior sexual history, though arguably relevant to issues such as consent, is not admissible except for three strictly limited purposes . . . and we may not graft additional exceptions onto the statute." *Id.* at 929.

107. While Maryland apparently has not considered the issue of homosexuality pursuant to its rape shield law, it has considered the admissibility of a defense proffer of evidence that the complainant was "freaking" for cocaine within the time period of the alleged rape. *See* Johnson v. State, 632 A.2d 152, 153 (Md. 1993). Freaking is a street term indicating the engagement in sexual activity for compensation of drugs. *See id.* There, like several other states, the Court of Appeals of Maryland determined that where the proffered evidence has special relevance, and further passes the balancing test of probative value versus prejudicial effect, evidence not specifically enumerated in the rape shield law may be admissible. *See id.*

complete Michigan-style perspective. An analysis of the changing undercurrents in Michigan-style rape shield law follows.

1. A Survey of Michigan-Style Cases

a. Michigan[108]

While Michigan's rape shield law previously was held constitutional on its face,[109] the Michigan Supreme Court in 1985 considered whether prior sexual conduct evidence not explicitly exempted by statute must *always* be excluded.[110] It stated:

> The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a

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at 160-62.

108. The Michigan rape shield law reads as follows:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

MICH. COMP. LAWS § 750.520j(1)-(2) (1997) (citation omitted).

109. *See* People v. Arenda, 330 N.W.2d 814, 819 (Mich. 1982).

110. *See* People v. Hackett, 365 N.W.2d 120, 123-24 (Mich. 1984).

> complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge.[111]

Under this holding, Michigan announced that, contrary to the plain language of its rape shield law, it has not wholly shut and locked the door to admission of evidence of the complainant's sexuality. If Charlie's lawyer has otherwise airtight admissible evidence, and can offer it solely for the purpose of revealing the chicken-hawk's bias or ulterior motives for lying, Charlie may yet be able to present his consent defense, even in a Michigan-style rape shield state.

In *People v. Hackett*, the defense sought to introduce evidence of the complainant's reputation for homosexuality, as well as specific prior incidences of the complainant's sexual intercourse with a fellow inmate of the same race.[112] Upholding the trial court's restrictions, the Supreme Court of Michigan noted that, at trial, the complainant did not deny his homosexuality, and, thus, there never was a need to rebut the denial of homosexuality which had emerged in pretrial proceedings.[113] The court stated:

> Like prostitution, the fact that a person is a homosexual, standing alone, has little or no logical relevance between the excluded prior sexual acts evidence and the issues of consent or credibility. Thus, to the extent defendant sought to introduce evidence as to complainant's reputation as a homosexual or to specific acts of homosexuality for the purpose of bolstering his defense of consent, we find such evidence is irrelevant and the trial court properly excluded it.[114]

The court recognized the invisible presumption among jurors faced with a charge of homosexual rape: "[A] closer question is presented where such evidence was sought to dispel the assumption that most jurors would believe such an act, especially given the interracial element, is not likely to occur voluntarily."[115] In this particular case, the Michigan Supreme Court upheld the limitations imposed by the trial court because the defendant had been able to present evidence at trial of a specific incident of sex between the complainant and a male of a different race, as well as evidence of two stains

111. *Id.* at 124-25 (citations omitted).
112. *See id.* at 126.
113. *See id.*
114. *Id.* at 126-27.
115. *Id.* at 127.

of seminal fluid which, it was implied, came from two or more other males.[116] Such evidence seems sufficient to fulfill the defendant's fair trial rights.

The court's discussion of "bolstering" the defendant's defense is troublesome.[117] The court is implying that corroboration of the defendant's own story is somehow cumulative and unnecessary. However, precluding all prosecution evidence other than the complainant's testimony on the grounds of mere "bolstering" of the complainant's story would have great repercussions on the state's case. Given this absurdity, the Michigan Supreme Court struck a fine balance between the defendant's rights and the application of the rape shield law. The graphic evidence of the complainant's other recent homosexual encounters may counterbalance the invisible presumption of heterosexuality. However, this presumption may be stronger in Charlie's case than in jailhouse encounters because media portrayals have alerted the public to the prevalence of homosexual encounters within prison facilities.[118] That the Michigan court acknowledged the existence and nature of the invisible presumption is a notable first step in subjecting such presumptions to the scrutiny of daylight.

In *People v. Slovinski*, a typical heterosexual rape case, the Michigan Court of Appeals upheld, on the state's appeal, a trial court's admission of evidence of the complaining witness' acts of prostitution.[119] Like Charlie, the defendant claimed that the charged act "was consensual arising from a verbally-assented-to agreement of sex for money. In addition, because the complainant denied being a prostitute, her credibility was placed in issue."[120]

On Michigan's version of interlocutory appeal, the State argued that the Michigan rape shield law barred the admission of the proffered evidence of prostitution.[121] While the Michigan statute had previously been determined constitutional on its face in Sixth Amendment challenges, the Michigan

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116. *See id.*

117. *Id.* The troubling implications are contained in the following language: "[T]o the extent defendant sought to introduce evidence as to complainant's reputation as a homosexual or to specific acts of homosexuality *for the purpose of bolstering his defense of consent*, we find such evidence is irrelevant and the trial court properly excluded it." *Id.* (emphasis added).

118. A recent, popular film entitled THE SHAWSHANK REDEMPTION included scenes of homosexual activity in prison. *See* THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994).

119. *See* People v. Slovinski, 420 N.W.2d 145 (Mich. App. 1988).

120. *Id.* at 147. The admitted evidence proffered by the defense consisted primarily of two waitresses' testimony. One testified that she saw the complainant walking and standing on the street and associating in the restaurant with known prostitutes. The other had served as a "go between," brokering an agreement for prostitution services between a restaurant patron and the complaining witness. *Id.*

121. *See id.* The Michigan statute is even more restrictive than the Vermont rape shield law in that it does not admit evidence of prior false allegation of sexual assault.

appeals court analyzed whether the rape shield law could be unconstitutional as applied, should it be held to bar the proffered evidence of prostitution.[122]

The court of appeals' analysis on the admissibility of the proffered prostitution evidence under Michigan's rape shield law, upon which Vermont's statute is patterned, is extremely instructive. The *Slovinski* court first examined the admissibility of the evidence under Michigan's rules of evidence.[123] Holding the evidence of prostitution relevant and material, the court stated:

> [E]vidence of alleged prostitution is probative on the issue of consent if the fact that a complainant has engaged in intercourse for money has any tendency to make it more probable that the complainant consented to the sex act in issue. We conclude that, on the record made below, the proffered evidence of alleged specific acts of prostitution is probative on the issue of consent. It has a tendency to make it more probable that the complainant entered into a financial arrangement with defendant for sexual acts.[124]

The court went on to distinguish between character evidence offered solely to show that the witness allegedly acted in conformity (which would be inadmissible) and the case at issue in which character evidence was offered as probative of financially induced consent (which is admissible).[125]

Having concluded that the proffered evidence was otherwise admissible under the rules of evidence, the Michigan Court of Appeals considered whether it could be barred lawfully by the rape shield law. After passing reference to a number of other jurisdictions which had admitted evidence of prostitution where prostitution was the defense, the court concluded that in Slovinski's case, "evidence of the victim's prior sexual activity is absolutely critical in ensuring defendant a fair trial and in preserving his confrontation right. Without this evidence, defendant would be precluded from presenting his defense of consent."[126]

Thus, the Michigan courts have declared that the plain language of the Michigan-style rape shield laws do not extinguish the constitutional rights of a rape defendant. Such rights cannot be extinguished by the black and white lines of a rape shield statute.

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122. *See id.* at 148.
123. *See id.* at 151.
124. *Id.* at 153-54.
125. *See id.* at 154.
126. *Id.* at 155.

b. Colorado

In 1985, the Colorado Court of Appeals considered a sexual assault defendant's proffer of evidence of a minor boy's prior homosexual experiences.[127] Although the court did not discuss the purposes for which the proffer was asserted, the court did hold that the defense did not overcome the statutory presumption of irrelevancy.[128] Thus, at a minimum, this illustrated that there may still be circumstances under which this presumption can be overcome.[129]

In a more recent case, the Colorado Supreme Court reiterated that the rape shield statute:

> [D]oes not absolutely preclude the introduction of evidence regarding a rape victim's prior sexual conduct. Rather, the statute creates a presumption that evidence of prior sexual conduct is irrelevant. Evidence concerning a victim's sexual conduct may be admitted where a defendant demonstrates that such evidence meets a statutory exception or that the evidence is otherwise relevant to a material issue in the case. Thus, although the Rape Shield Statute bars evidence of a rape victim's sexual orientation and past sexual conduct, the defense may still introduce such evidence if the prosecution makes the evidence relevant by "opening the door" to the evidence.[130]

The court addressed the invisible presumption of heterosexuality in its analysis of whether the prosecution opened the door to rebuttal testimony by asking two questions on direct examination regarding the complainant's ex-wife and child.[131] The Colorado Supreme Court rejected the proposition that the defendant should have been able to rebut this implication of heterosexuality with direct evidence of the complainant's homosexual past, in good part because the defendant was able to effectively rebut the implication through expert witness testimony regarding homosexuality.[132] The expert explicitly testified that it is not uncommon for homosexuals to be married and have children.[133]

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127. *See* People v. Koon, 713 P.2d 410 (Colo. App. 1985).

128. *See id.* at 411. Because this was a statutory rape case, the evidence could not have been proffered for purposes of showing consent as an element of the crime.

129. The trial court had permitted the defendant to testify about conversations he had with the boy pertaining to homosexual experiences. *See id.*

130. People v. Murphy, 919 P.2d 191, 195 (Colo. 1996) (citations omitted).

131. *See id.*

132. *See id.* at 196.

133. *See id.*

Furthermore, the defendant's proffered evidence was deemed insufficient.[134] The defendant's only evidence was that the complainant had been seen in bed with a young man.[135] Accordingly, the proffered testimony did not rise to the level of admissibility; the prosecution had not opened the door to rebuttal of the implied assumption of homosexuality, and the defendant's confrontation rights were protected by the presentation of expert witness evidence.

Were Charlie in Colorado, he would face a difficult battle. The mere presence of the chicken-hawk's wife and kids would not be enough to trigger Charlie's right to have his lawyer inquire into the complainant's sexuality. However, Charlie's lawyer could consider applying for public funds to present expert testimony regarding the "homosexual lifestyle." Of course, he then would face an uphill side-battle: convincing the public defender system that such expenditure was necessary to his defense. If the request was denied, he could be back to another habeas petition, this time on the grounds of ineffective assistance of counsel.

c. Massachusetts

In *Commonwealth v. McGregor*, the Supreme Judicial Court of Massachusetts held *inadmissible* evidence of a male sexual assault complainant's homosexuality for purposes of either bolstering the defense of consent or showing that the defendant knew of the complainant's homosexuality and acted in response to that knowledge.[136] Such evidence, however, is *admissible* for purposes of showing the complainant's motive to lie.[137] In *McGregor*, the evidence proffered was therapists' notes indicating that the complainant, a fellow inmate of the defendant, engaged in homosexual activities for money and drugs.[138] Understandably, the complainant wished to suppress this evidence.[139] While the evidence had not been proffered at trial for the purpose of showing motive to lie, the Supreme Judicial Court held that failure to permit the defendant to present such evidence constituted "a substantial risk of miscarriage of justice."[140] The court noted that "[i]n the context of a prison setting, a motive to lie about one's homosexuality could be even more compelling."[141] In Charlie's case, the complainant's motives to lie,

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134. *See id.* at 197.
135. *See id.*
136. *See* Commonwealth v. McGregor, 655 N.E.2d 1278, 1280 (Mass. 1995).
137. *See id.*
138. *See id.* at 1279.
139. *See id.* at 1280.
140. *Id.*
141. *Id.*

including the wish to avoid the consequences of potential probation violations and the impact that information about his homosexuality might have on his family and community, are arguably equally compelling.

The Massachusetts Supreme Judicial Court previously held evidence of prior acts of prostitution admissible for purposes of showing the complaining witness' motive to lie.[142] The defendant in *Commonwealth v. Joyce* was caught in a car in a sexual act with a woman who claimed she was being raped.[143] The defense sought to introduce evidence showing that on two prior occasions the complainant had been caught late at night engaged in sexual acts with men in cars, and subsequently prosecuted for prostitution.[144] The defense offered the evidence not to show character or specific consent but to demonstrate that the complainant had a motive to lie—to avoid the inconvenience and possible loss of liberty from a third prosecution.[145]

The Supreme Judicial Court reversed the trial court's preclusion of the evidence, stating: "We do not believe that the prohibition in the rape-shield statute sweeps so broadly as to render inadmissible evidence of specific instances of a complainant's sexual conduct in situations when that evidence is relevant to show the complainant's bias."[146] The court noted that "[t]here is nothing in the history of the enactment of § 21B which indicates any legislative consideration of constitutional issues, and, more particularly, the question of impeachment by proof of bias."[147] The court held: "Reasonable cross-examination to show motive or bias has long been a matter of right. We do not read the rape-shield statute as abridging this right."[148] Thus, like Michigan, the Massachusetts courts have held that, despite the confining language of the state's rape shield law, the defendant's rights relative to trial and confrontation may not lawfully be abridged by such a statute.

Most recently, the Massachusetts Appeals Court held in *Commonwealth v. Pearce*, a case of statutory rape, that it was reversible error to preclude the defense from inquiring about the minor complainant's sexual activity at the time of the charged incident.[149] The defense sought such evidence to show the complainant's motive to fabricate the story, and not to show consent or any purpose prohibited by the rape shield law.[150] Discussing at length

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142. *See* Commonwealth v. Joyce, 415 N.E.2d 181 (Mass. 1981).

143. *See id.*

144. *See id.* at 183-84 One of these prosecutions was continued without a finding (a Massachusetts method of informally deferring sentence); the other resulted in conviction. *See id.*

145. *See id.* at 184.

146. *Id.* at 185.

147. *Id.* at 186.

148. *Id.* (citations omitted).

149. *See* Commonwealth v. Pearce, 681 N.E.2d 296 (Mass. 1997).

150. *See id.* at 299.

Massachusetts' rape shield case law, the appeals court went so far as to suggest that, in cases where consent is not a defense (e.g., statutory rape), the rape shield law does not apply.[151] As of this writing, this case is pending application for further appellate review.

d. Ohio

The Court of Appeals of Ohio recently upheld a statutory rape conviction that involved the use of homosexuality evidence.[152] In *State v. Hart*, the male complainants' adoptive father sought to introduce evidence that the two boys were engaged in homosexual activity, for which he severely punished them, and that their allegations against him were fabricated to cause his removal from their home.[153] While the court initially stated that the proffered evidence was not one of the enumerated exceptions to the rape shield law,[154] it did discuss the defendant's confrontation right and the relative probative value versus prejudicial effect of the proffered testimony.[155] The court determined that the defendant's confrontation right was preserved insofar as the defendant was permitted to offer evidence of his harsh disciplinary measures against the boys, and their desire to avoid his punishments.[156]

Previously, in *State v. Williams*, the Supreme Court of Ohio permitted the introduction of evidence of the complaining witness' acts of prostitution.[157] The defense asserted that the charged sexual acts were consensual; the complaining witness testified that she never consented to sex with males because she was a lesbian.[158] This is analogous to Charlie's case, where the complaining witness, by testimony or by implication, indicates that he does not consent to homosexual acts because he is heterosexual.

The *Williams* court stated that the proffered evidence had an "important purpose, which is to negate the implied establishment of an element of the crime charged," namely, lack of consent.[159] Accordingly, the Ohio Supreme Court held that the Ohio "rape shield law as applied in this case"—to preclude evidence of prostitution relevant to the issue of consent—"violates appellee's Sixth Amendment right of confrontation."[160] Having so established, the court

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151. *See id.* at 303.
152. *See* State v. Hart, 678 N.E.2d 952 (Ohio App. 1996).
153. *See id.* at 954.
154. *See id.*
155. *See id.* at 955.
156. *See id.*
157. *See* State v. Williams, 487 N.E.2d 560, 563 (Ohio 1986).
158. *See id.* at 560, 562-63.
159. *Id.* at 563.
160. *Id.*

quickly concluded that the evidence was relevant, material, and otherwise admissible, and affirmed the appellate court's decision to reverse the defendant's conviction and remand for a new trial.[161]

In an interesting but brief concurring opinion, Justice Wright noted that the court's holding did not violate the policy underlying the rape shield law.[162] Justice Wright wrote that while the law "was enacted to protect rape victims[,] it should not also serve as a means to commit perjury as to a relevant, noncollateral matter."[163]

e. South Carolina

The Court of Appeals of South Carolina dealt squarely with the issue of impeaching a complainant's denial of homosexuality.[164] When the defense sought to introduce impeaching evidence on this point, the trial judge precluded it based on the rape shield law.[165] The appellate court reversed and remanded, noting that, when the evidence of the complainant's sexuality is offered "simply for the purpose of impeaching the victim's credibility[,]" the rape shield law is inapplicable.[166] If the prosecutor in Charlie's case opens the door as widely as the prosecutor in South Carolina did, Charlie's opportunity to present evidence of the complainant's homosexuality should be similarly wide open.

f. Virginia

The Court of Appeals of Virginia found reversible error when a trial court refused the defendant a preliminary evidentiary hearing.[167] The defendant proffered evidence showing that two of the complainants had a lesbian relationship, giving them a motive to fabricate criminal charges against him.[168] Thus, despite the classification of Virginia as a Michigan-style state, the courts seem to have applied the Commonwealth's rape shield law in an Arkansas-like manner, requiring preliminary evaluation of the proffered evidence.[169]

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161. *See id.* at 564.

162. *See id.*

163. *Id.*

164. *See* State v. Lang, 403 S.E.2d 677, 678 (S.C. 1991) (where the prosecution asked, on direct examination, "Are you a homosexual?").

165. *See id.*

166. *Id.*

167. *See* Johnson v. Commonwealth, 385 S.E.2d 223 (Va. Ct. App. 1989).

168. *See id.*

169. For a discussion of Arkansas' rape shield law, see *supra* note 82.

In cases like Charlie's, even if the proffered evidence is precluded after preliminary hearing, simply getting the evidence in front of the trial judge could be of vital importance later in sentencing. After the preliminary hearing, at least the judge will understand the defense position on the facts it needs to tell the defendant's story. The judge could either allow greater leeway at trial than might have been expected absent a preliminary hearing, or take the mitigating circumstances into account in sentencing.

In *League v. Commonwealth*, the Commonwealth of Virginia had previously addressed the admission of evidence of a complainant's prostitution.[170] The court of appeals determined that it was reversible error to have applied the Commonwealth's rape shield law to preclude evidence that the complaining witness and the defendant previously had consensual sex, that she had advised the defendant that all future sexual acts between them would be for a specified sum of money, and that after the charged incident the defendant offered her money which she declined.[171] However, the court's discussions of sex for money were so intertwined with the prior consensual acts with the defendant that it is impossible to distinguish the analysis. Moreover, it is unclear whether the court ruled the statute unconstitutional as applied or merely found error in applying a statutory exception to precluded evidence. In any event, the court in *League* held that admissibility of evidence of prior sexual conduct can only be decided on a case-by-case basis.[172] The Court of Appeals of Virginia did not bar evidence of the complaining witness' financially induced consent.[173]

170. *See* League v. Commonwealth, 385 S.E.2d 232, 234 (Va. App. 1989).
171. *See id.* at 238.
172. *See id.* at 237.
173. *See id.* at 238.

g. Wisconsin[174]

The Court of Appeals of Wisconsin has held that the Constitution

> requires that where the evidence [of prior sexual conduct] to be admitted is probative of the complainant's bias or prejudice, shows that she [or, presumably, he] has a motive to fabricate, or shows a continuing pattern of conduct, the trial court must balance the probativeness of the evidence against its prejudicial nature. A refusal to allow this evidence in all cases based solely upon an evidentiary rule is a violation of the defendant's sixth amendment rights to confront adverse witnesses and present witnesses in his own behalf.[175]

The court in *State v. Herndon* held that the portion of the Wisconsin statute that prohibits admission of any evidence of a complaining witness' prior sexual conduct (other than a few listed exceptions) is facially unconstitutional.[176] The Wisconsin statute is the closest to Vermont's because it allows for the introduction of evidence of prior false allegations. However, the paragraph which the court in *Herndon* rejected is notably absent from the Vermont statute.[177]

The trial court in *Herndon* excluded evidence of the complainant's prior arrests for prostitution, evidence that such arrests were in precisely the same area and under similar circumstances to the charged incident, and evidence that the complainant's mother was aware of and disapproved of the

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174. The Wisconsin rape shield law reads in pertinent part:

> (b) If the defendant is accused of a crime . . . , any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to § 971.31(11):
>
> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.
>
> (c) Notwithstanding § 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b) 1, 2 or 3.

WIS. STAT. ANN. § 972.11(2)(b)-(c) (West 1985 & Supp. 1997).

175. State v. Herndon, 426 N.W.2d 347, 362 (Wis. App. 1988).

176. *See id.* at 363 (holding § 972.11(2)(c) unconstitutional).

177. For the text of Vermont's rape shield law, see *supra* note 3.

complainant's acts of prostitution.[178] Such evidence was proffered to show motive to lie and to corroborate the defense of consent.[179] After lengthy, scholarly discussion of the various approaches to rape shield laws around the country, the court in *Herndon* reversed the defendant's conviction and remanded for the reasons stated above.[180]

In a case involving a child sexual assault in 1990, the Supreme Court of Wisconsin overruled *Herndon* insofar as it declared the rape shield law facially unconstitutional.[181] However, the court did not disturb the principle of the *Herndon* decision which ruled that the rape shield law may be unconstitutional as applied, when it bars otherwise admissible evidence relative to a complainant's motive to lie.[182] The court relied on *Herndon* in holding that a defendant may cross-examine a minor complainant about sexual abuse by other adults to show prior knowledge of sexual acts and terms and a related ability to lie about the events.[183]

The Court of Appeals of Wisconsin has since had opportunity to consider a defendant's proffer of evidence of a minor complainant's homosexuality on a charge of sexual assault.[184] Although the court did not indicate that such evidence would be barred in all cases, the defendant failed the first required basis for consideration: clear proof that the prior acts actually occurred.[185] The defendant's allegation that the complainant was involved in a sexual relationship with another adult male was the only evidence offered.[186] Such an unsupported proffer was appropriately rejected without implicating the constitutionality of admitting proper evidence of the complainant's homosexuality in other cases. The Wisconsin decisions underscore the importance in Charlie's case of making sure that the proffered evidence of the complainant's prior homosexual acts are as solid and admissible as possible under the circumstances before making the rape shield admissibility argument.

178. *See Herndon*, 436 N.W.2d at 348-52.
179. *See id.* at 352.
180. *See id.* at 352-63.
181. *See* State v. Pulizzano, 456 N.W.2d 325, 330 (Wis. 1990).
182. *See id.* at 335.
183. *See id.*
184. *See* State v. Marston, 478 N.W.2d 68 (Wis. 1991) (unpublished decision).
185. *See id.*
186. *See id.*

2. Analysis of Admission of Evidence of the Complainant's Homosexuality in Michigan-Style States

Charlie is being prosecuted for homosexual rape in Vermont, one of the twenty-six Michigan-style states. While these statutes are reputed to have the most stringent preclusive effect on defense evidence in rape cases, each of the Michigan-style states that has addressed the admissibility of evidence of prior acts of prostitution by the complainant—whether relevant to the issue of consent, motive to lie, or impeachment—has held such evidence admissible.[187] It is noteworthy that the Michigan-style states, which have admitted evidence of prostitution, generally have rape shield laws that are *more* restrictive than Vermont's rape shield laws. Where Michigan-style states have considered evidence of the complainant's homosexuality, rulings on admission have varied. However, Indiana is the sole state to explicitly hold that evidence not specifically enumerated in an exception is wholly inadmissible.[188]

One by one, the Michigan-style states, through case law, have been bringing their rape shield laws into accord with the federal style rape shield law. Federal-style statutes include a catch-all exception for evidence that meets the balancing test of probative value versus prejudicial effect[189] *and* that is necessary to protect the defendant's fair trial rights.[190] It is unclear whether the position taken by Indiana will pass federal constitutional muster when applied to prevent admission of otherwise admissible, relevant, and material evidence for a legitimate purpose.

While the decisions of these jurisdictions are not controlling upon any decision Vermont may face in a case like Charlie's, the collective reasoning and wisdom of all of these states should be considered in a case of first impression. Given the trend of the Michigan-style states towards recognizing that no evidentiary statute may lawfully abrogate a defendant's constitutional rights of fair trial and confrontation, Charlie's defense counsel would be wise to assert the state and federal constitutional bases for the proffered evidence of the complainant's homosexuality early and often.

III. THE LAW UNDER VERMONT'S RAPE SHIELD STATUTE

Because Charlie is being charged in Vermont, the specific language and interpretation of Vermont's rape shield law will determine Charlie's fate for the next forty or fifty years. This Part examines the legislative history of

187. *See supra* note 88.
188. *See* Kelly v. State, 586 N.E.2d 927, 929 (Ind. Ct. App. 1992).
189. *See* FED. R. EVID. §412(b)(2).
190. *See* FED. R. EVID. §412(b)(1)(C).

Vermont's rape shield law, searching for any indication of the drafters' intentions relative to admission of evidence of a homosexual rape complainant's sexual orientation. The Part then analyzes the current state of Vermont rape shield case law. Although the Vermont Supreme Court has not yet examined a case like Charlie's, a general review of Vermont's rape shield case law sheds light on the issues of concern to the court.

A. History of the Vermont Statute

Vermont's rape shield law[191] states in pertinent part that, in a prosecution for aggravated sexual assault,[192] "[n]either opinion evidence of, nor evidence of the reputation of the complaining witness' sexual conduct shall be admitted[,]"[193] and that "[e]vidence of prior sexual conduct of the complaining witness shall not be admitted."[194]

The statute makes limited exception to this blanket prohibition as follows:

> provided, however, where it bears on the credibility of the complaining witness or it is material to a fact at issue and its probative value outweighs its private character, the court may admit:
>
> (A) Evidence of the complaining witness' past sexual conduct with the defendant;
>
> (B) Evidence of specific instances of the complaining witness' sexual conduct showing the source of origin of semen, pregnancy or disease;
>
> (C) Evidence of specific instances of the complaining witness' past false allegations of violations of this chapter.[195]

The Vermont statute is silent about whether this list of exceptions is all-inclusive, or whether other instances in which evidence that "bears on the credibility of the complaining witness or . . . is material to a fact at issue and its probative value outweighs its private character"[196] may be admitted.

Rape shield laws aim to protect victims of sexual assaults from undergoing character assassinations. Under Vermont common law, the

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191. For the text of Vermont's rape shield law, see *supra* note 3.

192. Vermont's rape shield law applies to all charges brought under any section of Chapter 72 of Title 13 pertaining to any form of sexual assault; it also applies to charges brought under Sections 2601 and 2602 of Title 33 pertaining to sexual assaults upon an elderly or disabled adult.

193. VT. STAT. ANN. tit. 13, § 3255(a)(1) (Supp. 1997).

194. VT. STAT. ANN. tit. 13, § 3255(a)(3) (Supp. 1997).

195. VT. STAT. ANN. tit. 13, § 3255(a)(3)(A)-(C) (Supp. 1997).

196. *Id.*

promiscuity of a rape victim was traditionally admissible for purposes of showing that the victim was an immoral person.[197] Supposedly, this indicated both an inclination to consent to any given sexual act and a propensity to lie about those acts.[198] Additionally, corroboration of the complainant's allegation was required for conviction.[199] The victim's story alone was not considered legally sufficient to form a prima facie case.[200]

The legislative history of Vermont's rape shield law reveals that elimination of the corroboration requirement, which had evolved through case law, was the primary topic of discussion in committee meetings.[201] In the few available Record Committee Meetings of the Senate Judiciary Committee relative to passage of Vermont's rape shield law are the following notations:

> §. 7-Motion by Sen. O'Brien to strike all and substitute the following: "In a prosecution for a crime defined in this chapter, the

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197. *See* State v. Patnaude, 140 Vt. 361, 372, 438 A.2d 402, 406 (1981). As the *Patnaude* court stated:

> It was considered fair game, in a profession dominated by male chauvinism and, formerly, by juries composed of men, to permit defense counsel to inquire into chastity. The process of "reasoning" which connected past acts with the present was that an instance of past consensual sex is evidence of unchastity, unchaste women are immoral, and immoral women are more likely to consent to sexual activity on any given occasion, and to lie about whether or not they consented. If proven unchaste, a woman was thought to somehow be less believable than a virtuous woman.

Id. (citation omitted).

198. *See id.*

199. Corroboration to an accusation of rape or other sexual misbehavior is a common requirement in many cultures. For example, the Holy Quran speaks of the need for four witnesses to acts of adultery. *See, e.g.*, AL-QUR'AN (Ahmed Ali, trans., Akrash Pub. 3d. ed. 1995). As discussed above, eyewitnesses to sexual assaults are rare; however, corroboration by medical examination is available in many cases. The requirement of corroboration is a double edged sword: on the one hand, it implies that a woman's word is not enough for a jury to accept as evidence; on the other hand, it recognizes that rape is an accusation easily made and impossible to defend.

It is interesting to consider that the requirement of corroboration of rape charges in the United States has fallen contemporaneously with a significant rise in the reporting of sexual assaults against men. "Until recently . . . there has been little consideration of sexual assault of men in the community. Statistics on male sexual assault are rare, encouraging disbelief in the phenomenon." Michael B. King, *Male Sexual Assault in the Community*, *in* MALE VICTIMS OF SEXUAL ASSAULT, *supra* note 23, at 1. "In the United States there has also been a generalized finding of an increase in male victims among all rape cases, one study published in the late 1970s reporting an increase from 0 percent to 10 percent in three years." *Id.* Other data from around "the United States suggest that when specific services are developed within a given area, the proportion of all rape victims coming forward who are men may be as high as 22.7%." Hillman, *supra* note 31, at 247-48 (citing C.L. Anderson, *Males as Sexual Assault Victims: Multiple Levels of Trauma*, 1982 J. HOMOSEXUALITY, at 145-62).

200. For an extensive history and discussion of prior rape law and the purpose of rape shield laws, see Berger, *supra* note 4, at 1.

201. *See* Senate Judiciary Comm. (Vt. 1977) (record of February 22, 1977 Senate Judiciary Committee meeting).

> same rules of criminal procedure and rules of evidence shall apply as apply to all prosecutions, including rules relative to corroborative testimony." Failed by the vote of 3-3.[202]
>
> § 3207(a)(3)-amended to read: "Evidence of corroboration shall be required only as provided by the rules of evidence and the Vermont Rules of Criminal Procedure, and evidence of corroboration heretofore set forth by case law shall no longer be required." Moved by Sen. Gibson, adopted unanimously.[203]

The only reference in Vermont's rape shield law that indicates legislative consideration of evidence of homosexuality is the definition of the complainant's "sexual conduct."[204] Sexual conduct is defined in the statute as "any conduct or behaviour relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual acts, use of contraceptives, living arrangement and mode of living."[205] On February 22, 1977, by unanimous vote of the Vermont Senate Judiciary Committee, the word "life-style" in the previous draft of the statute was changed to "mode of living."[206] No explanation of the change appears.[207] Thus, there is no way to determine what the legislature intended by this change in the statutory language.

Today, the expression "life-style" can imply what is commonly called the homosexual life-style.[208] "Mode of living" seems to imply the manner in which one lives in a more private sense. The phrase "living arrangement and mode of living" thus seems to take into consideration where one lives and works. Under these current meanings, it seems a reasonable inference that the legislature retracted through this change in phrase any implied protection of inquiry into the "homosexual lifestyle." However, there is no way to determine what these words meant at the time and in the context of the legislative adoption, when the phrase "homosexual lifestyle" was not prevalent in the media. It does not appear that the potential for unconstitutional applications of the statute to bar otherwise admissible

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202. Senate Judiciary Comm. (Vt. 1977) (record of February 16, 1977 Senate Judiciary Committee meeting).

203. Senate Judiciary Comm. (Vt. 1977) (record of February 22, 1977 Senate Judiciary Committee meeting).

204. *See* VT. STAT. ANN. tit. 13, § 3251(2) (Supp. 1997).

205. *See id.*

206. Senate Judiciary Comm. (Vt. 1977) (record of February 22, 1977 Senate Judiciary Committee meeting).

207. *See id.*

208. *See, e.g.*, Hon. Clifford Taylor, *Who Is in Charge Here? Some Thoughts on Judicial Review*, 77 MICH. B.J. 32, 33 (1998).

evidence was considered by the Vermont legislature during the adoption of the state's rape shield law.[209]

B. Vermont Rape Shield Case Law

It is both a blessing to the populace, and a burden to the practitioner, that Vermont, being a small, peaceful state, has a relative dearth of reported criminal cases.[210] Since the adoption of the rape shield law in 1977, there have been only twenty-four reported interpretive cases,[211] with only five since 1994. Many of these cases deal with the statute's enumerated exceptions.[212] More than half of the cases concern statutory rape,[213] where consent is not an issue.[214] A few of the cases have been appealed due to evidentiary issues not implicating the rape shield law.[215] Additional cases have been remanded or

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209. *See* S. 34 (1977 Vt., Bien. Sess.) (original version introduced January 11, 1977). The Sponsor's Statement of purpose of the original S. 34 reads: "It is the purpose of this bill to revise the laws relating to the crime of rape and related crimes, and to fix the penalty for each; and to provide for the manner of proof, the elements of a prima facie case, and the permitted use of opinion evidence and evidence of prior sexual conduct of the complaining witness." *Id.*

210. Vermont has no intermediate appellate courts; criminal trials are held in District Courts, and appeal is directly to the Vermont Supreme Court.

211. Reported, interpretive cases of Vermont's rape shield law include the following: State v. Cate, 165 Vt. 404, 683 A.2d 1010 (1996); State v. Leggett, 164 Vt. 599, 664 A.2d 271 (1995); State v. Lund, 164 Vt. 70, 664 A.2d 253 (1995); State v. Goodnow, 162 Vt. 527, 649 A.2d 752 (1994); State v. Jarry, 161 Vt. 629, 641 A.2d 364 (1994); State v. Ashley, 160 Vt. 125, 623 A.2d 984 (1993); State v. Bruyette, 158 Vt. 21, 604 A.2d 1270 (1992); State v. Blair, 155 Vt. 271, 583 A.2d 591 (1990); State v. Lavelette, 154 Vt. 426, 578 A.2d 108 (1990); State v. Derouchie, 153 Vt. 29, 568 A.2d 416 (1989); State v. Dunbar, 152 Vt. 399, 566 A.2d 970 (1989); State v. Giroux, 151 Vt. 361, 561 A.2d 403 (1989); State v. Ringler, 153 Vt. 375, 571 A.2d 668 (1989); State v. Ross, 152 Vt. 462, 568 A.2d 335 (1989); State v. Dubois, 150 Vt. 600, 556 A.2d 86 (1988); State v. Hooper, 151 Vt. 42, 557 A.2d 880 (1988); State v. Catsam, 148 Vt. 366, 534 A.2d 184 (1987); State v. Shaw, 149 Vt. 275, 542 A.2d 1106 (1987); State v. DeJoinville, 145 Vt. 603, 496 A.2d 173 (1985); State v. Gonyaw, 146 Vt. 559, 507 A.2d 944 (1985); State v. Patnaude, 140 Vt. 361, 438 A.2d 402 (1981); State v. Bevins, 140 Vt. 415, 439 A.2d 271 (1981).

212. State v. Goodnow, 162 Vt. 527, 649 A.2d 745 (1994) (prior false allegations); State v. Lavalette, 154 Vt. 426, 589 A.2d 108 (1990) (past sexual conduct of the victim with the defendant); State v. Hooper, 151 Vt. 42, 557 A.2d 880 (1988) (evidence of semen on the complainant); State v. Gonyaw, 146 Vt. 559, 507 A.2d 944 (1985) (past sexual conduct of the victim with the defendant).

213. The cases involving statutory rape include the following: State v. Leggett, 164 Vt. 599, 664 A.2d 271 (1995); State v. Lund, 164 Vt. 70, 664 A.2d 253 (1995); State v. Jarry, 161 Vt. 629, 641 A.2d 364 (1994); State v. Ashley, 160 Vt. 125, 623 A.2d 984 (1993); State v. Dunbar, 152 Vt. 399, 566 A.2d 970 (1989); State v. Ringler, 153 Vt. 375, 571 A.2d 668 (1989); State v. Giroux, 151 Vt. 361, 561 A.2d 403 (1989); State v. Ross, 152 Vt. 462, 568 A.2d 335 (1989); State v. Dubois, 150 Vt. 600, 556 A.2d 86 (1988); State v. Catsam, 148 Vt. 366, 534 A.2d 184 (1987).

214. The Massachusetts Appeals Court has recently gone so far as to suggest that, in cases of statutory rape, where consent is not an issue, rape shield laws may not apply, because the legislative rationale declaring evidence of promiscuity irrelevant to the issue of consent in any particular case is inapplicable. *See* Commonwealth v. Pearce, 681 N.E.2d 296 (Mass. App. Ct. 1997). As of this writing, application for further appellate review on this case is pending.

215. *See* State v. Parker, 149 Vt. 393, 545 A.2d 512 (1988). *Parker* upheld the admission of

decided on procedural grounds, such as failure to properly preserve issues.[216] No case has specifically addressed either admission of evidence of the complaining witness' homosexuality or evidence of prostitution,[217] where the defense is that of a consensual homosexual act.[218] Only three cases shed light on the admission of the complainant's homosexuality in Charlie's case: *State v. Lund*, *State v. Patnaude*, and *State v. Bevins*.

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evidence of the defendant's sexual conduct with his older son, in a prosecution for sexual conduct with his younger son. *See id.* The Vermont Supreme Court upheld the admission of such evidence in rebuttal to the defendant's testimony on cross-examination stating "I am not perverted." *Id.* at 396, 545 A.2d at 514. Because this case addressed the admission of prior sexual acts of the defendant, rather than the complaining witness, the rape shield law did not apply.

216. The prosecution in *State v. Dubois* sought to bar defense use of evidence of a sexual relationship between the alleged victim and her brother. *See* State v. Dubois, 150 Vt. 600, 556 A.2d 86 (1988). Such evidence was offered to show that the brother had reported the charged offense to distract attention from his own misdeeds. *See id.* at 601, 556 A.2d at 87. The Vermont Supreme Court determined that interlocutory appeal of a decision on a motion in limine was inappropriate, and declined to decide the issue. *See id.* at 603, 556 A.2d at 88.

217. There has been one reported case in Vermont where the defense sought to introduce evidence of the complainant's prior acts of what the court called "sexual favors for minor considerations." State v. Patnaude, 140 Vt. 361, 375, 438 A.2d 402, 408 (1981). The defendants in *Patnaude* were charged with repeated sexual assaults on two women in what the court termed "a late-night gang rape." *Id.* at 366, 438 A.2d at 403. The defense was one of consent. Defendants sought to admit evidence that one complainant had on two prior occasions engaged in sex with more than one person, or engaged in couples-swapping. *See id.* at 374-75, 438 A.2d at 408. Defendants also sought to admit evidence that on certain occasions one of the complainants had engaged in sex in exchange for small cash payments or for services such as tattoos. *See id.* at 375, 438 A.2d at 408. However, the defendants presented no evidence that the complainant had engaged in a personal relationship with any of the defendants; thus the evidence of "couples-swapping" was unlike the charged incident. Most critically for our analysis, the defense did not allege that the charged acts were incidents of financially induced consent; thus any prior incidents of prostitution were properly excluded as irrelevant.

Patnaude was Vermont's first reported case under the rape shield law, and as such, the Vermont Supreme Court took the opportunity to discuss the law at great length. It remains one of small handful of cases addressing defense attempts to present evidence not enumerated as exemptions to the rape shield law.

218. There has been one reported case in Vermont dealing with sexual assault by an adult male upon another adult male. (Several of the sexual assault on minor cases have dealt with molestation of young males by adult males; neither consent nor implication of sexual orientation of such child victims can be considered relevant in those cases). In *State v. Blair*, 155 Vt. 271, 583 A.2d 591 (1990), the Vermont Supreme Court was presented with the appeal of a man convicted of sexually assaulting his cellmate at the Woodstock Correctional Center. In a typical summary of a sexual assault case, "[t]he trial came down to a credibility contest between two prison inmates. The victim testified that he was sexually assaulted by defendant, his cell mate. . . . Defendant testified in his own behalf and denied that he had sexually assaulted the victim at any time." *Id.* at 273, 583 A.2d at 592.

Blair's appeal was grounded, not in denial of ability to present evidence under the rape shield law, but on the trial court's preclusion of testimony of other inmates regarding their opinion of the complainant's veracity, offered pursuant to the Vermont Rules of Evidence, Rule 608. *See supra* note 54. The Vermont Supreme Court reversed and remanded Blair's conviction. *See Blair*, 155 Vt. at 278, 583 A.2d at 595. The trial court, in ruling the opinion evidence inadmissible, *see id.* at 272, 583 A.2d at 592, failed to "differentiate between opinion and reputation evidence." *See id.* at 278, 583 A.2d at 595.

1. *State v. Patnaude*

Patnaude—heavily relied upon in future cases—was Vermont's first rape shield case.[219] The defense in *Patnaude* offered evidence of the complaining witness' prior sexual acts with more than one person at a time, as well as acts of prostitution.[220] The defense did not assert that the charged incident—a violent gang rape at a remote cabin—was an act of prostitution; nor did it allege that the incident was an act of "couples swapping."[221] The Vermont Supreme Court began its analysis of the excluded evidence by assessing relevance and materiality, without which no further analysis would be necessary.[222] This early analysis hinted at the idea, recently stated in *State v. Lund*, that the rape shield law's enumerated exceptions do not constitute the totality of admissible evidence where the defendant's rights of fair trial require otherwise.[223]

Similar to Charlie's case is the evidence sought to be entered by the defense in *Patnaude*, that of the complainant's prior sexual encounters with more than one individual.[224] Perhaps most jurors looking at an average female complainant would find it unlikely, absent evidence to the contrary, that she would consent to sex with multiple persons in the same episode. Though sex with multiple partners is not analogous to an attack by multiple assailants, evidence of the willingness to sexually engage with multiple partners could overcome a potentially critical jury bias to the contrary. Although the issue apparently was not pressed in this light, the Vermont Supreme Court nevertheless seemed nonplussed by the theory.[225] The justices dismissed the evidence as instances of "couples swapping" or a "menage a trois[,]" entirely distinct in character from gang rape.[226] The tone of the court's dismissal indicates that it did not find such evidence particularly unusual or dispositive.[227]

The evidence offered by the defense in *Patnaude* contrasts with that presented by the *prosecution* regarding the *defendant's* past sexual practices

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219. State v. Patnaude, 140 Vt. 361, 372, 438 A.2d 402, 406 (1981).

220. *See id.* at 374-75, 438 A.2d at 408.

221. *Id.* In a pretrial, in-camera hearing, the defendants alleged that one or both of the prosecuting witnesses had in the past engaged in acts of couples swapping and prostitution. *See id.* at 374-75.

222. *See id.* at 370, 438 A.2d at 405.

223. *See* State v. Lund, 164 Vt. 70, 71-72, 664 A.2d 253, 254 (1995). For a discussion of *Lund*, see infra, Part III.B.2.

224. *See Patnaude*, 140 Vt. at 374-75, 438 A.2d at 408.

225. *See id.* at 376, 438 A.2d at 408-09.

226. *Id.* at 379, 438 A.2d at 410.

227. *See id.* The following demonstrates the court's tone: "[D]efendants do not offer a new theory, but merely tinker with an old one, which has long been in disrepute. . . . The proffered evidence is worse than worthless." *Id.* at 380, 438 A.2d at 410.

in *State v. Bruyette*.[228] There, the Vermont Supreme Court upheld the testimony of the defendant's girlfriend.[229] Her testimony included a description of his preferred sexual positions, his use of cocaine during sex, his verbal expressions, and his fantasy of kidnapping and sexually tormenting a stranger meeting the description of the complainant.[230] The testimony was relevant to the identification of the defendant because the victim was blindfolded for the duration of the extended, vicious encounter at knifepoint.[231] In its analysis, the Vermont Supreme Court looked to the remarkable parallels of the offered testimony to the incident being charged, reflecting on their unique and unusual nature.[232] The proffered testimony in *Patnaude* regarding a prior, brief partner-swapping incident did not have the same sort of parallels to the charged occurrence of prolonged sexual encounters with multiple men, and hence, did not reflect a unique and unusual pattern of identifiable behavior.[233]

2. *State v. Lund*

In 1995, eighteen years after the adoption of Vermont's rape shield law, the Vermont Supreme Court recognized in dicta that the enumerated exceptions to the rape shield law may not be constitutionally adequate.[234] The list does not address all potential instances in which a defendant's constitutional rights of fair trial and confrontation outweigh the State's interests or the complainant's rights, which are thoroughly armored by the rape shield laws.[235] In *Lund*, the defendant was charged with the sexual assault of his minor niece.[236] Though consent was not an issue, the defense sought to present evidence of a prior sexual assault on the child by another

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228. State v. Bruyette, 158 Vt. 21, 25, 604 A.2d 1270, 1271 (1992).

229. *See id.* at 25, 604 A.2d at 1271.

230. *See id.*

231. *See id.*

232. *See id.* at 26, 604 A.2d at 1272.

233. In another case early in the history of Vermont's rape shield law, the Vermont Supreme Court upheld exclusion of evidence when the complaining witness "had engaged in sexually provocative conduct with the defendant's brother-in-law" at a bar on the same evening of the alleged rape. State v. Bevins, 140 Vt. 415, 418, 439 A.2d 271, 272 (1981). In *Bevins*, the Vermont Supreme Court declined even to proceed to analysis under the rape shield law, holding the evidence inadmissible as irrelevant. *See id.* at 419, 439 A.2d at 272-73. The actions at issue in *Bevins* were the flirtations of a woman with a male patron of a bar. *See id.* at 418, 439 A.2d at 272. Heterosexual flirtations are an ordinary and lawful course of conduct among members of our society. They are precisely within the sphere of behavior excluded by rape shield laws. Charlie's case differs markedly because acts of homosexual prostitution are not the norm. *See supra* Part I.B. Indeed, they are unlawful in most jurisdictions. *See supra* note 35.

234. *See* State v. Lund, 164 Vt. 70, 71-72, 664 A.2d 253, 254 (1995).

235. *See id.* at 71-72, 664 A.2d at 254.

236. *See id.* at 70, 664 A.2d at 254.

relative.[237] The defense theorized that the child had confused the two incidents, or fabricated the charged incident to reflect the prior occurrence.[238]

Before upholding exclusion of the evidence, the Vermont Supreme Court made the following remarks:

> The Sixth Amendment affords a criminal defendant the right to confront witnesses against him at trial. The right is not absolute, however. It may yield to other legitimate interests at trial and does not make evidence automatically admissible. All evidence, including that offered for the purpose of confrontation, is first subject to a balancing test for admissibility. Vermont's rape shield statute is merely a specific application of the Rule 403 balancing test. *If the proffered evidence is relevant and otherwise admissible under Rule 403, then the Confrontation Clause may override the rape shield statute's prohibitions and the State's interest in protecting the victim.*[239]

In *Lund*, the Vermont Supreme Court recognized the axiom that an otherwise lawful statute cannot be unconstitutionally applied.[240] As the United States Supreme Court stated in *Davis v. Alaska*, "[t]he Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings . . . ."[241] The Court in *Davis* held that juvenile delinquency records can be used to impeach a juvenile complainant in a criminal proceeding.[242] The United States Supreme Court stated that "the State's policy interest . . . cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[243] As *Lund* implied, the same is true for the State's policy interest in shielding the privacy of rape victims.[244]

Without the ability to cross-examine witnesses on matters critical to the defense, the right of confrontation is meaningless. "The opponent demands

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237. *See id.* at 71, 664 A.2d at 254.

238. *See id.*

239. *Id.* at 71-72, 664 A.2d at 254 (emphasis added) (citations omitted).

240. *See id.*

241. Davis v. Alaska, 415 U.S. 308, 315 (1974). The Vermont Constitution explicitly protects confrontation and fair trial rights as well. *See* VT. CONST. ch. I, art. 10-12. While rape shield statutes have universally been held to be facially in compliance with the United States Constitution, a number have been held to infringe upon state constitutions. *See* Note, *Sexual Assault Law Reform in Colorado—An Analysis of House Bill 1042*, 53 DENV. L.J. 349 (1976).

242. *See Davis*, 415 U.S. at 320.

243. *Id.*

244. *See Lund*, 164 Vt. at 71-72, 664 A.2d at 254.

confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers."[245] In a rape case, cross-examination of prosecution witnesses and presentation of defense witnesses on issues that directly impact the elements of consent and the complaining witness' credibility should be within the bounds of the rules of evidence.

The Vermont Supreme Court in *Lund* finally faced the issue of the unconstitutional application of Vermont's rape shield law.[246] Although it held the evidence inadmissible, it recognized that the rape shield law could not preclude all unenumerated evidentiary offers.[247] Prior case law had side-stepped this issue, generally holding proffered evidence to be inadequate without addressing the eventual admissibility of adequate evidence.

Thus, Vermont's rape shield jurisprudence, though a Michigan-style statute, incorporates the legal flexibility of the federal approach to the rape shield law. Early cases in Michigan-style states foreshadowed this eventuality, now ubiquitous enough to be called a trend. This trend makes clear doctrinal sense when the rape shield law is viewed theoretically as guidance when conducting an evidentiary Rule 403 balancing test in a certain factual situation.[248] Ultimately, the Michigan approach seems to envision the same goals as the federal approach.

CONCLUSION

Evidence of reputation or specific instances of homosexual prostitution is relevant and material on a charge of sexual assault when the defendant asserts that the incident was a consensual act of homosexual prostitution. The admission of such evidence is critical to the defense. In non-Michigan-style states, such evidence is likely to be admitted because it directly relates to the issues of consent and credibility and is otherwise admissible.

In Charlie's case, to prohibit inquiry into the complainant's homosexuality during discovery, and to bar such evidence at trial, would be to apply unlawfully Vermont's rape shield law in contravention of the defendant's state and federal constitutional rights of confrontation. The United States and Vermont constitutional fair trial rights require that evidence not specifically enumerated in Vermont's rape shield exceptions must be admitted when sufficiently proffered. A sufficient proffer includes the

245. 5 WIGMORE, EVIDENCE, § 1395 (Chadbourn rev. 1974).
246. *See Lund*, 164 Vt. 70, 71-72, 664 A.2d 253, 254-55 (1995).
247. *See id.*
248. *See id.* at 71-72, 664 A.2d at 254.

probative value outweighing the prejudicial effect, and a consideration of the defendant's fair trial rights.

If Charlie can procure solid evidence of the complainant's homosexuality, he should be permitted to rebut the invisible presumption of heterosexuality at trial. The earlier, and more strongly, that counsel asserts the necessity of the evidence to support his constitutional fair trial and confrontational rights, the more likely it is that the trial court or Vermont Supreme Court would rule in his favor. Raising the argument early will also increase the odds that a federal habeas corpus petition, if necessary, will be granted.

I reach this conclusion in part by recognizing the trend of the Michigan-style states to move away from a stark, literal interpretation of their rape shield laws and toward the consideration explicitly stated in the federal jurisdictions. The federal approach prevents the rape shield laws from depriving a criminal defendant of the constitutional rights of fair trial and confrontation. With the complainant exposed to the court as a chicken-hawk, Charlie should be back crowing any day now.