A COUNSELLOR'S CRISIS: PROTECTING WITNESSES' PRIVACY RIGHTS IN SEXUAL ASSAULT PROSECUTIONS

INTRODUCTION

Have you ever been a victim of a sexual assault? This question posed by a defense attorney to a witness, not a party to the action, has raised evidentiary and constitutional issues not yet addressed by the Vermont Supreme Court.[1] This note addresses these issues and concludes that the question fails on both evidentiary and constitutional grounds. In addition, this note suggests that it is incumbent upon the state legislature to pass a statute preventing this sort of questioning of a witness in rape prosecutions.

In May of 1987, Chris Phelps was called to the Rutland Regional Medical Center to offer counsel to a woman who had just been raped.[2] Chris was one of two women who were on call that night at the Rutland County Women's Network. This was standard procedure.[3] If she had not been on call, and no one else was available, Ms. Phelps would have gone.[4]

The counsellors at the Rutland County Women's Network are not professionals.[5] They are volunteers who, when called on to help, offer compassion. If a victim so desires, the counsellors offer direction on how to utilize the legal system. More often they offer common sense advise.[6]

Ms. Phelps was more than competent to act as a rape counsellor.[7] For five years she had been director of the Rutland County Women's Network. Before that she was one of a small group of women who established the original Rape Crisis Team in Rutland, the forerunner of the Rutland County Women's Network.[8] She had worked in the Office on Aging and with the Rutland Mental Health

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1. The district court of Rutland, Vermont, considered the constitutional issues and ruled that the question be admitted and answered. State v. Cochran, Opinion and Protective Order, No. 635-5-87Rcr (Vt. Dist. Ct., Sept. 16, 1987).

2. Telephone interview with Barbara Carney, Acting Director of the Rutland County Women's Network (Oct. 29, 1987) [hereinafter Carney Telephone Interview].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Agency. In the last year she had counselled at least seven rape victims.[9] More importantly she was instrumental in, if not directly responsible for, the training of the Rutland County Women's Network counsellors.[10]

In *State v. Cochran*,[11] defense attorney Larry S. Novins deposed Ms. Phelps, who had been named as a potential witness for the state.[12] On the night of the assault Ms. Phelps had been present during the questioning of the victim by the Vermont State Police.[13] Ostensibly she was to testify concerning what she witnessed during the questioning of the victim.[14] She was never alone with the victim during the time in question.[15] Attorney Novins deposed Ms. Phelps along with other potential state witnesses: the examining doctors, the investigating officer, and a state police trooper.[16]

After questioning Ms. Phelps about her experience, training, and background in rape crisis counselling, attorney Novins asked Ms. Phelps if she had ever been a victim of sexual assault.[17] The State's Attorney, James Mongeon, objected to the question.[18] Attorney Novins continued with other questions.[19]

On August 21, 1987, attorney Novins filed a Motion to Compel Answers to Deposition Questions with the Rutland District Court.[20] He argued that because Ms. Phelps could be a state's witness[21] it was "highly probable that Ms. Phelps might testify in a manner detrimental to Mr. Cochran's [the defendant's] interest."[22] Attorney Novins was attempting to impeach Ms. Phelps' testimony

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9. *Id.*

10. *Id.*

11. No. 635-5-87Rcr (Vt. Dist. Ct., 1987).

12. Defendant's Motion to Compel Answers to Deposition at 1, State v. Cochran, No. 635-5-87Rcr (Vt. Dist. Ct., filed Aug. 21, 1987) [hereinafter Defendant's Motion].

13. *Id.*

14. Defendant's Motion, *supra* note 12, at 1.

15. Carney Telephone Interview, *supra* note 2.

16. State's Response to Defendant's Motion to Compel Answers to Deposition Questions at 1-2, *Cochran*, No. 635-5-87Rcr (Vt. Dist. Ct., filed Aug. 26, 1987) [hereinafter State's Response].

17. State's Response, *supra* note 16, at 1.

18. *Id.*

19. Telephone interview with James Mongeon, Rutland County State's Attorney (Oct. 29, 1987).

20. Defendant's Motion, *supra* note 12.

21. *Id.* at 2.

22. *Id.*

by a showing of bias.[23] State's Attorney Mongeon responded that the question was irrelevant and improper.[24]

On September 8th, the district court issued an order compelling Ms. Phelps to testify.[25] Subsequently, Ms. Phelps, by her attorney, Mary Ashcroft, filed a Motion for Reconsideration and Protective Order.[26] In her memorandum of law, attorney Ashcroft argued that compelling Ms. Phelps to answer the questions would violate the witness' right of privacy, diminish the state's interest in prosecuting sexual crimes, and discourage witnesses from testifying in rape cases.[27]

On September 16th, the district court once again issued an order compelling Ms. Phelps to answer the question.[28] The court found that the defendant's right to confront his witness outweighed Ms. Phelps' "interests."[29] Pursuant to Vermont Rule of Criminal Procedure 16.2(d), the court ordered that the deposition of Ms. Phelps be taken and "once executed be under seal until permission to open the deposition [was] granted by the Court."[30] However, the deposition was never taken because the defendant plead nolo contendere on September 21, 1987.[31]

This note addresses the evidentiary[32] and constitutional[33] issues raised by the Rutland District Court's decision to compel Ms. Phelps' answer to the question "have you ever been a victim of sexual assault."

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23. *See infra* text accompanying note 37.

24. State's Response, *supra* note 16 at 1. It should be noted that attorney Mongeon also raised the issue of discrimination. According to the State's Response, defense counsel did not ask the same question of the proceeding *male* deponents. This contention became moot, however, when Novins asked the following deponent, a male state trooper, that *and* additional questions regarding his personal experience with rape or rape victims. *Id.* at 2.

25. State v. Cochran, Order to Compel Testimony No. 635-5-87Rcr (Vt. Dist. Ct., Sept. 8, 1987).

26. Witness' Motion to Delay Taking Deposition and Motion for Reconsideration and for Protective Order, *Cochran*, No. 635-5-87Rcr (Vt. Dist. Ct., filed Sept. 15, 1987).

27. Memorandum of Law in Support of Witness' Motions, *Cochran*, No. 635-5-87Rcr (Vt. Dist. Ct., Sept. 16, 1987).

28. *Cochran*, Opinion and Protective Order at 1, No. 635-5-87Rcr (Vt. Dist. Ct., Sept. 16, 1987). The district court in its order never discussed what Ms. Phelps' "interests" may be.

29. *Id.*

30. *Id.* at 2. The court reserved disclosure of the response until trial, thereby preserving its discretion to admit the deposition responses.

31. *Cochran*, No. 635-5-87Rcr (Vt. Dist. Ct., Sept. 21, 1987).

32. Phyllis McCoy is the author of this section.

33. Cynthia Burns is the author of this section.

I. THE EVIDENTIARY ISSUES

Vermont Rule of Evidence 402 states that "all relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules prescribed by the Supreme Court. Evidence which is not relevant is not admissible."[34] Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."[35] In determining whether proffered evidence is relevant, a court must decide if the evidence is both material and relevant.[36]

Because the credibility of a witness is always open to attack on cross-examination, a witness' credibility is a material issue.[37] The test administered to determine relevancy is whether the evidence has probative value or, in other words, whether it advances the inquiry to be proven.[38] If a court determines that evidence is relevant, the evidence may still be inadmissible if its prejudicial effect substantially outweighs its probative value.[39] Evidence which is speculative, remote, or collateral to the issue to be proven is inadmissible due to its lack of probative value.[40] Accordingly, this section argues that questioning a witness in a rape trial about his or her past sexual history is irrelevant to determining the witness' credibility because it is speculative, remote, and collateral.

A. *Evidence of a Witness' Past Sexual History is Speculative*

Evidence of a witness' past sexual history is not relevant to prove bias against an alleged rapist because the inference to be made that a rape victim is in the future biased against all alleged rapists is of a speculative nature. In *Cochran*, the defense did not come forth with any evidence that a prior rape proves present bias. One fact does not necessarily lead to the other.

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34. VT. R. EVID. 402.

35. VT. R. EVID. 401.

36. *See, e.g.*, State v. Picknell, 142 Vt. 215, 230, 454 A.2d 711, 718 (1982).

37. State v. Berard, 132 Vt. 138, 147, 315 A.2d 501, 508 (1974).

38. State v. Chambers, 144 Vt. 234, 242, 477 A.2d 110, 114 (1984), *cert. denied* 469 U.S. 875 (1984).

39. VT. R. EVID. 403.

40. MCCORMICK ON EVIDENCE, § 185 (E. Cleary 3d ed. 1984).

In *People v. Phillips*,[41] the defense wished to cross-examine a witness as to her past as a prostitute in order to show bias against the defendant who acted as her pimp.[42] The defense wanted to elicit this information to show that if the defendant was the witness' pimp that "might have been a motive for giving biased, untruthful testimony since 'many prostitutes have strong feelings of resentment and outrage against [their pimps].' "[43] The California Supreme Court upheld the trial court's exclusion of the evidence due to its speculative nature regarding the relationship between prostitutes and pimps.[44] The court also stated that the trial court could very well have excluded the evidence as too prejudicial because the disgrace to the witness outweighed its probative value.[45]

Similarly, evidence about a witness' past sexual history is speculative at best. In *Cochran*, the defense offered no evidence of a connection between a past rape and present bias towards alleged rapists.[46] Therefore, the evidence should have been ruled inadmissible because it is irrelevant to the issue of bias of the witness.

Additionally, the evidence regarding the bias of the witness in *Phillips* was offered to show bias against that defendant.[47] The defendant's interest in admitting this evidence would arguably be greater when trying to show bias against him or herself personally. The court in *Phillips* excluded evidence proffered to show specific bias against the defendant as lacking in probative value due to a speculative relationship between prostitutes and pimps.[48] Hence, the evidence regarding a rape counsellor's prior sexual history should be excluded unless the evidence attempts to show bias towards the defendant.

In *Davis v. Alaska*, the United States Supreme Court reversed an Alaska Supreme Court decision prohibiting the defense from cross-examining a key state witness about his juvenile record.[49] In *Davis*,[50] the defense wished to show that the witness may have been biased because the stolen property in question had been

41. 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985).
42. *Id.* at 51, 711 P.2d at 435, 222 Cal. Rptr. at 139.
43. *Id.*
44. *Id.*
45. *Id.* at 49-51, 711 P.2d at 434-35, 222 Cal. Rptr. at 138-39.
46. Defendant's Motion, *supra* note 12.
47. *Phillips*, 41 Cal. 3d at 51, 711 P.2d at 435, 222 Cal. Rptr. at 139.
48. *See, e.g.*, Davis v. Alaska, 415 U.S. 308 (1974).
49. 415 U.S. 308 (1974).
50. *Id.* at 315.

found on the witness' property.[51] In addition, because the witness was on probation in a juvenile adjudication for burglary, he may have had a motive to shift the blame to the defendant.[52] The court concluded that the defendant's right to cross-examine witnesses outweighed the state's interest in protecting the anonymity of juvenile offenders.[53]

The defense in *Davis* attempted to show specific bias against the defendant.[54] Further, most states allow the credibility of a witness to be impeached by a showing of a criminal record, although the requirements for admission of a juvenile criminal record are more stringent.[55] In *Cochran*, the defense did not attempt to show any specific bias towards the defendant. If the defense had attempted to show specific bias towards the defendant, the speculative nature of the evidence should still make it inadmissible without a showing of particular circumstances tending to prove specific bias; for example, that the defendant had raped the witness.

Additionally, assuming the evidence had any probative value to prove bias, the Vermont Supreme Court has acknowledged that in determining the admissibility of evidence to prove bias of a witness one factor to consider is " 'whether there are alternative means of proving bias or motive or to challenge credibility.' "[56] In *Cochran*, the defense could have attempted to prove bias in alternative ways. The defense wanted to call the rape counsellor as a witness concerning the complainant's police interview at the hospital. The rape counsellor was never alone with the victim during the times in question. The best way to determine if a witness has a bias against alleged rapists—thereby affecting her recollection and perception of what transpired—would be to corroborate or contradict her testimony with the testimony of the other witnesses. Thus, the defense had alternative methods to prove bias. Moreover, considering the witness' privacy interest and the state's vital interest in encouraging the reporting and prosecuting of sexual crimes,[57] the evidence of a rape counsellor's past sexual history should be held inadmissible to prove bias. A rape counsellor promotes the

51. *Id.*

52. *Id.* at 311.

53. *Id.* at 320.

54. *Id.* at 311.

55. *See, e.g.*, VT. R. EVID. 609; N.H. R. EVID. 609.

56. State v. Catsam, No. 85-522, slip op. at 13 (Vt. Aug. 14, 1987) (quoting Commonwealth v. Black, 337 Pa. Super. 548, 556-57, 487 A.2d 396, 400-01 (1985)).

57. State v. Patnaude, 140 Vt. 361, 373, 438 A.2d 402, 407 (1981).

state's interest in prosecuting sexual crimes because he or she usually encourages a rape victim to utilize the legal system.[58]

B. A Witness' Sexual History is a Collateral Issue and, Therefore, is Irrelevant

Although the credibility of a witness is always open to attack on cross-examination, the Vermont Supreme Court has held that the scope of cross-examination may be limited, especially in the area of collateral issues.[59] The court defined a collateral issue as "one not relevant to any material proposition in the case itself. In the instance of impeachment, the collateral issue would be one bearing only on the credibility of the particular witness . . . ."[60]

In *State v. Berard*, the Vermont Supreme Court held that questioning a witness on a collateral issue to prove bias may be limited if the collateral issues are too remote.[61] The defense in *Berard* attempted to ask a murder witness if she had ever been threatened at gunpoint prior to the incident in question.[62] The Vermont Supreme Court upheld the trial court's limitation of cross-examination on this issue, reasoning that the connection to the witness' credibility was very indirect, and thus irrelevant and remote.[63] The court also stated that this line of questioning was "too general in character and represented an exploratory cross-examination."[64] The court appropriately noted that " '[t]he pursuit of a witness into the realm of collateral must, of necessity, end somewhere—or litigation would not.' "[65]

Similarly, questions asked to a rape counsellor about her prior sexual history represent a collateral issue because they have a bearing only on the credibility of the rape counsellor's testimony as a witness. In *Cochran*, there was no showing that prior rape victims are biased against all alleged rapists.[66] Further, the defense did not attempt to show why the rape counsellor personally had a bias in that particular case. The connection between the rape

58. Carney Telephone Interview, *supra* note 2.
59. State v. Berard, 132 Vt. 138, 147, 315 A.2d 501, 508 (1974).
60. *Id.*
61. *Id.*
62. *Id.* at 151, 315 A.2d at 510.
63. *Id.*
64. *Id.*
65. *Id.* (quoting State v. Teitle, 117 Vt. 190, 196, 90 A.2d 562, 567 (1952)).
66. *See* Defendant's Motion, *supra* note 12.

counsellor's credibility and her past sexual history is very indirect. Hence, this type of questioning goes only to collateral issues and is at best only remotely connected to bias.

Additionally, because the defense also planned to ask the state police officer who had conducted the interview with the rape victim if he or any member of his family had ever been raped,[67] the questions were most likely exploratory in nature. If on cross-examination a rape counsellor or a police officer can be asked about their personal sexual history or the sexual history of their family, where does cross-examination end? Witnesses will be deterred from coming forth to testify if their lives may be examined in minute detail and their credibility challenged on matters irrelevant to credibility or the issue being tried.

C. *Evidence of a Witness' Past Sexual History Should be Excluded Because it Could Disgrace the Witness*

The Vermont Supreme Court has acknowledged that the scope of cross-examination may be limited where the evidence sought is immaterial and prejudicial.[68] In *State v. Johnson*, the court held that a witness does not have the right to refuse to give answers tending to disgrace him or herself where the question asked pertains to a matter material to issues being tried.[69] The converse of the holding would be that a witness may refuse to answer when the question being asked is not material to any issue being tried. More recently, the Family Court for the City of New York, in a paternity action brought by the Commissioner of Social Services, held that the mother of a child born out-of-wedlock may refuse to testify about her sexual life.[70] The court stated that the mother may refuse to testify under the fifth amendment because the testimony may tend to degrade her.[71] In reaching its conclusion, the court found that instances of adultery, rape, involvement in a sordid sexual act, or even revelation of one's sexual life would be good cause to refuse to testify on the grounds that such testimony would tend

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67. Interview with Mary Ashcroft, Esq., attorney for Ms. Phelps, in South Royalton, Vt. (Oct. 29, 1987).

68. Morse v. Morse, 126 Vt. 290, 295, 229 A.2d 228, 231 (1967).

69. 28 Vt. 512, 513 (1856).

70. Commissioner of Social Serv. v. C.C., 97 Misc. 2d 485, 486, 411 N.Y.S.2d 809, 810 (N.Y. Fam. Ct. 1978).

71. *Id.*

to disgrace the witness.[72]

In the *Cochran* case, the rape counsellor's past had nothing whatsoever to do with the alleged rape. The only justification for the question was to show bias, but the right to cross-examine witnesses is not unlimited especially where the evidence sought is not relevant and seeks to disgrace the witness. As Section II of this note discusses, a person's sexual life is a private aspect of one's life and should not be intruded into without significant justification.[73] A rape counsellor's past sexual history is not material to prove the alleged rape or the counsellor's own bias. The disgrace to the witness on a matter immaterial to the ultimate issue to be tried should be grounds to exclude the evidence.

D. Exclusion of a Witness' Past Sexual History Promotes the State's Vital Interest in Prosecuting Sexual Crimes

The Vermont Legislature has determined that the past sexual history of a complaining witness is inadmissible in a criminal rape case except in certain limited situations.[74] The Vermont Supreme Court upheld the constitutionality of the rape shield law even though this law limits the defendant's right to introduce evidence.[75] In *State v. Patnaude*, the court found that evidence of a complaining witness' past sexual conduct with persons other than the defendant is not legally relevant for determining the guilt or innocence of the defendant.[76]

The *Patnaude* court discussed the reasons for the enactment of the rape shield law and the public policies it addressed. The

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72. *Id.*

73. *See infra* text accompanying notes 87-129.

74. VT. STAT. ANN. tit. 13, § 3255 (1981). This provision of the sexual assault statute, referred to as the rape shield law, prohibits the admission of a complaining witness's past sexual history except:

> 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.

Id. (emphasis added).

75. State v. Patnaude, 140 Vt. 361, 368, 438 A.2d 402, 404 (1981).

76. *Id.* at 374, 438 A.2d at 407.

court stated that prior to the enactment of the rape shield law the victim was put on trial.[77] The female victim had to prove her chastity because "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."[78] Because of this type of rationale, perjury became a problem in rape trials. If a defendant could "find" witnesses to testify to sexual conduct with the victim, he stood a better chance of being acquitted.[79] Due to this embarrassment faced upon testifying, many victims did not report sexual crimes.[80]

In an attempt to promote the reporting and prosecution of sexual crimes, the legislature enacted the rape shield law.[81] The rape shield law is "an explicit legislative decision to eliminate trial practices under . . . [Vermont's] former rape law that effectively frustrated society's vital interest in the prosecution of sexual crimes."[82] The court stated that no injustice befalls the defendant in rape cases from the exclusion of a victim's past sexual conduct because the evidence is "without probative value to begin with . . . ."[83]

Similarly, in an attempt to promote the state's vital interest in the reporting and prosecution of sexual crimes, the past sexual history of a rape counsellor testifying as a witness in rape trials should also be held inadmissible. Many sexual crimes would not be reported or prosecuted but for the aid and encouragement of rape counsellors.[84] If a rape victim trusts the rape counsellor, the counsellor can encourage the victim to proceed with prosecution. However, if the counsellor is afraid that she may have to reveal her own personal life if called to testify at trial, she cannot effectively encourage victims to proceed with prosecution.[85] Because rape counsellors are a critical link in effectuating the state's vital interest in

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77. *Id.* at 373, 438 A.2d at 407.
78. *Id.* at 372, 438 A.2d at 406.
79. *Id.*
80. *Id.* at 373, 438 A.2d at 407.
81. *Id.*
82. *Id.*
83. *Id.* at 374, 438 A.2d at 407.
84. Carney Telephone Interview, *supra* note 2; *see also* S. ESTRICH, REAL RAPE (1987).
85. Carney Telephone Interview, *supra* note 2. Ms. Carney stated that since the Phelps incident the Rutland County Women's Network has lost some of its counsellors and many are inhibited and uncomfortable about counselling rape victims in fear that they may later be called on to testify about their own personal lives.

prosecuting sexual crimes, evidence[86] of a rape counsellor's sexual history should be excluded in rape trials unless specific bias can be shown against the defendant.

E. Conclusion as to Evidentiary Issues.

With all due respect, the trial court in *Cochran*, by ordering the rape counsellor to answer questions regarding her sexual past, did not recognize that the defendant's right to cross-examine witnesses is not absolute. The right does not extend to questioning witnesses about issues which are speculative, collateral and remote as to the issue of the alleged rape or the bias of the particular witness. This type of evidence only unnecessarily disgraces witnesses.

To promote the state's vital interest in prosecuting sexual crimes, questioning witnesses about their sexual history should be inadmissible. If admitted it would deter rape counsellors from testifying in court or even counselling rape victims in fear that they would have to reveal the intimate details of their own lives in court. A witness who provides such a critical link in promoting a vital state interest should not be humiliated in such a manner when the evidence is irrelevant.

II. Constitutional Concerns

A. The Right to Privacy

The Vermont Supreme Court has not yet defined a right to privacy under the Vermont Constitution[87] except in a case involving automobile search and seizure.[88] Rather, the Vermont Supreme

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86. In 1986 the Vermont Legislature recognized the importance of victim advocates by enacting legislation authorizing state's attorneys to hire victim advocates. Vt. Stat. Ann. tit. 13, § 5306 (Supp. 1986). The purpose of this chapter of Vermont laws is stated as "to reduce the financial, emotional and physical consequences of criminal victimization, to prevent victimization by the law enforcement and criminal justice system and to assist victims with problems that result from their victimization." *Id.* § 5303. The legislature has already acknowledged the importance of emotionally aiding victims of crimes and therefore should have no trouble in promoting this critical service by protecting the victim advocate in criminal proceedings.

87. In State v. Bell, the Vermont Supreme Court declined to define the right of privacy under the Vermont Constitution. 136 Vt. 144, 147, 385 A.2d 1094, 1096 (1978). The court did not reach this issue because the argument that the appellant's prosecution for marijuana possession infringed his federal *and* state constitutional right to privacy was presented only in the amicus curiae's brief. *Id.*

88. State v. Martin, 145 Vt. 562, 496 A.2d 442 (1985).

Court to date has based its decisions involving a right to privacy on the United States Constitution.[89] As the United States Supreme Court has noted, the federal constitution does not explicitly mention any right of privacy.[90] Tracing a line of cases from 1886 through 1969, the Court observed that earlier courts had found the roots of that fundamental right in the first, fourth, fifth and ninth amendments; in the penumbras of the Bill of Rights; and in the "concept of liberty guaranteed by the first section of the Fourteenth Amendment."[91] In the most recent cases, the right to privacy has been found in the fourth and fourteenth amendments.[92]

The applicable provision of the fourth amendment of the federal constitution states that: "The right of the people to be secure in their persons . . . against *unreasonable* searches and seizures, shall not be violated . . . ."[93] Chapter I, article II of the Vermont Constitution provides: "That the people have a right to hold themselves . . . free from search and seizure."[94] Notable by its absence is the qualification of "unreasonableness." Hence, the Vermont Constitution clearly affords greater protection than does the United States Constitution.[95]

The fourteenth amendment of the federal constitution guarantees protections of the individuals' inalienable rights and personal liberty.[96] In an article similar in context to the fourteenth amendment,[97] but more explicit in terms, the Vermont Constitution states: "[A]ll men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which

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89. State v. Hewey, 144 Vt. 10, 471 A.2d 236 (1983) (fourth amendment and automobile stop); State v. Rucheleau, 142 Vt. 61, 451 A.2d 1144 (1982) (fourth amendment and seizure of marijuana); Valeo v. Valeo, 132 Vt. 526, 322 A.2d 306 (1974) (change of custody because of unfitness of natural mother). In this post-*Jewitt* era, this reliance on the federal constitution is very likely to change, as courts look more and more to the Vermont Constitution. *See* State v. Jewitt, 146 Vt. 221, 500 A.2d 233 (1985).

90. Roe v. Wade, 410 U.S. 113, 152 (1972).

91. *Id.* (citations omitted).

92. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

93. U.S. CONST. amend. IV, § 1 (emphasis added).

94. VT. CONST. ch. I, art. II.

95. State v. Brunelle, No. 85-872, slip op. at 6 (Vt. Aug. 14, 1987).

96. U.S. CONST. amend. XIV, § 3.

97. The fourteenth amendment is generally held to be written in relation to the abolishment of slavery. *See, e.g.*, Slaughterhouse Cases, 83 U.S. (1 Wall.) 36, 70 (1873). At its inception in 1777, the Vermont Constitution explicitly prohibited slavery and went on to establish fundamental rights. It is notable that this *is* the first article of the Vermont Constitution.

are the enjoying and defending of life and liberty . . . ."[98]

The United States Supreme Court in *Roe v. Wade* noted that only personal rights, "deemed implicit in this concept of ordered liberty," are included in the right to privacy.[99] What, if anything, can be deemed more personal, or more private, than one's sexual life or history? Indeed, the Vermont Supreme Court has stated that "[p]ast sexual conduct . . . is particularly private in character."[100] It is not appropriate to distinguish rape, which is a nonconsensual sexual act, from consensual sexual acts. It is equally as private. In defending the right to privacy in the instance here, it must be noted that the Supreme Court has stated that the right to privacy has "some extension to the *activities* relating to marriage."[101] The activities cited by that Court[102] and by subsequent courts[103] involve at some level and to some degree a sexual act between men and women. This note does not assert that the sexual act inherent in a rape is akin to sexual acts inherent in marriage, procreation or contraception. Rather this note asserts that these activities are equally private, equally intimate[104] sexual acts and, therefore, must be protected by a right to privacy.

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98. VT. CONST. ch. I, art. I.

99. *Roe*, 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

100. State v. Patnaude, 140 Vt. 361, 376, 438 A.2d 402, 408 (1981).

101. *Roe*, 410 U.S. at 152-53 (emphasis added).

102. *Id.* at 152-53.

103. *See, e.g.*, Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (minor's abortion rights); Zablocki v. Redhail, 434 U.S. 387 (1978) (marriage only with court approval for resident not having minor children in custody); Black v. Beame, 419 F. Supp. 599 (S.D.N.Y. 1976) (welfare benefits for children in care).

104. It is interesting to note that the common, connotative definitions of intimacy generally assumes some level of sentiment between the parties. The dictionary definition, however, suggests that it is not so limited:

> intimate: . . . 1 A : of or relating to an inner character or essential nature: INNERMOST: characteristic of the genuine core of something . . . B : belonging to or characterizing the inmost true self: indicative of one's deepest nature . . . 2 : marked by a very close physical, mental, or social association, connection, or contact: as A : showing complete intermixture, compounding, fusion: thoroughly or closely interconnected, interrelated, interwoven . . . B : showing depth of detailed knowledge and understanding and broadness of information from or as if from long association, near contact, or thorough study and observation . . . C : marked by or as if by knowledge of esp. personal details which only an eyewitness or very close confidant might have . . . .

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1184 (1971).

The Vermont Supreme Court in *Patnaude* stated that it was partly because of its intimacy, that admission of past sexual conduct presents "great potential danger when placed in evidence in a rape trial." *Patnaude*, 140 Vt. at 376, 438 A.2d at 408.

Rape is an extremely personal matter,[105] not frequently talked about[106] and infrequently reported.[107] It is misunderstood or misinterpreted by large portions of society.[108] The United States Supreme Court has explicitly stated that the right to privacy is "the individual interest in avoiding disclosure of personal matters."[109] Public disclosure of the fact that one has been raped is disclosure of a highly personal matter. It could, and probably would, affect one's personal and family relationships. A court must, therefore, have a compelling reason to rule that an individual disclose this information, give up her right to privacy and reveal to a public tribunal information about this highly personal matter. The compelling reason asserted is the defendant's fundamental right to confront his or her witnesses.

B. Confrontation of Witnesses

Chapter I, article 10 of the Vermont Constitution states: "That in all prosecutions for criminal offenses, a person hath a right . . . to be confronted with the witnesses . . . ."[110] Numerous Vermont Supreme Court decisions have affirmed this fundamental right.[111] Yet, the Vermont Supreme Court has also noted that this right is not absolute but " 'must occasionally give way to considerations of public policy and the necessities of the case.' "[112] Refer-

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105. During hearings on the Rape Shield Act, passed by the Vermont Legislature in 1977, Rep. Stephany of the House Judiciary Committee made the following remarks:

> Sexual assault is one of the most obscene experiences one human being can impose upon another human being. Sexual assault is not a dirty joke or a subject for locker room humor or for adolescent snickering. It is an act of aggression, reaching to the very roots of human dignity. The essence of the crime is not sex; it is aggression, the infliction of punishment. Sexual assault robs its victims of the sacred aspect of personhood—the sanctity of the human body. It violates the victim's 'innermost being' destroying his/her self-worth. It is a most brutal and degrading assault on the victim's whole person and personality. Sexual assault is the ultimate pornographic act, pornography at its lowest level.

Journal of the House, Thursday, April 7, 1977.

106. *See generally* S. ESTRICH, REAL RAPE (1987). (This is an important book for anyone writing about or dealing with the issue of rape.).

107. *See, e.g., Patnaude*, 140 Vt. at 373, 438 A.2d at 407 ("only one rape in ten is ever reported").

108. *See generally* ESTRICH, *supra* note 94.

109. Whalen v. Roe, 429 U.S. 589, 599 (1977).

110. VT. CONST., ch. I, art. 10.

111. *See, e.g.*, State v. Berard, 132 Vt. 138, 315 A.2d 501 (1974); State v. Sprague, 144 Vt. 385, 479 A.2d 128 (1984); State v. Paquette, 146 Vt. 1, 497 A.2d 358 (1985).

112. State v. Sprague, 144 Vt. 385, 391, 479 A.2d 128, 131 (citing Mattox v. U.S., 156

ring to a United States Supreme Court decision,[113] the Vermont Supreme Court stated that a court, when determining when a defendant's right of confrontation must yield, must carefully consider the facts and circumstances of the particular case before it.[114]

The Vermont Supreme Court has said that the right to confrontation is basically a trial right.[115] The primary objective of this right is to assure personal examination and cross-examination of the witness.[116] The court also stated that "[c]ross examination normally only goes to that which limits, explains, or refutes direct examination or modifies the inferences to be drawn therefrom. The exception is credibility."[117]

It is of no consequence that in *Cochran* the order upholding the defendant's constitutional rights was issued in regards to a deposition and not a trial. Under the Vermont Rules of Criminal Procedure, the scope of examination in a deposition is the same as the scope of examination in a trial.[118] What is of consequence is that the scope of examination, whether in a trial or during deposition, is limited. "There are limitations on the questions which may be used to impeach."[119]

It seems inherently wrong to say that there is a "hierarchical" scheme of constitutional rights and that one individual's constitutional right deserves greater protection than another individual's constitutional right. Both being fundamental and individual implies that they are on the same plane. Ultimately, however, it is one right pitted against another: A witness' fundamental right to privacy versus the defendant's right to confront his witness. One of these rights must yield.

U.S. 237, 243 (1895)).

113. Davis v. Alaska, 415 U.S. 308 (1974).

114. State v. Patnaude, 140 Vt. 361, 370, 438 A.2d 402, 405 (1981). It must be noted that the District Court of Rutland summarily "recognized" the rape counsellor's "interests" but based its entire opinion on the confrontation rights of the accused. The court cited three cases supporting a defendant's right to confrontation but did not mention what the rape counsellor's interests may be and never noted that the right to confrontation is not absolute. State v. Cochran, Opinion and Protective Order, No. 635-5-87Rcr (Vt. Dist. Ct., Sept. 16, 1987).

115. *Sprague*, 144 Vt. at 391, 479 A.2d at 131 (quoting Barber v. Page, 390 U.S. 719, 725 (1968)).

116. State v. Berard, 132 Vt. 138, 146, 315 A.2d 501, 507 (citations omitted).

117. *Id.* at 147, 315 A.2d at 508.

118. VT. R. CRIM. P. 15(d).

119. *Berard*, 132 Vt. at 147, 315 A.2d at 508.

C. Conclusions as to Constitutional Issues

In *Sprague,* the Vermont Supreme Court made reference to the fact that the right of confrontation was heightened when the defendant was denied the opportunity to fully cross-examine the state's key witness.[120] Conversely, it would seem that a defendant's right of confrontation, pitted against a witness' competing right, would not receive greater deference when he is confronting a witness of lesser stature than a state's key prosecution witness.[121] In most, if not all, prosecutions for rape, the state's key witness will be the complaining witness. Vermont's rape shield law prohibits admission of evidence of the complaining witness' past sexual conduct except in instances when it goes to the credibility of the complaining witness or is more probative than prejudicial.[122] However, even then, only evidence of past sexual conduct with the defendant,[123] evidence showing the source of semen, pregnancy or disease[124] or evidence of past false allegations, may be admitted.[125] Thus, under most circumstances the defendant would not be permitted to ask the complaining witness if she had ever been raped. If the key complaining witness is so protected, certainly a witness, one of several, who does not "provide the crucial link in the prosecution's case,"[126] should receive equal if not greater protection.[127] The defendant's rights are thus diminished.

When confronted with this dilemma of competing rights, the courts must also look to the different means by which the defend-

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120. State v. Sprague, 144 Vt. 365, 369, 479 A.2d 128, 130 (1984) (citing U.S. v. Nunez, 668 F.2d 1116, 1122 (1981)). In *Nunez,* the defendant's right to confront was balanced against the witness' fifth amendment right prohibiting self-incriminations. The court determined that the one question that the witness refused to answer went to information collateral to the issue at hand and upheld the witness' right to refuse to answer. *Id.* The court also noted that the defendant had "ample opportunity to otherwise challenge the witness' credibility." *Id.*

121. The rape counsellor was one of several witnesses the state was prepared to bring. Witness' Motion to Delay Taking of Deposition and Motion for Reconsideration and for Protective Order at 3, *Cochran,* No. 635-5-87Rcr (Vt. Dist. Ct., Sept. 8, 1987).

122. VT. STAT. ANN. tit. 13, § 3255(3) (Supp. 1987).

123. *Id.* § 3255(a)(3)(A).

124. *Id.* § 3255(a)(3)(B).

125. *Id.* § 3255(a)(3)(C).

126. *Sprague,* 144 Vt. at 389, 479 A.2d at 130 (quoting U.S. v. Nunez, 668 F.2d 1116, 1122 (1981)).

127. It is interesting to note that during the legislative hearings on the rape shield law, the Vermont Legislature did not intentionally exclude witnesses other than the complaining witness. Apparently, it was not recognized as an issue. Interview with Althea Kroeger, former state representative from Essex Junction (Nov. 9, 1987).

ant's ends could be achieved.[128] The defense in *Cochran* wished to impeach the rape counsellor's testimony as to what she had heard or observed at the hospital. The defense had many alternative questions available. For example, he could have questioned the counsellor's mental and physical condition at the time she was with the victim. He could have questioned the reasons or conditions under which she was called to be present. He could have inquired as to the number of women she had counselled, and how many stories of rape she had heard. He could have even asked her, perhaps, why she was a voluntary rape counsellor. It was not crucial that he probe into such a highly personal matter and force the witness to give up her right to privacy.

The Vermont Supreme Court recently stated that:

> The discretion of a trial court to restrict the impeachment of a key prosecution witness with evidence reflecting on his credibility is limited by the requirements of the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment to the United States Constitution . . . as well as by Chapter I, Article 10 of the Vermont Constitution.[129]

This requirement should swing both ways. It should not limit the court solely to considerations of the defendant's rights, but should include the rights of all witnesses. A witness does not shed her fundamental rights because she is not confrontational or because she has no stake in the outcome.

The witness as an individual has a fundamental right to privacy. The defendant has a fundamental right to confrontation. Neither right is limitless or inherently greater than the other. Neither compels the court to give greater deference to one than to the other. Courts must look to the facts and circumstances of the case: at who the witness is; under what circumstances the witness is testifying; to what she is testifying; and how substantially limited would the defendant's right to cross-examine be, particularly in regards to impeachment of credibility. Then ultimately one right would yield. In this instance, the right to privacy would prevail.

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128. *Sprague*, 144 Vt. at 391-92, 479 A.2d at 132.

129. State v. Covell, 146 Vt. 338, 341, 503 A.2d 542, 544 (1985) (citations omitted).

CONCLUSION

At the time the Vermont Legislature adopted the rape shield law it was responding to a very real and very immediate problem: victims of sexual crimes did not report or prosecute because they feared being put on trial themselves. The legislature expressly excluded admission of certain evidence so as to encourage reluctant rape victims to come forward and report the crime, encourage those same victims to testify in court against their assailant, and produce more prosecutions and convictions, and thus be a greater deterrent.[130] In enacting the rape shield law, the legislature sought to promote the state's vital interest in the reporting and prosecution of sexual crimes.

The legislature did not specifically address the protection of other witnesses' past sexual histories from the rape shield law. The system of rape counsellors, battered women counsellors, and other support groups was not well established in Vermont at that time. As such, these individuals were infrequently called as witnesses.

The time has come again for the legislature to act and pass a statute excluding inquiry into a witness' past sexual history except in certain limited situations.[131] Although, upon review by the Vermont Supreme Court, the decision of the Rutland District Court probably would be reversed,[132] the proper avenue for resolution of this issue is within the province of the Vermont Legislature.[133] The legislature has corrected the problem for complaining witnesses but is now confronted with the protection of other witnesses in a prosecution for sexual assault.[134] With the increase in victim advo-

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130. State v. Patnaude, 140 Vt. 361, 373, 438 A.2d 402, 407 (1981).

131. An exception permitting admission of evidence of a witness' past sexual conduct with defendant should be made. Even this exception should be conditioned on the evidence being material, bearing on credibility and being more probative than prejudicial. Note that this exception is similar to an exception curently provided for in the rape shield law. *See* VT. STAT. ANN. tit. 13, § 3255 (a)(3)(A).

132. Jeffrey Amestoy, Vermont's Attorney General, recently made the same prediction. Referring to Judge Hudson's decision he said: "I think it is an inflammatory and prejudicial ruling. . . . If it came to the Vermont Supreme Court I think Hudson would be overruled." Brattleboro Reformer, Nov. 13, 1987, at 12, col. 4.

133. The Vermont Legislature need not be concerned about the constitutionality of an amended act protecting witnesses. The Vermont Supreme Court upheld the constitutionality of the rape shield law in State v. Patnaude, 140 Vt. 361, 368, 438 A.2d 402, 404 (1981).

134. A rape crisis counsellor is not the only type of witness who could be confronted with this question. There is nothing to prevent the defense from asking this same question of the attending doctors, nurses or the investigating officers—or anyone connected with the case. Moreover, since the alleged rationale for asking the question is to impeach by showing

cate groups, more and more counsellors will be called to testify during sexual assault trials. As a consequence, legislation is needed to protect these counsellors from being questioned about their prior sexual history. Otherwise, many counsellors will be deterred from aiding victims of sexual or violent crimes, lest they have to testify regarding the private nature of their own lives. Without the essential support of these counsellors, many women will be unwilling and unable to prosecute their assailants. The state's vital interest in the reporting and prosecuting of sexual assault will be thwarted.

Cynthia Burns and
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bias, one could conceivably be asked if anyone they knew had ever been raped. It is a Pandora's box full of humiliation and abuse.