CRIMINAL LAW REFORM IN VERMONT: THE PROPOSAL TO EXCLUDE EVIDENCE OF THE VICTIM'S CHARACTER IN FORCIBLE RAPE CASES

The rules which govern the admissibility of character evidence in forcible rape cases are presently in a state of flux.[1] One of the more interesting developments in this area involves a proposal which has been under consideration by the Vermont legislature and which would make almost all character evidence of the victim—in particular, evidence concerning her previous sexual conduct—inadmissible in prosecutions for rape.[2] This proposal is based on a recently enacted Michigan law which has been characterized as the most modern law on the subject in the nation.[3] The rape proposal is part of a comprehensive effort to reform the criminal law in the state of Vermont.[4] Although the reform bill was passed only by the House during the recent legislative session, it is likely to be reintroduced for further consideration by the legislature.

Under current law, character evidence consisting of the previous sexual conduct[5] of the alleged victim is admissible for three purposes. First, it can be used as circumstantial proof of the substantive issue of consent, an element of the crime of forcible rape.[6] The jury is permitted to infer that if the alleged victim has consented previously to intercourse with other parties, she is likely to have consented to intercourse during the incident in question.[7] Secondly, the evidence may be used for the additional inference that

1. States which have recently enacted or proposed new laws on the subject are: California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kentucky, Michigan, New Hampshire, New York, Ohio, Washington, and Wisconsin.

2. H.419 §3 at 49-50 (1975). For the full text of the provision see note 11 *infra*.

3. *Hearings on H.419 Before the Vermont House Comm. on the Judiciary*, at 11 (1975).

4. H.419 (1975).

5. Previous sexual experience of the victim can be proven by the general reputation of the victim for unchastity. Specific instances of the victim's sexual conduct cannot be independently proven by extrinsic evidence. *See* State v. Johnson, 28 Vt. 512, 514-15 (1856); State v. Reed, 39 Vt. 417, 418-19 (1867).

6. VT. STAT. ANN. tit. 13 § 3201 (1974). When the victim is under sixteen years of age, consent is not an issue. *Id.*

7. The underlying presumption of relevance is that an "unchaste woman" is more likely than not to have consented to the sex act in question. *See* State v. Johnson, 28 Vt. 512, 513 (1856); State v. Reed, 39 Vt. 417, 419 (1867); State v. Jackson, 126 Vt. 250, 255, 227 A.2d 280 (1967).

the victim has falsely asserted denial of consent.[8] Thus, circumstantial character evidence is admissible for the purpose of attacking the credibility of the victim's testimony at trial.[9] Finally, evidence of the victim's previous sexual conduct is admissible as direct evidence of her state of mind to the extent that previous sexual conduct with the particular defendant is indicative of a continuing desire to engage in repeated sexual acts with him.[10]

The Vermont proposal would automatically exclude character evidence of this sort when brought in at trial as circumstantial proof of the victim's consent.[11] Since the jury would thereby be cut off from evidence that the victim had previously consented to intercourse with others, it would not be able to rely on such evidence to infer that she had consented to intercourse on the occasion in ques-

8. State v. Hollenbeck, 67 Vt. 34, 36-37, 30 A. 696 (1894). In this case the Vermont Supreme Court held that the trial court erred in excluding evidence of the victim's close relationship with the defendant before and after the incident in question because such evidence "would have a strong tendency to discredit her claim that the act was by force and against her will, and render it more probable that the act was without force and with her consent." 67 Vt. at 36.

9. Since the victim in a rape case is often the most important witness for the prosecution, the weight of the victim's testimony and her credibility are properly considered by the jury. *See* State v. Ovitt, 126 Vt. 320, 326, 229 A.2d 237 (1967); State v. Machunsky, 129 Vt. 195, 198, 274 A.2d 513 (1971).

10. 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 398, (3rd ed. 1940) [hereinafter cited as WIGMORE ON EVIDENCE].

11. The full text of the provision relating to character evidence in rape trials reads as follows:

> 3. In a prosecution for a crime defined in this chapter, 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 unless and only to the extent that the court finds that the following proposed evidence is material to a fact in issue in the prosecution and that its private character is outweighed by its probative value:
>
> A. Evidence of the victim's past sexual conduct with the defendant;
>
> B. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy, or disease.

H.419, §3 at 50 (1975).

An alternate provision substantially similar to the one above has been proposed by the Governor's Commission on the Status of Women. It differs from the above proposal in only one respect: when the defendant chooses to introduce evidence consisting of his previous sexual experience with the alleged victim, he is restricted to proof by specific instances of conduct. Interview with Phoebe Morse, Assistant Attorney General of Vermont, in Montpelier, May 3, 1976.

tion, or that she was possibly lying with respect to her denial of consent.[12] The Vermont proposal, however, would permit the introduction at trial of character evidence consisting of the victim's previous sexual conduct with the defendant.[13] Such evidence is not used as circumstantial proof of the victim's consent; rather it is direct evidence of the victim's state of mind—her sexual desire for the defendant.[14]

The Vermont proposal would bring the rules governing the admissibility of character evidence in rape cases into conformity with the exclusionary rules long in effect for other crimes. The first part of this note examines the justification for such a change under long-standing principles of evidence law. First it explores the special problem of witness credibility at rape trials, in which the outcome often rests on whether the jury chooses to believe the testimony of the alleged victim or that of the defendant. It then compares the current law in Vermont, which allows the jury to rely on often highly prejudicial character evidence, with the common law rule in force for other crimes, which generally excludes from trial such prejudicial evidence,[15] concluding that there is no basis for such a distinction. The second part of the note turns to an analysis of a constitutional issue raised by the proposed reform: Whether the exclusion of character evidence violates the defendant's constitutional right to confront witnesses under the due process clause of the fourteenth amendment.[16]

I. The Reform Proposal and Common Law Rules of Evidence

When the defendant at a rape trial admits to his sexual penetration of the victim, but interposes a defense that the victim consented to such penetration, a distinction must be made under com-

12. *See* cases cited in note 7 *supra*.

13. H.419, § 3A at 50 (1975). The proposal would also allow the admission of previous sexual conduct evidence of the victim if brought in for the purpose of showing the "source or origin of semen, pregnancy, or disease." *Id.* § 3B at 50.

14. 2 Wigmore on Evidence, *supra* note 10.

15. 1 Wigmore on Evidence § 55; C. McCormick, Handbook of the Law of Evidence § 188, at 444, (2d ed. 1972) [hereinafter cited as McCormick on Evidence].

16. The right to confront and to cross-examine is a right of criminal defendants vested in them by the United States Constitution and binding on the state of Vermont. *See* State v. Berard, 132 Vt. 138, 146, 315 A.2d 501, 507 (1974).

mon law between an act involving mutually consenting adults and an act of sexual assault. Because alleged rapes usually occur in private[17] and therefore neither eyewitness testimony nor direct tangible evidence of abuse is available, the victim's testimony at trial will often be the most relevant evidence on the issue of consent. Under these conditions the trier of fact is faced with the evidentiary problem of whether to take the word of the victim or the word of the defendant.

The choice of whom to believe is influenced by the introduction at trial of secondary evidence. Circumstantial evidence of the encounter and the character of the victim is often resorted to in order to prove the victim's consent or lack of consent. The Vermont proposal is not designed to provide a more effective means of ascertaining the truth in an oath-swearing contest. Rather, the exclusion of character evidence by the proposal is designed to end the singular practice by which an oath-swearing contest in a rape case is resolved by the admission at trial of character evidence which is enormously prejudicial to the alleged victim and consequently to the prosecution's case in chief.[18]

A. *The Common Law Rule of Character Evidence and the Special Rule For Rape Cases*

The common law has traditionally treated the female victim who charges rape as suspect, and therefore subjects her to a form of strict scrutiny at trial. The current rules of evidence with respect to rape were designed in the last century to protect the possibly innocent defendant from false accusation by females who were of

17. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 142 (1966). Table 40 shows that eyewitnesses were at the scene of the alleged rape in only 4% of the rape cases studied. In State v. Hollenbeck, 67 Vt. 34, 30 A. 696 (1894), the court said: "Usually the prosecutrix is the only witness upon the question of whether the act was by force and against her will, and without her testimony no conviction can be expected." 67 Vt. at 37.

18. H. KALVEN & H. ZEISEL, *supra* note 17, 249:

> The law recognizes only one issue in rape cases other than the fact of intercourse: whether there was consent at the moment of intercourse. The jury, as we come to see it, does not limit itself to this one issue [citation omitted]; it goes on to weigh the woman's conduct in the prior history of the affair. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.

"unchaste mentality".[19] Nineteenth century morality regarded a female of unchaste mentality to be impure, immoral, and prone to sexual fantasies.[20] Thus, at trial, the defendant is allowed great latitude in eliciting from the alleged victim the extent of her "unchastity" so as to diminish the credibility of her testimony that she was protecting her virtue or chastity during the incident in question.[21] As an aid in evaluating the victim's testimony of denial of consent, character evidence of the victim which is circumstantial proof of consent is permissible at trial.[22]

In contradistinction to the rule in rape cases, the general common law rule of character evidence is that the character of an individual is generally not admissible to prove circumstantially that he or she acted in conformity therewith on a particular occasion.[23] This rule is the product of years of judicial experience[24] and is used by the courts to prevent a jury judgment based upon the bad character of an individual rather than on affirmative evidence of guilt.[25]

To fully understand the distinctive use of character evidence in rape cases, one should examine a parallel use of character evidence in criminal assault cases. Such cases are subject to the general common law character evidence rule—that circumstantial evidence of character is inadmissible as direct evidence of the substantive

---

19. 3A WIGMORE ON EVIDENCE § 924(a) at 736:

> The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.

20. *Id.*

21. Since the victim in a rape case is often the only witness to the particular occurrence, case law gives the defendant the right to the broadest possible cross-examination. See State v. Reed, 39 Vt. 417, 419, (1867); State v. Hollenbeck, 67 Vt. 34, 37, 30 A. 696, 697 (1894).

22. *See* cases cited in note 7 *supra.*

23. *See* MCCORMICK ON EVIDENCE § 188; 1 WIGMORE ON EVIDENCE § 55. Among exceptions to the common law rule are the following: defendant's good character is always admissible in his/her favor, *id.* § 56; the prosecution may rebut evidence of defendant's good character by offering evidence of defendant's bad character, *id.* § 58; the character of the victim in a rape case is admissible, *id.* § 62; and the character of the deceased in a homicide is admissible when the defendant pleads self-defense, *id.* § 63.

24. MCCORMICK ON EVIDENCE § 186 at 442.

25. 1 WIGMORE ON EVIDENCE § 57.

issue. In assault cases, the defendant may assert that the bodily injury inflicted on the victim was inflicted in self-defense, thus raising the substantive issue of whether the victim was the initial aggressor.[26] Similarly, in a rape case an element of the defense may be that the victim consented to the act in question. Both defendants may subsequently seek to use evidence of the character of the victim circumstantially as evidence of the substantive issues at trial.[27] The defendant in the assault case may contend that since the victim has a reputation for being an aggressive and quarrelsome individual, he or she probably acted aggressively on the occasion of the alleged assault. Similarly, the defendant in the rape case may contend that since the supposed victim has consented previously to acts of intercourse with other people, one may infer that she consented on the occasion in question.[28] In each case, there is an attempt to use character evidence as circumstantial proof of the particular act in question.

The character evidence in the assault case would not be admitted[29] because, as the common law character rule tells us, the prejudicial impact upon the jury is thought to outweigh the probative value of evidence of the victim's quarrelsome nature. The particular prejudicial effect is the jury's assessment that since the victim is of quarrelsome nature, he or she is a bad person who deserves punishment, regardless of whether guilt of aggression in the particular instance is determined.[30] In contrast, character evidence in the rape case would, given the traditional approach, be admissible as probative of the issue of consent, even though the evidence has the same prejudicial effect upon the jury.[31] The previous sexual experience of the victim with other people suggests to the jury contributory be-

26. State v. Dragon, 128 Vt. 568, 570, 268 A.2d 913, (1970); State v. Rounds, 104 Vt. 442, 450, 160 A. 249, (1932).

27. McCormick on Evidence, § 188 at 444.

28. *See* cases cited in note 7 *supra*.

29. State v. Meader, 47 Vt. 78, 81 (1874).

30. *See* 1 Wigmore on Evidence § 57.

31. H. Kalven & H. Zeisel, *supra* note 17, 249-52, discuss the fact that reputation evidence consisting of the previous sexual experience of the victim suggests to the jury contributory behavior on the part of the victim during the incident in question. In cases where there was strong evidence of forcible rape in the particular instance, a conviction seldom occurred when evidence of the victim's previous sexual experience was introduced.

havior on her part, even in the face of strong evidence indicating forcible rape.[32] The Vermont proposal would exclude this use of circumstantial character evidence,[33] and is in effect a surrogate common law character rule which extends the substance of the common law rule to rape cases.

B. *The Exception to the Exclusion of Character Evidence Under the Reform Proposal*

The Vermont proposal would permit the admission into evidence of the victim's prior sexual conduct with the particular defendant[34] via the continuing state of mind rule. Under this rule, the victim's previous sexual experience with the defendant is considered as direct evidence of a continuing desire to engage in repeated sexual acts with him. This evidence of the victim's continuing desire for the defendant permits the inference that this same emotional state of mind existed at the time of the incident in question.[35] Evidence of the victim's sexual desire for third persons would not be relevant because it would not evidence a continuing desire for the defendant.[36]

This rule of evidence is consistent with the application of the state of mind exception elsewhere. Returning to the assault hypothetical, evidence of the victim's quarrelsome nature, although not admissible if used circumstantially, would be admissible as direct evidence of the reasonable apprehension of the defendant of bodily harm to himself, a state of mind which is an operative fact in self-defense.[37] The aggressive character of the victim must have been communicated to the defendant previous to the alleged assault in order for him to have such a reasonable apprehension.[38] The character evidence would then be admissible under the continuing state

32. *Id.* at 210.

33. *See* note 11 *supra.*

34. *Id.* § 3A.

35. 2 WIGMORE ON EVIDENCE § 398.

36. *Id.* § 402.

37. *See generally* State v. Rounds, 104 Vt. 442, 450, 160 A. 249 (1932).

38. Russ v. Good, 90 Vt. 236, 97 A. 987 (1916); McQuiggan v. Ladd, 79 Vt. 90, 100, 64 A. 503 (1906); Knight v. Smythe, 57 Vt. 529, 531 (1885); State v. Lull, 48 Vt. 581, 587 (1876); State v. Meader, 47 Vt. 78, 81 (1874); Harrison v. Harrison, 43 Vt. 417, 424 (1871).

of mind rule, the permissible inference being that if the defendant had a reasonable apprehension upon first hearing about the victim's aggressive nature, such reasonable apprehension continued to the time of the incident in question.

In furtherance of the policy of insulating the jury from the prejudicial impact of character evidence, the Vermont proposal provides a safeguard to cover the situation where the defendant proposes to introduce evidence before the jury of his own previous sexual experience with the victim. The defendant may do so only after a judge has determined during an *in camera* hearing that the probative value of the testimony outweighs its private character.[39] The judge must determine whether the victim's relationship with the defendant was sufficiently intense and proximate to the incident to indicate a continuing desire, or whether the relationship was so infrequent or so far in the past that a continuing desire for the defendant could not be inferred. If the latter, the judge may exclude such evidence.

There are strong policy reasons in favor of such a procedure. The law makes a technical distinction when it allows evidence of the previous sexual conduct of the victim with the defendant to be admitted at trial under the state of mind rule, while excluding the same evidence if it is used circumstantially to prove the victim's consent. The jury cannot be expected to make such subtle distinctions, even when instructed by the court as to the limited admissibility of such character evidence.[40] Since this type of character evidence is admissible only if it is logically probative of the continuing state of mind of the victim, the *in camera* procedure is desirable. If the victim's sexual experience with the defendant is not relevant under the state of mind rule, there is no reason for this evidence to be before the jury for its possible consideration of such evidence as circumstantial proof of consent. When such character evidence is admitted as relevant to the state of mind of the victim, the only method of tempering its prejudicial impact is by an instruction to the jury of limited admissibility. When the evidence is not relevant

39. *See* note 11 *supra*.

40. 3A WIGMORE ON EVIDENCE § 988.

under the state of mind rule, the *in camera* hearing avoids the problem of prejudicial impact.

To summarize, the reform proposal would correct a long-standing imbalance in the character evidence rule by making the rule applicable in rape cases conform to the general rule applicable in all criminal prosecutions, including cases of assault which are closely analogous to rape cases. This change would further the same policy underlying the general common law character evidence rule—that evidence with only marginal probative value but with a high potential for prejudicing the outcome should not be admitted for jury consideration at trial. However, the reform proposal would ensure that evidence which does have significant probative value, namely evidence of the victim's prior sexual relations with the defendant, may be admitted after judicial determination of its relevance and probative value to the issue at trial. Thus, from the point of view of evidentiary law, it is recommended that the proposed reform be passed by the Vermont legislature. Let us now turn to a consideration of whether the proposal will unconstitutionally infringe upon a defendant's right to confrontation.

II. The Exclusion of Circumstantial Character Evidence Under the Vermont Proposal and the Defendant's Right to Confrontation

One commentator[41] has recently concluded that legislation such as the present proposal[42] conflicts with the defendant's right to confrontation, which courts have interpreted to include the rights to effective cross-examination[43] and full access to relevant evidence.[44] According to this commentator:

> The desire to keep from the jury evidence of the victim's prior sexual history is understandable. Nevertheless, to rule all or

41. Comment, *Limitations on the Right to Introduce Evidence Pertaining to The Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?* 3 Hofstra L. Rev. 403 (1975).

42. The author based his discussion on the Michigan rule, which is virtually the same as the proposed Vermont rule. *See* Mich. Comp. Laws § 750.520 (j)(1974).

43. Pointer v. Texas, 380 U.S. 400, 404 (1965).

44. United States v. Nixon, 418 U.S. 683, 711 (1974).

> most such evidence inadmissible by legislative fiat flies in the face of a long and virtually undivided history of court decisions allowing in such evidence.[45]

The author proceeds to argue that circumstantial character evidence consisting of the victim's prior sexual history is in fact logically relevant to the issue of consent,[46] therefore rendering legislation such as the Vermont proposal unconstitutional because it denies the defendant his sixth amendment right of access to all relevant evidence at trial.[47]

That the proposed legislation contradicts a history of court decisions allowing in such evidence in rape cases cannot be denied,[48] but this does not dispose of the constitutional issue. The question to be addressed is whether the constitutional right to confrontation is of such a nature as to preclude a legislative determination to conform the rules of evidence in rape cases to evidentiary rules governing other criminal prosecutions. It is important to note that the Vermont proposal *automatically* excludes only *circumstancial* character evidence. It does no more than has traditionally been done

---

45. Note 41 *supra* at 407.

46. Note 41 *supra* at 412-17.

47. The sixth amendment is binding on the State of Vermont. State v. Berard, 132 Vt. 138, 146, 315 A.2d 501, 507 (1974).

48. *See* cases cited in note 7 *supra*. Although the United States Supreme Court has never directly considered the question of the relevancy of circumstantial character evidence in rape cases, the suppression of such evidence by a state prosecutor did have an impact on a Supreme Court decision. In Giles v. Maryland, 386 U.S. 66 (1967), the Court vacated a rape conviction and remanded the case to the state court for a determination of whether the prosecution suppressed evidence consisting of the victim's previous sexual experience with third parties. The issue that confronted the Court, however, was whether character evidence deemed relevant under state law was suppressed, and not the relevance per se of that evidence to the issue of consent.

The Court of Appeals of Michigan has dealt indirectly with the character evidence exclusions of the Vermont proposal. Michigan's recently enacted legislation is virtually the same as the Vermont proposal. In People v. Whitfield, 58 Mich. App. 585, 228 N.W. 2d 475 (1975), the court upheld the defendant's conviction of rape. One ground of the defendant's appeal was that the trial court erred in precluding his counsel from cross-examining the victim about her prior sexual experience with third persons. Although the court applied prior law, which gave the trial judge wide discretion in determining the admissibility of such evidence, the court noted that such exclusions were consistent with public policy as evinced by the recent enactment by the state of Michigan in their act. 58 Mich. App. at 589. However, the court was merely concerned with the application of state law; the constitutional issue raised by the exclusion of such evidence was not considered.

by judicial development elsewhere in the criminal law, and it does so on the basis of the same policy that underlies the general common law rule of character evidence.

In this respect, the purpose and effect of the Vermont proposal can be seen as eliminating the special anti-victim bias of the unique and outdated rules governing evidence in rape cases, a bias based in part on notions about sexual behavior, sex role stereotypes, and standards of morality that no longer pertain. Indeed, without legislative reform in this area, it is possible that the special rule governing character evidence in rape trials could be struck down by the courts since its underpinnings and effect are, it would seem, clearly discriminatory and thus in violation of the equal protection clause.[49]

The response to the constitutional challenge to the proposed legislation need not rest on these grounds, however. The unarticulated premise of such a challenge, at least as presented by the commentator cited above, is that the constitutional right to confrontation extends to requiring the introduction at trial of all logically relevant evidence regardless of its prejudicial impact on the jury.[50] To make such an assertion one must be prepared to show that the right to confrontation is, in effect, absolute—or at least that it is sufficiently strong that it overrides centuries of traditional evidence law under which evidence that is logically relevant may be systematically excluded from trial if it has limited probative value and a high potential for prejudicial impact.[51] Not only are there no historical grounds to show the right to confrontation was intended to extend this far,[52] but the decided case law would seem to indicate that this position is unsupportable.

---

49. *See generally* Frontiero v. Richardson, 411 U.S. 677 (1973).

50. Evidence that is logically probative of an issue might not be admitted if it is not legally relevant. If logically relevant evidence would unduly arouse the emotions or prejudice of a jury, the judge may determine that its probative value is outweighed by its prejudicial impact on the jury, and consequently exclude it as not legally relevant. This balancing process, with some exceptions, is left to the discretion of the judge. One exception is the rule of character evidence which provides for an automatic exclusion, thus removing from the judge's discretion the determination of when the probative value of the evidence is outweighed by its prejudicial value. McCormick on Evidence §§ 185, 186.

51. McCormick on Evidence § 188 at 444.

52. Mattox v. United States, 156 U.S. 237 (1895). Referring to the confrontation clause, the Court stated:

The first question to be addressed is whether the right to confrontation has been construed by the courts to be an absolute one or whether, instead, the courts have engaged in a balancing process in applying it. If the courts have utilized a balancing process, the second question is whether in the rape context the right to confront overrides the countervailing policy of excluding circumstantial character evidence that has been determined to have low probative value and excessive prejudicial impact on the jury.

In *Pointer v. Texas,*[53] the sixth amendment right to confrontation was incorporated into the fourteenth amendment and made applicable to the states because it was "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[54] However, the Supreme Court has consistently taken the position that the right to confrontation is not absolute. For example, in *Illinois v. Allen,*[55] the state's interest in conducting a trial free from repeated disruptions by the defendant prevailed over the defendant's sixth amendment right to be present at his own trial, and accordingly, confront his accusers.[56] When fair and orderly trial proceedings are involved, the confrontation clause will not be applied in such an absolute fashion as to require the physical presence of the defendant.

Even in those cases where the Court has held that the confrontation clause prevailed over a particular state policy, the Court has consistently reaffirmed the fact that the confrontation clause is not absolute. In *Chambers v. Mississippi,*[57] the Court struck the balance in favor of the confrontation clause by holding that the defendant's

---

> The primary objection of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242-43.

53. 380 U.S. 400 (1965).

54. *Id.* at 405.

55. 397 U.S. 337 (1970).

56. *Id.* at 342.

57. 410 U.S. 284 (1973).

sixth amendment rights to cross-examine and compel the attendance of witnesses in his favor were infringed by the trial court's refusal to permit the defendant to impeach his own witness and by the exclusion of the favorable testimony of other witnesses as hearsay.[58] The combined effect of these restrictions was to violate the defendant's due process right to a fair trial.[59] However, the Court stated: "Of course the right to confront and to cross-examine is not absolute and may in appropriate cases bow to accommodate other legitimate interests in the criminal trial process."[60]

In *Roviaro v. United States*,[61] the issue confronting the Court was whether the sixth amendment gave the accused access to the identity of a government informant. The policy of facilitating the flow of information to law enforcement officials by preserving the anonymity of informants was weighed against the defendant's right of access to all relevant evidence.[62] According to the Court, the most important consideration in determining the proper balance was the "possible significance,"[63] or materiality, of the informant's testimony to the issue of the defendant's guilt or innocence.[64] The Court held that the government was obligated to disclose the identity of its informant because he was inextricably linked with the transaction which brought about the defendant's possession of heroin. Since the informant was a material witness on the question of whether the defendant knowingly transported drugs,[65] the defendant's right to discover the identity of the witness and to confront him at trial could not be abridged. Although the Court held in favor of the confrontation right, it endorsed the balancing approach by concluding that "no fixed rule with respect to disclosure is justifiable."[66]

---

58. *Id.* at 294-95.

59. *Id.* at 298-303.

60. *Id.* at 295.

61. 353 U.S. 53 (1957).

62. Extensive litigation on the confrontation clause did not develop until after *Pointer v. Texas* was decided in 1965. Thus, the issue in the *Roviaro* case was framed in the context of due process, i.e. the right to prepare a proper defense. 353 U.S. 53, 62 (1957).

63. *Id.* at 62.

64. *Id.*

65. *Id.* at 62-65.

66. *Id.* See Annot. 1 L. Ed. 2d 1998 (1957), for cases in which the identity of the informant has not been held to be material.

In the informant cases, the central issue was not the extent to which the right to confront reaches all relevant evidence, but whether the defendant had an opportunity to confront at all. Even in those cases, the Court has consistently held that the right to confront is not absolute. A different and even less compelling situation exists when the defendant has an opportunity to confront the witness at trial, and the only problem involves the scope of the defendant's cross-examination.

In *Davis v. Alaska*,[67] the defendant asserted that his sixth amendment right of cross-examination was infringed when he was not allowed to introduce evidence consisting of a sealed juvenile record of an adverse witness. The theory of the defense was that since such evidence would prove that the witness was on probation at the time of the alleged crime, it would show that he was susceptible to pressure by law enforcement officials, out of fear of revocation of probation, to identify the defendant. Consistently with the balancing approach in *Roviaro*, the Court weighed the state's desire to preserve the anonymity of juvenile offenders against the defendant's need to use the witness' sealed juvenile record for impeachment of the witness by proof of bias.[68] The determining factor was the materiality of the juvenile record to the defendant's case. The Court noted that "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[69] The Court further stated that "[s]erious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry."[70] The Court concluded that on the facts of this case the defendant's right to a full cross-examination outweighed the embarrassment that might result to the witness and his family.[71]

Although the *Davis* case struck the balance in favor of the right to confront, the Court's analysis makes clear that a balancing ap-

67. 415 U.S. 308 (1974).
68. *Id.* at 319.
69. *Id.* at 316.
70. *Id.* at 319.
71. *Id.*

proach is to be utilized in determining the scope of cross-examination available to the defendant. Moreover, in both this type of case and that presented when the issue is whether the defendant will be able to confront an opposing witness at all, such as in the informant situation, it is clear that the critical factor is whether or not the proffered evidence is likely to be highly probative of the issue at trial. In this respect, a rape case under the reform proposal would be distinguishable from the cases in which the Court favored the right to confrontation because the circumstantial character evidence excluded by the reform proposal is unlikely ever to be more than marginally probative of the issue of consent. Of the many techniques for illuminating motivation or conduct in a rape case, or any other case, circumstantial character evidence is clearly the most tenuous.[72] On this basis alone, therefore, the Vermont proposal can be distinguished from the cases such as *Roviaro* in which the right to confrontation was held to outweigh a countervailing policy which would have resulted in the exclusion of highly probative evidence.

Although the primary consideration for a court is the materiality, or relative probative value, of the proffered evidence to the issues at trial,[73] the Court must also consider the important public policy of conducting a trial devoid of prejudicial evidence. The prejudicial impact on the jury of allowing circumstantial character evidence to be introduced in rape cases is almost without exception likely to be far in excess of its marginal probative worth. It has been said that the long-standing judicial policy of automatically excluding such evidence in other areas of the criminal law is the "child of the jury system."[74] Because a trial can be a hyperemotional event conducted in an adversary setting before jurors with little or no expertise, common law courts have traditionally excluded evidence which, although logically relevant, might unduly arouse the emotion or prejudice of the jurors.[75] This practice rests on the important public interest in creating a judicial climate conducive to a fair and objective jury determination. The "exercise of calm and informed

72. McCormick on Evidence § 186 at 442.

73. *See* text accompanying note 63 *supra*.

74. J. Thayer, Preliminary Treatise on Evidence 266 (1898).

75. Trautman, *Logical or Legal Relevancy—A Conflict of Theory*, 5 Van. L. Rev. 385, 392 (1952).

judgement by [the members of a jury] is essential to proper enforcement of the law."[76]

The proposal under consideration here can be distinguished from the situation presented by the *Davis* case in two important respects. First, the evidence excluded by the Vermont proposal is not of significant probative value in proving the issue of consent in rape cases. Second, under the proposal, the countervailing policies are much stronger than they were in the *Davis* case. In that case, allowing in the disputed evidence would have at most caused embarrassment and an invasion of privacy to the witness and his family. Under the proposal, there are serious problems of embarrassment and privacy, but more importantly, there is the unavoidably extreme prejudicial impact which the introduction of such evidence would exert on the proceedings. It is safe to conclude, therefore, that a court confronting the issue would find that the right of confrontation does not outweigh the countervailing policy of excluding such evidence in rape cases where the evidence is excluded on account of its inherently slight probative value and inordinate prejudicial impact on trial proceedings.

It may be argued, however, that the *Roviaro* and *Davis* cases require a case-by-case assessment of the materiality of evidence to the issues at trial. Thus, the Vermont proposal would be unconstitutional because it would cut off the required case-by-case determination of materiality by *automatically* excluding all circumstantial character evidence. The answer to this contention is that it fails to take into consideration the fact that a policy of automatic exclusion of such evidence has long prevailed at common law for all other crimes. The formalized rules of character evidence are the result of centuries of trial court practice and experience and represent the determination that circumstantial character evidence, as opposed to other types of evidence, will *always* have a prejudicial effect disproportionate to its marginal probative value. The pervasive trial practice of automatically excluding circumstantial character evidence in other prosecutions has been endorsed by the Supreme Court in *Michelson v. United States.*[77] The Vermont proposal would

76. Sinclair v. United States, 279 U.S. 749, 765 (1929).

77. 335 U.S. 469 (1948).

do no more than make this automatic exclusion applicable to rape cases since the reasons for any differences are no longer valid.

III. Conclusion

Because of the nature of the crime, a rape trial often reduces itself to a credibility contest in which the jury must choose whether to believe the testimony of the female victim or the testimony of the defendant. In order to facilitate a resolution of this oath-swearing contest, a rape trial is currently allowed to play host to a prejudicial sexual stereotyping via the route of character evidence. In contrast, the common law character rule in effect for other crimes excludes circumstantial character evidence because of its prejudicial impact on the jury. The Vermont proposal would replace the current rules of character evidence in effect for rape cases with a rule which would exclude prejudicial circumstantial character evidence of the victim from trial. This change is desirable in terms of evidentiary principles, and should be enacted by the legislature.

While this proposal may be challenged on the ground that it infringes on the defendant's due process right of confrontation, there are at least three reasons why a constitutional challenge to the Vermont proposal would have to fail. First, the proposal serves merely to correct a long-standing imbalance in the law of evidence which differentiates rape cases from others on the basis of sex role stereotypes and double-standards of morality quite inconsistent with present-day notions of equality. Second, the right to confront is not absolute, and there is no reason why it should extend to require a court to admit evidence which is at most logically relevant, but not legally relevant because its probative value is slight and its prejudicial impact is excessive. Finally, the automatic exclusion of such evidence by legislative fiat does no more than bring evidentiary rules for rape into conformance with the rules of evidence prevailing in other areas of the criminal law.

Lawrence Berger