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Blaming The Victim: The Admissibility Of Sexual History In Homicides

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BLAMING THE VICTIM: THE ADMISSIBILITY OF SEXUAL HISTORY IN HOMICIDES

I. Introduction

On August 26, 1986, Robert Chambers killed Jennifer Levin in Central Park in New York City.[1] The pretrial publicity centered as much on the fact that the victim died while engaging in sex as on the fact that she was killed.[2] New York newspapers reported the homicide with such headlines as: " 'Wild Sex Killed Jenny,' 'Sex Play Got Rough' and 'She Raped Me.' "[3] As in many rape cases, the publicity that engulfed the killing was awash with the victim's purported past sexual activity.[4] According to one former criminal defense lawyer, "the [comparison] to a rape case is appropriate," because "[a]lthough it's a murder case as it's been publicized it's been all about sexual relations." The fact "[t]hat Jennifer Levin got killed is treated as almost incidental."[5] Similarly, the head of the sex crimes unit for the Manhattan District Attorney's office[6] sees the tactic of blaming the victim, which defense attorneys formerly used in rape cases, as emerging in this case.[7] Just as some people

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1. *See Darkness Beneath the Glitter: Life of Suspect in Park Slaying*, N.Y. Times, Aug. 28, 1986, at A1, col. 1.

On March 25, 1988, Robert Chambers pled guilty to first-degree manslaughter in the death of Jennifer Levin. On April 15, 1988, Chambers was sentenced to 5 to 15 years imprisonment. The sentence was agreed to by the Levin family, Chambers' defense attorneys and the prosecution after the jury in Chambers' trial had remained deadlocked during nine days of deliberation. *See* N.Y. Times, Apr. 16, 1988, at 33, col. 2.

2. *See, e.g., Sexual Politics and a Slaying: Anger at Chambers's Defense*, N.Y. Times, Dec. 4, 1986, at A1, col. 1 [hereinafter *Sexual Politics and a Slaying*]. *But see Trial Opening For Chambers in Park Killing*, N.Y. Times, Jan. 4, 1988, at B1, col. 5 (prosecutor in case has stated that sex may not have played any part in killing).

3. *See Sexual Politics and a Slaying*, *supra* note 2, at A1, col. 2.

4. *Id.*

5. *Id.* (quoting Judith Levin).

6. *See An Aggressive Defense—or 'Obscene' Quest?*, Nat'l L.J., Apr. 13, 1987, at 10, cols. 1-3 [hereinafter *Aggressive Defense*].

7. *Id.*; *cf. Playing Hardball*, A.B.A. J., July 1, 1987, at 48, 51 (plaintiff's attorney in wrongful death suit involving Toxic Shock Syndrome argued that questions during deposition regarding late wife's sexual habits were used to harass and intimidate plaintiff into dropping suit).

once believed that "women who get raped are 'asking for it,' "[8] a morbid twist has some people blaming Jennifer Levin for her own death.[9]

Many states have enacted rape-shield statutes to reduce the attention directed at a rape victim's past sexual behavior.[10] Arguably, rape-shield statutes have done much to redress perceived biases inherent in the legal system[11] by prohibiting a defendant from making the sexual conduct of a woman-victim an issue.[12] The 1986 Report of the New York State Task Force on Women in the Courts, however, concluded that "[t]he attitudes embodied in the former law [pertaining to rape] . . . continue to operate in the minds of some judges, jurors, defense attorneys and prosecutors."[13]

This Note analyzes whether legislation analogous to rape-shield statutes should be enacted to limit testimony concerning the prior sexual history of a murder victim. Part II discusses the historical development of rape-shield statutes and the policies underlying their enactment. Part III examines the constitutionality of rape-shield statutes, analyzing *Davis v. Alaska*[14] and *Chambers v. Mississippi*,[15] the leading Supreme Court cases cited by opponents of these statutes.

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8. *See Aggressive Defense*, *supra* note 6, at 10, col. 3.

9. *Id.*

10. *See generally* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977) [hereinafter Berger].

11. *See* 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE §§ 5381-5393, at 509-10 (1980) ("[i]f the common law rule admitting evidence of the victim's prior sexual conduct was based on male distrust of female witnesses, the reform statutes are in large part shaped by female distrust of male judges") [hereinafter WRIGHT & GRAHAM]; *see, e.g.*, Berger, *supra* note 10, at 32-39. Feminists argue that the law permitting defendants to introduce evidence of prior sexual conduct is a remnant of prior law. *See, e.g.*, Gold & Wyatt, *The Rape System: Old Rules and New Times*, 27 CATH. U.L. REV. 695, 695 (1978). The procedure, in effect, makes the victim a co-defendant, not a witness.

12. Rape-shield laws are "aimed at eliminating a common defense strategy of trying the complaining witness rather than the defendant. The result of this strategy was harassment and further humiliation of the victim as well as discouraging victims of rape from reporting the crimes to law enforcement authorities." State v. Williams, 224 Kan. 468, 470, 580 P.2d 1341, 1343 (1978).

Rape-shield statutes prevent judges from allowing excesses that were permitted under common law despite the fact that these excesses were more than likely unjustified. *See, e.g.*, Packineau v. United States, 202 F.2d 681, 684-86 (8th Cir. 1953) (judge permitted testimony of prior sexual conduct by victim, beaten brutally by defendant, as evidence of consent), *overruled*, United States v. Kasto, 584 F.2d 268 (8th Cir. 1978).

13. NEW YORK STATE TASK FORCE ON WOMEN IN THE COURTS, *reprinted in* 15 FORDHAM URB. L.J. 11, 62 (1987).

14. 415 U.S. 308 (1974).

15. 410 U.S. 284 (1973).

Part III also contains a discussion of the rationale behind state court decisions upholding the constitutionality of rape-shield statutes. Next, Part IV considers whether existing law concerning the right of privacy and testimonial privileges may be construed to enable the family members of a murder victim to prevent the exposure of a deceased victim's sexual past. Based upon this analysis, the Note proposes legislation to extend the protection of rape-shield statutes to deceased victims of sex crimes.

II. Historical Development of Rape-Shield Laws

During the mid-1970's, lawmakers throughout the nation proposed laws that restricted the scope of admissible evidence of past sexual conduct in rape prosecutions.[16] These statutes, commonly known as rape-shield laws, were quickly passed by state legislatures[17] and by Congress.[18] By 1980, forty-eight states had enacted some form of rape-shield statute.[19] Professor Harriett R. Galvin, in a critique and analysis of existing rape-shield statutes,[20] has classified them by four distinct models: the Michigan,[21] Texas,[22] Federal[23] and California approaches.[24]

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16. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 (1986) [hereinafter Galvin].

17. By 1976, over half the states had enacted some form of rape-shield statute. *See* Berger, *supra* note 10, at 32.

18. *See* J. WEINSTEIN, EVIDENCE—RULES AND STATUTE SUPPLEMENT 47-51 (1984) (discussing bill in House of Representatives) [hereinafter WEINSTEIN].

19. *See* Galvin, *supra* note 16, at 906-07, Table 1 (listing federal and state statutes restricting admissibility of evidence of prior sexual conduct in rape trials). The two states without rape-shield statutes are Utah and Arizona. In Utah, when the issue is consent, probative evidence pertaining to the victim's reputation or moral character is considered to outweigh any prejudicial factors and is, therefore, admissible. *See* State v. Howard, 544 P.2d 466, 470 (Utah 1975). In Arizona, evidence regarding the unchaste reputation of the victim is admissible in situations involving consent or the refutation of scientific or physical evidence. *See* State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 29, 545 P.2d 946, 953 (1976).

The rape-shield statutes have aroused great interest. *See generally* Berger, *supra* note 10, at 1; Galvin, *supra* note 16, at 906; *see also* 23 WRIGHT & GRAHAM, *supra* note 11, at 510; NATIONAL INSTITUTE OF LAW ENFORCEMENT & CRIMINAL JUSTICE, FORCIBLE RAPE: AN ANALYSIS OF LEGAL ISSUES (1978); Herman, *What's Wrong With the Rape Reform Laws?*, 3 CIV. LIBERTIES REV. 60 (Dec. 1976/Jan. 1977) [hereinafter Herman]; Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185 (1978).

20. *See* Galvin, *supra* note 16.

21. *Id.* at 812-76.

22. *Id.* at 876-83.

23. *Id.* at 883-93.

24. *Id.* at 894-902.

The Michigan approach[25] has been termed the "inflexible legislature rule."[26] This type of statute bars admission of evidence of the victim's past sexual conduct subject to specific enumerated exceptions.[27] For example, all statutes patterned on the Michigan statute permit the introduction of evidence concerning sexual conduct between the accused and the complainant.[28] The exceptions outlined in such statutes demonstrate attempts by legislatures to determine in what instances evidence of prior sexual history may be relevant and material to the presentation of a defendant's case[29] and thus, required by the sixth amendment of the Constitution.

The Texas approach,[30] or the "untrammeled judicial discretion approach,"[31] differs significantly from the Michigan classification.[32]

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25. Twenty-five states have enacted laws similar to the Michigan statute. *See* ALA. CODE § 12-21-203 (1986); FLA. STAT. ANN. § 794.022(2)-(3) (West Supp. 1987); GA. CODE ANN. § 24-2-3 (1982); ILL. ANN. STAT. ch. 38, paras. 115-117 (Smith-Hurd Supp. 1987); IND. CODE ANN. § 35-37-4-4 (Burns 1985); KY. REV. STAT. ANN. § 510.145 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 15.498 (West 1981); MD. ANN. CODE art. 27, § 461A (1982); MASS. ANN. LAWS ch. 233, § 21B (Law. Co-op. 1986); MICH. COMP. LAWS ANN. § 750.520(J) (West Supp. 1987); MO. ANN. STAT. § 491.015 (Vernon Supp. 1988); MONT. CODE ANN. § 45-5-511(4) (1987); NEB. REV. STAT. § 28-321 (1985); N.H. REV. STAT. ANN. § 632-A:6 (1986); OHIO REV. CODE ANN. § 2907.02(D) (Anderson 1987); 18 PA. CONS. STAT. ANN. § 3104 (Purdon 1983); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985); TENN. CODE ANN. § 40-17-119 (1982); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1987); VA. CODE ANN. § 18.2-67.7 (1982); W. VA. CODE § 61-8B-11 (Supp. 1987); WIS. STAT. ANN. §§ 972.11(2), 971.31(11) (West 1985); ME. R. EVID. 412; MINN. R. EVID. 404(c); N.C. R. EVID. 412; *see also* Galvin, *supra* note 16, at 906.

26. *See* Galvin, *supra* note 16, at 876. Professor Galvin criticizes the Michigan type statutes because the legislative determination regarding an entire category of evidence precludes consideration of the specific facts and circumstances of the case or the purpose for which the evidence is offered. *Id.* at 872.

27. *Id.* at 871 n.518 ("[t]he two exceptions are: (1) evidence of sexual conduct between the complainant and the accused; and (2) evidence of specific instances of sexual activity showing the source of origin of semen, pregnancy or disease").

28. *Id.* at 815. In addition, Professor Leon Letwin has stated the following:

> The goal of rationally untangling what happened between the two persons on the charged occasion requires one to understand the history of their sexual relationship. Quite apart from any character implications, this prior relationship bears too heavily on the complainant's probable conduct on the charged occasion, as well as on the motivation for her present accusation, to be excluded.

Letwin, *"Unchaste Character," Ideology and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 72 (1980).

29. *See* Galvin, *supra* note 16, at 872.

30. Nine states have enacted statutes similar to the Texas approach. *See* ALASKA STAT. § 12.45.045 (1984); ARK. STAT. ANN. § 41-1810.1-4 (1977 & Supp. 1985); COLO. REV. STAT. § 18-3-407 (1978); IDAHO CODE § 18-6105 (1979); KAN. STAT. ANN. § 21-3525 (Supp. 1986); N.J. STAT. ANN. § 2A:84A-32.1-3 (West Supp. 1987); S.D. CODIFIED LAWS ANN. § 23A-22-15 (1979); WYO. STAT. § 6-2-312 (1983); N.M.

In the majority of jurisdictions employing the Texas approach, a defendant is permitted to introduce *any* evidence pertaining to the prior sexual history of the complainant provided that there is a judicial determination of relevancy[33]—*i.e.*, that prejudicial effect outweighs probative value.[34] Courts make relevancy determinations at *in camera* hearings to avoid exposing the jury to information which may taint the fact-finding process and to prevent unwarranted exposure of the private life of the complainant before a verdict is rendered.[35]

The third model, labeled the Federal approach,[36] combines aspects of both the Michigan and the Texas statutes. Key features include:[37]

> (1) a general prohibition of sexual conduct evidence; (2) several exceptions permitting sexual conduct evidence considered indisputably relevant to an effective defense; and (3) a "catch-basin" provision authorizing the trial court to determine the admissibility of unexpected sexual conduct evidence on a case-by-case basis according to a prescribed standard.[38]

The Federal rape-shield statute, Rule 412 of the Federal Rules of Evidence,[39] illustrates this approach.[40]

R. EVID. 11-413; *see also* Galvin, *supra* note 16, at 907. Texas repealed its original statute on September 1, 1986, 1985 Tex. Gen. Laws ch. 685, § 9(b), and enacted a statute similar to the federal approach. TEX. CRIM. EVID. RULES ANN. R. 412 (Vernon 1985).

31. *See* Galvin, *supra* note 16, at 876.

32. *Id.*

33. *Id.* (seven of the nine states following Texas approach).

34. *See infra* notes 151-56 and accompanying text.

35. *See* Galvin, *supra* note 16, at 877.

36. *See id.* at 883. Five states have enacted statutes similar to the federal approach. In addition, the military has enacted a comparable rape-shield statute. *See* FED. R. EVID. 412; MIL. R. EVID. 412; CONN. GEN. STAT. ANN. § 54-86f (West 1985); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981); OR. REV. STAT. ANN. § 40.210 (1984); HAW. R. EVID. 412; IOWA R. EVID. 412; *see also* Galvin, *supra* note 16, at 907.

37. *See* Galvin, *supra* note 16, at 883.

38. *Id.*

39. Federal Rule of Evidence 412 provides the following:

> (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.
>
> (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

Under the fourth legislative grouping, known as the California approach,[41] evidence of the complainant's prior sexual conduct is

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(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or
(2) admitted in accordance with subdivision (c) and is evidence of—
(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.
(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.
(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.
(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.
(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

FED. R. EVID. 412.

40. *See* Galvin, supra note 16, at 884.

41. *Id.* at 894. Six states have enacted laws similar to the California statute. *See* CAL. EVID. CODE §§ 782, 1103(b) (West Supp. 1988); DEL. CODE ANN. tit. 11, §§ 3508, 3509 (1987); MISS. CODE ANN. § 97-3-70 (Supp. 1985); NEV. REV. STAT. §§ 48.069, 50.090 (1986); N.D. CENT. CODE §§ 12.1-20-14 to -15 (1985); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1988); WASH. REV. CODE ANN. § 9A.44.020 (Supp. 1987); *see also* Galvin, *supra* note 16, at 894.

separated into two categories, "depending on the purpose for which it is offered."[42] The first category involves substantive evidence or evidence offered to prove consent, while the second category centers on credibility evidence proffered to attack the credibility of the complainant.[43] Evidence of consent is prohibited unless it pertains to the complainant's previous sexual history with the accused.[44] Like Texas-approach statutes, however, California-approach statutes require that the judge first decide the issue of relevancy outside the hearing of the jury.[45]

Rape-shield statutes changed, to a degree, the common law rule that permitted the defense to introduce evidence of the sexual history of the complainant during trial.[46] Under case law,[47] a defendant accused of rape was able to question the complainant as to her possible unchaste[48] character.[49] This type of questioning was considered permissible for several reasons. First, the evidence was considered relevant because it was thought to show the complainant's propensity to engage in sexual relations. Frequency of sexual relations in turn, was thought to bear on the issue of consent,[50] which, if

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42. Galvin, *supra* note 16, at 894.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 546 (1980) [hereinafter Tanford & Bocchino].

47. At common law, the sexual history of the victim was always admissible. Traditional wisdom depicted rape as a peculiar offense. Many commentators supported admission of this evidence because they viewed women as having vindictive natures and overactive imaginations. Thus, accusations by women who had been raped required different treatment from allegations of other crimes. *See* Berger, *supra* note 10, at 7-22.

48. " 'Chastity' denotes abstention from premarital or extramarital intercourse." *See id.* at 15 n.94.

49. The courts considered the victim's unchastity essential to the issue of consent. "The underlying thought here is that it is more probable that an unchaste woman would assent . . . than a virtuous woman." *Id.* (quoting People v. Collins, 25 Ill. 2d 605, 611, 186 N.E.2d 30, 33 (1962)).

Judge Cowan, in the much quoted *People v. Abbot*, differentiated between a woman "who has already submitted herself to the lewd embraces of another, and the coy and modest female, severely chaste and instinctively shuddering at the thought of impurity," and asked: "And will you not more readily infer assent in the practiced Messalina, in loose attire than in the reserved and virtuous Lucretia?" People v. Abbot, 19 Wend. 192, 195-96 (N.Y. 1838).

50. Before Congress and state legislatures enacted rape-shield laws, such evidence was admissible. *See, e.g.*, FED. R. EVID. 404(a)(2) advisory committee note ("an accused may introduce pertinent evidence of the character of the victim, as in support of . . . consent in a case of rape").

established, was a complete defense to the charge of rape.[51] Second, some jurisdictions admitted this evidence for the purpose of impeaching the victim's credibility, reasoning that "promiscuity imports dishonesty."[52]

Finally, courts were afraid of false charges by vindictive women.[53] Indeed, judges frequently referred to the words of Sir Matthew Hale, the Lord Chief Justice of the King's Bench, that rape "is an accusation easily to be made . . . and harder to be defended by the party accused, tho never so innocent."[54]

The movement to change the common law rule originated from an alliance of women's rights groups and law enforcement officials.[55] Feminist organizations[56] lobbied for legislation to prevent a rape trial from turning into "inquisitions into the victim's morality, not trials

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51. Indeed, consent is still a defense to every sex offense in New York, except the offense of consensual sodomy. *See* N.Y. PENAL LAW § 130.05 (McKinney 1986) (sex offenses; lack of consent).

> (1) Whether or not specifically stated, it is an element of every offense defined in this article, except the offense of consensual sodomy, that the sexual act was committed without consent of the victim. (2) Lack of consent results from: (a) Forcible compulsion; or (b) Incapacity to consent; or (c) Where the offense charged is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct. (3) A person is deemed incapable of consent when he is: (a) less than seventeen years old; or (b) mentally defective; or (c) mentally incapacitated; or (d) physically helpless.

Id.

52. Berger, *supra* note 10, at 16; *see, e.g.*, Seals v. State, 114 Ga. 520, 40 S.E. 731, 732 (1902). *But cf.* State v. Fortney, 301 N.C. 31, 40, 269 S.E.2d 110, 115 (1980) ("[i]f sexual experiences outside marriage render one woman less truthful than her virgin sister, then sexual experience outside marriage would be an issue at any trial where a woman was a witness").

53. *See* Tanford & Bocchino, *supra* note 46, at 546.

54. *Id.* (quoting M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634 (1st American ed. Philadelphia 1847) (1st ed. London 1736)).

55. *See* 23 WRIGHT & GRAHAM, *supra* note 11, § 5382, at 493-505; *see also* Williams v. State, 690 S.W.2d 656, 658 (Tex. Ct. App. 1985) (rape-shield law "was promulgated to diminish the embarrassment and humiliation suffered by rape victims and the consequential low rate of reporting the crime"); *Aggressive Defense*, *supra* note 6, at 10, col. 2 (after enactment of rape-shield law, Manhattan conviction rate for crime of rape was "75 to 90 percent" as compared with "10 percent" conviction rate before passage of statute).

56. *See* 23 WRIGHT & GRAHAM, *supra* note 11, § 5382, at 515. As a political cause, the crime of rape became "a powerful metaphor for the sort of oppression that many women found in the traditional roles assigned to them in our society." *Id.* § 5382, at 516; *see* Griffin, *Rape: The All-American Crime*, RAMPARTS, Sept., 1971, at 35. "The same men and power structure who victimize women are engaged in the act of raping Vietnam, raping Black people and the very earth we live upon. Rape is a classic act of domination." *Id.*

of the defendant's innocence or guilt."[57] Moreover, prosecutors and police favored reform of the common law rule because they believed that the proposed laws would make it easier to obtain convictions.[58] Thus, in response to public opinion, and in recognition of the invalidity of the assumptions upon which the common law doctrine was based,[59] Congress and state legislatures enacted rape-shield statutes.[60]

III. The Constitutionality of Rape-Shield Laws

A. Background

Rape-shield laws have generated much controversy.[61] Scholars[62] and civil libertarians[63] have expressed concern that foreclosing questions about a victim's prior sexual conduct in order to protect her privacy rights[64] may interfere with a defendant's sixth amendment

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57. 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman).

58. NATIONAL INSTITUTE OF LAW ENFORCEMENT & CRIMINAL JUSTICE, FORCIBLE RAPE: FINAL PROJECT REPORT 56 (1978). Results from a survey of prosecutors indicated that 65% believed that legislation repealing the common law rule admitting prior sexual history would increase the effectiveness of the prosecutions. *See id.* *But see* Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 592-93 (1980). This study found that the Washington rape reform statute had little effect in that state on prosecutions of rape. *Id.* at 592.

59. *See supra* note 47 and accompanying text.

60. *See supra* notes 17-18 and accompanying text.

61. *See generally* Tanford & Bocchino, *supra* note 46, at 545 (concluding some rape-shield laws violate defendant's sixth amendment rights).

62. *See, e.g.*, 23 WRIGHT & GRAHAM, *supra* note 11, § 5387, at 566-90; Berger, *supra* note 10, at 52-72.

63. *See* Herman, *supra* note 19, at 60. The American Civil Liberties Union (ACLU), strongly committed to the rights of criminal defendants and to women's rights, was embroiled in controversy over the scope of the rape-shield laws. An example that highlights the controversy follows:

> Joan Little's acquittal was applauded by those who support[ed] the most stringent rape law reform. Yet the defendant was permitted to prove that the deceased sheriff had sexually abused other female inmates. That evidence—of propensity or pattern and practice—was regarded as relevant . . . . Relevance is not a street to be walked only as it suits one's convenience or gender.

Id. at 68.

64. *See, e.g.*, 23 WRIGHT & GRAHAM, *supra* note 11, § 5382, at 522-23 (complainant's right of privacy should be "respected to the same degree as other witnesses and [is] not to be sacrificed lightly to claims of relevance based upon a logic tainted by sexist assumptions").

rights to confront witnesses and present relevant evidence.[65] These authorities have also expressed concern about the need to avoid erroneous convictions.[66]

B. Arguments Against Constitutionality

Opponents of rape-shield laws point to *Davis v. Alaska*[67] and *Chambers v. Mississippi*,[68] two Supreme Court decisions holding certain state exclusionary rules of evidence unconstitutional.[69] In both cases, the Court applied its highest level of judicial scrutiny because sixth amendment rights were at issue.[70] Thus, the state had to assert a compelling governmental interest which justified infringing the defendant's sixth amendment rights.[71] In order to withstand judicial scrutiny, legislation which would extend rape-shield laws to deceased victim's of sex crimes must be considered in light of *Davis*[72] and *Chambers*.[73]

1. Davis v. Alaska

In *Davis v. Alaska*,[74] the state interest in question was the rehabilitation and protection of juvenile delinquents.[75] A state statute prevented the use of a juvenile's past criminal record for impeachment

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65. Galvin, *supra* note 16, at 771; *see* Tanford & Bocchino, *supra* note 46, at 589 ("[t]he state and federal governments may not legislate to alter the rules of evidence so as to place unusual and new burdens on the accused's ability to defend himself . . . . Shield laws also run afoul of the Constitution when they alter the traditional standard for the admissibility of evidence").

66. Herman, *supra* note 19, at 63. Herman restated the following argument:

> There is in many rape cases a potential conflict between the right of the defendant to a fair trial and the complainant's right to have his or her claim to protection of the law vindicated without undue invasion of sexual privacy. In many cases this conflict may be irresolvable, and when that is the case the right to a fair trial should not be qualified, no matter how compelling the countervailing concerns.

Id. (quoting policy adopted at February, 1976, meeting of ACLU's Board of Directors).

67. 415 U.S. 308 (1974).

68. 410 U.S. 284 (1973).

69. *See Davis*, 415 U.S. 308 (1974); *Chambers*, 410 U.S. 284 (1973); *see also* Galvin, *supra* note 16, at 802-03.

70. *See Davis*, 415 U.S. at 318; *Chambers*, 410 U.S. at 295.

71. *See Davis*, 415 U.S. at 319; *Chambers*, 410 U.S. at 295-98.

72. 415 U.S. 308 (1974).

73. 410 U.S. 284 (1973).

74. 415 U.S. 308 (1974).

75. *Id.* at 310-11.

purposes.[76] In *Davis*, the defendant was accused of grand larceny and burglary in connection with the robbery of a safe.[77] During the trial, the state's crucial witness, one Richard Green,[78] a sixteen-year old boy, testified that Joshuaway Davis was one of the two men he saw standing behind a blue car with "something like a crowbar in his hands."[79] The safe[80] was discovered on the same day and at the very spot that Green testified he had seen the car.[81]

At trial, the defense attempted to cross-examine Green in order to establish that he had previously been adjudicated a juvenile delinquent.[82] The defense sought to demonstrate that Green, under unreasonable pressure from the authorities, identified Davis to shift police suspicion from himself.[83] The prosecutor invoked the state's juvenile-shield law[84] to prevent any reference to Green's criminal record in the interest of "protecting the anonymity of juvenile offenders,"[85] and to encourage the rehabilitative goals of the juvenile justice system.[86]

The interests of the defendant, however, in admitting the juvenile's criminal record were twofold. First, since Green was the main witness for the prosecution, the "accuracy and truthfulness of [his] testimony were key elements in the [s]tate's case."[87] Second, the effort by the defense to cross-examine Green was a means of "revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand."[88]

The state court upheld the constitutionality of the juvenile-shield law.[89] The Supreme Court, however, reversed and held that the defendant's right of confrontation had been denied.[90] The Court,

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76. *Id.* The Alaska statute provides in pertinent part that: "[t]he commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceeding in any other court . . . ." ALASKA STAT. § 47.10.080(g) (1971).

77. *Id.* at 309-10.

78. *Id.* at 310.

79. *Id.*

80. The safe, which was later discovered to be the one stolen from the Polar Bar, "had been pried open and [had its] contents removed." *Id.* at 309.

81. *Id.* at 310.

82. *Id.* at 312-13.

83. *Id.* at 311-13.

84. *Id.* at 311; *see supra* note 76.

85. *Davis*, 415 U.S. at 319.

86. *Id.*

87. *Id.* at 317.

88. *Id.* at 316.

89. *Id.* at 314.

90. *Id.* at 320.

balancing the competing interests of the state and the defendant, decided that the defendant's right to confront witnesses was "paramount to the [s]tate's policy of protecting a juvenile offender."[91]

The Court did not challenge the validity of Alaska's policy of protecting the confidentiality of its juvenile offenders.[92] Rather, it reaffirmed its holding in *Alford v. United States*,[93] that a witness has no rights which prevent the defense from exposing his criminal record.[94] In short:

> [N]o obligation is imposed on the court, . . . to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.[95]

In *Davis*, the Court reasoned that "[w]hatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record . . . is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness."[96]

Opponents of rape-shield statutes argue that *Davis* is applicable to cases where false accusation is the issue.[97] There are, however, important distinctions between the two shield laws that should limit the application of *Davis*.[98] First, the policy considerations underlying juvenile-shield statutes and rape-shield statutes differ.[99] The basic purpose behind the juvenile-shield law is to protect juvenile offenders from public disclosure of their youthful transgressions, even though highly relevant testimony would be excluded.[100] In contrast, two of the main reasons behind enacting rape-shield laws were to exclude evidence of the victim's chastity[101] and to encourage rape victims to report the crime to law enforcement officials.[102] Indeed, those who

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91. *Id.* at 319.
92. "We do not and need not challenge the [s]tate's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender." *Id.*
93. 282 U.S. 687 (1931).
94. *Davis*, 415 U.S. at 320.
95. *Alford*, 282 U.S. at 694.
96. *Davis*, 415 U.S. at 319.
97. *See* 23 WRIGHT & GRAHAM, *supra* note 11, § 5387, at 568.
98. Galvin, *supra* note 16, at 806.
99. *Id.* at 806.
100. *See supra* notes 75-86 and accompanying text.
101. *See supra* notes 48-60 and accompanying text.
102. *See supra* note 55 and accompanying text.

were interested in changing evidentiary rules pertaining to rape cases argued that proof of chastity "distorts the fact-finding process because jury prejudice towards the unchaste complainant may result in unjust acquittals."[103]

Second, the Court in *Davis* was concerned with the accuracy and truthfulness of the witness.[104] The chastity of a rape victim, however, does not usually bear on a witness' honesty.[105] Thus, the issue of chastity is not similar to evidence used to impeach a witness.[106] Therefore, the Supreme Court's interest in reliability of the witness presented to the jury for impeachment purposes is not present in a rape trial.[107]

2. *Chambers v. Mississippi*

In *Chambers v. Mississippi,* the defendant, Leon Chambers, was charged with the murder of a law enforcement officer during an altercation with police and a crowd of people in a rural Mississippi town.[108] During the trial, the defendant was prevented from establishing that one Gable McDonald had previously confessed to the murder.[109] Leon Chambers was convicted of murder.[110] On appeal, the defendant claimed that his due process rights were violated[111] because he was not permitted to cross-examine McDonald in order to elicit his confession.[112] The appellate court ruled that the confession was inadmissible because it was hearsay[113] and because the state's voucher rule[114] prohibited a party from impeaching his own witness.[115]

The Supreme Court reversed, finding that Chambers was denied a fair trial[116] because his sixth amendment rights to cross-examine witnesses and to have compulsory process for obtaining witnesses in his favor had been thwarted.[117] Although *Chambers* can be broadly

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103. Galvin, *supra* note 16, at 806.
104. *Davis*, 415 U.S. at 317.
105. *See supra* notes 55-60 and accompanying text.
106. *See* 23 WRIGHT & GRAHAM, *supra* note 11, § 5387, at 568-70.
107. *Id.*
108. 410 U.S. 284, 285-88 (1973).
109. *Id.* at 289.
110. *Id.* at 285.
111. *Id.* at 289-90.
112. *Id.* at 291.
113. *Id.* at 293 n.6.
114. *Id.* at 295-96 (voucher rule rests on idea that party who calls witness "vouches" for his credibility and therefore cannot impeach him).
115. *Id.*
116. *Id.* at 302.
117. *Id.* at 295-97.

construed,[118] thereby finding unconstitutional any state evidentiary law that excludes testimony without a compelling reason during a criminal trial, such an interpretation is not widely accepted by legal scholars.[119] Commentators have stated that "the Court's narrow rationale is not very conducive to [the] use of the opinion as a basis for holding [a rape-shield law] invalid on its face."[120]

First, in reversing the conviction, the Court stressed that the holding was specific to "the facts and circumstances of this case."[121] That is, the excluded testimony "was critical to Chambers' defense"[122] and "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest."[123] Second, the Court stressed the antiquated nature of the voucher rule[124] and noted that such rules had "been rejected altogether by the [then] newly proposed Federal Rules of Evidence . . . ."[125] Finally, the Court concluded that the accused's right to defend himself outweighed the state's interest in upholding these evidentiary rules.[126]

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118. *But cf.* State v. Gardner, 13 Wash. App. 194, 534 P.2d 140 (1975). The court stated the *Chambers* rule as follows:

> The minimal evidentiary criteria which must be met before any declaration can be considered as rising to constitutional stature are these: (1) the declarant's testimony is otherwise unavailable; (2) the declaration is an admission of an unlawful act; (3) the declaration is inherently inconsistent with the guilt of the accused; and (4) there are such corroborating facts and circumstances surrounding the making of the declaration as to clearly indicate that it has a high probability of trustworthiness.

Id. at 198-99, 534 P.2d at 142.

119. *See* Westen, *Compulsory Process*, 73 MICH. L. REV. 71, 151-52 (1974) [hereinafter Westen].

120. 23 WRIGHT & GRAHAM, *supra* note 11, § 5387, at 567.

121. 410 U.S. at 303.

122. *Id.* at 302.

123. *Id.*

124. The Court made the following observation:

> Although the historical origins of the "voucher" rule are uncertain, it appears to be a remnant of primitive English trial practice in which "oath-takers" or "compurgators" were called to stand behind a particular party's position in any controversy. Their assertions were strictly partisan and, quite unlike witnesses in criminal trials today, their role bore little relation to the impartial ascertainment of the facts.

Id. at 296.

125. *Id.* at 296 n.9.

126. *Id.* at 302. The Court stressed that "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. But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." *Id.* at 295 (quoting Berger v. California, 393 U.S. 314, 315 (1969)) (citation omitted).

Furthermore, the *Chambers* Court itself was careful to point out that it "establish[ed] no new principles of constitutional law."[127] Rather, the Court stated that the holding does not:

> [S]ignal any diminution in the respect traditionally accorded to the [s]tates in the establishment and implementation of their own criminal trial rules and procedures. . . . [W]e hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived [the defendant] of a fair trial.[128]

The decision has been called one of the " 'most important constitutional law case[s] in the field of criminal evidence . . . .' "[129] Yet, no decision by the Supreme Court since *Chambers* has held that the accused has a constitutional right to introduce *any* type of evidence thought inadmissible under state rules of evidence.[130]

The uncertainty concerning the scope of the decision has left state courts to interpret the opinion.[131] Although *Chambers* has been construed to require the admission of hearsay statements when a defendant endeavored to establish a defense of entrapment,[132] and when a defendant attempted to admit opinion evidence regarding the results of a polygraph test,[133] the hearsay statements offered in those cases had strong indicia of reliability.[134] Indeed, the *Chambers* Court stressed the reliability of the hearsay statements offered at trial.[135] Thus, "the overwhelming reliability of the particular hearsay

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127. *Id.* at 302.

128. *Id.* at 302-03.

129. *See* Westen, *supra* note 119, at 151 n.388 (quoting remarks of Judge Otto M. Kaus, Proceedings of the 1973 Sentencing Institute for Superior Judges, 112 Cal. Rptr. at 97 (1973)).

130. *Id.* at 152.

131. Rudstein, *Rape-Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1, 18 & n.81 (1976).

132. *Id.* (citing Kreisher v. State, 303 A.2d 651, 652 (Del. 1973)).

133. *Id.* (citing State v. Dorsey, 87 N.M. 323, 325-26, 532 P.2d 912, 914-15 (Ct. App. 1975), *aff'd*, 88 N.M. 184, 539 P.2d 204 (1975)).

134. *See supra* note 118 and accompanying text.

135. 410 U.S. at 300-01. The Court made the following observations:

> First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case—McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest.

Id. (footnote omitted).

in *Chambers* makes it difficult to determine what the Court would do in cases involving more questionable evidence."[136]

C. Constitutionality Upheld by State Courts

Although the Supreme Court has not ruled on the constitutionality of rape-shield statutes, most state courts have upheld these laws.[137] Courts have held: (1) rape-shield laws are similar to other exclusionary rules which bar hearsay statements;[138] (2) the Constitution does not entitle the defendant to present highly inflamatory and irrelevant evidence;[139] (3) both opinion and reputation evidence concerning a complainant's past sexual history are not indicative of veracity or consent to have sex with the defendant;[140] and (4) the complainant in a rape prosecution needs to be shielded from the prejudice and unnecessary embarrassment that "only serve to exacerbate the trauma of the rape itself."[141]

IV. Family Rights: Current Status of the Law

A. Background

There are no higher stakes than those of the defendant in a murder trial; the defendant may lose his liberty[142] or perhaps even his life.[143]

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136. Westen, *supra* note 119, at 154.

137. 23 WRIGHT & GRAHAM, *supra* note 11, § 5387, at 571; *see* Doe v. United States, 666 F.2d 43, 47-48 n.9 (4th Cir. 1981) (survey of state cases).

138. *See, e.g.*, People v. Blackburn, 56 Cal. App. 3d 685, 690-91, 128 Cal. Rptr. 864, 866-67 (1976); State v. Hudlow, 99 Wash. 2d 1, 10-11, 659 P.2d 514, 518-19 (1983). Exclusion of hearsay testimony regarding a victim's promiscuity in *Hudlow* did not violate the defendant's rights because the report lacked probative value. *Id.*

139. *See, e.g.*, Marion v. State, 267 Ark. 345, 347, 590 S.W.2d 288, 290 (1979) ("no constitutional right to present irrelevant evidence at trial"); State v. Schenck, 222 Neb. 523, 529, 384 N.W.2d 642, 647 (1986) (evidence of prior sexual history of complainant in rape prosecution has no more relevance than would prior philanthropic acts of robbery victim).

140. State v. Fortney, 301 N.C. 31, 40, 269 S.E.2d 110, 115 (1980) ("[a] woman, just as a man, 'may be intemperate, incontinent, profane and addicted to many other vices that ruin the reputation, and yet retain a scrupulous regard for the truth' . . . .") (quoting Gilchrist v. McKee, 4 Watts. 380, 386 (Pa. 1835)), *quoted in* Commonwealth v. Crider, 240 Pa. Super. 403, 406, 361 A.2d 352, 354 (1976).

141. Smith v. Commonwealth, 566 S.W.2d 181, 183 (Ky. Ct. App. 1978) (state rape-shield statute is constitutional "and is a valid exercise by the legislature of this Commonwealth to prevent the victim in a sexually related crime from becoming the defendant at the trial").

142. *See, e.g.*, N.Y. PENAL CODE art. 125 (McKinney 1987) ("Homicide, Abortion and Related Offenses").

143. In *Furman v. Georgia*, the Court held that the death penalty was pre-

The evidence presented to the jury determines the fate of the defendant.[144] It is fundamental to the truth-gathering process that the prosecution and the defense present to the jury only evidence that "bears on the issue to be decided."[145]

Accordingly, Rule 402 of the Federal Rules of Evidence,[146] which provides that "relevant evidence generally [is] admissible [and] irrelevant evidence [is] inadmissible,"[147] constitutes "a presupposition involved in the very conception of a rational system of evidence."[148] The requirement of relevancy[149] is essential—it is the framework upon which the structure of exclusion and admission is built.[150]

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sumptively excessive: "[T]he death penalty [was] exacted with great infrequency even for the most atrocious crimes and . . . there [was] no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not." 408 U.S. 238, 313 (1972).

In Gregg v. Georgia, 428 U.S. 153 (1976), which upheld the constitutionality of the death penalty for murder, the Supreme Court stated that "[t]he most marked indication of society's endorsement of the death penalty for murder [was] the legislative response to *Furman*." *Id.* at 179. At least 35 states re-enacted the death penalty during the four-year period between *Furman* and *Gregg*. *Id.* at 179-80.

144. Churchwell, *The Constitutional Right to Present Evidence: Progeny of* Chambers v. Mississippi, 19 CRIM. L. BULL. 131, 141 (1983).

145. C. MCCORMICK, MCCORMICK ON EVIDENCE § 184, at 540 (Cleary ed. 1984) [hereinafter MCCORMICK].

146. Federal Rule of Evidence 402 reads as follows:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FED. R. EVID. 402.

147. *Id.*

148. Graham, *Relevancy—The Necessary But Not Sufficient Condition of Admissibility*, 17 CRIM. L. BULL. 599, 599 (1983) (quoting J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE OF THE COMMON LAW 264-65 (1898)) [hereinafter Graham].

149. Professor McCormick defines relevant evidence as having two elements: materiality and probative value.

> Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is 'in issue,' . . . is within the range of the litigated controversy . . . . The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove.

MCCORMICK, *supra* note 145, § 185, at 541.

Federal Rule of Evidence 401 defines "relevant evidence." " 'Relevant evidence' means evidence having 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." FED. R. EVID. 401.

150. Graham, *supra* note 148, at 599.

Rule 403 of the Federal Rules of Evidence[151] permits courts generally to exclude evidence which is of unquestioned relevance.[152] The rule is used in situations that require a balancing between the probative value of the evidence and the harm resulting from its prejudicial effect;[153] it does not represent a new development in the law.[154] In fact, it follows the lead of the common law.[155] Under Rule 403, the trial judge, in his discretion, has the "power of exclusion . . . necessary to facilitate the ascertainment of truth and to keep the conduct of the trial within bounds."[156]

A rape-shield statute is an example of a specific law enacted to exclude evidence that may be considered relevant in a rape prosecution.[157] Federal Rule of Evidence 412[158] and comparable state statutes[159] call for exclusion of evidence in certain circumstances dealing with the victim's prior sexual experiences. It was the judgment of Congress and state legislatures[160] that the admission of such evidence would not only mislead, confuse or appeal to the prejudice of the jury panel,[161] but would also overshadow the truth and deter public policy considerations.[162]

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151. Federal Rule of Evidence 403 limits admissibility of evidence:

> 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.

FED. R. EVID. 403.

152. *Id.*; *see also* MCCORMICK, *supra* note 145, § 185, at 544-45.

153. *See* WEINSTEIN, *supra* note 18, at 28-29.

154. *See* MCCORMICK, *supra* note 145, § 185, at 545.

155. *See* Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

> Recognizing the trial as an adversary proceeding taking place under the dramatic conditions of emotional disturbance, with defiance, antagonism, surprise, sympathy, contempt, ridicule and anger permeating the atmosphere of the entire proceeding, and with members of the jury chosen from the public at large with no required experience in determining controversial issues of fact under such circumstances, the courts at an early date excluded logically relevant circumstantial evidence when the risks involved in the above policy considerations were found to be so out of proportion to the probative value of the offered evidence as to constitute a *clear* basis of exclusion.

Id. at 392 (emphasis in original).

156. Graham, *supra* note 148, at 600.

157. *Id.* at 599.

158. *See supra* note 39.

159. *See supra* notes 25, 30, 36, 41.

160. 23 WRIGHT & GRAHAM, *supra* note 11, § 5385, at 559.

161. *Id.*

162. *See* MCCORMICK, *supra* note 145, § 47, at 110 n.5 (quoting Attorney General

Rape-shield statutes preclude the defendant from inquiring into the complainant's sexual past[163] even though the complainant is the key witness for the prosecution.[164] Rape-shield statutes, in varying degrees, govern the admissibility of evidence of the rape victim's character and permissible modes of proof.[165]

In a murder trial, there are additional considerations. A defendant is permitted by statute to prove a "pertinent trait"[166] of the victim's character[167] under Federal Rule of Evidence 404(a)(2)[168] even though the victim cannot testify for the prosecution. Similarly, at common law, the accused in a homicide trial may prove self-defense by establishing that his victim was the aggressor.[169] The underlying rationale is that the evidence might establish that the defendant had

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v. Hitchcock, Exch. 104, 154 Eng. Rep. 38 (1847)). McCormick notes the following observation made by the court in *Hitchcock*.

> If we lived for a thousand years instead of about sixty or seventy, and every case were of sufficient importance, it might be possible and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind [sic] find it to be impossible. Therefore, some line must be drawn.

Id.

163. Galvin, *supra* note 16, at 765-66.

164. *Id.* at 783-84.

165. *Id.* at 773.

166. Federal Rule of Evidence 404 provides the following:

> (a) Character evidence generally. 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: (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609. (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of 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.

FED. R. EVID. 404.

167. *Id.*

168. *Id.*

169. *See* MCCORMICK, *supra* note 145, § 193 at 572-73; 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[06] (1981).

reason to fear the victim.[170] This is commonly known as the "justification defense."[171] Courts have reasoned that under the justification defense when the character of the victim is relevant,[172] evidence of the victim's character tends to prove conduct.[173]

Courts are divided as to whether the defendant needs to have previous knowledge of the victim's violent behavior in order to claim the justification defense.[174] In a majority of jurisdictions, the character of the victim is relevant and therefore admissible even if the defendant had no previous knowledge.[175] In a minority of jurisdictions the defendant is permitted to introduce evidence of reputation of specific acts of violence,[176] only when the defendant has such knowledge of these acts at the time of the killing.[177] Even though the previous acts of the victim are relevant, "the crucial fact at issue . . . is not the character of the victim, but rather, the state of mind of the defendant."[178]

Where the character trait to be proved in a justification defense involves the victim's aggressive sexual behavior, the law in the majority of jurisdictions would permit the introduction of opinion evidence concerning the murder victim's past sexual conduct *only* in cases where the accused claims that he was defending himself from the victim's aggressive sexual behavior.[179] Furthermore, in jurisdictions following the minority rule, the defendant must have had knowledge of the victim's propensity for violent sex *at the time* of the murder itself.[180]

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170. *See* Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 856 (1982) [hereinafter Uviller].

171. *See, e.g.*, N.Y. PENAL LAW § 35.15 (McKinney 1978).

172. *See* WEINSTEIN, *supra* note 18, at 31. Weinstein states the following:

> [A]n accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide. . . . While its basis lies more in history and experience than in logic an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

Id. (citations omitted).

173. *Id.*

174. *See generally* Uviller, *supra* note 170, at 856-57.

175. *Id.*

176. *Id.* at 857; *see also* People v. Miller, 39 N.Y.2d 543, 550, 349 N.E.2d 841, 846, 384 N.Y.S.2d 741, 746 (1976).

177. *Miller*, 39 N.Y.2d at 551, 349 N.E.2d at 847, 384 N.Y.S.2d at 747.

178. *Id.*

179. *See supra* note 174.

180. *See supra* notes 176-79.

In short, in a murder trial, except when the defendant claims self-defense, the sexual history of the victim is less relevant than in a rape prosecution.[181] The reasoning behind the enactment of the rape-shield laws[182] applies with equal force to murder trials[183] since evidence regarding the victim's prior sexual conduct, even if relevant,[184] has arguably far too little probative value to justify any extensive inquiry.[185]

In addition, evidence pertaining to the victim's past sexual history, may very well prejudice a jury.[186] The seminal study on jury behavior in the United States, *The American Jury*,[187] reported that juries have a tendency, "in crimes with victims to weigh the conduct of the victim in judging the guilt of the defendant."[188] A jury, after learning of the murder victim's prior sexual conduct, might feel that "she got what she deserved,"[189] and judge the defendant not on the basis of guilt but on the "moral worth of the victim."[190]

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181. *See, e.g.*, Doe v. United States, 666 F.2d 43, 48 (4th Cir. 1981). When the defendant acquires knowledge of the victim's prior sexual conduct after the rape, it is deemed irrelevant to the defendant's state of mind when the crime was committed.

182. *See* Uviller, *supra* note 170, at 859. "[T]he whole point of the enactment of Rule 412 [of the Federal Rules of Evidence] was to change the law of relevancy concerning 'sexual character.' " *Id.*

183. Jeffrey Newman, an attorney for the Jennifer Levin family, drew an analogy to the rape-shield laws:

> The public policy in the state of New York is generally to preclude an inquiry into the complainant's sexual history—and to do so notwithstanding the fact that the complainant will be taking the stand as the key prosecution witness against the defendant. . . . Where, as here, the defendant has gone further and killed his victim—where, in short, that victim will not be testifying for the prosecution—surely that victim's sexual history is no less irrelevant.

See Aggressive Defense, supra note 6, at 11, col. 1.

184. Arguably, there is another approach regarding the relevance of a murder victim's sexual history. This approach questions whether the sexual conduct of the murder victim is ever relevant above and beyond the traditional justification defense considered when a defendant is on trial for murder. The victim is dead; that the victim engaged in sex prior to the murder is immaterial since a threat to vulnerable parts of defendant's body would fall into the rubric of the traditional justification defense. *See, e.g.*, People v. Liberta, 90 A.D.2d 681, 455 N.Y.S.2d 882 (4th Dep't 1982).

185. *Id.*

186. *See* Berger, *supra* note 10, at 30.

187. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 250-51 (1966).

188. *Id.* at 243.

189. 23 WRIGHT & GRAHAM, *supra* note 11, § 5382, at 514-15.

190. *Id.* § 5382, at 522.

Furthermore, in a murder trial, unlike a trial for rape, there is no witness to claim that the testimony concerning her prior sexual conduct interfered with her right of privacy and there is no witness for the jury to observe. It is left to the family of the victim to claim that the indiscriminate questioning into the intimate activities of the deceased breaches what is considered privacy by most people.[191] The issue, therefore, is whether the family of the murder victim has a privacy right, under the Constitution or the common law, or whether a testimonial privilege exists that would prevent testimony regarding the victim's sexual past.

B. Constitutional Right of Privacy

Some privacy rights are readily inferred from the text of the Constitution[192]—for example, the right to be free from governmental seizures, without probable cause[193] and freedom of speech.[194] There is no specific provision in the Constitution, however, which speaks of a general right of privacy.[195] The constitutional " 'right of privacy' has come to mean a right to engage in certain highly personal activities."[196] The Supreme Court has based this "right of privacy" on the due process clause of the fourteenth amendment.[197] In addition, the Supreme Court has recognized the existence of zones of privacy guaranteed under specific provisions of the Bill of Rights.[198] Justice Douglas, in *Griswold v. Connecticut*,[199] found the existence of the right to privacy in "penumbras, formed by emanations"[200] stemming from the guarantees of the Bill of Rights.[201]

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191. *See, e.g.*, *Law Protects Privacy of Victim's Diary in Central Park Killing*, N.Y. Times, Jan. 9, 1987, at A26, col. 5 ("law is clearly in accord with ordinary decency in rejecting a claim seeking only to damage the character of the deceased victim, by publicity or otherwise) [hereinafter *Law Protects*].

192. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 14.26, at 684 [hereinafter NOWAK & ROTUNDA].

193. *Id.*; *see* U.S. CONST. amend. IV.

194. NOWAK & ROTUNDA, *supra* note 192, § 14.26, at 684; *see* U.S. CONST. amend. I.

195. *See* U.S. CONST.

196. NOWAK & ROTUNDA, *supra* note 192, at 684.

197. *See infra* notes 201-06.

198. NOWAK & ROTUNDA, *supra* note 192, at 684.

199. 381 U.S. 479 (1965).

200. *Id.* at 484.

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the [f]irst [a]mendment is

In a line of cases dating back to 1891,[202] the Court has held that an individual is protected from state interference in areas relating to procreation,[203] contraception,[204] marriage[205] and family relationships.[206] These personal privacy rights have been deemed to be fundamental and can only be abridged if the state asserts a compelling interest.[207]

The constitutional right of privacy recognized by the Supreme Court is, however, limited. The Court restricts *only* intrusions by the government.[208] Furthermore, the right of privacy recognized by the Supreme Court "terminates upon death and does not descend

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one. . . . The [t]hird [a]mendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The [f]ourth [a]mendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.' The [f]ifth [a]mendment in its [s]elf-[i]ncrimination [c]lause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The [n]inth [a]mendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

Id. (citations omitted from original).

201. *Id.*

202. Roe v. Wade, 410 U.S. 113, 152-53 (1973). The Court held:

In a line of decisions, however, going back perhaps as far as . . . [1891] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy does exist under the Constitution. In varying contexts the Court or individual Justices have, indeed, found at least the roots of that right in the [f]irst [a]mendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the [f]ourth and [f]ifth [a]mendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886), *see* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. at 484-85; in the [n]inth [a]mendment, *Id.* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the [f]ourteenth [a]mendment, *see* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, and child rearing and education . . . .

Id.

203. Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

204. Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972).

205. Loving v. Virginia, 388 U.S. 1, 12 (1967).

206. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

207. *Roe*, 410 U.S. at 154.

208. *See supra* notes 201-06 and accompanying text.

to the heirs of the deceased."[209] Thus, there is no constitutional or court defined right of privacy that would be applicable to the family of a murder victim since only a testimonial privilege would shield the murder victim's family interest during the judicial process.

C. Common Law Privacy

The common law right of privacy focuses on a person's "right to be let alone."[210] Four distinct areas of invasion of personal privacy rights are recognized:[211] (1) appropriation;[212] (2) intentional interference;[213] (3) public disclosure of private facts;[214] and (4) false light.[215] Virtually all jurisdictions[216] recognize at least one form of the right of privacy.[217] When there has been publicity about an individual of a highly objectionable nature the cause of action that accrues is known as public disclosure of private facts.[218]

Although there has been some disagreement as to the controlling principles in this area, all authorities agree that to be actionable the private material disclosed to the public must be both distasteful and offensive to the reasonable person of usual sensibilities.[219] It has been stated that "[t]he ordinary, reasonable person [takes offense at] . . . details of sexual relations [that] are spread before the public

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209. United States v. Amalgamated Life Ins. Co., 534 F. Supp. 676, 679 (S.D.N.Y. 1982). Here, the government sought an administrative subpoena relating to the death of a group of employees. Amalgamated Life Insurance Company unsuccessfully claimed the documents were protected by a constitutional right of privacy and were privileged. *Id.*

210. Garner v. Triangle Publications, 97 F. Supp. 546, 548 (S.D.N.Y. 1951).

211. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 117, at 851 (5th ed. 1984) [hereinafter PROSSER & KEETON].

212. *Id.* § 117, at 851-54 (appropriation of plaintiff's likeness or name for defendant's benefit).

213. *Id.* § 117, at 854-56 (defendant's intentional interference with plaintiff's seclusion or solitude).

214. *Id.* § 117, at 856-63 (highly objectional publicity about the plaintiff).

215. *Id.* § 117, at 863-66 (publicity which puts plaintiff in false light in public's eye).

216. *Id.* § 117, at 851.

217. *Id.* The champions of the right to privacy were Samuel D. Warren and Louis D. Brandeis. Warren and Brandeis pioneered the doctrine in *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

218. PROSSER & KEETON, *supra* note 211, § 117, at 856.

219. *Id.* § 117, at 856-57. Dean Prosser listed three factors necessary for recovery: (1) facts must be publicly disclosed—not privately; (2) facts disclosed to the public must be private, not public; (3) disclosure of the facts must be highly offensive to a reasonable person of ordinary sensibilities. *Id.* Professor Hill, however, considers the most important factor to be "the shocking character of a disclosure." Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1258 (1976).

eye, or [when] there is a highly personal portrayal of his intimate private characteristics or conduct."[220] The standard, however, does not protect the hypersensitive.[221] Moreover, the tort of public disclosure of private facts results in a remedy of damages for the injured party.[222] The cause of action does not prevent the initial disclosure of private facts, but merely remedies the injustice.[223] This action, therefore, would not give the family of a murder victim the right to prevent testimony regarding the victim's sexual past.

D. Privileges

Testimonial or evidentiary privileges exist both in the common law[224] as well as in state[225] and federal statutes.[226] These privileges include the attorney-client privilege,[227] the physician-patient privilege,[228] the psychotherapist-patient privilege[229] and familial privi-

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220. PROSSER & KEETON, *supra* note 211, § 117, at 857 (footnotes omitted). In a well known case, *Sidis v. F-R Publishing Corp.*, the court held that "misfortunes and frailties of neighbors and 'public figures' are of considerable interest . . . to the rest of the population." *Id.* (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)). The court reasoned it might have held differently if "[r]evelations . . . so intimate . . . and so unwarranted . . . as to outrage the community's notions of decency" were disclosed. *Sidis*, 113 F.2d at 809.

221. *See* PROSSER & KEETON, *supra* note 211, § 117, at 857.

222. Black's Law Dictionary defines a tort as "[a] private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form or an action for damages." BLACK'S LAW DICTIONARY 1335 (5th ed. 1979).

223. *See* PROSSER & KEETON, *supra* note 211, § 117, at 857; *see also* Garner v. Triangle Publications, 97 F. Supp. 546, 548-59 (S.D.N.Y. 1951).

224. *See* Note, *Developments—Privileged Communications*, 98 HARV. L. REV. 1450, 1455-58 (1985) [hereinafter *Developments*].

225. *See, e.g.*, N.Y. CIV. PRAC. L. & R. §§ 4501-4505 (McKinney 1978).

226. *See, e.g.*, FED. R. EVID. 501.

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, [s]tate, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which [s]tate law supplies the rule of decision, the privilege of a witness, person, government, [s]tate, or political subdivision thereof shall be determined in accordance with [s]tate law.

Id.

227. *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 4503 (McKinney 1978).

228. *See id.* § 4504 (McKinney 1978).

229. *See Developments*, *supra* note 224, at 1539-55.

leges.[230] Although privileges are classified as rules of evidence, they are sometimes viewed as having the opposite effect of prominent exclusionary rules.[231] Exclusionary rules, such as the hearsay rule or the best evidence rule, elucidate the truth "by operating to exclude evidence which is unreliable or which is calculated to prejudice or mislead."[232] On the other hand, privileges may be seen to operate to "preclude the consideration of competent evidence which could aid in determining the outcome of the case . . . ."[233] There are two main justifications for privileges[234]—encouraging communications which are considered socially useful[235] and a privacy rationale which focuses "on the protection that privileges afford to individual privacy."[236]

The privacy rationale has been termed a need for all individuals[237] and "an end in itself."[238] Privacy, however, is not always recognized as a legal interest.[239] Furthermore, the need for privacy must be balanced against society's interest in determining the truth[240]—at present there exists no testimonial or evidentiary privilege available to family members seeking to exclude testimony of a deceased's sexual past. The need for a testimonial privilege which would act as a shield to prevent testimony about a murder victim's past sexual history must also be weighed against society's need for determining the truth.

The family of the murder victim *does*, however, have an interest in protecting the reputation of the deceased by analogy to a rule of evidence concerning the doctor-patient privilege.[241] For example, in New York, a person who practices medicine is prohibited from disclosing any information pertaining to the physical or mental condition of the deceased if it would tend to disgrace the memory of the decedent.[242]

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230. *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 4502 (McKinney 1978).
231. *See* MCCORMICK, *supra* note 145, § 72, at 171.
232. *Id.*
233. State v. 62.96247 Acres of Land in New Castle County, 57 Del. Ch. 40, 52, 193 A.2d 799, 806 (1963).
234. *Developments*, *supra* note 224, at 1471.
235. *See* MCCORMICK, *supra* note 145, § 72, at 171.
236. *Developments*, *supra* note 224, at 1480.
237. *See* A. WESTIN, PRIVACY AND FREEDOM 13 (1973).
238. *Developments*, *supra* note 224, at 1481.
239. *See id.* at 1482.
240. *See* Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85 (1973).
241. *See supra* note 228.
242. *See* N.Y. CIV. PRAC. L. & R. § 4504 (McKinney 1978).

Furthermore, the medical practitioner can not give out information that would tend to disgrace the memory of the decedent by either an express waiver or an implied waiver by the decedent's representative.[243] The trial judge is required to evaluate the testimony offered and to determine whether it would be viewed as disgraceful.[244] Publicly disclosing private information regarding a murder victim's sexual past is precisely the type of information reasonable people might consider highly offensive.[245] Furthermore, it is the type of material that might disgrace the memory of the murder victim.[246]

> Physician, dentist and nurse (a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine or dentistry, or a registered professional or licensed practical nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. (b) Identification by dentist; crime committed against patient under sixteen. A dentist shall be required to disclose information necessary for identification of a patient. A physician, dentist or nurse shall be required to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime. (c) Mental or physical condition of deceased patient. A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived: 1. by the personal representative, or the surviving spouse, or the next of kin of the decedent; or 2. in any litigation where the interests of the personal representative are deemed by the trial judge to be adverse to those of the estate of the decedent, by any party in interest; or 3. if the validity of the will of the decedent is in question, by the executor named in the will, or the surviving spouse or any heir-at-law or any of the next of kin or any other party in interest.

Id.

243. *See id.* § 4504(c).

244. Tinney v. Neilson's Flowers Inc., 61 Misc. 2d 717, 719, 305 N.Y.S.2d 713, 716 (Sup. Ct. Nassau County 1969), *aff'd*, 35 A.D.2d 532, 314 N.Y.S.2d 161 (2d Dep't 1966).

245. *See supra* notes 218-19.

246. *See Law Protects*, *supra* note 191, at A26, col. 5; *see also* W. GAYLIN, THE KILLING OF BONNIE GARLAND 15 (1983). In stressing the importance of not tainting the memory of the murder victim, Gaylin identifies two forms of immortality for individuals who are not religious. The first is biological immortality, symbolized by children and grandchildren; the second is "immortality of memory. The dead continue to live in memories, and usually with the mythic distortion that time lends to those who need no longer pass muster in the real world." *Id.*

Indeed, many philosophers argue that there can be harm after death. For example, Aristotle said the following: "A dead man is popularly believed to be capable of experiencing good and ill fortune—honor and dishonor, and prosperity and the loss of it among his children and descendents generally—in exactly the same way

V. Recommendation

Legislation should therefore be enacted extending rape-shield laws to non-rape situations. This legislation would strictly limit the admission of evidence of a victim's sexual past. Admittedly, trial judges already possess great discretion to exclude evidence which tends to confuse, mislead or prejudice the jury.[247] Nevertheless, the rationale underlying Professor Berger's defense of restrictive rape-shield laws is instructive:[248]

> [W]arning defendants not to count on using evidence of unchastity, spurring prosecutors to object to introduction, and reminding judges that this kind of proof is presumptively inadmissible and merits extremely careful scrutiny. The hope is that a clear change in the spirit of the rules will lead to a change in their application.[249]

A. Constitutionality of Proposed Legislation

In a murder trial, unlike a trial for rape, there is no victim-witness. Thus, a court is not confronted with deciding whether the defendant has the right to cross-examine a witness as to prior sexual history.[250] In addition, a court does not have to decide whether the testimony of the rape victim pertaining to prior sexual conduct is material.[251] Accordingly, the court is not faced with the problem of determining the probative value of the victim's testimony.[252]

Furthermore, in a murder trial, unlike a rape trial, there is no need to determine whether the victim's testimony bears on her credibility.[253] Unlike a rape-defendant, the murder-defendant has no defense if he claims he acted with the murder victim's consent.[254] Therefore, the Supreme Court's concern in *Davis* as to the right of a defendant to impeach a witness' credibility does not exist in a

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as if he were alive but unaware or unobservant of what was happening." Partridge, *Posthumous Interests & Posthumous Respect*, 91 ETHICS J. 243, 243 (1975) (quoting ARISTOTLE, NICHOMACHEAN ETHICS 1.10).

247. *See supra* notes 151-56 and accompanying text.

248. *See* Berger, *supra* note 10, at 34.

249. *Id.*; *see also Sexual Politics and a Slaying*, *supra* note 2, at B26, col. 2 ("Levin case . . . assumes an added importance precisely because it comes a decade after the change in the rape law and after the consciousness-raising attempts of the feminist movement . . . .").

250. *See supra* note 183.

251. *Id.*

252. *Id.*

253. *Id.*

254. *See* N.Y. PENAL LAW § 125.25(1)(b) (McKinney 1986).

murder trial. The victim is not alive to be impeached. The *Davis* analysis, therefore, would not be applicable to legislation which extends the protection of rape-shield statutes to deceased victims of sex crimes. Thus, if states were to enact statutes prohibiting the admissibility of testimony regarding a murder victim's past sexual behavior, the defendant's sixth amendment rights as interpreted by the Supreme Court in *Davis* would not be infringed.

If *Chambers v. Mississippi* is broadly construed, however, the accused in a murder trial would have the constitutional right to introduce any exculpatory evidence, including reliable hearsay statements pertaining to the victim's past sexual conduct.[255] These statements would be barred only if the hearsay evidence was so unreliable that the jury would have no rational basis to determine its truth.[256] If, however, *Chambers* is interpreted narrowly, the holding would be limited to the facts of the case.[257] A narrow interpretation seems more defensible in that rape-shield statutes have generally been upheld.[258]

Similarly, in a murder trial, the value of any statements made about the victim's prior sexual conduct is questionable. It would be virtually impossible to verify[259] any statements made by sexual partners of the deceased since there would be no witnesses to the sex act itself. In addition, the right of compulsory process that *Chambers* requires is different from that in a murder/sex trial since one must consider the reliability of the evidence introduced.[260] Indeed, evidence of the victim's past sexual history is not necessarily exculpatory in the *Chambers* sense.[261] In *Chambers* the exculpatory evidence was a confession by a third party to the murder itself[262]—the jury did not need to draw an inference between the evidence introduced and the confession.[263] On the other hand, evidence proffered concerning the deceased victim's prior sexual history can *only* be inferential[264]—placing doubt in the jury's mind and failing to establish separate

255. *See supra* note 119 and accompanying text.
256. *See supra* note 123 and accompanying text.
257. *See supra* note 121 and accompanying text.
258. *See supra* notes 19-45 and accompanying text.
259. "Because sexual activity, criminal or otherwise, is usually conducted in private, the state almost always establishes its substantive case [in a rape prosecution] through the complainant's testimony." Galvin, *supra* note 16, at 896.
260. *See supra* note 123 and accompanying text.
261. *See supra* notes 127-28 and accompanying text.
262. 410 U.S. 297 (1973).
263. *See supra* notes 109-15 and accompanying text.
264. *See supra* notes 19-45 and accompanying text.

conclusive facts. Thus, *Chambers v. Mississippi* would not apply to legislation that would bar testimony concerning the past sexual history of the deceased victim.

Finally, even if a court were to determine that a deceased victim's prior sexual conduct was relevant evidence,[265] the court must determine that the probative value of the evidence is not substantially outweighed by prejudice.[266] The sixth amendment does not require admissibility of such prejudicial, yet probative, evidence.[267] It is well settled that a defendant does not have a constitutional right to present evidence on his behalf that is irrelevant and prejudicial.[268]

B. Proposed Legislation

The following provisions should be included in a proposed statute that extends the protection of rape-shield laws to murder victims:[269]

> Evidence of a victim's prior sexual conduct shall not be admissible unless such evidence: (1) proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or (2) proves or tends to prove that the defendant believed that he was in imminent danger of an assault by specific acts of violent sex with the victim which reasonably relate to the murder; or (3) is determined by the court after a hearing away from the proximity of the jury, or such hearing as the court may require, to be

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265. See *supra* notes 146-50 and accompanying text for a general discussion of relevancy. *See also Feminism Goes Beyond Civil Libertarianism: Two Cases Not Alike*, N.Y. Times, Nov. 24, 1987, at A22, col. 6.

> [D]epending on what precisely Mr. Chambers intends to show by way of Miss Levin's 'sexual aggressiveness', the evidence may be wholly irrelevant or at least insufficiently relevant (in light of its probable tendency to mislead or unfairly prejudice the jury) to justify its introduction even by a criminal defendant.
>
> Specific examples of acts with other people that closely resemble the conduct Mr. Chambers claims Miss Levin engaged in with him might be pertinent and admissible. But generalized accounts that Miss Levin routinely 'came on' to men or was sexually loose or performed certain types of sexual acts that were not distinctive and directly related to his defense might well be excludable.
>
> Exclusion would, moreover, be constitutional and not unfair in the circumstances. Criminal defendants are not exempt from the rules of evidence, nor should they be.

Id.

266. *See supra* notes 151-56 and accompanying text.

267. *See* Graham, *supra* note 148, at 599.

268. *Id.*

269. Several provisions are adopted from the New York rape-shield statute. *See supra* note 36.

relevant and admissible in the interests of justice. The court must issue a statement saying that its findings of fact were essential to its determination.

VI. Conclusion

Enactment of this proposed legislation would shift the focus of the finders of fact away from the victim's moral worth to the actions and culpability of the defendant. In addition, this legislation would continue the program of the rape reform movement and help to abandon rigid and traditional assumptions inherent in the legal system.[270] Finally, this legislation should help put to rest the "blame the victim"[271] defense often used by attorneys in sex cases. Such legislation would also serve to protect a defendant's sixth amendment rights of compulsory process. Thus, a defendant would not be denied his *Chambers v. Mississippi* defense.[272] That is, if the defendant has exculpatory evidence that bears "assurances of trustworthiness,"[273] it will be admitted. At the same time, the state's interest in having relevant evidence presented at trial will be strengthened.

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270. *See supra* note 11 and accompanying text.

271. *See Sexual Politics and a Slaying*, *supra* note 2, at B26, col. 1; *supra* note 2 and accompanying text.

272. *See supra* notes 108-28 and accompanying text.

273. *See supra* note 123 and accompanying text.