

# Washington Law Review

---

Volume 52 | Number 4

---

10-1-1977

## Evidence—Admissibility of the Victim's Past Sexual Behavior under Washington's Rape Evidence Law—Wash. Rev. Code § 9.79.150 (1976)

Evelyn Sroufe

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Criminal Procedure Commons](#), and the [Evidence Commons](#)

---

### Recommended Citation

Evelyn Sroufe, Recent Developments, *Evidence—Admissibility of the Victim's Past Sexual Behavior under Washington's Rape Evidence Law—Wash. Rev. Code § 9.79.150 (1976)*, 52 Wash. L. Rev. 1011 (1977).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol52/iss4/9>

This Recent Developments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

EVIDENCE—ADMISSIBILITY OF THE VICTIM'S PAST SEXUAL BEHAVIOR  
UNDER WASHINGTON'S RAPE EVIDENCE LAW—WASH. REV. CODE §  
9.79.150 (1976)

In 1975, Washington enacted a comprehensive revision of its laws governing sex crimes.<sup>1</sup> The new legislation includes provisions which limit the admissibility at trial of the past sexual behavior of the victim of a sexual offense.<sup>2</sup> Under R.C.W. § 9.79.150(2) and (3), the admis-

---

1. The new legislation, effective September 8, 1975, defined consent, WASH. REV. CODE § 9.79.140(6) (1976), expanded the definition of sexual intercourse, *id.* § 9.79.140(1), and forcible compulsion, *id.* § 9.79.140(5), and divided rape into three degrees, *id.* §§ 9.79.170–190. It also codified cases such as *State v. Morden*, 87 Wash. 465, 151 P. 832 (1915), and *State v. Davis*, 20 Wn. 2d 443, 147 P.2d 940 (1944), which held that a defendant may be convicted on the uncorroborated testimony of the victim. WASH. REV. CODE § 9.79.150(1) (1976). In addition, the new legislation spelled out the circumstances in which the victim's sexual history may be admissible as evidence at trial. *Id.* § 9.79.150(2)–(4). For a recent survey and analysis of rape laws governing the admissibility of the victim's past sexual history, see Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1 (1976). For a summary of the current status of rape legislation in each state, see Battelle Law and Justice Study Center, *Forcible Rape: An Analysis of Legal Issues* (December 1976) (unpublished draft report prepared for the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, on file at *Washington Law Review*) [hereinafter cited as Battelle Legal Analysis].

Congress is also considering a bill sponsored by Representative Elizabeth Holtzman which would amend the Federal Rules of Evidence to restrict the use of the victim's past sexual behavior in rape cases. H.R. 6491, 95th Cong., 1st Sess. (1977). This bill would completely prohibit the use of reputation or opinion evidence and would allow evidence of specific instances of past sexual behavior in two situations: sexual behavior with someone other than the accused to identify the source of pregnancy, disease, semen, or injury; or behavior with the accused, to determine whether the victim consented.

2. The statute provides in part:

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

sibility of evidence of the victim's sexual history depends upon the purpose for which it is offered. It is inadmissible to impeach the victim's credibility. It may be admissible to prove that the victim consented to the defendant if the judge, in a pretrial hearing, finds that the probative value of the evidence outweighs its prejudicial effect.<sup>3</sup>

Although R.C.W. § 9.79.150 deals with many sex crimes, this note is limited to its application in forcible rape cases.<sup>4</sup> Part I examines

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

WASH. REV. CODE § 9.79.150(2)-(4) (1976).

3. In *State v. Cosden*, 18 Wn. App. 213, 568 P.2d 802 (1977), a recent case construing R.C.W. § 9.79.150, the Washington Court of Appeals made it clear that, although the statute deals only with past sexual behavior offered to prove credibility or consent, the victim's sexual behavior may be relevant on other issues, and thus may be admissible on those issues subject to the balancing process outlined in subsection (3)(d) of the statute. In *Cosden*, the defendant denied that he had had intercourse with the victim. He wished to introduce evidence of the victim's act of intercourse with another person within four days prior to the rape; not to prove consent, but to explain the presence of semen in the victim's body. The trial court ruled that the evidence was inadmissible because it did not tend to prove that the victim had consented. The court of appeals stated: "The trial court assumed, incorrectly we think, that evidence of prior sexual behavior of a prosecuting witness in a rape case may be allowed under R.C.W. 9.79.150 only on the issue of consent, and within the guidelines prescribed in subsection (d)." 18 Wn. App. at 218, 568 P.2d at 806 (emphasis added). In a case such as this, "[w]here the defendant denies any sexual contact with the victim, yet the post-rape medical tests show evidence of a recent sexual contact, then all recent sexual contacts which could account for those testing results become highly relevant on the issue of defendant's responsibility for the crime." *Id.* at 219, 568 P.2d at 806. The court of appeals concluded that the evidence should have been subjected to the statutory balancing test to determine admissibility, but, in view of other evidence supporting the victim's version of the facts and the defendant's failure to lay a proper foundation for the evidence, the exclusion was not prejudicial error.

4. For purposes of this note the term "forcible rape" will be used in contradistinction to statutory rape and will encompass all nonconsensual sexual intercourse with a person not the spouse of the perpetrator. All three degrees of rape under the new

various exclusionary rules of evidence' in order to develop a framework for analysis of Washington's new law. Part II discusses the relevance of the victim's sexual history to her<sup>5</sup> credibility as a witness; it concludes that the complete exclusion of past sexual history to attack credibility may be unconstitutional under the United States Supreme Court holding in *Davis v. Alaska*.<sup>6</sup> On the other hand, Part III suggests that R.C.W. § 9.79.150 should be redrafted to limit further the use of sexual history to prove consent. Conceding that a past sexual encounter between the victim and the defendant may be sufficiently probative of consent to overcome the prejudicial effects of the evidence,<sup>7</sup> Part III argues that this is not the case when past behavior

---

Washington law fall within this definition. In Washington, "forcible compulsion" is an element of first and second degree rape. WASH. REV. CODE §§ 9.79.170(1), .180(1)(a) (1976). "Forcible compulsion" is defined as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." *Id.* § 9.79.140(5). Third degree rape does not require forcible compulsion, but only lack of consent by the victim. *Id.* § 9.79.190(1)(a). The statute defines consent to mean that "at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." *Id.* § 9.79.140(6). In contrast, the FBI defines forcible rape as "the carnal knowledge of a female through the use of force or the threat of force." FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 22 (1975) [hereinafter cited as 1975 UNIFORM CRIME REPORTS].

5. Although the new law provides for both heterosexual and homosexual rape by describing sexual intercourse as an act "committed on one person by another, whether such persons are of the same or opposite sex," WASH. REV. CODE § 9.79.140(1)(b) (1976), this note will assume the more common state of affairs: a female victim and a male perpetrator.

6. 415 U.S. 308 (1974).

7. In most jurisdictions, evidence that the victim previously consented to intercourse with the defendant has been held admissible to raise an inference that the victim consented in the case at bar. Annot., 140 A.L.R. 364, 390 (1942). Dean Wigmore discussed the reason why conduct with the defendant has generally been admitted: "Such conduct is not intended to show a general willingness or disposition to commit acts of unchastity, but merely an emotion towards the particular defendant tending to allow him to repeat the liberty; it is thus not only more cogent as evidence, but is not open to the objections advanced against evidence of intercourse with third persons." 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 200, at 688 (3d ed. 1940) (emphasis added). See also 2 *id.* §§ 399, 402.

Washington's new statute provides: "when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense." WASH. REV. CODE § 9.79.150(2) (1976). The language of the statute creates possible confusion over whether past sexual behavior with the perpetrator must be screened by the procedural requirements of R.C.W. § 9.79.150(3)(a)-(d). Subsection (3), which describes the screening procedure, does not specifically mention past sexual behavior with the perpetrator, and the language in subsection (2) appears to exclude this behavior from the procedural requirements. The statute will probably be interpreted to mean that past sexual behavior with the perpetrator is also subject to the procedural

with *others* is offered to prove consent to the defendant. The note concludes that past sexual conduct with third parties may be constitutionally excluded on the issue of consent.

## I. THE THEORY BEHIND RULES OF EXCLUSION

Evidence may be excluded for one of two reasons: it may be irrelevant, or it may be relevant but inadmissible on public policy grounds. If exclusion of relevant evidence would deny the defendant his constitutional right to confront a witness against him, the evidence may be admissible notwithstanding public policy.

### A. *Relevance*

Relevance is the threshold requirement for admissibility. To be relevant, evidence must meet two tests: (1) it must help to prove or disprove a particular proposition, and (2) that proposition must be at issue in the case.<sup>8</sup> The courts have held a rape victim's sexual history to be relevant for two purposes: to impeach the victim's credibility and to prove her consent. In both instances, the evidence clearly passes the second of the two relevance tests: the victim almost always takes the stand in a rape trial, thereby placing her credibility at issue, and most rape statutes make lack of consent by the victim an element of the crime, thus placing consent at issue.<sup>9</sup> However, if sexual history

---

requirements in subsection (3). Subsection (2) states that sexual history with the perpetrator "may be admissible on the issue of consent," implying the exercise of judicial discretion, and subsection (3) arguably includes any evidence of past sexual behavior offered to prove consent, whether with the perpetrator or with others. The Washington Court of Appeals, construing R.C.W. § 9.79.150 in *State v. Blum*, 17 Wn. App. 37, 561 P.2d 226 (1977), stated: "In situations other than where the victim and the accused have engaged in sexual intercourse in the past, evidence of past sexual behavior is inadmissible to show consent except as provided in subsection (3) of the statute." *Id.* at 45, 561 P.2d at 230. The court did not address the issue of whether past sexual behavior with the defendant is also subject to the screening process.

8. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 691 (1941). The Federal Rules define relevant evidence as "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. Though the Federal Rules have not been adopted for Washington courts, this formulation is in accord with Washington rulings requiring materiality plus minimal probative value for admissibility. See 5 R. MEISENHOLDER, WASHINGTON PRACTICE EVIDENCE § 1 (1965).

9. See note 77 and accompanying text *infra* for a discussion of the extent to which the new rape statutes in Washington remove consent as an element of the crime.

does not make the victim's credibility or consent more or less probable then it fails the first of the two relevance tests and should be excluded.

### B. Public Policy

Relevant evidence is excluded on public policy grounds when a court determines that it could have detrimental effects outweighing its probative value. Although it is generally defendants who avail themselves of exclusionary rules,<sup>10</sup> the policies underlying most such rules may also justify exclusion of evidence on behalf of witnesses. As a general policy, courts wish to encourage witnesses to come forward and testify, but once on the stand, a witness may be impeached by attacks upon his or her character.<sup>11</sup> If a party were allowed to delve into all aspects of the witness' past for impeachment purposes, few people would be willing to come forward. Accordingly, most courts limit the scope of the inquiry to the witness' reputation for truth and veracity, and prohibit inquiry into specific acts of misconduct by the witness.<sup>12</sup> In so doing, they not only prevent "terror of the witness box" but also reduce the confusion attendant upon the introduction of collateral issues and assure that relevant information necessary to reach an accurate verdict will be heard.<sup>13</sup>

If the witness has been convicted of a crime, most courts will allow

---

10. The most dramatic example is the exclusionary rule in criminal prosecutions, designed to deter unconstitutional searches, seizures, and interrogations by police. *Miranda v. Arizona*, 384 U.S. 436 (1966) (interrogations); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (seizures); *Mapp v. Ohio*, 367 U.S. 643 (1961) (searches). But even where constitutional rights are not at stake, auxiliary policies operate to exclude relevant evidence. For example, evidence of previous convictions may tend to increase the likelihood that a defendant committed the crime for which he is being tried. Nevertheless, most courts will exclude evidence of this type because it is too prejudicial. *See, e.g., Michaelson v. United States*, 335 U.S. 469 (1948). For a discussion of the general category of past acts of misconduct, see 1 J. WIGMORE, *supra* note 7, § 57. *See also* C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 190 (2d ed. E. Cleary 1972); FED. R. EVID. 404, Advisory Committee's Note. Courts exclude this evidence because they fear a verdict based on a general assessment of the defendant's character, rather than on the facts presented at trial. *See* 1 J. WIGMORE, *supra* note 7, § 57 and cases collected therein.

11. *See* 3A J. WIGMORE, *EVIDENCE* § 921 (Chadbourn rev. 1970).

12. *See id.* § 922.

13. These considerations of auxiliary policy are summed up in the prejudice rule for federal courts, which states that "[a]lthough 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. For a thorough discussion of each of the elements of the rule, see Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220 (1976).

evidence of the conviction as an exception to the general policy prohibiting inquiry into specific acts of misconduct.<sup>14</sup> Many jurisdictions, however, limit such evidence to crimes which have a bearing on credibility<sup>15</sup> in the belief that convictions not meeting this criterion are prejudicial and of minimal relevance, and may influence the jury to disregard reliable testimony.<sup>16</sup>

The arguments for excluding certain kinds of character evidence to impeach witnesses apply a fortiori to the use of past sexual conduct to impeach victims in rape cases. The rape victim often refuses to report the crime or testify at trial because she fears embarrassment or retaliation by the defendant.<sup>17</sup> In addition, a major study has documented

14. See C. McCORMICK, *supra* note 10, § 43; 3A J. WIGMORE, *supra* note 11, § 980.

15. There is great disagreement over which crimes may be admissible for impeachment of witnesses. California allows conviction of a felony. CAL. EVID. CODE § 788 (West 1966). Other jurisdictions require that the crime involve "moral turpitude." See examples in C. McCORMICK, *supra* note 10, § 43. The Federal Rules allow evidence of conviction of crimes "punishable by death or imprisonment in excess of one year" or involving "dishonesty or false statement, regardless of the punishment." FED. R. EVID. 609. In criminal trials, Washington allows evidence of conviction of felonies and misdemeanors, WASH. REV. CODE § 5.60.040 (1976), and does not distinguish between crimes involving moral turpitude and those that do not. *State v. Martz*, 8 Wn. App. 192, 197, 504 P.2d 1174, 1177, *review denied*, 82 Wn. 2d 1002 (1973) (AWOL conviction).

16. Cf. FED. R. EVID. 609, Report of the Senate Committee on the Judiciary (other felonies may be used to impeach if the probative value outweighs the prejudicial effects).

17. "[L]aw enforcement administrators recognize that [forcible rape] is probably one of the most under-reported crimes due primarily to fear and/or embarrassment on the part of the victims." 1975 UNIFORM CRIME REPORTS, *supra* note 4, at 22, 24. Although the percentage of unreported rapes is usually conceded to be high in relation to other crimes, the very factors which cause rape to be unreported make it difficult to arrive at the exact percentage of unreported rapes. In the Seattle/King County area, researchers from the Battelle Institute conducted a survey of rape victims as part of an ongoing study of how the criminal justice system responds to rape. They contacted rape victims primarily through media solicitation. The researchers completed 46 victim interviews during April and May of 1975. Ninety-two percent of the responding victims were white and 96% were over 18 years old. Of the 46 cases, 30% of the women did not report the crime to the police. Battelle Human Affairs Research Centers, Discretionary Grant No. 75-NI-99-0015, Law Enforcement Assistance Administration, Research and Development of Model Procedures for Criminal Justice System Involvement with the Crime of Forcible Rape, Appendices to Third Quarter and National Advisory Panel Report, at 123 (1975) (unpublished report on file at Battelle Institute, Seattle, Washington) [hereinafter cited as Battelle Third Quarter Appendices]. Compare a similar survey in Washington, D.C., which found that one-third of all rapes were unreported. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 21 (1967).

In the Seattle study, the following reasons for not reporting a rape were most commonly given (multiple responses were accepted):

Fear of treatment by police/prosecutors	57%
Fear of trial procedures	43%
Fear of publicity/embarrassment	36%

manifestly unfair jury verdicts resulting from unduly influential evidence of the victim's sexual history.<sup>18</sup> Nevertheless, most jurisdictions have allowed inquiry into the victim's sexual history in rape cases as an exception to the general rule limiting impeachment evidence to reputation for truth and veracity.<sup>19</sup>

### C. Constitutionality

Although public policy may support exclusion of relevant information in many cases, the court's basic obligation to provide a fair trial to the defendant is an important countervailing consideration. The concept of a fair trial is grounded in the fourteenth amendment due process clause and in specific procedural safeguards of the Bill of Rights deemed part of due process in state courts through incorporation.<sup>20</sup> One such procedural safeguard is the sixth amendment right of the accused to be confronted with the witnesses against him.<sup>21</sup>

The right to confrontation is, in essence, the right of a criminal defendant to cross-examine opposing witnesses;<sup>22</sup> its purpose is to help assure the "integrity of the fact-finding process."<sup>23</sup> But the Supreme Court in *Chambers v. Mississippi*<sup>24</sup> indicated 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."<sup>25</sup> Unfortunately, the Court has not identified the "legitimate interests" that override the right to confrontation, nor the "ap-

---

Procedures too time consuming	36%
Fear of reprisal from offender	36%

Battelle Third Quarter Appendices, *supra* at 123.

18. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 251 (1966). The authors note that rape ranks second to murder in defendant preference for a jury trial. *Id.* at 26.

19. For a full discussion, *see* notes 32 & 33 and accompanying text *infra*.

20. Incorporation is the process by which various Bill of Rights guarantees have been deemed to be part of the fourteenth amendment. Although a majority of the Supreme Court has never supported the "total incorporation" approach which holds that all Bill of Rights guarantees are incorporated within the fourteenth amendment, over the years the Court has selectively incorporated more and more of the specifics of the Bill of Rights into the fourteenth amendment. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

21. The sixth amendment right to confrontation was held incorporated within the fourteenth amendment and therefore binding upon the states in *Pointer v. Texas*, 380 U.S. 400 (1965).

22. *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965).

23. *Linkletter v. Walker*, 381 U.S. 618, 639 (1965). *Accord, Dutton v. Evans*, 400 U.S. 74, 89 (1970).

24. 410 U.S. 284 (1973).

25. *Id.* at 295.



propriate cases" in which the right to confrontation must yield.<sup>26</sup> A witness' fifth amendment protection against self-incrimination will surely prevail over the defendant's right to confrontation,<sup>27</sup> but statutory privileges, hearsay rules, and the discretionary power of judges may not.<sup>28</sup>

To summarize briefly, the validity of Washington's new rules for excluding evidence of a victim's past sexual behavior turns on the relevance of sexual history to both credibility and consent, the public policies favoring exclusion, and the constitutionality of exclusion.

## II. CREDIBILITY

Prior to the enactment of rape legislation, there were two ways in which defense attorneys could use the victim's sexual history to attack her credibility in rape cases. They could present evidence of the victim's lack of chastity on the theory that unchaste<sup>29</sup> women are more likely to tell lies. They could also argue that the victim's past sexual behavior created a specific bias against the defendant or a reason for the victim to lie about the facts of the case.<sup>30</sup> Obviously, defense coun-

---

26. In *Chambers* the Court cited *Mancusi v. Stubbs*, 408 U.S. 204 (1972), as an example of an "appropriate case." There, the witness was unavailable for cross-examination because he had left the country, but his prior recorded testimony from an earlier trial was admissible against the defendant, notwithstanding the unavailability of the witness.

27. *Alford v. United States*, 282 U.S. 687, 694 (1931).

28. See generally Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska*, 73 MICH. L. REV. 1465 (1975).

29. The word "unchaste" was commonly used by early courts to denote the condition of women who engaged in intercourse without the sanction of marriage or who engaged in extra-marital intercourse. See, e.g., *State v. Gay*, 82 Wash. 423, 428, 144 P. 711, 713 (1914). The judgmental character of the word is apparent in the discussions of how unchastity was to be proved. Early courts referred specifically to acts of "illicit intercourse" by the victim. *State v. Holcomb*, 73 Wash. 652, 658, 132 P. 416, 418 (1913). Later courts referred more ambiguously to "specific acts of misconduct." *State v. Severns*, 13 Wn. 2d 542, 554, 125 P.2d 659, 664 (1942). Both expressions imply moral condemnation. The term has fallen into disfavor and is rarely used by modern Washington courts. In California, the legislature has gone so far as to ban the expression "unchaste character" in rape prosecutions. CAL. PEN. CODE § 1127e (West Supp. 1976).

30. One commentator lists sexual relations between a witness and a party in the case as a possible source of partiality but points out that "[t]he kinds and sources of partiality are too infinitely varied to be here reviewed." C. McCORMICK, *supra* note 10, § 40, at 78. The same may be said of situations creating hostility toward the defendant, or a motive to lie about the facts of the case. It is clear from illustrative cases, however, that bias is usually proved by evidence of specific conduct or expressions by the witness, and not by general reputation evidence. See *id.* § 40, at

sel preferred the first approach because it entailed merely proving the victim's lack of chastity and allowing the jury to draw its own conclusions. The argument that the victim's past sexual behavior with a third party created a bias against the defendant is much more difficult to make. As a result, case law on the use of the victim's sexual history has developed around a general attack on credibility rather than a demonstration of specific bias or motive. On its face, however, R.C.W. § 9.79.150 prohibits both methods of impeachment because it bans all use of past sexual history to attack credibility.<sup>31</sup>

### A. General Truthfulness

A brief look at the evolution of Washington case law in the area may shed some light on the intent of the legislature in enacting R.C.W. § 9.79.150. Early Washington courts assumed without discussion that a woman's lack of chastity had a bearing on her credibility.<sup>32</sup> The only significant debate concerned permissible ways to prove her lack of chastity. Washington courts allowed a defendant who wished to attack the victim's credibility in a trial for forcible rape to introduce the victim's general reputation for chastity, but not evidence of specific acts of unchastity unless such acts were between the defendant and the victim.<sup>33</sup> The inadmissibility of specific acts was not based on

---

78-79 nn.94-99 (cases collected therein).

In the rape context, at least one jurisdiction has accepted the argument that the victim's past sexual activity with the defendant caused her to be biased against him. *Motley v. State*, 207 Ala. 640, 93 So. 508 (1922) (illicit relations between victim and defendant broken off shortly before alleged rape admissible to show her hostility toward the defendant). Defense counsel seldom resort to the argument that sexual activity with *others* creates a bias against the defendant, but at least one such argument was successful. *Shoemaker v. State*, 58 Tex. Crim. 518, 126 S.W. 887 (1910) (when asked to refrain from intercourse with a boyfriend, prosecutrix threatened to bring a retaliatory charge of rape against her sister's husband). Another example, often posed but rarely substantiated, of sexual history creating a motive to lie is the situation in which a woman brings a charge of rape against an innocent defendant in order to explain a pregnancy resulting from a relationship with a third party.

31. WASH. REV. CODE § 9.79.150(2) (1976), *quoted at note 2 supra*.

32. *State v. Godwin*, 131 Wash. 591, 230 P. 831 (1924) (impeachment of statutory rape victim by cross-examination as to prior chastity held to be a matter of right); *State v. Coella*, 3 Wash. 99, 28 P. 28 (1891) (at a murder trial it was proper to inquire whether a woman was a prostitute to impeach her credibility).

33. *State v. Severns*, 13 Wn. 2d 542, 125 P.2d 659 (1942); *State v. Pierson*, 175 Wash. 650, 27 P.2d 1068 (1933); *State v. Gay*, 82 Wash. 423, 144 P. 711 (1914) (statutory rape); *State v. Holcomb*, 73 Wash. 652, 132 P. 416 (1913).

Initially, the rule was the same for both forcible and statutory rape, *i.e.*, only evidence of the victim's reputation for chastity was admissible; in later statutory rape cases, however, a radically different rule developed. A 1924 decision held that when-

relevancy grounds, but on policy grounds. This type of evidence was considered collateral to the main issue and highly prejudicial to the witness.<sup>34</sup>

Later, the Washington Supreme Court declared that reputation evidence of unchastity was inadmissible to attack credibility.<sup>35</sup> Although the high court did not explain its change of position, a Washington court of appeals case<sup>36</sup> revealed that an important shift had taken

---

ever the testimony of the prosecuting witness was uncorroborated, the defendant could cross-examine her regarding specific acts of unchastity as a matter of right. *State v. Godwin*, 131 Wash. 591, 230 P. 831 (1924).

The court later reconsidered the statutory rape exception in *State v. Linton*, 36 Wn. 2d 67, 216 P.2d 761 (1950), and held that cross-examination of the victim as to specific sexual acts was no longer a matter of right, but was within the discretion of the trial court judge. Two years later, the court confused matters by reiterating the *Linton* holding, but adding that reputation for unchastity was inadmissible. *State v. Wolf*, 40 Wn. 2d 648, 652, 245 P.2d 1009, 1012 (1952). At that point the rule in statutory rape cases was the exact opposite of the rule in forcible rape cases. The *Wolf* rule was upheld in *State v. Lampshire*, 74 Wn. 2d 888, 891, 447 P.2d 727, 730 (1968) (in which the defendant woman argued that the reputation for chastity of the male victim was not as important as that of a female and thus should be admissible), and in *State v. Dorough*, 2 Wn. App. 820, 470 P.2d 230 (1970). The latter provides a good summary of the statutory rape cases.

34. The best statement of the policy reasons for limiting impeachment inquiry to reputation evidence appears, not in a rape case, but in a case dealing with unlawful possession of liquor. *State v. Gaffney*, 151 Wash. 599, 606-07, 276 P. 873, 875-76 (1929). *Gaffney* was cited in subsequent forcible and statutory rape cases. See, e.g., *State v. Thomas*, 8 Wn. 2d 573, 580, 113 P.2d 73, 76 (1941); *State v. Pierson*, 175 Wash. 650, 651, 27 P.2d 1068, 1069 (1933).

35. The statement appeared as dictum in an attempted rape case, *State v. Simmons*, 59 Wn. 2d 381, 368 P.2d 378 (1962), and later in a forcible rape case, *State v. Allen*, 66 Wn. 2d 641, 404 P.2d 18 (1965). The *Simmons* case is particularly dubious precedent. The defendant was a superior court judge. His response to the charge was to claim that the victim had consented and that police and prosecutors had conspired to "frame him." The case was reversed and remanded for misconduct in cross-examination, but the court commented that "neither side had a monopoly on low blows." 59 Wn. 2d at 387, 368 P.2d at 381.

The best analysis of the admissibility of reputation evidence of chastity appears in the statutory rape cases. Because consent was not a defense to statutory rape, the only way to get the victim's sexual history before the jury was by using it to attack her credibility. In *State v. Linton*, 36 Wn. 2d 67, 216 P.2d 761 (1950), the Washington Supreme Court cited authority which questioned the value of chastity evidence as an indicator of veracity, while upholding the trial court's discretion to exclude the evidence. *Id.* at 91-92, 216 P.2d at 776. In a later statutory rape case, the court specifically questioned the value of reputation evidence of chastity: "If the witness' reputation for chastity is so bad that it has in some way affected his or her reputation for truth and veracity, then the direct question can be asked as to reputation for truth and veracity. If the witness' reputation for chastity has not produced this result, then the jury should not be invited to make this deduction." *State v. Wolf*, 40 Wn. 2d 648, 653, 245 P.2d 1009, 1012 (1952).

36. *State v. Geer*, 13 Wn. App. 71, 533 P.2d 389, review denied, 85 Wn. 2d 1013

place in the rationale for exclusion. The court of appeals stated that exclusion was justified on relevancy grounds, not just on the basis of prejudiciality and other policy considerations. Although the statement was dictum, the court declared that neither reputation evidence nor specific acts of unchastity were probative of credibility.<sup>37</sup> R.C.W. § 9.79.150 essentially codified the case law and dicta in this area.<sup>38</sup> It draws no distinction between reputation evidence and specific sexual acts, but excludes both for the purpose of attacking credibility.

*B. Bias or Motive*

There is only one Washington rape case dealing specifically with the use of the victim's sexual history to show that she was biased or had a motive to lie.<sup>39</sup> There are, however, many cases dealing with the

---

(1975). In *Geer*, the defendant forced his way into the victim's house, held a hunting knife to her forehead, and raped her. To attack the victim's credibility, and also to show that she consented, the defendant wished to introduce evidence that she had lived with a man who was not her husband, that she had an illegitimate child by him, and that she had two other illegitimate children. *Id.* at 73, 533 P.2d at 391.

37. *Id.* at 74-75, 533 P.2d at 391.

38. No Washington forcible rape case has expressly held that the victim's general reputation for chastity is irrelevant to attack general credibility; however, *Geer* did cite with approval a statutory rape case standing for that proposition. *Id.* at 74, 533 P.2d at 391, (citing *State v. Wolf*, 40 Wn. 2d 648, 245 P.2d 1009 (1952)). In an earlier attempted rape case, the Washington Supreme Court implied that the matter was decided when it stated "we have ruled out such testimony as having no bearing on the issue of veracity." *State v. Simmons*, 59 Wn. 2d 381, 387, 368 P.2d 378, 381 (1962).

39. *State v. Blum*, 17 Wn. App. 37, 561 P.2d 226 (1977). In the past, as long as defense counsel could use the victim's sexual history to attack her general credibility or to show that she had consented, there was no need to resort to an assertion that her prior sexual conduct created a motive for her to perjure herself. If the traditional avenues for admitting past sexual conduct are foreclosed, defense counsel are likely to begin using the bias attack whenever possible in an attempt to get the information before the jury. Restrictions on the admissibility of past sexual behavior may explain the defendant's resort to the bias attack in *State v. Blum*. The prosecutrix in *Blum* testified that the defendant yanked her from her bed, forcefully removed her clothes, raped her repeatedly, and threatened her with death. Her testimony was corroborated by evidence of scratches and bruises on her body, signs of a struggle in her room, and her hysterical state when she first complained of the rape. The defendant wished to introduce evidence of her past sexual relationship with his cousin to prove that she had consented and, alternatively, to show that she was biased against members of the defendant's family. The trial court ruled that the evidence was inadmissible for either purpose and the court of appeals affirmed, holding that there had been no abuse of discretion by the trial judge. *Cf. People v. Hernandez*, 63 Cal. App. 3d 381, 133 Cal. Rptr. 753 (1976) (claim that prosecutrix had sex with the defendant to retaliate against boyfriend for duping her into taking a non-narcotic injection was too speculative to establish bias).

kinds of evidence that can be used to show bias or motive on the part of a witness.<sup>40</sup> Washington courts have traditionally been receptive to bias attacks. Cross-examination to show bias, prejudice, or interest is a matter of right,<sup>41</sup> subject only to the judge's discretion to exclude evidence that is speculative or conjectural.<sup>42</sup> Evidence inadmissible to attack general credibility may be admissible to establish bias or motive.<sup>43</sup> The greatest leeway in cross-examination is allowed in criminal cases, where the testimony of the witness is essential to the prosecutor's case and the bulk of the evidence is circumstantial.<sup>44</sup>

Rape cases present precisely the situation in which trial court judges are most likely to allow wide-ranging cross-examination to establish bias or motive. Eyewitnesses to rape are rare, and the majority

---

40. See cases cited in note 43 *infra*. See generally R. MEISENHOLDER, 5 WASHINGTON PRACTICE EVIDENCE § 299 (1965). The bias attack proceeds on a different theory than the general attack on credibility; namely, by recognizing "the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self-interest of the witness in the outcome of the case." C. McCORMICK, *supra* note 10, § 40, at 78. Bias, in other words, is likely to color the witness' testimony for or against a specific defendant. In contrast, the general attack on credibility is aimed at character or other defects of the witness having no relationship to the particular defendant. Sexual history showing bias is therefore highly relevant to credibility, whereas sexual history in general is irrelevant on that point.

41. *State v. Robbins*, 35 Wn. 2d 389, 213 P.2d 310 (1950); *State v. Wills*, 3 Wn. App. 643, 476 P.2d 711 (1970). Denial may be grounds for reversal. *State v. Robbins*, 35 Wn. 2d 389, 213 P.2d 310 (1950); *State v. Eaid*, 55 Wash. 302, 104 P. 275 (1909).

42. *E.g.*, *Dods v. Harrison*, 51 Wn. 2d 446, 319 P.2d 558 (1957) (refusal to give statement to police did not show bias against plaintiff); *State v. Knapp*, 14 Wn. App. 101, 540 P.2d 898 (1975); (evidence that defendant's brother wanted to put him in jail was too nebulous to show bias against defendant).

43. *State v. Temple*, 5 Wn. App. 1, 485 P.2d 93 (1971) (juvenile records) (dictum); *State v. Wills*, 3 Wn. App. 643, 476 P.2d 711 (1970) (dismissed murder charge); *State v. Tate*, 2 Wn. App. 241, 469 P.2d 711 (1970) (previous guilty plea to forgery). Only one Washington case deals with the use of past sexual activity of a principal witness to prove she was biased. In *State v. Robbins*, 35 Wn. 2d 389, 213 P.2d 310 (1950) (auto theft), the court held that it was reversible error to prohibit cross-examination of the defendant's ex-wife regarding her pregnancy by another man while the defendant was in the Army. Even though the court recognized that this was a specific act of misconduct impermissible to impeach her general credibility, it held that "this should not deprive appellant of the opportunity of proving that transaction and resultant bias." *Id.* at 397, 213 P.2d at 316.

44. *State v. Wills*, 3 Wn. App. 643, 476 P.2d 711 (1970) (where witness charged with murder agreed to testify that defendant committed the murder, the defendant should have been allowed to cross-examine the witness for bias as a matter of right); *State v. Tate*, 2 Wn. App. 241, 469 P.2d 999 (1970) (witness' guilty plea to forgery admissible to show motive, bias, self-interest, and hope for leniency, even though it was not yet a conviction because a final order had not been entered). *Tate* is illustrative of the practice in Washington: "Where a criminal case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. . . . [G]reat latitude is allowed in cross-examining an essential prosecution witness to show motive for his testimony." *Id.* at 247, 469 P.2d at 1003.

of rape cases rests upon the testimony of the prosecuting witness, together with available circumstantial evidence.<sup>45</sup> On the other hand, situations in which the victim's past sexual activity with a third person creates a motive for her to lie about a rape charge are probably unusual. Given the paucity of case law on this point and the rarity of the fact situation, it is not surprising that the drafters of R.C.W. § 9.79.150 failed to provide for this particular kind of impeachment. Unfortunately, because the statute does not provide for the admission of the victim's sexual history to prove bias, it may be constitutionally defective.<sup>46</sup>

### C. Constitutionality

Two relatively recent cases help delineate the point at which the power to exclude evidence must give way to the right to confrontation and due process. In *Chambers v. Mississippi*,<sup>47</sup> the Court held that combined application of the voucher rule<sup>48</sup> and a particular hearsay rule violated due process. In *Davis v. Alaska*,<sup>49</sup> the Court held that the enforcement of a statutory exclusionary rule denied the defendant his

---

45. The Battelle analysis of forcible rape complaints in Seattle reveals that witnesses were available in 25.9% of all cases reported. Only a small percentage of these, however, were eyewitnesses, as the following data indicate:

Eyewitness	6.2%
Corroborating—I.D. Info.	16.1%
Corroborating—no I.D. Info.	3.6%

Battelle Final Report (Law and Justice Study Center, Human Affairs Research Center, Discretionary Grant No. 75-NI-99-0015, Law Enforcement Assistance Administration, Research and Development of Model Procedures for Criminal Justice Involvement with the Crime of Forcible Rape, at 68-69 (Final Report Nov. 10, 1975) (unpublished report on file at Battelle Institute, Seattle, Washington). See also H. KALVEN & H. ZEISEL, *supra* note 18, at 138, in which the authors found that in criminal cases generally, eyewitnesses appeared in 25% of the prosecution cases and 11% of the defense cases.

46. In *State v. Blum*, 17 Wn. App. 37, 45-46, 561 P.2d 226, 230-31 (1977), the court of appeals implied that the victim's past sexual behavior may be admissible to prove bias under R.C.W. § 9.79.150, while simultaneously affirming that past sexual behavior is "inadmissible on the issue of credibility." It appears that the court implicitly distinguished an attack based upon bias or motive from an attack on general credibility and believed that the statute did not reach the former. A clearer statement of such a distinction could provide a judicial gloss that would cure the constitutional defect.

47. 410 U.S. 284 (1973).

48. Under the voucher rule as applied in *Chambers*, the party who calls a witness vouches for the witness' credibility and is prevented from impeaching his testimony, even though the interests of the witness may be adverse to those of the party who called him. *Id.* at 296-98.

49. 415 U.S. 308 (1974).

right to confrontation. Because *Davis* addressed the defendant's right to impeach the credibility of a prosecution witness by revealing his potential bias, it is particularly relevant to the constitutionality of those portions of R.C.W. § 9.79.150 which completely prohibit the use of past sexual behavior to impeach credibility.

In *Davis*, the defendant was on trial for burglary. Green, the principal witness for the prosecution, was on probation from juvenile court, also for burglary. On Green's property, police found a safe stolen in the burglary at issue. When they questioned him about it, he identified the defendant as one of the persons who had placed it there. At trial, defense counsel sought to introduce evidence of Green's probationary status, not to raise doubt about his veracity, but to show that Green had a motive to identify the defendant falsely. The trial court held that state law<sup>50</sup> governing juvenile records required exclusion, regardless of the manner of impeachment. *Davis* challenged the exclusion as a denial of his sixth amendment right to confront the witness.

To determine whether the scope of cross-examination had been unconstitutionally limited by the lower court, Chief Justice Burger, writing for the majority, applied a balancing test. Against the state's interest in suppressing the evidence, the Chief Justice weighed the purpose of the line of questioning, the probative value of the evidence offered, and the impact it was likely to have on the prosecution's case. He found that the purpose of the questioning was not to attack general credibility but to reveal Green's potential bias, and cited Wigmore for the proposition that the bias or partiality of a witness is always relevant to credibility.<sup>51</sup> The Chief Justice indicated that Green's juvenile record could plausibly have created a motive to lie,<sup>52</sup> and because Green was a key witness, cross-examination as to his probationary status could have done "[s]erious damage to the strength of the State's case."<sup>53</sup> Finally, the Chief Justice examined the state's interest in preserving the anonymity of juvenile offenders<sup>54</sup> and concluded

---

50. ALASKA STAT. § 47.10.080(g) (1971); ALAS. R. CHILDREN'S P. 23.

51. 415 U.S. at 316 (citing 3A J. WIGMORE, *supra* note 11, § 940).

52. Chief Justice Burger found that the witness' juvenile records could have created an inference of undue pressure because of his "vulnerable status as a probationer," *id.* at 318, or an inference that he might have lied out of fear that he was a suspect. *Id.*

53. *Id.* at 319.

54. The state argued that failure to suppress the evidence "would likely cause

that "the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself."<sup>55</sup>

When an exclusionary rule such as R.C.W. § 9.79.150 prevents a rape defendant from arguing that the victim's sexual history creates a bias on her part against the defendant, the fact situation is closely analogous to *Davis*. In a rape trial, the victim is virtually always the key prosecution witness. Facts suggestive of bias, partiality, or self-interest on her part will always be relevant to her credibility and could seriously weaken the prosecution's case. Finally, when the defendant has a plausible basis for a bias attack, it is doubtful that Washington's interest in protecting rape victims and encouraging reporting is any more compelling a limitation on cross-examination than Alaska's interest in protecting juveniles.<sup>56</sup> To avoid a constitutional challenge based on *Davis*,<sup>57</sup> R.C.W. § 9.79.150(2) should be modified to allow use of the victim's sexual history for the limited purpose of proving bias, motive, or prejudice.<sup>58</sup>

---

impairment of rehabilitative goals of the juvenile correctional procedures" which might in turn "encourage the juvenile offender to commit further acts of delinquency . . . or otherwise suffer unnecessarily for his youthful transgression." *Id.*

55. *Id.* at 320.

56. *Cf.* *State v. DeLawder*, 28 Md. App. 212, 344 A.2d 446 (1975) in which the Maryland court held that under *Davis*, it was unconstitutional to prevent a defendant on trial for statutory rape from cross-examining the complaining witness about her past sexual behavior in order to reveal bias, merely to spare her the attendant embarrassment.

57. It could also be argued that *Chambers v. Mississippi*, 410 U.S. 284 (1973), would support a constitutional challenge of the ban on sexual history to attack credibility based on fundamental due process grounds. The factual situation in *Chambers* is sufficiently distinguishable to make its application in this context doubtful. *See* notes 24-28 and accompanying text *supra*. In *Davis*, the court did not cite *Chambers*, but relied on confrontation clause cases, *e.g.*, *Smith v. Illinois*, 390 U.S. 129 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965).

58. Although the majority did not specifically limit its holding to cross-examination for bias or motive, Justice Stewart stressed in his concurring opinion that "the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." 415 U.S. at 311. Subsequent to *Davis*, four state courts addressed the specific question whether juvenile records could be admitted to attack general credibility; all four held that this was impermissible. *Gonzales v. State*, 521 P.2d 512 (Alas.), *cert. denied*, 419 U.S. 868 (1974); *State v. Williams*, 309 So. 2d 303 (La. 1975); *State v. Burr*, 18 Or. App. 494, 525 P.2d 1067 (1974); *Warren v. State*, 514 S.W.2d 458 (Tex. Crim. 1974). In *Gonzales*, the court discussed the difference between impeachment of general credibility and impeachment for bias:

The attempted impeachment here was of general credibility by proof of prior "convictions." The probative value of this type of evidence is considerably less



Admission of the victim's past sexual behavior for a specific and limited attack on credibility can be accomplished without significantly diluting the protection that the present statute offers a testifying victim. By adopting the procedural requirements of R.C.W. § 9.79.150(3)(a)–(d) to screen sexual history offered to attack credibility,<sup>59</sup> the interests of both the victim and the defendant can be safeguarded. The procedure requires an *in camera* examination of the proffered evidence and incorporates a balancing test similar to the one employed in *Davis* to determine the admissibility of sexual history. The trial court is directed to consider the relevance of the victim's behavior to the issue, the possibility that undue prejudice to the victim might substantially outweigh the probative value of the evidence, and whether exclusion would do "substantial justice" to the accused.

Under this test, the threshold requirement for admission is probative value. If evidence of the victim's past sexual behavior is found to be probative of bias or motive, the judge cannot exclude it unless it is unduly prejudicial<sup>60</sup> and its undue prejudice substantially outweighs its probative value. If prejudice and probative value are equal, the evidence should come in under the statutory test. This result would bring R.C.W. § 9.79.150 more in accord with prior case law allowing cross-examination for bias or motive as a matter of right.<sup>61</sup> Even under prior case law, Washington courts conscientiously restricted inquiries

---

than that which suggests false or distorted testimony because of bias. The need to confront a witness with such evidence is correspondingly less.

It is apparent then that juvenile adjudications which are . . . directed solely at general credibility rather than bias, are generally not sufficiently probative to create a genuine conflict with the defendant's right of confrontation.

521 P.2d at 514–15. It is even more apparent that evidence of the sexual history of the rape victim, introduced solely to attack general credibility rather than to show bias, is "not sufficiently probative to create a genuine conflict with the defendant's right of confrontation." *Id.*

59. The procedural requirements in this section were adopted to screen past sexual behavior offered to prove consent. They are set forth fully in note 2, *supra*. In *State v. Blum*, 17 Wn. App. 37, 561 P.2d 226 (1977), the rape defendant claimed that the pretrial motion requirement in R.C.W. § 9.79.150(3) denied him procedural due process. The court of appeals held that this requirement was no more offensive than a motion *in limine*, and did not violate due process, because the defendant was not prejudiced by having presented his evidence before trial.

60. The statute does not define undue prejudice but the promulgators may have had in mind the concept of unfair prejudice referred to in Rule 403 of the Federal Rules of Evidence. The Advisory Committee's Note defines "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403, Advisory Committee's Note.

61. See note 41 and accompanying text *supra*.

into bias or motive which seemed irrelevant.<sup>62</sup> There is no reason to believe judges would be less diligent if discretion is returned to them for this limited statutory purpose.<sup>63</sup>

### III. CONSENT

Evidence of the victim's past sexual behavior is admissible to prove consent under the procedures in R.C.W. § 9.79.150(3)(a)–(d).<sup>64</sup> The new statute appears to be based on several legislative assumptions:

---

62. See note 42 and accompanying text *supra*. The majority opinion in *Davis* also affirmed "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation." 415 U.S. at 316. In response to appeals based on *Davis*, recent federal court decisions have reaffirmed the discretion of the trial court judge to limit cross-examination that is likely to be minimally productive. *United States v. Marshall*, 526 F.2d 1349, 1361 (9th Cir. 1975) (permissible to deny defendant the right to ask the witness the same questions asked at an earlier suppression hearing on grounds that the evidence was speculative and only marginally relevant); *United States v. Bastone*, 526 F.2d 971, 981 (7th Cir. 1975) (additional questioning as to witness' state of mind properly excluded as cumulative); *United States v. Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975) (in absence of *Brady* material, continued questioning about a promise not to prosecute was merely speculative); *Flemmi v. Gunter*, 410 F. Supp. 1361, 1371–72 (D. Mass. 1976) (evidence that witness had been indicted for a more serious charge than the one to which he eventually pleaded guilty properly excluded as cumulative where defense counsel had already examined witness in detail about the plea).

63. See *State v. Blum*, 17 Wn. App. 37, 46, 561 P.2d 226, 231 (1977), in which the trial court ruled that evidence of a rape defendant's sexual relationship with the defendant's cousin was inadmissible because it "failed to establish even an inference of animosity or possible motive." The California legislature adopted a screening process similar to the one proposed in this note in the Robbins Rape Evidence Law, CAL. EVID. CODE § 782 (West Supp. 1977). It provides that a defendant may always offer evidence to attack the credibility of a complaining witness, but if the evidence consists of past sexual conduct, there must be a written offer of proof and the evidence can be admitted only after a hearing *in camera* to determine its relevancy. *Id.*

The constitutionality of the California statute was subsequently attacked by a rape defendant who was prevented from introducing evidence of the victim's unchastity. *People v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976). He argued that the procedural requirements were unconstitutionally vague because they lacked a standard for the sufficiency of the offer of proof. He further contended that by requiring an offer of proof before he presented his testimony, the statute denied him the privilege against self-incrimination. Both arguments were rejected.

64. See note 2 *supra*. The evidentiary section of the bill is a modification of the original proposal formulated by the Seattle Women's Commission. The Commission initially took the strong stand that: "past marital or sexual history or general reputation, tending to show promiscuity, chastity or non-chastity, is irrelevant to the issue of consent or the issue of credibility and should be inadmissible in evidence." Seattle Women's Commission, *A Study on Rape in the City of Seattle*, at 5 (1974) (unpublished report on file at the Seattle Public Library). In keeping with this view, they proposed including the following language in the new law: "(2) Evidence of the victim's general reputation for promiscuity, non-chastity, or sexual mores, or of specific acts related thereto, is inadmissible to prove the victim's consent to the offense and is inadmissible on the issue of credibility." Subst. H.B. 208 (Feb. 28, 1975 reading). This earlier version made an exception when the defendant and the victim had en-

there may be cases in which the victim's past sexual conduct with third parties is probative of consent; in some cases the probative value will not be outweighed by prejudice to the victim; in those cases, it may be unconstitutional to prohibit the evidence entirely. The validity of these assumptions is open to serious question. In reality, sexual history is rarely more than minimally probative of consent; prejudice to the victim is almost always substantial; and there is no constitutional requirement that such evidence be admitted.

### A. *Relevance*

The prior Washington statute resembled rape laws in most jurisdictions in that the victim's lack of consent was an essential element of the crime.<sup>65</sup> Because there are seldom eyewitnesses to a rape, consent usually had to be inferred from circumstantial evidence. The victim's sexual history was one factor offered by rape defendants to raise the inference that the victim consented. Whether this was a permissible inference was the subject of considerable debate.<sup>66</sup> Most courts held that a woman's general reputation for unchastity was both relevant and admissible to prove consent. They reasoned that a bad reputation

---

gaged in intercourse before, and that fact was material to consent.

Although there is no official legislative history to reveal the reason for the change in the bill as it was ultimately passed, a Women's Commission member who took an active part in the formulation of the measure stated that the Senate Committee on the Judiciary questioned the constitutionality of the near total exclusion of sexual history in the original version. Telephone interview with Jackie Griswold, in Seattle (Sept. 21, 1976). Ms. Griswold viewed the amendment allowing limited admission of past sexual history to show consent as an acceptable compromise, necessary to the passage of the legislation as a whole. *Id.* Patricia H. Aitken, Deputy Prosecutor for King County, who supported the original version of the bill, concluded that rape victims were better off under the prior case law than under the statute as enacted. In her view, R.C.W. § 9.79.150 legitimizes the use of past sexual behavior to prove consent by expressly making it possible for the evidence to be admitted for that purpose. Interview with Patricia H. Aitken, Deputy Prosecutor for King County, in Seattle (Sept. 14, 1976). The consent standard is analyzed more fully in Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 638 (1976), and Comment, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity*, 7 LOY. CHI. L.J. 118 (1976).

65. The prior statute defined rape as "an act of sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent." 1909 Wash. Laws, ch. 249, § 183 (repealed 1975) (formerly codified at R.C.W. § 9.79.010).

66. The arguments for and against admitting past sexual history to show consent were developed in turn-of-the-century case law. Although various jurisdictions have vacillated between the two positions, the basic arguments have remained the same. See notes 67-70 and accompanying text *infra*. The significant change in this area of the law is legislation designed to protect rape victims. See note 1 *supra*.

implied repeated acts of unchastity, which, in turn, increased the likelihood that the victim had consented to the defendant.<sup>67</sup>

Courts were divided, however, on the admissibility of evidence of specific sexual acts between the victim and others to prove consent.<sup>68</sup> Some courts admitted evidence of specific sexual acts, arguing that the virgin must be distinguished from the prostitute and that a virtuous woman would be far less likely to give her consent than would a licentious one.<sup>69</sup> The majority of courts disagreed; they excluded evidence of specific acts on the theory that prior consent to one or more individuals was minimally probative of later consent to the defendant. Furthermore, in their view, whatever probative force there might be was more than outweighed by the evils of confusion of issues, prejudice to the witness, and unfair surprise.<sup>70</sup>

Washington courts generally followed the majority rule, excluding specific acts, but admitting general reputation for unchastity to prove consent.<sup>71</sup> Early decisions were handed down with little discussion. The Washington Supreme Court continued steadfastly to maintain that specific acts of unchastity were inadmissible to prove consent,<sup>72</sup> and began to question as well the advisability of admitting evidence of

67. See Annot., 140 A.L.R. 364, 380-82 (1942).

68. See *id.* at 380-90 (1942); 1 J. WIGMORE, *supra* note 7, § 200, in which the author observed: "No question of evidence has been more controverted."

69. The most widely quoted language illustrating the argument appears in an early New York case:

[A]nd are we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? that the triers should be advised to make no distinction in their minds between the virgin and a tenant of the stew? between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex?

. . . And will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?

*People v. Abbott*, 19 Wend. 192, 195 (N.Y. Sup. Ct. 1838). The language of other early courts in support of this position approached hyperbole. For a collection of quotations in this vein, see Note, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflections of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403 n.3 (1975). Although most women today fall somewhere between the extremes presented by these courts (see note 80 and accompanying text *infra*), nevertheless the argument still is given credence in modern decisions.

70. See cases cited in 1 J. WIGMORE, *supra* note 7, § 200, especially *Rice v. State*, 35 Fla. 236, 17 So. 286 (1895).

71. *E.g.*, *State v. Severns*, 13 Wn. 2d 542, 125 P.2d 659 (1942); *State v. Holcomb*, 73 Wash. 652, 132 P. 416 (1913).

72. *State v. Ring*, 54 Wn. 2d 250, 254, 339 P.2d 461, 464 (1959). The court cited *State v. Severns*, 13 Wn. 2d 542, 125 P.2d 659 (1942), which merely stated the common law rule. *Id.*

the victim's general reputation for this purpose.<sup>73</sup> Recent dicta from the court of appeals indicated that sexual history in either form should be completely inadmissible to prove consent.<sup>74</sup> The court of appeals stated that specific acts of sexual misconduct have little or no relationship to the victim's alleged consent to the intercourse,<sup>75</sup> and in the usual case, reputation evidence of chastity has little relevance to the issue of consent.<sup>76</sup>

73. In *State v. Allen*, 66 Wn. 2d 641, 643, 404 P.2d 18, 19 (1965), the Washington Supreme Court stated that neither reputation evidence of unchastity nor specific acts of unchastity were admissible to prove consent.

74. *State v. Geer*, 13 Wn. App. 71, 533 P.2d 389 (1975). See note 36 *supra* for the facts of the *Geer* case.

The *Geer* decision turned upon another point. *Geer* admitted his use of force but still claimed that the victim consented. The court held, however, that given the defendant's admission together with corroborating evidence of his use of force, the victim's submission could hardly be considered consensual. As a result, her sexual history was simply not relevant.

It was not clear in *Geer* whether it was necessary for the defendant to admit to using force in order to remove consent as an issue, or whether the allegation of force, together with corroborative evidence (bruises, broken bones, lacerations), was sufficient to preclude a consent defense. If an admission by the defendant was required, then few victims will benefit from *Geer*, particularly if defendants are represented by competent counsel. For a discussion of the tactics of the consent defense, see Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309, 321-25 (1973).

The idea that the prosecution should not have the additional burden of proving lack of consent where there is evidence of use of force by the defendant is reflected in the definitions of the various degrees of rape under the new statute. Forcible compulsion, defined *supra* note 4, replaces lack of consent as an essential element of first degree rape. WASH. REV. CODE § 9.79.170 (1976). In second degree rape, the essential element is either forcible compulsion or lack of capacity to consent on the part of the victim. *Id.* § 9.79.180. Only in third degree rape is the victim's lack of consent an element of the crime:

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9.79.140(6) to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

*Id.* § 9.79.190. The definition of consent in R.C.W. § 9.79.140(6) is set forth at note 4 *supra*.

Under these definitions, the victim's sexual history should be irrelevant to prove first or second degree rape, but this is not the case. By denying that he used force and asserting that the victim consented, the defendant places consent at issue, even in first degree rape. He can then move to admit the victim's prior sexual behavior under R.C.W. § 9.79.150(3).

75. 13 Wn. App. at 73-74, 533 P.2d at 391.

76. *Id.* at 74, 533 P.2d at 391. The court distinguished attempted rape cases on the theory that: "Attempted rape requires the specific intent to rape. The accused's subjective belief that the prosecutrix would consent to intercourse may refute that specific intent. Hence, chastity reputation evidence may be relevant to the issue of the accused's state of mind." *Id.* at 74 n.1, 533 P.2d at 391 n.1.

The new statute does not distinguish between specific acts and reputation for unchastity, but permits the use of either form of evidence to prove consent if it passes the balancing test in R.C.W. § 9.79.150(3)(a)–(d).<sup>77</sup> As discussed earlier,<sup>78</sup> the balancing test favors admission. If the judge is convinced that the evidence is probative, it can be admitted unless the prejudice it engenders substantially outweighs its probative value. This is apparently the case even if the proffered evidence consists of specific acts with third parties, which would have been inadmissible under the prior case law. The new statute thus significantly restricts the protection previously available to rape victims.

Under the new law, it is critical to determine whether past sexual activity with a third party is in fact probative of consent to the defendant. Early cases give little guidance because they viewed victims in moralistic terms, in effect rewarding the virtuous and condemning the unchaste.<sup>79</sup> Even modern courts have failed to address this question in light of contemporary moral standards. Statistically, premarital intercourse is likely to be the rule and not the exception;<sup>80</sup> however,

---

77. These subsections are set forth fully in note 2 *supra*. It is unclear under the new law who has the burden of proving consent to the defendant in cases of first and second degree rape. The definition of consent in R.C.W. § 9.79.140(6) requires that the victim indicate her consent by affirmative acts. *See* note 4 *supra*. If she fails to do so, she has not consented, and the defendant assumes consent at his own risk. Since consent is not an element of first and second degree rape, the burden should be on the defendant to prove that the victim consented. Lack of consent is an element of third degree rape, and the language defining lack of consent appears to place the burden of proof squarely on the prosecutor. According to R.C.W. § 9.79.190(1)(a), the victim must clearly express lack of consent by her words or conduct. If she fails to do so, then presumably she has consented. Prior Washington case law holding that the burden of proving lack of consent in a rape case always falls on the prosecution will probably be controlling. *See, e.g., State v. Chambers*, 50 Wn. 2d 139, 309 P.2d 1055 (1957); *State v. Thomas*, 9 Wn. App. 160, 510 P.2d 1137 (1973). Paul J. Bernstein, Deputy Prosecutor for King County, Washington, stated that the new statute does not shift the burden of proving consent to the defendant in first and second degree rape. Telephone interview with Paul J. Bernstein, Deputy Prosecutor for King County, Washington, in Seattle (October 21, 1976). The Battelle researchers concluded that the issue was in doubt. Battelle Legal Analysis, *supra* note 1, at 29–30.

78. *See* discussion regarding use of the test to screen sexual history offered to attack credibility in text accompanying notes 59–63 *supra*.

79. *See, e.g., People v. Abbott*, 19 Wend. 192, 195 (N.Y. Sup. Ct. 1838), *quoted at* note 69 *supra*.

80. Two Johns Hopkins professors surveyed young women representing a national probability sample of the 15–19 year-old female population of the United States. Of the 4240 never-married young women interviewed, 46% had experienced intercourse by age 19. Zelnick & Kantner, *Sexual Experience of Young Unmarried Women*, 4 FAMILY PLANNING PERSPECTIVES 9 (1972). The figure increases with the age of the women in the sample. A nationwide survey of sexual behavior conducted in 1972 isolated the responses of white single women from the total of 1044 women respondents.

women generally confine themselves to one partner.<sup>81</sup> It is difficult to see how the victim's discriminating exercise of sexual choice with one partner has any predictive value in determining whether she consented to a different individual, the defendant.

But what of the case of the promiscuous woman who consents to intercourse indiscriminately?<sup>82</sup> Leaving aside the problems of prejudice inherent in attempting to prove her promiscuity and considering only the relevance of her conduct, is her pattern of behavior sufficiently predictable to raise the inference that she consented to the defendant at the time in question? Some commentators argue that even in the extreme case, "human behavior is far too complex to allow for any great correlation between past behavior and behavior in respect to a particular event."<sup>83</sup> The trend, however, is for courts to find evidence relevant if it has any tendency to make the existence of a material fact more or less probable.<sup>84</sup> Under this definition of relevance, the sexual history of a promiscuous woman may be minimally relevant to consent. But if one concedes minimal relevance in this case, the problem then becomes how to prove promiscuity.

The court could allow the defendant to call a parade of witnesses, each testifying to specific acts of intercourse with the victim.<sup>85</sup> That

---

In this category, nearly three-quarters of the women had had intercourse by age 25. M. HUNT, *SEXUAL BEHAVIOR IN THE 1970'S* 149 (1974).

81. Three-fifths of the sexually experienced young women in the Zelnick & Kantner study had had only one partner. Zelnick & Kantner, *supra* note 80, at 10. About half reported that they had intercourse only with the person they intended to marry. *Id.*

82. One proponent of new rape legislation, discussing the reluctance of rape victims to report the crime, likened the sexually promiscuous woman to a philanthropic robbery victim and hypothesized the following cross examination:

"... Have you ever been held up before?"

"No."

"Have you ever *given* money away?"

"Yes, of course."

"And you did so willingly?"

"What are you getting at?"

"Well, let's put it like this, Mr. Smith. You've given money away in the past.

In fact, you have quite a reputation for philanthropy. How can we be sure you weren't *contriving* to have your money taken . . . ?"

*The Legal Bias against Rape Victims*, 61 A.B.A.J. 464 (April 1975).

83. Battelle Legal Analysis, *supra* note 1, at 55. *Accord*, Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 939 (1973). *But see* Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?*, 9 IND. L. REV. 418, 427-31 (1976), in which the author distinguishes discriminating consent to third parties from indiscriminate consent, and concludes that in the latter case, the evidence is relevant.

84. *See* FED. R. EVID. 401, set forth fully in note 8 *supra*.

85. Although Wigmore and others argue that this evidence is necessary to counter false claims of rape by alleged victims, 1 J. WIGMORE, *supra* note 7, § 924a, few com-

alternative, however, was expressly rejected by Washington courts long before R.C.W. § 9.79.150 was enacted, because of the prejudicial effects of such evidence and the fear that such a procedure would encourage subornation of perjury.<sup>86</sup> Alternatively, the court could allow the defendant to introduce reputation evidence showing the victim's lack of chastity, but that course is not without difficulties. Not only is the evidence collateral and prejudicial, but its probative value is questionable. It is further removed in the chain of inference than specific acts with third parties, and it is frequently based on hearsay which may be motivated by malice. Furthermore, the concept of chastity itself is changing. When a witness testifies that the victim's reputation for chastity is bad, he could mean either that she is a prostitute,<sup>87</sup> or that it is rumored she stayed out late one night with a male friend. In sum, the victim's lack of chastity is essentially collateral to the issue of the defendant's guilt, as well as highly prejudicial to the prosecution's case. The wisest course would be to exclude completely evidence both of specific acts with third parties and of reputation for chastity on the issue of consent.<sup>88</sup>

---

mentators have addressed the possibility of fabrication by defendants or by witnesses called on their behalf. If specific instances of the victim's unchastity are admissible at trial, the possibility of subornation of perjury by defendants who have convinced friends to testify against the victim seems almost as likely as the possibility that the victim will testify falsely. At least one early Washington court adhered to this view in rejecting evidence of specific acts of unchastity. *State v. Holcomb*, 73 Wash. 652, 658, 132 P. 416, 418 (1913).

86. *State v. Severns*, 13 Wn. 2d 542, 125 P.2d 659 (1942); *State v. Pierson*, 175 Wash. 650, 27 P.2d 1068 (1933); *State v. Holcomb*, 73 Wash. 632, 132 P. 416 (1913).

87. In *Haynes v. State*, 498 S.W.2d 950 (Tex. Crim. 1973), the court rejected reputation evidence where the victim was a prostitute, stating: "Even if it had been shown that prosecutrix was a prostitute, this would not have proved consent, or made her any the less the subject of rape by force. A prostitute does not lose the right of choice, and may consent or not consent according to her own will." 498 S.W.2d at 952.

88. Ten state legislatures have opted to prohibit the use of the victim's past sexual conduct on the issue of consent. CAL. EVID. CODE § 1103(2) (West Supp. 1977); DEL. CODE tit. 11, § 3509 (Supp. 1976); IND. CODE ANN. § 35-1-32.5-1 (Burns 1976); MICH. STAT. ANN. § 28.788(10) (Supp. 1977); MONT. REV. CODES ANN. § 94-5-503(5) (Supp. 1975); N.D. CENT. CODE § 12.1-20-14 (1976); OHIO REV. CODE ANN. § 2907.02(D) (Page Supp. 1977); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1976); OR. REV. STAT. § 163.475 (1975); WIS. STAT. ANN. § 972.11(2)(b) (West Supp. 1977). California, in addition, has prohibited use of an instruction which allowed the jury to infer that a woman who had previously consented would be likely to consent again:

In any criminal prosecution for the crime of rape, . . . or for an attempt to commit, or assault with intent to commit, any such crime, the jury shall not be instructed that it may be inferred that a female who has previously consented to sexual intercourse with persons other than the defendant would be therefore more likely to consent to sexual intercourse again.

CAL. PENAL CODE § 1127d(a) (West Supp. 1977).



## B. Constitutionality

A growing number of legislatures have voted to bar the use of the victim's sexual history with third parties to prove consent.<sup>89</sup> Their actions amount to a legislative determination that past sexual conduct is never sufficiently probative to overcome the prejudice it creates in the minds of jurors. The constitutionality of these statutes has been attacked by commentators who claim that the blanket exclusion of sexual history to prove consent violates the due process rights of rape defendants.<sup>90</sup> First, such commentators contend that past sexual history is more than minimally relevant to consent.<sup>91</sup> They then read *Davis v. Alaska*,<sup>92</sup> or *Chambers v. Mississippi*<sup>93</sup> and *Davis* combined, as a mandate for admission of relevant evidence favorable to the defendant.<sup>94</sup> Both arguments are specious.

Only in the extreme case of the indiscriminately promiscuous woman can it be argued that past sexual behavior with third persons is even minimally relevant to consent.<sup>95</sup> *Chambers* and *Davis* involved facts which made the excluded evidence highly relevant to a material issue; therefore, neither case is apposite when applied to the exclusion of sexual history to prove consent.

In *Chambers*, the defendant was charged with a murder to which another man, McDonald, confessed. Chambers called McDonald to testify, but McDonald recanted his confession and professed to have an alibi for the night in question. Chambers was prevented from examining McDonald as an adverse witness by Mississippi's voucher rule.<sup>96</sup> He was also prevented by the hearsay rule<sup>97</sup> from calling witnesses to attack McDonald's version of events. Justice Powell, writing

89. See note 88 *supra*.

90. Rudstein, *supra* note 1; Note, *supra* note 83; Note, *supra* note 69. Cf. Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska*, 73 MICH. L. REV. 1465, 1489-90 n.110 (1975) (commenting on FED. R. EVID. 609(b)).

91. Rudstein, *supra* note 1, at 22-23; Note, *supra* note 83, at 430 (habitual indiscriminate sexual conduct is more than minimally relevant); Note, *supra* note 69, at 413-17.

92. 415 U.S. 308 (1974).

93. 410 U.S. 284 (1973).

94. Rudstein, *supra* note 1, at 18; Note, *supra* note 83, at 437.

95. See notes 82-84 and accompanying text *supra*.

96. See note 48 *supra*.

97. The witnesses would have testified to hearsay statements by McDonald which were against his penal interest. Mississippi, however, recognized a hearsay exception only for declarations against the witness' pecuniary interests and not for declarations against penal interest. 410 U.S. at 299-301.

for the Court, held that the combined effect of the two rules was to deny Chambers due process.<sup>98</sup> He emphasized that the constitutional guarantee of due process encompasses both the right to confront witnesses through cross-examination and the right to call witnesses on the defendant's behalf.<sup>99</sup> The bulk of his analysis, however, was devoted to the evidentiary questions. He discussed the dubious validity of the voucher rule and the trustworthiness of a declaration against penal interest as an exception to the hearsay rule. Although he did not invalidate either rule, he held that under the particular set of facts presented, they operated to deny Chambers a fair trial.<sup>100</sup>

Evidence of past sexual behavior to prove consent does not stand on an equal footing with evidence of a third party confession. As in *Chambers*, it is always relevant to prove that someone else committed the crime for which the defendant is accused; short of eyewitness testimony, a voluntary confession is the most persuasive proof of another's guilt. Evidence that the victim consented may also exculpate the defendant, but past sexual activity with others is, at best, weak evidence of consent.<sup>101</sup> An admission by the victim that she consented would have probative value equivalent to that of the confession in *Chambers*, but past sexual activity with third parties does not. Given Justice Powell's emphasis on the trustworthiness of the evidence involved and his reluctance to state a general rule transcending the facts of the case, it is unlikely *Chambers* poses a threat to the constitutionality of statutes banning the use of past sexual history to prove consent.

*Davis v. Alaska*<sup>102</sup> dealt specifically with impeachment evidence directed at the issue of bias; application of *Davis* in other contexts is doubtful. Although it is possible to read *Davis* as a broad holding that the defendant's right to confrontation will always override the state's

98. *Id.* at 302. Justice Powell concluded that the voucher rule "plainly interfered with Chambers' right to defend against the State's charges," *id.* at 298, and that the hearsay rule "may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

99. *Id.* at 294. See Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 *IND. L. REV.* 713, 788 (1976), where the author points out that sixth amendment incorporation theory alone would not support the result in *Chambers*. The right to call witnesses on the defendant's behalf is not within the express provisions of the sixth amendment, but Justice Powell found it to be essential to due process under the fourteenth amendment.

100. 410 U.S. at 302-03.

101. Furthermore, evidence of past sexual activity creates the risk of undue prejudice. In the usual case, prejudice created by the admission of a confession stems from its extreme relevance and therefore is not undue.

102. 415 U.S. 308 (1974).

interest in protecting the privacy of prosecution witnesses, this interpretation ignores Chief Justice Burger's repeated emphasis on the facts of the case.<sup>103</sup> General statements by the Chief Justice about the right of confrontation are all made within the narrower context of impeachment for bias,<sup>104</sup> and the opinion is permeated with references to a specific right to cross-examine for bias.<sup>105</sup> Taken as a whole, *Davis* is implicitly limited to impeachment for bias.<sup>106</sup>

Even if one does not accept this implicit limitation, *Davis* does not mandate admission of past sexual conduct to prove consent. Chief Justice Burger implied that, given the suspicious circumstances preceding the statement of the key witness, his juvenile record was as probative of bias as a prosecutor's promise of immunity or evidence of coercive detention.<sup>107</sup> A rape victim's past sexual activity with third parties is not equivalently probative of consent. Until the Court holds that the exclusion of minimally relevant evidence violates the defend-

103. The Chief Justice stated: "In this setting [where the defendant sought to cross-examine for bias and the evidence could have seriously damaged the prosecution's case] we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* at 319.

104. 415 U.S. at 316-19.

105. "Whatever 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." *Id.* at 319 (emphasis added). "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320 (emphasis added).

106. In practice, the narrow application of *Davis* has prevailed. Within the impeachment setting, state courts have further restricted *Davis* to impeachment for bias, and have not applied it to allow impeachment of general credibility. See note 58 *supra*. They have been reluctant to apply *Davis* at all, outside the impeachment setting. Cf. *People v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976) (inadmissibility of evidence of specific instances of victim's sexual conduct with others is not a denial of due process). But see *State v. Hembd*, 232 N.W.2d 872 (Minn. 1975) (*Davis* required that statutory doctor-patient privilege must give way to the defendant's right to confrontation). *Davis* is most likely to be applied in cases which parallel its facts. *United States v. Garrett*, 542 F.2d 23 (6th Cir. 1976) (permissible to show witness, a policeman, had been suspended under suspicion of using drugs because he might have cooperated in order to lift the suspension); *United States v. Croucher*, 532 F.2d 1042 (5th Cir. 1976) (evidence that prior charges had been dismissed in exchange for the witness' cooperation admissible to show testimony might have been biased); *Moynahan v. Manson*, 419 F. Supp. 1139 (D. Conn. 1976) (witness' involvement in same criminal scheme as defendant admissible to show bias); *State v. Robinson*, 337 So.2d 1168 (La. 1976) (permissible to use arrest records to show bias even though not admissible under state law to impeach general credibility); *People v. Tyler*, 54 App. Div. 2d 723, 387 N.Y.S.2d 478 (1976) (evidence that witness' mandatory life sentence was waived in exchange for lifetime probation admissible to show motive to lie); *Smith v. State*, 541 S.W.2d 831 (Tex. Crim. 1976) (evidence of plea bargaining admissible to show bias, prejudice, or ulterior motive).

107. 415 U.S. at 318-20 (citing *Alford v. United States*, 282 U.S. 687 (1931)).

ant's right to confrontation, statutes banning the use of the victim's sexual history to prove consent are safe from constitutional attack.<sup>108</sup>

#### IV. CONCLUSION

As an exclusionary rule Washington's new rape evidence law is both too broad and too narrow. By totally excluding evidence of the victim's past sexual behavior to attack the credibility of the victim, the statute conflicts with the ruling in *Davis v. Alaska*. R.C.W. § 9.79.150(3) should be redrafted to allow the admission of past sexual history to prove bias or motive, subject to the hearing procedure established in subsections (a)–(d).

On the other hand, the victim's past sexual history should be totally excluded on the issue of consent. Past sexual history is at most minimally probative on this issue and neither *Davis* nor *Chambers v. Mississippi* mandates the admission of minimally probative evidence.

Rape laws have always involved the balancing of victims' and defendants' rights. Washington's rape evidence law is part of a comprehensive attempt by the legislature to correct an imbalance favoring the defendant. The suggested changes in R.C.W. § 9.79.150(2) and (3) may be a further step toward equilibrium, providing a balance be-

---

108. Two state courts have addressed the question whether exclusion of sexual history to prove consent violates due process. In *People v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976), the defendant charged that California's law completely prohibiting use of past sexual history to show consent denied him due process under *Davis*. In response the California Court of Appeals pointed out that even relevant information is barred for policy reasons, and that policy considerations "are deemed incorporated within the definition of a fair trial." *Id.* at 689, 128 Cal. Rptr. at 866. The court specifically cited rules barring hearsay, opinion evidence, and privileged communications. In contrast to the evidence barred under these rules, the California court concluded that the relevance of sexual history is slight at best, *id.* at 692, 128 Cal. Rptr. at 867, and held that the constitutional challenge was without merit.

In *State v. Hill*, 244 N.W.2d 728 (Minn. 1976), the defendant claimed that limitation of cross-examination as to the victim's past sexual behavior to prove consent under a statutory procedure similar to that in R.C.W. § 9.79.150(3) denied him the right of confrontation. He relied on *State v. Hembd*, 232 N.W.2d 872 (Minn. 1975), wherein *Davis* was applied to override a statutory doctor-patient privilege on confrontation clause grounds. (*Hembd* is criticized in Note, *Constitutional Law: Davis v. Alaska Applied to Hold that Physician-Patient Privilege Must Give Way to Accused's Right to Confrontation*, 60 MINN. L. REV. 1086 (1976)). The Minnesota Supreme Court declined to apply *Hembd* and instead found as a matter of law "that the proffered evidence of complainant's prior cohabitation with two men did not have sufficient probative value in the context of this case to permit its introduction on the issue of whether or not she consented to sexual relations with this defendant." 244 N.W.2d at 731. The court left open the question of the probative value of evidence of promiscuity. *Id.*

tween the interests of victim and defendant that will benefit society by increasing the likelihood that legitimate rape cases will come to trial and result in conviction.

*Evelyn Sroufe*