


1984

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Recommended Citation

Philip L. Hatchett, *Winfield v. Commonwealth: The Application of the Virginia Rape Shield Statute*, 18 U. Rich. L. Rev. 433 (1984).
Available at: <http://scholarship.richmond.edu/lawreview/vol18/iss2/8>

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WINFIELD *v.* COMMONWEALTH: THE APPLICATION OF THE VIRGINIA RAPE SHIELD STATUTE

I. INTRODUCTION

In *Winfield v. Commonwealth*,¹ the Virginia Supreme Court held that the state's recently enacted rape shield statute could not restrict or infringe upon the defendant's sixth amendment right² under the United States Constitution to confront his accusers.³ In overruling the trial judge, the court stated that section 18.2-67.7 of the Code of Virginia⁴ actually

1. 225 Va. 211, 301 S.E.2d 15 (1983).

2. The sixth amendment contains the following pertinent language: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

3. 225 Va. at 218, 301 S.E.2d at 19.

4. VA. CODE ANN. § 18.2-67.7 (Repl. Vol. 1982). The Virginia law provides:

A. In prosecutions under this article, general reputation or opinion evidence of the complaining witness's unchaste character or prior sexual conduct shall not be admitted. Unless the complaining witness voluntarily agrees otherwise, evidence of specific instances of his or her prior sexual conduct shall be admitted only if it is relevant and is:

1. Evidence offered to provide an alternative explanation for physical evidence of the offense charged which is introduced by the prosecution, limited to evidence designed to explain the presence of semen, pregnancy, disease, or physical injury to the complaining witness's intimate parts; or

2. Evidence of sexual conduct between the complaining witness and the accused offered to support a contention that the alleged offense was not accomplished by force, threat or intimidation or through the use of the complaining witness's mental incapacity or physical helplessness, provided that the sexual conduct occurred within a period of time reasonably proximate to the offense charged under the circumstances of this case; or

3. Evidence offered to rebut evidence of the complaining witness's prior sexual conduct introduced by the prosecution.

B. Nothing contained in this section shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused. If such evidence relates to the past sexual conduct of the complaining witness with a person other than the accused, it shall not be admitted and may not be referred to at any preliminary hearing or trial unless the party offering same files a written notice generally describing the evidence prior to the introduction of any evidence, or the opening statement of either counsel, whichever first occurs, at the preliminary hearing or trial at which the admission of the evidence may be sought.

C. Evidence described in subsections A and B of this section shall not be admitted and may not be referred to at any preliminary hearing or trial until the court first determines the admissibility of that evidence at an evidentiary hearing to be held before the evidence is introduced at such preliminary hearing or trial. The court shall exclude from the evidentiary hearing all persons except the accused, the complaining witness, other necessary witnesses, and required court personnel. If the court deter-

expanded the admissibility of evidence related to specific prior sexual conduct of the prosecutrix.⁵ By this ruling, Virginia has joined a minority of jurisdictions which have refused to recognize the special dilemma of the prosecutrix in a rape trial and to grant additional protections under her constitutional right of privacy.⁶ Such recognition and protection is the intent of the rape shield statutes.⁷

This comment will examine *Winfield* and analyze the defendant's right of confrontation in relation to the victim's right of privacy and the state's interest in prosecuting the violent crime of rape. Section 18.2-67.7 will be interpreted in light of the *Winfield* decision, and future standards of admissibility for reputation and specific conduct evidence will be explored. Finally, in view of the creation of a Court of Appeals of Virginia, sched-

mines that the evidence meets the requirements of subsections A and B of this section, it shall be admissible before the judge or jury trying the case in the ordinary course of the preliminary hearing or trial. If the court initially determines that the evidence is inadmissible, but new information is discovered during the course of the preliminary hearing or trial which may make such evidence admissible, the court shall determine in an evidentiary hearing whether such evidence is admissible.

Id.

5. 225 Va. at 220, 301 S.E.2d at 20.

6. In addition to Virginia, the states of Michigan, Oregon, and New Hampshire have adhered to the view that rape shield laws must not infringe upon the defendant's constitutional right of confrontation. Also, to a lesser extent, Pennsylvania and Tennessee have upheld the defendant's right to cross-examine the victim fully. *See infra* note 82.

7. Forty-seven states and the federal government have passed some type of rape victim protection law: ALA. CODE § 12-21-203 (Supp. 1983); ALASKA STAT. § 12.45.045 (1980); ARK. STAT. ANN. § 41-1810.1 (1977); CAL. EVID. CODE § 782 (West Supp. 1983); COLO. REV. STAT. § 18-3-407 (Repl. Vol. 1978); CONN. GEN. STAT. ANN. § 54-86f (West Supp. 1983-84); DEL. CODE ANN. tit. 11, §§ 3508-3509 (Repl. Vol. 1979); FLA. STAT. ANN. § 794.022(2) (West Supp. 1983); GA. CODE ANN. § 38-202.1 (1981); HAWAII R. EVID. 412 (1981); IDAHO CODE § 18-6105 (1979); ILL. REV. STAT. ch. 38, § 115-7 (Supp. 1983-84); IND. CODE ANN. § 35-37-4-4 (Burns Supp. 1983); IOWA CODE ANN. § 813.2 rule 20(5) (West 1979); KAN. STAT. ANN. § 60-447(a) (1976); KY. REV. STAT. ANN. § 510.145 (Baldwin Supp. 1983); LA. REV. STAT. ANN. § 15.498 (West 1981); MD. ANN. CODE art. 27, § 461A (Repl. Vol. 1982); MASS. ANN. LAWS ch. 233, § 216 (Michie/Law. Co-op. Supp. 1983); MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1983-84); MINN. STAT. ANN. § 609.347(3) (West Supp. 1983); MISS. CODE ANN. § 97-3-70 (Supp. 1983); MO. REV. STAT. § 491.015 (Supp. 1984); MONT. CODE ANN. §§ 46-15-401 to -403 (1983); NEB. REV. STAT. § 28-323 (1979); NEV. REV. STAT. §§ 48.069, 48.071 (1981); N.H. REV. STAT. ANN. § 632-A:6 (Cum. Supp. 1983); N.J. STAT. ANN. § 2A:84A-32.1 (West Supp. 1983-84); N.M. STAT. ANN. § 30-9-16 to -17 (1978 & Supp. 1983); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981); N.C. GEN. STAT. § 8-58.6 (Repl. Vol. 1981); N.D. CENT. CODE § 12.1-20-14 (Repl. Vol. 1976); OHIO REV. CODE ANN. §§ 2907.02, 2907.05 (Baldwin 1982); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1983-84); OR. REV. STAT. § 163.475 (1979); OR. R. EVID. 412 (1983); 18 PA. CONS. STAT. ANN. § 3104 (Purdon 1983); R.I. GEN. LAWS § 11-37-13 (1981); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. Supp. 1983); S.D. COMP. LAWS ANN. § 23A-22-15 (1979); TENN. CODE ANN. § 40-17-119 (Repl. Vol. 1982); TEX. PENAL CODE ANN. § 21.13 (Vernon Supp. 1982-83); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1983); WASH. REV. CODE ANN. § 9.79.150 (1977); W. VA. CODE § 61-8B-12 (1977); WIS. STAT. § 972.11 (Supp. 1983-84); WYO. STAT. § 6-2-312 (1977). Also, the United States federal courts provide rape shield protection. FED. R. EVID. 412.

uled to go into effect on January 1, 1985,⁸ this comment will examine how future appeals of the trial judge's evidentiary order might be handled and whether it is necessary for the General Assembly to modify the rape shield statute.

II. THE VIRGINIA RAPE SHIELD STATUTE—SECTION 18.2-67.7

The sexual revolution of the late 1960's brought with it a more open forum in which to discuss intimate sexual issues.⁹ Partly because of this situation, legal commentators have questioned the common law rules for admitting evidence in rape trials.¹⁰ It is generally agreed that evidence of the victim's prior sexual conduct has little probative value.¹¹ Defense attorneys historically have humiliated and embarrassed rape victims, not to enlighten the jury, but to redirect the focus of the trial from the defendant toward the prosecutrix.¹² Thus, only a minority of victims report rape to the police.¹³ Consequently, during the 1970's, legislatures began enacting statutory protections for the victim in the form of rape shield laws.¹⁴ Usually the statutes were broad prohibitions with specific exceptions for admission of prior sexual conduct of the prosecutrix. Such an approach was considered necessary because the prior vague evidentiary concepts of relevancy and probative value had lent themselves to easy manipulation.¹⁵

8. VA. CODE ANN. § 17-116.01 (Cum. Supp. 1983).

9. See A. SMITH & J. GILES, *AN AMERICAN RAPE* (1975); *RAPE VICTIMOLOGY* (L. Schultz ed. 1975).

10. There have been many articles written on rape and rape shield statutes. Those most often cited by the Virginia Bar include the following: Amburg & Rehtin, *Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims*, 22 ST. LOUIS U.L.J. 367 (1978); Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); Gold & Wyatt, *The Rape System: Old Rules and New Times*, 27 CATH. U.L. REV. 695 (1978); Kneedler, *Sexual Assault Law Reform in Virginia—A Legislative History*, 68 VA. L. REV. 459 (1982); Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90 (1977); Spector & Foster, *Rule 412 and the Doe Case: The Fourth Circuit Turns Back the Clock*, 35 OKLA. L. REV. 87 (1982); Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980); Comment, *The Illinois Rape Shield Statute: Will It Withstand Constitutional Attack*, 1981 U. ILL. L.F. 211.

11. See Kneedler, *supra* note 10, at 486.

12. See Comment, *Federal Rule of Evidence 412: Was the Change an Improvement?*, 49 U. CIN. L. REV. 244, 247 (1980) ("Unfortunately, misuse of the victim's sexual past has been the rule rather than the exception in rape trials, because a victim who possesses an illicit sexual background is apt to be perceived as somehow undeserving of the protection of criminal rape laws.").

13. See *infra* note 15.

14. See *supra* note 7.

15. There are many examples of gross abuses in questioning a victim about her general reputation for chastity in the community. This line of questioning is allowed under the theory that a person of bad moral character is less likely to speak the truth. See, e.g., *Brown v.*

Prior to Virginia's enactment of a rape shield statute, trial courts in the Commonwealth followed the traditional common law standards which allowed the defendant to prove consent by introducing character evidence of the complainant's reputation in the community for being unchaste and immoral.¹⁶ However, such reputation evidence was excluded when used only to attack the credibility of the witness or to impeach her testimony.¹⁷ Generally, Virginia did not admit evidence of specific prior sexual conduct of the prosecutrix to prove her general propensity to be sexually active.¹⁸ Such evidence was deemed too prejudicial. However, there were four exceptions. The defendant himself could testify to prior sexual acts with the prosecutrix in order to show the likelihood of consent.¹⁹ To rebut certain physical evidence such as pregnancy, disease, or the presence of semen, the defense could expose the complainant's other sexual relations as a possible source for such evidence.²⁰ Evidence of prior sexual relations between the victim and a third party was admissible if the defendant

State, 50 Ala. App. 471, —, 280 So. 2d 177, 179 (1973) ("The rule [of competent evidence] is based on the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character . . ."). Specifically in relation to rape, having a chaste character is pertinent to the possibility of consent. *People v. Collins*, 25 Ill. 2d 605, —, 186 N.E.2d 30, 33 (1962), *cert. denied*, 373 U.S. 942 (1963) ("The underlying thought here is that it is more probable that an unchaste woman would assent . . . than a virtuous woman . . .").

Clearly this potential attack on the victim's character helped rape become the least reported crime. Even though there were 55,000 to 60,000 reported attempted or actual rapes in 1974, it was feared that three or four times more assaults were actually committed, but the victims were afraid to report them to the police. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 11 (1974) [hereinafter cited as UNIFORM CRIME REPORTS]. See *Berger*, *supra* note 10, at 4-5, 15-17; Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 935-36 (1975); see also NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 21 (1973) [hereinafter cited as NATIONAL STRATEGY].

16. See *Wynne v. Commonwealth*, 216 Va. 355, 218 S.E.2d 445 (1975).

Virginia has long followed the generally accepted rule that where consent is advanced as a defense to a charge of rape, the previous unchaste character of the prosecutrix may be shown by proof of general reputation . . . Such evidence is relevant and admissible, within the recognized limits, to show the probability of consent by the prosecutrix.

Id. at 356, 218 S.E.2d at 446. See also *Burnley v. Commonwealth*, 208 Va. 356, 158 S.E.2d 108 (1967); *Fry v. Commonwealth*, 163 Va. 1085, 177 S.E. 860 (1935).

17. See *Fry*, 163 Va. 1085, 177 S.E. 860. The court upheld the trial judge in prohibiting the defense from using chastity to impeach the prosecutrix, saying, "It is not competent in a simple attack on credibility." *Id.* at 1088, 177 S.E. at 862.

18. *Wynne v. Commonwealth*, 216 Va. 355, 356-57, 218 S.E.2d 445, 446 (1975).

19. *Finney v. Commonwealth*, 154 Va. 808, 152 S.E. 555 (1930) (defense allowed to question the prosecutrix about sexual intercourse with the defendant to show probability of consent).

20. *Dotson v. Commonwealth*, 170 Va. 630, 196 S.E. 623 (1938) (prosecutrix less than 16 years old and pregnant; the defense allowed to elicit testimony on cross-examination that the prosecutrix had had sexual relations with others and this sexual activity accounted for her pregnancy).

could demonstrate that the complainant had an ulterior motive to charge the accused with rape.²¹ Finally, if the prosecution offered evidence of the victim's chastity, the defense could rebut this claim by proving specific sexual relations involving the victim.²²

In response to the previously mentioned deficiencies in the common law view,²³ the Virginia General Assembly enacted a rape shield statute in 1981.²⁴ The statute is divided into three parts: prohibitions, admissions, and procedural qualifications. The Code of Virginia rejects the common law and explicitly bars the introduction of "general reputation or opinion evidence of the complaining witness's unchaste character or prior sexual conduct."²⁵ Reputation and opinion testimony concerning the victim's unchaste character cannot be introduced even to prove consent.²⁶

The statute proceeds to outline the four instances in which specific prior sexual conduct of the victim is admissible. These exceptions to the general prohibition, all directly related to the exceptions found at common law,²⁷ allow evidence (1) to prove consent by prior sexual acts with the defendant; (2) to explain the existence of pregnancy; (3) to provide a motive to fabricate a charge of rape; and (4) to rebut the prosecution's own testimony.²⁸ It was originally believed that the "motive to fabricate" exception would be narrow in scope and would apply only to the type of situation the court had previously recognized.²⁹ In such a situation, the prior sexual behavior would be the direct cause of the prosecutrix's fabricating the rape charge. An example of the motive to fabricate is the case in which the complainant is afraid to admit having been sexually active, believes she is pregnant, and charges an innocent third party with rape.³⁰

21. *Dotson v. Commonwealth*, 170 Va. 630, 196 S.E. 623 (1938) (defendant allowed to introduce evidence that the prosecutrix was impregnated by one of two others and that she was impelled by an ulterior motive to bring a rape charge against the defendant).

22. *Gray v. Commonwealth*, 184 Va. 236, 35 S.E.2d 65 (1945).

23. See *supra* notes 9-15 and accompanying text.

24. 1981 Va. Acts ch. 397 (codified at VA. CODE ANN. § 18.2-67.7 (Repl. Vol. 1982)). See *supra* note 4.

25. VA. CODE ANN. § 18.2-67.7(A) (Repl. Vol. 1982).

26. Kneedler's article discusses which provisions required compromise and what objections were raised about the statute. See Kneedler, *supra* note 10, at 460-61, 492, 494, 496 n.144.

27. Compare cases cited *supra* notes 19-22 with VA. CODE ANN. § 18.2-67.7 (Repl. Vol. 1982).

28. VA. CODE ANN. § 18.2-67.7(A)-(B).

29. See Kneedler, *supra* note 10, at 494-96. The bill, as originally proposed to the General Assembly, did not contain the "motive to fabricate" section. This language was added as part of a compromise to offset the prohibition of reputation evidence. *Id.*

30. See *infra* notes 97-105 and accompanying text. Without expressly limiting the defense, the Code suggests using evidence only of past sexual conduct, saying courts should admit "evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused." VA. CODE ANN. § 18.2-67.7(B) (Repl. Vol. 1982).

Finally, the statute provides procedural safeguards to protect the victim. All evidence about the victim's sexual conduct must first be heard by the judge in an in camera hearing before it can be used at a preliminary hearing or at trial.³¹ The court's decision in the evidentiary hearing is final unless new evidence is discovered before or during the trial, in which case the judge may convene another in camera hearing and rule again.³²

III. *Winfield v. Commonwealth*

A. *Statement of the Case*

Herbert Winfield, Jr. was indicted for the rape and forcible sodomy of Sandra Nelson.³³ Admitting to sexual intercourse with the complainant, the defendant alleged that the couple had entered into a prostitution agreement and that the criminal charge was Nelson's retaliation for not being immediately paid.³⁴ Nelson contended that she had not willingly participated in sexual intercourse but, rather, was threatened by Winfield

31. VA. CODE ANN. § 18.2-67.7(C) (Repl. Vol. 1982). Only the accused, the complaining witness, necessary testifying witnesses, and court personnel are admitted to the evidentiary hearing. *Id.*

32. The defense must give written notice of its intent to introduce any excludable evidence and provide the prosecution an opportunity to argue against admitting such evidence. *Id.*

33. *Winfield v. Commonwealth*, 225 Va. 211, 214, 301 S.E.2d 15, 17 (1983).

34. Brief for Appellant at app. 34-48, *Winfield v. Commonwealth*, 225 Va. 211, 301 S.E.2d 15. Winfield was questioned as to how the prostitution arrangement was made.

Winfield: She said . . . [another] guy wanted to give her \$150.00 for the evening, she asked me what I think she ought to do. I told her it was up to her.

Defense Attorney: Did you'll [sic] have any more conversation after that?

Winfield: Yea, that's when we started, I told her I say I'd give her \$50.00.

Defense Attorney: Give her \$50.00 for what?

Winfield: For . . . [sexual intercourse].

Defense Attorney: And what did she respond?

Winfield: She said O.K.

Brief for Appellant at 34-35.

Winfield's testimony was partially corroborated by three defense witnesses. *Winfield*, 225 Va. at 217, 301 S.E.2d at 18. One of the witnesses claimed to have overheard Winfield and Nelson making the prostitution agreement. *Id.* A cousin of Nelson testified that Nelson had admitted to having sexual relations with Winfield in exchange for \$50. "She said Bennie [the defendant] had . . . [sexual intercourse with] her and she wished he had given her \$50.00 That she's going to make sure he gets some time." Brief for Appellant at app. 31. Finally a friend of both Nelson and Winfield saw the pair sitting close together and apparently wanting to be alone. *Winfield*, 225 Va. at 217, 301 S.E.2d at 18.

All this testimony was admitted by the trial judge without an initial ruling on its admissibility in an evidentiary hearing. It appears that the Commonwealth's attorney could have objected to the testimony of these witnesses under § 18.2-67.7(C). Moreover, portions of this testimony might have been stricken for failing to meet any of the exceptions under § 18.2-67.7(A) or (B). Since the parties did not raise an objection, the issue is moot for the purposes of this article. See VA. CODE ANN. § 18.2-67.7 (Rep. Vol. 1982).

and resisted to the best of her ability.³⁵

As required by the Code of Virginia section 18.2-67.7, the defendant requested a motion in limine on the admissibility of testimony of six witnesses who would support Winfield's contention that Nelson's rape charge stemmed from an ulterior purpose. At the in camera hearing, the defense proffered the testimony of Leon Moore,

that Sandra Nelson agreed to have sexual intercourse with him on the condition he pay her twenty dollars; that he had sexual intercourse with Sandra Nelson; that he did not pay her the twenty dollars; that Sandra Nelson stated that if he did not pay her the twenty dollars that she would tell his wife; that he paid her twenty dollars³⁶

The remaining witnesses were to testify to the complainant's reputation in the community for unchastity and immorality. Two witnesses were to testify either to having sex with Nelson or to having previously paid her for sexual favors. Others would testify that Nelson had told them of her prior sexual activity or had admitted to prostituting herself.³⁷

In a pretrial order, the trial judge prohibited the defense from introducing any of the proffered testimony. At trial Winfield testified that he

35. *Winfield*, 225 Va. at 216, 301 S.E.2d at 18. Nelson had gone to Winfield's apartment on the night of the incident and asked for a ride to a local "night spot." Nelson alleged that Winfield asked for sexual favors while giving her the ride, but that she rebuffed him. Winfield then turned off the main highway to a rural area and told Nelson that she could not leave the car because this was an area where the "K.K.K." met. Brief for Appellant at app. 20. According to Nelson, Winfield then stopped the car and threatened to hurt her if she resisted. He forcibly removed her clothes and, pinning her hands behind her back, subjected her to rape and sodomy. *Id.* at app. 21.

36. *Winfield*, 225 Va. at 214, 301 S.E.2d at 17.

37. The defense requested the in camera hearing to admit the following testimony:

(1) Testimony of Laurance Winfield that Nelson asked him if she should prostitute herself because she needed the money; that he had sexual intercourse with her and paid her ten dollars for the sexual favor; that Nelson has a bad reputation in the community for being unchaste and immoral;

(2) Testimony of Anthony Branch that Nelson had on several occasions had sexual intercourse with men and then reported the incident to the person's wife or girlfriend; that Nelson has a reputation in the community for being unchaste and immoral;

(3) Testimony of Denise Daniels that Nelson told her that she had been offered \$100 by a man for sexual favors but instead she allowed him to feel her breasts for \$25; that Nelson has a bad reputation in the community;

(4) Testimony of Towana Parham that Nelson had stated to her that she had had sex with several men and was not sure who impregnated her; that Nelson had a bad reputation in the community; and

(5) Testimony of Carol Jackson that he had had sexual intercourse with Nelson; that he knew a person who had paid \$150 to have sex with Nelson; that he knew another who had sex with Nelson [,] then Nelson told the man's girlfriend; that Nelson had a reputation in the community for being unchaste and immoral.

Id. at 214-15, 301 S.E.2d at 17.

had entered into a prostitution contract with Nelson.³⁸ The defendant's story was partially corroborated by three witnesses, one of whom claimed to have overheard Nelson and Winfield discussing the agreement.³⁹ Another witness testified that Nelson had admitted to the prostitution agreement and had said that she was "going to make sure he gets some time" for not paying.⁴⁰ The third testified that he had observed the two together, apparently desiring to be alone.⁴¹ The jury found Winfield guilty of both rape and forced sodomy.⁴²

B. *The Virginia Supreme Court Decision*

In reversing and remanding the case,⁴³ the Virginia Supreme Court considered only the evidentiary issue.⁴⁴ In setting the parameters of section 18.2-67.7, the court said that no statute can deprive a criminal defendant of his sixth amendment right to confront and cross-examine his accusers.⁴⁵ The court implied that the defendant's rights were paramount and, as such, had to be strictly and completely enforced. Notably, there was no discussion of the state's interest in prosecuting the crime or of the victim's right of privacy, through which the court could have engaged in a balancing of competing interests.⁴⁶ Without acknowledging the intent of section 18.2-67.7, the court said the statute actually expanded the use of testimony of specific prior sexual conduct of the victim. "[T]he new law gives a defendant access for the first time to far more probative evidence: specific prior sexual conduct with third persons, if it is relevant for the purposes set forth in Code § 18.2-67.7."⁴⁷

The supreme court agreed with the defense's position that the evidence which showed Nelson "had a distinctive pattern of past sexual conduct, involving the extortion of money by threat after acts of prostitution, of which her alleged conduct in this case was but an example, . . . [was]

38. *Id.* at 216, 301 S.E.2d at 18.

39. *Id.* at 217, 301 S.E.2d at 18. *See supra* note 34.

40. 225 Va. at 217, 301 S.E.2d at 18. *See supra* note 34.

41. 225 Va. at 217, 301 S.E.2d at 18-19. *See supra* note 34.

42. The defendant was sentenced by the jury to five years in prison for rape and five years in prison for forcible sodomy. 225 Va. at 217, 301 S.E.2d at 19.

43. *Id.* at 221, 301 S.E.2d at 21. On remand to the circuit court, the judge granted permission for Leon Moore to testify. At the subsequent trial, the jury found Winfield guilty of consent sodomy and fined him \$500. Telephone interview with H. Taylor Williams, IV, attorney for defendant.

44. 225 Va. at 213, 301 S.E.2d at 16.

45. *Id.* at 218, 301 S.E.2d at 19. The court stated that "no legislation, however salutary its purpose, can be so construed as to deprive a criminal defendant of his Sixth Amendment right to confront and cross-examine his accuser and to call witnesses in his defense." *Id.* (citing *Davis v. Alaska*, 415 U.S. 308 (1974)).

46. *See infra* text accompanying notes 58-92.

47. 225 Va. at 220, 301 S.E.2d at 20.

relevant, probative and admissible in . . . [Winfield's] defense."⁴⁸ This circumstance triggered application of the "motive to fabricate" exception of Code section 18.2-67.7(B). The court read into the statute a broad privilege to enable the defense to introduce any evidence of specific prior sexual conduct tending to support the contention that the victim's charges served ulterior purposes. Even though Winfield had already been permitted to corroborate his own testimony concerning the prosecutrix's alleged scheme to extort money, the court reasoned that evidence of a previous extortious scheme was admissible, specifically Leon Moore's testimony about his meretricious relationship with Nelson.⁴⁹ "Thus there is a sufficient nexus between . . . [Nelson's] alleged efforts to extort money by threats from others, after acts of prostitution, and Winfield's version of her conduct in the present case, to render such evidence relevant and probative of a motive to fabricate."⁵⁰ The court stated that if, at an evidentiary hearing conducted pursuant to section 18.2-67.7(C), this evidence tends to show a "pattern of past sexual conduct involving the extortion of money by threat after acts of prostitution"⁵¹ and in addition meets the rules of evidence, then the testimony should be admitted at the trial.⁵²

The court did, however, distinguish Moore's testimony from that of other defense witnesses whose testimony was no more than an attack on the complainant's character.⁵³ The testimony of the latter witnesses was offered to show Nelson's reputation as a prostitute through evidence of specific prior sexual acts and general reputation or opinion evidence of her unchaste character.⁵⁴ Evidence of prior sexual acts does not establish a motive to fabricate and was inadmissible both at common law and under the rape shield statute.⁵⁵ The reputation or opinion evidence is inadmissible hearsay;⁵⁶ but the court suggested that if, at a subsequent

48. *Id.*

49. *Id.* at 220, 301 S.E.2d at 21.

50. *Id.*

51. *Id.* at 220, 301 S.E.2d at 20.

52. *Id.*

53. *Id.* at 220-21, 301 S.E.2d at 21. *See supra* note 37.

54. 225 Va. at 220-21, 301 S.E.2d at 21.

55. *Id.* The court stated that

the proffered evidence of most of the witnesses to the effect that Sandra had engaged in sexual acts with others for money, is a mere attack on her character, related only indirectly to the theory of the defense. It attempts to show her reputation, by specific acts, as a prostitute, but it does not directly establish a motive to fabricate any charge against the accused. Such evidence was inadmissible at common law and the new statutory scheme does not open the door to its admission.

Id.

56. *Id.* at 221, 301 S.E.2d at 21. The court stated that any evidence of prior sexual conduct by the complaining witness must comply with the usual rules of evidence as well as the requirements of the "rape shield" law. Since general reputation or opinion evidence as to unchaste character is to be excluded, it

evidentiary hearing, the trial court finds that such evidence meets an exception to the hearsay rule, then it would also be admissible.⁵⁷

IV. CONFLICTING CONSTITUTIONAL INTERESTS IN RAPE TRIALS

A. *The United States Supreme Court Decision in Davis v. Alaska*

The Virginia court's strict adherence to sixth amendment rights was based on its interpretation of *Davis v. Alaska*.⁵⁸ In *Davis*, the United States Supreme Court held that a state statute barring reference to a juvenile record was unconstitutional when it denied the defendant the right to confront his accusers and expose potential biases and prejudices.⁵⁹ The state's key witness in a burglary and larceny trial was a juvenile who had previously been found guilty of burglary.⁶⁰ The defense wanted to expose this prior conviction, not to attack the juvenile's character, but to show that the witness had acted out of fear and had made a hasty identification in order to shift suspicion away from himself.⁶¹ Even though the trial judge allowed the defense to develop partially the issue of bias during cross-examination of the juvenile, the Court stated that the "[p]etitioner was . . . [nevertheless] denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'"⁶²

It is questionable whether the Virginia Supreme Court correctly interpreted *Davis*. The United States Supreme Court in *Davis* defined the right of confrontation as paramount.⁶³ However, the decision was reached

appears probable from the defendant's notice that at least three of the proffered witnesses would relate nothing more than inadmissible hearsay.

Id.

57. *Id.*

58. 415 U.S. 308 (1974).

59. *Id.* at 318.

60. *Id.* at 308. The prosecution's witness testified to seeing the defendants standing beside a car later discovered to contain paint chips from a safe which had been stolen. *Id.* at 310. The safe was found near the place where the witness said he saw the car parked. The witness further testified to the fact that one of the defendants was holding "something like a crowbar." *Id.*

61. *Id.* at 311. The juvenile was on probation for burglary at the time he observed the defendants.

62. *Id.* at 318, (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968) (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966))). The trial court had granted a protective order to restrict the defense from questioning the juvenile about his burglary charge. *Davis*, 415 U.S. at 311. This motion was based on ALASKA STAT. § 47.10.080(g) (1979) (stating that "[t]he commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court") and ALASKA R. CHILDREN'S P. 23. *Davis*, 415 U.S. at 311 n.2.

63. *Davis*, 415 U.S. at 319. "In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* The Court viewed the state's interest as inordinately burdensome to the defendant. "[T]he State cannot, consis-

only after the Court had balanced all of the significant interests of both the defendant and the state. After evaluating the totality of the circumstances, the Court found the state's interest in protecting the secrecy of juvenile proceedings was "outweighed by petitioner's right to probe into the influence of possible bias"⁶⁴ The Court's analytical process is clearly presented in an opinion divided into three main parts in which the Court discusses the key factors on each side and then compares their significance.⁶⁵ The Virginia Supreme Court correctly interpreted the portion of the *Davis* opinion concerning the relevant weight of the sixth amendment, but the Virginia court did not follow the entire decision because it failed to evaluate and balance the competing interests of the state and the defendant.

B. *Conflicting Interests*

The weight attached to the sixth amendment in the *Davis* decision conforms to that in other Supreme Court decisions.⁶⁶ In *Smith v. Illinois*,⁶⁷ having acknowledged that the right of confrontation is fundamental to the criminal legal system,⁶⁸ the Court held that testimony given under a pseudonym by a key prosecution witness was in violation of this right.⁶⁹ In *Smith*, the state wanted its informant to testify anonymously to prevent him from being identified.⁷⁰ The state's interest in *Smith* was clearly equal to or greater than the state's interest under rape shield statutes, which protect the victim from the temporary humiliation and adverse psychological effects of publicly testifying about her sexual activity. The Supreme Court in *Smith*, however, did not balance the competing interests but instead relied primarily on the fact that the defense was severely handicapped in cross-examining the witness.⁷¹ It is difficult to see how *Smith* fits into the *Davis* rationale. The apparent conflict can perhaps be

tent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records." *Id.* at 320.

64. *Id.* at 319.

65. *Id.* at 315-21.

66. See *Smith v. Illinois*, 390 U.S. 129 (1968); *McCray v. Illinois*, 386 U.S. 300 (1967); *Roviaro v. United States*, 353 U.S. 53 (1957); see also Note, *Extent of the Government's Informer Privilege in Federal and Florida Criminal Cases*, 21 U. FLA. L. REV. 218, 219 (1968).

67. 390 U.S. 129 (1968).

68. *Id.* at 129.

69. *Id.* at 133.

70. *Id.* at 130-31. The informant, while acting as an undercover agent, purchased drugs from the defendant. The informant's testimony was critical to the prosecution's case.

71. *Id.* at 131. The defense was unable to interview this witness prior to trial. The informant's credibility as a witness, if unknown to the defense, was clearly beyond the scope of cross-examination. The Court said, "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.* See also Tanford & Bocchino, *supra* note 10, at 559-68.

explained by the fact that *Smith* is an older case, decided before the Court recognized the victim's right to protection of privacy.⁷² *Smith* also preceded the Supreme Court's recognition of the equal protection clause of the fourteenth amendment as a universal protector of individual rights, requiring the Court to balance conflicting interests.⁷³

The Supreme Court has given credence to the victim's interest by holding that the right of privacy is fundamental and cannot be breached except for compelling reasons.⁷⁴ Furthermore, the fourteenth amendment's due process clause embodies the concept of personal liberty, including sexual privacy.⁷⁵ The Court "has recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution."⁷⁶ Furthermore, the interest of the state in preventing crime must be added to the victim's right of privacy. Rape is an unreported crime primarily because the victims are too intimidated and frightened to seek help.⁷⁷ During the early 1970's, rape was the fastest growing violent crime in the country, yet the conviction rate remained low.⁷⁸ Law enforcement officials claimed that, in order to combat rape, the victim had to be accorded special treatment.⁷⁹

C. Resolution of Conflicting Interests

In order to resolve the conflicting constitutional interests, it is necessary to decide which is the most compelling—the rape victim's right of privacy, the state's interest in prosecuting this violent crime or the defendant's sixth amendment right of confrontation. A majority of the courts

72. See *infra* note 74 and accompanying text.

73. The fourteenth amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. See also *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979); *Palmer v. Thompson*, 403 U.S. 217 (1971); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

74. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Berger*, *supra* note 10, at 47.

75. *Roe*, 410 U.S. at 129, 152. See generally Comment, *The Illinois Rape Shield Statute: Privacy at Any Cost?*, 15 J. MAR. L. REV. 157, 171 (1982).

76. 410 U.S. at 152. "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy . . ." *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

77. See UNIFORM CRIME REPORTS, *supra* note 15, at 22; see also *State v. Fortney*, 301 N.C. 31, —, 269 S.E.2d 110, 116 (1980); Comment, *Criminal Law — The Constitutionality Of North Carolina's Rape-Shield Law—State v. Fortney*, 17 WAKE FOREST L. REV. 781, 797-99 (1981).

78. UNIFORM CRIME REPORTS, *supra* note 15, at 23-24.

79. Compare *id.* at 11 with NATIONAL STRATEGY, *supra* note 15, at 10.

which have reviewed rape shield laws have upheld the statutes as constitutional and not offensive either to due process⁸⁰ or to the right to confront or cross-examine witnesses.⁸¹ In upholding the rape shield statutes, these courts have uniformly applied a balancing test to examine the totality of the circumstances.

Although it is a minority view, the Virginia Supreme Court's strict adherence to the sixth amendment right of confrontation has been supported in other jurisdictions.⁸² The Oregon Court of Appeals in *State v. Jalo*⁸³ held that, despite the prohibition of the state's rape shield statutes,⁸⁴ a rape defendant could introduce testimony of other sexual conduct by the prosecutrix in order to prove a motive to fabricate.⁸⁵ In *Jalo*, the complainant was a ten-year-old who had been sexually active with the defendant's thirteen-year-old son and others. The defense maintained that, when the defendant discovered this situation, he told the complainant that he would have to tell her parents.⁸⁶ Apparently frightened, the girl immediately accused the defendant of rape. At trial the defendant was barred from using or referring to any evidence concerning the girl's prior sexual conduct.⁸⁷ This limitation effectively prevented raising the "motive to fabricate" defense.⁸⁸ The Oregon court relied on *Davis*, saying

80. *Kemp v. State*, 270 Ark. 835, 606 S.W.2d 573 (1980); *Cherry v. State*, ___ Ind. ___, 414 N.E.2d 301, cert. denied, 453 U.S. 946 (1981); *State v. Williams*, 224 Kan. 468, 580 P.2d 1341 (1978); see also Annot., 1 A.L.R. 4th 287 (1980).

81. *State v. Hill*, 309 Minn. 206, 244 N.W.2d 728 (1976), cert. denied, 429 U.S. 1065 (1977); *State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980); *State v. Persinger*, 286 S.E.2d 261 (W.Va. 1982).

82. See *People v. Williams*, 95 Mich. App. 1, 289 N.W.2d 863 (1980); *State v. LaClair*, 121 N.H. 743, 433 A.2d 1326 (1981); *State v. Jalo*, 27 Or. App. 545, 557 P.2d 1359 (1976); *Commonwealth v. Duncan*, 279 Pa. Super. 395, 421 A.2d 257 (1980); *Schockley v. State*, 585 S.W.2d 645 (Tenn. Crim. App. 1978); see also *State v. Howard*, 121 N.H. 53, 426 A.2d 457 (1981) (allowing the admission of evidence of the prosecutrix's prior sexual activity in a statutory rape case).

83. 27 Or. App. 845, 557 P.2d 1359 (1976).

84. The Oregon rape shield statutes provides in part: "[I]n a prosecution . . . [of sex offenses], evidence of previous sexual conduct of complainant shall not be admitted and reference to that conduct shall not be made in the presence of the jury." OR. REV. STAT. § 163.475 (1979).

85. 27 Or. App. at ___, 557 P.2d at 1362.

86. *Id.* at ___, 557 P.2d at 1361. When confronted by the defendant, the complainant admitted to having sexual intercourse with the defendant's son, another boy, and the complainant's uncle. *Id.*

87. *Id.*

88. The initial trial ended in a mistrial because the defense, in the opening statement, said that the prosecutrix "told the defendant that she had had sexual intercourse with a . . . boy . . . and also he found out that his own son, his thirteen-year-old son was having sexual intercourse with her." *Id.* at ___, 557 P.2d at 1360 (quoting the defense attorney). The trial court said the reference to the complainant's sexual conduct was prohibited by statute. *Id.* The Oregon Court of Appeals said there was no error in the defendant's opening statement and therefore no basis for a mistrial. The court further found that the second trial was barred by double jeopardy and reversed the defendant's conviction at that trial. *Id.*

"[t]he only difference between *Davis* and this case is that the policy of . . . [the rape shield statutes] is to protect a sex-crime complainant. On the facts at bar, however, this policy must likewise be subordinated to the defendant's constitutional right to confrontation."⁸⁹

The Virginia court in *Winfield* recognized and adopted the *Jalo* reasoning.⁹⁰ However, unlike the situation in *Winfield*, the defendant in *Jalo* was denied the opportunity to present his entire defense. The trial judge in *Jalo* not only denied the defendant the right of confrontation but also breached the defendant's due process right to a fair trial.⁹¹ It was appropriate for the court of appeals in *Jalo* not to balance the competing interests in such a flagrant example of unfair proceedings. *Winfield* can be distinguished because the trial court allowed the defense to show that the victim may have had a motive to fabricate.⁹² The Virginia Supreme Court was faced with competing interests that should have been balanced.

V. SECTION 18.2-67.7 AFTER *Winfield*

Even though the intent of Virginia's rape shield statute may have been better served if the Virginia Supreme Court had employed a balancing test, section 18.2-67.7(A) of the statute has effectively eliminated the use of unchaste character evidence to prove the victim's bad reputation in the community. The statute reverses a long line of cases that allowed reputation evidence to be admitted to suggest the victim's consent.⁹³ Inevitably, such reputation evidence opened the door for abuse by the defense attorney in order to focus the jury's attention on the prosecutrix's character.⁹⁴ The court in *Winfield* gave two reasons for unholding section 18.2-67.7(A) on reputation evidence, stating such evidence had little probative value and "that there is no logical connection between a woman's willingness to submit to the defendant accused of raping her, and her willingness to share intimacies with another man with whom she might have had a special relationship."⁹⁵

Of the four instances in which specific prior sexual conduct between the

at ____, 557 P.2d at 1362.

89. *Id.* at ____, 557 P.2d at 1362.

90. *Winfield*, 225 Va. at 219, 301 S.E.2d at 20.

91. *Jalo*, 27 Or. App. at ____, 557 P.2d at 1360-62.

92. *Winfield*, 225 Va. at 220, 301 S.E.2d at 20-21.

93. *See, e.g.*, *Wynne v. Commonwealth*, 216 Va. 355, 218 S.E.2d 445 (1975); *Burnley v. Commonwealth*, 208 Va. 356, 158 S.E.2d 108 (1967); *Powell v. Commonwealth*, 179 Va. 703, 20 S.E.2d 536 (1942); *Bailey v. Commonwealth*, 82 Va. 107 (1886).

94. Such a reaction can be found in *Bailey*, where the court said, "This offense may be committed as well on a woman unchaste, or a common prostitute, as on any other female. In . . . [the] matter of evidence, however, want of chastity may, within recognized limits, be shown as rendering it more probable that she consented." *Bailey v. Commonwealth*, 82 Va. at 110-11, *quoted in Winfield*, 225 Va. at 217-18, 301 S.E.2d at 19.

95. *Winfield*, 225 Va. at 218, 301 S.E.2d at 19.

complainant and third parties can be introduced,⁹⁶ the court in *Winfield* analyzed the only section subject to diverse interpretations. By expanding the "motive to fabricate" exception to admit any evidence showing a similar pattern of behavior by the prosecutrix in fabricating threats in connection with her sexual activity, the court made the statutory exception broader than was originally anticipated.⁹⁷ Commentators had suggested that only when a specific sexual act or relationship gave rise to a motive to fabricate could the provision be utilized.⁹⁸

This narrow interpretation of the motive to fabricate offered by the commentators was originally defined in *State v. DeLawder*⁹⁹ under a challenge of the Maryland rape shield law.¹⁰⁰ The prosecutrix in *DeLawder* was a minor who had confided in the defendant her fear of pregnancy because of her relationship with a third person.¹⁰¹ The defense strategy was to show that the girl was so afraid of parental disciplinary actions if she confessed that she fabricated the rape charge to excuse her pregnancy.¹⁰² Under Maryland law the defendant was barred from asking the prosecutrix if she had engaged in sexual intercourse with others to account for her concern about being pregnant.¹⁰³ Moreover, the defense was prohibited from questioning the prosecutrix or her friend as to her confessions about sex with others.¹⁰⁴ The prosecutrix was not asked about her fear of her mother because the testimony was considered irrelevant.¹⁰⁵

The Maryland Court of Appeals said the defense was completely denied the opportunity to prove why the prosecutrix was biased or had an ulterior motive.¹⁰⁶ Again, such an argument is not applicable to *Winfield*

96. See *supra* notes 19-22 & 27 and accompanying text.

97. *Winfield*, 225 Va. at 222, 301 S.E.2d at 21.

98. See *Kneedler, supra* note 10, at 494-97. See generally *Sweet v. United States*, 449 A.2d 315 (D.C. 1982); *Commonwealth v. Frey*, 390 Mass. 245, 452 N.E.2d 226 (1983).

99. 28 Md. App. 212, 344 A.2d 446 (1975).

100. The Maryland rape shield statute provides, in part:

Evidence of specific instances of the victim's prior sexual conduct may be admitted only if the judge finds the evidence is relevant and is material to a fact in issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value, and if the evidence is: . . . (3) [e]vidence which supports a claim that the victim has an ulterior motive in accusing the defendant of the crime

MD. ANN. CODE art. 27, § 461A (Repl. Vol. 1982). See also *FED. R. EVID.* 412; *MINN. STAT. ANN.* § 609.347(3) (West Supp. 1983); *N.C. GEN. STAT.* § 8-58.6 (Repl. Vol. 1981).

101. *DeLawder*, 28 Md. App. at _____, 344 A.2d at 451-54.

102. According to defense counsel, the prosecutrix's mother was a strict disciplinarian, never allowing her to date and beating her as punishment for other misbehavior. *Id.* at _____, 344 A.2d at 453.

103. The court had said in an earlier appeal that this line of questioning was prohibited by the rape shield statute. See *DeLawder v. Warden, Md. House of Correction*, 23 Md. App. 435, _____, 328 A.2d 76, 77 (1974).

104. *DeLawder*, 28 Md. App. at _____, 344 A.2d at 452.

105. *Id.* at _____, 344 A.2d at 453-54.

106. *Id.* at _____, 344 A.2d at 454.

because the *Winfield* jurors were fully informed of the defense's theory of prostitution.¹⁰⁷ The court in *DeLawder* determined that the jury must have been confused or misinformed because "the prosecutrix had indicated only that she was afraid she was pregnant as a result of the alleged rape."¹⁰⁸ Furthermore, since the *DeLawder* court relied on the *Davis* decision, it presumably balanced the competing interests.¹⁰⁹ After considering the misconceptions of the jury and the defense's inability to argue its case, the court held the defendant's evidence and cross-examination were permissible.

The accuracy and truthfulness of the prosecutrix's testimony, perhaps even more so than was the case with the witness in *Davis*, were key elements in the state's case against DeLawder. In fact, its case depended entirely on the witness's veracity. The claim of bias, prejudice, or ulterior motive which the defense sought to develop was admissible as a basis for the inference of undue pressure because of the prosecutrix's possible fear of her mother. The defense was otherwise unable to build a record from which to argue to the jury *why* the prosecutrix might be biased or lack that degree of impartiality expected of a witness at trial.¹¹⁰

In *DeLawder* it was the specific prior sexual activity that caused the complainant to fear becoming pregnant and therefore to fabricate the rape charge. As the dissent explains, in *Winfield*, the only common points between the defendant's testimony and that of the other proffered witness were that the prosecutrix was involved in prostitution, and that both the defendant and the proffered witness were unwilling to pay.¹¹¹ However, the *Winfield* jury heard testimony about the prostitution agreement between Winfield and Nelson and about why the prosecutrix may have wanted to retaliate against the defendant.¹¹² *Winfield* has broadened the "motive to fabricate" provision to encompass any possible argument when consensual intercourse is a defense. This expansion of the exception is too great: "A threat to extort money is not the legal equivalent of a motive to fabricate"¹¹³

VI. PROCEDURAL ASPECTS OF SECTION 18.2-67.7

After the supreme court ruling, *Winfield* was remanded for a second jury trial. The appeal itself had taken more than seventeen months; by the time the second trial was completed, it had been almost two years

107. *Winfield*, 225 Va. at 216, 301 S.E.2d at 18.

108. 28 Md. App. at —, 344 A.2d at 453 n.7.

109. *Id.* at —, 344 A.2d at 449-50, 454.

110. *Id.* at —, 344 A.2d at 454.

111. *Winfield*, 225 Va. at 223, 301 S.E.2d at 22 (Thompson, J., dissenting).

112. *Id.* at 216-17, 301 S.E.2d at 18.

113. *Id.* at 223, 301 S.E.2d at 22 (Thompson, J., dissenting).

since the incident had occurred,¹¹⁴ a lapse which raises questions about the defendant's sixth amendment right to a speedy trial.¹¹⁵ Clearly an immediate appeal from the trial judge's order barring the testimony of the six proffered witnesses would have promoted judicial efficiency and saved the Commonwealth significant time and expense. At the time of *Winfield*, however, an appeal of the evidentiary order was not realistic since it could have been heard only by an already overworked supreme court.

However, as of January 1, 1985, the new Court of Appeals of Virginia will have appellate jurisdiction.¹¹⁶ Along with other appellate jurisdiction, the court will hear appeals from final convictions in criminal trials as a matter of right.¹¹⁷ However the court of appeals will not have jurisdiction for equity suits except domestic relations suits¹¹⁸ and therefore could not rule on an injunction per se.¹¹⁹ It seems appropriate that the Virginia General Assembly should review the rape shield statute in light of the new appellate court's jurisdiction in order to determine if it would be more accommodating to grant appeals from the evidentiary hearing and temporarily suspend the criminal trial. Such a system, which is already utilized in other jurisdictions,¹²⁰ would serve three purposes: (1) to protect the privacy of the victims; (2) to prevent the judicial inefficiency of having to remand and retry a case on the evidentiary order; and (3) to speed up the trial process and preserve the defense's evidence. Naturally, any appeal on the evidentiary hearing order would be objectionable if it created burdensome delays.¹²¹

Furthermore, the prosecutrix might be able to initiate an equitable action for an injunction, claiming that section 18.2-67.7 implicitly provides for a private remedy. This type of action was successful in *Doe v. United States*,¹²² in which the prosecutrix obtained a permanent injunction after the trial judge ruled that all sexually related testimony would be admissi-

114. Compare the date of the Order of Punishment, Brief for Appellant at app. 8, *Winfield v. Commonwealth*, No. 81-2250 (Supreme Ct. of Va., filed Nov. 12, 1982), with the date of the opinion, *Winfield*, 225 Va. at 211, 301 S.E.2d at 15 (1983).

115. See U.S. CONST. amend. VI ("the accused shall enjoy the right to a speedy and public trial . . .").

116. VA. CODE ANN. § 17-116.01 (Cum. Supp. 1983).

117. *Id.* § 17-116.05(A) ("Any aggrieved party may appeal to the Court of Appeals from the entry by a circuit court of any final judgment, . . . [in] . . . [a]ny final conviction of a crime except where a sentence of death has been imposed.").

118. *Id.* § 17-116.05(A)(3).

119. *Id.* § 17-116.05(A).

120. See *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981); ARK. STAT. ANN. §41-1810.2 (1977); MD. R. P. 1085 (Repl. Vol. 1977); MO. REV. STAT. 491.015 (Supp. 1984); N.C. GEN. STAT. § 15A-979(C) (Repl. Vol. 1983); OR. R. EVID. 412(c) (1983); TENN. R. APP. P. 9 (Supp. 1983); W. VA. CODE § 58-4-1 (1966); W. VA. R. SUP. CT. APP. 6 (1984).

121. See *supra* note 115 and accompanying text.

122. 666 F.2d 43 (4th Cir. 1981).

ble.¹²³ The Fourth Circuit relied on the Supreme Court's decision in *Cort v. Ash*,¹²⁴ which found that a criminal statute could provide a private cause of action.¹²⁵ Drawing on the *Cort* rationale, the *Doe* court outlined three pertinent factors that should be considered in determining if an implicit cause of action exists: (1) whether the plaintiff (prosecutrix) is in the special class expected to benefit from the statute; (2) whether there is any indication of legislative intent to create or deny a private right; and (3) whether it is consistent with the underlying purpose of the statute to grant a remedy.¹²⁶ The issue of an implied private cause of action has never been addressed by the Virginia Supreme Court. If the Virginia courts do not find a private cause of action under the *Cort* doctrine, the intent of section 18.2-67.7 would be frustrated, and the victim would not have the opportunity to appeal an erroneous ruling.¹²⁷ As mentioned above, the court of appeals currently would lack jurisdiction to hear an appeal from denial of an injunction.

VII. CONCLUSION

The Virginia Supreme Court in *Winfield v. Commonwealth* defined the "motive to fabricate" provision of section 18.2-67.7 so broadly that any nexus between a prosecutrix's alleged efforts to blackmail sexual partners and the defense's proffered rationale of an ulterior purpose in a rape

123. The trial judge's evidentiary order would have allowed the defense to introduce evidence that the prosecutrix allowed men to spend the night in her apartment and that she had a reputation at a nearby army post for immorality. Doe herself was involved in a child-custody proceeding which questioned her fitness as a mother and therefore wanted an injunction to prevent the court from calling the necessary witnesses and to seal the record. *Id.* at 47-48. The trial judge denied the injunction order. It was this decision from which Doe appealed. *Id.* at 45.

The case was tried in federal court because the rape had allegedly occurred on the Fort Lee, Virginia military post.

124. 422 U.S. 66 (1975). See generally Comment, *Private Causes of Action from Federal Statutes: A Strict Standard for Implication By Sole Reliance on Legislative Intent*, 14 U. RICH. L. REV. 605 (1980).

125. 422 U.S. at 78-80. *Cort* involved a shareholder's action against the Bethlehem Steel Corporation and its board of directors, who were allegedly making illegal campaign contributions. The plaintiff sought an injunction to prevent corporate monies from being used in this manner. Political contributions by corporations are criminal violations. *Id.* at 68-79.

126. *Id.* at 78, quoted in *Doe*, 666 F.2d at 46 n.6. The *Doe* court held that FED. R. EVID. 412 implicitly provides for a private remedy and, separately, for the right of appeal from the criminal trial decision because no other party to the criminal trial shares the victim's interest. "The rule makes no reference to the right of a victim to appeal an adverse ruling. Nevertheless, this remedy is implicit as a necessary corollary of the rule's explicit protection of the privacy interest Congress sought to safeguard." *Doe*, 666 F.2d at 46. The court then said it had jurisdiction even though it was not reviewing the final judgment. *Id.*

127. A related issue is whether the victim is entitled to free counsel if she cannot afford representation herself. Such legal services are provided in some states, such as Ohio. See, e.g., OHIO REV. CODE ANN. § 2907.02 (Baldwin 1982). A discussion of this issue is beyond the scope of this comment.

charge is admissible. By not setting limits on the "motive to fabricate" exception, *Winfield* may provide the defense the opportunity to introduce both legitimate and illegitimate evidence about the victim's specific prior sexual conduct, thereby thwarting the original intent of the rape shield statute. Otherwise, *Winfield* does acknowledge the legitimacy of section 18.2-67.7. Specifically, the use of general reputation evidence of a prosecutrix's bad moral character is no longer admissible in rape trials. Moreover, the introduction of evidence concerning the complainant's past sexual conduct is limited to four specified instances.

Regrettably, the Virginia procedural practices whereby a rape victim can obtain judicial review of a trial judge's evidentiary ruling are unsettled. Therefore, it is submitted that the Virginia General Assembly should amend the state's rape shield statute in light of the formation of the Court of Appeals of Virginia and should explicitly acknowledge the victim's right to review of a trial court's evidentiary decision. Until these changes occur, Virginia rape victims may point to the reasoning in *Doe v. United States*¹²⁸ in arguing that some method of judicial review is implicit. Otherwise, the protection afforded to the rape victim by section 18.2-67.7 is in jeopardy.

Philip L. Hatchett

128. 666 F.2d 43 (4th Cir. 1981).

