STATE V. OLIVER: CHILDREN WITH A PAST; THE ADMISSIBILITY OF THE VICTIM'S PRIOR SEXUAL EXPERIENCE IN CHILD MOLESTATION CASES

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INTRODUCTION

It is a tragic reality that child sexual abuse[1] is an increasingly frequent occurrence in the United States.[2] Studies indicate that a substantial number of children are sexually victimized, leading some researchers to conclude that sexual abuse may be more prevalent than physical abuse.[3] One such study concluded that one out of every five girls and one out of every eleven boys have been victims of sexual abuse at the hands of an adult.[4] While

1. The term "child sexual abuse" evades precise definition primarily because there is no consensus among researchers, authors and practitioners as to what acts constitute sexual abuse, or even what age defines a child. D. RUSSEL, SEXUAL EXPLOITATION, RAPE, CHILD SEXUAL ABUSE AND WORKPLACE HARASSMENT 177 (1984).

For purposes of this Note, "child sexual abuse" refers to any sexual conduct with a minor under the age of 18 years. Such conduct includes, but is not limited to, simulated, attempted or actual sexual intercourse (vaginal and anal); attempted or actual sodomy (oral and anal); fondling of genitalia; kissing, hugging or fondling in a sexual manner; and any exhibitionist display of the genitals. Moreover, the term refers to not only the conduct of the adult abuser, but also any conduct which the abuser requires the victim to engage in.

2. *See* State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985). According to the *Myatt* court:

> [T]he incidence of sexual abuse of young children has increased dramatically in recent years . . . . Statistics show that there has been a 200% increase in the reporting of sexual abuse since 1976. By 1980, there were 25,000 reported cases annually. A substantial number of cases are never reported; estimates of the actual incidence vary from 100,000 to 500,000 per year.

Id. at 22, 697 P.2d at 841.

Additionally, a nationwide survey conducted in 1981 reported 44,700 substantiated cases of child sexual exploitation. The study included cases reported to protective service agencies, as well as professionals in schools, hospitals and other major agencies. THE NATIONAL INCIDENCE STUDY, NATIONAL CENTER ON CHILD ABUSE AND NEGLECT (NCCAN) U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (1981).

3. D. FINKELHOR, R. GELLES, G. HOTALING & M. STRAUS, THE DARK SIDE OF FAMILIES 85-87 (1983) [hereinafter DARK SIDE]. Although both physical abuse and sexual abuse are forms of child abuse, there are some very striking differences. Physical abuse, by definition, causes physical pain and often results in injury to the child. Furthermore, physical abuse is considered life-threatening. Sexual abuse, on the other hand, involves contact with the child of a sexual nature. The trauma associated with this type of abuse is primarily psychological, although there can be physical damage to the genital area and transmission of venereal disease, and, in most cases, the contact is not considered life-threatening. D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 5-6 (1979) [hereinafter SEXUALLY VICTIMIZED CHILDREN].

4. The conclusions reached in the study were based on data compiled from questionnaires and interviews of 796 college students from six New England colleges during 1977 and 1978. The participants included 530 females and 266 males, a majority of whom were caucasian and from middle

these statistics are alarming and probably surprising to most people, what is even more unsettling is the relatively young age at which our nation's children are exposed to incidents of sexual contact. Results from one study found the average age of female sexual victims was ten, while the average age for males was eleven.[5] More recent information suggests that even higher percentages of children under the age of twelve are being sexually victimized, with possibly one third of those being children under the age of six.[6]

Statistics such as these should serve to shatter most traditionally rooted beliefs that children are sexually inexperienced and relatively unfamiliar with the nature of sexual acts, anatomy and terminology. Yet, despite widespread media attention focused on the increasing incidence of child molestation and on the problems related to sexually active children, many people continue to believe that where sexual matters are concerned, young children are completely ignorant and naive. This perception presents particularly difficult and unique evidentiary obstacles in the prosecution of child molesters.

One problem is that jurors in child molestation cases may believe that the child witness is only able to testify in detail about the sexual molestation because the defendant did, in fact, commit the offense as charged.[7] In order to rebut such an inference, a common defense tactic is to attempt to introduce evidence of the child victim's prior sexual experiences.[8] This sometimes leads to the unpalatable result of the child witness being subjected to intense and harsh cross-examination by defense counsel with respect to his or her prior, often traumatic, sexual experiences.

In response to the ever increasing number of child sexual abuse prosecutions, the legislative and judicial branches, at both the federal and state level, have attempted to address the unique problems inherent in such trials. Emphasis has been placed on protecting the child victim from the further trauma associated with the courtroom experience.[9] The awareness of the

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income to upper-middle income economic backgrounds. Approximately 75% of the participants were 21 years of age or under. Sexual victimization was defined as 1) subjected to sexual intercourse, actual, simulated or attempted; 2) fondling of genitals; 3) subjected to exhibitionist display of genitals by older persons; 4) kissed, hugged or fondled in a sexual manner, and 5) asked to exhibit genitals. Of the total number of participants, 19.2% of the females and 8.6% of the males reported having been sexually victimized as children, DARK SIDE, *supra* note 3, at 71-72.

5. *Id.* at 60.

6. Bulkey, *Evidentiary & Procedural Trends in State Legislation & Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 647 (1985).

7. *See, e.g.*, State v. Oliver, 158 Ariz. 22, 760 P.2d 1071 (1988), and see *infra* notes 106-11 and accompanying text; State v. Davis, 406 A.2d 900 (Me. 1979) (evidence of nine-year-old victim's preoccupation with human sexual organs improperly excluded by trial court); Commonwealth v. Ruffen, 399 Mass. 811, 507 N.E.2d 684 (1987) (defendant entitled to voir dire examination of victim and victim's mother to determine whether child victim had been sexually abused in the past, as such past abuse would bear on victim's knowledge and terminology of sexual acts); Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985) (testimony relating to six-year-old victim's prior sexual abuse admissible to dispel jury's inference that child would be unable to describe molestation unless defendant had committed the alleged acts); State v. Howard, 121 N.H. 53, 426 A.2d 457 (1981) (defendant must be afforded opportunity to show, by specific acts of sexual conduct, that the child victim has the experience and ability to contrive the present statutory rape charges).

8. *See, e.g., Oliver*, 158 Ariz. 22, 760 P. 2d 1071 (1988); *see also infra* notes 106-11 and accompanying text; *Davis*, 406 A.2d 900; *Ruffen*, 399 Mass. 811, 507 N.E.2d 684; *Summitt*, 101 Nev. 159, 697 P.2d 1374; *Howard*, 121 N.H. 53, 426 A.2d 457.

9. For a thorough review of the various evidentiary changes and courtroom techniques in use today in child molestation prosecutions see Bulkey, *supra* note 6.

special needs of child witnesses has led to substantial modifications in the way criminal trials are conducted. These modifications include: reforms in the area of evidence, such as exceptions to the hearsay rule; the elimination of competency tests for child witnesses; the abolishment of the corroboration requirement; and, the advent of innovative courtroom techniques, such as allowing children to testify via closed circuit television and the introduction of videotaped testimony.[10]

This Note first reviews the historical background surrounding the emergence of rape shield laws in the United States, with particular attention to Arizona's rape shield law. Next, it focuses on the trend among courts in applying rape shield laws to child molestation cases. In examining the admissibility of a child victim's prior sexual experiences in child molestation cases, this Note concentrates on the judiciary's role in balancing the state's interest in protecting the child witness against the defendant's constitutional right to a fair trial.

This Note places special emphasis on the recent Arizona Supreme Court decision in *State v. Oliver*.[11] In that case, the defendants sought new trials based on alleged constitutional violations stemming from the exclusion of evidence relating to the child victims' past sexual conduct.[12] In reaching its decision, the *Oliver* court confronted the difficult task of determining whether Arizona's rape shield rule[13] should be extended to child molestation cases. And, if so, whether certain exceptions to the rule are necessary to protect the defendant's sixth amendment constitutional rights.[14]

HISTORICAL BACKGROUND

Protecting the Privacy and Dignity of the Rape Victim: The Reformation of Evidentiary Rules in Sexual Assault Cases

An unusual alliance between the feminist movement and law enforcement agencies across the country[15] pressured state legislatures in the 1970's to make evidentiary changes designed to protect rape victims[16] in the court-

10. *See* Bulkey, *Introduction: Background & Overview of Child Sexual Abuse, Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5, 5-7 (1985).

11. 158 Ariz. 22, 760 P.2d 1071 (1988).

12. *See infra* notes 114-15 and accompanying text.

13. State *ex rel.* Pope v. Superior Ct., 113 Ariz. 22, 545 P.2d 946 (1976), held that evidence of a rape victim's prior sexual history is inadmissible to prove consent or to impeach credibility.

14. The amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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 defence.

U.S. CONST. AMEND. VI.

15. For a comprehensive history of the emergence of rape shield legislation and the moving forces behind the reform movement see Galvin, *Shielding Rape Victims in State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986).

16. Throughout this Note the term "rape victim" is used to refer to victims of the female gender unless otherwise specified. While men and male children are subject to sexual victimization, the majority of victims are female. *See* Galvin, *Id.* at 765 n.5.

room.[17] As a result of this cooperative effort, forty-eight states, the military, and the federal government enacted legislation restricting the admissibility of a rape complainant's prior sexual conduct in sexual assault trials.[18] These statutes are commonly referred to as rape shield laws. Only two states, Arizona and Utah, are without rape shield statutes. In those states, judicial decisions govern the admissibility of sexual conduct evidence.[19]

The enactment of rape shield laws reflect legislative and judicial recognition that the prior sexual conduct of a rape victim has little relevance to issues of consent[20] or credibility.[21] Prior to passage of these statutes, it was commonly thought that evidence of the complainant's prior "unchaste character"[22] was relevant not only to prove consent but also to impeach the cred-

17. The various feminist organizations maintained that the "character assassination" in open court of rape victims acted as a significant deterrent to the reporting and prosecution of rape and accounted for the high rate of acquittal in rape prosecutions. Both police and prosecutors joined forces with the feminists due to their desire to create conditions which would lead to an increase in the apprehension and conviction of rapists. *Id.* at 767.

18. Federal: FED. R. EVID. 412; Military: MIL. R. EVID. 412; Alabama: ALA. CODE § 12-21-203 (Supp. 1985); Alaska: ALASKA STAT. § 12.45.045 (Supp. 1985); Arkansas: ARK. STAT. ANN. § 16-42-101 (1987); California: CAL. EVID. CODE §§ 782, 1103(b) (West Supp. 1986); Colorado: COLO. REV. STAT. § 18-3-407 (1986); Connecticut: CONN. GEN. STAT. ANN. § 54-86f (West 1985); Delaware: DEL. CODE ANN. tit. 11, §§ 3508, 3509 (Supp. 1988); Florida: FLA. STAT. ANN. § 794.022(2)-(3)(West Supp. 1985); Georgia: GA. CODE ANN. § 24-2-3 (Harrison 1982); Hawaii: HAW. R. EVID. 412; Idaho: IDAHO CODE § 18-6105 (1979); Illinois: ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1988); Indiana: IND. CODE ANN. § 35-37-4-4 (Burns 1985); Iowa: IOWA R. EVID. 412; Kansas: KAN. STAT. ANN. § 21-3525 (Supp. 1987); Kentucky: KY. REV. STAT. ANN. § 510.145 (Michie/Bobbs-Merrill 1985); Louisiana: LA. REV. STAT. ANN. § 15:498 (West 1981); Maine: ME. R. EVID. 412; Maryland: MD. ANN. CODE art. 27, § 461A (1982); Massachusetts: MASS. ANN. LAWS ch. 233, § 21B (Law. Co-op. 1985); Michigan: MICH. STAT. ANN. § 23.788(10) (Callaghan 1982); Minnesota: MINN. R. EVID. 404(c); Mississippi: MISS. CODE ANN. §§ 97-3-68, 97-3-70 (1988); Missouri: MO. ANN. STAT. § 491.015 (Vernon Supp. 1989); Montana: MONT. CODE ANN. § 45-5-511(4) (1987); Nebraska: NEB. REV. STAT. § 28-321 (Supp. 1985); Nevada: NEV. REV. STAT. §§ 48.069, 50.090 (1985); New Hampshire: N.H. REV. STAT. ANN. § 632-A:6 (Supp. 1986); New Jersey: N.J. STAT. ANN. § 2A:84A-32.1-.3 (West Supp. 1988); New Mexico: N.M. STAT. ANN. § 30-9-16 (1984); New York: N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981); North Carolina: N.C. R. EVID. 412; North Dakota: N.D. CENT. CODE §§ 12.1-20-14 to -15 (1985); Ohio: OHIO REV. CODE ANN. § 2907.02(D) (Page Supp. 1987); Oklahoma: OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1985); Oregon: OR. REV. STAT. § 40.210 (1984); Pennsylvania: 18 PA. CONS. STAT. ANN. § 3104 (Purdon 1983); Rhode Island: R.I. GEN. LAWS § 11-37-13 (1981); South Carolina: S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985); South Dakota: S.D. CODIFIED LAWS ANN. § 23A-22-15(1988); Tennessee: TENN. CODE ANN. § 40-17-119 (1982); Texas: TEX. R. EVID. 412; Vermont: VT. STAT. ANN. tit. 13, § 3255 (Supp. 1988); Virginia: VA. CODE ANN. § 18.2-67.7 (1988); Washington: WASH. REV. CODE ANN. § 9A.44.020 (1988); West Virginia: W. VA. CODE § 61-8B-11 (1984); Wisconsin: WIS. STAT. ANN. §§ 972.11(2), 971.31(11) (West Supp. 1989); Wyoming: WYO. STAT. § 6-2-312 (1988).

19. *Pope*, 113 Ariz. at 26, 545 P.2d at 950; *see infra* note 34 and accompanying text. *State v. Johns*, 615 P.2d 1260 (Utah 1980)(absent circumstances which enhance its probative value, evidence of rape victim's general reputation for sexual promiscuity and specific prior unchaste acts is generally irrelevant and inadmissible).

20. Consent, as used in the law of rape, means "consent of the will, and submission under the influence of fear or terror cannot amount to real consent. There must be an exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent." BLACK'S LAW DICTIONARY 276 (5th ed. 1979).

21. *See* Galvin, *supra* note 15, at 791-802. *See also Pope*, 113 Ariz. at 26, 545 P.2d at 950.

22. Chaste is defined as "not indulging in unlawful sexual intercourse; virtuous: said especially of women; free from obscenity; pure in thought and act; innocent; modest." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 307 (2d ed. 1979). For purposes of this Note, "unchaste" acts or character is used to denote premarital or extramarital sexual intercourse. *See* State v. Bird, 302 So. 2d 589, 592 (La. 1974).

ibility of the witness.[23] Decisions in early rape cases are replete with language embodying sentiments and stereotypes contemptuous of women who dared to violate the sexual mores of their times.[24] Moreover, many courts supported the admissibility of this evidence for the purpose of impeaching a witness' credibility based on a theory, often attributed to Dean Wigmore,[25] that such evidence was relevant because "promiscuity imports dishonesty."[26]

In addition to the contemporary view that prior sexual activity has little relevance to issues of credibility or consent, proponents of rape shield legislation predicted that evidentiary reform would lead to increased reporting of the crime of rape.[27] Rape victims would not be deterred from reporting the crime for fear that every past detail of their private sex lives would be fair game for the defense at trial.[28]

Proponents also maintained that prohibiting evidence of the victim's prior sexual behavior would lead to an increase in the conviction rates of guilty offenders.[29] Rather than being distracted by highly prejudicial evidence concerning the victim's prior sex life, jury attention would focus on the factual elements of the actual rape case.[30]

Legislative reform in the area of rape shield laws is extensive, yet the statutes are inconsistent regarding which type and under what circumstances evidence of prior sexual conduct may be prohibited.[31] As one commentator observes, the statutory reforms take four basic approaches[32] ranging from highly restrictive statutes which come dangerously close to impinging on the defendant's constitutional rights, to those so permissive that the legislation seems ineffectual.[33]

The Rape Shield Rule In Arizona: A Historical Overview

Prior to the Arizona Supreme Court's decision in *State ex rel. Pope v.*

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23. *See, e.g.*, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955); State v. Coella, 3 Wash. 99, 28 P. 28 (1891).

24. *See infra* notes 36-42 and accompanying text.

25. According to at least one commentator, the courts which did admit evidence of the complainant's prior unchaste acts may have done so due to "the powerful influence of Dean Wigmore, who was adamant in his view that an exception was warranted for female complainants in sexual offense cases "because a certain type of feminine character predisposes to imaginary or false charges of this sort." Galvin, *supra* note 15, at 787.

26. *Id.* at 766, 787.

27. *Id.* at 767.

28. *Id.* at 767, 795 n.150.

29. *Id.* at 796-97.

30. *Id.*

31. For a complete review of the rape shield statutes and their application see Galvin, *supra* note 15, at 908-16.

32. According to Galvin, the four different approaches are referred to as the California, Michigan, Texas and federal approaches. *Id.* at 773.

33. *Id.* at 773-76. Galvin observes that the twenty-five states whose statutes are modeled on the Michigan statute are highly restrictive; they prohibit introduction of sexual conduct evidence subject to highly specific exceptions and "have stripped courts of their discretion to determine the relevancy of sexual conduct evidence on a case-by-case basis." *Id.* at 773. On the other end of the spectrum are the eleven states which follow the Texas approach where "trial courts have nearly unfettered discretion to admit sexual conduct evidence merely upon a showing of relevancy under traditional standards. . . . [and] [b]ecause the statutes lack any substantive restrictions . . . judges are as free to permit its introduction as they were prior to the enactment of the legislation." *Id.* at 774.

Superior Court,[34] evidence of the rape complainant's prior sexual experiences was admissible when the defendant raised consent as a defense in a prosecution for forcible rape.[35] Relying heavily on California case law,[36] the Arizona Court of Appeals in *State v. Wood*[37] held that while evidence of the complainant's prior unchaste acts was inadmissible for the direct purpose of impeaching the witness' credibility, it was clearly relevant and material for the purpose of discrediting the complainant's testimony that the accused used force or violence to commit the act.[38]

Considering the negative view toward women who engaged in premarital or extramarital sexual intercourse at the time of *Wood*, it is not surprising the court failed to consider the prejudicial effect of such evidence upon the complainant.[39] Although the court recognized a rape victim would have great difficulty in disproving specific charges of prior unchaste acts, it reasoned that justice was better served by protecting a potentially innocent defendant.[40] The underpinnings of such reasoning appear to be derived from traditional ideology which included a double standard for men and women in the area of sexual conduct[41] and which characterized unchaste women as being vindictive and prone to fantasies and false accusations of rape.[42]

The court in *Wood* restricted its holding to those cases in which the

34. 113 Ariz. 22, 545 P.2d 946 (1976).

35. *See, e.g.*, State v. Kelley, 110 Ariz. 196, 515 P.2d 569 (1973); State v. Martinez, 67 Ariz. 389, 198 P.2d 115 (1948); *Wood*, 59 Ariz. 48, 122 P.2d 416.

36. The court in *Wood*, 59 Ariz. 48, 122 P.2d 416, cited two California cases: People v. Johnson, 106 Cal. 289, 39 P. 622 (1895), and People v. Pantages, 212 Cal. 237, 297 P. 890 (1931). Both held that evidence of an adult rape complainant's prior consensual sexual activity was relevant and admissible for the purpose of discrediting her testimony that the defendant had used force or violence in accomplishing the alleged rape. *Johnson*, 106 Cal. 289, 39 P. at 623; *Pantages*, 212 Cal. 238, 297 P. at 901. The court in *Johnson* expressed its opinion as to the admissibility of the evidence suggesting "it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed." *Johnson*, 106 Cal. 289, 39 P. at 623.

37. 59 Ariz. 48, 122 P.2d 416 (1942).

38. *Id.* at 52, 122 P.2d at 418.

39. The *Wood* court's attempt to justify the admissibility of the rape victim's prior sexual history was expressed in this manner:

> [I]f consent be a defense to the charge [rape], then certainly any evidence which reasonably tends to show consent is relevant and material, and common experience teaches us that the woman who has once departed from the paths of virtue is far more apt to consent to another lapse than is the one who has never stepped aside from that path.

Id. at 52.

See also Galvin, *supra* note 15, at 791-92, for a discussion of the historical attitudes and traditional ideology regarding women and sexuality held by the male-dominated legal system which led feminists to seek reform in rape laws.

40. As the court stated:

> It is true that it is possible sometimes a prosecuting witness may find it difficult to disprove specific charges of previous unchastity because she is taken by surprise at trial, but upon weighing the danger of the situation arising as against the possibility of the conviction of an innocent defendant, we think that on the whole justice is more apt to be done by the admission than the rejection of the evidence . . . .

Wood, 59 Ariz. at 52, 122 P.2d at 418.

41. *See* 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE §§ 5381-5393 (1980). *See also* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); Comment, *Rape and Rape Laws: Sexism in Society and the Law*, 61 CALIF. L. REV. 919, 938 (1973).

42. The notion that charges of rape were frequently brought by a scorned mistress can be seen in the following quote of Sir Matthew Hale, Lord Chief Justice of the King's Bench. The quote, which frequently crops up in early judicial opinions, is that rape "is an accusation easily to be made

defense of consent was legally applicable.[43] Arizona courts ruled as early as 1921[44] that in a prosecution for statutory rape, where the complainant is under the age of legal consent, evidence of unchastity is entirely immaterial to prove consent or to impeach credibility.[45]

Arizona courts consistently adhered to the *Wood* holding[46] until 1976 when the Arizona Supreme Court overruled it in *Pope*.[47] The court, in a careful analysis of Arizona's rules of evidence,[48] held that character evidence of unchastity is inadmissable to impeach the credibility of the victim in a prosecution for forcible rape.[49] The court based its opinion on trends in other jurisdictions[50] and on a review of empirical data.[51] The *Pope* court further held that evidence of an unchaste reputation or specific prior unchaste acts is inadmissible for the purpose of proving consent.[52] This rule is, however, subject to certain limited exceptions.[53]

In reaching its decision, the *Pope* court noted four primary reasons for the exclusion of such evidence. First, it recognized that prior acts of promiscuity are unrelated to the complainant's ability to tell the truth under oath.[54] The court also observed that if the defense can show that the witness' reputation for chastity is so poor that it could conceivably be tied to untruthfulness, extrinsic evidence would be admissible to prove her bad reputation for honesty and veracity.[55] Any reference to prior illicit sexual activity is, however, strictly prohibited.[56]

Second, the *Pope* court pointed out that prior consensual sexual activity with an individual other than the accused is not substantial evidence the

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and hard to be proved, and harder to be defended against by the party accused, tho never so innocent." *See* 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634 (1st Am. ed. 1847).

Dean Wigmore was also highly suspicious of women who made charges of rape. In fact, Wigmore was so biased in his beliefs that he suggested all rape victims undergo a psychiatric examination in order to prevent baseless claims. *See* 3A J. WIGMORE, WIGMORE ON EVIDENCE § 924a, at 737 (J. Chadbourn rev. 1970).

43. *Wood*, 59 Ariz. at 52, 122 P.2d at 418.

44. Sage v. State, 22 Ariz. 151, 160, 195 P. 533, 537 (1921).

45. *Id.* at 158-59.

46. *See, e.g.*, *Kelley*, 110 Ariz. 196, 515 P.2d 569; *Martinez*, 67 Ariz. 389, 198 P.2d 115.

47. 113 Ariz. 22, 545 P.2d 946 (1976).

48. *Id.* at 26-27, 545 P.2d at 950-51.

49. *Id.* at 29, 545 P.2d at 953.

50. *Id.* at 27, 545 P.2d at 951.

51. The *Pope* court considered statistical data compiled by the Federal Bureau of Investigation which reported that of the four "violent crime" offenses of murder, forcible rape, robbery, and aggravated assault, forcible rape has the highest rate of acquittal or dismissal. *Id.* at 27, 545 P.2d at 951 (citing the FBI, UNIFORM CRIME REPORTS 1973, at 116, table 18 (1974)).

> The court also considered a leading study of jury behavior in which it was found that: the 'jury chooses to re-define the crime of rape in terms of its notions of assumption of risk,' such that juries will frequently acquit a rapist or convict him of a lesser offense, notwithstanding clear evidence of guilt. . . . The jury 'closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part . . . .'

Pope, 113 Ariz. at 27, 545 P.2d at 951 (quoting H. KALVEN & H. ZEISEL, THE AMERICAN JURY 254 (1966)).

52. *Id.* at 29, 545 P.2d at 953.

53. *See infra* notes 63-69 and accompanying text.

54. *Pope*, 113 Ariz. at 26, 545 P.2d at 950.

55. *Id.*

56. *Id.* at 26-27, 545 P.2d at 950-51.

complainant consented on the occasion in question.[57] According to the court, the fact that a woman may have voluntarily chosen to engage in sexual conduct with a particular person or persons in the past in no way supports a belief she consented on the occasion in question, and, in fact, may very well indicate the contrary.[58] The court further observed that even if such evidence tends to be relevant, its limited relevancy is greatly outweighed by its prejudicial effect.[59]

Third, evidence of prior unchaste acts introduces collateral issues into the case which tend to inflame and confuse the jury, drawing their attention away from the true issue in the case, namely the guilt or innocence of the defendant.[60] Finally, the *Pope* court reasoned that the victim in a rape prosecution simply should not have to come to court prepared to defend every incident of her past sex life.[61]

Despite the *Pope* court's obvious solicitude for the plight of the testifying rape victim, it nevertheless acknowledged that circumstances may arise in which this evidence is not only crucial to the defendant's right to a fair trial but has sufficient probative value to outweigh its prejudicial effect.[62] The *Pope* court suggested certain limited situations in which it believed excluding evidence of the victim's prior sexual conduct would jeopardize the defendant's constitutional rights and, therefore, the evidence should be admissible. These include: evidence of prior consensual activity between the victim and the accused;[63] testimony which would directly refute physical or scientific evidence;[64] evidence which would disprove the prosecution's assertion that the complainant has a reputation for chastity;[65] evidence the complainant has made prior false accusations of rape;[66] evidence which would tend to support the defendant's allegation that the witness had consented to an act of prostitution;[67] and finally, cases in which the subjective intent of the defendant is an element of the crime.[68] The *Pope* court made clear that the list of exceptions it announced was not exhaustive.[69]

JURISDICTIONAL OVERVIEW OF THE APPLICATION OF RAPE SHIELD STATUTES TO CHILD MOLESTATION CASES

As noted previously, in addition to the federal government and the military, forty-eight states have enacted legislation designed to protect the rape victim from inquiry into irrelevant and highly prejudicial evidence pertain-

57. *Id.* at 28, 545 P.2d at 952.
58. *Id.*
59. *Id.* at 28-29, 545 P.2d at 952-53.
60. *Id.* at 27, 545 P.2d at 951.
61. *Id.*
62. *Id.* at 29, 545 P.2d at 953. *See also* ARIZ. R. EVID. 403.
63. *Pope*, 113 Ariz. at 29, 545 P.2d at 953.
64. The court included such physical and scientific evidence as alleged loss of virginity, and the origin of semen, disease and pregnancy. *Id.*
65. This evidence is limited to situations in which the prosecution offers evidence of the complainant's chastity in its case in chief. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

ing to prior sexual conduct.[70] Because the focus of the reform movement was on adult rape victims, many of the rape shield statutes, in their original form, contained either no provision or only limited provisions applicable to sex crimes involving minor victims.[71]

As a result of the increasing number of child molestation prosecutions,[72] a number of state courts, even those in states whose statutes specifically refer to sex crimes involving minors, have been forced to determine whether application of the rape shield statute to sexual offenses involving minor victims is appropriate and, if so, whether such application is constitutional.[73]

The general consensus of the courts is that rape shield statutes do apply to cases involving minor victims.[74] The strict and mechanical application of the statute to child molestation cases has, however, caused many statutes to come under constitutional attack. In one case, the Supreme Court of New Hampshire found it necessary to "rewrite" the rape shield statute in order to uphold its constitutionality when applying it to a case of child molestation.[75]

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70. *See supra* note 18.

71. Many of the original rape shield statutes applied only to crimes classified as rape and sexual assault, which, depending on the statutory definition of such crimes, may or may not have included minor victims. Although many of the rape shield statutes specifically included the crime of statutory rape, many other sexual crimes against children were not included.

Since the original enactments, however, a number of states have amended their statutes to specifically include sex crimes perpetrated against children, such as sexual exploitation of a child, unlawful sexual conduct with a minor and various other crimes of child sexual abuse. *See, e.g.*, ALASKA STAT. § 12.45.045 (1985) (the 1985 amendment inserted "sexual abuse of a minor in any degree, or unlawful exploitation of a minor"); DEL. CODE ANN. §§ 3508, 3509 (Supp. 1988) (the 1988 amendment included crimes of unlawful sexual conduct with minors); MO. ANN. STAT. § 491.015 (Vernon Supp. 1989) (amended in 1986 to include sexual offenses against children); WIS. STAT. ANN. §§ 972.11(2), 971.31(11) (West Supp. 1989) (amendment effective July 1, 1989, and includes several categories of sex crimes involving children).

72. *See supra* note 2.

73. The following twenty-nine cases from twenty-one states were researched: Latzer v. Abrams, 602 F. Supp. 1314 (E.D.N.Y. 1985); Jager v. State, 748 P.2d 1172 (Alaska Ct. App. 1988); Fields v. State, 281 Ark. 43, 661 S.W.2d 359 (1983); Vargas v. State, 184 Ga. App. 650, 362 S.E.2d 461 (1987); Worth v. State, 183 Ga. App. 68, 358 S.E.2d 251 (1987); State v. Palin, 106 Idaho 70, 675 P.2d 49 (1983); People v. Warren, 162 Ill. App. 3d 430, 515 N.E.2d 467 (1987); Snider v. State, 274 Ind. 401, 412 N.E.2d 230 (1980); State v. Clarke, 343 N.W.2d 158 (Iowa 1984); State v. Freeman, 447 So. 2d 600 (La. Ct. App. 1984); State v. Rossignol, 490 A.2d 673 (Me. 1985); *Davis*, 406 A.2d 900; Lucado v. State, 40 Md. App. 25, 389 A.2d 398 (1978); *Ruffen*, 399 Mass. 811, 507 N.E.2d 684; Commonwealth v. Frey, 390 Mass. 245, 454 N.E.2d 478 (1983); People v. Haley, 153 Mich. App. 400, 395 N.W.2d 60 (1986); People v. Arenda, 416 Mich. 1, 330 N.W.2d 814 (1982); *Summitt*, 101 Nev. 159, 697 P.2d 1374; State v. Durham, 74 N.C. 159, 327 S.E.2d 920 (1985); *Howard*, 121 N.H. 53, 426 A.2d 457; Commonwealth v. Baldwin, 348 Pa. 368, 502 A.2d 253 (1985); Commonwealth v. Black, 337 Pa. 548, 487 A.2d 396 (1985); Shockley v. State, 585 S.W.2d 645 (Tenn. Ct. App. 1978); State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976); State v. Carver, 37 Wash. App. 122, 678 P.2d 842 (1984); State v. Peyatt, 315 S.E.2d 574 (W. Va. 1983); State v. Vonesh, 135 Wis. 2d 477, 401 N.W.2d 170 (1986); State v. Padilla, 110 Wis. 2d 414, 329 N.W.2d 263 (1982); Angus v. State, 76 Wis. 2d 191, 251 N.W.2d 28 (1977).

74. An exception to this general rule is found in *Carver*, 37 Wash. App. 122, 678 P.2d 842. Distinguishing between prior sexual history and prior sexual abuse the court observed:

> The evidence proffered in this case does not fit within the concepts and purposes of the rape shield statute. First, the evidence sought to be admitted here was prior sexual *abuse*, not *misconduct*, of a victim. . . . Under these circumstances the evidence is not prejudicial to the victims nor does it tend to discourage prosecution . . . .

Id. at 123, 678 P.2d at 843.

75. New Hampshire's rape shield statute, N.H. REV. STAT. ANN. § 632-A:6 (Supp. 1983), is recognized as one of the most restrictive statutes in the area of rape shield legislation. *See* Tanford &

In other cases, courts have held that strict application violates the defendant's constitutional rights.[76] Without expressly finding the statute to be unconstitutional, one court held that state policy protecting the child witness must be subordinate to the defendant's constitutional right to confrontation.[77]

Responding to the constitutional attacks upon these statutes, most courts have carved out special exceptions to their rape shield statutes when applied to child molestation cases.[78] The most commonly recognized exception involves allowing admission of prior sexual conduct evidence to show the child victim's source of sexual knowledge.[79] The general reasoning behind such an exception is the belief that a jury is likely to infer that a young child is a sexual innocent and, therefore, would only be able to describe the sexual aspects of the alleged molestation because the defendant did, in fact, molest the child.[80] Other exceptions include admitting the evidence to

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Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 597-602 (1980); *see also* Galvin, *supra* note 15, at 867; Berger, *supra* note 41, at 33 n.203.

Recognizing the restrictiveness of its rape shield statute, the court in *Howard*, 121 N.H. 53, 426 A.2d 457, chose to interpret the statute so as to allow admission of the evidence without finding the statute itself unconstitutional. The court acknowledged that because "[s]o total an exclusion of evidence . . . raises serious constitutional questions . . . a defendant . . . must, upon motion, be given an opportunity to demonstrate that due process requires the admission of such evidence because the probative value . . . outweighs its prejudicial effect . . . ." *Id.* at 58-59, 426 A.2d at 460-61.

76. In *Black*, 337 Pa. 548, 487 A.2d 396, the jury convicted the defendant of statutory rape, corruption of minors, incest and attempted involuntary deviate sexual intercourse involving his thirteen-year-old daughter. At trial, based on the Pennsylvania Rape Shield Law, 18 PA. CONS. STAT. ANN. § 3104 (Purdon 1983), the court denied the defendant the opportunity to present evidence that his daughter engaged in a consensual sexual relationship with her brother. The defendant contended that the daughter fabricated the charges after an argument between the defendant and her brother caused the brother to leave home. A Superior Court of Pennsylvania reversed the conviction, holding:

> [I]nsofar as the Rape Shield Law purports to prohibit the admission of evidence which may logically demonstrate a witness' bias, interest or prejudice or which properly attacks the witness' credibility, it unconstitutionally infringes upon an accused's right of confrontation under the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.

Black, 337 Pa. at 558, 487 A.2d at 401-02. *See also Jalo*, 27 Or. 845, 557 P.2d 1359.

77. *Jalo*, 27 Or. at 851, 557 P.2d at 1362.

78. *See, e.g., Shockley*, 585 S.W.2d 645 (evidence of thirteen-year-old's sexual history admissible to show source of pregnancy); *Davis*, 406 A.2d 900 (evidence of nine-year-old's unusual preoccupation with human sexual organs admissible to dispel jury's inference of victim's sexual innocence); *Ruffen*, 399 Mass. 811, 507 N.E.2d 684 (evidence of ten-year-old's prior sexual abuse admissible to show child's knowledge of sexual acts and terminology); *Durham*, 74 N.C. 159, 327 S.E.2d 920 (evidence of five-year-old's nightmares concerning sexual abuse and child's statement that father, in addition to defendant, had molested her admissible to impeach child's credibility).

79. *See, e.g., Howard*, 121 N.H. 53, 426 A.2d 457; *Summitt*, 101 Nev. 159, 697 P.2d 1374; *Padilla*, 110 Wis. 2d 477, 329 N.W.2d 263; *Ruffen*, 399 Mass. 811, 507 N.E.2d 684; *Davis*, 406 A.2d 900.

80. The *Howard* court explained:

> We believe that the average juror would perceive the average twelve-year-old as a sexual innocent. Therefore, it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it.

Howard, 121 N.H. at 61, 426 A.2d at 462.

But see Arenda, 416 Mich. 1, 330 N.W.2d 814. Adopting the minority approach, and one that arguably conflicts with the defendant's constitutional right to a fair trial, the court concluded that an eight-year-old boy's prior sexual experiences were inadmissible to show source of knowledge because the relevancy of the evidence, at best, was minimal and "[a] jury is unlikely to consider a witness's ability to describe sexual conduct as an independent factor supporting a conviction." Furthermore,

demonstrate the origin of pregnancy,[81] to support a defense of mistaken identity,[82] and to establish motive or bias to testify falsely.[83]

To determine whether evidence of a child victim's prior sexual history may be admissible, most courts adopt a case by case approach in which they analyze the proffered evidence in terms of relevancy, probative value, and risk of unfair prejudice. In evaluating these factors, courts generally employ a balancing test, weighing the evidence's probative value against its prejudicial effect.[84] An integral part of this test involves counterbalancing the state's interest in protecting the child witness against the defendant's sixth amendment right to confrontation.[85]

Although the procedure for employing the balancing test varies from state to state, a common approach is to allow the defense to make an offer of proof to the court as to the relevancy of the sexual conduct evidence.[86] If the court finds the offer of proof sufficient, it then conducts an *in camera* hearing to determine if the evidence's probative value outweighs its prejudicial effect.[87] Where evidence of prior sexual experience has substantial probative value, the evidence is admissible.[88]

While a majority of the courts addressing the issue have extended their rape shield statutes to child molestation cases,[89] from the standpoint of defendant rights, it is significant that so many courts utilize a case by case approach in determining the validity of such application.[90] The numerous exceptions found to the application of rape shield statutes to child molestation cases clearly demonstrates the judiciary's paramount concern for the defendant's right to a fair trial.[91]

ARIZONA: THE APPLICATION OF THE *POPE* RAPE SHIELD RULE TO CHILD MOLESTATION CASES

Arizona has no rape shield statute. Therefore, the question presented to

"[t]hese children [young or apparently inexperienced] . . . are the ones who are most likely to be adversely affected by unwarranted and unreasonable cross-examination into these areas." *Id.* at 12-13, 330 N.W.2d at 818.

81. *Shockley*, 585 S.W.2d at 649.

82. *Abrams*, 602 F. Supp. 1314 (application of rape shield statute barring the introduction of thirteen-year-old victim's prior sexual experiences considered violation of defendant's constitutional confrontation rights in light of evidence that victim and his two brothers gave conflicting descriptions of the perpetrator where defense was based on claim of mistaken identity).

83. *Black*, 337 Pa. at 550, 487 A.2d at 398; *Jalo*, 27 Or. at 848, 557 P.2d at 1362; *Angus*, 76 Wis. 2d at 196, 251 N.W.2d at 33.

84. FED. R. EVID. 402-403.

85. U.S. CONST. AMEND. VI provides in pertinent part: "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 . . . ." *See also* Davis v. Alaska, 415 U.S. 308 (1974) (State policy of protecting the privacy of a juvenile offender's police record is subordinate to the defendant's sixth amendment constitutional rights.).

86. *Padilla*, 110 Wis. 2d at 429, 329 N.W.2d at 271.

87. *Id.* at 430-31, 329 N.W.2d at 271-72; *Black*, 337 Pa. at 557-58, 487 A.2d at 401; *Howard*, 121 N.H. at 61, 426 A.2d at 461; *Shockley*, 585 S.W.2d at 650; *Abrams*, 602 F. Supp. at 1321.

88. *Padilla*, 110 Wis. 2d at 429-30, 329 N.W.2d at 271; *Black*, 337 Pa. at 557-58, 487 A.2d at 401; *Howard*, 121 N.H. at 61, 426 A.2d at 461; *Shockley*, 585 S.W.2d at 650; *Abrams*, 602 F. Supp. at 1321.

89. *See supra* note 74.

90. *See supra* notes 84-85 and accompanying text.

91. *See supra* notes 78-83 and accompanying text.

the Arizona judiciary was whether the rule announced in *Pope*[92] should extend to child molestation cases. In *State v. Oliver*,[93] the Arizona Supreme Court addressed two issues: whether the *Pope* rape shield rule applies to child molestation cases, and, if so, whether an exception is warranted when the defense contends the child fabricated the molestation.[94]

The *Oliver* court held that the *Pope* rape shield rule does apply to child molestation cases.[95] It recognized an exception may be warranted, however, in cases where all three of the following criterion are present: the victim is quite young; the defendant raises fabrication as a defense; and the defendant is able to establish the relevancy of the evidence.[96] In such cases inquiry into the child victim's prior sexual experiences is permissible.[97]

In holding the *Pope* rape shield rule applicable to child molestation cases, the court noted the underlying policies justifying the rule, which are, that allowing inquiry into the victim's past sexual experiences will discourage reporting of the crime and that introduction of sexual history evidence might prejudice or confuse the jury.[98] Without much discussion, the court concluded that these reasons are just as valid in child molestation cases as in rape prosecutions.[99] Furthermore, the court justified the exclusion of such evidence by observing that a child victim may be even more adversely affected by unwarranted and unreasonable inquiry into largely collateral and irrelevant evidence than would be an adult rape victim.[100]

Understanding the Ruling in State v. Oliver*: The Factual Background of the Defendants' Cases*

In order to fully understand why the *Oliver* court held that an exception to the *Pope* rape shield rule may be necessary in situations where the defendant raises the defense of fabrication, an examination of the facts in the combined cases of appellants Joseph L. Oliver and David E. Cordone is warranted.

Both Oliver and Cordone were convicted of child molestation.[101] Appellant Oliver's conviction stemmed from charges involving the molestation of his nine-year-old daughter, Jackie.[102] Testimony at trial established that Oliver asked Jackie and her brother to sleep in his bed.[103] Jackie awoke to

92. *Pope*, 113 Ariz. 22, 545 P.2d 946.

93. The Arizona Supreme Court's decision in *Oliver*, 158 Ariz. 22, 760 P.2d 1071, is a consolidation of appeals from two appellants, Joseph L. Oliver and David E. Cordone, both of whom were convicted of child molestation in violation of various Arizona criminal statutes.

94. *Id.*

95. *Id.* at 27, 760 P.2d at 1076.

96. *Id.* at 28, 760 P.2d at 1077.

97. *Id.*

98. *Id.* at 27, 760 P.2d at 1076.

99. *Id.*

100. *Id.*

101. The applicable statutes involved in the appellants' convictions are ARIZ. REV. STAT. ANN. §§ 13-1410, 13-701, 13-702, 13-801 and 13-803 (1987), which encompass the classification of the crime of child molestation and the corresponding sentences and fines.

Both convictions were affirmed by the Arizona Court of Appeals in unpublished memorandum decisions. *Oliver*, 158 Ariz. at 25, 760 P.2d at 1074.

102. *Id.* at 25, 760 P.2d at 1074.

103. *Id.*

find the her father on top of her with his hands on her "private parts."[104] Jackie testified that the following morning her father requested she shower to wash off the "white stuff from sex."[105] At trial, the defense sought to introduce evidence of Jackie's prior sexual history in an effort to support the defendant's theory that Jackie was able to fabricate the charges against her father.[106] Defendant claimed that Jackie's sexual victimization on four prior occasions enabled her to describe the physiological aspects of the alleged molestation.[107] Recognizing that the jury might infer that Jackie was only able to testify about sexual intercourse because the defendant had molested her, the trial court allowed limited evidence, through leading questions directed to Jackie, to establish that she had independent knowledge of ejaculation and seminal fluids from someone other than the defendant.[108]

The other appellant in *Oliver*, Cordone, was charged with eight counts of child molestation involving two boys under the age of fifteen.[109] The charges arose from repeated incidents in which Cordone performed oral sex on the boys.[110] Cordone attempted to introduce evidence of the boys' prior sexual experiences to support several defense theories: that the boys fabricated the molestation charges, that the evidence would shed light on the witness' credibility, that one of the boys had a tendency to exaggerate, and that the boys had a motive to falsely accuse the defendant.[111]

After a hearing on a motion *in limine*, the trial court determined that, as a general proposition, the evidence was inadmissible, but agreed to forego a final ruling until it had an opportunity to review the boys' testimony.[112] During cross-examination of the boys, the defense renewed its motion to question the victims about their prior sexual history, at which time the trial court denied the motion-making the initial ruling final.[113]

On appeal, both defendants, argued that the trial courts' refusal to admit evidence of the victims' prior sexual experiences constituted fundamental error requiring reversal of the convictions.[114] Both contended the evidence was necessary to show the jury that the victims had an independent source of sexual knowledge from someone other than the defendants.[115]

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104. *Id.*
105. *Id.*
106. *Id.*
107. The trial record disclosed the four incidents of sexual victimization the defendant alleged were: 1) Jackie had engaged in sexual intercourse with a cousin; 2) a neighbor had fondled Jackie; 3) the same neighbor had unsuccessfully attempted sexual intercourse with Jackie; and 4) Jackie had witnessed a sexual act involving her mother and her mother's boyfriend. *Id.* at 29, 760 P.2d at 1078.
108. *Id.*
109. *Id.* at 25, 760 P.2d at 1074.
110. *Id.*
111. Cordone alleged that one of the boys, Jeremy, had a tendency to exaggerate. In an attempt to prove this, he asserted that Jeremy claimed to have participated in sexual intercourse with four different girls when he was eleven years old and that one of the girls performed oral sex on him. Cordone also argued that the boys' prior sexual experiences were relevant to prove that the boys had a motive to testify falsely against him. Cordone claimed that because he had observed John masturbating, the boy's humiliation caused him to retaliate by fabricating the molestation charges. *Id.* at 30, 760 P.2d at 1080.
112. *Id.*
113. *Id.*
114. *Id.* at 25, 760 P.2d at 1074.
115. *Id.*

Although the *Oliver* court recognized the validity of some of the defendants' arguments on appeal, it affirmed both convictions.[116]

Determining the Admissibility of the Child Victim's Prior Sexual Experience: Oliver*'s Two Prong Test*

According to the *Oliver* court, a determination that a particular criminal case warrants an exception to the *Pope* rule requires the court to first determine if the proffered evidence is generally relevant.[117] Where the evidence has little or no probative value, it is considered irrelevant and inadmissible.[118]

One factor affecting relevancy is the age of the child victim. In cases where the child witness is of such "tender years" that the jury is likely to conclude that the child's ability to describe the sexual molestation derives solely from defendant's act of molesting the child, evidence of prior sexual experience is relevant to rebut such an inference.[119]

If evidence of the child victim's prior sexual conduct is deemed relevant, the court must then balance its probative value against the likelihood of creating unfair prejudice.[120] Where the prejudicial and inflammatory effect of the evidence substantially outweighs the probative value of otherwise relevant evidence, the court may exclude the evidence.[121]

Recognizing the difficulty of balancing the evidence's probative value against the danger of unfair prejudice, the *Oliver* court set forth an analytical framework to be used for determining admissibility. Adopting the approach of other jurisdictions,[122] the *Oliver* court proposed a two prong analysis. The first prong requires that the defendant establish, *in camera*, the child victim's actual exposure to a prior sexual act.[123] If the defendant fails to meet this burden, the inquiry ends and any reference to prior sexual activity is clearly inadmissible.[124] If, however, the defendant can establish the existence of a prior sexual act the court proceeds to the second prong of inquiry.[125] Under this prong, the defendant must demonstrate that the prior sexual act was "sufficiently similar" to the present act such that it has furnished the child with the sexual knowledge and experience to fabricate the

116. *Id.* at 32, 760 P.2d at 1081.

117. Relevant evidence is "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." ARIZ. R. EVID. 401. According to the *Oliver* court, the standard for establishing that evidence is relevant is "not particularly high." *Oliver*, 158 Ariz. at 28, 760 P.2d at 1077.

118. *Oliver*, 158 Ariz. at 28, 760 P.2d at 1077; ARIZ. R. EVID. 401. *See also* State v. Meraz, 152 Ariz. 588, 734 P.2d 73 (1987).

119. *Oliver*, 158 Ariz. at 28, 760 P.2d at 1077.

120. *Id.*; ARIZ. R. EVID. 403.

121. In addition to the exclusion of highly prejudicial relevant evidence, Rule 403 permits exclusion of evidence based on "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ARIZ. R. EVID. 403.

122. *Ruffen*, 399 Mass. 811, 507 N.E.2d 684; *Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263.

123. *Oliver*, 158 Ariz. at 28, 760 P.2d at 1077. Such a requirement prevents the defense from using cross-examination as a "fishing expedition" to uncover possible prior sexual experiences of the victim which may be completely unfounded and unnecessarily inflammatory in nature.

124. *Id.*

125. *Id.*

present charge.[126]

Failure to prove either one of the two requirements results in exclusion of the evidence, based on the presumption that its probative value is substantially outweighed by the danger of its inflammatory and prejudicial effect.[127] While the *Oliver* court strongly urged future application of this two prong analysis, it was careful in pointing out that the two factors identified do not require mechanical application, nor are they the only factors to be considered.[128]

Applying the two prong test to the facts of Oliver's conviction, the court upheld the trial court's decision to allow limited testimony from Jackie regarding her prior knowledge of the physiological aspects of sex.[129] Approving of the technique used by the trial court, the *Oliver* court suggested that, when possible, courts should attempt to protect child victims from unreasonably intrusive questioning concerning their prior sexual history.[130] As in the *Oliver* trial, the court suggested that methods should be implemented whereby juries are informed that the victim is knowledgeable about sexual matters without subjecting the child to intensive cross-examination involving specific details of the prior sexual episodes.[131]

While Oliver sought to introduce the sexual history evidence solely to reveal the source of sexual knowledge, Cordone's case was complicated by the numerous theories he claimed supported admission of the evidence.[132] For example, on appeal, Cordone contended that the blanket exclusion of the victims' prior sexual histories violated the confrontation clause of the sixth amendment.[133] Citing *Davis v. Alaska*,[134] Cordone argued that he had an absolute right to cross-examine the boys regarding their sexual history to show bias, motive, source of sexual knowledge, and to impeach their credibility.[135]

The *Davis* case involves constitutional considerations present in many child molestation cases. *Davis* holds that, in certain circumstances, the defendant's right to a fair trial outweighs the state's interest in protecting the witness.[136] At issue in *Davis* was an Alaska policy[137] designed to protect the

126. *Id.*
127. *Id.* at 29, 760 P.2d at 1078.
128. *Id.* at 28, 760 P.2d at 1077 n.3. While the *Oliver* court does not identify what additional factors might be considered by trial courts in determining the admissibility of prior sexual history evidence, such factors might include the victim's age, level of emotional maturity and stability, the apparent ability of the child to undergo such a line of questioning, the degree of trauma suffered as a result of the present molestation, and the extent to which the victim has been exposed to other sources of sexual knowledge. In evaluating these factors, judges should consider appointing trained professionals to prepare reports and make recommendations to the court.
129. Namely, her knowledge of the physiological aspects of ejaculation and seminal fluid. *Id.* at 27, 760 P.2d at 1078.
130. "Whenever possible, we believe the trial court should endeavor to protect minor victims from unwarranted and unreasonably intrusive cross-examination by requiring counsel to demonstrate, if possible, independent knowledge of sexual matters without producing evidence of the details of the victim's previous sexual experience." *Id.* at 30, 760 P.2d at 1079.
131. *Id.*
132. *See supra* note 111 and accompanying text.
133. U.S. CONST. AMEND. VI; *see supra* note 14.
134. 415 U.S. 308 (1974).
135. *Oliver*, 158 Ariz. at 30, 760 P.2d at 1079.
136. *Davis*, 415 U.S. at 320.

confidentiality of a juvenile offender's record.[138] The effect of the policy was the exclusion of a juvenile's police record in criminal proceedings.[139] The policy applied both to juveniles charged with crimes as well as those who appeared as witnesses in criminal proceedings.[140]

The defendant in *Davis* was charged with burglary and grand larceny.[141] The defense sought to cross-examine a crucial prosecution witness about his juvenile record[142] in an attempt to show the witness possessed a motive or bias to testify falsely.[143] Despite defense counsel's assurance that the evidence would be used only to show bias or motive to testify falsely, and not for general impeachment purposes, the trial court prohibited admission of the evidence.[144] The defendant was subsequently convicted of the charges.[145]

The United States Supreme Court reversed the conviction, finding that the exclusion of the evidence violated the confrontation clause by denying the defendant adequate cross-examination of a crucial witness.[146] In balancing the state's policy of protecting the juvenile offender[147] against the right of meaningful confrontation, the Court concluded that the temporary embarrassment caused by disclosure of the juvenile witness' record was outweighed by the defendant's right to inquire into the possible bias of the witness in his identification of the defendant.[148]

According to the *Oliver* court, the *Davis* decision would control if Cordone established that the evidence he sought to introduce was relevant.[149] Nevertheless, the court noted that the sixth amendment does not confer on a defendant an absolute right to introduce evidence which is irrelevant, nor even relevant evidence which is outweighed by its highly prejudi-

137. ALASKA RULE OF CHILDREN'S PROCEDURE 23; ALASKA STAT. § 47.10.080(g) (1971).

138. Alaska Rule 23 of Children's Procedure states that "[n]o adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for the use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate." ALASKA RULE OF CHILDREN'S PROCEDURE 23.

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

139. An exception to the policy allowed admission of the juvenile's record in presentencing adjudications. ALASKA RULE OF CHILDREN'S PROCEDURE 23.

140. *See supra* note 137.

141. *Davis*, 415 U.S. at 308.

142. Witness Green, a juvenile, was on probation at the time of trial for the burglary of two cabins in the area. *Id.* at 311.

143. According to the record, the defense theory was that the witness, acting out of fear or concern of possible jeopardy to his probation status, may have made a faulty and hasty identification of the defendant in an effort to shift suspicion away from himself. In the alternative, he may have made the identification under pressure from the police because of the fear his probation would be revoked. *Id.*

144. *Id.*

145. *Id.* at 314.

146. *Id.* at 320.

147. The State argued that exposure of a juvenile's delinquency record might seriously impair the rehabilitative goals of the juvenile correctional process. If the juvenile's record were exposed, it could impair employment opportunities or cause the juvenile to commit future crimes. *Id.* at 319.

148. *Id.*

149. *Oliver*, 158 Ariz. at 30-31, 760 P.2d at 1079-80.

cial effect.[150]

Reviewing Cordone's arguments separately, the court found the evidence to be irrelevant for all asserted purposes.[151] First, because of the age of the victims[152] and the unexplicit nature of their testimony,[153] the jury was unlikely to infer the victims' ability to describe the molestations was derived solely from the defendant's actions.[154] Second, citing *Pope*, the court dismissed the argument that the evidence was admissible to impeach the credibility of the witnesses.[155] Referring to the rules of evidence,[156] the *Oliver* court held that evidence relating to prior sexual misconduct simply is not probative of truthfulness.[157] Third, the court rejected the relevancy of a young man's bragging about sexual conquests with girls, finding such evidence to be wholly unrelated to the matter at issue.[158]

In addressing Cordone's final argument, and the one most closely related to the *Davis* case, the *Oliver* court refused to consider the evidence relevant to establish motive or bias to testify falsely.[159] Cordone alleged that because he had caught one of the victims masturbating the boy's humiliation caused him to retaliate by fabricating the charges.[160] The court found this argument to be without merit noting that it was illogical to believe that a teenage boy who is embarrassed at being caught masturbating would retaliate by drawing attention to a homosexual relationship.[161]

THE IMPLICATIONS AND EFFECT OF *STATE V. OLIVER* ON FUTURE ARIZONA CHILD MOLESTATION CASES

The *Oliver* decision creates a sound and balanced approach to weighing the state's interest in protecting the youthful victim against the defendant's right to a fair trial. It not only allows, but encourages, trial courts to take a case by case approach in evaluating the admissibility of evidence of prior sexual conduct in child molestation cases.[162]

Trial courts should endeavor to adhere closely to the rules and procedures articulated by the *Oliver* court. In doing so, trial courts should carefully consider whether the defendant's constitutional rights are jeopardized by the exclusion of evidence pertaining to the child victim's prior sexual history.[163] In those cases where the defendant presents a plausible argument

150. *Id.* at 30, 760 P.2d at 1079 (citing Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).
151. *Oliver*, 158 Ariz. at 31-32, 760 P.2d at 1080-81.
152. At the time the molestations were first reported to the police, John was 13 and Jeremy was 12. At the time of the trial, however, they were 16 and 15 years old. *Id.* at 31, 760 P.2d at 1080.
153. As noted in the decision, "[a]t its most graphic, the testimony of the victims merely indicated that Cordone had placed his mouth on their penises." *Id.* at 31 n.6, 760 P.2d at 1080 n.6.
154. *Id.* at 31, 760 P.2d at 1080.
155. *Id.*
156. ARIZ. R. EVID. 608(b).
157. *Oliver*, 158 Ariz. at 31, 760 P.2d at 1080.
158. Additionally, the court considered that the witness' exaggerated claims were remote in time from his trial testimony. Therefore, under ARIZ. R. EVID. 608(b) and 403, the trial court properly excluded the evidence. *Id.* at 31, 760 P.2d at 1080.
159. *Id.* at 31, 760 P.2d at 1080.
160. *Id.* at 32, 760 P.2d at 1081.
161. *Id.*
162. *Id.* at 28-29, 760 P.2d at 1077-78.
163. *See supra* note 14.

that the evidence has probative value sufficient to outweigh its prejudicial effect, the evidence should be admitted. In admitting the evidence, however, the court must be particularly mindful of its duty to protect the witness from undue harassment and embarrassment.[164]

As in the *Oliver* trial, methods should be fashioned to restrict the manner in which the jury is informed that the child witness has independent knowledge of sexual matters. This objective may be accomplished in a number of ways without violating the spirit of the *Oliver* decision. One such way is for the State and defendant, prior to trial, to agree on the form of the questions to be put to the witness.[165] Another way to achieve the goal, without producing specific evidence of prior sexual conduct, would be for counsel to ask the child witness if he or she had any prior experiences which helped him or her to describe the sexual aspects of the alleged molestation. Such experiences might include exposure to books and movies, discussions with others concerning sex, exposure to sex education materials at school, or witnessing persons engaged in sexual activity.[166]

While these methods may be useful for the purpose of dispelling a jury's inference that the child witness is only able to describe the molestation because the defendant committed the offense as charged, they will not suffice in cases where the defendant claims that the child witness' prior sexual conduct directly relates to motive or bias to testify falsely.[167] In such cases it would constitute fundamental error to deny the defendant an opportunity to inquire into the specifics of the victim's prior sexual conduct.

CONCLUSION

Substantial evidentiary reform in the area of rape prosecutions has taken place during the last two decades, the most notable of which has been the enactment of rape shield statutes.[168] These reforms, coupled with the steadily increasing number of child molestation prosecutions, have prompted many states to extend their rape shield laws to cases of child sexual abuse and to uphold the constitutionality of such application.[169]

Arizona's equivalent to a rape shield statute, the *Pope* rape shield rule, now extends to cases of child molestation as a result of the Arizona Supreme Court decision in *Oliver*. The court did, however, carve out an exception to the general exclusion of sexual history evidence. Where the defendant raises

164. ARIZ. R. EVID. 611(a)(3).

165. Prior to opening statements in the *Oliver* trial, the State and Oliver agreed to the form of the questions to be directed to Jackie to elicit from her the fact that she was knowledgeable about ejaculation and seminal fluid. The State asked Jackie during direct examination: "Okay. Now, before [the Oliver molestation] happened you knew that when people had sex that white stuff would sometimes come out of men's penises?" To which, Jackie responded affirmatively. *Oliver*, 158 Ariz. at 29, 760 P.2d at 1078.

166. The Michigan Supreme Court in *Arenda*, 416 Mich. at 13, 330 N.W.2d at 818, advanced this method of informing the jury that the child is knowledgeable about sexual matters.

167. *See, e.g., Jalo*, 27 Or. 845, 557 P.2d 1359 (Victim alleged to have fabricated charges after defendant threatened to tell victim's mother that victim was sexually active.); *Black*, 337 Pa. 548, 487 A.2d 396 (Daughter allegedly fabricated incest charges after defendant caused son—with whom daughter was having sexual relations—to leave home.).

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

169. *See supra* notes 73-74 and accompanying text.

the defense of fabrication, and the victim is of such "tender years" that a jury is likely to infer that the only way the victim could testify in detail about the alleged molestation is because the defendant in fact sexually molested the child, evidence of the victim's prior sexual history is relevant and admissible to rebut such an inference.[170]

To determine the admissibility of the evidence, *Oliver* proposed the use of a two prong test. First, the defendant must show, *in camera*, that the victim had previously been exposed to a sexual act.[171] Second, the defendant is required to prove that the prior sexual act was sufficiently similar to the present act to have given the child the sexual knowledge and ability to fabricate the present molestation charge.[172] If the defendant is able to satisfy the two prongs of the test, the evidence is admissible.[173] In admitting the evidence, however, Arizona courts are cautioned to do so in a manner designed to protect the victim from unreasonable harassment and embarrassment.[174]

Following the *Oliver* approach diminishes the risk that an automatic or statutorily mandated exclusion of the evidence will impinge upon the defendant's constitutionally guaranteed rights, a problem frequently encountered in jurisdictions where adult rape shield statutes are mechanically applied. Moreover, it will ensure that Arizona continues to strive toward meeting its duty to protect the unfortunate victims of child sexual abuse.

170. *See supra* notes 96-97 and accompanying text.
171. *See supra* note 123 and accompanying text.
172. *See supra* note 126 and accompanying text.
173. *See supra* note 97 and accompanying text.
174. *See supra* notes 130-31 and accompanying text.