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The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim's Prior Sexual Conduct

Christopher B. Reid

INTRODUCTION

The Sixth Amendment gives criminal defendants the right to confront witnesses against them.¹ The primary means for exercising this right is through cross-examination of the prosecution's witnesses.² The defendant's right to cross-examine, however, is not without limits; in particular, there are limits on the subject matter and scope of the cross-examination.³ In the area of sex crimes, the conflict between the right to cross-examine and the right of sexual assault victims to keep private their prior sexual history brought to the forefront the issue of limitations on the scope of cross-examination. A nationwide debate over this issue during the 1970s resulted in the enactment of a "rape shield" statute in virtually every state in the country.⁴ The typical rape shield statute limits the ability of the defendant to question the prosecuting witness about prior sexual conduct.⁵ The statutes repre-

1. U.S. CONST. amend. VI. This right also applies to state prosecutions through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

2. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). ("Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.'") (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

3. *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) ("[T]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

4. Currently 48 states, the military, and the federal government have enacted rape shield statutes. The remaining two states, Arizona and Utah, have judicial decisions that accomplish the same goal by excluding prior sexual conduct evidence in general. For a complete citation list of these statutes and decisions, see Kim Steinmetz, Note, *State v. Oliver: Children With a Past; The Admissibility of the Victim's Prior Sexual Experience in Child Molestation Cases*, 31 ARIZ. L. REV. 677, 680 nn.18-19 (1989).

5. For example, the federal rape shield statute reads in relevant part:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of [the federal offense of rape], reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.

(b) Notwithstanding any other provision of law, [in such a case] evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is —

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of —

(A) past sexual behavior with persons other than the accused, offered by the accused

sented a legislative judgment, one that rejected widespread thinking,⁶ that a woman's prior sexual conduct was of limited relevance to the defense of a sexual assault charge.

Although the rape shield statute began as a response to the widespread admissibility of a woman's prior sexual conduct for the purposes of showing consent to a sexual act, the courts soon extended the statute's reach to child molestation cases.⁷ In these cases, the courts excluded any evidence of a prior molestation of the child, even though

upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.

(c)(1) [If the defendant] intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, [the defendant must make a written motion to offer such evidence to the court not later than fifteen days before the start of the trial. The defendant must also serve the motion upon all parties and the alleged victim.]

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such a purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) if the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which [the federal offense of rape is alleged.]

FED. R. EVID. 412. For an in-depth examination and comparison of rape shield statutes throughout the country, see Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986).

6. Professor Harriett Galvin states:

Rape-shield statutes were primarily directed against the second common-law usage of victim character evidence. That usage was based on the notion that women who had engaged in sexual intercourse outside of marriage had violated societal norms and therefore possessed the character flaw of unchastity, that is, a propensity to engage in nonmarital sexual activity. Accordingly, a defendant accused of forcible rape who professed innocence on the ground that the complainant consented to the sexual act in question was permitted to prove the complainant's "unchaste character." From that proof, the jury was permitted to infer that such an unchaste woman was more likely to have consented to sexual intercourse on the occasion in question. . . . This evidentiary theory is a straightforward application of the exception to the general rule prohibiting character evidence — it permits evidence of the victim's character to prove conduct, namely consent.

Galvin, *supra* note 5, at 783-84 (citations omitted).

7. See Steinmetz, *supra* note 4, at 685 ("The general consensus of the courts is that rape shield statutes do apply to cases involving minor victims."). The most glaring exception to this rule is *State v. Carver*, 678 P.2d 842 (Wash. App. 1984), in which the court distinguished evidence of the prior sexual abuse of a child from evidence of the prior sexual conduct of a rape victim, which Washington's rape shield statute prohibited. The court stated: "The evidence proffered in this case does not fit within the concepts and purposes of the rape shield statute. . . . [T]he evidence sought to be admitted here was prior sexual abuse, not misconduct, of a victim." 678 P.2d at 843.

consent was never an issue in those cases.⁸ Within the past ten years, however, defendants have developed a new theory to support the admissibility of a child's prior sexual conduct in a child molestation case in spite of the prohibitions of the rape shield statute. This Note names this relatively new strategy the *sexual innocence inference* theory of admissibility.⁹

The sexual innocence inference refers to the thought process a jury follows when it hears a young child testify about sexual acts and matters that reveal an understanding of such acts beyond the capacity likely at his or her age. A jury is likely to assume that because the child is so young, he or she must be innocent of sexual matters. Shocked by the child's display on the witness stand, the jury may then infer that the child could have acquired such knowledge only if the charged offense of child molestation is true.¹⁰ To rebut this inference,

8. In general, the victim's consent is never a defense in a criminal prosecution because of the notion that a crime is an offense against the entire society and not just the single victim. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.11, at 687 (1986). Some crimes, however, are defined so that the victim's lack of consent is an element of the crime. In these cases, the victim's consent will prevent an element of the crime from having occurred; in that sense, consent will function as a defense. *Id.* § 5.11, at 688. Conversely, a child molestation statute never makes the child victim's lack of consent an element of the crime. See, e.g., IND. CODE ANN. § 35-42-4-3 (West 1986):

Sec. 3. (a) A person who, with a child under twelve (12) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if it is committed by using or threatening the use of deadly force, or while armed with a deadly weapon, or if it results in serious bodily injury.

(e) It is a defense that the accused person reasonably believed that the child was sixteen (16) years of age or older at the time of the conduct.

(f) It is a defense that the child is or has ever been married.

9. The Supreme Court of New Hampshire generally receives credit for first tackling this issue in *State v. Howard*, 426 A.2d 457 (N.H. 1981). See *People v. Arenda*, 330 N.W.2d 814 (Mich. 1982). In *Arenda*, the Michigan Supreme Court calls the sexual innocence inference theory "ingenious," 330 N.W.2d at 817, and notes that *Howard* is the only case known to have faced the issue at that time. 330 N.W.2d at 818 n.8. It appears, however, that the Maine Supreme Court handled the identical issue in 1979. See *State v. Davis*, 406 A.2d 900 (Me. 1979). The *Davis* court found that evidence of the victim's "undue curiosity regarding the human sexual organs, as more particularly manifested by a preoccupation to pull down, or have pulled down, the pants of other people," must be admitted to prevent the jury from thinking that the victim was "too innocent of sexual matters to think up the kind of sexual conduct she had described unless it was real and she had actually experienced it." 406 A.2d at 901-02.

10. A majority of courts addressing the sexual innocence inference theory agrees that a jury might make such an inference, but the courts cannot agree about how to determine *when* the jury is susceptible to such an inference for the purpose of judging the admissibility of the prior sexual conduct evidence. See *State v. Oliver*, 760 P.2d 1071, 1076-77 (Ariz. 1988); *People v. Rice*, 709 P.2d 67, 68-69 (Colo. App. 1985); *State v. Jacques*, 558 A.2d 706, 708 (Me. 1989); *Commonwealth v. Ruffen*, 507 N.E.2d 684, 687 (Mass. 1987); *Commonwealth v. Rathburn*, 532 N.E.2d 691, 695-96 (Mass. App. Ct. 1988); *State v. Benedict*, 397 N.W.2d 337, 340-41 (Minn. 1986); *Woodruff v. State*, 518 So. 2d 669, 671-72 (Miss. 1988); *Summitt v. State*, 697 P.2d 1374, 1376-77 (Nev. 1985); *State v. Howard*, 426 A.2d 457, 462 (N.H. 1981); *State v. Budis*, 580 A.2d 283, 290 (N.J. Super. Ct. App. Div. 1990), *aff'd*, 593 A.2d 784 (1991); *State v. Pulizzano*, 456 N.W.2d 325, 334-35 (Wis. 1990).

At least two courts simply do not believe that juries make such inferences. See *State v. Clarke*, 343 N.W.2d 158, 163 (Iowa 1984); *People v. Arenda*, 330 N.W.2d 814, 818 (Mich. 1982).

a defendant would like to introduce evidence of the child's prior sexual conduct, including a prior molestation, to show that the child could have acquired sexual knowledge from prior abuse rather than from the charged encounter.¹¹ The evidence demonstrates an alternative source for the child's sexual knowledge.¹² This, in turn, permits the defendant to argue credibly that the child had the capacity to fabricate the charge against him.¹³

Thus, a court attempting to decide whether such evidence is admissible faces a difficult problem. Under the Sixth Amendment, the defendant may cross-examine the child and, to the extent that evidence of a prior molestation might prevent a jury from making the sexual innocence inference, the cross-examination represents an attack on the credibility of the witness which has traditionally been permissible. On the other hand, the rape shield statute, by its terms, excludes the evidence. The goal of this Note is to provide a rational means of resolving this quandary.

To aid in the resolution of this problem, this Note makes a number of assumptions. First, in light of the significant number of cases acknowledging the theory,¹⁴ as well as some sparse empirical data which lend it limited support,¹⁵ this Note assumes that juries do indeed infer sexual innocence, and focuses on the more pressing problem of deter-

At least one court has noted evidence that tends to demonstrate that juries do make the sexual innocence inference:

In the affidavit supporting appellant-defendant's motion for a new trial in the proceedings below, it was asserted that Juror No. 1, Richard L. Linton, after the verdict was rendered, stated to both counsel for the state and the appellant that during the jury's deliberations "the question was posed among the jurors why a girl of such a young age would know of such sexual acts unless they had, in fact, occurred as alleged."

Summitt v. State, 697 P.2d 1374, 1377 n.4 (Nev. 1985).

11. See, e.g., *Oliver*, 760 P.2d at 1076; *Jacques*, 558 A.2d at 708; *Ruffen*, 507 N.E.2d at 687.

12. See, e.g., *Oliver*, 760 P.2d at 1076-77; *Jacques*, 558 A.2d at 708; *Ruffen*, 507 N.E.2d at 687.

13. See, e.g., *Oliver*, 760 P.2d at 1076; *Howard*, 426 A.2d at 462; *Budis*, 580 A.2d at 291.

14. See *supra* note 10.

15. At least one study argues that juries might make the sexual innocence inference in certain situations. Gail S. Goodman et al., *When a Child Takes the Stand*, 11 LAW & HUM. BEHAV. 27, 38 (1987) (hypothesizing that jurors may be more likely to believe a younger child because such a child does not have the sexual knowledge to be able to fabricate a detailed sexual molestation charge); See also Bruce E. Bohlman, *The High Cost of Constitutional Rights in Child Abuse Cases — Is the Price Worth Paying?*, 66 N.D. L. REV. 579, 582 (1990) ("[The Goodman study, *supra*,] concluded that while credibility usually increases as the age of the child increases, the opposite is true for children testifying in sexual abuse cases. The study found jurors are more prone to believe a younger child because the young child does not have sufficient experience or knowledge to fabricate a report of sexual activity.") (footnotes omitted). But see *id.* at 582 n.21 ("The literature is in the developmental stage on the issue of credibility of children, and one can certainly state that children's credibility is not a subject on which there is universal agreement. As in every case, the credibility of each witness is for the trier of fact to determine."); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 170 (1966) ("[I]n a series of child sex cases, the suggestion is that the jury has a distinctive tendency to believe the accused adult as against the accusing young child. . . . [This suggestion is doubtful.] One would expect that in these conflicts the choice between child and adult is extremely close, sometimes falling one way, sometimes the other. And indeed this is the case.").

mining when they draw the inference and what should be done in response. Second, this Note assumes a limited fact situation. In the typical case envisioned by this Note, a child has accused an adult of some kind of sexual molestation such as a simple fondling or a more severe sexual assault. At some time prior to the charged assault, the child suffered an instance of sexual abuse, which need not have been inflicted by the defendant in the present case. This Note also assumes that other methods of introducing the child's prior sexual conduct into evidence have failed. For example, this Note assumes there is no physical evidence of the present assault; if there were, and if the prior sexual conduct were sufficiently recent, the defendant might persuade a judge to admit the prior sexual conduct evidence under the rape shield statute to demonstrate that the defendant is not the only potential source of the semen or injury.¹⁶ This Note also assumes that the child's prior sexual conduct does not tend to demonstrate that the child may be biased against the defendant.¹⁷ Under such circumstances, the sexual innocence inference theory is essentially the defendant's last hope.

Given these assumptions, this Note argues that the admissibility of a child's prior sexual conduct to rebut the sexual innocence inference can be effectively determined by reference to the Federal Rules of Evidence governing relevance and prejudice, both of which are virtually identical to their state evidentiary law counterparts.¹⁸ This Note contends that many state courts today err on the side of the defendant by

16. See FED. R. EVID. 412(b)(2)(A); *infra* note 34.

17. See, e.g., *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam). In *Olden*, the criminal defendant had been charged with kidnapping, rape, and forcible sodomy. The defendant argued that the victim had consented to the sexual acts. To support that argument, the defendant wished to present evidence that the victim had an ongoing sexual relationship with the defendant's half-brother; such evidence, the defendant argued, indicated that the victim had a motive to lie to preserve that relationship with the defendant's half-brother. The Court summarized this argument: "[The defendant] has consistently asserted that he and [the victim] engaged in consensual sexual acts and that [the victim] — out of fear of jeopardizing her relationship with [the defendant's half-brother] — lied when she told [the defendant's half-brother] she had been raped and has continued to lie since." 488 U.S. at 232. The Court held that the trial court's refusal to allow the defendant to pursue this theory on cross-examination violated his Sixth Amendment rights. 488 U.S. at 233. In sum, "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness . . ." 488 U.S. at 231 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). Thus, a criminal defendant might be able to introduce the child's prior sexual conduct if the evidence indicated how the child might be biased against the defendant.

18. This Note often refers to relevance and prejudice principles as a shorthand reference to the principles found in the Federal Rules of Evidence 401 and 403 respectively. Rule 401 states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. Although substantial variations exist throughout the states in the rape shield area, the great majority of states have relevance and prejudice provisions similar to these federal rules. See generally 1 GREGORY P.

admitting prior sexual conduct evidence when it is either irrelevant, overly prejudicial, or both. Part I briefly traces the constitutional development of the defendant's right to cross-examine and its relationship to the relevance and prejudice provisions of the Federal Rules of Evidence. Part II outlines the current responses of state courts to the sexual innocence inference theory. Part III argues that by applying standard relevance and prejudice concepts embodied in the federal rules, courts can determine admissibility in a more logical manner. This Note concludes that state courts defer too readily to defendants in these admissibility decisions and that they can usually exclude this evidence without violating the defendant's Sixth Amendment rights.

I. THE OPERATION OF THE RAPE SHIELD STATUTE AND THE RIGHT TO CROSS-EXAMINE IN A CHILD MOLESTATION CASE

This Part analyzes the operation of rape shield statutes in child molestation cases in an effort to define more precisely the conflict between the defendant's right to cross-examine and the interest of the prosecution and judicial system in keeping highly prejudicial prior sexual conduct evidence out of a criminal trial. Section I.A focuses on the prototypical rape shield statute, Federal Rule of Evidence 412,¹⁹ to determine exactly what effect such a statute has on the right to cross-examine. Section I.B briefly traces the constitutional development of the right to cross-examine by discussing relevant U.S. Supreme Court decisions. The first two sections conclude that the Constitution entitles a defendant to present relevant evidence so long as the probative value of the evidence outweighs its prejudicial effect. Section I.C.1 then examines the meaning of relevance in the Federal Rules of Evidence. Section I.C.2 follows with an evaluation of the prejudice principles of Federal Rule of Evidence 403 and their relationship to relevance. This Part concludes that a defendant seeking to introduce evidence must show its relevance before invoking any constitutional rights, and that a trial court may constitutionally exclude relevant evidence in certain circumstances.

A. *The Rape Shield Statute*

Several courts in child molestation cases have discussed rape shield statutes at some point in their opinions. Some courts resolved the sexual innocence inference issue by looking only at the rape shield stat-

JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987).

19. See *supra* note 5 (quoting text of Rule 412).

ute.²⁰ Others referred to the statute to support their reasoning.²¹ This section explores the purpose of the typical rape shield statute in an effort to discover how it should operate in child molestation cases.

The rape shield statute was a legislative response to an assumption made by many courts when hearing rape cases that "most women were virtuous by nature and that an unchaste woman must therefore have an unusual character flaw."²² This flaw caused the "unchaste" woman to consent to sex in situations in which "normal" women would not have consented.²³ Thus, the courts would allow the defendant to introduce into evidence prior sexual acts to show the woman's tendency to consent.²⁴ Proponents of the rape shield statute argued that this practice discouraged women from reporting rapes for fear of being humiliated at trial by attorneys delving into their sexual histories.²⁵ Further, by the 1970s, the very premise underlying this assumption was eroding; society no longer considered the fact that a woman had sexual relations outside of marriage a character flaw.²⁶ Drafting a legislative solution, however, proved difficult; even the proponents of the rape shield legislation agreed that prior sexual conduct evidence was relevant in certain narrowly circumscribed situations.²⁷

20. See, e.g., *People v. Arenda*, 330 N.W.2d 814 (Mich. 1982); *State v. Howard*, 426 A.2d 457 (N.H. 1981); see also *infra* sections II.A and II.B.

21. See, e.g., *State v. Budis*, 580 A.2d 283 (N.J. Super. Ct. App. Div. 1990), *affid.*, 593 A.2d 784 (1991); *State v. Pulizzano*, 456 N.W.2d 325 (Wis. 1990); see also *infra* section II.C.

22. J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 547-48 (1980).

23. *Id.* at 548.

24. *Id.*

25. Galvin, *supra* note 5, at 794-95. Professor Galvin writes:

If the complainant's version nonetheless withstood official scrutiny and the case proceeded to trial, the common-law rules permitting proof of the complainant's sexual past resulted in nothing less than character-assassination in open court. The catch-phrase "victim on trial" captures the essence of this criticism. This focus on the complainant's sex life led to insinuations by defense attorneys that she "enjoyed" the sexual act in question and that she "asked for it" by her appearance or conduct. Cross-examination often delved not only into the complainant's chastity or lack thereof but also into matters such as her use of contraceptives, attendance at nightspots, adulterous relationships, illegitimate offspring, and so on. The image of a typical rape trial put forth by reformers was that of an inquisition into the moral worth of the complainant to determine if she were deserving of the full protection of the law.

Id. at 794-95 (footnotes omitted). In child molestation cases, however, this privacy rationale is not as persuasive. See *infra* section III.B.1.

26. Galvin, *supra* note 5, at 798-99 ("Because the decision to engage in consensual nonmarital sexual activity is no longer a decision to defy conventional norms, the behavior is 'character-neutral' and does not support the inference 'if she strayed once, she'll stray again.'") (footnotes omitted).

27. Professor Galvin states:

Even the most ardent reformers acknowledged the high probative value of past sexual conduct in at least two instances. The first is when the defendant claims consent and establishes prior consensual sexual relations between himself and the complainant. The second is when the defendant denies altogether engaging in the sexual act in question and proves specific sexual acts between the complainant and another man at the relevant time, such proof sufficing to prove an alternative explanation for the physical consequences of the alleged rape. *Id.* at 807 (footnotes omitted).

The resulting rape shield statutes "tend to the opposite extreme of the old rule of automatic admissibility: presumptive inadmissibility."²⁸ The rape shield statute thus represents a legislative judgment that prior sexual conduct evidence is generally irrelevant and too prejudicial to admit, with certain exceptions.

The Sixth Amendment, however, gives the defendant the right to cross-examine.²⁹ The rape shield statute clearly limits that right. But a legislative act cannot override a constitutional mandate; consequently, a state should not be able to limit that right simply by declaring certain types of evidence to be irrelevant.³⁰ Thus two commentators argue:

If the Constitution assures no more than the right of a defendant to present evidence that the state has determined to be relevant, then the defendant cannot complain of a state law changing the rules to restrict certain types of evidence. The issue has been put to rest by the Supreme Court. Because the ability of the accused to present testimony is grounded in a constitutional right, a federal constitutional standard applies. . . . To say that a state has changed the traditional law and declared evidence irrelevant thus does not answer the constitutional question.³¹

In light of the conclusion that the rape shield statute cannot exclude constitutionally protected evidence, this section attempts to determine how the statute should operate in child molestation cases when the defendant asserts the sexual innocence inference theory.³²

Federal Rule of Evidence 412 states a basic presumption that the

28. Tanford & Bocchino, *supra* note 22, at 551.

29. U.S. CONST. amend. VI; *see supra* note 2.

30. Tanford & Bocchino, *supra* note 22, at 555 ("Clearly, the State could not constitutionally define all cross-examination as irrelevant without running afoul of the sixth amendment. The question, then, is whether sexual history evidence may be singled out and made inadmissible.") (footnote omitted).

31. *Id.* at 559-60 (footnotes omitted). The authors support their statements with citations to Supreme Court cases. In *Washington v. Texas*, 388 U.S. 14, 22 (1967), the Court stated, "it could hardly be argued that a State would not violate the [Confrontation] clause if it made all defense testimony inadmissible as a matter of procedural law." The authors also drew support from *Davis v. Alaska*, 415 U.S. 308 (1974), in which the Court held that a state law prohibiting the publication of a juvenile offender's record must bend to the defendant's right to cross-examine and attack the witness' credibility based on that record to show a possible bias against the defendant.

32. In the typical sexual innocence inference situation, the defendant seeks to explain the child's developed sexual knowledge by introducing evidence that the child has been molested in the past. This evidence will undoubtedly contain a description of the prior acts of molestation inflicted upon the child. Because the great majority of states consider the acts of molestation within the meaning of "prior sexual conduct," the rape shield statute will apply. *See supra* note 7 and accompanying text. One can argue that the rape shield statute was not aimed at and should not be applicable to child molestation cases. *See, e.g., State v. Carver*, 678 P.2d 842, 843 (Wash. App. 1984). However, because the vast majority of cases have considered the statute applicable, this Note forgoes debating whether the statute should be involved in child molestation cases and focuses on resolving the conflict between this accepted application of rape shield statutes and the defendant's Sixth Amendment right to cross-examine.

victim's past sexual conduct is not admissible.³³ The defendant can, however, rebut this presumption by demonstrating that the evidence falls into one of three exceptions. First, the evidence is admissible if it indicates that another person was the source of the semen found in or on the child or the cause of the injury suffered by the child.³⁴ Second, the evidence is admissible if it is offered to show a pattern of consensual sexual behavior between the victim and the defendant.³⁵ Because a child's consent is irrelevant to the crime of child molestation,³⁶ the trial judge should quickly reject this theory of admissibility. Third, the court must admit the evidence if it "is constitutionally required to be admitted."³⁷ This exception is the last hope of the defendant. Because this exception requires a constitutional analysis, the rape shield statute on its own does not and cannot resolve the problem presented by the sexual innocence inference theory of admissibility.³⁸

Despite the above analysis, the rape shield statute is not meaningless when applied to the sexual innocence inference theory. The judge will usually have discretion to exclude evidence whose prejudicial effect substantially outweighs its probative value under Rule 403; but that rule does not *require* the judge to exclude such evidence.³⁹ The rape shield statute *forces* the judge to exclude the evidence when it is constitutionally permissible to do so.⁴⁰ Consequently, it is necessary

33. FED. R. EVID. 412.

34. FED. R. EVID. 412(b)(2)(A). This Note addresses only cases in which there is no medical evidence of molestation such as collected semen or physical injury. If there is such evidence, evidence of prior molestation may be relevant to show that the defendant is not responsible for the semen or injury. Obviously, if there is medical evidence, the defendant will not normally rely upon so ethereal a theory as the sexual innocence inference but will instead base his foundation for admissibility on the semen or injury exception to Rule 412. In fact, "physical injury in child sexual abuse cases is rare The most commonly reported type of child sexual abuse is nonviolent genital manipulation, which would rarely cause any physical damage." L. Matthew Duggan III et al., *The Credibility of Children as Witnesses in a Simulated Child Sex Abuse Trial*, in *PERSPECTIVES ON CHILDREN'S TESTIMONY* 71, 73 (Stephen J. Ceci et al. eds., 1989).

35. FED. R. EVID. 412(b)(2)(B).

36. See *supra* note 8.

37. FED. R. EVID. 412(b)(1).

38. Some commentators and courts say that without such a "constitutionally required" exception, a rape shield statute may operate to exclude evidence in violation of the defendant's rights. See, e.g., Tanford & Bocchino, *supra* note 22, at 545 ("To the extent that a defendant in a rape case is categorically prevented from offering types of evidence that other criminal defendants may offer, his sixth amendment rights are violated."); see also *State v. Howard*, 426 A.2d 457 (N.H. 1981):

Strictly construed, our State rape shield statute precludes an accused from making any showing that the victim's prior sexual activity has a bearing on any of these factors. . . . [I]n order to uphold the constitutionality of [the rape shield statute], we hold that a defendant . . . must, upon motion, be given an opportunity to demonstrate that due process requires the admission of such evidence because the probative value in the context of that particular case outweighs its prejudicial effect on the prosecutrix.

426 A.2d at 460-61.

39. See *infra* section I.C.2.

40. The effect of Rule 412 is significant in this respect. As one commentator notes, when Rule 403 is applied and "the balance is close between probative force and one or more counterweights, the federal rule favors admissibility." GRAHAM C. LILLY, AN INTRODUCTION

to determine when the Constitution permits a court to exclude prior sexual conduct evidence and when such evidence may not be excluded because it is "constitutionally required." The Supreme Court's analysis of the Confrontation Clause provides the answer.

B. *The Confrontation Clause of the Sixth Amendment*

The Sixth Amendment grants to the criminal defendant the right "to be confronted with the witnesses against him."⁴¹ The Supreme Court has held that this right "means more than being allowed to confront the witness physically. 'Our cases construing the [Confrontation] clause hold that a primary interest secured by it is the right of cross-examination.'"⁴² Because cross-examination is an important tool in enforcing the right to confront, any limits placed on cross-examination require a constitutional analysis.

The Supreme Court has determined, however, that the right to cross-examine is not absolute. In *Chambers v. Mississippi*,⁴³ the Court made clear that "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."⁴⁴ The *Chambers* Court indicated that the Federal Rules of Evidence can place constitutionally permissible limits on the right to cross-examine.⁴⁵

Federal Rule of Evidence 402 states that relevant evidence is admissible, with some exceptions, but irrelevant evidence is not admissible.⁴⁶ In light of the Court's statement in *Chambers* and the fact that the Supreme Court has never read the Sixth Amendment "to mean that the defendant has the right to introduce whatever he wants,"⁴⁷ the defendant clearly has no right to present irrelevant evidence, whether through direct or cross-examination. The Court implied as much in *Rock v. Arkansas*,⁴⁸ when it stated, "[T]he right to present relevant testimony is not without limitation."⁴⁹ In sum, the Court has

TO THE LAW OF EVIDENCE § 2.5, at 40 (West 1987) (footnote omitted). When Rule 412 is applied, however, "[i]f the balance between probative force and prejudice is roughly equal, Rule 412 commands that the evidence in question be excluded." *Id.* § 5.9, at 144.

41. U.S. CONST. amend. VI.

42. *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

43. 410 U.S. 284 (1973).

44. 410 U.S. at 302.

45. 410 U.S. at 295; see *infra* text accompanying note 50.

46. FED. R. EVID. 402.

47. *Tanford & Bocchino*, *supra* note 22, at 558 ("Rather, [the defendant's] right is limited to evidence having some probative value.").

48. 483 U.S. 44 (1987).

49. 483 U.S. at 55 (emphasis added).

ruled that evidence must be relevant before its exclusion can violate the defendant's Sixth Amendment right to confrontation.

Once a trial judge finds the evidence relevant, the constitutional inquiry is not complete. As the Court stated in *Chambers*, the right to confront and cross-examine "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."⁵⁰ The Court discussed the constitutionality of allowing limits on this right in *Delaware v. Van Arsdall*.⁵¹

It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, *prejudice*, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.⁵²

Van Arsdall made clear that relevance was not the sole factor in a Sixth Amendment inquiry; the trial court was free to consider the other traditional reasons for excluding evidence. In doing so, the Court was simply elaborating upon its year-old ruling in *Delaware v. Fensterer*.⁵³ In *Fensterer*, the Court said, "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."⁵⁴ The Court envisioned a confrontation right that a trial court, exercising its reasonable judgment, could limit for certain purposes. As the Court noted in *Van Arsdall*, potential prejudice resulting from the admission of a certain piece of evidence is a factor the trial judge can consider in determining its admissibility. Because the trial judge has such power, clearly the judge can force a party to proceed along an alternate path in its attempt to offer evidence, as *Fensterer* suggests. As long as the trial court permits a party to express a relevant point, the trial court may reasonably limit or adjust the manner or angle of questioning the party employs during cross-examination to make that point.

The Supreme Court recently resolved any doubts about the constitutionality of this limit on the Sixth Amendment. In *Michigan v. Lucas*,⁵⁵ the Court stated: "To the extent that [the rape shield statute] operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished. This does not necessarily render the

50. 410 U.S. at 295.

51. 475 U.S. 673 (1986).

52. 475 U.S. at 679 (emphasis added).

53. 474 U.S. 15 (1985) (per curiam).

54. 474 U.S. at 20.

55. 111 S. Ct. 1743 (1991).

statute unconstitutional."⁵⁶ This ruling supports the argument of two commentators, who described the right to cross-examine in the following manner: "[T]he [S]ixth [A.]mendment guarantees that a criminal defendant will be able to introduce any evidence probative of a material issue, unless the probative value is outweighed by the prejudicial effect of the testimony."⁵⁷ To judge whether an evidentiary item is constitutionally required, and consequently whether a rape shield statute may exclude it,⁵⁸ initially one must assess the item's relevance and probative value, and then its prejudicial effect.

C. *The Balance Between Relevance and Prejudice*

1. *The Relevance Principle*

Any examination of the concept of relevance should begin with Federal Rule of Evidence 401: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁵⁹

Rule 401 contains two requirements: "(1) The evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action."⁶⁰ Determining whether the proposition to be proved is a fact of consequence within the meaning of Rule 401 generally requires looking at "the substantive law [at issue] within the framework of the pleadings."⁶¹ But regardless of the substantive law involved, "the term *fact of consequence* includes facts bearing circumstantially upon the evaluation of the probative value to be given to other evidence in the case, including the credibility of witnesses."⁶²

56. 111 S. Ct. at 1746.

57. Tanford & Bocchino, *supra* note 22, at 560.

58. The rape shield statute itself is essentially a judgment that prior sexual conduct evidence is relevant only in certain situations, and often prejudicial. Consequently, it seems intuitive to require the defendant to prove that the evidence is relevant and that its probative value outweighs its prejudicial effect before the court may admit the evidence:

The text of Rule 412(c)(3) provides that the accused must establish that the probative value of the evidence outweighs solely the danger of unfair prejudice. Rule 403 on the other hand provides for admissibility of relevant evidence unless the opponent of the evidence establishes that the trial court concerns enumerated substantially outweigh the probative value. Thus Rule 412(c)(3) alters the content, standard and allocation of the burden established in Rule 403.

MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 412.1, at 305 (3d ed. 1991).

59. FED. R. EVID. 401. Rule 402 provides that only relevant evidence is admissible: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

60. *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. Unit A Aug. 1981).

61. GRAHAM, *supra* note 58, § 401.1, at 144 (footnote omitted) (emphasis added).

62. *Id.* § 401.1, at 145 (footnotes omitted).

As noted in the Introduction, the sexual innocence inference is essentially a judgment of the child's credibility;⁶³ the jury will give more weight to the child's testimony if it infers that the child could only have the sexual knowledge she demonstrates in her testimony if the charged offense has occurred.⁶⁴ Thus, the source of the child's knowledge is a fact of consequence if the child demonstrates sexual knowledge beyond her years.⁶⁵ To complete a showing of relevance, however, the defendant must still demonstrate that his evidence makes it *more probable* that the child obtained her sexual knowledge from a prior incident. Although this is not a very rigorous test,⁶⁶ there are situations in which evidence of the child's prior sexual conduct fails to pass the test.⁶⁷ Once relevance is established, the trial judge must weigh its probative value against its prejudicial effect before admitting the evidence.⁶⁸

2. The Prejudice Principle

The Constitution does not require that all relevant evidence be admitted.⁶⁹ The trial judge, therefore, must have some method of deter-

63. See *supra* text accompanying notes 10-13.

64. See *supra* note 10 and accompanying text; see also GRAHAM, *supra* note 58, § 607.4, at 431 ("The capacity and actuality of a witness' perception, his ability to record and remember sense impressions, and his ability to narrate are relevant to an assessment of the weight to be given a witness' testimony. Each of these areas is a proper subject of cross-examination.") (footnote omitted).

65. The child's source of knowledge is only a fact of consequence if the jury makes the sexual innocence inference. The jury only makes the sexual innocence inference if the child demonstrates sexual knowledge beyond her years. See, e.g., *Commonwealth v. Rathburn*, 532 N.E.2d 691 (Mass. App. Ct. 1988). In *Rathburn*, the court found that a child witness must demonstrate "knowledge of sexual matters beyond his or her years" before any sexual innocence inference by the jury may be presumed. 532 N.E.2d at 696. In applying the rule to the facts of the case, the court held that a 13-year-old victim had not demonstrated sexual knowledge beyond her years when she used the terms "penis," "butt," "hard," and "rubbing" in her testimony. 532 N.E.2d at 696; see also *State v. Oliver*, 760 P.2d 1071 (Ariz. 1988):

We believe that if an accused raises the defense of fabrication, and if the minor victim is of such tender years that a jury might infer that the only way the victim could testify in detail about the alleged molestation is because the defendant had in fact sexually abused the victim, then evidence of the victim's prior sexual history is relevant to rebut such an inference. 760 P.2d at 1077.

Thus, in determining that the child's source of knowledge is a fact of consequence, the court, and not the jury, must reach the conclusion that the child has demonstrated sexual knowledge unusual for his or her age.

66. One commentator has noted:

[The trial judge] must exercise broad discretion in drawing on his own experience in the affairs of mankind in evaluating the probabilities upon which relevancy depends. The concept of logical relevancy employed in Rule 401 must be kept separate from issues of sufficiency of evidence for any purpose such as to satisfy a burden of production. "A brick is not a wall" — relevancy is the brick, sufficiency is the wall. Thus minimal logical relevancy is all that is required.

GRAHAM, *supra* note 58, § 401.1, at 142 (quoting EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 185, at 543 (3d ed. 1984)) (footnotes omitted).

67. See *infra* section III.A.

68. FED. R. EVID. 403.

69. See *supra* section I.B.

mining which relevant evidence to admit. Federal Rule 403 supplies that standard: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."⁷⁰ If the trial judge determines that the evidence is prejudicial, the judge then must balance the probative value of the evidence against the prejudicial effect its admission would have on the proceedings.⁷¹

In deciding whether to exclude evidence, the trial judge should also consider the availability of other means of proof.⁷² If the judge decides to allow other means of proof, the judge should be satisfied that this other, less prejudicial evidence has the same potential to prove the case as the more prejudicial evidence did.⁷³ Moreover, when

70. FED. R. EVID. 403.

71. Rule 403 requires the judge to engage in

a conscious process of balancing the costs of the evidence against its benefits. Unless the judge concludes that the probative worth of the evidence is "substantially outweighed" by one or more of the countervailing factors, there is no discretion to exclude; the evidence must be admitted. If, on the other hand, the balance goes against probative worth, the judge is not required to exclude the evidence but he or she "may" do so. In other words, the process of balancing is a prerequisite to the exercise of discretion but it is not a formula for its exercise; the rule presupposes a two-step process — balancing, then the discretionary judgment.

22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5214, at 263-64 (1978) (footnotes omitted).

72. "The availability of other means of proof may also be an appropriate factor." FED. R. EVID. 403 advisory committee's note.

73. See Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 250-51 (1976):

If other evidence is available, the consequences of totally excluding, rather than attempting to ameliorate, the prejudicial evidence are less severe. . . . This approach, however, can be risky. It is not enough for a court to assert that there is another way to prove the case — other *specific* evidence must in fact be available.

Id. at 251 (footnotes omitted). For a case strongly asserting the defendant's right to introduce specific evidence to rebut the sexual innocence inference, see *State v. Baker*, 508 A.2d 1059 (N.H. 1986). In *Baker*, the state argued that evidence already in the case showed that the 13-year-old victim was "street-wise and experienced," thus dispelling the sexual innocence inference. 508 A.2d at 1062. The court rejected the state's argument, finding that the defendant had a right to a hearing on the admissibility of the prior sexual conduct evidence because that would definitely rebut the inference by unequivocally establishing the state of the child's sexual knowledge. The defendant did not have to rely on the more subtle method of rebutting the inference suggested by the state. 508 A.2d at 1062. This approach is more permissive than that suggested by the U.S. Supreme Court in *Delaware v. Fensterer*, 474 U.S. 15 (1985). See *supra* text accompanying note 54.

Other courts have considered "street-wise" evidence to be sufficient to dispel the sexual innocence inference:

A reading of the record establishes the child victim in this case was very poorly supervised and had largely unsupervised activity on the street and in the homes of other children, some older than her. Under these circumstances, it is highly likely she learned of sexual terms and anatomy in her play as well as with the contacts with appellant.

Commonwealth v. Appenzeller, 565 A.2d 170, 172 (Pa. Super Ct. 1989). The *Appenzeller* court found that such evidence established effectively the state of the child's sexual knowledge and precluded any need for further testimony on the subject. 565 A.2d at 172.

Several courts have held that other evidence in the case was sufficient to rebut the sexual

the evidence is offered for a limited purpose, such as to rebut the sexual innocence inference in a child molestation case, the judge should consider "the probable effectiveness or lack of effectiveness of a limiting instruction."⁷⁴ In deciding whether to admit the evidence subject to a limiting instruction, one commentator suggests that a judge consider the presence of other, less prejudicial evidence:

[The] instruction may not always be effective, but admission of the evidence with the limiting instruction is normally the best available reconciliation of the respective interests. It seems, however, that in situations, where the danger of the jury's misuse of the evidence for the incompetent purpose is great, and its value for the legitimate purpose is slight *or the point for which it is competent can be readily proved by other evidence*, the judge's power to exclude the evidence altogether is clear in case law and under the Federal and Revised Uniform Rules of Evidence.⁷⁵

In child molestation cases, then, a judge has the power to exclude prior sexual conduct evidence if other evidence is available to demonstrate that the child had the capacity to fabricate the alleged conduct.

Thus, the Constitution and the Federal Rules of Evidence provide a framework to address the question of admissibility of prior sexual conduct evidence to rebut the sexual innocence inference. The typical rape shield statute, such as Federal Rule of Evidence 412, will exclude prior sexual conduct evidence offered to rebut the sexual innocence inference unless the Constitution requires the trial judge to admit the evidence.⁷⁶ This Note argues that the Constitution only requires a trial judge to admit evidence which is relevant and whose probative value outweighs its prejudicial effect.⁷⁷ Federal Rules of Evidence 401 and 403 define the terms *relevant*, *probative value*, and *prejudicial effect*.⁷⁸ When one applies these rules to the sexual innocence inference situation, one can arrive at the following framework for analyzing this problem. First, the defendant must show that the child demonstrates sexual knowledge beyond his or her years. Second, the defendant must show that the evidence in question makes it more probable than

innocence inference without admitting the prior sexual conduct evidence. See, e.g., *State v. Weiler*, 801 S.W.2d 417, 419 (Mo. App. 1990) ("From the State's own evidence the jury could infer that [the victim] was sexually aware, and the evidence defendant was not permitted to introduce would have added very little."), *cert. denied*, 112 S. Ct. 295 (1991), *aff'd*, S.W.2d 291 (1992); *State v. Wright*, 776 P.2d 1294, 1298-99 (Or. App. 1989) ("[T]he state presented evidence that children of the victim's age would have some knowledge about sexual matters. Consequently, the state had not advanced the theory that defendant wished to rebut."); *State v. Simmons*, 759 P.2d 1152, 1157 (Utah 1988) ("The evidence sought by further cross-examination having thus been already brought out . . . , defendant was not prejudiced by the exclusion of further cross-examination.") (Hall, J., concurring and dissenting) (footnote omitted).

74. FED. R. EVID. 403 advisory committee's note.

75. CLEARY ET AL., *supra* note 66, § 59, at 151-52 (emphasis added).

76. See *supra* section I.A.

77. See *supra* section I.B.

78. See *supra* section I.C.

not that the prior sexual conduct furnished a source for the child's sexual knowledge. Third, the evidence's prejudicial effect must not outweigh its probative value. Within this requirement, the judge must consider the prejudicial effect of the prior sexual conduct evidence as well as the availability of other means of dispelling the sexual innocence inference. If the judge finds that the evidence's prejudicial force outweighs its probative value, the rape shield statute requires the judge to exclude the evidence.⁷⁹ As a means of comparison, the next Part outlines the approaches state courts are currently using to address the sexual innocence inference.

II. APPROACHES IN THE STATES

This Part examines the various approaches states currently employ to determine the admissibility of prior sexual conduct evidence to rebut the sexual innocence inference. Section II.A details the approach followed by a handful of states favoring general admissibility of the evidence. Conversely, section II.B examines an approach favoring inadmissibility. Section II.C reviews the strategies of those states that have attempted in various ways to reach a middle ground by establishing a flexible test. Finally, Section II.D discusses the law in those states that have declared the sexual innocence inference theory to be valid but have left the admissibility of the evidence to the discretion of the trial court. This Part concludes that each approach has its own merits, which may be combined to produce a coherent method of analysis for this problem.

A. *States Favoring General Admissibility*

The New Hampshire Supreme Court was among the first of the state courts to address the sexual innocence inference theory. In *State v. Howard*,⁸⁰ the court held that a defendant accused of statutory rape had a constitutional right to challenge the credibility of a child witness through the use of prior sexual conduct evidence to demonstrate a capacity to fabricate. The court found the sexual innocence inference theory valid:

We believe that the average juror would perceive the average twelve-year-old girl 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. However, if statutory rape victims have had other sexual experiences, it would be possible for them to provide detailed, realistic testimony concerning an incident that may never have happened. To preclude a defendant from presenting such evidence to the jury, if it is otherwise admissible, would be obvious error. Accordingly, a

79. See *supra* note 40 and accompanying text.

80. 426 A.2d 457, 462 (N.H. 1981).

defendant must be afforded the opportunity to show, by specific incidents of sexual conduct, that the prosecutrix has the experience and ability to contrive a statutory rape charge against him.⁸¹

The court was unpersuaded by arguments that New Hampshire's rape shield statute, generally considered among the toughest in the nation,⁸² prevented the admission of the prior sexual conduct evidence; it held that the rape shield statute must yield to the defendant's Sixth Amendment right to confront the witnesses against him.⁸³ Although the "otherwise admissible" clause suggests that the court required a specific examination of the evidence offered on relevance grounds, the court did not make such an examination. It instead focused on the conflict with the rape shield statute. Once it decided that the statute had to accommodate the defendant's Sixth Amendment rights, there was no need for further analysis and the matter was remanded for retrial.⁸⁴

Using a somewhat different approach, the Nevada Supreme Court in *Summitt v. State*⁸⁵ reached the same result in a child molestation case. The court held that the prior sexual conduct evidence was admissible to show a capacity to fabricate because the admission of the evidence would not offend the purpose behind the rape shield statute,⁸⁶ namely, to prevent general attacks on a victim's character.⁸⁷ Because this evidence "was offered to show knowledge of such acts rather than lack of chastity," the purpose of the rape shield statute

81. 426 A.2d at 462 (emphasis added). The defendant's offer of proof stated that the prior sexual conduct evidence would show that the prosecuting witness had been seen "'masturbating a bull,'" had "had sex with her father and grandfather, the latter in exchange for money," and had undressed young boys she was babysitting to play with them naked. 426 A.2d at 458.

82. See N.H. REV. STAT. ANN. § 632-A:6 (1986); N.H. R. EVID. 412; Tanford & Bocchino, *supra* note 22, at 596-602.

83. 426 A.2d at 460 (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). In *Davis*, the Court held that a defendant in a criminal case must be allowed to attack a prosecution witness' credibility by disclosing that witness' juvenile criminal record which revealed a possible bias against the defendant. 415 U.S. at 316-17. The Court held that the state's interest in the confidentiality of juvenile criminal records did not override the defendant's rights. 415 U.S. at 320. The *Howard* court, looking to *Davis*, acknowledged the defendant's right to attack the child's credibility by exposing an alternative source of sexual knowledge that gave the child the capacity to fabricate. 426 A.2d at 460-61.

84. The *Howard* court correctly recognized that the state's rape shield statute could not exclude evidence that was constitutionally required to be admitted. 426 A.2d at 460-61. Because the New Hampshire statute, unlike Federal Rule of Evidence 412, did not contain a "constitutionally required to be admitted" exception, the court undoubtedly found itself in the difficult position of either declaring the controversial statute unconstitutional on its face or creating via judicial opinion a "constitutionally required" exception. The *Howard* court chose the latter option. 426 A.2d at 460-61. See *infra* note 91 for a discussion of the necessity of a "constitutionally required" exception in rape shield statutes.

85. 697 P.2d 1374, 1377 (Nev. 1985).

86. 697 P.2d at 1377. The defendant sought to introduce evidence of an instance of intercourse, fellatio, and fondling performed on the prosecuting witness when she was four. The child was six at the time of the charged offense. 697 P.2d at 1375.

87. 697 P.2d at 1375.

would not be violated by its admission.⁸⁸

In Maine, courts have held that the sexual innocence inference is a valid theory and that efforts to limit a defendant's attempt to rebut the inference violate his confrontation rights. In *State v. Jacques*,⁸⁹ the Supreme Court of Maine held:

Where the victim is a child, as in this case, the lack of sexual experience is automatically in the case without specific action by the prosecutor. A defendant therefore must be permitted to rebut the inference a jury might otherwise draw that the victim was so naive sexually that she could not have fabricated the charge.⁹⁰

The *Jacques* court found that evidence rebutting this inference, even if it involved the victim's prior sexual conduct, was constitutionally required to be admitted and thus overcame the blanket exclusion of the state's rape shield statute.⁹¹

Courts following the general admissibility approach thus make a number of assumptions. First, these courts assume that the sexual innocence inference theory is valid.⁹² Also, they generally assume that evidence of prior sexual conduct is relevant without comparing details of the prior molestation with those of the charged offense.⁹³ As Part I of this Note demonstrated, the defendant has no right to present irrelevant evidence; the defendant must first establish the evidence's relevance before claiming any violation of his constitutional rights.⁹⁴

88. 697 P.2d at 1377.

89. 558 A.2d 706 (Me. 1989).

90. 558 A.2d at 708.

91. 558 A.2d at 708. Maine has adopted rules of evidence modeled on the Federal Rules of Evidence. See 1 JOSEPH & SALTZBURG, *supra* note 18, at xxv & n.1. However, Maine's rape shield statute, ME. R. EVID. 412, is substantially tougher than the federal rule because it contains no catch-all provision that admits evidence if it is "constitutionally required." See Galvin, *supra* note 5, at 908-09, 914-15. In fact, Professor Galvin argues that by omitting provisions such as a "constitutionally required" exception, the Maine statute and others like it "fail to afford the accused the opportunity to present sexual conduct evidence which is indisputably relevant and necessary to the presentation of a legitimate defense theory." *Id.* at 814.

Like the *Howard* court, see *supra* note 84, the *Jacques* court added a "constitutionally required to be admitted" exception to its interpretation of Maine's rape shield statute. In admitting prior sexual conduct evidence, the *Jacques* court noted the absence of an express "constitutionally required" exception in its statute, but added that "the Advisory Committee Note is explicit that 'evidence constitutionally required to be admitted' overrides the exclusion in the text of Rule 412." 558 A.2d at 708 (citations omitted).

92. See, e.g., *Howard*, 426 A.2d at 462; *Jacques*, 558 A.2d at 708; *Summitt*, 697 P.2d at 1377.

93. For example, the New Hampshire Supreme Court in *Howard* simply compared the purposes of the rape shield statute with the defendant's Sixth Amendment rights, 426 A.2d at 460-62, rather than continuing on, as this Note argues it should, to question the relevance, probative value, and prejudicial effect of the proffered evidence. See *supra* section I.C. Likewise, in *Summitt*, although the Nevada Supreme Court indicated that the trial court should balance the probative value of the evidence against its prejudicial effect, the court itself did not engage in such balancing. 697 P.2d at 1377. The *Summitt* court either assumed that the evidence was relevant — and simply omitted its relevance analysis from the opinion — or ignored the issue of relevance altogether. In any event, neither court stressed the first requirement for admissibility of evidence: relevance. See FED. R. EVID. 401.

94. See *supra* text accompanying note 49.

Finally, these courts resolve the conflict between the defendant's right to cross-examine and the rape shield statute's prohibition against such evidence by arguing either that it is constitutionally required⁹⁵ or that its admission, because the issue is sexual knowledge and not consent, does not frustrate the purposes behind the statute.⁹⁶

B. States Favoring General Inadmissibility

Courts that do not admit prior sexual conduct evidence to show an alternative source for a child's sexual knowledge generally reject the sexual innocence inference theory, refusing to believe that juries reason in such a manner. The Iowa Supreme Court, for example, stated that the sexual innocence inference theory "is based on unsubstantiated assumptions and fears about what a jury may infer from the complaining witness's testimony."⁹⁷

The Iowa court approached the issue from the same starting point as the Maine Supreme Court in *Jacques*, stating that its rape shield statute, modeled on Federal Rule 412, prohibited the admission of the evidence unless it was constitutionally required.⁹⁸ The court then evaluated the issue under the relevancy and prejudice tests.⁹⁹ The court concluded that the prior sexual conduct evidence would have little probative value and that the sexual innocence inference theory itself was unpersuasive.¹⁰⁰ Furthermore, the court evaluated the relevance and prejudice concerns:

The evidence which the trial court ruled admissible is, at most, of very marginal probative value. It certainly does not constitute evidence whose probative value outweighs the substantial danger of unfair prejudice, confusion of the issues, misleading of the jury, and invasion of complainant's privacy which rule 412 and other rape shield laws are designed to prevent.¹⁰¹

The Iowa court reached a substantially different conclusion than the Maine court did in *Jacques*, despite starting from the same position, because the Iowa court looked more carefully at the competing issues

95. *Howard*, 426 A.2d at 460-61; *Jacques*, 558 A.2d at 708.

96. *Summitt*, 697 P.2d at 1375, 1377.

97. *State v. Clarke*, 343 N.W.2d 158, 163 (Iowa 1984); cf. *People v. Rice*, 709 P.2d 67, 68-69 (Colo. App. 1985) (refusing to admit prior sexual conduct evidence, asserting that Colorado's rape shield statute by its terms prohibited the testimony).

98. 343 N.W.2d at 160-61.

99. 343 N.W.2d at 162-63.

100. 343 N.W.2d at 163 ("[W]e find no logical or natural inference that the complaining witness could more plausibly describe a fantasized act of oral sex if she had experienced oral sex with another person.").

101. 343 N.W.2d at 163. At least one court has read *Clarke* to mean that prior sexual conduct evidence offered to rebut the sexual innocence inference is not admissible under any aspect of Rule 412. See *State v. Risdal*, 404 N.W.2d 130, 133 (Iowa 1987). Iowa Rule 412 is modeled on the federal rule. See 1 JOSEPH & SALTZBURG, *supra* note 18, at xxv & n.1; Galvin, *supra* note 5, at 914-15.

of probative value and prejudicial effect, as this Note recommends.¹⁰²

The Michigan Supreme Court similarly rejected the sexual innocence inference, stating that “[a] jury is unlikely to consider a witness’s ability to describe sexual conduct as an independent factor supporting a conviction.”¹⁰³ The court’s primary reason for rejecting the evidence was a lack of relevance combined with the tremendous potential for prejudice.¹⁰⁴ For the evidence to have any relevance at all, it would have to include details of the prior sexual conduct so that those details could be compared with those in the charged offense; the court found that making such a comparison would create a “real danger” of misleading the jury as well as invading the victim’s privacy.¹⁰⁵ The court also ruled that the sexual innocence inference will arguably have some probative value only when the victims are young children; the court stated, however, that these same young children “are among the persons whom the [rape shield] statute was designed to protect.”¹⁰⁶ Even if juries made such inferences, the court said, there were alternative methods of rebutting the inference:

[I]n most of the cases in which the source of the victim’s ability to describe a sexual act may be relevant, there are other means by which one can inquire into that source of knowledge without necessarily producing evidence of sexual conduct with others. Counsel could inquire whether the victim had any experiences (e.g., reading a book, seeing a movie, conversing with others, schoolwork or witnessing others engaged in such activity) which aided him or her in describing the conduct that is alleged.¹⁰⁷

Thus, both the Michigan and Iowa courts applied relevance and prejudice rules in dismissing the sexual innocence inference, finding that such evidence was irrelevant and prejudicial in general. In fact, it appears that the courts functioned much as the legislatures did in drafting the rape shield statutes — they simply declared an entire category of evidence to be inadmissible in every situation.

C. States Using Structured Tests for Admissibility

The previous two sections illustrated how one group of courts has

102. See *infra* Part III.

103. *People v. Arenda*, 330 N.W.2d 814, 818 (Mich. 1982).

104. 330 N.W.2d at 818.

105. 330 N.W.2d at 818.

106. 330 N.W.2d at 818.

107. 330 N.W.2d at 818. At least one Michigan judge would like to reconsider *Arenda* in light of the approaches taken by courts in other states, which are examined in sections C and D of this Part. See *People v. Adams*, 440 N.W.2d 416 (Mich. 1989) (Levin, J., dissenting) (order denying review). In addition to reconsidering the court’s position on the sexual innocence inference, Justice Levin would reconsider whether the defendant’s conviction should be reversed because the prosecutor had asked during closing argument, “‘how does a five year old . . . know about all of these things,’” while the defendant was barred by *Arenda* from presenting evidence to answer that question. 440 N.W.2d at 416-17.

judged prior sexual conduct evidence relevant to rebut the sexual innocence inference while the other group judged such evidence irrelevant and challenged the validity of the inference itself. This section looks at those courts that have acknowledged the validity of the sexual innocence inference theory but have sought a middle-ground approach by establishing a structured test to determine admissibility on a case-by-case basis.

The common requirement for admissibility under these tests is that the prior sexual conduct must be similar to the charged offense. As the Massachusetts high court said in *Commonwealth v. Ruffen*,¹⁰⁸ this test is really a relevance inquiry:

If a defendant challenges the reliability of a child's testimony about sexual abuse, it is unfair to deprive him of the right to show that the child had personal knowledge of sexual acts and terminology. . . . If the victim had been sexually abused in the past in a manner *similar* to the abuse in the instant case, such evidence would be admissible at trial because it is relevant on the issue of the victim's knowledge about sexual matters.

We do not hold, however, that evidence of prior sexual abuse of the victim is admissible at trial for all purposes. . . . If the defendant wishes to use evidence of the victim's prior abuse for a purpose other than to show knowledge about sexual acts and terminology, then he will have to show how the evidence of prior abuse is relevant on that issue. Absent such a showing by the defendant of prior *similar* sexual abuse, it is difficult to envision a situation where evidence of the details of prior sexual abuse would be relevant.¹⁰⁹

Ruffen acknowledged the sexual innocence inference theory and held that similar prior sexual conduct was admissible to challenge the reliability of the child's testimony.¹¹⁰ The court stated, however, that it did not hold the evidence admissible for all purposes; the defendant was still required to satisfy relevance principles.¹¹¹

In *State v. Oliver*,¹¹² the Arizona Supreme Court, citing *Ruffen* for support, established a two-prong test to evaluate the admissibility of prior sexual conduct evidence. Under the first prong, the defendant

108. 507 N.E.2d 684 (Mass. 1987).

109. 507 N.E.2d at 687-88 (emphasis added) (citations omitted).

110. 507 N.E.2d at 688.

111. 507 N.E.2d at 688. A Massachusetts appellate court has applied this test on at least one occasion. See *Commonwealth v. Rathburn*, 532 N.E.2d 691, 695-97 (Mass. App. Ct. 1988). In *Rathburn*, the trial court had found that the prior sexual conduct was not sufficiently similar to be relevant. 532 N.E.2d at 696. Defense counsel, conceding the lack of similarity, argued that the evidence was nonetheless admissible because the prior abuse was "far greater" than that in the charged offense. The trial court based its ruling on the lack of similarity and excluded the evidence. The appellate court found support for the judge's ruling but also rejected the evidence on a different ground. The court ruled that the victim, a 13-year-old girl, had not demonstrated knowledge of sexual matters beyond her years and thus the jury would be unlikely to make the sexual innocence inference. 532 N.E.2d at 696.

112. 760 P.2d 1071 (Ariz. 1988).

must make an *in camera* showing that the prior sexual conduct did occur.¹¹³ Under the second prong, the defendant must show that the prior sexual conduct was sufficiently similar to the charged offense that the prior conduct would have provided the child with the sexual knowledge necessary to fabricate the charge.¹¹⁴

Most recently, the Wisconsin Supreme Court in *State v. Pulizzano*¹¹⁵ unveiled a five-part test to address the admissibility of prior sexual conduct evidence in child molestation cases. The court viewed the sexual innocence inference theory as valid and stated that because the sexual knowledge added credibility to the child's testimony, the defendant must be allowed to show an alternative source of sexual knowledge to attack the child's credibility.¹¹⁶ To determine when prior sexual conduct evidence is admissible to demonstrate an alternative source, the court articulated the following test:

[The defendant must show] (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect.¹¹⁷

Once the defendant has made this showing, the evidence is admissible unless the state's interest in excluding the evidence is so compelling as to override the defendant's right to present the evidence.¹¹⁸

113. 760 P.2d at 1077.

114. 760 P.2d at 1077. The court also applied relevance and prejudice principles in setting up the test, but as this Note argues, *infra* section III.A, applied them incorrectly. The court made its relevance determination on the basis of the sexual innocence inference theory itself rather than the facts of the case. That is, the court said that the evidence was relevant because it believed that a jury might infer that a child could have acquired such sexual knowledge only through contact with the defendant. 760 P.2d at 1077. Having said that the prior sexual conduct evidence is relevant to rebut the sexual innocence inference, the court viewed the "sufficiently similar" test as a means of applying the prejudice principles of Rule 403. As explained in Part III, *infra*, such an approach is incorrect because the "sufficiently similar" test is a necessary part of any relevance inquiry and is not a Rule 403 inquiry. See *infra* text accompanying notes 139-41. Under this Note's recommended approach, Rule 403 requires an inquiry into the existence of other, less prejudicial evidence that will function to rebut the sexual innocence inference.

115. 456 N.W.2d 325 (Wis. 1990).

116. 456 N.W.2d at 334-35.

117. 456 N.W.2d at 335.

118. 456 N.W.2d at 335. In the case at issue, the court found that the state's interest was not so compelling as to override the defendant's right to present the evidence. The court provided little guidance on the application of this part of the test. It appears that if the defendant satisfies the five-part test, the state's interest will generally be subordinate to the defendant's rights. See, e.g., *State v. Moats*, 457 N.W.2d 299, 317 (Wis. 1990) ("In *Pulizzano*, we concluded that the state's interest in promoting effective law enforcement was not sufficient to overcome that defendant's constitutional right to present evidence. This same ruling applies equally to the case now before us.") (citation omitted).

In *Moats*, the court attempted to apply the test it developed in *Pulizzano*. Both parties agreed that a prior molestation had occurred, and thus the first requirement was easily met. The second requirement was the most hotly contested, with the trial court finding that the defendant had satisfied it. The court held that the evidence met the third requirement because the fact that the child did have an alternative source for her sexual knowledge was a material issue and the prior molestation was relevant to show that source. The fourth requirement was satisfied because the

Thus, courts that use structured tests to evaluate this issue all include a similarity requirement but add other concerns as well. As Part III makes clear, the tests are incomplete attempts to resolve this problem.

D. States Using Other Approaches

This section discusses cases in which courts have ruled that the sexual innocence inference theory can be relevant to the admission of a child's prior sexual conduct but have declined to formulate any precise tests. These courts essentially give wide discretion to the trial judge and simply encourage the judge to make his or her evaluation based on principles found in evidence rules.

The Minnesota Supreme Court in *State v. Benedict*¹¹⁹ acknowledged the sexual innocence inference theory and held that a judge had discretion to admit evidence otherwise barred by a rape shield statute for the purpose of rebutting the alleged victim's sexual innocence.¹²⁰ The court required only that the trial judge make a Rule 403 inquiry by balancing the probative value of the evidence against its prejudicial effect.¹²¹ The Minnesota approach essentially requires that if a trial judge believes a jury may be tempted to make the sexual innocence inference given the age of the child, then he or she may admit prior sexual conduct evidence so long as its probative value outweighs its prejudicial effect.¹²²

In a case in which the defendant did not expressly raise the sexual innocence inference, the Mississippi Supreme Court characterized the defendant's attempt to show the relevance of the child's prior molestation as "tenuous at the very best."¹²³ The court did, however, note "the natural tendency of a jury hearing a child of tender years graphically relate a sexual battery to believe it must be true, otherwise the little child would never have known about it."¹²⁴ The court then con-

defendant needed the evidence to rebut the sexual innocence inference. The defendant met the fifth requirement because the trial court could use limiting instructions to ensure that the trier of fact would only use the evidence for the purpose for which it was admitted. 457 N.W.2d at 316-17. Consequently, the court allowed the defendant to introduce the evidence. 457 N.W.2d at 317.

But only the first two requirements of the five-part test as applied in *Moats* have any force. The court essentially stated that the third and fourth requirements would always be met when the purpose for the evidence's admission is to rebut the sexual innocence inference. 457 N.W.2d at 316-17. The fifth requirement, essentially embodying Rule 403 principles, merited little discussion in *Moats*. Part III of this Note argues that Rule 403 principles should not receive such a cursory examination.

119. *State v. Benedict*, 397 N.W.2d 337 (Minn. 1986).

120. 397 N.W.2d at 341.

121. 397 N.W.2d at 341.

122. 397 N.W.2d at 341; *see also* *State v. Kroshus*, 447 N.W.2d 203, 205 (Minn. App. 1989); *Wedan v. State*, 409 N.W.2d 266, 268-69 (Minn. App. 1987).

123. *Woodruff v. State*, 518 So. 2d 669, 672 (Miss. 1988).

124. 518 So. 2d at 672.

cluded that although there are certain situations in which a child's prior molestation can be relevant, "[e]ach case is different, and relevancy must be determined by the trial judge."¹²⁵

Thus, some appellate courts have declined to provide a general solution to this issue. They have, instead, shifted the onus onto the trial courts, with little guidance, to apply basic evidence principles and exercise their discretion to reach the most just results.¹²⁶ These courts have correctly focused on the rules of evidence as the proper tools of analysis, but have failed to offer a principled solution to the sexual innocence inference problem.

In sum, state courts have followed four approaches in resolving the problems posed by the sexual innocence inference theory. Some courts believe in the validity of the theory and consequently hold that a prior molestation is generally admissible to demonstrate a child's capacity to fabricate. Other courts reach a contrary conclusion, holding that the theory is invalid and thus rape shield statutes may block constitutionally the admission of such evidence. A third group of courts acknowledges the validity of the theory but holds that trial courts must employ flexible tests on a case by case basis to determine the admissibility of prior sexual conduct evidence. The fourth group of courts, grouped together primarily because their approaches do not fit the first three categories, has not provided a theoretical solution to the problem but instead has encouraged trial courts, relying on their discretion to produce fair and just determinations, to use the rules of evidence governing relevance and prejudice to analyze this issue. Any attempt to formulate a better method of handling the sexual innocence inference theory will necessarily borrow concepts from each of these four groups.

125. 518 So. 2d at 672. Utah also resolves this problem by applying relevance and prejudice principles. *See State v. Moton*, 749 P.2d 639, 644 (Utah 1988) ("The pertinency of this test is that character evidence, many times, is of slight probative value, is very prejudicial, and may confuse the issues at trial."); *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988) (ruling that other previously admitted evidence sufficed to dispel any sexual innocence inference).

126. A number of jurisdictions have dealt with the sexual innocence inference theory tangentially. In *Commonwealth v. Appenzeller*, 565 A.2d 170, 172 (Pa. Super. 1989), for example, the Superior Court of Pennsylvania ruled that the prior sexual conduct evidence was properly excluded as irrelevant. The court found that other evidence before the jury dispelled the sexual innocence inference: "A reading of the record establishes the child victim in this case was very poorly supervised and had largely unsupervised activity on the street and in homes of other children, some older than her. Under these circumstances, it is highly likely she learned of sexual terms and anatomy in her play as well as with the contacts with appellant." 565 A.2d at 172. The court also seemed to imply that the sexual innocence inference theory was valid only if the prosecution had opened the door by laying a foundation "that her knowledge of sexual techniques and nomenclature was derived from the contact with appellant and his co-conspirator." 565 A.2d at 171. The court concluded that because other evidence rebutted the sexual innocence inference, "[t]he best that appellant's presentation would show is that the child may *also* have been molested by other persons." 565 A.2d at 172.

III. APPLICATIONS IN CHILD MOLESTATION CASES

This Part applies the rules of evidence discussed in Part I and the case analyses in Part II to the facts and conflicts present in the typical child molestation case in which a defendant attempts to rebut the sexual innocence inference. Section III.A applies the relevance tests embodied in Federal Rule of Evidence 401. Section III.B applies the concerns behind Federal Rule of Evidence 403 to determine whether the prejudicial effect of the evidence outweighs its probative value. This Part concludes by drawing on the Federal Rules of Evidence and the state courts' approaches to formulate an admissibility test that protects the defendant's constitutional rights while remaining faithful to the policies underlying rape shield statutes.

A. *Relevance Principles Applied*

In the typical case, the defendant wants to introduce evidence of the prior sexual conduct of the child to demonstrate the child's capacity to fabricate, so as to rebut the sexual innocence inference.¹²⁷ Such evidence renders the child's testimony less compelling and, thus, any attempt to introduce the evidence is an attack on the child's credibility.¹²⁸ Such attacks on credibility, however, are permissible only if they are relevant.¹²⁹ To be relevant, evidence must meet two requirements. First, the proposition the evidence is offered to prove must be of consequence to the proceeding.¹³⁰ Second, the evidence must be probative of that proposition.¹³¹ This section considers these requirements in turn.

The credibility of a witness is always a fact of consequence to the proceeding.¹³² Attempting to introduce evidence of the child's prior sexual conduct is really an attack on the child's credibility because it questions the source of the child's knowledge of sexual matters. A jury that makes the sexual innocence inference assumes that the defendant's actions were the source of the child's knowledge because the child is too young to have acquired such knowledge independently. If the jury does not make the sexual innocence inference, then the source of the child's knowledge is irrelevant because the jury is not giving the child's testimony any additional credibility due to the child's supposed naïveté. In sum, the jury should not make the sexual innocence inference when, in light of the child's age, her testimony does not demon-

127. See *supra* text accompanying notes 10-18.

128. See *supra* text accompanying notes 10-18.

129. 27 CHARLES A. WRIGHT & VICTOR J. GOLD, *FEDERAL PRACTICE & PROCEDURE* § 6092, at 489 (1990).

130. FED. R. EVID. 401; see *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. Unit A Aug. 1981).

131. FED. R. EVID. 401; *Hall*, 653 F.2d at 1005.

132. See *supra* note 62 and accompanying text.

strate knowledge of sexual matters beyond her years.¹³³

A crucial question is how old a child must be before the sexual innocence inference theory can be categorically denied as a valid grounds for the admission of prior sexual conduct evidence.¹³⁴ In the cases surveyed by this Note, trial courts have applied the sexual innocence inference theory to children as old as twelve.¹³⁵ At least one court has decided against applying the sexual innocence inference theory to a thirteen-year-old child.¹³⁶ Although there are always exceptions to any blanket generalization,¹³⁷ this Note suggests a presumptive ban on the use of the sexual innocence inference theory of admissibility with children older than twelve at the time of trial. In certain situations, however, the trial judge may find it appropriate to adjust that threshold age.¹³⁸

133. See *supra* note 65 and accompanying text.

134. No case researched for this Note has directly ruled whether a judge should use the victim's age at the time of the reporting of the incident or the victim's age at the time of trial to determine whether the jury is likely to make the sexual innocence inference. Reasonable arguments could be made in support of both positions. In support of using the age at the time of the incident, the defendant could argue that the very purpose of introducing the prior sexual conduct evidence is to show the child's capacity to fabricate at the time she reported the incident. When a prosecutor notes that an 11-year-old child made her first report at age nine, the jury is likely to consider the younger age as the most relevant for judging her capacity to fabricate: if the story was fabricated, that was the time when the child first could have possessed the capacity to do so.

On the opposite side, the prosecutor could argue that the child's age at the time of trial is the relevant age because the sexual innocence inference theory is essentially a theory based on the intuitive responses of a jury to a witness testifying in its presence. The jury considers the testimony as it comes from the person appearing on the witness stand. Any credibility it adds or subtracts results from its assessment of the child's demeanor at that point in time, not at the time the report is first made. In other words, the jury either makes or does not make the sexual innocence inference on the basis of the witness before it. Thus the age of the child at trial is the relevant age.

Courts seem to imply that they are using the child's age at the time of trial as the relevant marking point. See, e.g., *Commonwealth v. Rathburn*, 532 N.E.2d 691, 696 (Mass. App. Ct. 1988) ("[T]he testimony of the victim, who was thirteen at the time of trial, did not demonstrate 'extraordinary knowledge' of sexual acts or sexual matters in general.") (emphasis added).

135. See *State v. Howard*, 426 A.2d 457, 462 (N.H. 1981) ("We believe that the average juror would perceive the average twelve-year-old girl as a sexual innocent.").

136. See *Rathburn*, 532 N.E.2d at 696.

137. See, e.g., *State v. Kroshus*, 447 N.W.2d 203, 205 (Minn. App. 1989) (holding that the sexual innocence inference theory could be applied in the case of an adult victim with a mental age of seven and a half).

138. The judge may find that a lower or higher age is more appropriate depending on the characteristics of the community. Setting the upper limit at 12 years of age, however, does not seem unreasonable in that children most likely have acquired a developed sexual knowledge by this time and so should no longer be presumed to be innocent of such matters. The average American female experiences her first menstrual flow at 12.8 years of age. JAMES M. TANNER, *FOETUS INTO MAN: PHYSICAL GROWTH FROM CONCEPTION TO MATURITY* 146 (1990). The average European male has an acceleration of penis growth at 12.5 years of age, *id.* at 59, and the first spontaneous ejaculation of semen, usually in the form of a "wet dream," generally occurs approximately one year later. *Id.* at 62. For North American males, penis growth acceleration occurs approximately four months earlier. *Id.* at 59.

In addition to these physical changes, behavioral research indicates that most children have had some sort of sexual experience before age 12. In one study, over 82% of those responding said that they had had "some kind of sexual experience with another person before the age of 12." RONALD GOLDMAN & JULIETTE GOLDMAN, *SHOW ME YOURS!: UNDERSTANDING*

Assume that the first requirement of relevance, that the proposition to be proved is of consequence to the proceeding, is satisfied when the child is twelve years old or younger. Under the second requirement of relevance, that the evidence is probative of the proposition it is offered to prove, the evidence of prior sexual conduct must show that the child had the capacity to fabricate the story of molestation.¹³⁹ The prior sexual conduct must have been similar enough to the charged conduct so that a child experiencing the first molestation would have acquired sufficient sexual knowledge via that encounter to be able to fabricate the charged conduct. The Arizona Supreme Court uses such a similarity test in its approach to the sexual innocence inference: "[T]he defendant must establish that the prior sexual act was sufficiently similar to the present sexual act to give the victim the experience and ability to contrive or imagine the molestation charge."¹⁴⁰ It is not enough that the prior conduct be more severe in nature than the charged offense; the actual details of the two incidents should be similar.¹⁴¹

Thus, to meet the relevance requirements of Federal Rule of Evidence 401, the defendant must prove two things:

- (1) That the child is young enough at the time of trial such that the jury might make the sexual innocence inference. As an initial presumption subject to rebuttal, a court may assume that the jury will make the inference when the child is twelve years old or younger; and
- (2) That the prior sexual conduct is sufficiently similar to the charged offense such that experiencing the prior incident would give the child the specific knowledge necessary to be able to fabricate the charged offense.

If the defendant's offer of proof satisfies this test, he must then face the rigors of Federal Rule of Evidence 403.

CHILDREN'S SEXUALITY 149 (1988). Sixty percent of those responding stated that they had had a sexual experience with other children before age 12. These sexual experiences ranged from exhibitionism to touching another's sex organ or being touched. *Id.* at 154. The authors characterized the children's behavior as "playful curiosity and a mutual exploration of sexuality, not of the sexual reproduction activities or sexual pleasures of mature adults." *Id.* at 155.

Another study based on the analysis of written answers to various questions about sexual knowledge by children from kindergarten age to sixth grade concluded that children possess "overt sexual interest and knowledge. There is a continuing, progressive expansion of social awareness and activities." Samuel S. Janus & Barbara E. Bess, *Latency: Fact or Fiction, in CHILDREN AND SEX: NEW FINDINGS, NEW PERSPECTIVES* 75, 81 (Larry L. Constantine & Floyd M. Martinson eds., 1981).

Thus, although there is always some arbitrariness involved in line drawing, empirical support exists for a preliminary assumption that children aged 13 and older are not innocent of sexual matters.

139. See *supra* notes 66-67 and accompanying text.

140. *State v. Oliver*, 760 P.2d 1071, 1077 (Ariz. 1988).

141. See, e.g., *Rathburn*, 532 N.E.2d at 696, discussed *supra* note 111.

B. *Prejudice Principles Applied*

When Federal Rule of Evidence 412 is applied to child molestation cases, the only possible method the defendant can use to admit prior sexual conduct evidence is the "constitutionally required" exception,¹⁴² which permits admission only if the probative value of relevant evidence outweighs its prejudicial effect.¹⁴³ This section addresses the question of prejudice, using Federal Rules of Evidence 403 and 412 as the primary tools of analysis. It argues that, in light of the rape shield statute, if the trial judge has the power to exclude the evidence because its prejudicial effect outweighs its probative value, he or she *must* exclude it.

At the outset, it is important to identify what this Note means by the term *prejudice* in child molestation cases. When state legislators passed rape shield statutes, two separate rationales sparked them to action. First, it had become clear that a woman's sexual relations outside of marriage were not probative, in most situations, of whether she had consented to sex in the occasion at issue.¹⁴⁴ This rationale, which this Note refers to as the *evidentiary rationale*, essentially represented a judgment that the admission of the woman's prior sexual conduct encouraged jurors to believe that the woman had a character flaw which caused her to consent to sex in situations in which normal women would not have consented, thus prejudicing the jury with no significant probative benefit.¹⁴⁵ Second, the legislators listened to proponents of rape shield legislation who argued that the ease with which trial courts admitted potentially embarrassing prior sexual conduct evidence discouraged women from reporting and prosecuting rapes to avoid possible humiliation at trial.¹⁴⁶ This rationale, which this Note refers to as the *privacy rationale*, focuses on encouraging the reporting of rapes as well as eliminating unnecessary harm to the victim. When applying rape shield statutes in child molestation cases, it is important to determine whether the two types of prejudice denoted by these rationales are present.

1. *The Privacy Rationale*

The privacy rationale loses some of its potency in the child molestation context. The Court of Appeals of Washington reasoned in *State v. Carver*¹⁴⁷ that admitting the prior molestations of two children into evidence would not be an indictment of the character of the victims because the victims "were young girls who were incapable of con-

142. See *supra* text accompanying notes 33-38.

143. See *supra* note 58.

144. See *supra* notes 22-27 and accompanying text.

145. See *supra* notes 22-27 and accompanying text.

146. See *supra* notes 22-27 and accompanying text.

147. 678 P.2d 842 (Wash. Ct. App. 1984).

senting to such acts.”¹⁴⁸ The *Carver* court’s argument does have some force. In the rape context, the woman is accusing the defendant of a crime committed against her will; the defendant may seek to introduce evidence of the woman’s *willing* participation in prior sexual activities with others. Evidence of willing participation may be a reflection on a person’s character; consequently, if defense attorneys are likely to indulge in a humiliating and embarrassing examination of this so-called character flaw in most rape prosecutions,¹⁴⁹ women are unlikely to report rapes. In a child molestation case, however, the defendant seeks to introduce evidence that the child was the *unwilling* participant in previous sexual encounters with others. The *Carver* court essentially argues that because a child is considered a victim of these prior attacks rather than a willing participant, cross-examination of these matters, though difficult for the child, will not represent an indictment of the child’s character and thus should not discourage child molestations from being reported.¹⁵⁰

The privacy rationale’s other factor, reducing unnecessary harm to the victim-witness, remains strong in the child molestation context. The Michigan Supreme Court in *People v. Arenda*¹⁵¹ concluded that “[t]hese children and others are the ones who are most likely to be adversely affected by unwarranted and unreasonable cross-examination into these areas. They are among the persons whom the statute was designed to protect.”¹⁵² However, over the years courts have developed several procedural methods of reducing the amount of harm suffered by the child when the child testifies, while still protecting the defendant’s confrontation rights.¹⁵³ Although the child may suffer

148. 678 P.2d at 843.

149. See *supra* notes 22-27 and accompanying text.

150. See *State v. Budis*, 580 A.2d 283, 291 (N.J. Super. Ct. App. Div. 1990), *aff’d*, 593 A.2d 784 (1991) (“The evidence was not offered to establish any of the classic inferences the [rape shield] law was meant to interdict. Inclination to consent was not an issue in the case because of the victim’s age. Further, the proffered testimony as to [the child’s] prior victimization did not implicate her own ‘conduct’ and could not place her moral character in issue in any way.”). Moreover, this Note argues that a child and her guardian, having decided to pursue a prosecution for the charged offense, would likely not abandon their plan once they learned that the child would have to testify to the prior abuse as well. Once a child and guardian have decided to endure the pain of testifying to one sexual assault, the addition of another would probably not dissuade them, especially because neither the prior abuse nor the charged abuse is an indictment of the child’s character.

151. 330 N.W.2d 814 (Mich. 1982).

152. 330 N.W.2d at 818.

153. The U.S. Supreme Court, in *Maryland v. Craig*, 497 U.S. 836 (1990), upheld the use of one-way closed circuit television of a child’s testimony. In *Craig*, a state statute authorized a judge, upon determining that testifying in the presence of the defendant will cause the child to suffer “serious emotional distress such that the child cannot reasonably communicate,” 497 U.S. at 841, to allow the child to testify in another room and televise her testimony into the courtroom. The prosecutor and the defense attorney accompanied the child witness in the room while the judge remained with the jury and the defendant in the courtroom. The defendant was in constant communication with his attorney electronically. 497 U.S. at 841-42. Approving the procedure, the Court stated through Justice O’Connor that the Confrontation Clause did not

some harm through testifying,¹⁵⁴ the availability of these methods of reducing that harm serves to render the privacy rationale slightly less compelling when applied to child molestation cases. The evidentiary rationale, however, more than compensates for this weakness and supports exclusion of prior molestation evidence.

2. *The Evidentiary Rationale*

The evidentiary rationale focuses on how prior sexual conduct evidence may affect the jury. This Note argues that such evidence can damage a child's credibility in the eyes of a jury by enabling the jurors to believe, unreasonably, that a child who has suffered prior sexual abuse is much more likely to fabricate a second charge. This argument follows intuitively from a number of factors.

First, existing empirical studies tend to support a hypothesis that such evidence will prejudice the jury against the child because, as a

guarantee an "absolute right to a face-to-face meeting with witnesses against them at trial." 497 U.S. at 844. The Confrontation Clause did not prohibit such a procedure "[s]o long as a trial court makes . . . a case-specific finding of necessity." 497 U.S. at 860.

The absence of a specific determination of necessity appeared to be the decisive issue in *Coy v. Iowa*, 487 U.S. 1012 (1988), in which the Court held that the defendant's confrontation rights were violated when the trial court authorized a screen to be placed between the witnesses and the defendant, preventing the witnesses from seeing the defendant and presumably enabling them to feel more comfortable. Justice Scalia, speaking for the Court, acknowledged that "rights conferred by the Confrontation Clause are not absolute," but stated that no exception to the clause's general requirement of face-to-face confrontation applied in this case because "there have been no individualized findings that these particular witnesses needed special protection . . ." 487 U.S. at 1020-21.

Thus *Craig* and *Coy* stand for the proposition that such procedural measures which seek "to further the important state interest in preventing trauma to child witnesses in child abuse cases," *Craig*, 497 U.S. at 856-57, are constitutionally permissible if the trial court makes a particularized finding of need in the case at bar.

For a discussion of these procedural safeguards, see generally Josephine A. Bulkley, *Recent Supreme Court Decisions Ease Child Abuse Prosecutions: Use of Closed-Circuit Television and Children's Statements of Abuse Under the Confrontation Clause*, 16 NOVA L. REV. 687 (1992); Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HASTINGS L.J. 1259 (1992).

154. Some early research suggested that the legal process can compound the emotional trauma of the child sexual abuse victim. See Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES, Summer 1984, at 125, 128; Gail S. Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40 J. SOC. ISSUES, Summer 1984, at 157, 167-68 (summarizing existing research). Recent research, however, suggests that some children may benefit from the experience. See SANDRA B. SMITH, CHILDREN'S STORY: SEXUALLY MOLESTED CHILDREN IN CRIMINAL COURT 11-12 (1985) ("A misplaced desire to protect the child sometimes results in prosecutors, police officers, and other well-meaning adults treating the child like a china doll. . . . While there are some really valid reasons to not go through a court proceeding, the china doll syndrome should not be one of them. . . . Molested children have lost control over the most fundamental concept of the self: the integrity of one's body. Investigation and prosecution allow a child a safe forum from which to vent that anger and rage."); Desmond K. Runyan et al., *Impact of Legal Intervention on Sexually Abused Children*, 113 J. PEDIATRICS 647, 652 (1988) ("These data support a hypothesis that juvenile court testimony is not harmful and may actually be therapeutic for child victims."); John F. Tedesco & Steven V. Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 11 CHILD ABUSE & NEGLECT 267, 270 (1987) ("Data obtained from the sample did not, however, support the idea that the interview and litigation process was necessarily 'harmful' to children.").

general rule, jurors tend to doubt a child's testimony.¹⁵⁵ This belief conflicts with the opinions of researchers in the sexual abuse area that children rarely fabricate charges of sexual abuse.¹⁵⁶ Consequently, from the very beginning, jurors view children as less credible than adults.

Second, several state courts have found this evidence to be prejudicial. The Iowa Supreme Court, recognizing the danger of such evidence, stated that prior sexual conduct evidence had a "substantial danger of unfair prejudice, confusion of issues, misleading of the jury, and invasion of the complainant's privacy which Rule 412 and other rape shield laws are designed to prevent."¹⁵⁷ Likewise, the Michigan

155. Goodman et al., *supra* note 15, at 36-37 ("The present study suggests that mock jurors are concerned that children may remember less than adults do and that children may be easily manipulated into giving false reports. . . . Our findings indicate that adults can have negative biases about the veracity of children's testimony."); see also A. Daniel Yarmey & Hazel P. Tresillian Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in EVALUATING WITNESS EVIDENCE 13, 35 (Sally M.A. Lloyd-Bostock & Brian R. Clifford eds., 1983) (finding that only 30% of adults surveyed believed that a child would be likely to respond accurately to questioning by the police or in court); Duggan et al., *supra* note 34, at 92. In the Duggan article, the authors describe a study in which they conducted a series of simulated child sex abuse trials using child prosecuting witnesses of ages five, nine, and 13. They found that the nine-year-old prosecuting witness was more credible than the five-year-old witness, but the 13-year-old witness was the least credible of the three. The authors attributed the 13-year-old's lesser credibility to a judgment by the jurors that a child of that age may be partly responsible for the occurrence of the sexual activity.

156. Kathleen C. Faller, *Is the Child Victim of Sexual Abuse Telling the Truth?*, 8 CHILD ABUSE & NEGLECT 473, 475 (1984) ("Clinicians and researchers in the field of sexual abuse are in agreement that false allegations by children are extremely rare. Further in those unusual instances where they do occur, there is usually some serious malfunction in the family.") (footnote omitted); Berliner & Barbieri, *supra* note 154, at 127:

While adults are often skeptical when children report sexual abuse, especially by those in or close to the family, there is little or no evidence indicating that children's reports are unreliable, and none at all to support the fear that children often make false accusations of sexual assault or misunderstand innocent behavior by adults. The general veracity of children's reports is supported by relatively high rates of admission by the offenders. Not a single study has ever found false accusations of sexual assault a plausible interpretation of a substantial portion of cases.

(citations omitted); BILLIE W. DZIECH & CHARLES B. SCHUDSON, ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN 57 (2d ed. 1991) (citing a number of studies which estimate fabrication rates to be from less than two percent up to eight percent, ascending with the age of the child, and summarizing that all researchers report that "false accusations are extremely rare."). Other researchers assert child abuse fabrication may be more common. See John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1726 (1990) (review of DZIECH & SCHUDSON, *supra*) (arguing that Dziech and Schudson exaggerate the agreement among researchers by noting that two studies have found fabrication rates as high as 20% when the child's parents are embroiled in divorce litigation); HOLLIDA WAKEFIELD & RALPH UNDERWAGER, ACCUSATIONS OF CHILD SEXUAL ABUSE 280 (1988) (citing statement by former director of National Center on Child Abuse and Neglect "that 65% of all reports of suspected child abuse turn out to be unfounded" and reasoning that although that percentage is based on child abuse in general, "there is no reason to assume that it is any different with reports of child sexual abuse."). But see Myers, *supra*, at 1712-13, 1716 (review of WAKEFIELD & UNDERWAGER, *supra*) (arguing that Wakefield and Underwager have forsaken their objectivity, that this "loss of objectivity finds repeated expression in their resort to exaggeration," and that their book is "a biased, inaccurate, and adversarial indictment of efforts to respond to child sexual abuse").

157. State v. Clarke, 343 N.W.2d 158, 163 (Iowa 1984).

Supreme Court has noted:

[T]he potential prejudice from the admission of such evidence is great. First, in order for it to have minuscule probative value, it would have to refer not only to the existence of sexual conduct but also to the *details* of such conduct. To demonstrate a source of knowledge the details of such conduct would have to be compared to the details as presented at trial. There would be a real danger of misleading the jury.¹⁵⁸

Thus, these courts have noted the prejudicial qualities of prior sexual conduct evidence in child molestation cases.

Third, evidence of a prior molestation conveys much more information to the jury than the sexual innocence inference theory demands. The defendant ostensibly is arguing that the court should admit the evidence to show *capacity* to fabricate. Prior sexual conduct evidence, however, informs the jury that the child not only had the capacity to fabricate the charged conduct but that the child has in the past suffered through a traumatic experience, similar in nature to the one she now alleges. This added information, when coupled with jurors' innate distrust of children's testimony, may convince them that such trauma has caused the child to suffer under a delusion that the prior molestation has continued into the present. Alternatively, the jury may believe that it is simply too much of a coincidence for one child to have suffered two sexual assaults and consequently decide that the child must be fabricating the second assault — the charged offense.¹⁵⁹

Thus a court must be wary in dealing with such evidence. It seems clear that jurors will tend to value prior sexual molestation evidence too highly because of the shocking nature of the evidence as well as the jurors' own prejudices regarding child witnesses. While this prejudicial effect is significant, the prejudice is not sufficiently great to warrant categorical exclusion of all such evidence in child molestation

158. *People v. Arenda*, 330 N.W.2d 814, 818 (Mich. 1982); see *State v. Oliver*, 760 P.2d 1071 (Ariz. 1988):

Two of the policies underpinning [Arizona's court-created rape shield rule] — that requiring sex crime victims to defend every incident in their pasts will discourage prosecution and that the introduction of sexual histories might confuse the jury — are just as valid in a child molestation case as in a rape prosecution. In fact, child molestation victims may be even more adversely affected by unwarranted and unreasonable inquiry into largely collateral and irrelevant evidence than victims in rape cases.

760 P.2d at 1076.

159. Cf. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 209 (1986) (noting a study which found that in simulated rape trials, when the victim's prior sexual conduct was admitted in evidence, the subject-jurors tended to believe that the victim consented to intercourse, judged the victim's character unfavorably, and believed the victim was in some way responsible for the rape); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 67 (1988) ("[J]udging the credibility of witnesses is often a matter of logic and common sense. . . . Based on what they learn of the witness's background, jurors determine whether he or she is the kind of person who could be trusted As they do in other areas of life, jurors make these kinds of judgments on the basis of what they know from personal experience and culturally transmitted knowledge.").

cases. Nevertheless, the prejudicial effect is large enough to require the defendant first to attempt to prove the child's capacity to fabricate through other, less prejudicial means. This use of an alternative means of proof falls within the concept of probative value.

3. *Assessing Probative Value*

Probative value is a more narrow concept than relevance. An evidentiary item is relevant if it renders some material fact more or less probable. An item's probative value demonstrates *how much* more or less probable it renders a material fact.¹⁶⁰ The advisory note to Federal Rule 403 reveals other factors to be considered in balancing an item's probative value against its prejudicial effect: "Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. . . . The availability of other means of proof may also be an appropriate factor."¹⁶¹ The Advisory Committee's comment suggests the proper test: the judge must determine whether the evidence is necessary to rebut the sexual innocence inference, or whether other evidence in the case has successfully accomplished that. If there are alternative means of rebutting the sexual innocence inference that are not as prejudicial, the court may constitutionally exclude the prior sexual conduct evidence.

Several courts have acknowledged situations in which no need for the evidence existed because other evidence in the case clearly showed that the child was sexually knowledgeable and thus capable of fabricating the offense. A Missouri court found that "[f]rom the State's own evidence the jury could infer that [the child] was sexually aware, and the evidence defendant was not permitted to introduce would have added very little."¹⁶² Likewise, an Oregon court found that the State itself had prevented any possible sexual innocence inference by presenting "evidence that children of the victim's age would have some knowledge about sexual matters."¹⁶³ Thus, the judge should examine the evidence presented by the prosecution to see if it establishes that the child had the sexual knowledge necessary to fabricate the charge.¹⁶⁴

The other consideration of the Advisory Committee that the judge must evaluate — and, as this Note argues, the *most* important — is whether there are alternative means of rebutting the sexual innocence inference that are not so prejudicial. Two commentators argue that

160. Dolan, *supra* note 73, at 233-34.

161. FED. R. EVID. 403 advisory committee's note.

162. State v. Weiler, 801 S.W.2d 417, 419 (Mo. Ct. App. 1990), *cert. denied*, 112 S. Ct. 295 (1991), *affid.*, 827 S.W. 2d 291 (1992); see *supra* note 73.

163. State v. Wright, 776 P.2d 1294, 1298 (Or. Ct. App. 1989).

164. For other examples of the exclusion of evidence because evidence previously admitted had effectively rebutted the sexual innocence inference, see *supra* notes 125-26.

the sexual innocence inference can and should always be rebutted by this method.¹⁶⁵ Admitting prior sexual conduct evidence to rebut the sexual innocence inference "seems unnecessary inasmuch as the defendant can easily rebut this inference by questions or evidence limited to the child's prior knowledge of sexual terminology or practices, assuming that the prosecutor would not be willing to stipulate that the child was not sexually innocent."¹⁶⁶ The Michigan Supreme Court agrees: "Counsel could inquire whether the victim had any experiences . . . which aided him or her in describing the conduct that is alleged."¹⁶⁷

In the vast majority of cases, a judge could ensure that a defendant has an opportunity to prove the child's capacity to fabricate, without using prejudicial evidence, by simply requiring the defense attorney to ask questions about the child's sexual knowledge without making reference to the prejudicial source of that knowledge, the prior assault. Such questions do not offend the rape shield statute, which applies only to conduct; the opportunities to explore the basis for the child's knowledge also protects the defendant's cross-examination rights.¹⁶⁸ For example, defense counsel could cross-examine about (a) whether the child had seen movies or books that could have supplied such sexual knowledge; (b) whether the child had witnessed the sexual behavior of others; (c) whether the child had acquired sexual knowledge in school, through either traditional sex education classes or through "good touch, bad touch" training provided by local law enforcement authorities; or (d) whether the child might have learned about sexual matters from conversations with friends or family members.

Rarely should defense counsel be unable to prove to the jury through this method of questioning that the child had the sexual knowledge necessary to fabricate the offense.¹⁶⁹ In fact, the prosecution, rather than risk prolonged cross-examination of the young witness, may wish to consider stipulating to the fact that the child possesses the sexual knowledge necessary to fabricate the offense. Although conceding an important point, the prosecution prevents the jury from hearing the prior sexual conduct evidence, which, according to the evidentiary rationale analysis, is highly prejudicial because it conveys much more information than is necessary to establish capacity

165. 23 WRIGHT & GRAHAM, *supra* note 71, § 5387 (Supp. 1992).

166. *Id.*

167. *People v. Arenda*, 330 N.W.2d 814, 818 (Mich. 1982); *see supra* text accompanying note 107.

168. At least one court disagrees with such an approach. *See State v. Baker*, 508 A.2d 1059, 1062 (N.H. 1986), discussed *supra* note 73. But the Constitution requires only that the defendant have an opportunity for effective cross-examination; a trial judge can adequately supervise the questioning until satisfied that the state of the child's sexual knowledge has been established.

169. *See supra* text accompanying notes 107 and 166.

to fabricate.¹⁷⁰

Thus, the judge should exclude the evidence if:

- (1) evidence in the case has effectively rebutted the inference; or
- (2) there are less prejudicial means of rebutting the sexual innocence inference, such as by asking the child about her sexual knowledge.

If the state cannot satisfy either option, which would probably be a rare occurrence, the defendant's offer of proof would survive the relevance and prejudice tests and thus its admission would be constitutionally required under Federal Rule of Evidence 412 or state rape shield statutes modeled on that Rule.

CONCLUSION

Although the sexual innocence inference theory raises some potent constitutional arguments on its behalf, the theory is simply a vehicle for placing highly prejudicial evidence before the jury in child molestation cases. The theory raises the concern that the jury may give undue credibility to the child's testimony by inferring that the child could not have possessed the capacity to describe the sexual assault unless the offense had actually occurred. The force behind this argument is the Sixth Amendment's guarantee of a criminal defendant's right to cross-examine and challenge a witness's credibility. That force, however, simultaneously exposes its greatest weakness.

Although the Supreme Court has always stressed the importance of cross-examination as the defendant's main exercise of his Sixth Amendment confrontation rights, it also has stated that the defendant has no right to cross-examine in any way he sees fit. The defendant has no right to effective cross-examination; he has only the right to an *opportunity* for effective cross-examination. As long as the judge provides that opportunity, the defendant has received the full protection of the Sixth Amendment. The judge need not permit a prejudicial method of cross-examination when the defendant can achieve the same effect by another, less prejudicial method.

Any framework for the analysis of sexual innocence inference situations must ensure that the defendant has the opportunity to show that the child had the capacity to fabricate the offense, if such evidence exists, while also protecting the child and the State from the highly prejudicial effect of evidence of prior molestations. Consequently, before the judge admits prior sexual conduct evidence, he or she should examine the evidence to see if it meets these four requirements:

- (1) The child must be young enough at the time of trial such that the jury might infer that the child could not have possessed the requisite

170. See, e.g., *State v. Weeks*, 782 P.2d 430 (Or. Ct. App. 1989). In *Weeks*, the prosecution offered to stipulate that "children of the victims' ages would have some knowledge of sexual matters." 782 P.2d at 432 n.2. The court stated that this offer showed that the prosecution was not trying to assert the children's sexual innocence before the assault. 782 P.2d at 432 n.2.

sexual knowledge to describe the offense, unless the defendant had committed the offense. As an initial presumption subject to rebuttal, a court could reasonably assume that the jury will make the sexual innocence inference when the child is twelve years old or younger at the time of trial.

(2) The prior sexual conduct must be sufficiently similar to the charged offense such that experiencing the prior incident would give the child the specific knowledge necessary to be able to fabricate the charged offense.

(3) Other evidence admitted in the trial must fail to prove effectively that the child had the capacity to fabricate the offense.

(4) There must be no other less prejudicial means available to defense counsel to show that the child had the capacity to fabricate the offense.

If, after applying this framework,¹⁷¹ the trial judge remains unconvinced that the sexual innocence inference has been rebutted, the defendant has met his burden and the prior sexual conduct evidence, at this point constitutionally required, must be admitted.

Some maintain that a defendant should not have to follow such a circuitous route of cross-examination to establish a point that the prior sexual conduct evidence makes so forcefully.¹⁷² This view, however, fails to recognize that the evidence's prejudicial nature is precisely what makes it so "effective." When prior sexual conduct evidence is introduced, not only does the evidence effectively rebut the sexual innocence inference, it also plants a prejudicial seed in a juror's mind: the idea that a previous victim of molestation, due to the obvious emotional and mental trauma involved, has become prone to lie and fabricate other incidents of molestation. The defendant thus garners a double benefit from the evidence: he rebuts the sexual innocence inference and unfairly prejudices the jury against the child. Proper application of the above framework will protect effectively the defendant's Sixth Amendment right to cross-examine while ensuring the fair operation of the jurisdiction's rape shield statute.

171. At least one court followed a similar approach in dealing with an analogous issue. In *Commonwealth v. Black*, 487 A.2d 396 (Pa. Super. Ct. 1985), the defendant sought to introduce the prior sexual conduct of the child to show the child's motive to make a false accusation. The court held that to circumvent the state's rape shield statute prohibiting such evidence, the defendant must show: "(1) whether the proposed evidence is relevant to show bias or motive or to attack credibility; (2) whether the probative value of the evidence outweighs its prejudicial effect; and (3) whether there are alternative means of proving bias or motive or to challenge credibility." 487 A.2d at 401.

172. See *State v. Baker*, 508 A.2d 1059, 1062 (N.H. 1986); *supra* note 168 and accompanying text.