

# SEXUAL ASSAULT REPORT™

LAW | PREVENTION | PROTECTION | ENFORCEMENT | TREATMENT | HEALTH

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Pages 65 – 80

## *Recent Decisions*

### **Evidence, Rape Shield Laws, and DNA Testing**

by Anne L. Perry, Esq.

#### **Idaho Court of Appeals: New Trial Ordered to Allow Expert Testimony on Improperly Suggestive Interviewing Techniques**

**The Facts.** The defendant Robert Critchfield was tried on two charges of lewd contact with a minor, and seven charges of sexual abuse of a child. All of the victims, ranging in age from nine to 14 at the time of the incidents, were interviewed by law enforcement officers, and each later testified at trial. The defense sought to present the testimony of an expert in law enforcement techniques who was prepared to testify that the law enforcement interviews of the victims (which were recorded) were improperly conducted. According to the proposed testimony, rather than asking open-ended questions and following up on inconsistencies, the interviewing techniques were improperly suggestive and often called for the victim to agree with the interviewing officer, an authority figure, or with other victims, thereby possibly altering the perception and memory of a particular victim. The court excluded the testimony, concluding that because neither the recordings of the interviews nor testimony from the officers concerning the content of the interviews were placed into evidence, the expert

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## **Bystander Social Marketing Campaign: Its Impact Four Weeks Later**

by Sharyn J. Potter, Ph.D., MPH and Jane G. Stapleton, M.A.

### **I. Introduction**

Sexual and relationship violence are epidemic on college and university campuses, with research indicating that one in four women will be sexually assaulted or the victim of an attempted assault reporting during their college years (Fisher, Cullen & Turner, 2000; Koss & Gidycz, 1987; Krebs, Lindquist, Warner, Fisher & Martin, 2009; Frazier et al., 2009). This violence is not limited to women, however, as researchers have also found that 7% of men have been the victim of an attempted or completed sexual assault while in college (Banyard et al., 2007). On college and university campuses the majority of sexual assaults are perpetrated by intimate partners or acquaintances (e.g., classmates, residence hall neighbors, dates) rather than strangers (Fisher et al., 2000; Koss & Harvey, 1991; Sampson, 2002). Exposure to sexual and relationship violence is a significant public health problem as physical and mental health problems (including substance use, depressive symptoms, and symptoms of Post Traumatic Stress Disorder) are associated with exposure to sexual and relationship violence (Brener, McMahon, Warren & Douglas, 1999; Schafran, 1996; Black et

al., 2011). Further, conservative estimates of the monetary costs of one incident of rape are \$151,423. These costs include financial losses incurred by the victim, costs incurred in the justice system, and the expenses that communities are willing to pay to prevent this crime, including costs to increase personal security, third-party insurance costs, and government welfare programs (DeLisi et al., 2010).

Even though college and university campus communities are at-risk environments for sexual and relationship violence, there is great variability in the extent to which they are working to prevent this problem (Karljane, Fisher & Cullen, 2005). In an effort to hold college and university administrators accountable for the crimes occurring on their campuses, the U.S. Department of Education issued a Dear Colleague Letter (DCL) in April 2011 restating that Title IX of the Education Amendments of 1972 addresses sexual harassment which includes acts of sexual violence. The DCL provides clear directives for colleges and universities to implement education programs on sexual assault for incoming and returning students, residence hall staff, and faculty/staff members. Previous to this Dear

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Colleague Letter, Title IX of the Education Amendments of 1972 has historically been applied to sex equity in athletics. This Dear Colleague letter reminds colleges and universities of their responsibility to respond quickly and effectively to sexual assault complaints on their campuses. Additionally, the DCL recommends that colleges and universities provide prevention focused educational programs to faculty, students, and staff. This education will protect students from harm and insulate institutions from potential liability.

Historically, sexual and relationship violence prevention on college campuses has meant the presentation of in-person educational programming requiring student attendance, and the hiring or training of staff as facilitators. Studies of these programs demonstrate mixed results regarding effectiveness, especially over time (Anderson & Whiston, 2005). Recently, prevention programs have tried to engage community members in the prevention of sexual and relationship violence by training a community member to safely intervene as a bystander in situations where this type of violence is occurring, has the potential to occur, or has already occurred (Banyard, Moynihan & Plante, 2007;

Katz, 2007; Foubert & Newberry, 2006). However, the majority of the prevention strategies that train and educate community members to act as bystanders have been in the form of in-person programs (Potter & Banyard, 2011). Results from multiple evaluations of the *Bringing in the Bystander In-Person Prevention Program* indicate that this approach to prevention is effective in increasing participants' knowledge and attitudes regarding effective and prosocial responses to sexual and relationship violence. Further, participants exposed to the program report acting as a prosocial bystander in situations where sexual and relationship violence were occurring (Banyard et al., 2007; Moynihan, Banyard, Arnold, Eckstein & Stapleton, 2010; Banyard, Moynihan & Crossman, 2009).

A recent approach to sexual and relationship violence prevention on college and university campuses utilizes social marketing to model bystander skills. On college and university campuses, social marketing campaigns are used to educate target audiences on individual and community health issues, including increasing one's fruit intake (Shive, Neyman & Morris, 2006), reducing alcohol misuse (Turner, Perkins & Bauerle, 2008), and increasing the use of bicycle helmets (Ludwig, Buchholz &

Clarke, 2005). Yet few social marketing campaigns address the community member's role in preventing sexual and relationship violence (Potter & Perry, 2008). With few exceptions, evaluation of these campaigns is limited (Potter & Perry, 2008; Potter, 2012; Potter, Moynihan & Stapleton, 2011). Further, few social marketing campaigns assess target audience member reactions after the campaign materials are removed.

In this paper we assess the attitudes of undergraduate students exposed to a social marketing campaign that portrays community members acting as prosocial bystanders in incidents of sexual and relationship violence for a four-week period during the 2011 spring semester. Participant attitudes were compared at three points in time: prior to the campaign administration; immediately after the campaign ended and the materials were removed; and then again four weeks following this date. We assessed whether campaign exposure changed the attitudes of participants at a midsize northeastern public university and engaged them to work towards reducing sexual and relationship violence. We also sought to determine whether any such attitude changes persist over time.

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## Sexual Assault Report™

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## Campaign Development

The *Know Your Power Bystander Social Marketing Campaign* was originally developed by a working group of university faculty, staff, and students who received grant funds from the Office on Violence Against Women, U.S. Department of Justice, to design a campaign to address violence against women on college and university campuses (see Potter, Stapleton & Moynihan, 2008). The original campaign had four images that portrayed members of the college community safely intervening when their friends and/or peers are at risk for sexual or relationship violence, during and after an incident of sexual and relationship violence. Over the past eight years the campaign has grown and there are now 22 images that address the continuum of sexual and relationship violence, including glorifying sexual violence and cyberstalking. Four of the images address sexual and relationship violence in the lesbian, gay, and bisexual community (Potter, Fountain & Stapleton, 2012). When a campaign is administered in a new location, a total of four to eight images are selected from the 22; then, either the text on the images is changed to reflect the new campus context or the images are reshot using local actors, locations, and other details to ensure that they are immediately identifiable as reflecting the specific campus context.

We include our target audience members (undergraduate students) in all aspects of development, design, and administration of the campaign (Potter, Moynihan & Stapleton, 2011; Potter & Stapleton, 2011). Ideas for the specific image scenarios to be used in the campaign are obtained during facilitated focus groups with 15-20 members of the target audience (Potter & Stapleton, 2011). During the image development phase, university faculty, staff, and students in the working group facilitate focus groups and meet on a bi-weekly basis for three months to devise image scenarios and scene details, as well as identify and define the bystander's role. Faculty facilitators and students work together to determine the staging location, actor "costumes," and the other setting details for the photo shoot. After the locations and photographer are secured, the scenarios are photographed with target audience members serving as actors, directors, and photographic assistants (Potter & Stapleton, 2011). When the campaign is launched in a new location, we follow these steps to create new images that will reflect

the unique social context of that particular community or we edit the existing images to reflect the needs of the new locations.

## Description of Campaign Images

The campaign scenarios utilize place, context, and language familiar to target audience members (Potter, 2012; Potter et al., 2011; Potter & Stapleton, 2011). During the specific campaign administration we describe in this paper, we used the eight campaign images where the actors in the images model active bystander behaviors, safely intervening before, during, or after the occurrence of sexual and relationship violence. The content of each image is compatible with a campaign designed to educate students about the continuum of violence and aimed at reducing sexual and relationship violence on campus. Of the eight campaign images that were utilized during the spring 2011 semester, three images modeled bystanders intervening prior to the occurrence of an incident of sexual and relationship violence. In two of the eight images, friends are strategizing on

at a college party. The students realize that one of their friends has gone upstairs with the man with whom she was playing "beer pong." The friends identify the situation and discuss how they will prevent their friend from being sexually assaulted. The first friend says, "I just saw Joe take Anna into his room. She is wasted." The second friend states, "Joe got her drunk when they were playing Beirut (beer pong)." The third friend states, "Let's go check on her. If he does something when she's drunk, that's rape." This scenario highlights how bystanders can intervene when a potential perpetrator tries to use alcohol to facilitate an unwanted sexual experience. The tagline for this image read as "Friends watch out for one another ... Especially when there is alcohol involved."

Finally, the campaign images address how bystanders can intervene following an incident of relationship violence. Two friends are sitting in a residence hall study room when one friend notices that their friend's ex-boyfriend has been posting naked pictures of her on the Internet. The first friend says, "Look at this. Right after

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### *One campaign tag line: "Friends don't let friends use alcohol to commit a crime."*

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how to stop violence that is occurring, and in three of the eight images, bystanders are helping a friend or defining an incident that has occurred as sexual violence.

For instance, in one of the three images that focus on the role of the bystander before the occurrence of sexual violence, three young men are shown in the parking lot of a local convenience store discussing plans for their party later that night. The first friend states, "I'll get the beer." The second friend volunteers to watch over the party, saying: "I've got a 9:00 a.m. mid-term tomorrow morning. I won't drink. I'll make sure the guys stay in line." The third friend acknowledges the appropriateness of his friend's offer when he states, "Good call. We don't want a repeat of the rape that happened last year." In addition to the campaign slogan ("Know Your Power, Step in, Speak Up, You Can Make a Difference"), there is a tag line with advice to bystanders that is specific to each image. The tag line in this image states, "Friends don't let friends use alcohol to commit a crime."

In one of the two images that model bystander behavior when sexual violence is occurring, we highlight three students talking

Kyle and Angela broke up he posted photos of them having sex that have gone viral." The second friend realizes that their friend needs support and says, "I heard he used a hidden camera to take the pictures. I'm worried about her. Let's see if she is okay." The tag line on this image states: "Using hidden cameras is a crime and will be prosecuted to the full extent of the law."

## Campaign Administration

Campaign dissemination included five distinct components. First, eight campaign images were printed on 11 x 17 posters and then four posters (each with one campaign image) were posted near each other in clusters in 366 posting locations in all campus academic, administration, recreation, residence buildings, and surrounding local businesses. For instance, posters were hung on the back of the bathroom stall doors in residence halls with common restroom facilities. In university apartments, posters were hung in elevator lobbies and common study areas. Two times per week during the campaign period, student assistants used posting location sheets to

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make sure that the posters were in place and replaced missing and vandalized posters. Second, campaign images were enlarged to fit on sides of buses that regularly circled through campus. Third, the large screen spaces located outside student dining areas displayed campaign images and the 600+ university cluster computers rotated screen size campaign images that students viewed each time they logged on. Fourth, products displaying the campaign website and logo (e.g., water bottles, highlighter pens, Frisbees, bookmarks with campaign images) were distributed in high-traffic areas, including student and athletic centers as well as dining areas. Fifth, bookmarks with campaign images were distributed in all university libraries and bookstores.

### Previous Evaluations

Preliminary evaluation of the *Know Your Power Bystander Social Marketing Campaign* has been found to increase target audience members' awareness regarding sexual and relationship violence and stalking, increased willingness to get involved in reducing violence, and increased likelihood to act as an active bystander in a situation where sexual and relationship violence is about to occur, is occurring, or has occurred (Potter, Moynihan, Stapleton & Banyard, 2009; Potter, Stapleton & Moynihan, 2008; Potter, 2012). Further, participants who report seeing the campaign images once a day or more, show a higher internalization of the campaign message compared to participants who see the campaign less than once a day. In other words, a higher campaign "dose" is associated with participants' increased awareness regarding the problems of sexual and relationship violence and a greater willingness to work to reduce this problem (Potter, 2012; Potter et al., 2011; Potter & Stapleton, 2011). Students who report that the actors in the images look like themselves or the people they spend time with exhibit a greater willingness to intervene than those who do not report "seeing themselves" in the images (Potter et al., 2011).

## II. Methods

### Research Design

In this study, we set out to examine whether attitude change persists after the campaign ends and participants are no longer regularly exposed to the campaign materials and messages. To accomplish this, we evaluated the campaign in three stages. Two weeks prior

to campaign administration, we sent all undergraduate students an e-mail inviting them to complete three 5-7 minute online surveys focused on a community problem. Participants who completed the first survey and gave us permission to recontact them were e-mailed the link to a second survey immediately following the four-week administration of the campaign. Those students who completed the first and second surveys and gave us permission to recontact them were sent a link to the third survey five weeks after the administration of the second survey. Participants created a unique code for purposes of linking the three surveys together. In exchange for their participation in the research, students were offered two opportunities to win cash prizes. Following the completion of the post-test, participants were entered into a lottery drawing to win one of five \$100 cash prizes. Participants were then entered into a drawing to win one of two \$250 cash prizes after they completed the four-week follow-up test.

### Response Rate

Thirteen hundred students completed the pretest that was administered two weeks prior to the administration of the campaign, 585 students completed the post-test that was administered immediately following the four-week administration of the campaign, and 360 students completed the follow-up test that was administered five weeks following the administration of the campaign. Two hundred thirty-six students completed a survey at each of the three evaluation points. In this analysis we utilize the merged data for these participants.

### Measures

Outcomes included the *Revised Illinois Rape Myth Scale* (McMahon, 2010) and the *Action Stages of Change Bystander Behavior Scale* (Potter et al., 2011; Banyard, Eckstein & Moynihan, 2010). The post-test also included the widely used, shortened version of the *Social Desirability Scale* (SDS) (Strahan & Gerbasi, 1972) to determine if participants were providing answers they thought were "correct" rather than answers based on their experiences and attitudes. The scale includes a series of 10 true/false questions that assess respondents' attitudes and traits. Two examples of questions on this scale are: "I never hesitate to go out of my way to help someone in trouble," and "I am sometimes irritated by people who ask favors of me." The measure was included to test whether there were any significant correlations between the SDS and any of the

outcome variables, but there were none, so it was not included as a covariate in any of the subsequent statistical tests.

**Rape Myth Scale.** The *Revised Illinois Rape Myth Scale* (McMahon, 2010) is a 19-item Likert scale developed to assess participants' endorsement of a variety of common myths about sexual assault. The *Revised Illinois Rape Myth Scale* assesses participants' acceptance of rape myths using slightly different language than the original scale (e.g., "girls" and "guys" rather than "men" and "women"), and it includes 19 items rather than the 45 items on the long version of the scale (Payne, Lonsway & Fitzgerald, 1999). The scale can provide educators and program facilitators with a baseline understanding of undergraduate students' acceptance of commonly held myths regarding sexual assault. Two examples of questions in the scale include, "When girls go to parties wearing slutty clothes, they are asking for trouble" and "If a guy is drunk, he might rape someone unintentionally." Participants circle a number from 1-5, with a value of 1 representing *strongly agree* and 5 representing *strongly disagree*. If the scale is used in a pretest and post-test it can also be used as one measure in determining whether an educational intervention may be an effective tool in changing participant attitudes. Cronbach's *alpha* in the current study was .92.

**Action Stages of Change Bystander Behavior Scale.** The eight questions on this scale assess whether or not participants have taken action to prevent sexual and relationship violence (Potter et al., 2011; Banyard, Eckstein & Moynihan, 2010). The four relationship violence items on the action subscale are (1) "I have recently attended a program about intimate partner abuse," (2) "I am actively involved in projects to deal with intimate partner abuse on campus," (3) "I have recently taken part in activities or volunteered my time on projects focused on ending intimate partner abuse on campus," and (4) "I have been or am currently involved in ongoing efforts to end intimate partner abuse on campus." Higher scores indicate a greater likelihood that the participant has taken action to prevent sexual and relationship violence. Cronbach's *alpha* was .94 in the present sample.

## III. Results

### Participants

The average age of the participants was 19.9, and they had been enrolled in the university for an average of 4.5 semesters.

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First year students comprised 24% of the sample, sophomores accounted for 26%, juniors represented 32%, and seniors were 18%. Ninety-two percent of the students identified as white, and 77% lived in university housing (with 63% in residence halls and 14% in university apartments. An additional 23% resided in off-campus housing. Only 20% of the participants reported previously participating in a campus program aimed at preventing violence on campus. Comparing sample demographics to university statistics, we found the sample to be generally representative of the larger population with the exception of the sample having more women (78% versus 55%).

**Multivariate Analysis**

We calculated a repeated-measures multivariate analysis of variance (MANOVA) to compare participant scores on the revised

*Illinois Rape Myth Scale* and the *Action Stages of Change Bystander Behavior* at three times: pretest, post-test, and follow-up.

In the MANOVA analysis, we found an overall significant main effect for time ( $F_{4,236} = 2.90, p < .05$ , Wilks'  $\lambda = .951$ , partial  $\eta^2 = .05$ ) and for class standing, which contrasted first year students and sophomores with juniors and seniors ( $F_{2,236} = 7.21, p < .001$ , Wilks'  $\lambda = .941$ , partial  $\eta^2 = .06$ ). However, no main effects were found for the other variables that we measured, including perceived realism of campaign materials and participant exposure. Exposure was assessed by how often the participants reported seeing the campaign images (e.g., more than once a day or once a day or less) and whether or not the participants received a product with the *Know Your Power* campaign logo. There was a significant time-by-realistic scenario interaction ( $F_{4,236} = 4.26, p < .01$ , Wilks'  $\lambda = .930$ , partial  $\eta^2 = .07$ ), but no significant

time-by-sex, time-by class, time-by dosage or time-by product receipt interactions. Participants who indicated that they found the images realistic had significant changes in their scores on both the revised *Illinois Rape Myth Scale* and the *Action Stages of Change* measure over time compared to participants who disagreed or were undecided.

Table 1 displays means and standard deviations for outcome measures by independent variables at three time points. Univariate analyses yielded a significant difference in the rape myth scales scores across the three time periods (pretest, post-test, four-week follow-up) for participants who identified as both underclass (first year and sophomore) and upper class (junior and senior) ( $F_{2,236} = 3.15, p < .05$ , partial  $\eta^2 = .02$ ). In other words, both of these student groups had a reduced rape myth scale score following their exposure to the campaign. Further, participants who reported that campaign images were realistic had significant

**TABLE 1: Sample Size, Means, and Standard Deviations for Outcome Measures by Group and Time Across Three Data Collection Times (N =236)**

	Sample Size		Rape Myth Scale Score <sup>a</sup>						Action Stage of Change Scale Score <sup>b</sup>					
	All Participants		Pretest		Post-test		Follow-up		Pretest		Post-test		Follow-up	
	N	%	M	SD	M	SD	M	SD	M	SD	M	SD	M	SD
Sex														
Female	185	78	1.82	.62	1.74	.63	1.70	.67	12.51	6.43	12.96	6.89	13.07	7.05
Male	51	22	2.04	.59	1.99	.72	1.99	.73	11.63	6.04	11.49	5.27	11.79	5.57
Class														
Underclass: first or second year student	118	36	1.72	.56	1.67	.60	1.66	.64	11.98	6.37	12.17	6.35	12.13	6.23
Upperclass: third or fourth year student	118	36	2.01	.65	1.93	.69	1.86	.73	12.82	6.43	13.11	6.79	13.49	7.16
Campaign dosage														
Saw campaign images more than once a day	129	55	1.84	.64	1.79	.68	1.74	.70	13.29	6.91	13.22	7.13	13.53	7.33
Saw campaign images once a day or less	107	45	1.89	.60	1.81	.64	1.78	.69	11.27	5.49	11.80	5.67	11.83	5.80
Received at least one campaign product														
No	120	51	1.89	.58	1.84	.64	1.78	.68	11.69	5.60	12.00	5.82	12.79	6.09
Yes	116	49	1.85	.66	1.75	.68	1.74	.70	13.10	7.07	13.28	7.23	12.82	7.35
Realistic campaign images <sup>c</sup>														
Agree	108	46	1.80	.55	1.75	.56	1.64	.56	12.56	6.63	13.66	7.13	13.16	6.83
Disagree/undecided <sup>d</sup>	128	54	1.92	.68	1.84	.74	1.86	.77	12.21	6.17	11.65	5.86	12.45	6.62

<sup>a</sup> A decrease in the Rape Myth Scale Score indicates participants are less accepting of rape myths.

<sup>b</sup> An increase in the Action Stage of Change Scale Score indicates that participants report taking action to reduce sexual and relationship violence.

<sup>c</sup> Agreed with the following statement: *The images depict realistic situations.*

<sup>d</sup> Participants who agreed with the statement were compared to participants who disagreed or were undecided.

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differences in their scores on the rape myth scale ( $F_{2,236} = 4.00, p < .05, \text{partial } \eta^2 = .02$ ) and action stages of change scale ( $F_{2,236} = 3.29, p < .05, \text{partial } \eta^2 = .01$ ) scores. The participants who indicated that the images were realistic showed lower rape myth scale scores between the pretest and post-test and a further decrease in rape myth scale scores between the post-test and four-week follow-up. This suggests that their acceptance of rape myths decreased following exposure to the campaign, and the effect lasted at least four weeks following the removal of the campaign. A similar finding was seen for the action stages of change scale where participants exposed to the campaign reported an increase in the actions they had taken to reduce sexual and relationship violence on their campus. A large increase was seen between the pretest and post-test period, and some of this increase

remained through the follow-up period. Again, this suggests that exposure to the campaign can increase participants' actions to reduce sexual and relationship violence.

campus-wide and designed to permeate the campus, it was difficult to find undergraduates who were not exposed and could serve as a control group. A replication of this study could utilize at least two campuses with similar population demographics. Further, like most research that examines attitude change we relied on participants' assessment of their own attitudes and changes in attitudes. However, the lack of significant results from the *Social Desirability Scale* addresses this concern to some extent by suggesting that participants provided insights based on their actual perceptions and experiences rather than trying to give the "correct answers."

### V. Conclusion

The positive impact of the program is particularly encouraging given its modest cost; the total cost for the four-week period of the social marketing campaign was approximately \$15,000. This included

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## ***Results indicate that social marketing can indeed change undergraduate students' attitudes. Further research is needed to examine how long exposure effects last.***

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### IV. Discussion

To our knowledge, this is the first time that a sexual and relationship violence prevention social marketing campaign has been evaluated at two post-administration time points. Results indicate that social marketing can indeed change undergraduate students' attitudes. The significant effects for participant attitudes (as exhibited by the reduction of their acceptance of common rape myths) indicate that social marketing campaigns can change attitudes. Further, participant reports of increased bystander behaviors for participants who described the campaign images as realistic further supports the practice of engaging target audience members in the creation of social marketing campaigns to reduce sexual and relationship violence. While we found that changes were maintained five weeks following exposure, further research is needed to examine how long exposure effects last.

One limitation of our study was the lack of opportunity to include a control group. Since the campaign was administered

poster printing, bus image printing and set-up, product costs, student labor, and cash prizes for the lottery drawing for research participants. Image production was completed on a minimal budget as university photographers and graphic artists were employed. Students served as actors, directors, and photographic assistants. An outside graphic design firm worked with researchers to design the original image frame. Clearly, the \$15,000 price tag for the saturation of a campus with 12,000 undergraduate students for a four-week period represents only a fraction of the mental, social and physical health costs (including lost work and schooling) that are incurred by victims of sexual and relationship violence. With benefits including the reduction of participants' acceptance of common rape myths and an increase in the actions taken to prevent such violence, it is clear that the modest cost of such social marketing efforts are worthwhile. We believe they should be replicated on other college and university campuses.

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### Arizona Court of Appeals: Rape Shield Statute Precluded Evidence of Victim's Prior Sexual Conduct Absent Violation of Defendant's Constitutional Rights

**The Facts.** The 38 year old defendant was charged with four counts of sexual conduct with a 15 year old minor. The defendant sought to introduce the victim's statement to him that the victim had engaged in oral sex with two other individuals. The defendant argued that this evidence was admissible because it spoke to his belief that the victim was 18 or older. The defendant also argued that the rape shield statute was unconstitutional as applied to the evidence he sought to admit.

The trial court denied the State's pretrial motion to preclude the statements about the victim's prior sexual conduct. The trial court found that the evidence was not prohibited by Arizona's rape shield law, as the evidence was relevant to the theory of defense and supported by the defendant's right to confrontation. The trial court reasoned that "the rape shield law was not designed to protect against the defendant from being able to raise a theory of defense that goes to an element of the offense."

The State sought relief from the trial court's pretrial order permitting testimony at trial of the victim's prior sexual conduct.

**Evidence Precluded by Plain Language of Rape Shield Law.** The Court of Appeals of Arizona examined the plain language of the rape shield statute which precludes evidence of the victim's prior

sexual conduct except in five narrowly described circumstances. It was conceded that the offered evidence did not fall into any of the five exceptions and was thus prohibited by the plain language of the statute. The appellate court expressly disagreed with the trial court rationale since any evidence that goes to an element of the offense would be relevant, but the rape shield statute would nonetheless apply.

**Trial Court Should Have Engaged in Balancing to Determine Whether Statute Was Constitutionally Applied.** The court next considered the constitutionality of the statute as applied to the evidence the defendant sought to admit. While the rape shield statute was previously found constitutional on its face, there may be cases where

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