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REFORMING THE CRIMINAL LAW: UNIVERSITY OF BALTIMORE SCHOOL OF LAW GROUP GOES TO ANNAPOLIS

By Lynn McLain¹

I. The Law is Ever Evolving

Law students arrive at the beginning of their first year, expecting to “learn the law.” They may naively think of the law as a body of information they must commit to memory.

Law students quickly learn, however, that “studying law” is a more apt phrase for what will be a lifelong undertaking. The law can never be “learned” in the sense of being memorized. Bits and pieces – some of its basic building blocks – can and should be committed to memory. But most important of these are the skills of (1) finding the law applicable to a given problem (which in turn necessitates both analysis that results in asking the right questions and then searching all the appropriate places for the possible answers), (2) analyzing that law, and analogizing and synthesizing it to and with related legal authority, and (3) finally, expressing one’s reasoning and conclusions clearly, both orally and in writing.

Memorizing all of “the law” is impossible for two reasons. First, there is just too much law out there for any one person to memorize. This remains true even if one concentrates on a limited field, such as criminal law, family law, environmental law, trusts and estates, real property law, copyright law, patent law, bankruptcy law, trademark law, or tax law. Secondly, the law is ever evolving. Federal, state, and local agencies make new rulings and adopt new regulations; federal and state legislatures and town councils adopt new statutes and ordinances; executives issue executive orders; and courts all across the country (leaving aside, for a moment, international law) issue new opinions daily.

Law school is merely a three-to-four year concentrated introduction to the study of law, which will become a lifetime avocation for all lawyers. Like most things in life, there are plusses and minuses to this fact. On the plus side, because the law is never finished, it need not remain the same. We can make an effort to reform it when we discern a need for improvement.

II. Law Students Can Achieve Law Reform

The recognition that we may change the law for the better presents both a daunting and empowering challenge. University of Baltimore School of Law faculty, alumni, and students routinely take up this challenge on local, state, national, and international fronts.

Recognition of my students’ power to reform the law was brought home to several of my Evidence students in late fall 2001. In the midst of a section of the course focusing on character evidence in general, we whitewater rafted at a dizzying speed through the federal rape shield law, Federal Rule of Evidence (FRE) 412, and its Maryland state counterpart.² I mentioned a recent decision of the Court of Special Appeals of Maryland that, in my mind, pointed out the need to amend the Maryland statute, and asked that interested students contact me after the end of the semester if they wanted to pursue the challenge.

This article will first provide some background regarding rape shield laws in general and the Maryland statute. It then will chronicle my students’ and my successful efforts over the 2002 and 2003 legislative sessions to reform Maryland criminal and evidence law by legislatively overruling two Maryland appellate cases: *Churchfield v. State*,³ which held that the state rape shield law did not protect victims when the defendant was being tried for sexual child abuse, and *Cooksey v. State*,⁴ which held that Maryland recognizes no crime of continuing sexual offense against a child other than the rather narrowly applicable crime of child abuse.⁵

III. The Rape Shield Laws in General

Both the Maryland rape shield statute and FRE 412 were adopted in the 1970s (1976⁶ and 1978,⁷ respectively) in a national wave of law reform achieved by “the women’s movement.” Studies show that rape was⁸ (and, unfortunately, remains)⁹ a vastly under-reported and, thus, under prosecuted crime.

The 1970s reform was aimed at protecting rape vic-

tims from intimidation caused by having to face public humiliation and harassment during cross-examination as to any consensual sex the victims might have had at anytime in their lives, with anyone other than the defendant.¹⁰ These excoriating cross-examinations became known as “the second rape upon the witness stand.”¹¹ Prior to the adoption of the rape shield laws, many victims who reported rape declined to go forward with the prosecution of their assailants because the victims feared the ordeal of such brutal cross-examinations.

The common-law theory of relevance – which, to many modern ears, no doubt seems so outdated as to be quaint – of this line of questioning was twofold. First, in every case in which a woman complained of a sexual assault, her reputation as a previously unchaste woman was admissible to impeach her credibility by showing that she possessed a character that made her unworthy of belief.¹² Secondly, if consent were raised as a defense, this evidence was admissible as substantive evidence to help prove consent.¹³ The underlying logic was that if the victim consented to sexual activity with one person (*e.g.*, her boyfriend or her fiancé) it increased the likelihood that she consented to sex with the defendant (no matter whether it was acquaintance “date rape” or dragged-by-a-stranger-into-an-alley-rape). The fact that the victim was a “fallen woman” who had had premarital or extramarital sex was provable both by character witnesses who gave reputation or opinion evidence as to the victim’s lack of chastity and, in some jurisdictions, by questioning the victim about specific instances of her prior sexual conduct.¹⁴

The legislators’ response to the women’s movement’s outrage to this line of questioning was to pass “rape shield laws.” Under these statutes and rules, evidence of the victim’s reputation for chastity or lack of chastity is generally wholly inadmissible (unless the prosecution or victim puts it in controversy),¹⁵ as is another witness’s opinion testimony regarding the victim’s character for chastity.¹⁶ Evidence of specific instances of the victim’s prior sexual conduct is sharply curtailed.

Rape shield laws generally provide that a victim’s sexual activity with someone other than the defendant is inadmissible to prove consent to sex with the defendant.¹⁷ The only evidence of prior sex that is admissible on the issue of consent is evidence of prior instances of consensual sex between the victim and the defendant.¹⁸

sent, evidence of specific instances of the victim’s sexual conduct, other than with the defendant, may be admissible under the rape shield laws, but only if shown in a pretrial hearing to have special relevance to the pending case.¹⁹ For example, the rape shield laws do not *per se* preclude the defendant from offering evidence of the victim’s sex with another person if it resulted in physical evidence that has been entered against the defendant or was found at the time of the charged crime, such as semen, or evidence of physical injury.²⁰ To a large extent, however, the tremendous advance of DNA technology makes much of this kind of use of evidence of other sex obsolete.²¹

FRE 412 contains an intentionally vague safety valve permitting the admission of evidence of the victim’s sex with others when its admission is mandated by “the constitutional rights of the defendant” (*i.e.*, the accused’s right to confrontation).²² The Maryland statute guarantees that same protection but uses more helpful language. The Maryland statute provides that evidence that gives the victim a motive to falsely accuse the defendant will be admitted.²³

The Maryland statute provides:

Evidence of a specific instance of a victim’s prior sexual conduct may be admitted . . . only if the judge finds that (1) the evidence is relevant; (2) the evidence is material to a fact in issue in the case; (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and (4) the evidence is:

- (i) of the victim’s past sexual conduct with the defendant;
- ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
- (iii) supports a claim that the victim has an ulterior motive in accusing the defendant of the crime; or
- (iv) is offered for the purpose of impeachment after the prosecutor has put the victim’s prior sexual conduct in issue.²⁴

Both federal and state laws require that the defendant provide pretrial notice of his or her intent to offer

evidence of specific instances of the victim's sexual activities.²⁵ The trial judge, in an *in camera* (closed) hearing, must evaluate the probative value of such evidence against the risk of unfair prejudice to the victim, confusion and misleading of the jury, and undue consumption of trial time.²⁶

The judge generally must rule pretrial whether the evidence will be permitted.²⁷ The requirement of a pretrial ruling prevents sneak attacks on a victim. If the judge rules pretrial that the evidence will not be permitted, defense counsel cannot delve into it at trial. If the judge rules that the evidence will be permitted, the victim may reevaluate whether she wishes to proceed. The victim also can appeal that interlocutory ruling, because forcing the victim to wait until after the objectionable evidence comes out at trial would provide the victim with no meaningful protection if the trial judge was incorrect. If the appellate court finds the trial judge erred, the victim will be protected at trial.

IV. The Evolution of Maryland's Rape Shield Statute Pre-*Churchfield*

As passed in 1976, Maryland's rape shield statute provided that it would apply in cases of first- or second-degree rape. Rape is defined under Maryland criminal law as involving penetration of the vagina.²⁸ The initial rape shield law, therefore, responded to the need to protect female rape victims from being dragged through the mud by irrelevant cross-examination. The Legislature was responding logically to the identified problem: defendants were unfairly intimidating rape victims by (1) routinely offering reputation or opinion evidence as to the victims' lack of prior chastity and by (2) raising consent as a defense and then harassing and humiliating victims by questioning them about their other unrelated sexual experiences, which were not in fact probative of consent with the defendant.

But the limited coverage of the rape shield statute necessitated its repeated amendment as it became clear this defense tactic could be used unfairly in the context of other charged sex crimes as to which consent was a defense.²⁹ In the flurry of piecemeal responses to that problem, the second implicit purpose of the initial law, rejecting the common-law precept that a female who had had sex other than in marriage was unworthy of belief, became obfuscated.

The bills that we proposed in 2002 and 2003, and the one that ultimately passed in 2003, addressed both of these problems, so as to put a stop to the use of such information to impeach a female's credibility and to preclude the need for further piecemeal amendment. The bills also extended the scope of Maryland's "rape shield law" to provide equal protection for male and female victims of sex crimes.

A. Credibility: The Second Tine of the Common-Law Fork

Maryland's 1976 rape shield statute responded most obviously to the outrage voiced over the notion that a woman's consensual sex with one man prior to or outside marriage somehow helped to prove that she consented to sex with any other man. Yet it also implicitly responded to another, at least equally perfidious common-law doctrine: that such a "fallen woman" was unworthy of belief when she testified under oath.

The common law permitted character evidence as to a woman's lack of chastity for these two purposes, consent and credibility, in two ways:

(1) Testimony by character witnesses as to the woman's reputation in the community for lack of chastity³⁰ (later expanded by statute to permit opinion testimony, as well),³¹ and

(2) Proof of specific instances of the woman's sexual conduct other than that pertinent to the charged crime, by questioning the woman herself and, perhaps, by extrinsic evidence as well.³²

The great evidence scholar Dean Wigmore happily embraced this unashamedly sexist doctrine. He wrote, in 1940:

There is . . . at least one situation in which chastity may have a direct connection with veracity, *viz.* when a *woman or young girl testifies as complainant against a man charged with a sexual crime, — rape, rape under age, seduction, assault.* Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal

instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. *The unchaste* (let us call it) *mentality* finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim.

* * *

*No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.*³³

Wigmore advocated that rules of evidence “must be modified or interpreted to permit *the woman's character as to chastity* to be considered, inasmuch as this trait may be *inextricably connected with a tendency to untruthfulness in charges of sex offences.*”³⁴

Maryland's General Assembly rejected this line of thinking in two ways in 1976, when it passed the State's first rape shield law. First, it excluded reputation and opinion evidence as to a rape victim's chastity altogether. Second, it restricted evidence of specific instances of the victim's other sexual experiences to those having specific relevance. One of these permissible categories listed in the statute goes directly to the victim's credibility: “Evidence which supports a claim that the victim has an ulterior motive in accusing the defendant of the crime”³⁵

This provision was not intended to un-do the statute's trumping of the common law, which had permitted such evidence *de rigueur* in every case. Rather, it was intended (and subsequently construed) to permit such evidence only when it was highly relevant, in that it provided a specific motive to falsely charge rape. In 1976, the classic hypothetical example of when this provision would apply was when an unmarried female had become pregnant as a result of consensual sex with her lover; wanting to cover up that fact, she falsely cried rape by another person, the defendant.³⁶ Today, the child's paternity could be readily determined.

B. Piecemeal Extension of the Crimes Covered

In 1977, only one year after the initial passage of the rape shield statute, the General Assembly realized that the statute was under-inclusive, and amended it to apply also in prosecutions for commission of any “sexual offense in the first or second degree.”³⁷ Sexual offense in either the first³⁸ or the second³⁹ degree includes engaging in any of various sexual acts with another, other than vaginal intercourse: cunnilingus, fellatio, anilingus, or anal intercourse.⁴⁰ The rationale for the rape shield law's application to rape applied equally when other sexual offenses were charged.

The statute, however, remained under-inclusive. In 1997, it was again amended to explicitly include prosecutions for attempted rape in the first or second degree and attempted sexual offenses in the first or second degree.⁴¹ The evidence of the victim's prior chastity or lack thereof was, of course, no more probative in such cases than it was in cases for the accomplished rape or sexual offense.

Over the years, the courts faced the questions of how to treat the rape shield law if (1) a crime listed in the statute was being prosecuted along with lesser included crimes or (2) only a lesser included crime was being prosecuted.

V. Case Law Pre-*Churchfield* as to Lesser Included Offenses

The Court of Special Appeals quickly discerned that the rape shield law would be entirely foiled if it were held to apply only to the prosecution of a crime listed in the statute, and not to the prosecution of lesser included crimes also being prosecuted in the same trial. In a first-degree rape case, for example, lesser included crimes could include second-degree rape, sexual offense in the first, second, third, or fourth degree, child sexual abuse, sexual abuse of a vulnerable adult, incest, sodomy, and simple assault, as well as attempts at a number of these crimes.⁴² The Court of Appeals thus held, in *Davenport v. State*,⁴³ that the statute also applied to lesser included offenses in a trial for one or more of the offenses enumerated in the statute.

Ten years later, on April 2, 2001, in *Churchfield v. State*,⁴⁴ the Court of Special Appeals declined to extend this holding to the situation when only a lesser included offense was charged. The *Churchfield* case had proceeded to trial only on the charge of sexual child abuse.

VI. *Churchfield*

In *Churchfield*, the Court of Special Appeals not only held the rape shield statute inapplicable where the trial was for sexual child abuse, it returned to the antiquated Wigmore approach that the female victim's lack of chastity was probative of her lack of truthfulness.

A. Background Facts

Christina, the victim in *Churchfield*, was the daughter of the defendant and his second wife. Christina was ten years of age when she was removed from her drug-addicted mother's home in Florida and sent to live with her father and his third wife in Wicomico County, Maryland.⁴⁵ After some time, her adult half-brother (born to her father and his first wife) came to live there also.⁴⁶ Her half-brother impregnated Christina when she was twelve.⁴⁷ Christina gave birth to a baby, who was given to another relative to raise in another state.⁴⁸

A couple of years later, Christina ran away from home to live with a boyfriend's family.⁴⁹ At that time, she confided to the boyfriend's mother that her father had been having sexual intercourse with her.⁵⁰ The boyfriend's mother reported the matter.⁵¹ Social services investigated,⁵² and a Wicomico County Assistant State's Attorney, Angela Di Pietro,⁵³ prosecuted the father.

B. The Charges: *Cooksey's* Effect

Initially, Ms. Di Pietro charged Christina's father with second-degree rape, incest, and second-degree assault, as well as sexual child abuse, all continuing over a certain period of time.⁵⁴ Like most child victims, Christina apparently did not remember the specific dates that each sexual act occurred. The Court of Appeals' June 2000 decision in *Cooksey v. State* intervened.⁵⁵

In *Cooksey*, the child victim, and thus the State, was not able to state precisely when the sexual acts occurred.⁵⁶ *Cooksey* was indicted and charged for committing, *inter alia*, second- and third-degree sexual offenses by, respectively, performing cunnilingus on a child under the age of fourteen, when *Cooksey* was four or more years older than the child, and by engaging in various other specified sexual contacts with the child, continuously "up to fifteen times" over the period of a year.⁵⁷ The Court of Appeals held that Maryland recognizes no crime of continuing sexual

offense other than sexual child abuse, so that *Cooksey's* indictment had to be dismissed.⁵⁸ *Cooksey* held that Maryland law required that such allegations be charged individually for each particular occurrence.

The Court of Appeals held that, of sexual offense crimes, only the crime of sexual child abuse could be charged as a crime continuing over a period of time.⁵⁹ It let stand a count for sexual child abuse of the same child for that conduct "up to fifteen times" over a period of a year, as well as a count of sexual abuse against another child under the age of eighteen, between 75 and 100 times over a three-year period.⁶⁰

In light of the *Cooksey* decision, the Wicomico County State's Attorney's office nolle prossed the second-degree rape, incest, and second-degree assault charges against Christina's father and went to trial only on the charge of sexual child abuse.⁶¹

C. The Trial

At the time of trial, Christina was fifteen years old.⁶² She testified for the State and was extensively cross-examined by defense counsel.⁶³ The defense was permitted to bring out the fact that Christina had a baby when she was twelve and to try to show that she was angry with her father for having made her give up the baby.⁶⁴ The defense also wanted to question Christina as to whether she was, at age fifteen, having sex with two teenaged boyfriends.⁶⁵ The trial judge, the Honorable Donald C. Davis, sustained the prosecution's objection.⁶⁶

Judge Davis ruled that the defense was free to question Christina, and offer others' testimony, about alleged conflicts between father and daughter regarding curfew and other disciplinary matters.⁶⁷ Indeed, the defense did so not only in its questioning of Christina, but also in presenting testimony both by the defendant and by Christina's stepmother. The father testified that he had disciplinary problems with Christina including "clashes" over her manner of dress, wearing make-up, and dating.⁶⁸ The father also admitted, that upon his arrest, he stated, "I'll take care of that bitch when this is over."⁶⁹ The stepmother testified that Christina was a liar and a manipulator.⁷⁰

Such evidence supported the defense's theory that Christina fabricated the rape claim to "get back" at her father for having taken the baby away and for imposing disciplinary rules.⁷¹ But Judge Davis ruled that the de-

fense could not go into whether she was having sex with boys her age.⁷²

In the opinion of the author, Judge Davis ruled correctly under Maryland Rules 5-403⁷³ and 5-611(a).⁷⁴ The jury could well understand the defense's allegation that an out-of-control teenager resented her father's restrictive rules. The fact that Christina was allegedly having sex with teenaged boys added no substantial probative value to her alleged motive to falsely claim rape by her father; going into this matter would result in unfair embarrassment of and prejudice to her, distraction of the jurors from the issues in the case, and undue consumption of court time.

Moreover, there was no risk the jury would conclude that Christina's ability to describe the physical act of sexual intercourse necessarily meant that she had had intercourse with her father. The jury had heard testimony that she had been impregnated, several years before, by her adult half-brother and had given birth to a child.⁷⁵ In addition, the defendant had also managed to testify that Christina "used to brag about having sexual intercourse," before the prosecutor's objection was sustained.⁷⁶

Having heard the sharply conflicting testimony, the jury apparently believed Christina and disbelieved her father; the jury found the father guilty. He was sentenced to fifteen years imprisonment.⁷⁷

D. Reversal and Remand

On appeal, his conviction was reversed. In a decision shocking to this author, a unanimous panel of the Court of Special Appeals (Judge Raymond G. Thieme, Jr. (retired), joined by Judge John J. Bishop (retired) and Judge Peter Krauser) held that Judge Davis's ruling precluding inquiry into Christina's sexual activities with her alleged two boyfriends was an abuse of discretion, constituting reversible error.⁷⁸ Moreover, although an appellate court's role is not to second-guess a jury's findings as to credibility,⁷⁹ the panel appeared to do just that. Judge Thieme, writing for the court, appeared to fully credit the father's testimony; Judge Thieme asserted, "Christina accused her father of *the very activity from which he sought to protect her* . . ."⁸⁰

The Court of Special Appeals remanded the case for a new trial. As Ms. Di Pietro prepared to go to trial again, the father pled guilty in exchange for a lesser sen-

tence (4½ years imprisonment, 11½ years probation).⁸¹ He will remain a registered sex offender.⁸²

Christina, who was sent to live in a group foster home in Baltimore, is in the process of being adopted by another family.⁸³

E. *Churchfield's* Holding as to the Rape Shield Law

The Court of Special Appeals held in *Churchfield* that because trial proceeded only on sexual child abuse, a crime not listed in the rape shield statute, the rape shield law's protection was unavailable.⁸⁴ The underlying act charged was the same vaginal intercourse as occurs in first- or second-degree rape.⁸⁵ Thus, Christina, a minor victim, lacked the protection that an adult rape victim would have had under the rape shield law. As the students argued in their subsequent written testimony before the House Judiciary Committee and the Senate Judicial Proceedings Committee, the *Churchfield* status quo resulted in Maryland's giving the least protection to those most vulnerable and most in need of the shelter offered by the rape shield statute.⁸⁶

F. The Court of Special Appeals' Theory of Relevance

The rape shield law did not exclude the evidence proffered by the defense in the *Churchfield* trial because the defendant was prosecuted only for sexual child abuse. But in order for exclusion of the evidence to be error, it had to have been otherwise admissible. In order to be admissible, it had to meet the threshold requirement for any evidence: relevance to an issue in the case.⁸⁷

Consent is not a defense to sexual child abuse.⁸⁸ Therefore, the Court of Special Appeals' theory as to relevance of the evidence excluded in *Churchfield* could not have been that it was probative that the girl consented to sex with her own father. Rather, the appellate court's opinion was that the evidence was relevant to Christina's credibility. In Wigmoreque tones, Judge Thieme wrote that the young victim's alleged sex with her teenaged boyfriends was highly probative of her "credibility, especially about her sexual activities, and the extent to which she would go to evade parental restrictions in that area,"⁸⁹ and of her "propensity to lie about sex."⁹⁰ This language rang false to many modern ears, including some at the

University of Baltimore School of Law.

The Court of Special Appeals had in effect told Christina that, even though the jury had found she had been victimized, the jury had been duped. It seemed to this author that the appellate court's clear message to Christina was that she was not only unworthy of belief if she was sexually active, she was also unworthy of protection.

Unfortunately, many fifteen-year-olds are sexually active today.⁹¹ The *Churchfield* approach would permit impeachment of each of them in this manner if they alleged sexual abuse.

Until *Churchfield*, this position would seem to have been universally discredited since the 1970s. As the reviser of Wigmore's treatise wrote in its 1983 edition:

§ 62. Character of complainant in rape and other sex crimes.

Wigmore argued strongly for the admissibility of character for chastity and unchastity in the prosecutions for sex offenses against women, believing that such evidence should be admitted on the issue of the "credibility" of the complainant. Wigmore had a deep-rooted fear of baseless criminal prosecutions instigated by women having a psychological disposition "to imaginary and false charges" and plainly thought that the admissibility of character for unchastity was a necessary safeguard against the possibility of such prosecutions. Wigmore's views were shared by the men of his generation and by the men of the following generation. But *times have changed*, and quite suddenly. In most states [including Maryland, under art. 27, § 461A], the assumption now prevails that character for unchastity is inadmissible, in the absence of special circumstances.⁹²

What was particularly heartbreaking about *Churchfield* was that it is well documented that victims of sexual child abuse, such as Christina (who had

been abused by her half-brother), often become promiscuous as a result of their loss of self-esteem due to the abuse.⁹³ To require trial judges to permit their cross-examination as to their subsequent consensual acts is to "blame the victim" and further destroy their hope of regaining control of their lives. In a terrible irony, the *Churchfield* decision, making such children inherently impeachable, made them "safer" targets for subsequent adult sexual predators.

VII. University of Baltimore Group's Response: Taking up the Cudgel

It is no wonder that when I met Davis Ruark, the Wicomico County State's Attorney, at a Lower Eastern Shore Bar educational event in November 2001, he asked, "What are we going to do about *Churchfield*?" Learning that no one had plans to craft a legislative response, this author (who was to be on sabbatical, writing, in spring 2002 and thus was freed from a class schedule) determined to take up the cause and invited my fall semester Evidence students to help. Over the course of two years, seven students valiantly gave their time and energy to this law reform effort.⁹⁴

Experienced lobbyists know the ropes of legislative procedures well. They also maintain a constant presence in the Legislature. Would-be reformers without those luxuries rely on the good will of sympathetic legislators, private citizens, and public interest groups. We were fortunate to find many of each. Over the Christmas 2001 break, students Ilana Cohen, Christian Elkington, Michele Payer, Carlotta Woodward, and John Maclean volunteered. They in turn solicited letters of support from other students, including Anna Mantegna, who also traveled to Annapolis to testify.

As things developed, we proposed two bills in the January to April 2002 legislative session: one to overrule *Churchfield* by amending the rape shield statute, and one to overrule *Cooksey* by creating a crime in Maryland for a continuing sexual offense against a child. The *Cooksey*/continuing offense bill passed in 2002, and was signed into law by Governor Parris N. Glendening. The *Churchfield* rape shield bill passed both houses, in slightly different forms, but was not taken up by a Conference Committee, so failed. We vowed to return the next year.

In the 2003 session, Ilana Cohen, Anna Mantegna,

and I returned, joined by first-year student Joyce Lombardi. The rape shield bill passed this time, and was signed into law by Governor Robert L. Ehrlich, Jr. The participating students put their skills in analysis, research, and persuasion to the test through lobbying and providing oral and written testimony, emerging victorious. They are well poised to continue their law reform efforts throughout their legal careers.

A. A Complicated Process: The 2002 Session

Over the 2001 Christmas break, I drafted a proposed amendment to the rape shield statute and worked on obtaining sponsors and co-sponsors interested in overturning *Churchfield*. I met with then Delegate Kenneth Montague, law partner of University of Baltimore alumna, and one of my former students, Gustie Taler. Delegate Montague served on the Judiciary Committee, to which the bill would be assigned, and as chair of its subcommittee on juvenile law. He offered to sponsor the bill.

When I explained the history of the rape shield law as intended to protect women from the unequal treatment provided by the common law, he pulled out his copy of Black's Law Dictionary and discovered that "chaste" had a connotation referring only to females.⁹⁵ We agreed that the bill should make the statute gender neutral. He proposed to do this by adding, after the word "chastity," the gender-neutral phrase, "or prior sexual activity."

In the course of our conversation, I mentioned that a Wicomico County Assistant State's Attorney, Liz Ireland, had identified *Cooksey* as a problem. Saying "in for a penny, in for a pound," Delegate Montague said he would sponsor a bill to correct that problem as well.

1. The *Cooksey* Bill

As Judge Wilner pointed out in *Cooksey*:

All of the courts are sympathetic to the plight of both the young victims, often unable to state except in the most general terms when the acts were committed, and of prosecutors, either hampered by the lack of specific information or, when it is reported that the conduct occurred dozens or hundreds of times over a significant period, faced with the practical problem of how to deal with

such a multitude of offenses. The courts are all also properly concerned with the rights of defendants, who go to trial with a presumption of innocence, and with the ramifications to them of duplicitous pleading.⁹⁶

Judge Wilner quoted the highest court of Rhode Island as having acknowledged that: "reconceptualization of child sexual assault as a continuing course of conduct crime would eliminate duplicity problems in charging these offenses,"⁹⁷ but concluded, along with Rhode Island's court, that the creation of such a crime was for the legislature, not the court.⁹⁷

The Court of Appeals in *Cooksey* thus invited the General Assembly to act to create a continuing sexual offense statute, as had been done by the legislatures in New York and California, if it deemed it desirable: "New York and California attempted to deal with the problem by statute, allowing the legislative branch, after public hearings, to weigh all of the competing interests and concerns and strike a proper balance. That avenue, of course, is open in Maryland."⁹⁸ I learned that two bills (H.B. 939, sponsored by Del. Grosfeld, and H.B. 156, sponsored by Del. Kelly) had been submitted the previous year to overturn *Cooksey*, but they were not passed by the House Judiciary Committee. We reviewed those bills, and Christian set about researching the other states' laws, referenced by Judge Wilner in *Cooksey*, that recognized crimes of continuing sexual offenses against children. Using those states' statutes, from New York⁹⁹ and California,¹⁰⁰ as well as Arizona's statute, and case law upholding their constitutionality, we arrived at a draft that seemed to take the best from those models.

We proposed recognition of a felony for committing, over a period of ninety days or more, three or more sexual acts against a child under the age of fourteen and proposed that it be punishable by up to thirty years imprisonment.¹⁰¹ To support a conviction, a jury would need only to agree that the defendant committed three or more such acts; if more than three were charged, the jurors would not have to be unanimous as to which three the defendant committed. The draft was supported by a fact sheet summarizing the applicable case law from other states, as well as Maryland's. Ilana, Christian, and I met in Annapolis

with Delegate Montague and his legislative aide, “Brother Frank,” a kind and gifted former Catholic school principal who in mid-life switched gears to law school and a career in law. Delegate Montague submitted the draft to Legislative Reference, which made some nonsubstantive changes.

With our own phone calls and the leadership of Delegate Montague and Brother Frank, as well as the lobbying support of Ellen Mugmon, we added co-sponsors: Delegates Sharon Grosfeld (Chair of the Judiciary Committee’s subcommittee on criminal law), Ann Marie Doory (vice-chair of the Judiciary Committee), and Judiciary Committee members William Cole and Michael Dobson to what had emerged from Legislative Reference as H.B. 1302. I submitted written testimony in support of the bill, using Christian’s research (showing that similar statutes in other jurisdictions have been upheld as constitutional),¹⁰² to support its constitutionality, and obtained promises from Assistant State’s Attorneys John Cox of Baltimore County, Tonia Belton-Gofreed of Prince George’s County, and Liz Ireland of Wicomico County to testify in person at the bill hearings. Other supporting witnesses were Bobbi Seabolt of the American Academy of Pediatrics and Ellen Mugmon of the State Council on Child Abuse and Neglect. Attorney General J. Joseph Curran, Jr., Coalition to Protect Maryland’s Children, Citizens Review Board for Children, Inc., and American Academy of Pediatrics submitted written testimony in support of the bill.

At the committee hearings, Ted Wieseman of the Public Defender’s Office and Lia Young testified against the bill, particularly the length of the maximum sentence. Yet, one argument that proved helpful for us as proponents was that, in the absence of Maryland’s recognition of such an offense, prosecutors had to charge multiple counts of rape or other sex crimes,¹⁰³ and were sometimes obtaining sentences of over 100 years. Placing this crime on the books would give the prosecutors a more appropriate option (although they need not avail themselves of it).¹⁰⁴

H.B. 1302 – the “Cooksey bill” – passed the House Committee, then the House; the Senate Committee, then the Senate; and was signed into law by Governor Glendening. It became effective on October 12, 2002, and is codified as Section 3-315 of the Criminal Law Ar-

ticle of the Maryland Code.¹⁰⁵

2. The *Churchfield* Bill

In the Senate, we obtained Senator Perry Sfikas’ agreement to be the chief sponsor of the rape shield bill. Senator Philip Jimeno agreed to co-sponsor the bill. The Committee Chairman, Senator Walter Baker, was also highly supportive. I previously had the pleasure of working with all three of them on other legislation.

Our draft of the *Churchfield* bill was pre-filed and sent to Legislative Reference for numbering and for conformity in style with other bills. The rape shield bills became Senate Bill 212 and House Bill 1067. The House Bill was sponsored by Delegate Montague and co-sponsored by Delegates Ann Marie Doory, Sharon Grosfeld, Bill Cole, Pauline Menes, Carmen Amedori, and Tim Hutchins. Legislative Reference rewrote the purpose clause, leaving our statements of intent on the cutting room floor. In light of the fact that the Criminal Law Article 27 of the Annotated Code was being recodified, Legislative Reference also conformed the bill to the new sections of the pending criminal law Article.¹⁰⁶

As with the *Cooksey* bill, we prepared fact sheets, written testimony, and letters (submitted individually by Anna, Christian, Ilana, John, and myself) in support of the *Churchfield* bill. We made three main arguments:

- In order to provide *equal protection* to all victims of sexual crimes, regardless of which particular sexual crime goes to trial, Art. 27, § 461A must be amended to extend to *all victims of all sex crimes*. In order to be sure that the rape shield law is not circumvented, its protection also must extend to charges of lesser included crimes, such as simple assault.
- Part of the current legislative initiative is to make clear that the General Assembly strongly and unequivocally *rejects* the Wigmore view that a female is unworthy of belief because she is not a virgin or is sexually active. Moreover, it *extends that same protection to male victims* by adding the gender-neutral phrase “or prior sexual activity.”

- The bill thus corrects two significant, historical omissions by providing for *equal protection for not only young victims and adult victims*, but also equal protection for *male victims and female victims*.¹⁰⁷

We found support for this initiative to be widespread. Written testimony was also provided by many other groups and individuals in 2002:

- State Council on Child Abuse and Neglect
- Citizens' Review Board for Children
- The House of Ruth
- The Women's Law Center of Maryland
- Deputy State's Attorney for Prince George's County, Robert L. Dean
- Prevent Child Abuse Maryland
- Clinical/Forensic Social Worker in Office of State's Attorney for Baltimore City, Shannon B. Wood
- University of Baltimore School of Law Family Law Association President Dawn Anderson
- American Academy of Pediatrics
- Women Legislators of Maryland
- David Flemmer, Psy.D., Ph.D., child psychiatrist
- Robb Longman, Esq.
- University of Baltimore law students Adam Marker and Rue Stewart

Oral testimony was also provided in 2002 by:

- Baltimore County Assistant State's Attorney John Cox, Chief of Child Abuse and Sex Offense Division
- Wicomico County State's Attorney Davis Ruark and Assistant State's Attorney Angela Di Pietro
- Frederick County Deputy State's Attorney Charles Smith
- Ellen Mugmon, State Council on Child Abuse and Neglect
- Charlie Cooper, Citizens' Review Board for Children
- Bobbie Steyer, The House of Ruth
- Bobbi Seabolt, American Academy of Pediatrics
- Gloria Goldfaden, Prevent Child Abuse Maryland

Opponents were Angela Shelton, Larry Rogers, and Ted Wieseman of the Public Defender's Office. Before the House Judiciary Committee, Terry Rogers of the Public Defender's Office questioned the meaning of the gender-neutral phrase "or other sexual activity."

John Maclean, home in Illinois over Christmas break, had found that Illinois' rape shield statute applied to protect sexual child abuse victims.¹⁰⁸ Back in Baltimore, he wrote an op-ed piece for The Daily Record, supporting the bill.¹⁰⁹ Joe Surkiewicz wrote a news article about our efforts.¹¹⁰

The bill passed the Senate as introduced. But, in response to the Public Defender's issue, the House Committee substituted the phrase "or abstinence" for the phrase "or prior sexual activity," though this change was not intended to have any different substantive effect, and the bill passed the House with that amendment, on the last day of the session. The bill was not taken up in Conference. Because it did not pass both houses in identical form, the bill failed. Ilana, Anna, and I vowed to go back the next year and try again. On May 14, 2002, Christian, Ilana, and I appeared on WCBM's Court Talk, with Harold Dwin, to talk about the bill and our hopes for the next session.

B. The 2003 Session

With the leadership of Ellen Mugmon, a tireless child advocate and member of the State Council on Child Abuse and Neglect, we saw our *Churchfield* topic on the list to be considered in fall 2002 as part of the Women's Legislative Agenda for 2003. Anna and I attended that group's meeting on October 6, 2002. We met with several legislators, including Delegate Liz Bobo and Senator Delores Kelley. I made an oral presentation.

We were pleased to learn later that the bill was adopted as one of the group's top four legislative priorities. We also netted the help of Maryland Citizens Against Sexual Assault, and its lawyer-lobbyist, Lisae Jordan, who volunteered to be the lead contact on the bill for the Women's Legislative Agenda.

The redistricting and the 2002 elections had lost us several of our sponsors and supporters, including Senators Sfikas and Baker and Delegates Montague and Cole. Delegate Grosfeld was elected to the Senate and Delegate Doory moved to another committee in the House.

Delegate Montague was appointed by Governor Ehrlich to be the Secretary of Juvenile Services. But again, we were fortunate. Ilana, first-year evening student Joyce Lombardi, and I met with Delegate Pauline Menes, who agreed to be our lead sponsor in the House, and with Senator Jennie Forehand, who agreed to be the lead sponsor in the Senate. Our sponsors submitted the bill as it had passed the House in 2002; it became numbered S.B. 453 in the Senate and H.B. 196 in the House.

S.B. 453 was sponsored by Senator Forehand and co-sponsored by Senators Jim Brochins, Ulysses Currie, Brian Frosh (new chair of the Judicial Proceedings Committee), Rob Garagiola, Leo Green, Sharon Grosfeld, Paula Hollinger, Nancy Jacobs, Phil Jimeno, Delores Kelley, Gloria Lawlah, Thomas Middleton, and Leonard Teitelbaum.

H.B. 196 was sponsored by Delegate Menes and co-sponsored by Delegates Joanne Benson, David Boschert, Bennett Bozman, Anthony Brown, Joan Cadden, Jon Cardin, Mary Conroy, Steven DeBoy, Sr., Ann Marie Doory, Don Dwyer, Adelaide Eckardt, Barbara Frush, Tawanna Gaines, Marilyn Goldwater, Tim Hutchins, Mary-Dulany James, Sally Jameson, Darryl Kelley, Kevin Kelly, Nancy King, Ruth Kirk, Susan Lee, Mary Ann Love, Richard Madaleno, Jr., Salima Marriott, Brian Moe, Karen Montgomery, Dan Morhaim, Shirley Nathan-Pulliam, Doyle Niemann, Rosetta Parker, Obie Patterson, Carol Petzold, Neil Quinter, Justin Ross, Luiz Simmons, Ted Sophocleus, Veronica Turner, House Judiciary Chairman Joe Vallario, and Bobby Zirkin.

I met with Chairman Vallario and counsel to the House Judiciary Committee to discuss the bill. Ilana, Joyce, Anna, Lisae Jordan, and Ellen Mugmon met with numerous legislators and talked up the bill, as did Senator Forehand and her legislative aide, Maureen Reynolds, Delegate Menes and her aide, Grace Mary Brady.

In response to the questions raised during the meetings with individual legislators, Ilana set about delving into the legislative history of the original rape shield statute and each of its prior amendments. This endeavor entailed many hours spent poring over microfiche in the General Assembly's Annapolis library. Joyce used the Internet to research other states' rape shield laws. She discovered that Maryland's and Georgia's were the only two not to cover all sex offenses: Georgia's does not apply to sexual

battery or aggravated sexual battery, although it does apply to sexual child abuse.¹¹¹

Written testimony in support of the bills was submitted not only by us, but also by:

- Maryland Family Violence Council, Attorney General J. Joseph Curran, Jr.
- House of Ruth, Dorothy Lennig
- Maryland Network Against Domestic Violence
- Maryland Commission on Women
- League of Women Voters
- Maryland Coalition Against Sexual Assault
- University of Baltimore Center for Families, Children, and the Courts
- Maryland State's Attorney's Association, by Sue Schenning, Deputy State's Attorney for Baltimore County
- State Council on Child Abuse and Neglect
- Citizens' Review Board for Children
- Prevent Child Abuse Maryland
- Women's Law Center of Maryland
- Glenn Ivey, State's Attorney for Prince George's County
- American Association of University Women
- Maryland Jewish Alliance
- Family Law Association, student group, University of Baltimore School of Law
- Joseph Mantegna, retired police officer, Baltimore City
- Robb Longman, Esq.
- David Flemmer, Psy.D., Ph.D., child psychiatrist, Student Services, Montgomery County Public Schools
- University of Baltimore School of Law students Brendan O'Connell, Thomas Merrill, Jennifer Merrill, Rue Stewart, Sheila Garrity, and Lawrence Katz

Oral testimony other than ours and the sponsors' was provided by:

- Baltimore County Assistant State's Attorney Sue Hazlett, Child Abuse and Sex Offense Division, Chair of Maryland State's Attorneys' Association's Child Abuse Subcommittee
- Ellen Mugmon, State Council on Child Abuse and

Neglect

- Lisae Jordan, MCASA
- Claude de Vastey, Women's Bar Association
- Cynthia Golomb, Maryland Network Against Domestic Violence

I wrote an op-ed piece for The Daily Record¹¹² and Joyce contacted various news reporters and wrote letters to the editor of The Baltimore Sun.

S.B. 453 passed both Committees and both Houses, was signed by Governor Ehrlich, and went into effect October 1, 2003.¹¹³ The 2003 bill protects child abuse victims to the same extent as adult victims, and male victims as much as female victims. Opinion evidence or reputation evidence as to a victim's sexual orientation will now be precluded.¹¹⁴ But the statute does not preclude *the prosecution* from presenting evidence of the victim's prior specific acts or the absence thereof.¹¹⁵

VIII. Conclusion

The University of Baltimore law students who participated in reforming Maryland's criminal law by the adoption of the *Cooksey* bill, H.B. 1302, in 2002 and the rape shield/*Churchfield* bill, S.B. 453, in 2003 should be proud, as should all the dedicated public servants, including former Delegate Montague, Senator Forehand, and Delegate Menes, who led the fight for their passage. May the good works of all continue.

Appendix A

The "*Cooksey* Bill," H.B. 1302, enacted in 2002, and codified at Md. Crim. L. Code Ann. § 3-315 reads:

§ 3-315. Continuing course of conduct with child.

(a) *Prohibited.* — A person may not engage in a continuing course of conduct which includes three or more acts that would constitute violations of § 3-303, § 3-304, § 3-305, § 3-306, or § 3-307 [rape in the first degree, rape in the second degree, sexual offense in the first degree, sexual offense in the second degree, or sexual offense in the third degree] of this subtitle over a period of 90 days or more, with a victim who is under the age of 14 years at any time during the course of conduct.

(b) *Penalty.* — (1) A person who violates this sec-

tion is guilty of a felony and on conviction is subject to imprisonment not exceeding 30 years.

(2) A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence under § 3-602 [sexual abuse of a minor] of this title.

(c) *Determination.* — In determining whether the required number of acts occurred in violation of this section, the trier of fact:

(1) must determine only that the required number of acts occurred; and

(2) need not determine which acts constitute the required number of acts.

(d) *Merger.* — (1) A person may not be charged with a violation of § 3-303, § 3-304, § 3-305, § 3-306, or § 3-307 of this subtitle involving the same victim in the same proceeding as a violation of this section unless the other violation charged occurred outside the time period charged under this section.

(2) A person may not be charged with a violation of § 3-303, § 3-304, § 3-305, § 3-306, or § 3-307 of this subtitle involving the same victim unless the violation charged occurred outside the time period charged under this section.

Appendix B

The "*Churchfield* Bill," S.B. 453, enacted in 2003, amended as shown, Md. Crim. L. Code Ann. § 3-319, reads:

Sexual Offenses - Reputation and Opinion Evidence and Evidence of Sexual Conduct-Admissibility

Article-Criminal Law § 3-319

FOR the purpose of applying to sexual crimes against both males and females, the sexual abuse of a minor, the sexual abuse of a vulnerable adult, and lesser included crimes a prohibition against admitting in a prosecution reputation and opinion evidence relating to a victim's chastity or abstinence; applying to sexual crimes against both males and females, the sexual abuse of a minor, the sexual abuse of a vulnerable adult, and lesser included crimes and au-

thorization for admitting in a prosecution under certain circumstances a specific instance of a victim's sexual conduct; making a technical change; and generally relating to admissibility of reputation and opinion evidence and evidence of sexual contact.

(a) Evidence relating to a victim's reputation for chastity OR ABSTINENCE and opinion evidence relating to a victim's chastity OR ABSTINENCE may not be admitted in a prosecution for ~~rape, a sexual offense in the first or second degree, attempted rape, or an attempted sexual offense in the first or second degree~~: (1) A CRIME SPECIFIED UNDER THIS SUBTITLE 3 OR A LESSER INCLUDED CRIME; OR (2) THE SEXUAL ABUSE OF A MINOR UNDER § 3-602 OF THIS TITLE OR A LESSER INCLUDED CRIME; OR (3) THE SEXUAL ABUSE OF A VULNERABLE ADULT UNDER § 3-604 OF THIS TITLE OR A LESSER INCLUDED CRIME.

(b) Evidence of a specific instance of a victim's prior sexual conduct may be admitted in a prosecution ~~for rape, a sexual offense in the first or second degree, attempted rape, or an attempted sexual offense in the first or second degree~~ described in subsection (a) of this section only if the judge finds that: (1) the evidence is relevant; (2) the evidence is material to a fact in issue in the case; (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and (4) the evidence:

(i) is of the victim's past sexual conduct with the defendant;

(ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;

(iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or

(iv) is offered for impeachment after the prosecutor has put the victim's prior conduct in issue.

(c) (1) Evidence described in subsection (a) or (b) of this section may not be referred to in a statement to a jury or introduced in a trial unless the court has first held a closed hearing ~~under paragraph (2) of this subsection~~ and determined that the evidence is admissible.

(2) The court may reconsider a ruling excluding the evidence and hold an additional closed hearing if new information is discovered during the course of the trial that may make the evidence admissible.

ENDNOTES

1. Professor of Law and Dean Joseph Curtis Faculty Fellow, University of Baltimore School of Law; J.D., Duke University Law School, 1974; B.A., University of Pennsylvania, 1971.

Lynn McLain was an associate in the litigation department at Piper and Marbury in Baltimore, a graduate fellow at Duke University, and then in 1977 joined the faculty at the University of Baltimore School of Law, where she teaches courses in evidence and copyright law. Professor McLain is admitted to the bars of the Court of Appeals of Maryland (December 1974), the United States District Court for the District of Maryland (March 1975) and the United States Supreme Court (March 1990). In addition, Professor McLain is the author of a three-volume treatise, *Maryland Evidence: State and Federal*, as well as a book entitled *Maryland Rules of Evidence*. As a Special Reporter for the Rules Committee of the Court of Appeals of Maryland, she participated in drafting Maryland's rules of evidence.

2. At the time the pertinent statute was codified at MD. ANN. CODE, art. 27, § 461A. It was recodified in 2002 as MD. CRIM. L. CODE ANN. § 3-319.

3. *Churchfield v. State*, 137 Md. App. 668, 769 A.2d 313 (2001).

4. *Cooksey v. State*, 359 Md. 1, 752 A.2d 606 (2000).

5. Child abuse, as defined by the Maryland statute, may be committed only by "(1) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor . . . [or] (2) A household member or family member" of the child. MD. CRIM. L. CODE ANN. § 3-602(b) (Supp. 2003). Thus, for example, a teacher who meets a young student at home on the weekend and sexually abuses him would not commit child abuse. *Cf. Anderson v. State*, 142 Md. App. 498, 790 A.2d 732 (2002) (act qualified as child sexual abuse because teacher gave student ride to teacher's house from school); 82 Op. Att'y Gen. Md. 97-017 (1997).

6. 1976 Md. Laws ch. 574 (codified as MD. ANN. CODE, art. 27, § 461A). In 2002, section 461A was recodified as § 3-319 of the Criminal Law article of the Maryland Annotated Code.

7. H.R. 4727. *See* Cong. Rec. H11944 (Oct. 10,

1978); Cong. Rec. S18579 (Oct. 12, 1978).

8. See 124 Cong. Rec. 34,913 (1978) (remarks of Rep. Holtzman) (“Since rape trials become inquisitions into the victim’s morality, not trials of the defendant’s innocence or guilt, it is not surprising that [rape] is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.”).

9. See MCCORMICK ON EVIDENCE § 193 at 685 & n.30 (5th ed. 1999) (citing collections of studies).

10. See 124 Cong. Rec. 34,912 (1978) (remarks of Rep. Mann) (“[F]or many years in this country, . . . [d]efense lawyers were permitted great latitude in bringing out intimate details about a rape victim’s life. Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion with her private life.”). See generally LYNN McLAIN, 5 MARYLAND EVIDENCE: STATE AND FEDERAL §§ 412:1-412:2 (2d ed. 2001 & Supp. 2003) (citing numerous sources).

11. See generally Margaret Berger, *Man’s Trial, Woman’s Tribulation*, 77 COLUM. L. REV. 1 (1977).

12. See notes 30-34 *infra* and accompanying text.

13. See 1 WIGMORE ON EVIDENCE §§ 62 & 200 (3d ed. 1940) (admissibility of evidence of victim’s reputation for unchastity is “generally conceded,” though “many jurisdictions” preclude evidence of her other specific acts of unchastity; Wigmore argued for admissibility of specific instances); 1A WIGMORE §§ 62-62.1 (rev. 1983).

14. *Id.* See, e.g., *Humphreys v. State*, 227 Md. 115, 121, 175 A.2d 777, 780 (1961); *State v. Lucado*, 40 Md. App. 25, 35-37, 389 A.2d 398, 404-05 (1978).

15. FED. R. EVID. 412(a) (criminal and civil cases) & (b)(2) (civil cases only); MD. CRIM. L. CODE ANN. § 3-319(b)(ii)-(iv) (2002).

16. FED. R. EVID. 412; MD. CRIM. L. CODE ANN. § 3-319(a) (2002).

17. E.g., *Wheeler v. State*, 88 Md. App. 512, 527-28, 596 A.2d 78, 86 (1991).

18. FED. R. EVID. 412(b)(1)(B); MD. CRIM. L. CODE ANN. § 3-319(b)(i) (2002).

19. FED. R. EVID. 412(b)(1)(A) & (C)); MD. CRIM. L. CODE ANN. § 3-319(b)(ii)-(iv) (2002).

20. FED. R. EVID. 412(b)(1)(A); MD. CRIM. L. CODE ANN. § 3-319(b)(ii) (2002) (“the source or origin of semen, pregnancy, disease, or trauma”). See *United States*

v. Bear Stops, 997 F.2d 451 (8th Cir. 1993) (reversible error to exclude evidence that victim had been assaulted by others on another occasion when offered to provide alternative explanation for victim’s manifesting post-abuse syndrome and for physical evidence).

21. DNA evidence can pinpoint the identity of the individual whose blood, semen, hair, saliva, skin, etc. is found on the victim. See generally John P. Cronan, *The Next Frontier of Law Enforcement: A Purpose for Complete DNA Databanks*, 28 AM. J. CRIM. L. 119, 121 (2000).

22. FED. R. EVID. 412(b)(1)(C). See, e.g., *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam) (state trial court committed reversible constitutional error when it excluded evidence of a rape victim’s cohabitation at the time of trial with the man to whom she reported the rape [a man of another race than the victim, but of the same race as the defendant]; the defense was consent, and the defendant argued that the victim’s relationship with her boyfriend gave her a motive to lie).

23. MD. CRIM. L. CODE ANN. § 3-319(b)(iii) (2002) (the evidence “supports a claim that the victim has an ulterior motive to accuse the defendant of the crime . . .”). See *Johnson v. State*, 332 Md. 456, 632 A.2d 152 (1993) (reversible error to exclude evidence that the victim admittedly had recently exchanged sex for drugs, when defense was that she had agreed to do so, but defendant had failed to give her drugs).

24. MD. CRIM. L. CODE ANN. § 3-319(b) (2002). See, e.g., *White v. State*, 324 Md. 626, 638-39, 598 A.2d 187, 193 (1991) (trial judge properly balanced probative value against prejudice; “Proffered evidence must contain a direct link to the facts at issue in a particular case before it can be admitted.”).

25. FED. R. EVID. 412(c)(1); MD. CRIM. L. CODE ANN. § 3-319(c) (2002).

The United States Supreme Court has upheld the facial constitutionality of the similar notice and hearing requirements of Michigan’s rape-shield statute. *Michigan v. Lucas*, 500 U.S. 145 (1991), on remand, 484 N.W.2d 685 (Mich. App. 1992), appeal after remand, 507 N.W.2d 5 (Mich. App. 1993). In that case, the Michigan Court of Appeals had ruled that precluding a defendant (because of his failure to give notice and to comply with other statutory requirements) from presenting evidence of his own

prior sexual conduct with the victim violated, *per se*, the Sixth Amendment.

The Supreme Court majority reversed, but remanded to the Michigan court to determine, first, whether its statute permitted preclusion and, second, whether preclusion was constitutional under the facts of the particular case. In reaching this resolution, the majority, in an opinion by Justice O'Connor, recognized that "[t]he notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion." 500 U.S. at 152-53.

Maryland's statute was upheld as constitutional in *Thomas v. State*, 301 Md. 294, 483 A.2d 6 (1984).

26. See FED. R. EVID. 412(b)(1) (evidence must be "otherwise admissible under these rules," thus including, by reference, FRE 403); MD. CRIM. L. CODE ANN. § 3-319(b) (2002); *Smith v. State*, 71 Md. App. 165, 181-90, 524 A.2d 117, 125-29 (1987) ("Whether evidence of prior sexual contact will be admitted to explain, *inter alia*, the presence of semen requires the trial court to determine whether the probative value of the evidence of the victim's prior sexual contact *substantially outweighs* the danger of undue prejudice.").

27. FED. R. EVID. 412(c)(2); MD. CRIM. L. CODE ANN. § 3-319(c) (2002). See *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (if the court orders evidence of the victim's sexual conduct may be admitted at trial, the victim has the right to an immediate appeal of that order).

28. MD. CRIM. L. CODE ANN. §§ 3-303(a)(1) and 3-304(a)(1) (2002) refer only to "vaginal intercourse."

29. See 1977 Md. Laws ch. 294 (adding prosecutions for a "sexual offense in the first or second degree"); 1997 Md. Laws ch. 311 & 312 (adding prosecutions for attempted rape and attempted sexual offenses in the first or second degree).

30. Such reputation evidence was admissible on the issue of consent. *E.g.*, *Caldwell v. State*, 276 Md. 612, 349 A.2d 623 (1976); *Giles v. State*, 229 Md. 370, 379-80, 183 A.2d 359, 363 (1962), *vacated & remanded on other grounds*, 386 U.S. 66 (1967); *Humphreys v. State*, 227 Md. 115, 121, 175 A.2d 777, 780 (1961); 1 MCCORMICK ON EVIDENCE § 193 at 681-82 (5th ed. 1999); 1A WIGMORE ON EVIDENCE § 62 (rev. 1983).

31. MD. CTS. & JUD. PROC. CODE ANN. § 9-115 (2002 Repl. Vol.) (originally enacted as MD. ANN. CODE, art. 35, § 13C (1957)).

32. See 1 MCCORMICK ON EVIDENCE § 193 at 681-82 & n.9 (5th ed. 1999) (jurisdictions were divided as to whether proof by specific instances was permitted); 1 WIGMORE ON EVIDENCE §§ 62 & 200, *supra* note 13.

33. 3 WIGMORE ON EVIDENCE § 924a at 459-60 (3d ed. 1940) (some emphasis in original, some added). See *also id.* §§ 934a, 963, & 982; *id.* §§ 62 & 200.

34. *Id.* § 924b at 466 (emphasis added).

35. MD. CRIM. L. CODE ANN. § 3-319(b)(iii) (2002) (previously MD. ANN. CODE, art. 27, § 461A(a)(3) (1996 Repl. Vol.)). See *Olden v. Kentucky*, 488 U.S. 227 (1988) (defendant's confrontation right violated by preclusion of evidence that victim's affair with boyfriend created motive for her to falsely claim rape); *Johnson v. State*, 332 Md. 456, 632 A.2d 152 (1993) (abuse of discretion to exclude evidence of victim's having had sex with others in exchange for crack cocaine – on dates prior to alleged rape – when defense witnesses and defendant testified that she had made such an arrangement with them, though they failed to give her the drugs promised).

36. See *State v. DeLawder*, 28 Md. App. 212, 344 A.2d 446 (1975) (when the defense was that the victim thought she was pregnant by another, and charged the accused with rape in order to avoid disclosure of her having voluntarily had sexual intercourse, the Court of Special Appeals held that exclusion of evidence that she did have intercourse with others violated the defendant's right of confrontation) (case was decided before rape shield statute was enacted).

37. 1977 Md. Laws ch. 294.

38. MD. CRIM. L. CODE ANN. § 3-305 (2002).

39. *Id.* § 3-306.

40. *Id.* § 3-301(e).

41. 1997 Md. Laws. ch. 311 & 312.

42. See MD. CRIM. L. CODE ANN. §§ 3-304 through 3-312, 3-321 through 3-323, 3-602, and 3-604 (2002 & Supp. 2003). See *also Starkey v. State*, 147 Md. App. 700, 810 A.2d 542 (2002) (defendant was convicted of third-degree sexual offense for receiving fellatio from the young victim; statute prohibiting lesser crime of perverted sexual practices, including but not limited to fellatio did not control, so as to preclude conviction for

third-degree sexual offense); Jennifer McMenamain, *Rape Charges Added to Child Sex Abuse Case of Former Carroll Schools Superintendent*, BALT. SUN, Mar. 7, 2003, at 2B, col. 5 (defendant indicted for second-degree rape, in addition to charges of “two counts of sexual child abuse, third- and fourth-degree sex offenses, and one count of second-degree assault”); Jason Song & Jonathan D. Rockoff, *Dundalk Teacher Charged in Sex Crime*, BALT. SUN, Jan. 9, 2003, at 2B, col. 5 (defendant charged with “second-, third-, and fourth-degree sex offenses, possession of child pornography and filming a child in a pornographic act”).

43. *Davenport v. State*, 89 Md. App. 517, 598 A.2d 827 (1991).

44. *Churchfield v. State*, 137 Md. App. 668, 769 A.2d 313 (2001).

45. *Id.* at 673, 769 A.2d at 316.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 674, 769 A.2d at 316.

50. *Id.*

51. *Id.*

52. *Id.*, 769 A.2d at 316-17.

53. Ms. Di Pietro is a University of Baltimore School of Law alumna.

54. *Id.* at 677-78 & n.2, 769 A.2d at 319. Christina testified that the first incident of vaginal intercourse occurred in January or February 1999 and that the last incident occurred during the first week of January 2000, but “she could not say how many times it happened.” *Id.* at 673-74, 769 A.2d at 316.

55. *Cooksey v. State*, 359 Md. 1, 752 A.2d 606 (2000).

56. *Id.* at 3, 752 A.2d at 607.

57. *Id.* at 3-4, 752 A.2d at 607.

58. *Id.* at 17, 22-23, 752 A.2d at 614-15, 617-18.

The Court of Appeals, in a unanimous decision authored by Judge Wilner, held that the counts for second- and third-degree sexual offenses had to be dismissed as duplicitous, because under MD. ANN. CODE, art. 27, §§ 464A and B, they are “single act” crimes. 359 Md. at 6, 352 A.2d at 608. Convictions under those sections would be valid only if the jurors unanimously agreed that the defendant had committed the same single act proscribed.

As those counts had been alleged, jurors could potentially return a guilty verdict if some of them agreed that the defendant committed the sexual conduct on, for example, August 23 and others found that he had done so on October 13. Such a jury verdict would violate the rule of juror unanimity. It also would not disclose to the judge how many, if any, offenses on which the jury agreed, which could be pertinent to sentencing. Finally, a mistrial for a hung jury could not lead to a new trial without violating double jeopardy principles, because it might be that the first jury had believed that the defendant did not commit one or more of the alleged multiple acts.

Therefore, the charging of “separate criminal acts, committed not as part of a single continuing incident but over an extended period of time, to form a singular continuing crime” was not permissible under §§ 464A or 464B. 359 Md. at 17, 769 A.2d at 614-15.

59. *Id.* The Court of Appeals held that child “[a]buse, as defined in [MD. ANN. CODE, art. 27,] § 35C is . . . a crime that can be committed both by a single act and through a continuing course of conduct consisting of multiple acts.” 359 Md. at 23-24, 752 A.2d at 617-18.

60. *See id.* at 4-5, 23-24, 352 A.2d at 607-08, 617-18.

61. Telephone conversations of author with Elizabeth Ireland, Esq., Dec. 20, 2001, and Angela Di Pietro, Esq., Jan. 3, 2002; *Churchfield*, 137 Md. App. at 677-78 & n.2, 769 A.2d at 319 & n.2.

62. *Churchfield*, 137 Md. App. at 673, 769 A.2d at 316.

63. Testimony of Angela Di Pietro before the House Judiciary Committee, Annapolis, Md., Mar. 6, 2002; *Churchfield*, 137 Md. App. at 681, 769 A.2d at 320-21.

64. *Churchfield*, 137 Md. App. at 680, 769 A.2d at 320.

65. *Id.* at 676-82, 769 A.2d at 318-21.

66. *Id.* at 681, 769 A.2d at 321.

67. *Id.* at 680-81, 769 A.2d at 320.

68. *Id.* at 675, 769 A.2d at 317.

69. *Id.* at 674, 676, 769 A.2d at 317.

70. *Id.*

71. *Id.* at 685-86, 769 A.2d at 323.

72. *Id.* at 676-81, 769 A.2d at 318-20.

73. *See* 5 LYNN McLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL § 403:1 (2d ed. 2001) (citing, e.g.,

Lyba v. State, 321 Md. 564, 570-71, 583 A.2d 1033, 1036 (1991)).

74. See 6 LYNN MCLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL §611:2 at 583-86 & nn. 3 and 5 (2d ed. 2001 & Supp. 2003) (citing, e.g., Coleman v. State, 321 Md. 586, 609, 583 A.2d 1044, 1055 (1991)).

75. *Churchfield*, 137 Md. App. at 673, 769 A.2d at 316.

76. *Id.* at 676, 769 A.2d at 317.

77. *Id.* at 672, 769 A.2d at 316.

78. *Id.* at 672, 687-89, 769 A.2d at 316, 324-25. In a prescient comment, Judge Thieme wrote for the panel: "We recognize that our holding today might concern strong advocates for the rights of victims of child abuse and other crimes of a sexual nature." *Id.* at 695, 769 A.2d at 329.

79. E.g., *Smith v. State*, 145 Md. App. 400, 434, 805 A.2d 1108, 1128 (2002) (Eyler, J., dissenting, joined by Murphy, C.J., D. Eyler, Krauser, and Greene, JJ.).

80. *Churchfield*, 137 Md. App. at 696, 769 A.2d at 329.

81. Telephone conversation of Angela Di Pietro, Esq., with author, Jan. 3, 2002; testimony of Angela Di Pietro, Esq. before the House Judiciary Committee, Mar. 6, 2002, Annapolis, Md.

82. *Id.* See MD. CRIM. PRO. CODE ANN. § 11-701 (2002) (establishing registration procedure).

83. Telephone conversation of the author with Angela Di Pietro, Esq. (Jan. 3, 2002).

84. *Churchfield*, 137 Md. App. at 677-78, 769 A.2d at 318-19.

85. See notes 28 and 50 *supra* and accompanying text.

86. Written testimony of Ilana Cohen and Anna Mantegna (on file with author).

87. FED. R. EVID. 401, 402; MD. RULES 5-401, 5-402.

88. The statute does not require that the act be against the will of, or without the consent of, the victim. See MD. CRIM. L. CODE ANN. § 3-602 (Supp. 2003). Cf. *Owens v. State*, 352 Md. 663, 687-90, 724 A.2d 43, 55-56 (1999) (Maryland's statutory rape law is a flat prohibition of certain sexual conduct regardless of defendant's intent to violate law and regardless "whether the victim purported to consent"), *cert. denied*, 527 U.S. 1012 (1999); *Lusby v. State*, 217 Md. 191, 141 A.2d

893 (1958) (sexually abused daughter was victim of father, not his accomplice in incestuous relationship); *Taylor v. State*, 214 Md. 156, 133 A.2d 414 (1957) (juvenile's consent no defense in sodomy case). See generally Wayne LaFave, SUBSTANTIVE CRIMINAL LAW § 6.5(a) (2d ed. 2003) (because crime is against society, consent by a victim is generally not a defense to a criminal prosecution; rape is an exception to this general rule).

89. *Churchfield*, 137 Md. App. at 682, 769 A.2d at 321.

90. *Id.* at 686, 769 A.2d at 324.

91. Karen S. Peterson, *Sexually Active Teens are Often Clueless; May Lack Basic Knowledge about Disease, Birth Control*, USA TODAY, May 20, 2003, at D.08.

92. 1A WIGMORE ON EVIDENCE § 62 (Tillers rev., 1983) (emphasis added).

93. Jennie G. Noll, et al., *A Prospective Investigation of the Impact of Childhood Sexual Abuse on the Development of Sexuality*, 71 J. CONSULTING & CLINICAL PSYCHOLOGY 575, 582 (2003). See also Written Testimony of David Flemmer, Psy.D., Ph.D., provided to the House Judiciary Committee, Annapolis, Md., Feb. 11, 2003 (stating that sexual abuse may arouse a compulsive yearning for giving and receiving sexual pleasure because of the conditioning of inappropriate sexual activity).

94. Those students were Ilana Cohen, J.D., May 2003; Christian Elkington, J.D., December 2002; Joyce Lombardi, J.D. expected May 2006; John Maclean, J.D., May 2003; Anna Mantegna, J.D., May 2003; Michele Payer, J.D., May 2003; and Carlotta Woodward, J.D., May 2003. The author also wishes to thank Steve Goldberg, J.D. expected May 2004, who contributed his research assistance for this article.

95. BLACK'S LAW DICTIONARY 214 (5th ed., 1979) provides:

Chaste. Never voluntarily having had unlawful sexual intercourse. An unmarried woman who has had no carnal knowledge of men. *New v. State*, 141 Tex. Crim. 536, 148 S.W.2d 1099, 1101 (1941).

See also *Lucado v. State*, 40 Md. App. 25, 389 A.2d 398 (1978) (evidence that male victim's reputation that he was not homosexual – offered to rebut male defendant's testimony that victim had "'started messing around with [him]'" – did not relate to his "chastity" and therefore was not excluded by the rape shield statute). In

Lucado, the Court of Special Appeals relied on legislative history of the 1976 and 1977 acts, as well as on Webster's Dictionary, and legal precedent. Judge Wilner, writing for the panel, explained: "In the law, these terms ['chaste' and 'chastity'] have been traditionally used with particular reference to women; indeed, they have been associated with nearly every vestige of the different, and generally unequal, treatment of men and women by the law." *Id.* at 34-35 & nn. 7-9; 389 A.2d at 403-04 & nn. 7-9.

96. *Cooksey*, 359 Md. at 18-19, 752 A.2d at 615.

97. *Id.* at 19, 752 A.2d at 616.

98. *Id.* at 27, 752 A.2d at 620.

99. N.Y. PENAL LAW § 130.75 (McKinney 1997 & Supp. 2001).

100. CAL. PENAL CODE § 288.5 (West 1999). Christian also located ARIZ. REV. STAT. § 13-1417 (2001) and WIS. STAT. ANN. § 948.025 (West 2001) as additional models for such statutes.

101. In comparison, maximum penalties for "one act" sexual offenses are as follows:

Then Art. 27, § 464 (now Crim. L. § 3-305): First-degree sexual offense (*sexual act* using dangerous weapon, suffocation, strangulation, disfigurement, serious physical injury, or such threats, including the threat of kidnapping or murder to victim or another known to the victim.; or aided by another person(s); or in connection with burglary): life (unless defendant has previously been convicted of this crime of first-degree rape, or unless victim was a child under sixteen and defendant was also convicted under § 338 [kidnapping], then life without parole) (same penalty as rape in the first degree, now § 3-303).

Then § 464A (now § 3-306): Second-degree sexual offense (*sexual act* without consent by force or threat of force; or with mentally or physically incapacitated victim; or with victim under fourteen and defendant at least four years older than victim): twenty years (same penalty as rape in the second degree, now § 3-304).

Then § 464B (now § 3-307): Third-degree sexual offense (*sexual contact* [defined differently from "sexual act"] under same conditions as first-degree or second-degree sexual offense, or *vaginal intercourse* [defined separately from "sexual act"] by a twenty-one-year-old or older

with a person fourteen or fifteen years old): ten years.

Then § 464C (now § 3-308): Fourth-degree sexual offense (*sexual contact* without consent; or *sexual act* [not aided and abetted by another person] when victim is fourteen or fifteen and defendant is at least four years older than victim; or *sexual act* or vaginal intercourse with a victim who is fourteen or fifteen and defendant is at least four years older than victim [unless defendant was at least twenty-one, in which case it is third-degree sexual offense]): one year or \$1,000 or both.

Then § 461(e) (now § 3-301(e)): "Sexual act" means cunnilingus, fellatio, anilingus, anal intercourse, or penetration by an object into another person's genital opening or anus reasonably construed to be for sexual arousal, gratification, or abuse. (Vaginal intercourse is covered separately, in rape statutes: § 3-303, first degree [life or life without parole] and § 3-304, second degree [twenty years].).

Then § 461(f) (now § 3-301(f)): "Sexual contact" means intentional touching of victim or defendant's genital and/or other intimate area (other than by penis, mouth, or tongue) for purposes of sexual arousal, gratification, or abuse.

The crime of sexual child abuse (then § 35C, now § 3-602) has a maximum sentence of twenty-five years, whether for one instance or for many instances proved under the same count. The crime of a continuing course of sexual conduct with a child, set forth in Appendix A, has a maximum sentence of thirty years. MD. CRIM. L. CODE ANN. § 3-301 *et seq.* (2002 & Supp. 2003).

102. *People v. Adames*, 62 Cal. Rptr. 2d 631, 54 Cal. App. 4th 198 (Cal. Ct. App. 1997); *People v. Calloway*, 176 Misc. 2d 161, 672 N.Y.S.2d 638 (N.Y. Sup. Ct. 1998); *State v. Molitor*, 210 Wis. 2d 415, 565 N.W.2d 248 (Wis. Ct. App. 1997).

103. Precedent for this approach can be found in *State v. Mulkey*, 316 Md. 475, 560 A.2d 24 (1989). In *Mulkey*, the Court of Appeals reversed the dismissal of an indictment. The Court held that the State's charges may well have been alleged with the requisite "reasonable particularity," when each of twelve different, specific sexual

offense counts charged only one offense, but as having occurred between June 1 and September 3, 5, or 6. The trial court was directed, on remand, to consider certain factors:

In a sexual offense case involving a child victim, the trial court's determination as to how "reasonably particular" a charging document should be as to the time of the offense should include [among other things] the following relevant considerations: 1) the nature of the offense; 2) the age and maturity of the child; 3) the victim's ability to recall specific dates; and 4) the State's good faith efforts and ability to determine reasonable dates." *Id.* at 488, 560 A.2d at 30.

104. *See People v. Johnson*, 40 Cal. App. 4th 24, 46 Cal. Rptr. 2d 836 (Cal. Ct. App. 1996) (prosecutor was not required to charge under continuous course of conduct statute, rather than ten counts of lewd act on child).

105. 2002 Md. Laws ch. 26, § 12; ch. 278, § 2. *See Appendix A.*

106. H.B. 1067 and S.B. 212, which were identical.

107. Fact Sheet, p.2, submitted by this author, 2002 legislative session (on file with author).

108. ILL. REV. STAT. 1985, ch. 38, ¶¶ 115-17.

109. John Maclean, *A Shield for Minors, Too*, THE DAILY RECORD, Mar. 23, 2002, at 2B, col. 3.

110. Joe Surkiewicz, *Fixing a Hole in the Shield*, THE DAILY RECORD, Mar. 23, 2002, at 1B, col. 2.

111. *Stinson v. State*, 256 Ga. App. 902, 904, 569 S.E.2d 858, 861 (2002).

112. Lynn McLain, *Law Must Protect Child Victims*, THE DAILY RECORD, Jan. 11, 2003.

113. 2003 Md. Laws ch. 89. *See Appendix B, supra.*

114. With regard to similar results in Arkansas and Illinois, *see Logan v. Lockhart*, 994 F.2d 1324, 1330-31 (8th Cir. 1993) (trial court's application of Arkansas law to exclude evidence of male rape victim's past homosexual activity as irrelevant and more prejudicial than probative was not violation of due process); *State v. Campos*, 507 N.E.2d 1342 (Ill. App. Ct. 1987) (male child victim; rape shield statute applicable).

On the subject of male rape, see generally Nicholas

Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806 (1980).

115. *See MD. CRIM. L. CODE ANN. § 3-319(b)(4)(iv)* (Supp. 2003) (permitting impeachment "after the prosecutor has put the victim's prior sexual conduct in issue").