



1977

Legislation: Rape and Other Sexual Offense Law Reform in Maryland — 1976-1977

J. William Pitcher
University of Baltimore School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Law Commons](#)

Recommended Citation

Pitcher, J. William (1977) "Legislation: Rape and Other Sexual Offense Law Reform in Maryland — 1976-1977," *University of Baltimore Law Review*: Vol. 7: Iss. 1, Article 9.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol7/iss1/9>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

LEGISLATION

RAPE AND OTHER SEXUAL OFFENSE LAW REFORM IN MARYLAND

1976-1977

I. INTRODUCTION

During the 1976 and 1977 legislative sessions, the Maryland Legislature enacted significant and comprehensive legislation which codified Maryland law on rape and other sexual offenses.¹ The Legislative Council's Special Committee on Rape and Related Offenses² held numerous meetings and public hearings prior to the 1976 legislative session.³ Based on the Special Committee's findings, legislation was proposed, amended and adopted in the 1976 session as the first phase of reform and codification of Maryland sexual offense law.

The 1976 phase of the legislature's work dealt with the substantive law and rules of evidence for these crimes. The 1976 statutes divided rape into two degrees⁴ and delineated, in separate sections, four degrees of "sexual offenses."⁵ In addition, the legislation changed the sub-title of the subject code sections from "Rape" to "Sexual Offenses".⁶ Treating all sexual offenses on a gender-neutral basis, the new laws recognized women as possible offenders against men, men against men, women against women, as well as men against women. Finally, the new laws banned, outright, reputation evidence of the victim's chastity.⁷ The statute dictated that the court hold a prior *in camera* hearing to determine whether particular evidence of a victim's prior sexual conduct is admissible.⁸ To be admissible, such evidence must fall within four enumerated categories.⁹

1. Law of May 17, 1976, ch. 573, 1976 Md. Laws 1528; Law of May 17, 1976, ch. 574, 1976 Md. Laws 1541; Law of May 17, 1977, ch. 290, 1977 Md. Laws 1976; Law of May 17, 1977, ch. 292, 1977 Md. Laws 1985; Law of May 17, 1977, ch. 293, 1977 Md. Laws 1988; Law of May 17, 1977, ch. 294, 1977 Md. Laws 1990; Law of May 17, 1977, ch. 336, 1977 Md. Laws 2076.

2. Hereinafter referred to as the "Special Committee."

3. The following persons or groups gave testimony before the Special Committee: state prosecutors, defense attorneys, legislators, educators, The Maryland Commission on the Status of Women, The National Organization of Women, The Governor's Commission to Study Implementation of the Equal Rights Amendment, The Women's Law Center, jurors, civic groups, rape victims and their parents, and representatives of rape crisis centers. The Committee was chaired by Senate President Steny H. Hoyer.

4. MD. ANN. CODE art. 27, §§ 462-463 (Supp. 1976).

5. *Id.* §§ 464-464C.

6. Law of May 17, 1976, ch. 573, 1976 Md. Laws 1528.

7. MD. ANN. CODE art. 27, § 461A (Supp. 1976).

8. *Id.*

9. See text accompanying note 46 *infra*.

The second phase of reform took place during the 1977 session of the legislature. One bill was passed correcting sexual offense nomenclature throughout the Maryland Code, consistent with the 1976 changes.¹⁰ Other bills addressed the administrative and procedural problems involved with handling and treating victims of rape and related sexual offenses.¹¹

This article will examine Maryland's new sexual offense legislation and analyze the changes in Maryland criminal law and procedure.

II. MARYLAND COMMON LAW AND EARLIER STATUTORY PROVISIONS ON RAPE

Prior to the 1976 session of the Maryland Legislature, the Maryland rape statute was primarily a sentencing law, fixing the penalties without actually defining the crime.¹² Therefore, in order to discern what constituted the crime of rape, an examination of the common law was necessary. As is the case in many areas of the common law, courts differed upon the essential elements of the crime, and in how they were to be proved.

Common law rape was often defined as "the act of a man having unlawful carnal knowledge of a female over the age of ten years by force without the consent and against the will of the victim."¹³ However, other courts have defined the crime in more general terms as "unlawful carnal knowledge of a woman without her consent."¹⁴ Other typically required elements for common law rape were force,¹⁵ absence of the victim's consent,¹⁶ and penetration.¹⁷ Proof of emission was not essential.¹⁸

10. Law of May 17, 1977, ch. 290, 1977 Md. Laws 1976. The bill, S.B. 937, redefined pertinent crimes, penalties, and language to comport with the 1976 changes in the law of sexual offenses.

11. *Id.* ch. 293 at 1988.

12. MD. ANN. CODE art. 27, § 461 (1951). (The statute states that "penetration shall be evidence of rape," yet fails to set forth the other elements required for conviction).

13. *Hazel v. State*, 221 Md. 464, 468, 157 A.2d 922, 924 (1960); *Coward v. State*, 10 Md. App. 127, 130, 268 A.2d 508, 509 (1970); *Scott v. State*, 2 Md. App. 709, 711, 237 A.2d 61, 62 (1968).

14. *Frank v. State*, 6 Md. App. 332, 337, 251 A.2d 249, 252 (1969); *Scott v. State*, 2 Md. App. 709, 711, 237 A.2d 61, 62 (1968) (holding that carnal knowledge and sexual intercourse are synonymous, both meaning actual contact of sexual organs of a man and woman and actual penetration).

15. *See Hazel v. State*, 221 Md. 464, 469, 157 A.2d 922, 924 (1960); *State v. Merchant*, 10 Md. App. 545, 556, 271 A.2d 752, 758 (1970).

16. *Id.*

17. *Edmondson v. State*, 230 Md. 66, 67, 185 A.2d 497 (1962); *Smith v. State*, 224 Md. 509, 511, 168 A.2d 356, 357 (1961); *Robert v. State*, 220 Md. 159, 163, 151 A.2d 737, 739 (1959); *Craig v. State*, 214 Md. 546, 547, 136 A.2d 243, 244 (1957); *McEntire v. State*, 2 Md. App. 449, 452, 235 A.2d 311, 313 (1967).

18. *Scott v. State*, 2 Md. App. 709, 715, 237 A.2d 61, 65 (1968) (proof of emission was also specifically not required by statute, MD. ANN. CODE art. 27, § 461 (1951)).

Force need not have amounted to physical violence; under the common law definition of "force", serious threats to the victim's safety would suffice.¹⁹ In the face of such force, submission to an act of sexual intercourse was not considered to be equivalent to consent.²⁰ In practice, however, courts frequently required that the woman "resisted to the extent of her ability,"²¹ a requirement which effectively placed the onus of proving resistance on the victim.

Under Maryland common law, once a defendant asserted consent as a defense in a rape case, the general character or reputation (as distinguished from specific acts) of the prosecuting witness for chastity was admissible in evidence.²² According to the courts, this type of evidence was thought to be of probative value in determining whether the act was committed with or without the victim's consent.²³ The victim's difficulty of proof, however, was somewhat diminished by the evidentiary rule that the testimony of the prosecuting witness needed no corroboration.²⁴

The statutory rape provisions contained in the pre-1976 Maryland Code made it a felony for anyone to "carnally know and abuse any woman child under the age of fourteen years, or knowingly carnally know and abuse any woman who is an imbecile, non compos mentis or insane, of any age whatever."²⁵ It was only a misdemeanor for any female over the age of eighteen years to carnally know a male, not her husband, under the age of fourteen years.²⁶ The carnal knowledge of any female between the ages of fourteen and sixteen years, not the perpetrator's wife, was likewise considered a misdemeanor in the pre-1976 Code.²⁷

19. *Hazel v. State*, 221 Md. 464, 469, 157 A.2d 922, 924 (1960); *Burnette v. State*, 15 Md. App. 371, 376, 290 A.2d 816, 819 (1972); *State v. Merchant*, 10 Md. App. 545, 556, 271 A.2d 752, 758 (1970).

20. *Giles v. State*, 229 Md. 370, 381, 183 A.2d 359, 364 (1962); *Hazel v. State*, 221 Md. 464, 469, 157 A.2d 922, 924 (1960); *State v. Merchant*, 10 Md. App. 545, 556, 271 A.2d 752, 758 (1970).

21. *Hazel v. State*, 221 Md. 464, 469, 157 A.2d 922, 924 (1960); *See generally* CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES § 11.01 (7th ed. 1967).

22. *Caldwell v. State*, 276 Md. 612, 614-18, 349 A.2d 623, 625-27 (1976); *Johnson v. State*, 232 Md. 199, 207, 192 A.2d 506, 510 (1963); *Giles v. State*, 229 Md. 370, 381, 183 A.2d 359, 364 (1962); *State v. DeLawder*, 28 Md. App. 212, 214, 344 A.2d 446, 448 (1975).

23. *See Smallwood v. Warden, Md. Penitentiary*, 205 F. Supp. 325, 329-30 (D. Md. 1962) (withholding chastity evidence which might have affected outcome of trial is prejudicial error on part of State's Attorney); *England v. State*, 21 Md. App. 412, 421, 320 A.2d 66, 72 (1974) (citing *Humphreys v. State*, 227 Md. 115, 121-22, 175 A.2d 777, 780 (1961)); *See generally* J. WIGMORE, EVIDENCE § 62 (3rd ed. 1940).

24. *Green v. State*, 243 Md. 75, 80, 220 A.2d 131, 135 (1966); *Domneys v. State*, 229 Md. 388, 391, 182 A.2d 880, 881 (1962); *Leek v. State*, 229 Md. 526, 528, 184 A.2d 808, 809 (1962); *Doyal v. State*, 226 Md. 31, 34, 171 A.2d 470, 471 (1961). *But see Johnson v. State*, 3 Md. App. 219, 222, 238 A.2d 295, 296 (1968) (holding corroboration not required unless testimony of prosecutrix is internally inconsistent in relation to pertinent issues).

25. MD. ANN. CODE art. 27, § 462 (1951).

26. *Id.* § 462A.

27. *Id.* § 464.

III. PROBLEMS IN THE PRE-1976 LAW

The rape laws in effect at the beginning of 1976 created many problems for victims and offenders alike. A major problem confronting the rape reform advocates was that common law rape punished only men engaging in unlawful vaginal intercourse with women, and did not punish forcible anal or oral sexual acts committed against males or females. Even though all forcible anal and oral acts could be prosecuted, respectively, under the Sodomy or the Perverted Practices sections of the Code,²⁸ the maximum penalty for either sodomy or perverted practices was limited to ten years,²⁹ whereas common law rape could result in a sentence of life imprisonment.³⁰ Thus, crimes of equal force were assigned disparate punishments. Recognizing that most people regard forcible sex of any description as equally odious, a state commission studying Maryland rape law recommended equal sanctions for all forcible sexual acts.³¹

The rigidity of the existing law posed additional problems. Numerous witnesses testified before the Special Committee that the possibility of a life sentence and the absence of degrees of rape made many jurors reluctant to vote for a conviction³² in cases when there was no physical injury or when the victim might have placed herself in a vulnerable situation.³³ On the other hand, when a victim had suffered injury and numerous sexual indignities that fell short of the required element of physical penetration, the assailant could only be punished for simple assault and battery under the older Maryland law.³⁴ Assault and battery were also the only charges available to a husband or wife, no longer domiciled with his or her spouse, but

28. *Id.* § 553 ("Sodomy"); § 554 ("Perverted Practices").

29. *Id.*

30. *Id.* § 461.

31. GOVERNOR'S COMM. TO STUDY IMPLEMENTATION OF THE EQUAL RIGHTS AMENDMENT, RAPE LAW REFORM IN MARYLAND (January, 1976) (hereinafter referred to as RAPE LAW REFORM).

32. FBI crime statistics for 1970 showed that 46% of all rape trials ended in acquittals or dismissals, as compared to a 29% rate for all crimes. *Hearings on S.B. 358 Before the Senate Judicial Proceedings Comm.*, 1976 Legislative Session (February 18, 1976) (statement of Elaine L. Newman, Maryland Commission on the Status of Women). In 1974, fifty-seven rapes and rape attempts were reported in Montgomery County, Maryland, and thirty-four arrests were made. Only eleven defendants were found guilty of rape and assault with intent to rape. REPORT OF THE MONTGOMERY COUNTY SEXUAL OFFENSES COMMITTEE (June 1975). See generally *Hearings on S.B. 358 Before the Senate Judicial Proceedings Comm.*, 1976 Legislative Session (February 18, 1976) (statement of Ellen Burlow, President, Montgomery County Commission for Women).

33. See *Proposed Reform of the Maryland Laws of Rape and Other Sexual Offenses: Hearings Before the Special Comm.* (July 7, 22, 29, 1975; August 4, 1975; September 8, 29, 1975; October 20, 1975) (a vulnerable situation was thought to be such instances as where the victim was hitch-hiking or walking in a particularly dangerous area).

34. *Id.*

forcibly "raped" by that spouse, because Maryland common law did not define forcible sexual intercourse with one's spouse as a crime.³⁵

The existing law also created an inequity which made specific instances of the victim's past sexual conduct inadmissible into evidence, unless the conduct was with the defendant, yet which permitted introduction of a victim's general reputation for chastity if consent was a defense. As a representative of the Governor's Commission to Study Implementation of the Equal Rights Amendment stated: "Rape law reformers reject the legal supposition that a person who has a premarital or extramarital sexual relationship with one person is likely to consent to sexual relations with each and every other person who so desires."³⁶ Reformers contended that since the law held that a victim's reputation for chastity was relevant, many victims chose not to report and prosecute rape, rather than subject their past sex lives to embarrassing and degrading scrutiny and exposure in open court.³⁷

The sentencing provisions of the rape laws produced additional inequities. For example, under former section 462 a male fourteen years of age or older was guilty of statutory rape if he had intercourse with a consenting female less than fourteen years old.³⁸ Because statutory rape carried a life sentence, the defendant was automatically within the jurisdiction of the adult rather than the juvenile court, and was treated as an adult charged with a crime even if he was fourteen and the female was only one day less than fourteen years of age.³⁹ By contrast, consensual relations between a male over eighteen and a female between the ages of fourteen and sixteen became punishable only as a misdemeanor carrying a maximum two-year sentence.⁴⁰ Likewise, forcible or non-forcible intercourse between a female over the age of eighteen and a male under fourteen was a misdemeanor with a maximum penalty of no more than eighteen months imprisonment.⁴¹ Thus, many persons involved with the criminal justice system contended that the law of sexual offenses needed overhauling by the legislature.

IV. LEGISLATIVE RESPONSE

In 1975, the Legislative Council of the State Legislature established the Special Committee on Rape and Related Offenses. The Special Committee held thirteen public meetings and hearings

35. *Scott v. State*, 2 Md. App. 709, 711, 237 A.2d 61, 62 (1968).

36. RAPE LAW REFORM at 2.

37. *Id.*

38. MD. ANN. CODE art. 27, § 462 (1951). It was generally presumed at common law that a male under fourteen years old was a physical imbecile and therefore impotent. *Waters v. State*, 2 Md. App. 216, 226, 234 A.2d 147, 153 (1967).

39. MD. CTS. & JUD. PROC. CODE ANN. § 3-804(d)(1) (Supp. 1976).

40. MD. ANN. CODE art. 27, § 464 (1951).

41. *Id.* § 462A.

through the summer, fall and winter of 1975, and received testimony from all interested groups.⁴² At the conclusion of the testimony from those persons seeking reform of the sexual offense laws, as well as those opposed to change, the Special Committee drafted legislation which proposed comprehensive revision of Maryland's law relating to rape and other sexual offenses. The final amended versions of some of these bills became the nucleus around which Maryland's new sexual offense law grew.

V. 1976 CHANGES — PHASE ONE

Briefly stated, the 1976 laws present six possible sexual offenses: first and second degree rape, first and second degree sexual offenses (involving "sexual acts"), and third and fourth degree sexual offenses (involving "sexual contact"). Section 461 defines terms such as "mentally defective," "mentally incapacitated," "physically helpless," "sexual act," "sexual contact," and "vaginal intercourse."⁴³

Section 461A, entitled "Admissibility of evidence in rape cases," bans direct and opinion evidence relating to a victim's reputation for chastity from any prosecution for the commission of a rape.⁴⁴ On the other hand, the section does allow evidence of specific instances of the victim's prior sexual conduct, but only if the judge in a prior *in camera* hearing finds that the evidence is relevant and material to a fact in issue and that its inflammatory or prejudicial nature does not outweigh its probative value.⁴⁵ If those conditions are met, four types of evidence may be admissible: 1) evidence of the victim's past sexual conduct with the defendant; 2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma; 3) evidence which supports a claim that the victim has an ulterior motive in accusing the defendant of the crime; or 4) evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue.⁴⁶

The list of exceptions to the ban on evidence of specific instances of the victim's prior sexual activities was, in reality, a codification of the common law, and thus constituted no substantive change.⁴⁷ The outright ban on reputation evidence and the in-chambers balancing of prejudicial value against probative value, however, marked a

42. See note 2 *supra*.

43. MD. ANN. CODE art. 27, § 461 (Supp. 1976).

44. *Id.* § 461A.

45. *Id.* § 461A(b).

46. *Id.* § 461A(a)(1)-(4).

47. Cf. McCORMACK, EVIDENCE, § 44 (2d ed. 1972) (citing 3A J. WIGMORE, EVIDENCE § 924a (Chadbourn rev 1970)) (concerning the views of eminent psychiatrists as to the prevalence, and the abnormal motivations, of groundless complaints of sexual crime).

substantive change in Maryland law and, as such, was hotly debated during hearings before the Senate Judicial Proceedings Committee.

In testimony at those hearings, reformers contended that the banning of reputation evidence pertaining to the victim's chastity was an overdue measure which was essential to safeguard the victim's right of privacy. One witness testifying before the Committee, expressed the sentiment that:

For too long, the victim has been subjected to the embarrassment and harassment of a defense attorney's attempt to discredit her charge by questions designed to show that because she consented to sexual relations in the past, she must have consented in the situation at issue.⁴⁸

In another witness' words, "The suggestiveness of such testimony, both by devious inference and by intonation, can be very destructive and insidious, and the inferences invited by such suggestiveness must surely make an impact on the jury."⁴⁹ Proponents of the legislation universally agreed that as a result of the past evidentiary procedures, the complaining witness experienced subsequent anxiety and humiliation. These reformers felt that allowing evidence of a woman's sexual history in the courtroom made it difficult for the casual observer at a rape trial to determine who was actually being tried.

Senator Rosalie Abrams made what was perhaps the most persuasive argument for adoption of the present section 461A, in stating that the issue of chastity is not even relevant:

There is no reason to believe that a woman who engages in sexual acts voluntarily thereby implicitly consents to any and all. Nor is there any reason to believe that that which passes as a person's "reputation for chastity" has any bearing on the person's consent to a specific act.⁵⁰

Senator Abrams concluded that the proposed legislation, banning such evidence, would adequately limit admissible evidence to those facts which would demonstrably bear on the specific act in question.⁵¹

48. *Hearings on S.B. 358 Before the Senate Judicial Proceedings Comm.*, 1976 Legislative Session (February 18, 1976) (statement of Carolyn Feinglass, Task Force to Study the Treatment of Victims of Sexual Assault, National Organization for Women).

49. *Hearings on Rape and Related Offenses Before the Special Comm.* (July 22, 1975) (statement of Naomi Mestanas, Rape Sub-Committee, Maryland Commission on the Status of Women).

50. *Hearings on S.B. 358 Before the Senate Judicial Proceedings Comm.*, 1976 Legislative Session (February 18, 1976) (statement of State Senator Rosalie S. Abrams).

51. *Id.*

As a consequence of the pre-1976 evidentiary rules, the general consensus among persons testifying before the Senate Judicial Proceedings Committee was that a high percentage of rapes went unreported due to the fact that many victims preferred not to bare their past sexual lives before the community under the open court questioning of defense attorneys.⁵² Those who testified urged that something be done about curing this intolerable situation.

The proposed remedy, however, raised the countervailing consideration of a defendant's constitutional right to present relevant evidence on his behalf. In testimony before the Special Committee, a representative of the Maryland Chapter of the American Civil Liberties Union voiced concern over possible violation of the Sixth Amendment of the United States Constitution and Article 23 of the Maryland Declaration of Rights⁵³ by proposed section 461A.⁵⁴ Maintaining that the right of the defendant to a day in court requires paramount protection, the witness averred that the effect of limiting the scope of the defendant's opportunity to examine what is usually the only material witness against him would "create inflexibility and straightjacket a defendant's rights."⁵⁵

A memorandum by the Certiorari Review and Law Development Section of the Maryland Public Defender's Office likewise questioned the constitutionality of a ban on reputation evidence.⁵⁶ In support of its contention that the proposed legislation "could conflict with the constitutional right of a defendant to confront his accusers,"⁵⁷ the Public Defender's Office cited the Maryland Court of Special Appeals' decision in *State v. DeLawder*,⁵⁸ which relied on the United States Supreme Court's decision in *Davis v. Alaska*.⁵⁹

52. *Id.* (statement of Anne Arundel County Commission on the Status of Women; statement Theodore G. Venetoulis, County Executive of Baltimore County; statement of Elaine Newman, Executive Director of Maryland Commission on the Status of Women); see *Hearings on Rape and Related Offenses Before the Special Comm.*, (September 8, 1975) (statement of Mary Ann Willin, Esq., Assistant State's Attorney for Baltimore City, that in Baltimore City during 1975, of the 900 rape victims treated at Mercy and University Hospitals, only 480 were reported to police). The Women's Crisis Hotline at the University of Maryland, College Park Campus, had reports of 79 rapes during 1975, yet campus police only received 4 reports, *Hearings on S.B. 358 Before the Senate Judicial Proceedings Comm.*, 1976 Legislative Session (February 18, 1976) (statement of Susan Zevgolits, Director of Women's Affairs at the University of Maryland, College Park Campus).

53. MD. CONST., DEC. OF RIGHTS art. 23. See also MD. CONST., DEC. OF RIGHTS, art. 21.

54. *Hearings on Rape and Related Offenses Before the Special Comm.*, (September 29, 1975) (statement of Elsbeth Bothe, Esq., Maryland Chapter of the American Civil Liberties Union).

55. *Id.*

56. Memorandum from Certiorari Review and Law Development Section, Office of the Public Defender of Maryland (Legislative Session, 1976) (hereinafter referred to as Public Defender's Memorandum).

57. *Id.* at 3.

58. *State v. DeLawder*, 28 Md. App. 212, 344 A.2d 446 (1975).

The *DeLawder* decision, reversing a trial court's refusal to let defense counsel cross-examine the prosecutrix in a rape case about her statements to other persons that she was pregnant, held as follows:

[I]n the light of *Davis*, . . . defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. By being prevented from so doing *DeLawder* was denied the right of effective cross-examination, a constitutional error of the first magnitude which no amount of showing of want of prejudice would cure.⁶⁰

The court concluded that the desirability of the prosecutrix to be able "to testify free from embarrassment and with her reputation unblemished," is subordinate to "the right of an accused to seek out the truth in the process of defending himself."⁶¹

While recognizing that the proposed legislation allowed admission of the type of evidence which was excluded by the trial court in *DeLawder*, the memorandum stated that the *DeLawder* argument might successfully be used to challenge the total exclusion of evidence of the reputation for chastity of the rape victim.⁶² Apparently the legislators did not agree with the strong constitutional attack framed by critics of the new legislation; the bill was favorably reported and passed.⁶³

VI. THE TWO DEGREES OF RAPE

Section 462, entitled first degree rape, codified the common law definition of rape in non-gender specific terms.⁶⁴ The distinguishing feature of first degree rape is the inclusion of a set of aggravating circumstances. The first such circumstance includes the use or display by the offender of a dangerous or deadly weapon, or an article which the victim might reasonably conclude to be such a weapon.⁶⁵ A second aggravating element would be the offender's infliction of suffocation, strangulation, disfigurement, or serious physical injury upon the victim or anyone else in the course of committing the crime.⁶⁶ If the offender threatens or places the victim

59. *Davis v. Alaska*, 415 U.S. 308 (1974).

60. *State v. DeLawder*, 28 Md. App. 212, 227-28, 344 A.2d 446, 455 (1975).

61. *Id.*

62. Public Defender's Memorandum, *supra* note 56, at 4.

63. SENATE JUDICIAL PROCEEDINGS COMM., 1976 LEGISLATIVE SESS., REPORT ON S.B. 399. The legislation which was eventually passed by both houses was the House version contained in H.B. 715, to which the Public Defender's Memorandum was addressed.

64. MD. ANN. CODE art. 27, § 462 (Supp. 1976).

65. *Id.* § 462(a)(1).

66. *Id.* § 462(a)(2).

in fear that the victim or other persons known to the victim "will be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping," the third aggravating element exists.⁶⁷ The fourth aggravating element consists of the offender committing the offense aided and abetted by one or more persons.⁶⁸ Anyone convicted of a first degree rape offense is subject to life imprisonment.⁶⁹

Second degree rape, section 463, penalizes forcible vaginal intercourse with another person, or with a person whom the rapist "knows or should reasonably know" to be "mentally defective, mentally incapacitated, or physically helpless," but absent the aggravating elements of the first degree offense.⁷⁰ The maximum penalty for conviction of second degree rape is twenty years imprisonment.⁷¹

VII. THE FOUR DEGREES OF SEXUAL OFFENSE

First degree sexual offense, covered by section 464, consists of a "sexual act" with another person by force or threat of force, against the will and without the consent of the other person, in conjunction with any of the enumerated aggravating circumstances of first degree rape.⁷² Section 461 defines a "sexual act" as either cunnilingus, fellatio, anilingus, or anal intercourse, but expressly excludes vaginal intercourse.⁷³ The definition further states:

Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body if the penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for abuse of either party and if the penetration is not for accepted medical purposes.⁷⁴

Included in the section is the offense of a consensual sexual act with a person under fourteen years of age if the offender is more than four years older.⁷⁵ The maximum penalty for conviction of a first degree sexual offense is imprisonment for life.⁷⁶

Second degree sexual offenses are enumerated in section 464A. This section parallels the section on second degree rape to the extent of the force involved in the offense. It should be noted, however, that

67. *Id.* § 462(a)(3).

68. *Id.* § 462(a)(4).

69. *Id.* § 462(b).

70. *Id.* § 463.

71. *Id.* § 463(b).

72. *Id.* § 464.

73. *Id.* § 461(e).

74. *Id.*

75. *Id.* § 464(a)(2).

76. *Id.* § 464(b).

“sexual act” is substituted for “vaginal intercourse,”⁷⁷ and further, that section 464A contains the additional subsection which makes the forcible sexual act with a person under fifteen years of age a second degree sexual offense if the offender is four or more years older than the victim.⁷⁸ The maximum penalty for violation of the section is twenty years imprisonment.⁷⁹

Section 464B, which sets forth the elements of third degree sexual offense, states that a person is guilty of a sexual offense in the third degree if he or she engages in sexual contact against the will and without the consent of another person, and the act is aggravated by one of the four circumstances set out in first degree rape and first degree sexual offense.⁸⁰ Where the aggravating circumstances are lacking, the offender violates the section if he or she knows or should reasonably know that the victim is mentally defective, mentally incapacitated, or physically helpless, or where the victim is under fourteen years of age and the offender is four or more years older.⁸¹ “Sexual contact” is defined in section 461 as:

the intentional touching of any part of the victim’s or actor’s anal or genital areas or other intimate parts for the purposes of sexual arousal or gratification or for abuse of either party and includes the penetration, however slight, by any part of a person’s body, other than the penis, mouth, or tongue, into the genital or anal opening of another person’s body if that penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for the abuse of either party. It does not include acts commonly expressive of familial or friendly affection, or acts for accepted medical purposes.⁸²

The penalty for conviction of third degree sexual offense is imprisonment for a period of not more than ten years.⁸³

Section 464C, entitled fourth degree sexual offense, penalizes sexual contact with another person against the will and without the consent of that other person.⁸⁴ Additionally proscribed by the section is a sexual act with another person who is fifteen years old when the offender is four or more years older than the victim, or vaginal intercourse with another person fourteen or fifteen years old when the offender is four or more years older than the victim.⁸⁵ The

77. *Id.* § 464A(a).

78. *Id.* § 464A(a)(3).

79. *Id.* § 464A(b).

80. *Id.* § 464B(a).

81. *Id.* § 464B(a)(2)-(3).

82. *Id.* § 461(f).

83. *Id.* § 464(b).

84. *Id.* § 464C.

85. *Id.* § 464C(a)(2), (3).

penalty of violation of section 464C is imprisonment for a period of not more than one year, a fine of not more than \$1000, or both fine and imprisonment.⁸⁶

Finally, section 464D addresses itself to a sexual offense or rape against a person who is the offender's spouse.⁸⁷ It mandates that a person may not be prosecuted under section 462, 463, 464B, or 464C⁸⁸ if "the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense unless the parties are living separate and apart pursuant to a decree of divorce *a mensa et thoro*."⁸⁹

VIII. 1977 LEGISLATION PASSED — PHASE TWO

In addition to enacting a bill redefining certain crimes to include rape or sexual offenses in any degree, and correcting nomenclature pursuant to the 1976 changes,⁹⁰ the 1977 legislature continued in the spirit of reform with important changes in the laws of sexual offense. House Bill 1445 expanded Article 27, section 461A to exclude evidence of reputation for chastity in cases of second degree rape and first and second degree sexual offenses.⁹¹ Senate Bill 658 added section 461B to Article 27, establishing a general indictment or warrant for all rape and sexual offense cases.⁹² Senate Bill 934 was passed, downgrading statutory rape of a person under age fourteen by a person at least four years older than the victim, from the first to the second degree.⁹³

In the realm of administrative changes, House Bill 1984 stated that victims of rape and sexual offenses may not be charged for the cost of related examinations by a physician or hospital.⁹⁴ Further, the bill provided that hospitals and doctors be reimbursed by the Department of Health and Mental Hygiene, and that the rights of the victims who are insured be subrogated to the Department.⁹⁵ Finally, a bill was passed authorizing the Police Training Commission to require that the curriculum and course of study for police training include courses concerning the crimes of rape and sexual offenses.⁹⁶

86. *Id.* § 464C(b).

87. *Id.* § 464D.

88. *Id.* (the section does not specifically bar prosecution under 464, first degree sexual offense, and § 464A, second degree sexual offense. These offenses are generally included in the still existing Sodomy and Perverted Practices sections, §§ 553 and 554, respectively).

89. *Id.*

90. Law of May 17, 1977, ch. 290, 1977 Md. Laws 1976.

91. Law of May 17, 1977, ch. 294, 1977 Md. Laws 1990.

92. Law of May 17, 1977, ch. 336, 1977 Md. Laws 2076. Previously, indictment was generally covered by Md. Rule 703, as defined in sec. (a) of Rule 702.

93. Law of May 17, 1977, ch. 292, 1977 Md. Laws 1985.

94. Law of May 24, 1977, ch. 854, 1977 Md. Laws 3320.

95. *Id.*

96. Law of May 17, 1977, ch. 293, 1977 Md. Laws 1988.

IX. CONCLUSIONS

The basic goals of the comprehensive legislation during both phases of legislative reform were threefold. The first goal was to redefine the stigmatizing sexual crimes that existed in Maryland in non-gender specific terms which were less likely to cause additional psychic trauma to the victim.⁹⁷ The second goal sought to preclude the admission into evidence of certain testimony as to the chastity of the victim and to limit admission of evidence of specific instances of the victim's prior sexual conduct, thereby lessening the likelihood of exacerbating the psychological injury already suffered. Finally, the legislature attempted to provide viable criminal sanctions for those transgressors falling within the gap which formerly existed between the common law misdemeanor of assault and the felony of rape which was punishable by life imprisonment.⁹⁸

The first goal was sufficiently accomplished without any real cause for dissent. As previously discussed, the second goal was met by the enactment of section 461A, over the objections of those who thought the measure too heavily weighted toward the prosecution and in violation of the defendant's constitutional rights. Whether section 461A will stand the constitutional test that it is bound to be subjected to in the courts remains to be seen.⁹⁹

Concerning the third goal, that of codifying the elements and penalties of rape and other sexual offenses into degrees, the Special Committee has performed its task admirably and efficiently. Inconsistencies remain, however, which will be illustrated below.

One underlying consideration for the codification movement was what most concerned groups regarded as a conviction rate for rape which was dismally low when compared to conviction rates for other

97. *Hearings on S.B. 358 Before the Senate Judicial Proceedings Comm.*, 1976 Legislative Session (February 18, 1976) (statement of Elaine Newman, Maryland Commission on the Status of Women, wherein she expressed the sentiment that the old historical view of rape no longer prevailed, and therefore, that the nomenclature of the law should reflect that change. She further stated that because of the historical connotations of rape, the victim felt defiled, degraded, and of less value, and that many women refused to report a rape because they could not even bring themselves to say the word).

98. *See generally Hearings on Rape and Related Offenses Before the Special Comm.* (June 24, 1975).

99. See, for an analysis of the constitutional arguments of both sides of the issue: Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 *COLUM. L. REV.* 1 (1977); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 *JUD.* 391 (1975); Davis, *Character Evidence in Rape Cases*, 1976 *N.Z.L.J.* 178; Herman, *What's Wrong With Rape Reform Laws?*, 3 *CIV. LIB. REV.* 60 (1976); Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 *WM. & MARY L. REV.* 1 (1976); Comment, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflections of Reality or Denial of Due Process?*, 3 *HOFSTRA L. REV.* 403 (1975); 15 *DUQ. L. REV.* 155 (1976).

violent crimes.¹⁰⁰ These groups felt that the penalties for certain sex offenses should be changed or reduced because the life imprisonment penalty for rape was a roadblock to convictions.¹⁰¹ They contended that, pragmatically, there already existed degrees of rape, running the gamut from brutal ravishment and murder to what has euphemistically been referred to as the "date rape."¹⁰² According to these organizations, the failure of the law to recognize the gradations of severity among crimes all termed "rape" has encouraged many juries to refuse to convict when life imprisonment appeared to be an overly harsh penalty.

The new laws apparently were designed to meet what many felt to be an urgent need for re-examination of the one-category method of dealing with the crime of rape. If one follows this reasoning, then certain flaws in the present legislation become apparent. If the new laws are designed to set out smaller penalties for lesser degrees of violent offenses and thus promote greater incidence of convictions by giving the jury the option of a more equitable punishment for the crime, then why is the only alternative maximum penalty twenty years imprisonment? Some observers would argue that such a penalty for the crime of second degree rape is still too severe. Juries may persist in their refusal to convict certain rape offenders, even in the second degree, if the victim is not seriously injured or was in a so-called "vulnerable" situation. So, while the new law may bring about a greater rate of convictions, the legislature might do well to consider continuing study of the issue of further gradations of punishment for different degrees of rape. An examination of recently enacted legislation concerning sexual offenses in other states would prove helpful to legislators seeking an example of more rational penalties.

Some jurisdictions have approached the sentencing problem by entirely eliminating the possibility of life imprisonment for a rape offender,¹⁰³ or by greatly reducing the sentence for an offense committed without actual intent of infliction of bodily harm.¹⁰⁴ In Michigan, under a statutory scheme similar to Maryland's,¹⁰⁵

100. *Hearings on Rape and Related Offenses Before the Special Comm.* (September 24, 1975) (testimony of various State's Attorneys on the conviction rates in their respective jurisdictions).

101. *See Hearings on Rape and Related Offenses Before the Special Comm.* (August 4, 1975) (statement of Professor John M. Brumbaugh, Reporter, Maryland Commission on Criminal Law).

102. SENATE JUD. PROC. COMM., 1976 Legislative Session, REPORT ON S.B. 358 (stating "this latter term referring to a situation wherein, more often than not, parties are acquainted (albeit shortly) and the aggressor is numbed by alcohol, sexually aggressive and likely to misinterpret the fearful cries of the victim").

103. *See, e.g.*, CONN. GEN. STAT. ANN., tit. 53a, §§ 70-73a (Supp. 1977); OR. REV. STAT., §§ 163.305 to 163.465 (1973).

104. *See, e.g.*, CAL. PENAL CODE, § 264 (Supp. 1976) (provides a sentence of no greater than five years for sexual crimes without intent or actual infliction of harm).

105. MICH. STAT. ANN. § 28.788(2)-(5) (1977).

criminal sexual conduct in the first degree is punishable by life imprisonment. Unlike Maryland, Michigan expressly provides the alternative sentence of "any number of years."¹⁰⁶ This alternative not only makes allowances for situations in which the difference in age between the offender and the victim is very small, but it serves to lessen the chance that a jury will refuse to convict a rape defendant simply because the punishment is severe. In a similar vein, New York sets minimum and maximum determinate sentences for its three degrees of rape,¹⁰⁷ while allowing the court the flexibility of imposing sentencing alternatives for crimes in the second and third degree which take into account whether the person is a first-time or a recidivist offender.¹⁰⁸

Maryland's new laws still mete out disproportionate penalties for some crimes of nearly the same severity. Under section 463(a)(3), vaginal intercourse with a person under fourteen years of age, if the actor is at least four years older than the victim, is a second degree rape offense punishable by a possible twenty years imprisonment.¹⁰⁹ The same act with a fourteen year old is only a fourth degree offense, a misdemeanor subject to not more than one year imprisonment and/or a fine of not more than \$1000.¹¹⁰ Thus the law creates a potential disparity in punishment of up to twenty years for a difference in the victim's age of as little as one day.

A similar disparity can be found in section 464B(a)(3), where the line is drawn at age fourteen for an act of consensual sexual contact.¹¹¹ The possible penalty for committing this felony with a victim who is thirteen and a half years of age is ten years imprisonment. The same act committed against a "victim" of fourteen years of age or older is not even made a crime under Maryland statute.

These inequities merely serve to point out the difficulty of drawing a statutory line at certain ages in order to delineate different acts for which society feels punishment is warranted. This difficulty should not prevent the legislature in future sessions from re-examining those specific instances where disparate punishment is provided for sexual offenses of almost equal magnitude. Further consideration should also be given the problems which might arise as a result of the new statutory incorporation of most, but not all, of the acts from the Sodomy and Perverted Practices sections into the present sexual offense laws. This situation will undoubtedly create confusion for prosecutors and defendants, in that those specific acts

106. *Id.* § 28.788(2). While Maryland courts may choose to impose less than the maximum sentence for a given degree of sexual offense, no alternative sentences are expressly provided by statute.

107. N.Y. PENAL CODE, § 70.00(2)(a)-(e), (3) (1973).

108. *Id.* § 70.00(4), § 70.06.

109. Law of May 17, 1977, ch. 292, 1977 Md. Laws 1985.

110. MD. ANN. CODE art. 27, § 464C (Supp. 1976).

111. *Id.* § 464B(a)(3).

are still in effect under the old Sodomy¹¹² and Perverted Practices sections.¹¹³ The legislature might want to examine the Oregon statute in this regard because of its treatment of parallel degrees for rape and sodomy offenses.¹¹⁴ Such a solution may help to alleviate the political resistance by those opposed to repeal of Sodomy and Perverted Practices sections.

While the above flaws in the statute do exist, it was inevitable that a codification process embodying the elements of political and sociological considerations, taking place during the hectic pace of a 90-day legislative session, would be less than ideal. The recent legislative initiatives by Maryland in reforming the law of sexual offenses wisely recognize that society has a duty to impose punishments on sexual offenders of both sexes which correspond to the violence of their acts and the effects upon their victims. Such an approach best serves to protect not only the rights of the victim, but those of the aggressor as well.

J. William Pitcher

ADDENDUM

On January 30, 1978, the Maryland Senate passed on third reader an amendment to Section 461C of Article 27. The bill, which as of early February was before the Maryland House Judiciary Committee, prohibits the judge in a rape or sexual offense trial from issuing particular types of jury instructions. If the amendment becomes law, a jury may *not* be:

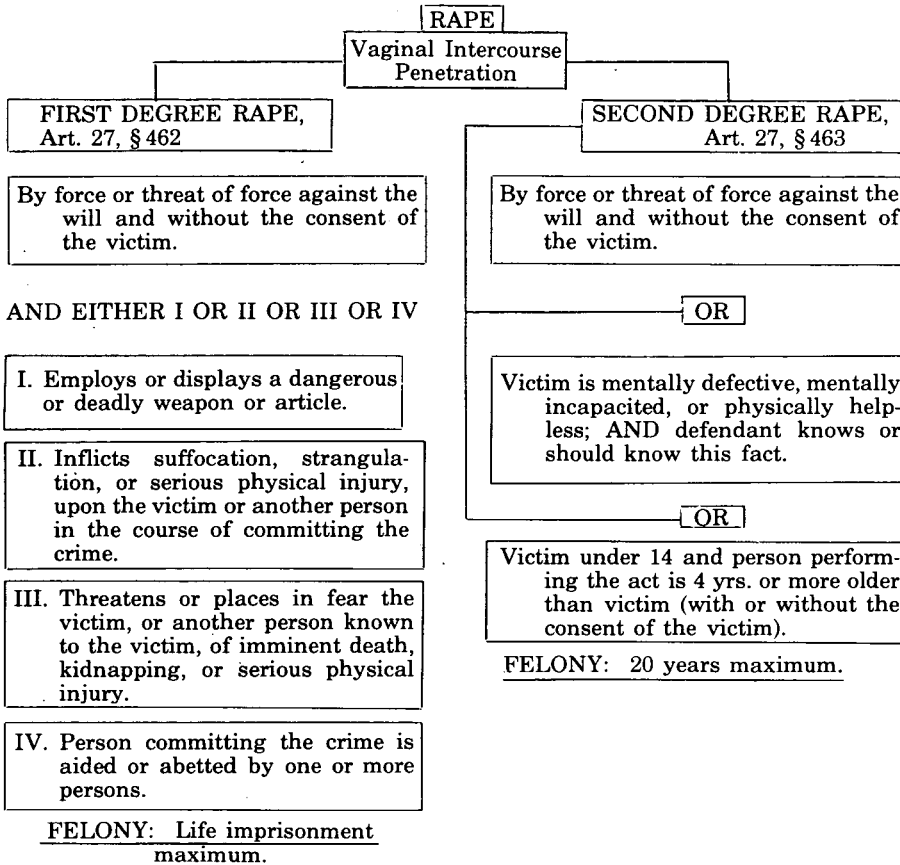
- (1) instructed, solely because of the nature of the charge, to examine with caution the testimony of the prosecuting witness;
- (2) instructed, solely because of the nature of the charge that the charge is easily made or difficult to disprove; or
- (3) given any similar instruction solely because of the nature of the charge.

112. MD. ANN. CODE art. 27, § 553 (1951).

113. *Id.* § 554.

114. OR. REV. STAT. § 163.305 to - .465 (1973).

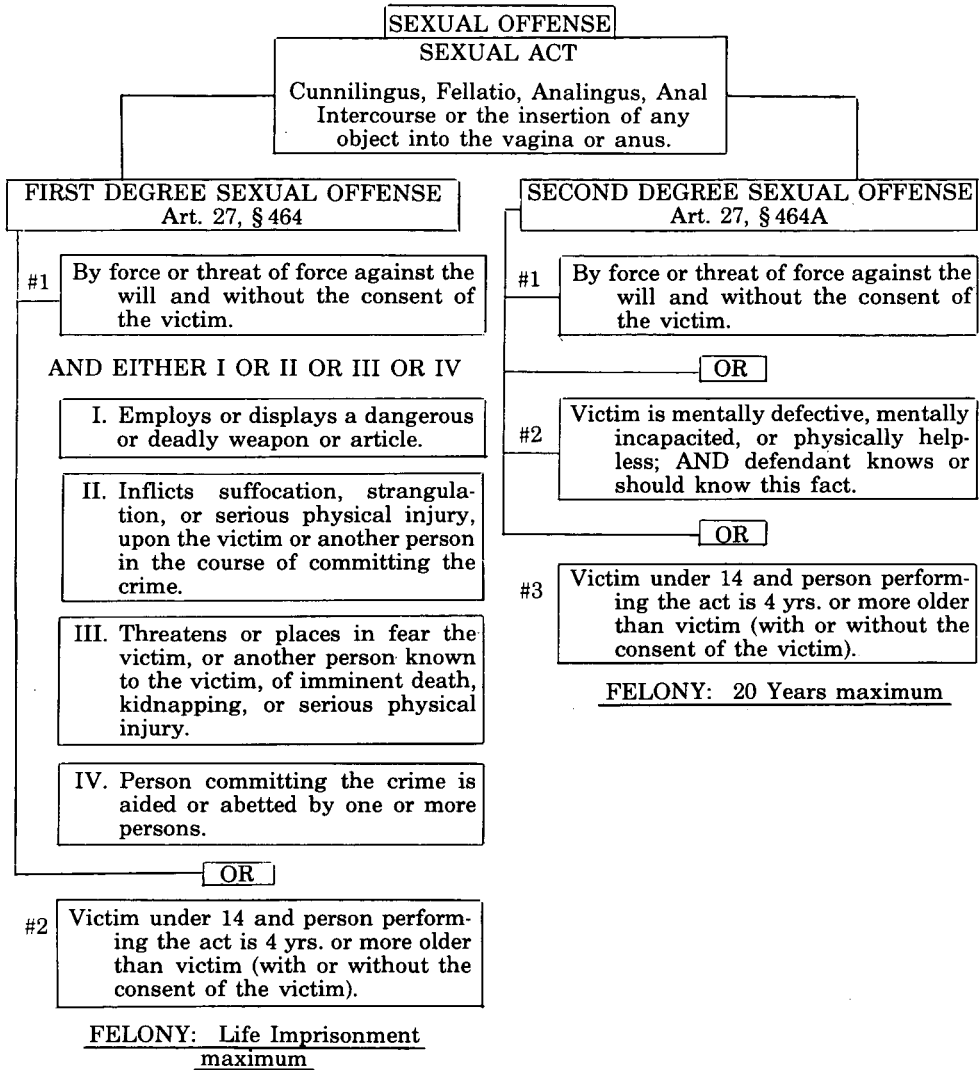
APPENDIX¹¹⁵
Sexual Offense legislation



DEFINITIONS OF CHART TERMS

- MENTALLY DEFECTIVE — permanent — victim suffers from a mental disorder, such as retardation.
- MENTALLY INCAPACITATED — temporary — due to drugs or alcohol, victim suffers from a mental deficiency.
- PHYSICALLY HELPLESS — victim is unconscious, asleep, physically handicapped or physically unable to resist.

115. The following charts and definitions are based on those contained in a document entitled NEW RAPE AND SEXUAL OFFENSE LEGISLATION, prepared by The Honorable Steny H. Hoyer, President, Maryland Senate, The Honorable Sandra O'Connor, State's Attorney for Baltimore County, and The Honorable Edwin H.W. Harlan, Jr., State's Attorney for Harford County, July 1, 1976.



SEXUAL OFFENSE

SEXUAL CONTACT

Intentional touching anal, genital or other intimate areas (breasts) for sexual purposes, or insertion of finger or other body part *except* penis, mouth or tongue into anal or vaginal area.

THIRD DEGREE SEXUAL OFFENSE
Art. 27, § 464B

#1 Against the will and without consent of the victim.

AND EITHER I OR II OR III OR IV

I. Employs or displays a dangerous or deadly weapon or article.

II. Inflicts suffocation, strangulation, or serious physical injury, upon the victim or another person in the course of committing the crime.

III. Threatens or places in fear the victim, or another person known to the victim, of imminent death, kidnapping, or serious physical injury.

IV. Person committing the crime is aided or abetted by one or more persons.

OR

#2 Victim is mentally defective, mentally incapacitated or physically helpless and the defendant knows or should know this fact.

OR

#3 Victim is under 14 and person performing the sexual contact is four (4) or more years older than the victim.

FELONY: 10 Years maximum

FOURTH DEGREE SEXUAL OFFENSE
Art. 27 § 464C

#1 Against the will and without consent of the victim.

OR

#2 In *Sexual Act* with victim 15 years old and the person performing the act is four (4) or more years older than the victim.

OR

#3 Vaginal intercourse with victim 14 or 15 and the person performing the act is four (4) or more years older than the victim (consensual).

MISDEMEANOR: 1 Year and \$1,000 fine maximum

STATUTORY RAPE AND
OTHER SEXUAL OFFENSES

Girl's Age	Boy's Age	Sex Act	Consent	Crime
12	15	Intercourse	Yes	None
12	16	Intercourse	Yes	2 Degree Rape
13	18	Intercourse	Yes	2 Degree Rape
14	17	Intercourse	Yes	None
14	19	Intercourse	Yes	4 Degree Sexual Offense
15	19	Intercourse	Yes	4 Degree Sexual Offense
13	16	Oral Sex	Yes	None
13	19	Oral Sex	Yes	1 Degree Sexual Offense
14	19	Oral Sex	Yes	2 Degree Sexual Offense
15	19	Oral Sex	Yes	4 Degree Sexual Offense