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THE COURT OF APPEALS OF MARYLAND: ROLES, WORK AND PERFORMANCE—Part I

WILLIAM L. REYNOLDS, II*

Appellate courts play a central role in our legal system, yet their operations are not always well understood. Interest in problems of appellate decision-making led me to undertake this study of the Court of Appeals of Maryland. My curiosity was aroused in part by the controversial recommendation that the jurisdiction of the United States Supreme Court be modified to provide that Court with greater control over its docket.¹ Because the Court of Appeals of Maryland at present has almost complete control of its docket, it seemed a likely court to study for the effect of such control on the quality of decisions. Teaching also stimulated my interest in the Court of Appeals: classroom analysis and criticism of appellate opinions led me to examine the problems of decision-making, the manner in which decisions are made, and the content of those decisions. The study was also self-reinforcing; what began primarily as an inquiry into the certiorari practices of the Court of Appeals gradually expanded, as it seemed necessary to elaborate on my observations and conclusions. This latter drive was in turn reinforced by the absence of studies such as this at the state level. Although appellate decision-making has been a much discussed area,² scholarly

* A.B. 1967, Dartmouth College; J.D. 1970, Harvard. I wish to thank my colleagues Chris Brown and David Bogen for their comments and suggestions on an earlier draft of this Part of this Article. I also wish to thank Gary Aiken of the Law School Class of 1977 for his research assistance and preparation of the Appendices to this Article. The State Reporter, James H. Norris, Jr., and his staff were most helpful.

1. See, e.g., COMMISSION ON REVIEW OF THE FEDERAL APPELLATE SYSTEM, STRUCTURE & INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975); FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972).

2. Excellent general examinations of the appellate decision-making process are H. HART & A. SACKS, THE LEGAL PROCESS (tent. ed. 1958); K. LLEWELLYN, THE COMMON LAW TRADITION (1960). Recently, Judge Aldisert and Dean Leflar have edited books which contain a collection of materials by judges and scholars on the

attention has concentrated on the glitter surrounding the Supreme Court and its decisions. As a result, the state supreme courts have been generally, although not universally, neglected by critics and commentators.³ The Court of Appeals of Maryland has been no exception to this lack of critical attention.⁴ This neglect is unfortunate because state courts handle the vast majority of litigation in this country and play, therefore, a major role in the development of the nation's law. Thus, this Article seeks not only a better understanding of the workings and practices of state appellate courts, but also to focus attention on the Court of Appeals of Maryland.

Part One of this Article has two sections. Section One analyzes the certiorari process in the Court of Appeals, while Section Two concentrates on the workload and opinions of the Court. Both of these sections are based on a study of all published decisions by the Court of Appeals that were handed down during the September, 1975 Term — that is, between September 1, 1975 and August 31, 1976. The Law Review has prepared a number of Tables detailing data concerning those opinions; those Tables can be found in Appendix A of this Article. Finally, Part Two of the Article is a critical look at

judicial function. R. ALDISERT, *THE JUDICIAL PROCESS* (1976); R. LEFLAR, *APPELLATE JUDICIAL OPINIONS* (1974).

For first-rate studies of decision-making in particular courts — one federal, one state — see M. SHICK, *LEARNED HAND'S COURT* (1970) (Second Circuit); Smith, *The Current Opinions of the Supreme Court of Arkansas: A Study in Craftsmanship*, 1 ARK. L. REV. 89 (1947).

3. Among the recent attempts to fill this void are Beatty, *Decision Making on the Iowa Supreme Court — 1965-1969*, 19 DRAKE L. REV. 342 (1970); Miller, *The Work of the Michigan Supreme Court During the Survey Period: Statistical Analysis*, 11 WAYNE L. REV. 1 (1964); A *Brief Survey of the Kentucky Court of Appeals Opinions Published, 1968-1971*, 61 KY. L.J. 512 (1973). See also Archbald, *Stare Decisis and the Ohio Supreme Court*, 9 W. RES. L. REV. 23 (1957). There also has been an excellent series of "Forewords" to the California Law Review's survey of the work of that state's highest court.

4. Some recent articles have helped improve this situation. See, e.g., Tomlinson, *Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland*, 35 MD. L. REV. 414 (1976). The annual review of Maryland law by the Maryland Law Review — now in its second year — is also a very welcome step. A generation ago, Brune & Strahorn, *The Court of Appeals of Maryland: A Five-Year Case Study*, 4 MD. L. REV. 343 (1940), studied data on the Court's workload during the 1935-40 period. An admirable description of the Court through the late nineteenth century is C. BOND, *THE COURT OF APPEALS OF MARYLAND, A HISTORY* (1928) [hereinafter cited as BOND, HISTORY]. Chief Judge Bond also provided an excellent introduction to a collection of decisions of the Court in the colonial period. C. BOND, *PROCEEDINGS OF THE MARYLAND COURT OF APPEALS, 1695-1729* (1933) [hereinafter cited as BOND, PROCEEDINGS].

MICPEL, a Maryland continuing legal education group, has recently published a two-volume work, *THE MARYLAND APPELLATE PRACTICE HANDBOOK* (P. Sandler ed. 1977).

the Court's craftsmanship and decision-making; Part Two (to be published subsequently) will not focus exclusively on the 1975-1976 Term, although it will concentrate on the decisions of that period.

SECTION ONE: CERTIORARI

I. Introduction

The Court of Appeals has its roots in the earliest days of the colony when the Governor and his Council issued writs of error to review judgments of the central Provincial Court.⁵ A court of last resort was formally established under royal authority in 1694. The court, typical of the colonial judiciary, consisted of the Governor and Council.⁶ In 1776 the Maryland Constitution organized the government of the State on the basis of separation of powers, with the Court of Appeals the highest court in the judicial branch.⁷ Although initially the Court of Appeals was not as highly regarded as the General Court, the state-wide trial court of general jurisdiction,⁸ it shortly earned recognition as an outstanding court.⁹

For almost the entire two centuries of Maryland's statehood the Court of Appeals was the sole appellate tribunal in the state. Following World War II, however, the expansion of Maryland's population and economy and the revolution in criminal procedure dramatically increased the workload of the Court of Appeals. This increase led ultimately to the passage of an amendment to the Maryland Constitution in 1966, enabling the General Assembly to establish an intermediate appellate court — the Court of Special Appeals.¹⁰

The jurisdiction of the Court of Special Appeals,¹¹ originally quite limited, has been gradually expanded over the past decade, until finally, as of January 1, 1975, it was given "exclusive initial

5. BOND, PROCEEDINGS, *supra* note 4, at v-vi.

6. BOND, HISTORY, *supra* note 4, at 21-26.

7. See generally W. LEWIS, THE MARYLAND CONSTITUTION OF 1776 (1976). The Court of Appeals did not actually sit as a court until 1780. BOND, HISTORY, *supra* note 4, at 68-69.

8. BOND, HISTORY, *supra* note 4, at 88-89. Judge Bond noted that four members of the General Court (Robert Hanson Harrison, Thomas Johnson, Samuel Chase, and Gabriel Duvall) were appointed to the Supreme Court; no member of the Court of Appeals has been so honored. *Id.* at 89.

9. *Id.* at 116.

10. MD. CONST. art. IV, § 14A (1966). See also notes 18 to 28 *infra* and Publisher's Note, 1 Md. App. v (1968). See also Maryland State Bar Association, Special Report of the Committee on Judicial Administration (reprinted in full at 1 Md. App. vii (1968)). *Id.* at vii (1965).

11. The jurisdiction of the appellate courts of Maryland is elaborated more fully in Appendix B *infra*.

appellate jurisdiction over any reviewable judgment . . . or other action of a circuit court, and an orphans' court."¹² As the jurisdiction of the Court of Special Appeals expanded, there was a corresponding increase in the amount of litigation which was subject to review in the Court of Appeals by petition for certiorari rather than by right of appeal. Today, "the sole method of securing review" of a decision by the Court of Appeals is by writ of certiorari.¹³ Thus, the Court of Appeals can control fully its appellate docket. And because it has general jurisdiction over the work of the Court of Special Appeals,¹⁴ the Court of Appeals can shape and control the growth of the decisional law of the state. Both forms of control, of course, are extremely important in defining the role played by the Court of Appeals.

The jurisdiction of the Court of Appeals is not limited to review of cases heard in the trial courts of the state. Litigation may also reach the Court if a "question of law" has been certified to it by either a federal court or an appellate court of another state under the Uniform Certification of Questions of Law Act.¹⁵ The final component of the jurisdiction of the Court of Appeals consists of appeals from the recommendation of a panel of judges which has sat in cases involving the discipline of attorneys.¹⁶ Although direct appeal is no longer available as a route to the court, the Court of Appeals did hear a number of such cases during the 1975 Term. In

12. MD. CTS. & JUD. PROC. CODE ANN. § 12-308 (Cum. Supp. 1976). The Court of Special Appeals, however, does not have jurisdiction to review cases "in which a final judgment has been rendered by a circuit court on appeal from the District Court . . .," *id.* at § 12-305, the Court of Appeals having exclusive jurisdiction to review cases in this area. See *Pinkett v. State*, 30 Md. App. 458, 468 n.13, 352 A.2d 358, 365 n.13 (1976).

For those unfamiliar with the Maryland court structure, the circuit courts are the trial courts of general jurisdiction, the district courts have limited civil and criminal jurisdiction, and the orphans' courts handle probate problems.

13. MD. R.P. 810 (Cum. Supp. 1976). Some effort is required to uncover the statutory authority for this rule. The appellate jurisdiction of the Court of Appeals is limited to "a case . . . pending in or decided by the Court of Special Appeals . . .," or a decision that has been rendered by a circuit court on appeal from a district court. MD. CTS. & JUD. PROC. CODE ANN. §§ 12-307(1) & (2) (1974 & Cum. Supp. 1976). In both situations the General Assembly has made certiorari the basis of securing review by the Court of Appeals. *Id.* at §§ 12-201 & 12-305.

14. There are several limitations to the appellate jurisdiction of the Court of Appeals. See MD. CTS. & JUD. PROC. CODE ANN. § 12-202 (Cum. Supp. 1976).

15. MD. CTS. & JUD. PROC. CODE ANN. § 12-307(3) (Cum. Supp. 1976). The Act is codified in *id.* §§ 12-601 to 609 (1974). The jurisdiction of the Court of Appeals under the Act is "exclusive," *id.* at § 12-307(3) (1974 & Cum. Supp. 1976), and apparently mandatory, despite the statutory language that the "Court of Appeals *may* answer questions of law certified to it . . ." *Id.* at § 12-601 (emphasis added). See *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972).

16. MD. R.P. BV 11b (1957 & Cum. Supp. 1976).

those cases appeals had been docketed before the effective date of legislation which eliminated this route to the Court.¹⁷

II. *The Court And Certiorari*

A. *Background.*

Because the present certiorari system of the Court of Appeals is a direct result of the creation of the Court of Special Appeals, an understanding of the Court's certiorari practices entails an inquiry into the reasons behind the establishment of the Court of Special Appeals and the subsequent elimination of the appeal as of right to the Court of Appeals.

The central purpose underlying the creation of the Court of Special Appeals was the need to reduce the workload of the Court of Appeals. By the mid-1950's, the pressures of population explosion, increased economic activity, and a rise in appeals in criminal cases had generated a staggering caseload for the Court of Appeals.¹⁸ Two special committees of the Maryland State Bar Association (the Eney Commission in 1958¹⁹ and the Case Commission in 1965²⁰) recommended the establishment of an intermediate appellate court in order to relieve the burden. The primary concern of these blue-ribbon commissions was that the heavy workload of the Court of Appeals would lead not only to delay, but also to deterioration in the quality of the Court's work.²¹ This consideration dramatized the need to afford the Court of Appeals adequate time for proper deliberation. The Eney Commission expressed its concern this way:

The judges of the Court of Appeals must be afforded sufficient time to study thoroughly the cases presented to them so that, while maintaining high quality in their work, they can meet their dual responsibility: dispensing justice to individual litigants, and molding the body of the law in Maryland.²²

17. 1973 Md. Laws, 1st Sp. Sess., ch. 2, § 1.

18. FINAL REPORT OF THE COMMITTEE TO STUDY THE CASELOAD OF THE COURT OF APPEALS, 64 TRANS. MD. ST. B.A. 1, 393 app. (1959) [hereinafter cited as ENEY REPORT].

19. *Id.*

20. COMMITTEE ON JUDICIAL ADMINISTRATION, SPECIAL REPORT, 70 TRANS. MD. ST. B.A. 244 (1965) [hereinafter cited as CASE REPORT].

21. *See, e.g.*, ENEY REPORT, *supra* note 18, at 395. Concern was also expressed that the Court might have to increase its use of nisi prius judges, "thereby in effect creating a modified panel system." *Id.*

22. CASE REPORT, *supra* note 20, at 247. An earlier change in the structure of the Court of Appeals was also motivated in part by this concern. *See Soper, Reorganization of the Court of Appeals of Maryland*, 8 MD. L. REV. 91 (1944).

Similar concerns were expressed several years ago by yet another special panel (The Russell Commission),²³ in discussing its recommendation that an all-certiorari Court of Appeals be created:

An appellate court does not simply decide cases: it is charged with the duty in most cases to state the reasons for a decision in an opinion. The opinion serves several important purposes: to acquaint the parties of the reasons for the actions of the court; to insure, through the process of written articulation, that preliminary assessments are substantiated or changed as a result of a thoughtful analysis and to preserve a record of the decision declaring what is the law of the State on the issue decided. . . . The quality of Court of Appeals opinions is therefore of critical importance not only for the justice of the moment to litigants before the court, but also for the exercise of proper leadership by the court through the precision, thoughtfulness, and craftsmanship that are at the heart of better laws and a wiser, more even-handed justice.²⁴

Thus, the Court of Special Appeals was designed, and its jurisdiction enlarged,²⁵ to ease the workload of the Court of Appeals sufficiently to enable that Court to maintain a high level of performance. Presumably this lightened caseload would enable the writer of an opinion to spend more time upon his product and afford the Court as a body more time for reflection and intramural discussion of problems before it.²⁶ That this "maturing of collective thought"²⁷ is indeed time-consuming cannot be doubted. And, assuming that extended deliberations help to achieve true consensus,²⁸ there would be a solid benefit from the reduction in the Court's workload, for the Court would be guiding the orderly development of

23. COMMISSION ON JUDICIAL REFORM, FINAL REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF MARYLAND 12 (1974) [hereinafter cited as RUSSELL REPORT].

24. *Id.* at 14.

25. The gradual expansion of the jurisdiction of the Court of Special Appeals over the past decade was anticipated at the time the Court of Special Appeals was established. *Id.* at 12. Creation of an all-certiorari Court of Appeals came following such a recommendation in the RUSSELL REPORT.

26. The clearest manifestation of this desire, of course, was the establishment of an all-certiorari Court of Appeals. Earlier reports, however, had also emphasized the "stringent" nature of the review to be exercised by the Court of Appeals. See ENEY REPORT, *supra* note 18, at 406.

27. Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959).

28. Compare *id.* and Griswold, *The Supreme Court, 1959 Term — Foreword: Of Time and Attitudes — Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960), with Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

the law of the State through better crafted and more thoughtful opinions.

B. *Standards.*

Neither the legislature, in establishing and maintaining a system of review by certiorari, nor the Court of Appeals, in implementing the jurisdiction that it has been given, has given much guidance concerning standards to be applied to certiorari petitions. The statutes are almost silent on the question; the only exception involves the rather rare situation of certiorari to a circuit court where the case had been appealed to that court from a judgment by a district court. In those cases the General Assembly has instructed that a writ may be issued: "[I]f it appears to the Court of Appeals . . . that: (1) Review is necessary to secure uniformity of decision . . . ; or (2) There are other special circumstances rendering it desirable and in the public interest that the decision be reviewed."²⁹ While the first part of this instruction, concerning conflicts among the lower courts, does give some guidance, the second part is of little assistance, for neither the General Assembly nor the Court of Appeals has made any attempt to define either "desirable" or "public interest."³⁰ Nor has the General Assembly given *any* instructions on the standards to be applied in the far more common situation of petitions seeking review of a decision by the Court of Special Appeals.³¹ There is a similar lack of guidance from the Maryland Rules of Procedure, which require only that the petition for certiorari must contain a "concise argument in support of the petition."³² Again, no effort has been made to define what the Court wants in the petition. Moreover, the reports of the special commissions that led to the creation of the Court of Special Appeals and the eventual elimination of the appellate jurisdiction of the Court of Appeals shed little light on the criteria to be applied to the problem of whether to grant a petition for certiorari. Indeed, except for general precatory statements which are of little use in any

29. MD. CTS. & JUD. PROC. CODE ANN. §12-305 (Cum. Supp. 1976).

30. It is not surprising, therefore, that many, if not most, petitions for certiorari are similarly conclusory. Influenced perhaps by the apparent lack of interest in the subject by court and legislature, the only statement in many petitions, apart from an argument on the merits, relating to the question of why the petition should be granted is that to do so would be "in the public interest."

31. The only other statutory provision even remotely on point is MD. CTS. & JUD. PROC. CODE ANN. §12-203 (1974), which prohibits a rule that would require the assent of more than three judges to the grant of a writ of certiorari.

32. MD. R.P. 811a3(g) (1977).

particular situation,³³ there is no evidence that these panels devoted any thought to the question of how the Court of Appeals should exercise the freedom it has to control its caseload. Finally, the Court of Appeals³⁴ has successfully avoided establishing guidelines for the grant of a petition of certiorari by labeling its decision to do so an "exercise of discretion;"³⁵ since the Court has not addressed the question, "discretion to do what?," it apparently feels itself under no institutional obligation to explain the factors it considers important with respect to certiorari decisions.³⁶

While little guidance has been given by the Court or the legislature on the question of standards to be applied in judging a petition for review, such standards can be elaborated. To do so it is first necessary to define the role of the Court of Appeals today. Judge Shirley Hufstедler, writing generally on the institutional roles of appellate courts, analyzed the problem in this fashion:

Appellate courts serve two quite different functions: First, appellate courts review the trial record for error in the particular case. We can call this the review for correctness. Second, appellate courts use the cases before them as vehicles for stating and applying constitutional principles, for authoritatively interpreting statutes, for formulating and expressing policy on legal issues of system-wide concern, for developing the common law, and for supervising each level of the system below them. We can call the second set of tasks the institutional functions — the business of Government.³⁷

Twenty years ago the Eney Commission, writing to urge the creation of an intermediate appellate court, said much the same thing, identifying two functions of an appellate court, (a) the "private function," which ensures that "justice is done to the litigants in each individual case," and (b) the "public function, . . . settl[ing] and

33. See, e.g., RUSSELL REPORT, *supra* note 23: the Court of Appeals will have "the option to choose the cases it will decide by certiorari," *id.* at 18; certiorari should be "liberally granted," *id.* at 19.

34. Several members of the Court have expressed individual views concerning the importance of various factors in deciding whether to grant certiorari. See note 59 *infra*.

35. *Walston v. Sun Cab Co.*, 267 Md. 559, 298 A.2d 391 (1973) (per Barnes, J.). The Court went on to observe: "The immediate purpose of this constitutional amendment [permitting the establishment of the Court of Special Appeals] was to enable the General Assembly to relieve this Court of the substantial increase of criminal appeals which had inundated the Court . . ." *Id.* at 564-65, 298 A.2d at 395.

36. See also text accompanying notes 56 to 59 *infra*.

37. Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971).

giv[ing] authoritative expression to the developing body of the law."³⁸

The Eney Commission thought those two functions were "of equal importance in the judicial system of Maryland."³⁹ As the jurisdiction of the Court of Special Appeals increased, however, the need to exercise the "private" or "correctness" function of the Court of Appeals decreased. As Judge Hufstedler has observed: "with each rise in the appellate structure, the importance of the review for correctness diminishes and the importance of the institutional [public] function increases."⁴⁰

This change in the relative importance of the roles of the Courts of Appeal can be explained without difficulty. Litigants are given one appeal as a matter of right to the Court of Special Appeals⁴¹ as an expression of concern that "justice be done in each case."⁴² This review seeks to ensure "correctness"; it is an exercise of the "private" function of the state's appellate system. There is no reason, however, to suppose that the Court of Appeals *as an institution* possesses any greater expertise in reviewing the record for error going only to the correctness of the individual decision than does the Court of Special Appeals;⁴³ further review by the Court of Appeals of such problems is unlikely to add anything but expense and delay to the legal process. More important, an attempt to perform such a role would seriously diminish the time and energy that the Court of Appeals can devote to its "public" function of guiding and controlling the development of state law, time and energy that could be used "to write opinions which will 'give authoritative expression to the

38. ENEY REPORT, *supra* note 18, at 400.

39. *Id.*

40. Hufstedler, *supra* note 37, at 910.

41. An exception is the denial of the right to appeal "from a final judgment of a court . . . in reviewing the decision of the District Court, an administrative agency, or a local legislative body." MD. CTS. & JUD. PROC. CODE ANN. § 12-302(a) (1974). Even in these cases, however, the losing party has had an appeal as a matter of right to the circuit court.

42. Hufstedler, *supra* note 37, at 910.

43. Commentators have questioned whether any appellate court has greater expertise in this area than the trial court that heard the matter. *See* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957). Judge Aldisert, *supra* note 2, at 727, has observed:

In the 1968 court year each United States Circuit Judge on the United States Court of Appeals for the Third Circuit read carefully the briefs in about 100 cases. By 1973 he was required to read some 240 cases in addition to reviewing opinions by panels of which he was not a member. Is it realistic to expect that each circuit judge reads the record in each case on which he sits?

Equally on point is the famous remark by Justice Jackson: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953).

developing body of law.'"⁴⁴ After all, it was the desire to afford the Court ample opportunity to research, analyze, consider, and express its decisions in writing that led to the creation of the Court of Special Appeals and the grant to the Court of Appeals of effective control over its own docket.

Recognition that the primary role of the Court of Appeals is the performance of its "public" or "institutional" function helps to determine which petitions for review should be granted by the Court. Expressed briefly, the readiness of the Court of Appeals to grant review should depend primarily upon its perception of the likelihood that the error asserted in the petition, if left uncorrected, will have an impact in cases other than the one currently before the Court. If error of that kind — institutional error, in other words — is not corrected by the Court of Appeals, it may well be applied as precedent by other courts, compounding the original problem; in these cases the obligation of the Court of Appeals to control the development of state law is most keen. Thus, the Court of Appeals should view problems of interpretation of federal and state constitutions, statutes, and its own precedents as more likely subjects for review than claimed errors in the fact-finding process. Also important are questions involving allegedly inconsistent decisions by lower courts;⁴⁵ in these cases the Court is not only acting in its supervisory role, but also attempting to ameliorate the very real sense of injustice that is felt when a litigant sees (or believes he sees) a "like" case not being treated in "like" fashion. All of the above situations implicate the Court's "public" function in a significant way.⁴⁶ Occasionally, however, the Court of Appeals may feel it advisable to review a case which has little or no impact on the "orderly development" of the law of the state. In some of these cases, review of the record by the Court of Appeals may even be necessary; it is likely, for example, that society expects that there be full appellate review before a death sentence is carried out, despite the

44. ENEY REPORT, *supra* note 18, at 400.

45. It is significant that the resolution of such conflicts is the only ground for granting a petition mentioned by the legislature, albeit in the context of reviewing cases heard by the circuit courts on appeal from the district court. MD. CTS. & JUD. PROC. CODE ANN. § 12-305(1) (Cum. Supp. 1976).

46. The importance of "wise" selection of cases to review is strengthened by the recognition that the Court of Appeals can review only a small fraction of cases heard in the Court of Special Appeals. In addition, the Court of Appeals is the sole authority for reviewing district court cases that have been appealed to a circuit court. Thus, it is vital that the Court select its cases wisely if it is to control effectively the development of the law of the State. Cf. Betten, *Institutional Reform in the Federal Appellate Courts*, 52 IND. L.J. 63, 65-68 (1976) (a good presentation of the literature concerning this problem in the federal system).

cost, delay, and necessary intrusion on the Court's institutional function.⁴⁷ Finally, it is quite possible that the demands on the "public" function of the Court will not be so heavy as to prevent the exercise of the "private" function in a limited number of cases.

The presence of factors supporting review in a given petition does not necessarily mean the Court of Appeals will or should hear the case. There are a variety of legitimate reasons why the Court may not want to hear such a case.⁴⁸ Even if it is likely, for example, that the Court of Special Appeals has badly misinterpreted an important statute, the Court may still wish to deny a petition seeking review of that construction. Perhaps the case did not present the issue properly because its factual setting was unclear; instead of settling the waters, a decision predicated on an insecure factual base may well muddy them further. The Court may also feel that the briefs and argument that can be expected from the litigants in the case at bar will not provide the "adversarial" help that a court needs in order to clarify its own thinking in the area. Or the Court may feel that the time has not come for deciding a particular issue, that the issue has not sufficiently "ripened" in the decisions of the lower courts, in the courts of other jurisdictions, or in critical commentary so that the Court of Appeals will feel confident of the correctness of the decision it reaches.⁴⁹ Finally, those interested in changing the holding below may vote against the grant of certiorari if they feel a majority of the Court will not agree — better a dismissal of certiorari than a hardening of adverse precedent in the area.⁵⁰ Such considerations, together with the underlying need of the Court to ensure that it has sufficient time for proper preparation and consideration of each case, suggest that the Court may properly feel no obligation to take every case that comes its way, even if those

47. See Denniston, *After Gilmore*, THE NEW REPUBLIC, Jan. 29, 1977, at 10.

48. Detailed analyses of problems in the Supreme Court regarding treatment of certiorari petitions can be found in a series of articles by Fowler Harper (with different co-authors) in the University of Pennsylvania Law Review: Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term*, 99 U. OF PA. L. REV. 293 (1950); Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. OF PA. L. REV. 354 (1951); Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. OF PA. L. REV. 439 (1953); Harper & Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. OF PA. L. REV. 427 (1954).

49. An example of this wait-and-see approach from an earlier Court of Appeals is *White v. King*, 244 Md. 348, 223 A.2d 763 (1965), where the Court, speaking through Judge Oppenheimer, refused to discard the *lex loci delicti* rule in torts conflicts cases until a "sound, practical alternative is evolved." *Id.* at 355, 223 A.2d at 767.

50. Less defensible, perhaps, is the possibility that the Court may believe the issue too "sensitive" for decision. Denial of certiorari can postpone the problem until a more propitious moment.

cases present serious questions of unsettled law. That flexibility does not justify, however, the lack of guidance from the Court of Appeals concerning its certiorari practice, particularly with respect to what factors it considers to be significant in reviewing a petition.

The Court's failure to elaborate standards for certiorari may have several undesirable consequences. Because the volume of petitions to a court reflects, in part at least, the expectation of petitioners that their petitions will be granted,⁵¹ the lack of guidelines probably increases the number of petitions presented to the Court. This, of course, increases the workload of the Court and decreases the amount of time the Court can spend on cases it does take. In addition, uncertainty concerning the possibility of review increases the costs to litigants — petitioners and respondents alike.

Another adverse effect flowing from the absence of criteria defining the "certworthiness" of a case is that the petitioner with a potentially serious claim does not know how to draft his petition, for the Maryland Rules of Procedure only tell a petitioner that he is to prepare "a concise argument" as to why the writ should be granted.⁵² Should he spend his limited time in an effort to convince the Court of Appeals of error below? Should he try to claim attention with the novelty or ubiquity of the claim he presents? Should he raise both points and risk losing the Court's attention with a prolix petition?⁵³ This uncertainty does not help the reputation — and, thus, the acceptance — of the Court in the legal community, nor, more practically, does the uncertainty do anything to help the Court in deciding whether certiorari should be granted. That situation would be remedied if petitioners were encouraged to spend a

51. See Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEG. STUD. 339, 361 (1974); Wright, *supra* note 43, at 779. At least with institutional litigants the petitioning process might also turn on the perceived receptivity of the Court to the substantive claims that might be advanced. See Lewin, *Avoiding the Supreme Court*, N.Y. Times, Oct. 17, 1976, § 6 (Magazine), at 31. On the other hand, a large percentage of petitions to the Court are filed by criminal defendants. It is doubtful that *any* system would discourage a significant number of these petitions.

52. MD. R.P. 811a3(g) (Repl. Vol. 1977). The petitioner is also told "failure . . . to present with . . . brevity . . . whatever is essential to a ready and adequate understanding . . . will be a sufficient reason for denying the petition." *Id.* at 811a(4).

53. The litigant's dilemma, it must be emphasized, is very real. The Rules encourage "brevity" in certiorari petitions, yet legal issues do not always lend themselves to brief treatment. If it is not clear to an attorney *what* the Court is looking for in a petition, he must choose between the Scylla of length and the Charybdis of omission of what might be important. If the petition is denied for either sin the Court of Appeals may well have missed a case of importance for the entire state.

substantial part of their effort in showing the Court why review is important to the people of the State.⁵⁴

Most important, the absence of expressed institutional criteria to be applied to certiorari decisions diminishes the protection offered litigants against arbitrary decision-making. When such criteria exist, however, they can be used as a basis for analysis and criticism of the decisions, both by litigants seeking assurances of equality and rationality in treatment and by commentators attempting to make the Court aware that there is a critical audience reviewing its decisions.

On the other hand, stating criteria with respect to its view of the "certworthiness" of a case does not mean that the Court must explain a decision not to grant a petition; as Justice Frankfurter once noted, "practical considerations preclude" such a course.⁵⁵ Thus, the Court's assertion that it has "discretion"⁵⁶ in certiorari decisions is justified in that it need not give reasons for its certiorari decisions, and because it has leeway to define what it believes to be a worthwhile subject for review.⁵⁷ But that assertion does not justify failure to establish rules for the game the Court is playing. Judges, like other governmental officials, operate within the framework provided by "established rules of law."⁵⁸ The latitude of the Court of

54. Compare the advice once given by Chief Justice Vinson:

Lawyers might be well-advised in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them. By that I do not mean that the petition should paraphrase the standards set out in Rule 38 [now Rule 19] of the Supreme Court Rules, . . . as so many petitions do now. What the Court is interested in is the actual, practical effect of the disputed decision — its consequences for other litigants and in other situations. A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose.

Vinson, *Work of the Federal Courts*, 69 S. Ct. v-vi (1949).

55. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (separate statement by Justice Frankfurter concerning the denial of certiorari). See also R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 210-13 (4th ed. 1969).

56. See text accompanying note 35 *supra*.

57. The Court also has "discretion" because its certiorari decisions are non-reviewable. For a good discussion of types of judicial "discretion," see Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32-36 (1967).

58. The quote is from *Walter v. Board of County Comm'rs*, 179 Md. 665, 668, 22 A.2d 472, 474 (1941), where the Court, in discussing the standard for issuing a writ of mandamus, stated that mandamus "rests in the sound discretion of the Court which must not be arbitrary, but is to be exercised under established rules of law." See also *Saltzgaver v. Saltzgaver*, 182 Md. 624, 35 A.2d 810 (1944), where the Court spoke approvingly of Lord Mansfield's dictum that "[d]iscretion, where applied by a court of justice, means sound discretion guided by law." *Id.* at 635, 35 A.2d at 815. Compare the situation of a trial judge who is said to have "discretion" concerning the grant of a

Appeals with respect to its certiorari power should be similarly cabined in order to help litigants, lawyers and the public understand its approach to the certiorari process.⁵⁹ Such an understanding would help the Court to perform its job and to maintain confidence in its decision-making, for, as Kenneth Culp Davis has written, “[w]here law ends, discretion begins.”⁶⁰ While it is impossible to eliminate some of the discretionary elements such as lack of explanation for its decisions and the absence of reviewability, the Court can exercise its “discretion” within self-imposed boundaries. This it should do.

C. *A Look at the Certiorari Decisions.*

This sub-section will discuss the decisions by the Court during the study Term regarding petitions for review. The section begins with an examination of a set of petitions, followed by a discussion of cases where review was denied by the Court, and then of cases which were heard by the Court. Special emphasis has been placed on the Court's frequent practice of taking cases that have not been first heard by the Court of Special Appeals.

new trial, but if he “abuses” that power — that is, goes beyond an accepted latitude — his decision will be called to task. *E.g.*, *Lancaster v. Gardiner*, 225 Md. 260, 170 A.2d 181 (1961).

59. Judge Levine of the Court of Appeals, in a recent speech to the Young Lawyers Section of the Maryland State Bar Association, made an effort to outline the approach of the Court to the problem of granting certiorari. As described by Judge Levine, the approach of the Court to the problem of defining a case having “public interest” does not appear to be significantly different from the suggestions made in this Article. Of particular importance is Judge Levine's assertion that “error on the part of a lower court is itself not sufficient to carry the day.” His speech also contains useful examples of cases that he, at least, considered to be of “public interest.” Levine, *Certiorari Procedures in the Maryland Court of Appeals*, *The Daily Record*, Jan. 20, 1977, at 1, col. 2.

Further discussion of certiorari procedures by individual members of the Court can be found in a series of interviews with a newspaper reporter. Coltman, *Mystique of the Maryland Judiciary*, *Baltimore Sun*, Sept. 5, 1976, at A1, A8. Again, the reported responses of the judges is not dissimilar to that suggested in this Article. A noteworthy exception is the emphasis placed by Judge Smith on the importance of error below as a basis for granting review.

While such informal expressions by members of the Court are useful, they do not satisfy the need for standards established by the Court — a formal, accessible, institutional set of characteristics defining in advance for petitioners what is important to the Court.

60. K. DAVIS, *DISCRETIONARY JUSTICE* 3 (1971). This is a reworking of William Pitt's famous dictum, “Where law ends, tyranny begins.”

1. *The Certiorari Process.*

Table I in the Appendix is a compilation of data concerning 100 petitions to the Court of Appeals seeking review by certiorari. Most of the data in the Table are self-explanatory. Striking among those figures are what appear to be a quite low number of pro se petitions,⁶¹ and the small number of petitions which sought expedited review by the Court of Appeals (particularly in light of the large number of cases decided by the Court which had not been heard in the intermediate court). Also surprising are the small number — 15 — of answers to petitions⁶² since it might be expected that most attorneys for respondents would desire to argue why “the public interest” requires no review.

a. *The Cases Not Heard.*

For the most part, a reading of petitions denied by the Court reveals little basis for questioning the Court’s determination that “there has been no showing that review by certiorari is desirable and in the public interest.”⁶³ Typical is *Morris v. State*,⁶⁴ in which the only question presented by the petition was whether sufficient evidence had been presented at trial to sustain petitioner’s conviction. The Court of Special Appeals, in an unreported per curiam decision, had adopted the trial judge’s opinion that sufficient evidence had been introduced. The case presented no interesting, novel, or important question of law. The issue raised by petitioner had been decided by a competent trial judge,⁶⁵ the person most likely to be aware of the merits of the claim, and had already been reviewed by one appellate court. Because of the limited scope of petitioner’s claim, the “public” function of the Court of Appeals was not involved. In such a situation, therefore, little or nothing would be gained if the Court of Appeals were to review petitioner’s case. Further, because the opinion of the Court of Special Appeals had not been reported and therefore lacked precedential value,⁶⁶ the Court of

61. The low number of *pro se* petitions may be due to representation of indigents by the Public Defender, and the removal of jurisdiction of the Court of Appeals in most cases that seek review of a criminal conviction by a route other than direct appeal.

62. Responses to petitions are authorized by Md. R.P. 811b (1977).

63. This is the standard wording of the Court’s order denying a petition.

64. Unreported *per curiam* in Court of Special Appeals; *cert. denied*, 274 Md. 730 (1975) (denials of certiorari by the Court of Appeals are not reported in the Atlantic Reporter).

65. Karwacki, J., of the Supreme Bench of Baltimore City.

66. See Md. R.P. 1092(c) (1977).

Appeals did not need to be concerned about the effect of that opinion on future cases.

While cases like *Morris* presented little trouble, more difficult questions were raised in other petitions. Several presented claims involving significant legal issues that had not been definitively resolved by the Court of Appeals, and in those cases it could be argued that certiorari should have been granted by the Court of Appeals. An example is *Becker v. Crown Central Petroleum Co.*,⁶⁷ in which a gas station operator whose franchise had been terminated sought reinstatement of his franchise on the ground that the defendant had not given the pre-termination notice required under the Maryland Gasoline Marketing Act.⁶⁸ The Court of Special Appeals denied Becker's request for equitable relief because damages are the only remedy provided by the Act.⁶⁹ *Becker* presented a colorable claim for review, involving both the "private" and "public" functions of the Court. First, the opinion of the Court of Special Appeals in *Becker* was the first appellate interpretation of this section of the statute. That opinion was reported and available as precedent. Further, the construction of the statute by the Court of Special Appeals raised both an issue of statutory interpretation and a more general problem of the extent to which a court of equity can grant relief in the absence of statutory authorization.⁷⁰ Finally, the question was one in which trial courts have a special need for guidance because a request for injunctive relief demands as quick and sure a response as possible. Thus, the claim on the Court's "public" role, while not as great as in some cases heard by the Court, was significant and a good deal more compelling than in many cases that were taken for review.⁷¹

Other petitions that were denied also call into question the Court's policy in granting certiorari. The petitioner in *Burriss v. State*,⁷² for example, sought to overturn the revocation of his

67. 26 Md. App. 596, 340 A.2d 324, *cert. denied*, 276 Md. 738 (1975).

68. MD. COM. LAW CODE ANN. §§ 11-301 to 308 (1975 & Cum. Supp. 1976).

69. 26 Md. App. at 616, 340 A.2d at 336.

70. Federal cases take a more liberal approach to the award of equitable relief. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

71. *See* notes 85-87 *infra*. It is possible that review was denied in *Becker* because the Court wished to delay deciding questions concerning the details of the Gasoline Marketing Act until the constitutional status of that Act was resolved in a case then working its way through the courts, *Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 372 A.2d 237 (1977). *Becker*, however, did not itself raise any constitutional issues, and *Exxon* (which upheld the constitutionality of the Act) did not involve the part of the statute at issue in *Becker*.

72. No. 206, Sept. Term, 1975. No. 871 (Court of Special Appeals, May 26, 1975), *cert. denied*, 276 Md. 739 (1975).

probationary status; the revocation had been based largely on hearsay testimony presented by a probation officer. The petitioner asserted that the failure of the trial judge to permit him to confront his accusers violated his constitutional rights⁷³ and that other jurisdictions had decided the issue differently than the Court of Special Appeals had in his case.⁷⁴ Except that the decision of the Court of Special Appeals was not published and thus not precedent,⁷⁵ all the elements for review were present: the issue had potential applicability to a large number of cases; the case involved the interpretation of recent decisions of the Supreme Court; other jurisdictions, it was asserted, had reached a different position than that taken by the Court of Special Appeals; and, finally, the petitioner himself was seriously affected by the decision below. Although the Court of Appeals may have agreed with the Court of Special Appeals on the merits, the issue was important enough, and recurrent enough, to warrant definitive treatment.⁷⁶

Another question concerning the Court's certiorari procedure is raised by petitions which do not present significant institutional issues, but whose claim on the Court's private function may make them seem more worthy of being heard than many cases heard by the Court.⁷⁷ Criminal cases, because of their impact on an individual, best illustrate this type of case. In *Holmes v. State*,⁷⁸ for example, the defendant had been sentenced to two concurrent life terms for murder and rape. Holmes' petition was based primarily on a straightforward *Miranda* question.⁷⁹ Because the law to be applied

73. Petitioner's Brief for Certiorari at 2, 5-6 (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)).

74. *Id.* at 7. See *State v. Marlair*, 20 Ariz. App. 191, 511 P.2d 204 (1973).

75. Although the reporting of a case by the Court of Special Appeals should be a factor in determining whether to grant review, it should not, by any means, be considered a prerequisite. Otherwise, the lower court's opinion of the importance of the case would control the docket of the higher court.

76. Somewhat similar is *Ward v. State*, No. 217 (Court of Appeals, Sept. 8, 1975). There, petitioner, who had been convicted on the basis of a submission of stipulated facts to the trial judge, argued that the standard applied to determine if a guilty plea had been a knowing and intentional relinquishment of rights should also be applied in his situation. The Court of Special Appeals, relying on *Palmer v. State*, 19 Md. App. 678, 313 A.2d 698, cert. denied, 271 Md. 742 (1974), had rejected the argument. *Ward v. State*, No. 1014 (Court of Special Appeals, May 21, 1975).

77. See text accompanying notes 85-87 *infra*.

78. *Holmes v. State*, No. 216 (Court of Appeals, Sept. 8, 1975).

79. The petition requested review of the trial judge's preliminary finding that Holmes' confession was voluntarily given and questioned the admissibility of testimony of a police officer who had conducted a second interrogation of the defendant without repeating *Miranda* warnings as required by the Court of Special Appeals in *Brown v. State*, 6 Md. App. 564, 252 A.2d 272 (1969).

was rather well settled, the case did not involve the institutional role of the court; surely, however, the claim of someone facing a long prison sentence is as worthy of attention as many of those that were heard.

Finally, there are cases where the Court might find significant issues inherent in a petition. *Biltjinitis v. State*⁸⁰ may have been such a case. The petitioner in *Biltjinitis* had pled guilty to burglary and assault with intent to rape. He then sought a new trial on the basis of a letter he had received from the victim stating that she had identified the wrong man. The motion was denied by the trial judge, who gave no reasons for his decision.⁸¹ The Court of Special Appeals affirmed, noting that the trial judge's decision on the motion was discretionary and that it saw no reason to overturn his exercise of discretion.⁸² The petition for certiorari argued that the trial judge had abused his discretion, but did not raise the issue of how any court could discover such an abuse in the absence of stated reasons for the denial by the trial judge. Implicit in the case, therefore, is the question of whether trial judges should be required to state their reasons for denying a new trial in an effort to make them accountable to litigants and the public for their actions. Because the Court has not indicated any interest in examining this question, it is unlikely to be raised in a petition. In reviewing petitions, the Court should be alert for problems litigants have not been encouraged to raise that it may wish to consider.

This examination of cases where certiorari has been denied indicates that, at least in the sample studied, the Court of Appeals has generally been exercising excellent judgment in selecting worthwhile cases from among the certiorari petitions; in none of the cases discussed in this section was the refusal of the Court to hear the case unquestionably wrong. The questions raised with regard to particular cases demonstrate the desirability of articulating clear standards for granting certiorari, and help to flesh out the desired content of those standards when elaborated.

80. *Biltjinitis v. State*, No. 234 (Court of Appeals, Sept. 8, 1975).

81. According to the opinion of the Court of Special Appeals, the trial judge simply stated that the victim was "in error," and that "[t]here were a number of circumstances . . . which convince the Court of the guilt of the defendant beyond a reasonable doubt." *Biltjinitis v. State*, No. 1048 (Court of Special Appeals, June 6, 1975), at 5.

82. *Id.* The court quoted from *Carlile v. Two Guys From Harrison, Glen Burnie, Inc.*, 264 Md. 475, 287 A.2d 31 (1972).

2. *The Cases Taken.*

Surprisingly, the Court of Appeals granted review in a number of cases where it is difficult to see any reason for doing so. Most of those cases reached the Court without prior decision by the Court of Special Appeals; they will be discussed in the next section. Of the cases that reached the Court of Appeals *after* a decision by the Court of Special Appeals, the grant of certiorari was questionable in only a few cases. The clearest example is *Rofra, Inc. v. Board of Education of Prince George's County*,⁸³ where the only question was whether a bid which conformed to an invitation from a school board was an effective "acceptance." The Court of Special Appeals quickly and properly disposed of the problem, and the Court of Appeals adopted that opinion as its own. A simple hornbook issue⁸⁴ decided correctly below raises neither "public" nor "private" questions which require the attention of the Court of Appeals. The same could be said of *Garland v. Hill*,⁸⁵ where the Court of Appeals, affirming both courts below, decided that the amount realized on a mortgage foreclosure was not so low as to "shock the conscience" of the Court and prevent ratification of the sale. Again, the legal issue was neither novel nor difficult: the application of those principles to the facts was easily done and the courts below, without any real question, had done so correctly.

There is of course nothing wrong in the Court's taking such cases. To the extent, however, that the time spent on cases of less significance interferes with time needed for writing, research and reflection in more important cases, the practice is objectionable.

3. *By-Passing The Court Of Special Appeals.*

a. *Effect on Decision-Making.*

Table II in Appendix A lists the manner in which cases came to the Court of Appeals. Although almost all cases were heard by grant of certiorari, a remarkable number of the cases decided by the Court of Appeals did not first go through the Court of Special Appeals, even though that Court had jurisdiction to hear the case. Approximately forty-three percent of the decisions made by the Court of Appeals during the Term fell into this category. The Court's practice of bypassing the Court of Special Appeals in this fashion is questionable, for taking such cases may adversely affect the

83. 278 Md. 102, 358 A.2d 562 (1976), *aff'g* 28 Md. App. 538, 346 A.2d 458 (1975).

84. The Court of Special Appeals relied on S. WILLISTON, *CONTRACTS* (3d ed. 1957) and a more obscure work, W. BRANTLY, *LAW OF CONTRACTS* (2d ed. 1912).

85. 277 Md. 710, 357 A.2d 374 (1976).

decision-making of the Court of Appeals in several ways. The primary role of the Court of Appeals is to supervise and direct the development of the law of the State; the Court of Special Appeals was created, as discussed earlier, to ensure that the workload of the Court of Appeals would be light enough to permit it to do so properly. Later, the Court of Appeals was given complete control of its docket by limiting its jurisdiction to certiorari only) in a further effort to permit the Court to perform its tasks as effectively as possible. The time spent on "bypass" cases makes it more difficult for the Court to fill this role. Indeed, many of these cases — a percentage substantially higher than in the cases that did come through the Court of Special Appeals — did not even belong in the Court of Appeals, for they raise no serious "institutional" questions.⁸⁶ After reviewing such cases the Court of Appeals necessarily has less time available to spend on the other cases it takes, or to hear additional cases where review has been sought. In either event, the ability of the Court to guide and develop the law of the State has been hindered.

Bypassing the Court of Special Appeals also deprives the Court of Appeals of the "screening" role played by the intermediate court. Screening saves a higher court's time and energy and thereby helps to maintain the quality of the higher court's over-all performance.⁸⁷ A more subtle effect, but perhaps one of greater importance, is the effect that screening may have on the quality of decision-making in individual cases. The opinion of the intermediate court, by eliminating unimportant issues from the case, focuses the attention of the

86. Three examples should be sufficient. The first, *Dietz v. Moore*, 277 Md. 1, 351 A.2d 428 (1976), involved a will contest in which routine questions of summary judgment, admission of hearsay testimony, and scope of examination of witnesses were involved. The second example is *Mayor of Baltimore v. Crane*, 277 Md. 198, 352 A.2d 786 (1976), a rather dull and uninteresting zoning case. Third is *Zion Evangelical Lutheran Church v. State Hwy. Admin.*, 276 Md. 630, 350 A.2d 125 (1976), involving an allegation that the defendant had acted arbitrarily and capriciously in finishing the Baltimore Beltway. For each of these cases Justice Stewart's remark in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 189 (1973) (Stewart, J., dissenting) is appropriate:

The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well settled principles to a familiar situation, and has little significance except for the respondent. Why certiorari was granted is a mystery to me — particularly at a time when the Court is thought by many to be burdened by too heavy a caseload.

87. In at least one case which bypassed the Court of Special Appeals, the Court of Appeals was forced to raise, *sua sponte*, an issue which required reargument. It is likely that such a need would not have arisen if the case had gone through the Court of Special Appeals. *Gordon v. Comm'rs of St. Michaels*, 278 Md. 128, 359 A.2d 543 (1976).

litigants and reviewing courts on the more significant issues that remain.⁸⁸ Furthermore, the lower court opinion can act as a catalyst,⁸⁹ crystallizing thought by both bench and bar on an issue by providing a basis for the attack (or defense) of an attempted resolution of a legal problem.⁹⁰ In a very real sense, therefore, prior review by the Court of Special Appeals assists the Court of Appeals in its own decision-making.⁹¹

b. *Exigencies.*

Despite the virtues of the intermediate court, there are times when it may be wise to bypass it. This would be true if it were necessary to give prompt guidance on an issue which has not been "previously considered by the Maryland appellate courts."⁹² The Court should be reluctant to "jump" a case, however, except in extraordinary circumstances and under guidelines established in advance;⁹³ respect for the virtues of prior review by the Court of Special Appeals should persuade the Court of Appeals to limit the number of expedited appeals.

In any event, there were few cases decided during the 1975 Term where the bypass was justified. In several cases, however, a need for quick review, based on the exigencies of the particular cases, could have been legitimately asserted. An example is *Anne Arundel County v. McDonough*,⁹⁴ involving a challenge to the sufficiency of

88. This is especially helpful when the reviewing court limits, as the Court of Appeals sometimes does, the questions on which it wishes to hear argument.

89. Given the quality of the briefs in some cases, the aid provided by the Court of Special Appeals in doing its own research may prove invaluable to the Court of Appeals. An extreme example is provided by *Johanna Farms, Inc. v. Elliott Equipment Co.*, 278 Md. 137, 360 A.2d 436 (1976), where the appellee filed no brief. Since courts in our adversarial system are to a large extent dependent upon the research and arguments of counsel, the absence of a brief could have a serious adverse impact upon the quality of a decision made by the Court.

90. Until recently, certain appeals in the federal system went directly to the Supreme Court without having first gone to one of the circuit courts of appeal. In expressing dissatisfaction with this procedure the Supreme Court has emphasized the importance of the screening function of the intermediate courts. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952) (mem. opinion of Burton & Frankfurter, JJ., concurring). Congress has recently eliminated most of those cases from the workload of the Supreme Court.

91. Perhaps in tacit recognition of this point, the Court of Appeals heard only a very few criminal cases in advance of judgment in the Court of Special Appeals.

92. *Thomas v. State*, 277 Md. 314, 316, 353 A.2d 256, 257 (1976).

93. The Supreme Court, for example, rarely grants review in such situations. Supreme Court Rule 20 states that such a writ "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes . . ." See generally R. STERN & E. GRESSMAN, *supra* note 55, at 183-84.

94. 277 Md. 271, 354 A.2d 788 (1976).

the ballot description of a zoning referendum in Anne Arundel County in 1974. If the case had been heard first in the Court of Special Appeals, final resolution would have been delayed several months. Because a large amount of property was involved,⁹⁵ that delay might have had a serious commercial impact. Furthermore, a case involving an election issue has some claim of priority in an election year. On the other hand, a year and a half had already elapsed since the referendum in question, and additional delay might not have been too costly in order to obtain a "better" decision on an issue of importance.⁹⁶

Another example of a bypass case where the importance and urgency of an issue could be thought to justify the decision to bypass is *Barry Properties, Inc. v. Fick Bros. Roofing Co.*⁹⁷ where the Court held the granting of a mechanic's lien without prior notice or hearing invalid under the United States Constitution. Expedition of the final decision in *Barry Properties* was justified by the large-scale use of such liens in the state and the need to settle their validity, which had been called into question by the decision of the trial court.⁹⁸

A different type of case where a decision to expedite a case rests on the urgency of the situation is illustrated by *Wakefield v. Little Light*.⁹⁹ The dispute in that case centered on the custody of a young Indian child. That question depended, in turn, on resolution of a difficult jurisdictional issue. A decision to bypass the Court of Special Appeals could be justified on the ground that quick resolution of the dispute was essential to minimize the impact on the child. Although the urgency of the problem in *Wakefield* involved the "private" role of the Court, the workload of the Court was light enough to permit it to advance the case in order to decide quickly and finally the struggle over the child.¹⁰⁰

95. The referendum concerned amendments to the zoning plan for 42 tracts of land located on, or in the vicinity of, Maryland Route 3.

96. A vigorous dissent was issued by Judge Levine, and joined in by Chief Judge Murphy. Another election case where quick review could be justified was *Steimel v. Board of Election Supervisors*, 278 Md. 1, 352 A.2d 386 (1976) (repeal of county blue laws by General Assembly subject to local referendum).

97. 277 Md. 15, 353 A.2d 222 (1976).

98. Other cases involving issues arguably in need of quick and authoritative resolution were *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975) (holding unconstitutional the newly created post of State Prosecutor), and *Blue Cross of Md., Inc. v. Franklin Square Hosp.*, 277 Md. 93, 352 A.2d 798 (1976) (dealing with a number of questions concerning the Health Services Cost Review Commission).

99. 276 Md. 333, 347 A.2d 228 (1975).

100. While the issue in *Wakefield* was a "public" one (the relationship between tribal and state courts), the decision to expedite the case — if done for the reason suggested in the text — was "private," for it touched only the parties to the case.

A final situation in which a decision to bypass the Court of Special Appeals might be justified is where there has been a conflict on the pertinent issue between two or more panels of the Court of Special Appeals. In that situation, a decision in the case at bar by still another panel would not resolve the underlying legal problem, for this is only something the supervisory court — that is, the Court of Appeals — can do. Apparently only one case decided during the 1975 Term raised this problem in any significant way.¹⁰¹

In short, there are situations where it is possible to argue with some force that the Court of Appeals was justified in expediting a case. It is impossible to tell, however, whether the presence of a Court of Special Appeals decision on which to focus would have enabled the Court of Appeals to avoid errors in particular cases, or to write opinion which would provide better guides for the orderly development of the law of the State. In any event, cases in which there was even a colorable justification for the decision to bypass the Court of Special Appeals formed a small percentage of the total number of bypass cases. As for the remainder, the Court of Appeals should not have removed them from the normal appellate process.

Why, then, did the Court of Appeals take so many cases out of turn? The most plausible explanation for the large number of cases jumped by the Court of Appeals is that the Court wished to ease the workload of the Court of Special Appeals; the Court of Special Appeals had an extremely heavy caseload and some of the judges on that Court had suffered serious illnesses during the year. The Court of Appeals apparently decided that the problems of the intermediate court outweighed the possible adverse impact on its own caseload and decision-making. If this be true, it is a situation rich in irony: the Court of Special Appeals was designed to ease the burden of the Court of Appeals and yet now the Court of Appeals devotes part of its docket to easing the burden of the Court of Special Appeals.

If the Court of Appeals is concerned about the burden of the Court of Special Appeals, there are ways of helping which lessen the impact on its own operations. Individual members of the Court, for example, could have been assigned to hear cases in the Court of Special Appeals. Because the Court of Appeals regularly sits in panels of at least five,¹⁰² while the Court of Special Appeals normally sits in three-judge panels, this would have been a more efficient

101. *Davis v. State*, 278 Md. 103, 361 A.2d 113 (1976), where the decision of the Court of Special Appeals was arguably inconsistent with other decisions of that court.

102. The Court of Appeals cannot effectively reduce the size of its panels; the constitutional quorum is five judges. Md. CONST. art. IV, § 14.

response.¹⁰³ This solution, however, is deficient in two respects: first, there may be a reluctance on the part of judges of inferior courts to contradict a superior in the judicial hierarchy;¹⁰⁴ and second, there is a possibility that participants in the legal system will treat an opinion written by a Court of Appeals judge sitting on the Court of Special Appeals as having more precedential value than a "regular" Court of Special Appeals opinion.¹⁰⁵ Another way of easing the Court of Special Appeals' burden would be to assign some of the many excellent trial court judges in the state to sit specially on the Court of Special Appeals.¹⁰⁶ While this solution does not eliminate the "deference" problem, it does carry the advantage of exposing trial judges to the problems faced by a reviewing court (and vice versa). That exposure may well make better judges out of each group. Another possible solution, of course, if the workload of the Court of Special Appeals is a permanent problem, is to increase the number of judges who sit on that court. This presents problems of its own,¹⁰⁷ however, and, in any event, is beyond the power of the Court of Appeals to handle administratively.

4. *Other Certiorari Cases.*

Almost all of the cases — 103 of 109, or ninety-three percent — which reached the Court of Appeals by certiorari were cases that either had been heard or could have been heard in the Court of Special Appeals.¹⁰⁸ The remainder of the petitions for certiorari were in cases which originated in a district court and were then appealed

103. The Court of Appeals began doing this with some frequency in the summer of 1976. See, e.g., *Millison v. Secretary of Health and Mental Hygiene*, 32 Md. App. 165, 359 A.2d 247 (1976) (per Singley, J.).

104. Note, for example, the very small number of separate opinions of the Court of Appeals authored or joined in by specially assigned judges. See note 124 *infra*.

105. This could take the form of reluctance on the part of the Court of Appeals to overturn an opinion by one of its members who sat specially below.

106. The Chief Judge of the Court of Appeals is authorized to assign a judge of any court (other than the Orphans' Court) to sit on any other court. MD. CONST. art. IV, § 18A.

107. The Court of Special Appeals has thirteen judges at present. While that court appears to be a very effective and capable body, there seems to be fairly general agreement that a court much larger than seven or nine members cannot function effectively as a court, functioning instead as a collection of judges. See, e.g., Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432 (1976). Because the Court of Special Appeals has been a successful court, there should be some reluctance to work fundamental changes in its structure. There are of course a myriad of other possible solutions. See, e.g., Lesinski & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211 (1973).

108. See Appendix A, Table II *infra*.

to a circuit court. That court's decision is the end of the road for those cases unless the Court of Appeals grants, as it did in these cases, the petition for certiorari.¹⁰⁹

III. Other Roads To The Court

A. Appeals.

A direct appeal to the Court of Appeals from a *nisi prius* decision is no longer possible. There were, however, six cases decided by the Court of Appeals during the study period which had been docketed as "appeals" in the Court prior to January 1, 1975, the effective date of the statute terminating this method of reaching the Court.¹¹⁰ These were all routine cases. Indeed, the trivial nature of the issues presented in some of them confirms the wisdom of the General Assembly in abolishing this form of jurisdiction.¹¹¹

In addition to appeals from trial court decisions, the Court of Appeals heard one case that came to it by a statutory appeal from a decision of the Maryland Tax Court.¹¹² The Court of Appeals there held that the General Assembly could not provide for an "appeal" to it directly from the Tax Court because under the Maryland Constitution the Court of Appeals, an "appellate court," could only hear matters that had first been decided by a "court." Since the Tax Court was found to be an administrative agency, no appeal would lie from that body. Thus, this method of reaching the Court is no longer available to litigants.

B. Certified Questions.

The Court of Appeals issued opinions in only two cases in which questions were certified to it by another court. Both cases came from United States district courts, one from Maryland,¹¹³ and the other from the District of Columbia.¹¹⁴ Both cases involved questions which were open under Maryland law, and in both cases the Court of Appeals gave more than adequate guidance to the certifying courts.¹¹⁵ Indeed, in one case the Court, after answering the certified

109. See note 12 *supra*.

110. See note 17 *supra*.

111. See, e.g., *Kapiloff v. Locke*, 276 Md. 466, 348 A.2d 697 (1975) (hearsay problem).

112. *Shell Oil Co. v. Supervisor of Assessments*, 276 Md. 36, 343 A.2d 521 (1975).

113. *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976).

114. *Holtze v. Equitable Life Assurance Soc'y*, 276 Md. 681, 351 A.2d 139 (1976).

115. The Court of Appeals has not commented on the constitutionality of the certified question procedure. Other states which have adopted the Uniform Act have had little difficulty in finding the procedure constitutional. See, e.g., *In re Richards*, 223 A.2d 827 (Me. 1966).

questions, made some "additional observations" with respect to issues that might arise on trial of the case.¹¹⁶ Because the certified question route is a convenient way for an "outside" court to be given authoritative guidance with respect to questions of Maryland law, it is surprising that greater use has not been made of the practice.¹¹⁷

The paucity of certified questions may merely reflect unfamiliarity with the practice. It may also reflect dislike of the practice by bench and bar, owing to the delay, extra effort, and expense that it will generally entail.¹¹⁸ A judge may also be reluctant to certify a question because of an unwillingness to let the development of the law "escape" his control.

It is difficult to tell whether any of these factors are responsible for the low number of questions certified to the Court of Appeals. A search through the Federal Supplements issued during the study period for published opinions by the United States District Court for the District of Maryland (the court most likely to be faced with substantial questions regarding Maryland law) failed to turn up any cases in which Maryland law was both unsettled and a significant aspect of the case.¹¹⁹ When such problems do arise in the future it is to be hoped that bench and bar will make use of the certified question route.

C. *Professional Supervision.*

The Court of Appeals issued opinions in five cases in which a panel of judges had recommended discipline of a member of the bar. In four of these the Court issued unanimous opinions; in all five

116. *Scott v. Watson*, 278 Md. 160, 171, 359 A.2d 548, 555 (1976). These observations were probably prompted by the necessary incompleteness of the record certified to the Court of Appeals.

117. The certified question route does sometimes make things difficult for the Court of Appeals. In *Mercantile-Safe Dep. & Trust Co. v. Purifoy*, 280 Md. 46, 371 A.2d 650 (1977), for example, the Court was asked to construe a provision of the Maryland adoption statute. The majority did so, but expressly avoided any consideration of the constitutionality of the construction placed on the Act — a position rejected in a dissenting opinion.

118. Certification requires: 1) briefing the certifying court on the need to certify; 2) briefing the Court of Appeals on the question certified; 3) briefing the certifying court on the application of the decision by the Court of Appeals. Without certification these steps could be compressed into one. On the other hand, the certified question route is analogous to an interlocutory appeal, a procedure which does have the potential for saving the parties, in the proper circumstances, both time and money.

119. *But see Patterson v. Ramsey*, 413 F. Supp. 523, 523 n.1 (D. Md. 1976) where Judge Young noted that he had not certified an open question of Maryland law because of the possibility of delay, and because resolution of the issue appeared to him to be "straightforward."

cases the Court disciplined the attorney in question: there were two reprimands, two suspensions (one of thirty days and one of one year), and one disbarment.

In addition, the Court decided a significant professional supervision issue, avoiding federal constitutional problems in so doing, when it ruled that an applicant who had been conditionally admitted to the bar need not maintain an office in the state for a year in order to be fully admitted to practice.¹²⁰

SECTION TWO: THE WORK OF THE COURT

I. *The Weight Of The Work*

A. *Published Opinions.*

Table IV shows the distribution of authorship of published opinions among the judges during the study period. The judges averaged about seventeen published opinions; for the six judges who sat during the whole year, the average was approximately eighteen per judge. The writing of the opinions of the Court was spread out in rather uneven fashion among the members of the Court; Judge Singley, for example, authored half again as many opinions for the Court as Judge Digges. While the differences among the judges narrow when the total number of opinions written is taken into consideration, differences are still substantial. Although it is possible that this uneven opinion load results from a practice of not assigning "difficult" opinions to a particular judge, an examination of the cases does not seem to bear out this hypothesis. Several other factors may account, however, for the disparity: illness, other official responsibilities,¹²¹ or, perhaps, campaigning for re-election.

The members of the Court of Appeals were helped to some extent by a number of other judges who sat by designation¹²² on the Court during the year. The impact of those judges on the Court's decision-making was apparently slight;¹²³ none wrote either a majority or

120. *In re Day*, 276 Md. 204, 345 A.2d 434 (1975). The petitioner in *Day* had challenged the requirement that a conditional admittee to the Maryland Bar maintain an office and practice in the state. Rules Governing Admission to the Bar, Rule 14 *et seq.* The Court neatly sidestepped the problem by deleting the requirement from the Rules.

121. The Chief Judge, for example, has numerous administrative responsibilities. See, e.g., MD. CONST., art. IV, § 18A.

122. See MD. CONST. art. IV, § 18A.

123. It is, however, impossible to know the influence of any judge in conference, or in comments that may be made with respect to proposed opinions.

dissenting opinion,¹²⁴ and in only two cases did the vote of the special judge affect the outcome.¹²⁵

In comparative terms, the workload of the Court of Appeals does not appear to be unduly heavy. In 1957, for example, the five judges then on the Court issued an average of forty-five opinions each; in 1952 they had written twenty-six and one-half each.¹²⁶ Indeed, the number of opinions written during the 1975 Term is dramatically smaller than it has been in recent years.¹²⁷ Data from other courts also support the conclusion that the Court of Appeals is not, at least in comparative terms, so burdened by its caseload that it is not capable of turning out high quality opinions.¹²⁸

B. *Other Burdens.*

The work of the Court is not limited to its reported decisions. For example, the Court has responsibility for adoption and modification of the Maryland Rules of Procedure.¹²⁹ Some portion of the Court's time is also devoted to work that is less visible because it is not reported. The greatest part of this invisible workload involves the certiorari process. During the 1975-1976 Fiscal Year, the Court was presented with 464 petitions for certiorari, of which 104 — about twenty-two percent — were granted.¹³⁰ The effort required to prepare

124. However, in *Kapiloff v. Locke*, 276 Md. 466, 348 A.2d 697 (1975), Chief Judge Orth of the Court of Special Appeals, joined in a dissent authored by Judge Smith, and in *State v. Williams*, 278 Md. 180, 361 A.2d 122 (1976), Judge Grady of the Supreme Bench of Baltimore City joined another dissent by Judge Smith.

125. *Winterwerp v. Allstate Ins. Co.*, 277 Md. 714, 357 A.2d 350 (1976) (4-3 decision; Judge Powers of the Court of Special Appeals voting with majority); *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975) (result would have been different if both special judges had switched their votes).

126. ENEY REPORT, *supra* note 18, at 413. Between 1935 and 1939 each judge on the Court wrote an average of 17.6 opinions per year. Brune & Strahorn, *supra* note 4, at 363. Those judges, however, also had significant nisi prius responsibilities. *Id.* at 356.

127. See RUSSELL REPORT, *supra* note 23, at 16.

128. See, e.g., Beatty, *Decision-Making on the Iowa Supreme Court — 1965-1969*, 19 DRAKE L. REV. 342, 349 (1969) (average of 31 opinions per judge during late 1960's); Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 652 (1954) (in 1950 the seven members of the California Supreme Court averaged over 29 opinions each); Wolfram, *Notes From a Study of the Caseload of the Minnesota Supreme Court: Some Comments and Statistics on Pressures and Responses*, 53 MINN. L. REV. 939, 939 (1969) (in 1968 an average of about 44 decisions by each of seven judges). See also ALDISERT, *supra* note 2, at 817, noting that in 1974 the Pennsylvania Supreme Court wrote 45 opinions per judge, as did the Wisconsin Supreme Court.

The accuracy of a comparison of judicial workloads based on opinions issued depends on the comparability of difficulty of cases reviewed (among other factors). It is, nevertheless, a fairly good indicator of the pressure placed on a court by its caseload.

129. See MD. CTS. & JUD. PROC. CODE ANN. §1-201 (1974).

130. ADMIN. OFFICE OF THE COURTS, ANN. REP., 1975-1976, at 65.

each member of the Court to make a decision on those petitions adds a significant burden to the workload of the Court.

During the study period the Court also issued opinions in nine unreported cases.¹³¹ In none of these cases was the Court's decision to refrain from publication questionable, at least given the decision to provide for unpublished opinions, for all apparently involved either problems unique to the case at bar or the application of well-settled rules.

The Court also made a number of miscellaneous decisions during the Term. These included the dismissal of petitions for certiorari as having been improvidently granted, dismissal on the basis of mootness, the denial of several petitions for a writ of mandamus, and the transfer of cases to other courts.

While all of these actions added to the burdens on the Court, they do not appear large enough to impair its ability to function effectively, nor do they appear to be of such character as to alter the conclusion that, in comparative terms, the Court of Appeals of Maryland is not overworked. To this extent, at least, the designs of the blue-ribbon committees that have acted over the past two decades have been realized.

II. *The Opinions*

This sub-section¹³² discusses the origins of the cases heard by the Court during the Term, then focuses on the Court's practice with respect to separate opinions, and concludes with an analysis of the substantive content of the opinions.

A. *Source.*

1. *Geographic.*

The Court, as shown in Table III, heard cases from all but five of the Maryland counties. There is a significant correlation between the

131. An "unreported" opinion of the Court of Appeals "is not a precedent within the rule of *stare decisis* . . ." MD. R.P. 891a2 (1977). For a critical review of unpublished opinions, see Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975).

132. Most readers will undoubtedly find much of the following material dull. The data and discussion are included in part to serve as a reference for future inquiries and in part because the absence of interesting data can be as significant as its presence. See A. DOYLE, *THE COMPLETE SHERLOCK HOLMES* (1905):

"[T]he curious incident of the dog in the nighttime."

"The dog did nothing in the nighttime."

"That was the curious incident . . ."

Id. at 347.

number of cases heard and the population of the county. The only exceptions are Calvert and Talbot counties, but because the number of cases involved is so small these data do not appear to be significant enough to alter the conclusion that the geographic origin of a case is not a factor in the decision whether to review it.¹³³

2. Courts.

a. Circuit Courts.

Similarly, the Court of Appeals did not appear to be significantly influenced in its selection process by the identity of the trial judge. No trial judge had a large number of cases heard by the Court during the Term, nor did any suffer a disproportionately high rate of reversal.

b. Court of Special Appeals.

The fate of the cases heard by the Court of Appeals that came to it from the Court of Special Appeals is shown in Table V. Again, it is difficult to glean much from the data. It is somewhat surprising that almost three-fifths of the authored Court of Special Appeals opinions were affirmed, since it might be expected that the cases taken for review were among the more troublesome ones decided by the Court of Special Appeals.¹³⁴ The preponderance of affirmances further supports the earlier observation that the Court of Appeals is perhaps not as selective in choosing cases to review as it might be.¹³⁵

No member of the Court of Special Appeals had a disproportionately high rate of reversal.¹³⁶ While some judges participated in a significantly greater number of decisions that were reviewed than did others, this may have been due to factors other than a lack of confidence in the writers of the opinions: illness, for example, or quirks in the data.

A comparison of the percentage affirmed figure of Tables V-A and V-B does lead to one interesting conclusion. Those figures indicate that a reviewed per curiam Court of Special Appeals decision is nearly three times as likely to be reversed as is a signed

133. Brune & Strahorn, *supra* note 4, found that over 61% of the Court's caseload between 1935-1939 originated in Baltimore City. *Id.* at 366. In 1975-1976 it accounted for only 15.7% of the cases. See Table VIII *infra*. The change reflects in large part the decline of Baltimore City as the population center of the State.

134. If so, the low number of dissents in the Court of Special Appeals in these cases is somewhat surprising.

135. See text accompanying notes 85 to 87 *supra*.

136. The panels on which Judges Davidson, Menchine and Powers sat, however, did have an unusually high rate of affirmance.

opinion from that court. Several explanations for this disparity are possible. First and simplest, the number of reviewed per curiam decisions is too small to permit any valid inference to be drawn. Second, a per curiam opinion, because it is unsigned, unpublished, and does not have precedential value,¹³⁷ is more likely to be "wrong" (in the view of the Court of Appeals) for the simple reason that it is not prepared as carefully and thoughtfully as an opinion that will be published, designed to serve as precedent, and which bears the author's name. Lesser care in the preparation of a per curiam opinion would seem a real possibility on a heavily burdened court.

The disparity in numbers of reviewed per curiam and published opinions may also be a function of the attitude of the Court of Appeals towards precedent. Thus, the Court of Appeals might be generally less interested in per curiam Court of Special Appeals opinions because they have not been published and cannot, therefore, be used as precedent. Review, therefore, would serve to correct error only in the case at bar and not to correct error in doctrine. On the other hand, it might be thought desirable at times to review a published opinion of the Court of Special Appeals — even if it appears "correct" — in order to put the imprimatur of the Court on the precedent that has been established.

B. *Dissent On The Court Of Appeals.*

Separate opinions (dissents and concurrences) serve a number of purposes. Because dissenters¹³⁸ are not limited by concessions often necessary to secure a majority on the primary issue, their opinions can illuminate issues slighted by the majority. For the same reason, dissenters have greater freedom to engage in extended discussion on limited points, helping to isolate vital issues and bring them to the attention of the public. "A dissent in a court of last resort," Chief Justice Stone once noted, "is an appeal to the brooding spirit of the law, to the intelligence of a future day"¹³⁹ Thus, a later court, faced with a similar problem, may find the dissent useful in

137. See MD. R.P. 1092(c) (1977).

138. Concurring opinions do not differ analytically from dissenting opinions; in each the opinion is generally of the form "I do not agree with the reasoning of the majority" An example is provided by Judge Smith's concurring opinion in *Dillon v. State*, 277 Md. 571, 357 A.2d 360 (1976). In that opinion Judge Smith agreed with the substantive position taken by the dissent, but voted to affirm appellant's conviction on the ground that the error in the trial court was harmless.

139. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928). See generally P. JACKSON, *DISSENT IN THE SUPREME COURT* (1969); ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959).

understanding difficulties in the positions taken in the majority opinion; that understanding may serve to limit (or increase) the impact of the earlier precedent in later cases.¹⁴⁰ In turn, the threat of a stinging dissent may force the writer of the majority opinion to analyze more clearly and effectively the problem before him. The threat of a dissent may also restrain the "judicial advocate" from overstating his case, for the readiness of the potential dissenter "to pounce upon what he believes to be majority suppression or distortion of fact or exaggeration of legal doctrine renders these things less likely to occur."¹⁴¹ Finally, dissents signal — and perhaps help trigger — intellectual ferment among the members of the Court.¹⁴² Because dissenting opinions serve a variety of healthy functions, their absence might be a worrisome sign.

On the other hand, there are several valid reasons why the number of dissents may not accurately reflect the level of disagreement among the members of the Court. In the first place, as Justice Walter Schaefer has observed, "there may be disagreement without dissent."¹⁴³ A judge will write a separate opinion only if his "fighting conviction"¹⁴⁴ has been stirred. But a judge must be careful not to jeopardize his relations with his colleagues by the too frequent or pointless use of dissents. He must also be aware of the fragile value of separate opinions which, like the little boy's cry of "wolf," if used too often may lose their special value and no longer signal to bench and bar that *this* is an issue worthy of special attention.¹⁴⁵ To preserve the special value of his separate opinions a judge must ask himself "whether it is likely to serve the law by extracting from the shadows the problems left unstated and the theories that should eventually control."¹⁴⁶

It is, of course, very difficult for an outsider to ascertain if either — or both — of these problems afflict the Court of Appeals. During

140. See Miller, *supra* note 3, at 12, 14.

141. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394, 403 (1952).

142. Cf. THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 170 (D. Danelski & J. Tulchia eds. 1973) ("Justice Harlan was disturbed by the serenity of the Court and complained to me that there were too few dissents.")

143. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3/8 (1966).

144. *Id.* at 9.

145. Chief Justice Stone's remark on this point in a letter he wrote to Karl Llewellyn is telling: "[I]f I should write in every case where I do not agree with some of the views expressed in the opinions, you and all my other friends would stop reading them." Quoted in W. MURPHY, *THE ELEMENTS OF JUDICIAL STRATEGY* 62 (1964).

146. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

the study period separate opinions were relatively rare. Approximately three-fourths of the Court's opinions during that span, as shown in Table VI, were unanimous. In only thirty-one cases were separate opinions issued — a total of twenty-five dissents and seven concurrences, or an average of 4.2 per judge. Indicative of the high degree of cohesion on the Court is the fact that only one plurality decision was handed down during the Term;¹⁴⁷ only once, that is, did the judges fail to agree on an opinion that could be approved by a majority of the Court.

Comparative data on the frequency of separate opinions are rare¹⁴⁸ and, in any event, would reveal little absent a detailed analysis of the decisions made in those cases. Thus, while a great deal of data concerning the separate opinions of the Supreme Court of the United States is available,¹⁴⁹ it is of little comparative use with respect to state appellate courts such as the Court of Appeals. Not only do state courts have a lighter caseload, and thus more time to work out collegial differences,¹⁵⁰ but the issues presented to such courts are generally less volatile and controversial than those presented to the Supreme Court. By their very nature, therefore, they are less likely to provoke an "appeal to the bar of history" in the form of a separate opinion.¹⁵¹

147. *Dillon v. State*, 277 Md. 571, 357 A.2d 360 (1976). The lead opinion was authored by Judge O'Donnell and joined in by Judges Murphy, Singley and Digges; Judge Smith issued a separate opinion and Judge Levine wrote a dissent that was joined by Judge Eldridge. Judge O'Donnell died, however, before his opinion had been adopted by the Court; thus, his opinion commanded the assent of only three of the six voting judges, making it a plurality opinion, as Judge Levine noted. *Id.* at 588, 357 A.2d at 371.

Fortunately, the factual situation in *Dillon* is unlikely to recur, and the plurality decision should not cause trouble similar to that which has plagued the Supreme Court in this area. See generally Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59.

148. Available figures indicate that the percentage of non-unanimous cases is rather high for a state court of last resort. According to Willis, *supra* note 3, at 513, the percentage of non-unanimous opinions in state supreme courts in recent years was 5.4% (Kentucky) and 9.7% (Iowa). See also Miller, *supra* note 3, at 12, for data on the Michigan Supreme Court a decade ago: approximately 73% of the cases decided by that court were unanimous. During the 1935-1939 period, members of the Court of Appeals issued an average of 2.5 dissents each year per judge. Brune & Strahorn, *supra* note 4, at 362.

149. Each year, the *Harvard Law Review* publishes in its Supreme Court issue data on the opinions of the Supreme Court. In the October, 1974 Term only 24.8% of the 137 "Full Opinions" handed down were unanimous. *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 11, 277 (1975).

150. But see text accompanying notes 26 to 28 *supra*.

151. See Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A.J. 361, 363 (1973): "It may well be that the nature of constitutional adjudication invites, at least, if it does not require, more separate opinions than does adjudication of law in other areas."

Analysis of the separate opinions of the Court of Appeals indicates they were not undertaken frivolously or lightly. Almost all raise serious questions with respect to the law declared by the majority opinion, or with the application of that law to the facts in the case at bar. In only a few cases did dissident judges engage in the questionable practice of not expressing the ground of disagreement.¹⁵² Rarely did a separate opinion focus primarily on a review of the evidence presented below,¹⁵³ nor were separate opinions often used by a judge to "decide" (for himself, at least) an issue that would probably be raised in the trial court on remand.¹⁵⁴ In short, there is little evidence of overindulgence in the freedom of dissent.¹⁵⁵

Whether members of the Court stayed their hand too often with regard to writing separate opinions is a more difficult question. While it is surprising, for example, that the wholesale revision of the common law of defamation in *Jacron Sales Co. v. Sindorf*¹⁵⁶ was unanimous, this does not seem to indicate malaise on the part of the Court. There are several reasons why there is no cause for alarm. First, much of the Court's caseload involves areas of relatively well-settled law (negligence, for example), and disagreement among the judges, if any, centers on "non-institutional" questions such as evaluation of a set of facts in the light of well-settled legal principles. Decisions in such cases, because they are unimportant to anyone

152. See Appendix A, note 7 *infra*. The dissent without opinion is "questionable" because no guide to the problem is given by the dissenter. See Miller, *supra* note 3, at 12, 14.

153. *But see* Fleming v. Prince George's County, 277 Md. 655, 686, 358 A.2d 892, 908 (1976) (Murphy, C.J., dissenting).

154. *But see* Taylor v. Armiger, 277 Md. 638, 653, 358 A.2d 883, 891 (1976) (Murphy, C.J., concurring). In *Taylor*, the five year-old plaintiff, riding a tricycle, "darted out" into a street from a driveway. The majority held that the jury should have been permitted to consider whether the child was contributorily negligent, but expressly did not "decide the question of whether a tricycle was a vehicle within the meaning of the then existing statute . . ." *Id.* at 639, 358 A.2d at 884. Chief Judge Murphy's concurrence does decide that question, in the affirmative.

155. It is unusual for a member of the Court to preserve his dissent by reiterating his position the next time that issue arises. *Ross v. State*, 276 Md. 664, 350 A.2d 680 (1976), and *Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976), decided within three days of one another, provide an example. In *Dorsey*, the Court held that a test of "harmless error" should be applied to all errors in a criminal trial whether or not "of constitutional dimension." Chief Judge Murphy, along with Judges Levine and Smith, dissented from this part of the holding in *Dorsey*. In *Ross*, the majority opinion applied the harmless error test to a non-constitutional error in a criminal case, finding that the conviction of the petitioner should be reversed. Chief Judge Murphy and Judge Levine joined in the majority opinion; Judge Smith dissented, but on other grounds. *But see* State v. Williams, 278 Md. 180, 361 A.2d 122 (1976), where Judge Eldridge dissented on the basis of his earlier dissenting opinion in *Williams v. Director, Patuxent Inst.*, 276 Md. 272, 347 A.2d 179 (1975).

156. 276 Md. 580, 350 A.2d 688 (1976).

other than the litigants, do not generally involve situations where it is likely that a separate opinion would be used to bring the problem to the attention of an outside audience (the bar as a whole, or the legislature, or the general public) in an effort to change the result.¹⁵⁷ Even if there is disagreement among the judges over legal principles, relatively minor or non-controversial issues are less likely to bring forth a separate opinion, for it is less likely that a judge in those cases will feel strongly enough to preserve his separate opinion as an "appeal to the bar of history." Hence, it is significant here that only one-fifth of the Court's cases involved constitutional questions.¹⁵⁸ Finally, the sharpness of the dissents that are written belies any concern that members of the Court pull their punches in the matter of dissents. The judges who wrote the separate opinions in *Barry Properties*¹⁵⁹ or in *State v. Fabritz*,¹⁶⁰ for example, are judges who are not afraid to speak their minds in the proper circumstances.

C. Congruence Of Opinion.

As noted in the preceding section, there is considerable agreement among the members of the Court. That conclusion is borne out by Table VIII, showing the voting alignments among members of the Court. The lowest degree of cohesion between any two members (between Judges Murphy and Eldridge) still indicates agreement in three-quarters of the cases. Furthermore, in eight out of the twenty-one possible combinations between two members, the level of agreement exceeded ninety percent. That very high congruence of opinion helps to confirm the view that much of the work of the Court is non-controversial. The high level of agreement also masks the possible existence of voting blocs on the Court;¹⁶¹ at a guess, the development of blocs, if there be any at all, is retarded by the lack of any need in the vast majority of cases to develop regular sources of support.

On the other hand, the data do show a degree of difference with respect to the persuasiveness of the judges. Table VII measures that characteristic in terms of the ability of a judge to convince his brethren of the correctness of his views and to have them join his

157. Put somewhat differently, if the result is unlikely to be changed either through the intervention of a higher court, or through that of a specific interest group which is adversely affected by the decision and which can secure legislative change, it is unlikely that a judge will risk otherwise good relations with his colleagues for the sake of a clear statement of his own position.

158. See Table IX, Appendix A, *infra*.

159. 277 Md. 15, 39, 353 A.2d 222, 236 (1976).

160. 276 Md. 416, 426, 348 A.2d 275, 281 (1975) ("I fear that my distinguished colleagues may have been swayed by the photographic exhibits . . .").

161. See generally W. MURPHY, *supra* note 145.

opinion. Four members of the Court had over eighty percent of their opinions issued unanimously, but the opinions of the other three fared far less well. This suggests either that the views of these three were somewhat out of tune with the rest of the Court, or, perhaps, an unwillingness on their part to compromise a position in order to gain votes.¹⁶²

IV. *Subject Matter*

Table IX categorizes, according to subject matter, each case decided by the Court of Appeals during the Term. Because no case is listed more than once, the categorization presents problems with classification and over-simplification.¹⁶³ This is especially true in cases which bypassed the Court of Special Appeals; because the Court of Appeals is the only appellate court to hear the case, it will, perforce, often hear more than one issue.¹⁶⁴ Nevertheless, single issue classification seemed the best and most effective way to present the work of the Court.

A. *Public Law.*

Over half of the opinions of the Court of Appeals involved questions of public law. Almost one-third of the cases were criminal or quasi-criminal.¹⁶⁵ The large proportion of the Court's caseload devoted to those matters reflects, of course, a large volume of criminal proceedings in the lower courts. More than that, however, it shows the judicial system's extreme concern for procedural fairness in criminal cases: thus, almost one-half of the criminal cases involved questions of constitutional law.¹⁶⁶ Outside of the criminal

162. Judge O'Donnell's record may also be influenced by the fact that, for the opinions of his that were adopted by the Court after his death, he was unable to "persuade" others to his point of view.

163. An example is *Gordon v. Comm'rs of St. Michaels*, 278 Md. 128, 359 A.2d 543 (1976). There, the Court of Appeals was presented with a constitutional challenge to the zoning power of the town of St. Michaels. The case is classified under "Maryland Constitutional" for this Article; it could have been listed instead, or in addition, under "Zoning."

164. *Davidson v. Miller*, 276 Md. 54, 344 A.2d 422 (1975) is illustrative. The Court in *Davidson* held, *inter alia*: 1) the Maryland automatic removal provision was unconstitutional under the Federal Constitution, 2) a trial judge may order a remittitur after granting a new trial, and 3) testimony by an expert witness was insufficiently probative to be admissible. In Table IX, however, *Davidson* is listed only under "United States Constitution," since that was the primary focus of the opinion of the Court of Appeals.

165. This includes juvenile and defective delinquency proceedings.

166. In contrast, no criminal case reviewed by the Court of Appeals had as the primary issue the question of sufficient evidence to support the conviction.

Concern for procedural fair play appears to be of relatively recent origin. *Brune & Strahorn*, *supra* note 4, at 350, found that only five percent of the cases decided between 1935 and 1940 involved "crimes."

area, only three cases involved substantial questions decided under the Constitution of the United States.¹⁶⁷ This suggests that litigants in Maryland view the federal bench as more receptive to such questions than the state bench, and that they take their constitutional claims into the federal system whenever possible.¹⁶⁸ These data also suggest that litigants believe the Maryland Constitution will not provide as effective a protection of claimed rights as parallel provisions of the United States Constitution. All the civil cases decided on state constitutional grounds, for example, lacked parallel federal provisions which could have served as an alternative ground of decision.

Fewer than ten percent of the opinions involved questions of administrative law. This seems a low figure given the importance and ubiquity of administrative judgments in the everyday life of the people and business of Maryland.¹⁶⁹ This paucity of cases is probably due in part to the deference given administrative judgments and decisions on review, and in part to the absence of parties with economic interests significant enough to justify the taking of an appeal.

B. *Private Law.*

The Court's decisions in the private law area are also revealing. About one-eighth of the decisions were procedural or evidentiary, leaving thirty-six cases — approximately thirty percent of the total heard by the Court — for development of private law. Over half of these cases involved tort and property questions, with a scattering of decisions in other areas. The paucity of cases in areas of private ordering (contract, for example) confirms the observations of others that businesses do not use the courts in any major way. The reasons for this are not hard to find: business is interested in orderly

167. *Davidson v. Miller*, 276 Md. 54, 344 A.2d 422 (1975) (see note 164 *supra*); *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976) (mechanic's lien statute held unconstitutional absent due process protection). See also *Westchester West No. 2 Ltd. Partnership v. Montgomery County*, 276 Md. 448, 348 A.2d 856 (1975) (constitutionality of county's rent control ordinance). Of course, all cases are decided within the framework of the U.S. Constitution. Occasionally, this leads to detailed analysis of Supreme Court opinions in order to determine the latitude left for decision making by the Court of Appeals. See, e.g., *Geelhoed v. Jensen*, 277 Md. 220, 352 A.2d 818 (1976) (excellent discussion of due process considerations with respect to the Maryland long-arm statute).

168. In criminal cases, it is difficult to raise an initial claim of right under the United States Constitution. See *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny. Thus, it is difficult to bypass the Court of Appeals in criminal cases.

169. For example, Administrative Appeals constituted 13.6 percent of cases filed in U.S. Circuit Courts in Fiscal 1976. DIRECTOR OF THE ADMIN. OFF. OF THE U.S. COURTS, ANNUAL REPORT, 155, 165 (1976).

procedures, in avoiding expensive (and risky) litigation, and in maintaining stable relationships.¹⁷⁰ Thus, those cases involving private ordering which did come to the Court of Appeals tended to involve small, one-shot transactions such as the sale of a house-trailer by a trailer-park owner,¹⁷¹ or a dispute over mitigation of damages by a residential landlord.¹⁷² Still, this does not explain the surprising absence of decisions in areas of labor law¹⁷³ (one case) or business associations (no cases), especially in view of the troubled economic state of the past half decade. Perhaps the absence of labor cases can be attributed to the fact that labor law involves a specialized bar accustomed to practice before a large federal administrative agency; since collective bargaining agreements have a federal forum available,¹⁷⁴ the labor bar will take litigation to that arena simply because it is more familiar territory. It is difficult to understand, however, why no cases involving business associations arose during the Term. This is an area regulated by state law where federal jurisdiction may be difficult to obtain, and where the disputes that may arise between a stockholder and the board of directors are seldom avoided for purposes of future harmony.¹⁷⁵

Equally puzzling is the relative absence of civil cases in which any significant evidentiary questions were raised.¹⁷⁶ Again, this phenomenon is difficult to explain. It may be that the cases involving evidentiary problems presented to the Court of Appeals for review involved decisions where the trial judge articulated the correct "law" but did not properly apply that law to the factual setting before him.¹⁷⁷ It is unlikely that such decisions would be given high priority by the Court of Appeals, since the cases often

170. See generally L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

171. *Lewis v. Hughes*, 276 Md. 247, 346 A.2d 231 (1975).

172. *Wilson v. Ruhl*, 277 Md. 607, 356 A.2d 544 (1976).

173. State courts have concurrent jurisdiction with federal courts to enforce collective bargaining agreements. *Local 714, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

174. 28 U.S.C. § 1337. No jurisdictional amount is necessary.

175. The presence of only one tax decision is probably due to disruption in the appellate process of those cases stemming from the *Shell Oil* decision. See note 112 *supra*.

176. Evidentiary problems played a significant role in several criminal cases. *E.g.*, *Caldwell v. State*, 276 Md. 612, 349 A.2d 623 (1976) (defendant in a rape case, when consent is in issue, may establish reputation for chastity of complainant in area where she does not live).

177. Additionally, proper development and preservation of evidentiary questions demands a good deal of effort at the trial level from bench and bar. It is possible that such an effort is not made in all cases.

involve review of the record, a review that has already been done — or is available — in the Court of Special Appeals.

The portrait of the Court of Appeals of Maryland painted above shows a cohesive and rather busy Court. Apart from a reluctance to cabin publicly its discretion, there are no readily apparent problems. The control that it can exercise over its own docket along with the relatively low number of cases that demand the attention of the Court ensure that its caseload will not be so heavy and burdensome as to prevent it from attaining a high level of performance. Part II of this Article will examine the Court's craftsmanship and the quality of its decision-making.

APPENDIX A*

THE WORK OF THE COURT OF APPEALS:
A STATISTICAL MISCELLANY

TABLE I:	A Sample Of Certiorari Petitions
TABLE II:	Source Of Cases
TABLE III:	County Of Origin
TABLE IV:	Action Of Judges
TABLE V:	The Court Of Special Appeals In The Court Of Appeals
	A. Reported Opinions Of The Court Of Special Appeals
	B. Unreported Opinions Of the Court Of Special Appeals
TABLE VI:	Frequency Of Separate Opinions
TABLE VII:	Judicial Persuasiveness
TABLE VIII:	Voting Alignment
TABLE IX:	Primary Subject Matter Of Opinions

* Tables prepared by Gary Aiken of the Law School Class of 1977.

TABLE I
A SAMPLE OF CERTIORARI PETITIONS^a

	Number of Petitions
A. Source of Jurisdiction	
Certiorari	100
To Court of Special Appeals ^b	88
Reported	35
Unreported	53
To Circuit or Orphans' Court (expedited) ^c	5
To Circuit Court (on appeal to that court from a district court) ^d	7
B. Type of Case	
Criminal	65
Certiorari Denied	55
Defendant as Petitioner	53
State as Petitioner	2
Certiorari Granted	10
Defendant as Petitioner	9
State as Petitioner	1
Civil and other Non-Criminal Matters	35
Certiorari Granted	10
Certiorari Denied	25
C. Type of Petition	100
Pro Se	5
Filed by an Attorney	95
D. Cases in which a Reply Petition was Filed	15
E. Action of Court of Appeals	
Certiorari Granted	20
General	13
Expedited	2
Limited Scope of Review	3
Additional Issue Raised <i>Sua Sponte</i>	1
Remanded to Court of Special Appeals	1
Certiorari Denied	80
Generally	79
Lack of Jurisdiction	1

a. The data in this Table were obtained by an examination of a random sample of 100 consecutive petitions for certiorari filed in the Court of Appeals in the September, 1975 Term.

b. See MD. CTS. & JUD. PROC. CODE ANN., § 12-201 (Cum. Supp. 1976).

c. See *id.*

d. See *id.* at § 12-305.

TABLE II
SOURCE OF CASES^a

	Number	Percentage
A. CERTIORARI		
To the Court of Special Appeals		
Decided in Court of Special Appeals	50	40.3
Expedited to Court of Appeals	53	42.7
To Circuit Courts	6	4.8
B. DIRECT APPEALS		
Circuit Court	6	4.8
Tax Court ^b	1	0.8
C. CERTIFIED QUESTIONS	2	1.6
D. PROFESSIONAL SUPERVISION	6	4.8
	<u>124</u>	

a. The data include all signed published decisions of the Court of Appeals decided between September 1, 1975 and August 31, 1976, inclusive. Not included, unless noted to the contrary, are the following:

1. All professional supervisory and disciplinary orders.
2. All per curiam opinions. However, *In Re Appeals No. 1022 and No. 1081*, 278 Md. 174, 359 A.2d 556 (1976), is included, despite a "per curiam order," since a signed opinion was later issued by the Court.
3. All unsigned orders. In addition to disciplinary opinions, published material omitted here are *State v. Bruce*, 277 Md. 92, 351 A.2d 896 (1976) (dismissal of writ of certiorari as having been improvidently granted), and *Luskin's, Inc. v. U.S. Pioneer Elec. Corp.*, ___ Md. ___, 343 A.2d 890 (1975) (dismissed as moot).

Judge O'Donnell died on April 2, 1976. Unless he is stated to be the author of the opinion, only those opinions adopted prior to his death are included in statistics that relate to him. With the exception of *Leatherbury v. Gaylord Fuel Corp.*, 276 Md. 367, 347 A.2d 826 (1975), no opinion has been listed in any Table more than once, even though the opinion decided more than one case. *Leatherbury* is treated differently because the two cases decided by the Court in that opinion reached it by different routes, and were separately docketed in the Court. Thus, in Tables II, III, and VIII, two cases are listed as coming from *Leatherbury*; since Tables IV-VII focus on opinions, *Leatherbury* is only counted once in those Tables.

b. This route to the Court of Appeals was held unconstitutional in *Shell Oil Co. v. Supervisor of Assessments*, 276 Md. 36, 343 A.2d 521 (1975).

TABLE III
COUNTY OF ORIGIN

COUNTY	NO. OF CASES	POPULATION ^a	PCT. OF CASES	PCT. OF POPULATION
Allegany	3	83,175	2.6	2.02
Anne Arundel	9	344,056	7.8	8.35
Baltimore	18	637,114	15.7	15.46
Calvert	4	26,588	3.5	0.65
Caroline	0	21,668	—	0.53
Carroll	0	80,607	—	1.96
Cecil	2	56,005	1.7	1.36
Charles	1	60,546	0.9	1.47
Dorchester	1	29,634	0.9	0.72
Frederick	2	96,158	1.7	2.33
Garrett	2	23,694	1.7	0.57
Harford	2	136,381	1.7	3.31
Howard	2	97,994	1.7	2.38
Kent	1	16,706	0.9	0.41
Montgomery	17	571,558	14.8	13.87
Prince George's	15	677,848	13.0	16.45
Queen Anne's	0	20,186	—	0.49
St. Mary's	2	51,400	1.7	1.25
Somerset	0	19,458	—	0.47
Talbot	3	25,393	2.6	0.62
Washington	2	108,045	1.7	2.62
Wicomico	1	59,072	0.9	1.43
Worcester	0	26,621	—	0.65
Baltimore City	28	851,698	24.3	20.66
Total ^b	115	4,121,605		

a. The statistics for the population of each county are taken from U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, POPULATION ESTIMATES AND PROJECTIONS (Series P-25, No. 668, April, 1977).

b. Table II indicates that the Court of Appeals decided 124 cases; Table III shows the origin of 115 of them. The remaining nine opinions are accounted for in the following way: one was from the Tax Court, two were certified questions originating outside the state court system, and six dealt with professional supervision.

a. In four cases judges concurred or dissented without opinion. *Anne Arundel County, Maryland v. McDonough*, 277 Md. 271, 354 A.2d 788 (1976) (Singley, J., concurring); *Caplan Bros., Inc. v. The Village of Cross Keys, Inc.*, 277 Md. 41, 353 A.2d 237 (1976) (Levine and Eldridge, JJ., concurring); *Eastgate Assoc. v. Apper*, 276 Md. 698, 350 A.2d 661 (1976) (Murphy, J., would not have granted certiorari; this is treated as a dissent without opinion); *Harrison v. State*, 276 Md. 122, 345 A.2d 830 (1975) (Murphy, J., joining in part of the concurring opinion of Smith, J.).

The designation of the opinion used by the judge who wrote a separate opinion has been used in this Table. *But see* *McMorris v. State*, 277 Md. 62, 72, 355 A.2d 438, 444 (1976), where Judge O'Donnell's opinion is labeled a "dissent" even though he stated that, "I concur in the result reached by the majority which affirms the judgments." *Id.* Since Judge O'Donnell would have made the same disposition of the case as the majority, his opinion was properly a concurrence. An opinion labeled as both a dissenting and concurring opinion has been treated as a dissenting opinion.

b. In *Kapiloff v. Locke*, 276 Md. 466, 348 A.2d 697 (1975), Judges Smith and Orth (specially assigned) joined in dissent. Because no author was noted for this dissent, both are treated as joining in the dissent and neither as authoring it.

c. Table II indicates a total of 124 opinions, while Table IV indicates a total of 117 opinions. The discrepancy may be accounted for in the following way: *Leatherbury v. Gaylord Fuel Corp.*, 276 Md. 367, 347 A.2d 826 (1975), is counted twice in Table II but only once in Table IV, *see* note a, Table II *supra*; Table II incorporates the six professional supervision cases whereas Table IV does not, *see id.* The professional supervision cases are included in Table II as that table presents the source of all cases decided by the Court of Appeals; as Table IV presents the workload of the individual judges, the supervisory cases were not included (they are generally decided in unsigned opinions).

TABLE V

THE COURT OF SPECIAL APPEALS IN THE COURT OF APPEALS^a
 A. REPORTED OPINIONS OF THE COURT OF SPECIAL APPEALS

	MAJORITY			DISSENT				
	Authored ^b Affirmed	Reversed	Joined Affirmed	Reversed	Authored Affirmed	Reversed	Joined Affirmed	Reversed
DAVIDSON	0	0	4	0	0	1	0	1
GILBERT	4	3	6	3	1	0	0	0
LOWE	3	2	4	3	0	1	0	0
MASON	0	0	3	2	0	0	0	0
MELVIN	0	1	3	2	0	0	0	0
MENCHINE	6	3	3	2	0	0	0	0
MOORE	2	1	1	2	0	1	0	0
MORTON	1	0	5	6	0	0	0	0
MOYLAN	2	2	3	3	0	0	0	0
ORTH	4	2	5	7	0	0	0	0
POWERS	1	1	7	1	0	0	0	0
THOMPSON	1	1	2	4	0	0	0	0
SPECIALLY ASSIGNED	0	1	1	1	0	0	0	0
TOTAL	24	17						
PERCENTAGE	58.5	41.5						

B. UNREPORTED OPINIONS OF THE COURT OF SPECIAL APPEALS

	Number	Percentage
Affirmed	2	22.2
Reversed	7	77.8

a. All but one of the Court of Special Appeals panels consisted of three judges. The exception was *Brohawn v. TransAmerica Ins. Co.*, 23 Md. App. 186, 326 A.2d 758 (1974). Nine judges of the Court of Special Appeals sat on the panel in that case.

In addition to the judges of the Court of Special Appeals, judges from other courts were occasionally assigned to the Court of Special Appeals. Thus, Chief Judge Murphy of the Court of Appeals wrote a panel opinion for the Court of Special Appeals while sitting as a judge specially assigned to that court. That decision was later reversed by the Court of Appeals, *Thompson v. State*, 278 Md. 41, 359 A.2d 203 (1976), *rev'g* 26 Md. App. 442, 338 A.2d 411 (1975). Judge Eldridge of the Court of Appeals participated in a panel decision of the Court of Special Appeals which was affirmed by the Court of Appeals, *State v. Renshaw*, 276 Md. 259, 347 A.2d 219 (1975).

b. A decision has been designated as "affirmed" or "reversed" if that is the label placed upon it by the order of the Court of Appeals. The "reversed" column includes decisions which were "modified" by the Court of Appeals.

"Affirmed" and "reversed" are fairly crude labels. A decision may be "affirmed," for example, even if the reviewing court thought the grounds given by a lower court to support the decision below were, in the view of the Court of Appeals, completely wrong. Nevertheless, the terms can serve as rough indicators of possible trends or problems.

TABLE VI
FREQUENCY OF SEPARATE OPINIONS^a

The Court	Number	Percentage
UNANIMOUS OPINIONS	86	73.5
DECISIONS WITH CONCURRING OPINIONS	6	5.1
DECISIONS WITH DISSENTING OPINIONS	24	20.5
DECISIONS WITH BOTH CONCURRING OPINIONS AND DISSENTING OPINIONS	<u>1</u>	0.9
	117	

^a For the purposes of this Table, the word "opinions" includes those situations in which a judge concurred or dissented without opinion. See note *a* to Table IV of this Appendix.

TABLE VII
JUDICIAL PERSUASIVENESS
(Figures are Percentages)

Author of the Opinion of the Court	Unanimous Opinions	Opinions with Concurrences	Opinions with Dissents	Opinions with Both
DIGGES	57.2	14.3	28.6	0.0
ELDRIDGE	81.3	0.0	18.8	0.0
LEVINE	80.0	0.0	20.0	0.0
MURPHY	87.5	6.3	6.3	0.0
O'DONNELL	50.0	10.0	30.0	10.0
SINGLEY	81.8	4.5	13.6	0.0
SMITH	63.2	5.3	31.6	0.0

TABLE VIII
VOTING ALIGNMENT^a

DIGGES ELDRIDGE LEVINE MURPHY O'DONNELL SINGLEY SMITH

Specially Assigned Judges	J	84.2	80.0	88.5	85.7	100.0	90.5	92.9
	C	0.0	4.0	0.0	0.0	0.0	0.0	0.0
	D	15.8	16.0	11.5	14.3	0.0	9.5	7.1
SMITH	J	91.9	84.6	88.7	80.2	88.1	92.0	
	C	0.9	4.8	0.9	2.1	3.0	1.8	
	D	7.2	10.6	10.4	17.7	9.0	6.2	
SINGLEY	J	96.4	88.0	91.9	85.0	90.6		
	C	0.9	3.0	1.8	3.2	3.1		
	D	2.7	9.0	6.3	11.8	6.3		
O'DONNELL	J	88.7	81.0	80.3	83.3			
	C	1.6	3.2	4.5	3.7			
	D	9.7	15.9	15.2	13.0			
MURPHY	J	81.5	75.0	81.9				
	C	3.3	4.8	3.2				
	D	15.2	20.2	14.9				
LEVINE	J	91.7	94.1					
	C	1.9	2.9					
	D	6.5	2.9					
ELDRIDGE	J	91.8						
	C	3.1						
	D	5.2						

a. Key: J — The two judges joined in the same opinion. One may have authored it.

C — The two judges agreed in the result, but in different opinions.

D — The two judges disagreed in the result.

Due to rounding errors, the scans may not total 100 per cent.

TABLE IX
PRIMARY SUBJECT MATTER OF OPINIONS

	<u>Number of Opinions</u>
A. Public Law	68
Criminal	35
Constitutional Issues (federal and/or state)	16
Evidentiary	5
Procedural (non-constitutional)	9
Substantive	5
Quasi-Criminal	3
Defective Delinquent	1
Juvenile	2
Civil	30
Administrative	11
Constitutional	8
Federal	3
Maryland	5
Elections	1
Municipal Law	2
Real Property	5
Eminent Domain	2
Zoning	3
Sovereign Immunity	2
Taxation	1
B. Private Law	51
Evidence	3
Procedural	12
Appellate	5
Pre-Trial and Trial	7
Substantive	36
Contracts	5
Custody	1
Insurance	5
Labor	1
Mechanics' Liens	1
Property (not including eminent domain & zoning)	5
Tort	12
Defamation/Privacy	3
Automobile	5
Other Negligence	4
Uniform Commercial Code	3
Wills/Estates/Trusts	3
C. Professional Questions	6
Admission	1
Discipline	5

APPENDIX B

APPELLATE JURISDICTION IN MARYLAND*

CHARTS:

1. Appeal from the District Court to the Circuit Court
 2. Appeal from the Orphans' Court
 3. Appeal from, or Certiorari to, the Circuit Court
 4. Jurisdiction of the Court of Appeals
 5. Questions Certified to the Court of Appeals
-

* The charts on the following pages illustrate only the routes available to the parties once they are in court; they do not illustrate the proper course of action for getting a dispute into the courts originally. Unless otherwise stated, all section numbers in the following charts and accompanying notes refer to MD. CTS. & JUD. PROC. CODE ANN. §§ 12-101 to 12-702 (1974 & Cum. Supp. 1976). Charts prepared by Gary Aiken of the Law School Class of 1977.

CHART 1: APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT

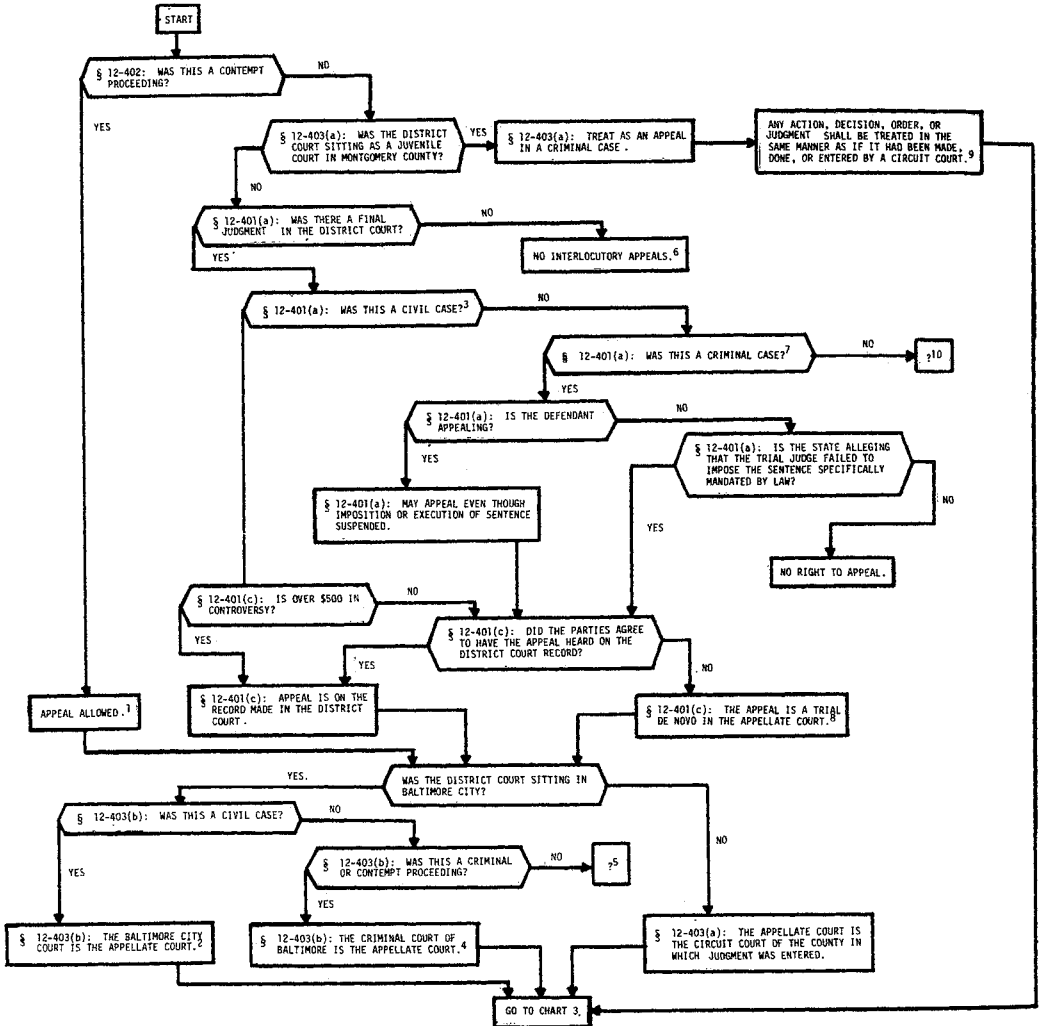


CHART 2: APPEAL FROM THE ORPHANS' COURT

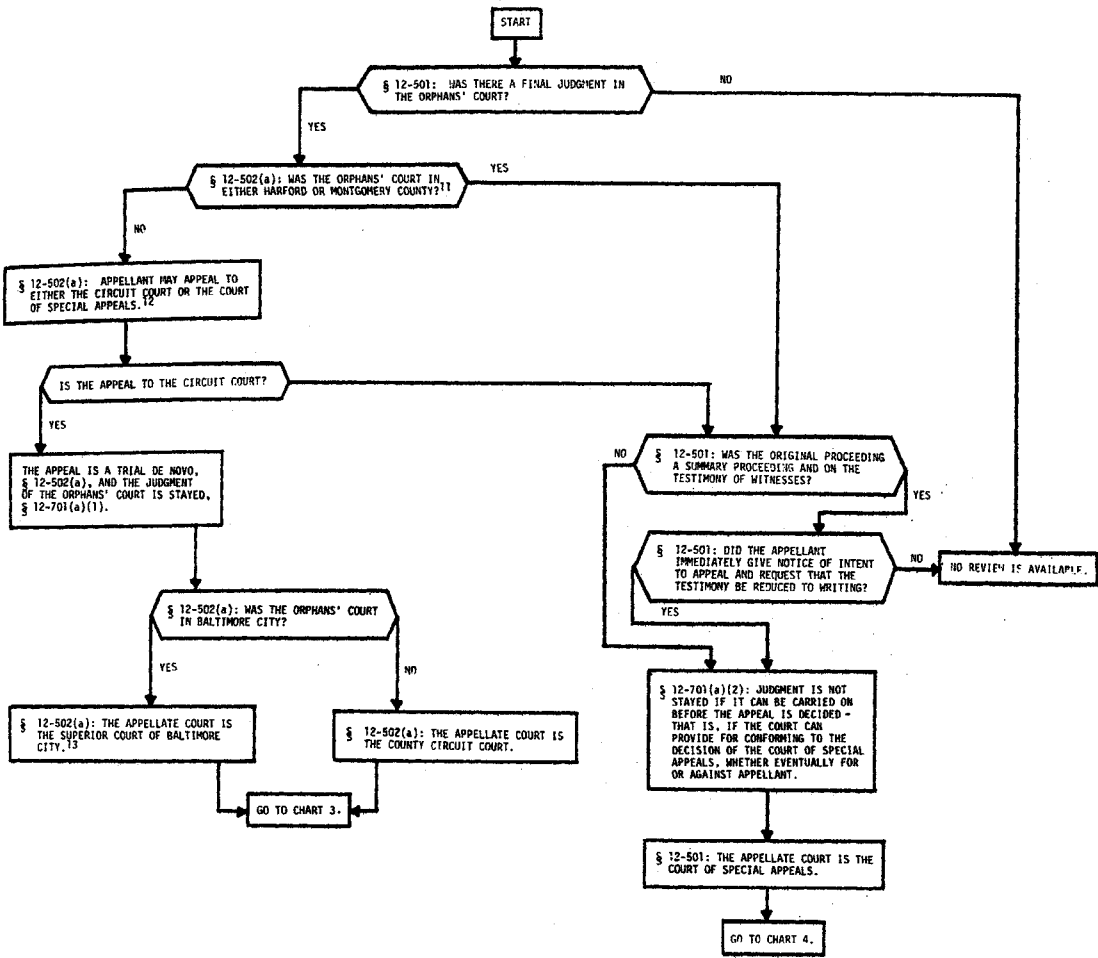


CHART 3: APPEAL FROM, OR CERTIORARI TO, THE CIRCUIT COURT

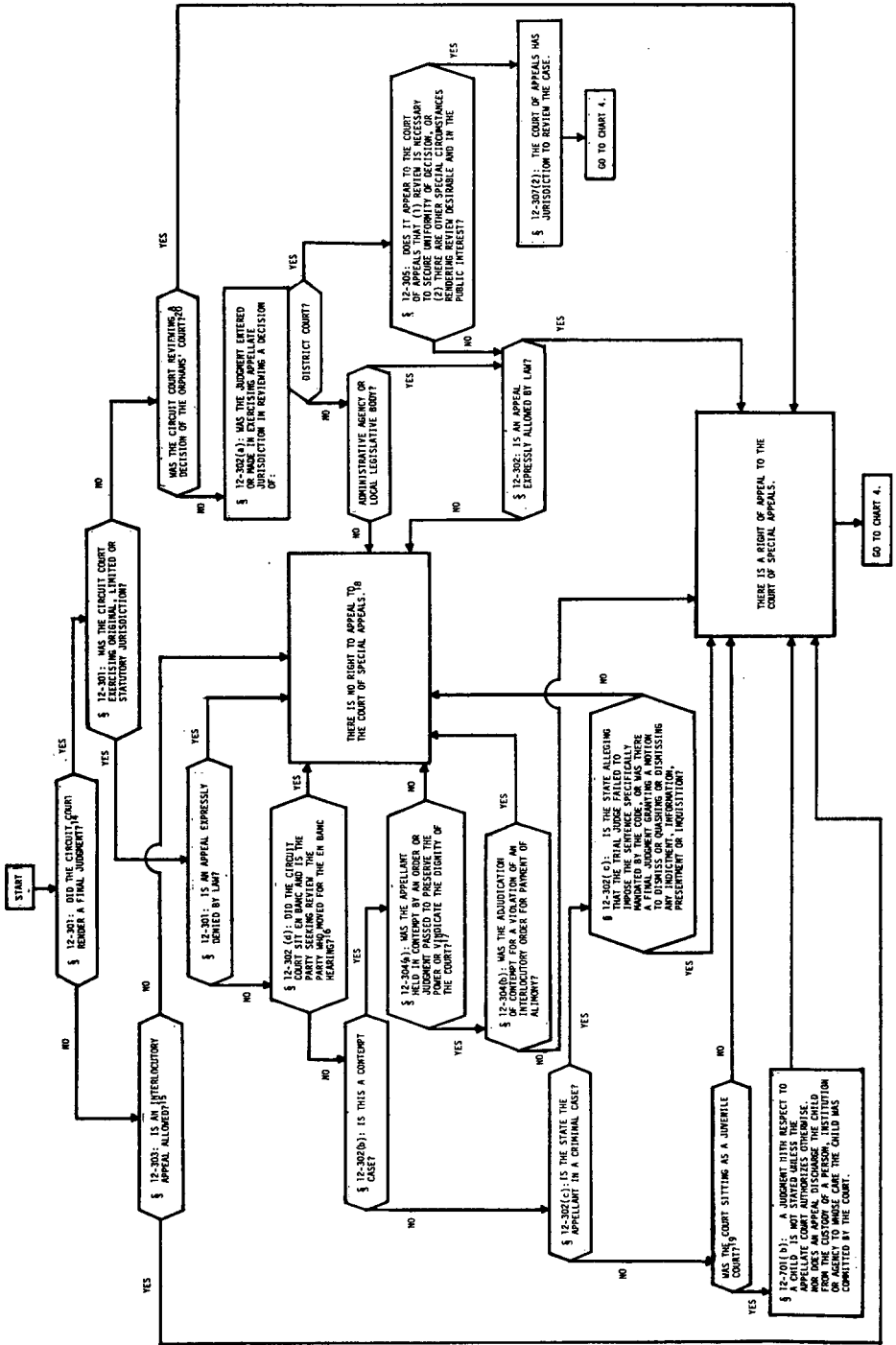


CHART 4: JURISDICTION OF THE COURT OF APPEALS

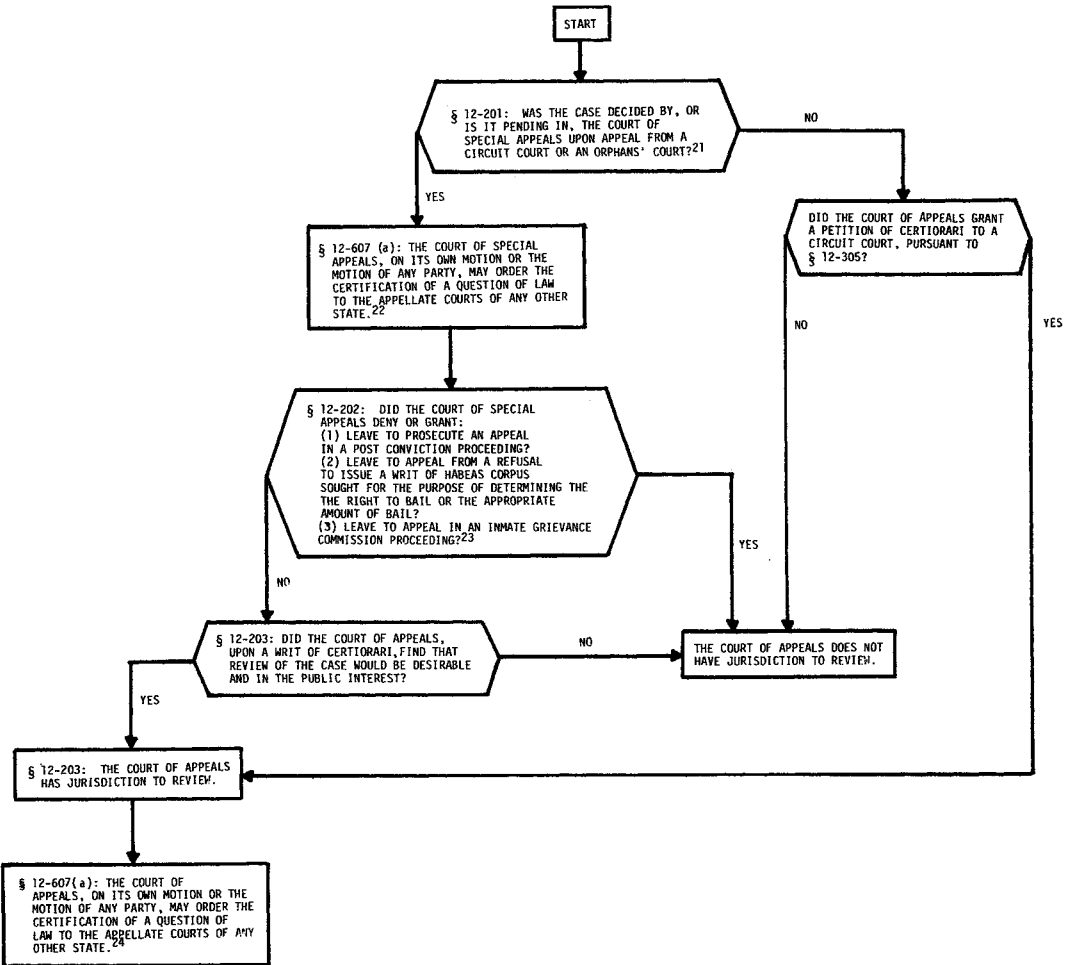
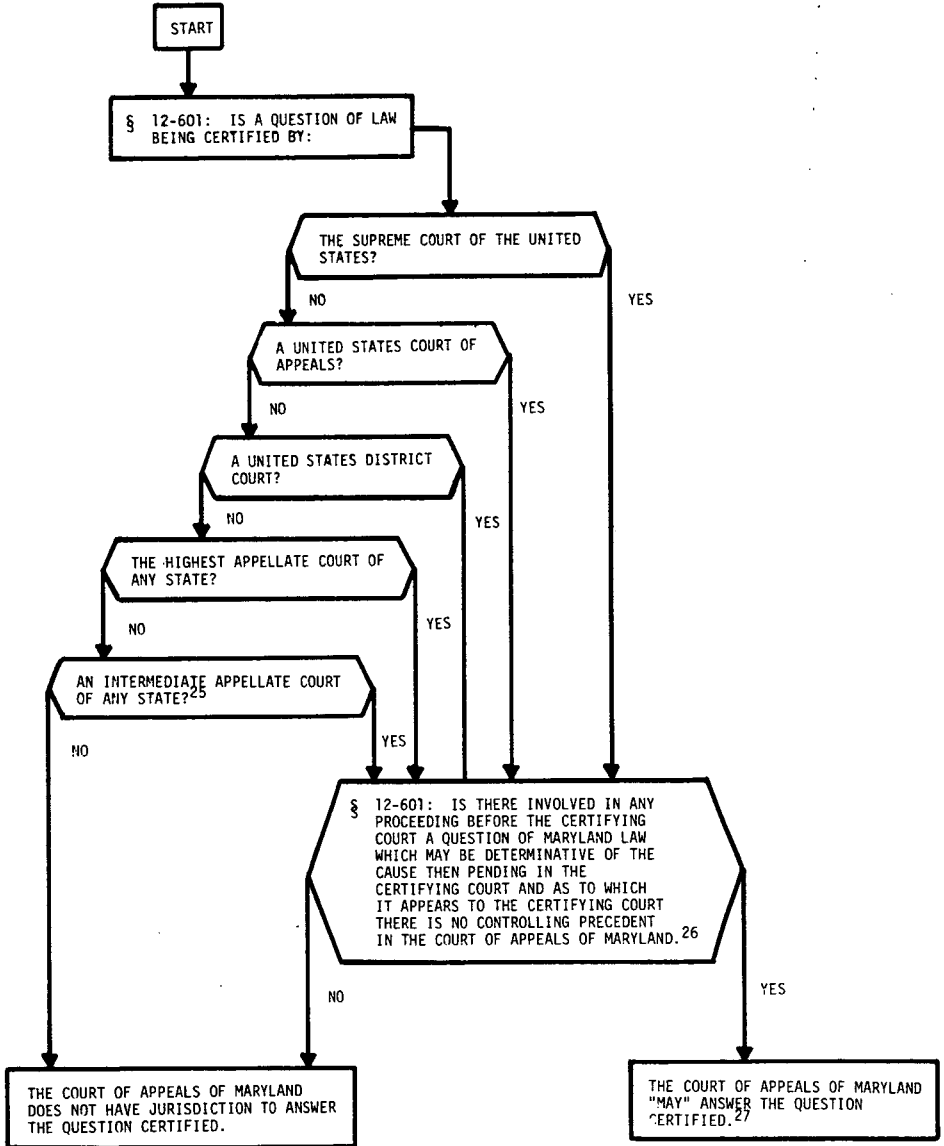


CHART 5: QUESTIONS CERTIFIED TO THE COURT OF APPEALS



1. Section 12-402 does not specify whether an appeal from a contempt proceeding is to be in the form of a trial de novo or a review of the district court record.

2. Section 12-101(d) defines "circuit court" to include "the circuit court for a county, the Superior Court of Baltimore City, Court of Common Pleas, Baltimore City Court, Circuit Court of Baltimore City, Circuit Court No. 2 of Baltimore City, and Criminal Court of Baltimore, or any of them."

3. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 4-401 (Cum. Supp. 1976).

4. See note 2 *supra*.

5. See note 10 *infra*.

6. The only statutory basis for allowing interlocutory appeals from the district courts is for contempt orders, § 12-402.

7. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 4-301 (Cum. Supp. 1976).

8. The Revisor's Note to section 12-401(c) indicates that all guilty and nolo pleas cases should be heard de novo; yet the statute authorizes an appeal on the record if the parties agree. This potential conflict probably will not arise because a criminal defendant would never agree to an appeal on the record review in a case in which he pled guilty or nolo contendere — an appeal he would surely lose.

9. MD. CTS. & JUD. PROC. CODE ANN. § 3-832 (Cum. Supp. 1976). The Maryland Constitution authorizes district courts to sit as juvenile courts, if provided by law. MD. CONST. art. IV, § 41A. Only in Montgomery County has such jurisdiction been provided; the circuit court sits as a juvenile court in all other counties and in Baltimore City. MD. CTS. & JUD. PROC. CODE ANN. § 3-801(i) (Cum. Supp. 1976). Consequently, in the absence of any special provisions, appeals in juvenile cases in Montgomery County would lie in the Montgomery County Circuit Court, § 12-403(a), whereas all other appeals in juvenile cases would lie in the Court of Special Appeals, § 12-308(a)(1). Section 3-832 provides for statewide uniformity — as juvenile cases in Montgomery County are to be treated as being decided by the Circuit Court, the right of appeal in the County will also be to the Court of Special Appeals.

10. The right to appeal from the district courts is given only in civil and criminal cases, § 12-401, and contempt cases, § 12-402. Although the district courts could conceivably have original jurisdiction in some other type of action, see, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 4-201 (1974), there is no statutory basis for appeal from the exercise of such jurisdiction.

11. Because the circuit court sits as an orphans' court in Harford and Montgomery Counties, MD. CONST. art. IV, § 20, the right to appeal to the circuit court from the orphans' court is inapplicable in those counties. See Schlossberg v. Schlossberg, 275 Md. 600, 606, 343 A.2d 234, 239 (1975).

12. A careful reading of the Maryland Code raises the possibility that if a party chooses to appeal to the circuit court, rather than to the Court of Special Appeals, there is no further right of review: There is no right of appeal to the Court of Special Appeals unless there is a final judgment by a circuit court in the exercise of "original, special, limited, [or] statutory jurisdiction." Section 12-301. Because a circuit court reviewing a decision of an orphans' court would appear to be exercising appellate jurisdiction, later appeal to the Court of Special Appeals would be unavailable. See § 12-101(b) & (c). Additionally, the right to petition for certiorari to the Court of Appeals exists only when the case (1) has been decided by, or is pending in, the Court of Special Appeals, § 12-201, or (2) when a circuit court renders final judgment on an appeal from a district court, § 12-305. A review by a circuit court of an orphans' court judgment (1) could never appear in the Court of Special Appeals, as explained above, and (2) is not a review of a district court judgment; therefore, review by the Court of Appeals would also appear to be foreclosed.

Nonetheless, in *Moats v. Schoch*, 24 Md. App. 453, 332 A.2d 43 (1975), the Court of Special Appeals decided that it could review the circuit court's review of a judgment of the Orphans' court. After reviewing the predecessors to §§ 12-301, 501, & 502, which expressly gave the Court of Special Appeals jurisdiction in such cases, it noted: "Although the express provision for further right of appeal to the Court of

Special Appeals does not appear in the statutes as revised, the substance of the former law was not intended to be changed." *Id.* at 454-55 n.1, 332 A.2d at 44-45 n.1.

In deciding which avenue of appeal to take from the orphans' court, a party should bear in mind that the Court of Special Appeals may not review a summary orphans' court proceeding that was based upon the testimony of witnesses unless the appellent immediately gave notice of the intent to appeal and requested that the testimony be reduced to writing, § 12-501.

13. See note 2 *supra*.

14. The judgment must be a final one; thus an appeal from the granting of a motion for summary judgment, *Felger v. Nichols*, 30 Md. App. 278, 352 A.2d 330 (1976), or from the granting of a motion for directed verdict, *Eastgate Associates v. Apper*, 276 Md. 698, 350 A.2d 661 (1976), is premature until judgment is entered. But if the trial court is denying an *absolute* constitutional right, final judgment is not needed. The constitutional right is not deemed absolute if the trial court is "rightfully exercising discretion" as to the functioning of the right. *Compare Neal v. State*, 272 Md. 323, 322 A.2d 887 (1974) (determination of double jeopardy involves no discretion) with *Pearlman v. State*, 226 Md. 67, 172 A.2d 395 (1961) (right to free trial transcript for appeal is subject to preliminary finding of indigency, which involves discretion; upon finding of indigency, the right is absolute).

Although § 12-101(f) defines the term "final judgment," it has not been construed as determining when an appeal may be taken. See, e.g., *Sokol v. Nattans*, 23 Md. App. 600, 608 n.10, 329 A.2d 115, 120 n.10 (1974).

15. Only those interlocutory orders enumerated in § 12-303 are appealable prior to final judgment. See *Rocks v. Brosius*, 241 Md. 612, 647, 217 A.2d 531, 551 (1966). There is also a right to appeal from the denial of an absolute constitutional right, see note 14 *supra*.

16. Md. CONST. art. IV, § 22, provides that the decision of a circuit court sitting en banc shall be

conclusive, as against the party, at whose motion said points, or questions were reserved; but such decision in *banc* shall not preclude the right of Appeal . . . to the adverse party, in those cases, civil or criminal, in which appeal . . . to the Court of Appeals may be allowed by Law.

This provision was ratified long before the creation of the Court of Special Appeals, and some changes in the operation of § 22 should be noted.

First, initial appellate review of circuit court action is now vested *exclusively* in the Court of Special Appeals, § 12-308(b). Consequently, although the language of the constitution purports only to authorize appeal to the Court of Appeals for en banc circuit court decisions, the Court of Special Appeals has stated that it will now hear such appeals. *Dobson v. Mulcare*, 26 Md. App. 699, 704 & n.4, 338 A.2d 898, 901-02 & n.4 (1975).

Secondly, the adverse party (that party not moving for the en banc review) may not petition for certiorari to the Court of Appeals until the case is either pending in, or has been decided by, the Court of Special Appeals, § 12-201. The only avenue for certiorari directly to the circuit court is § 12-305. Because that section only allows petitioning for certiorari when the circuit court has granted a final judgment on a review of a district court, it is inapplicable here. (This does not conflict with the right granted in article IV, § 22 of the Maryland Constitution, quoted above, to appeal to the Court of Appeals from a decision of the circuit court en banc, since that provision vests jurisdiction in the Court of Appeals only if "allowed by law." As the General Assembly has not seen fit to include en banc review by the circuit court in § 12-305, no such jurisdiction is "allowed by law.").

Finally, the right of the parties to apply for certiorari after Court of Special Appeals review must be examined. Section 12-201 authorizes *any* party to file a petition for certiorari "in any case or proceeding pending in or decided by the Court of Special Appeals upon appeal from a circuit court . . ." If the words "circuit court" are construed to include circuit courts en banc, the following anomalies result: (1)

Section 12-201 could be construed to allow the party moving for the en banc hearing below to petition for certiorari, since § 12-201 grants that right to *any party*. However, such a construction would be unconstitutional because article IV, § 22 states that the decision of the en banc circuit court is "conclusive" against that party. *See* *Buck v. Folkers*, 269 Md. 185, 186, 304 A.2d 826, 827 (1973) ("The decision of the court en banc is conclusive, final, and non-appealable by the party who sought the en banc review (the moving party)"). (2) If the adverse party petitions for certiorari, and it is granted, the case has been appealed twice (i.e., to the Court of Special Appeals and to the circuit court en banc — that review by the circuit court en banc is an "appeal" may be garnered from *State Roads Comm. v. Smith*, 224 Md. 537, 540-42, 168 A.2d 705, 707 (1961)) and then reviewed by the Court of Appeals. This violates the statutory scheme set up by Title 12 of the Courts and Judicial Proceedings Article, which allows only *one* appeal and one review by certiorari in any given case.

Consequently, the most logical construction of § 12-201 would be that it does not allow review by the Court of Appeals in such cases.

17. Only the person cited for contempt may prosecute the appeal. *Becker v. Becker*, 29 Md. App. 339, 347 A.2d 911 (1975).

18. Not only is there no appeal to the Court of Special Appeals — there is also no right to petition for certiorari review by the Court of Appeals. The reason for this is two-fold: if the circuit court exercises appellate jurisdiction, the only avenue to the Court of Appeals is § 12-305. And if the circuit court exercises any other form of jurisdiction, the only avenue to the Court of Appeals is to have the case decided by, or pending in, the Court of Special Appeals, § 12-201.

19. The state may appeal in a juvenile proceeding. *See In re Anderson*, 272 Md. 85, 321 A.2d 516 (1974).

20. *See* note 12 *supra*.

21. MD. CTS. & JUD. PROC. CODE ANN. § 12-201 (Cum. Supp. 1977) also purports to grant jurisdiction to the Courts in cases pending in, or decided by, the Court of Special Appeals upon appeal from the Maryland Tax Court. That jurisdiction was determined to be unconstitutional in *Shell Oil Co. v. Supervisor of Assessments*, 276 Md. 36, 343 A.2d 521 (1975). (The Maryland Tax Court is not a court; it is an administrative agency. As such, all appeals must first be to a circuit court.) The Maryland General Assembly apparently overlooked *Shell Oil* in its 1977 recodification of § 12-201, 1977 Md. Laws, ch. 555, § 1.

22. *See* note 25 *infra*.

23. Section 12-202 was repealed and reenacted twice by the 1977 session of the General Assembly. The first session law added a new subsection, § 12-202(4), to prohibit review by the Court of Appeals in those cases in which the Court of Special Appeals granted or denied "[l]eave to appeal in an inmate grievance commission proceeding." 1977 Md. Laws, ch. 311, § 3. The second session law made no reference to chapter 311; it eliminated § 12-202(2) (Cum. Supp. 1976) (which had prohibited review by way of certiorari when the Court of Special Appeals granted or denied "[l]eave to prosecute an appeal in a defective delinquent proceeding") and it did not include the new subsection enacted by chapter 311. 1977 Md. Laws ch. 678, § 4. This apparently confusing result may be resolved through an application of MD. ANN. CODE art. 1, § 17 (1976 Repl. Vol.):

If two or more amendments to the same section or subsection of the Code are enacted at the same or different sessions of the General Assembly, and one of them makes no reference to and takes no account of the other or others, the amendments shall be construed together, and each shall be given effect, if possible and with due regard to the wording of their titles. If the amendments are irreconcilable and it is not possible to construe them together, the latest in date of final enactment shall prevail.

A reading of chapters 311 and 678 would suggest that each intended to give effect to the specific changes made, therefore, the most reasonable conclusion is that § 12-202 now consists of subsections (1) and (3) of the 1976 codification and subsection (4) of the chapter 311 enactment.

Despite the otherwise seemingly clear requirements of § 12-202, the Court of Appeals has granted review by way of certiorari in cases in which the Court of Special Appeals granted leave to appeal in a post conviction proceeding, *Jourdan v. State*, 275 Md. 495, 341 A.2d 388 (1975), and in a defective delinquent proceeding, *Moss v. Director*, — Md. —, 369 A.2d 1011 (1977). Although acknowledging the mandates of § 12-202, the court has justified review by asserting that "once the Court of Special Appeals grants leave to appeal in such a case and transfers the case to its appeal docket, the matter takes the posture of a regular appeal, and we do have jurisdiction under § 12-201 . . . to review the Court of Special Appeals' decision on the appeal itself." *Jourdan v. State*, 275 Md. at 506 n.4, 341 A.2d at 394-95 n.4.

This rationale was strongly attacked by Judge Orth in a dissenting opinion in *Moss*:

I cannot agree that merely because *procedures* adopted to bring a granted application for leave to appeal to argument before the Court of Special Appeals are the same as those to bring a direct appeal to argument, the application for leave to appeal attains the status of a direct appeal so as to confer on the Court of Appeals jurisdiction to review the proceeding when such review is so plainly prohibited by § 12-202. The position of the Court of Appeals is manifestly incongruous in that its reasoning does not serve to permit a review of a defective delinquent or post conviction proceeding when the application for leave to appeal is denied by the Court of Special Appeals, no matter what the ground stated in the opinion accompanying the denial. And, perhaps of even more significance, is that under the reasoning of the Court of Appeals it may not review such a proceeding when the Court of Special Appeals grants the application for leave to appeal and does not transfer the case to the appeal docket but, as it may under the rules, simply issues an opinion in which the order appealed from is affirmed, reversed or modified, or the case remanded for further proceedings, without briefs being filed or argument heard.

— Md. at —, 369 A.2d at 1017.

24. See note 25 *infra*.

25. The Maryland Uniform Certification of Questions of Law Act produces the following curious results — while either the Court of Appeals or the Court of Special Appeals may certify a question "to the highest appellate court or the intermediate appellate court of any other state," § 12-607(a), questions certified to Maryland may only be answered by the Court of Appeals, § 12-307(3). See *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 154-55, 297 A.2d 721, 725 (1972).

26. Section 12-601 would seem to allow certification to the Court of Appeals even if there is controlling precedent in the Court of Special Appeals, as long as the Court of Appeals has remained silent, or uncommitted, on the issue.

27. While § 12-601 could be read to give the Court of Appeals discretion in deciding whether or not to answer a certified question ("The Court of Appeals *may* answer . . .", § 12-601 (emphasis added)), an equally plausible reading of the statute would be that the word "may" is simply a jurisdictional grant. The section would then read, "If a question is certified, then the Court of Appeals is allowed to answer . . ."