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Tribute to Chief Judge Mary Ellen Barbera

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Tribute

Tribute to Chief Judge Mary Ellen Barbera

A TEACHER, A LAWYER, AND A JUDGE, BUT ALWAYS A TEACHER

DONALD B. TOBIN*

In this Issue, the *Maryland Law Review* celebrates and recognizes the groundbreaking achievements of Chief Judge Mary Ellen Barbera as she retires from the Court of Appeals of Maryland.[1] We are honored to have some of the leading jurists and lawyers in the State discuss Chief Judge Barbera, as a lawyer, jurist, friend, and mentor.

As the dean of her law school, I am honored to count her as a graduate, and I note that the judicial excellence award bestowed by the law school is named in her honor. I have had the privilege of working with the Chief Judge Barbera[2] during her service on our Board of Visitors, but more importantly, I have had the honor of working with her on important issues facing the people of Maryland and the Maryland judiciary.

As you will read in the tributes, Chief Judge Barbera will clearly be remembered for her sharp legal mind, her leadership of the court as the country confronts twin epidemics of racism and an aggressive deadly virus, and her quest for excellence. As I reflect on the Chief Judge and her career, I think her strongest gift is that of a teacher. Chief Judge Barbera never stopped teaching!

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1. Maryland's highest court is named the Court of Appeals. It was established by Article 56 of the Maryland Constitution of 1776. Chief Judge Barbera has been an advocate for changing the name of the Court to the Supreme Court of Maryland. Legislation was passed in the General Assembly and voters will have an opportunity to vote on the name change in November 2022. *See* H.B. 885, 2021 Leg., 442d Sess. (Md. 2021).

2. I take the liberty of sometimes referring to Judge Barbera as "the Chief" when referring to her time on the Court of Appeals. While she often designates former Chief Judge Robert Bell as "her Chief," she has become Maryland's "Chief," so I use that reference to her at times in the tribute.

As is reflected in several of the tributes to the Chief, before she was a lawyer, she taught preschool in the Cherry Hill neighborhood of Baltimore.[3] She attended law school at night, graduating from the Maryland School of Law in 1984. I am sure that during this time, she reflected on being both a teacher and a learner, and she continued that process, of both teaching and learning, throughout her career. As a judge, she never forgot that she was a teacher. She used her decisions as a means of teaching us all about the law, and her decisions, in a sense, were our grades.

I started my legal career as an appellate litigator. When I entered academia, I quickly realized that the two activities, professor and litigator, were remarkably similar. As a litigator, I was trying to teach the court about my case, and about why my answer was the right answer. Unfortunately, as a litigator, even if I was the teacher, I certainly was not the grader. But through much of her career, Chief Judge Barbera was.

Chief Judge Barbera's career exemplifies what it means to be a teacher and learner, constantly seeking to teach others while also eager to learn from them. In this Issue, we see the Chief's desire to both teach and learn in comments from Attorney General Brian Frosh, her former clerk Rebecca Foreman,[4] and remarks by Judges Bair, Eyler, Greene, Harrell, Leahy and Moylan.

Many of our contributors discuss Chief Judge Barbera's early career in the Attorney General's office, but Judge Bair captures it in more detail, outlining the impact Chief Judge Barbera had within in the office and among her peers. She was a "line attorney" in the Criminal Appeals Division and then the Deputy Chief of the division. During this time, Chief Judge Barbera honed her skills as a writer and advocate. But maybe most importantly, she built a reputation as a hard worker, skilled jurist, and wonderful writer.[5]

The Chief moved from the Attorney General's Office to become the Deputy Legal Counsel for Governor Glendening, and then later to Legal Counsel. Judge Leahy, who worked with the Chief for several years in the Legal Counsel's office, highlights some of the important initiatives handled during their tenure together.[6] These included a lengthy Maryland Public Information Act matter, the trigger-lock anti-gun violence bill, and

3. *See* Gary E. Bair, Tribute, *Tribute to Chief Judge Mary Ellen Barbera*, 81 MD. L. REV. 416, 418 (2021); Debora Sweet Eyler, Tribute, *Chief Judge Mary Ellen Barbera: Making a Difference*, 81 MD. L. REV. 428, 431 (2021); Glenn T. Harrell, Jr., Tribute, *An Irregular Ode to Chief Judge Mary Ellen Barbera*, 81 MD. L. REV. 452, 454–55 (2021).

4. *See* Rebecca W. Foreman, Tribute, *Tribute to Chief Judge Mary Ellen Barbera: A Law Clerk's Perspective*, 81 MD. L. REV. 456, 456 (2021).

5. *See* Bair, *supra* note 3, at 417.

6. *See* Andrea M. Leahy, Tribute, *Tribute to Chief Judge Mary Ellen Barbera*, 81 MD. L. REV. 422 (2021).

preparation for potential emergency executive orders in the time leading up to Y2K.

In January 2002, she was appointed to the Maryland Court of Special Appeals. Both Judge Eyler's and Judge Greene's tributes to the Chief highlight some of her time on the Court of Special Appeals as well as her contributions to the law while serving on the Court of Appeals.

Judge Eyler's tribute recognizes then Judge Barbera's passion for making a difference, whether that be through her opinions or through her actions. She traces Judge Barbera's jurisprudence, stopping along the way to highlight the ways in which Judge Barbera shows her grasp of nuances in Maryland law, but also brings good ole common sense to her decisions. Judge Eyler notes that in Judge Barbera's debut opinion on the Court of Special Appeals, Barbera took issue with an antiquated doctrine of interspousal immunity. Judge Barbera recognized that it was not her role to modify existing jurisprudence. She followed the existing "antiquated" jurisprudence, but also, put on her teaching hat and explained why the rule should be changed.[7] In recognizing Judge Barbera's clear writing style, Judge Eyler notes, "[h]er opinions for our Court combined uncluttered narrative with teacherly guidance, and almost always began, blessedly, with a paragraph distilling the central issue and the Court's ultimate position on it."[8]

In 2008, Judge Barbera joined the Court of Appeals and in 2013 she became its Chief Judge. Judges Greene provides us with insight into the Chief as a colleague. Judge Greene's tribute notes "her considerable talents as a jurist, administrator, and trailblazer."[9] He explains her passion for the Court as an institution, and her work to enhance the public's perception of the Court.

Judge Greene's tribute also provides us insight into the Chief as a person who brings diverse life experiences to her leadership. He notes that in June 2020, in communications to her fellow judges, she wrote, "[t]he [mass] protests of the last several weeks have coalesced into a truth that cannot be ignored: people of color are being denied their rightful equality."[10] She further explained, "[w]e must assure that our courts do not suffer bias,

7. Eyler, *supra* note 3, at 430.

8. *Id.* at 431.

9. Clayton Greene Jr., Tribute, *A Tribute to the Honorable Mary Ellen Barbera*, 81 MD. L. REV. 443, 443 (2021).

10. *Id.* (citing Statement from Mary Ellen Barbera, C.J., Ct. Appeals Md., Statement on Equal Justice under Law 1 (June 9, 2020), https://mdcourts.gov/sites/default/files/import/coappeals/pdfs/statementonequaljustice060920.pdf.

conscious or unconscious. We must examine, together, the reasons for the disproportionate impact upon people of color, and address those reasons."[11]

In the tribute from Attorney General Frosh, we learn more about the Chief in her role as Chief Judge and groundbreaker (or glass ceiling breaker). She is Maryland's first female Chief Judge and led a court that was majority female (and also one with a majority of Maryland Law School graduates).

In her capacity as Chief, she leads the Maryland Judiciary. In this role, she has been a strong advocate and leader in promoting justice and the rule of law. For those of us who work with her in that role, we see a passionate advocate for access to justice and for making the judiciary more accessible to both the bar and the people it serves. Attorney General Frosh highlights Chief Judge Barbera's role in advocating for reform of the current bail system, working to ensure that people do not end up in jail pending trial solely based on their inability to pay.

Judge Harrell, not surprisingly, entertains us with an "irregular Ode" to the Chief. He notes that she is a "a born-and-bred teacher who adopts a relentlessly cheerful demeanor in the delivery of the day's lesson."[12] Judge Harrell also highlights the Chief as a colleague, describing their disagreement in *King v. State*.[13] Judge Harrell and Chief Judge Barbera were on opposite sides in the case and took a field trip together to the Supreme Court to watch the argument. Their relationship, and the method by which they handled an intellectual dispute, exemplifies the Chief's commitment to her colleagues and the Court.

The traits that many of us have come to admire in the Chief may best be seen by the tribute to her from one of her former law clerks, Rebecca Foreman, who had the good fortune to experience Chief Judge Barbera first as a law school student in her class, then as a summer intern in her office, and finally as a law clerk. In this piece, we see many of her attributes and contributions through the lens of one of her mentees. Her clerk discusses the Chief as a teacher, a mentor, a leader, a scholar, and a jurist of the highest integrity. This clerk even had the bonus of the Chief being her wedding officiant following her clerkship year!

The final word on the Chief, fittingly, goes to Judge Charles Moylan. He has known her since she graduated from law school in 1984, when she began her legal career as a law clerk to Judge Robert Karwacki, who joined Judge Moylan on the Court of Special Appeals that year. The Chief later appeared before Judge Moylan and the other Court of Special Appeals judges during her tenure in the Attorney General's Office. She also worked with

11. *Id.* (citing Statement, *supra* note 10, at 2).
12. Harrell, *supra* note 3.
13. 425 Md. 550 (2012).

Judge Moylan on the Criminal Pattern Jury Instructions Committee. The Chief ultimately was appointed to the Court of Special Appeals vacancy that was the result of Judge Moylan's reaching mandatory retirement at the end of 2000. They continued to serve together on that court (with Judge Moylan sitting as a senior judge) until the Chief was elevated to the Court of Appeals in 2008. In his inimitable style, Judge Moylan paints a picture of the Chief with endearing turns of phrases only he can give us.

Together our commentators present the vision of an excellent jurist, who is passionate about justice and who works with her colleagues to ensure equal justice and the rule of law. She worked to make the judiciary more efficient, and to create an environment where the public has faith in the judicial system. And she led by example, consistently promoting integrity, collegiality, and respect. But through it all, she continued to teach those around her. Sometimes she would teach in the classroom, sometimes from the bench, and sometimes as a mentor, and Maryland is better off because of her efforts to teach us all to be better lawyers, advocates, and people. As Judge Bair notes in his tribute, she is the "most brilliant, and most wonderful jurist Maryland has ever seen."[14]

14. Bair, *supra* note 3, at 416. And Judge Bair should know; he is married to Chief Judge Barbera.

TRIBUTE TO CHIEF JUDGE MARY ELLEN BARBERA

GARY E. BAIR*

As many know, Chief Judge Barbera (hereinafter "Mary Ellen" or "Mel") and I are one of Maryland's judicial couples. Others have included the Chasanows (Howard and Debbie), the Motzes (Fred and Diana), the Krausers (Sherry and Peter), the Eylers (Debby and Jim), and Jim Kenney and Karen Abrams. Maryland is still a relatively small legal and judicial community, so I imagine most lawyers and judges know that we are married even though we have different last names. Now that I am retired from the bench, I am totally free to express my unbiased and unvarnished views on the wisest, most brilliant, and most wonderful jurist Maryland has ever seen!

Mary Ellen graduated from the evening program of the University of Maryland School of Law in 1984, having transferred from the University of Baltimore School of Law after her first year in that school's evening program. After serving as a law clerk to Judge Robert L. Karwacki, she joined the Maryland Attorney General's Office as an Assistant Attorney General in the Criminal Appeals Division. I joined that Division as Chief in 1987 and had the pleasure to work with Mel for ten years and to teach with her for several decades on the adjunct faculty of the American University Washington College of Law.

Mary Ellen started as a "line attorney" in the Criminal Appeals Division in 1985 and stayed in that position for four years. When an opening arose for Deputy Chief in 1989, Attorney General Curran appointed Mary Ellen to fill that slot, and she was outstanding in that position for the next eight years. During that time, Assistants wrote ten or so appellate briefs every month. Many of the cases were argued before the Court of Special Appeals, while some were submitted on brief, and all the cases before the Court of Appeals were, of course, argued. To state what I trust is obvious, the Assistants in that Division worked quite hard and appeared before Maryland appellate judges more than most anyone else. Division attorneys also handled federal habeas corpus cases in the United States District Court for the District of Maryland and in the United States Court of Appeals for the Fourth Circuit. In those days, most federal appellate cases were argued in Richmond, but some were also heard in Baltimore and Wrightsville Beach, North Carolina. I recall that Mel had arguments in all three locales.

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The appellate judges were extremely impressed with Mary Ellen's briefs and oral arguments. I heard this from many of them personally and I saw Mel in action from time to time in Annapolis. I know she was a favorite of Judge Moylan, and I have no doubt he will wax on eloquently about his impressions in his tribute to Mel. She was also a favorite of many other judges of that day, including Chief Judge Gilbert, Judge Getty, Judge Bishop, Judge Wenner, Judge Alpert, Judge Wilner, and Judge McAuliffe. Her briefs were beautifully written in clear, concise prose. They were thorough, but not overly long. They were persuasive. They were flawless. In short, the judges on both appellate courts knew they could rely on what Mel argued the law stood for and what the record showed on appeal. Her oral arguments were welcomed by the appellate judges whether they agreed with her position or not. She was fully prepared for questions from the bench, always well versed with the record of the case, and a consummate diplomat as advocate. Mel had that certain touch so few appellate advocates have—forceful without being strident; capable of conceding when necessary, but only rarely having to do so; and using her time wisely, that is, knowing when to sit down. She knew how to read the panel and did not miss an opportunity to please the panel when possible.

Mary Ellen also worked on numerous cases with me in the United States Supreme Court. I was the lucky one there, as her talents as appellate advocate came shining through in that forum as well. The first case I worked on with her (and Assistant Attorney General Ann Bosse) was *Maryland v. Buie*.[1] The three of us wrote that petition for writ of certiorari, which, to our delight, was granted! The three of us then wrote the briefs and helped prepare one of the Deputy Attorneys General for oral argument. Several other cases went to the Supreme Court while Mary Ellen was in the Criminal Appeals Division and she was an integral part of all of them. These cases, too, were argued by a Deputy Attorney General or by Attorney General Curran. Only after Mary Ellen left the Office did I finally have the opportunity to argue two cases in the Supreme Court (in 2003), by which time she was on the Court of Special Appeals and we were already married. Even luckier for me, in a way, was to have her moral support and encouragement during those months of work on the briefs and preparation for oral argument.

Mary Ellen left the Division in January 1998 for a golden opportunity—to join the Office of Governor Parris Glendening as Deputy Legal Counsel. She soon was promoted to Legal Counsel when her predecessor, Andrea Leahy left that position. Now-Judge Leahy is on the Court of Special Appeals and has written a piece herein about Mel's days in the Governor's Office. I add just a few thoughts of my own on Mary Ellen's four years with

1. 494 U.S. 325 (1990).

the Governor. She loved that job and thoroughly enjoyed working with Andrea and the Governor, as well as those on staff with her. I recall her long hours, every day, as she commuted from Ellicott City to Annapolis and back. And I remember how difficult some of the legislative sessions could be for her, even though she was not directly working on those matters. Finally, there were two momentous events during her tenure with the Governor: the anticipation and preparation for the potential "Y2K" computer chaos as the year 1999 turned over to the year 2000; and September 11, 2001, when the country and the region were under attack.

I never had the opportunity to appear before Judge Barbera or have any of my cases reviewed by her, inasmuch as we were wed in 2000. She was sworn in on January 4, 2002, while I was still in the Attorney General's Office. Because of my supervisory position, she was recused from all criminal appellate cases for the first part of her tenure on the Court of Special Appeals. I was then in private practice from 2004 to 2011, and she was recused from cases that my firm had in the appellate courts. I served as a circuit court judge in Montgomery County from 2012 to 2020, and, of course, she was recused from any matter that I handled as a trial judge. I have watched her on Court of Appeals cases, as those arguments are live-streamed and now Zoomed. As always, Mary Ellen was the consummate professional as Chief Judge (and formerly as Associate Judge), polite and principled with all who appeared before the Court. I will leave it to her former colleagues on the two courts to further illuminate her career as a jurist.

Let me turn to Mary Ellen as educator. She distinguished herself for decades in so many ways as a teacher of laypersons, law students, lawyers, and judges alike. Her first foray in education was as a preschool teacher in the Cherry Hill neighborhood of Baltimore, where she taught three- and four-year-old's. Fresh out of Towson University with a degree in early childhood education, Mary Ellen taught there for several years, ultimately going to law school at night when she decided to make a career switch. Just three years after having finished teaching preschoolers, Mary Ellen made the leap to law students at the University of Baltimore where she taught a component of the legal writing program beginning in 1987. She went on to teaching an upper-level seminar, Appellate Advocacy, in 1997. Her long-term tenure as an adjunct professor, however, was in connection with the criminal procedure courses she taught at the American University Washington College of Law. In the early 1990's, Mary Ellen was recruited to teach the required course, Criminal Procedure I, which covers the constitutional law of search and seizure, confessions, and identifications. Later, she and I co-taught this course as well as Criminal Procedure II, an upper-level course covering the constitutional law of grand jury, speedy trial, jury trial, right to counsel, burdens of proof, double jeopardy, sentencing, appeal, and post-conviction.

We taught these classes on Monday evenings, from 7:30 to 10:10 PM, with Criminal Procedure I each fall semester and Criminal Procedure II every spring semester. We divided the teaching responsibilities evenly, whereby I would teach the first half of each class, generally going over the assigned reading, and Mary Ellen would lead a mock hearing session during the last half of the class. Two students would be the prosecutors and two others would be the defense counsel, and the suppression hearing or other type of hearing would illustrate and apply the case law covered in that class and previous classes during the semester. The students generally enjoyed this teaching methodology and it allowed us to gauge how the students were learning over the course of the semester.

As you can imagine, these teaching responsibilities became increasingly difficult when I became a trial judge in 2012 and Mary Ellen became Chief Judge in 2013. We persevered until 2017, when we reluctantly stopped teaching at the law school level. Given Mary Ellen's speaking commitments, legislative hearings, and outside engagements both locally and nationally, it became a little too hectic for her, and jury trial commitments were problematic for me at times. I know, however, that Mary Ellen touched the lives of a generation or two of law students in Baltimore and Washington in so many ways! Not just in the classroom, but before class, during breaks, and after class (10:30 on a Monday night!), she was always willing to answer questions, and to give constructive feedback and encouragement to the students who had performed that night.

Mary Ellen's commitment to legal education has extended far beyond the confines of the two local law schools where she served as an adjunct professor. She taught judges at the Judicial Institute of Maryland (now the Judicial College), lecturing on numerous criminal law and procedure topics dating back to 1995. She helped educate lawyers continue their legal education through various Maryland Institute for Continuing Professional Education of Lawyers programs in the 1990's. She spoke on appellate practice and criminal law issues at numerous Maryland State Bar Association programs, local county and specialty bar association programs, and Maryland State's Attorneys' Association programs. Mary Ellen helped prepare attorneys arguing in the Supreme Court by participating as a judge on moot courts sponsored by the National Association of Attorneys General. Since 2013, she has been on various panels and spoken at semi-annual meetings of the Conference of State Supreme Court Chief Justices.

Anyone who knows Mary Ellen appreciates her sincerity, humility, and warmth. This was shared not only with law students she taught, but also with her legions of law clerks over the past two decades. I encourage you to read Becky Foreman's tribute in this issue, as Becky was a student, intern, and law clerk of Chief Judge Barbera's. In addition, Mary Ellen's influence on

younger students extends far beyond the legal sphere. A graduate of Mercy High School in Baltimore and of Towson University, Mary Ellen has spoken to groups of students at both schools. For many years as Chief Judge, she gave out awards to elementary students in an annual bookmark contest and greatly enjoyed meeting with the students and their parents for many hours at this event. She would patiently pose for photos with scores of them! She also volunteered as a presiding judge in the Montgomery County Teen Court, a diversion program for first-time juvenile offenders. Although her impact has been felt by all who have seen and heard her, it is perhaps felt most personally by the legions of young girls and women who have seen Mary Ellen shine as the first woman to serve as Chief Judge of Maryland. Although she may not be as recognizable or as famous as "The Notorious RBG," her smiling visage in her signature red robe is known to many women across the State. She has been an amazing role model and mentor to so many people, most of whom will never be known to Mel.

As head of the judicial branch, Mary Ellen's style of leadership also had a profound impact on the people of Maryland she served, the incumbent and senior judges who worked with her, the lawyers who appeared at all levels of the court system, and the rank-and-file judiciary employees who she impacted day to day. As Judge Greene so aptly and eloquently writes in another part of this tribute, Mary Ellen was a visionary head of the judicial system for the past eight years. She always was highly principled and strove to "do the right thing." Some of those qualities were always with her as a person, but I have no doubt that they were further incorporated into her legal persona through her service to the people of Maryland under the tutelage of the two outstanding Attorneys General she worked under, namely Steve Sachs and Joe Curran.

Particularly during the last year and a half of her tenure as Chief Judge, her character as a leader was tested like never before. The pandemic brought so many unforeseen challenges to running a court system, not that the job in non-pandemic times is all that easy either. As the Stoic philosopher Seneca observed two millennia ago: "There is no great credit in behaving bravely in times of prosperity, when life glides easily with a favoring current, neither does a calm sea and fair wind display the art of the pilot. Some foul weather is wanted to prove his courage."[2] Needless to say, the Chief Judge's skills as a pilot were courageously demonstrated in the final eighteen months of her tenure.

It should be noted here that the courts were never really "closed," even during the most locked down time in the spring of 2020. Emergency matters

2. Letter from Lucius Annaeus Seneca the Younger, Roman Stoic Philosopher to De Consolatione ad Marciam (written around 40 AD).

were still being heard, a skeleton crew of judges, law clerks, assistants, court room clerks, administrative clerks, and others reported to work in all the courthouses across Maryland. A series of emergency administrative orders were promulgated during these many months to expand operations when possible and retract when necessary. Judiciary employees, along with most others, needed steady and creative leadership, and Mary Ellen provided it. Her frequent videos explaining where we were and where we were going as a judiciary brought calm to otherwise troubled waters. I know how much everyone, both within the judiciary and on the outside, appreciated the efforts she made to balance the competing needs and wants of all involved in the court system over this challenging time.

No doubt her roots growing up in a small row home in Hampden, where she shared space and a single bathroom with her brothers, parents, and grandfather, helped to mold her into the adult she has become. And her parochial education at St. Thomas Aquinas lower school and Mercy High School formed a strong moral core for her values as well. Going to college at Towson University and then raising two children while teaching pre-school and attending law school at night solidified her strong work ethic if it ever needed it. Now Mary Ellen and I will have a little more time to travel and to visit with our four adult children and four grandchildren. She will be missed by those she has so graciously touched over her professional career, but I have no doubt she will continue to serve the public interest in new ways that will make this a more fair and just state and nation.

TRIBUTE TO CHIEF JUDGE MARY ELLEN BARBERA

ANDREA M. LEAHY*

In 1998, Mary Ellen Barbera left the Criminal Appeals Division of the Maryland Attorney General's office, where she had earned the reputation as an exceptional appellate lawyer, to join Governor Parris N. Glendening's legal team in Annapolis. It was before social media, when we still wore beepers and David Simon's riveting "Homicide: Life on the Street" was collecting Primetime Emmy Awards. Governor Glendening had already racked up many achievements that won national acclaim. Among other things, he brought the Cleveland Browns to Baltimore; and he won legislative support for the 1996 Gun Violence Act, a statewide ban on smoking, and the Smart Growth and Neighborhood Conservation Act, pioneering what would become a national model for containing urban sprawl.

It was also an election year, and Governor Glendening was in a heated rematch against Republican candidate Ellen R. Sauerbrey. Governor Glendening's ambitious Minority Business Program and initiatives to diversify the judiciary—including his appointment of the first African American Chief Judge of the Court of Appeals—threatened many in the old guard. The Governor's bold and progressive agenda was not embraced by everyone, and his "flip-flop" on the Intercounty Connector drew criticism from the business community, giving Ms. Sauerbrey grist for her mill.

It was against this backdrop that Mary Ellen became the Governor's Deputy Legal Counsel and would soon become one of the Governor's closest advisors. At the time, I was the Governor's chief counsel, and I remember distinctly how pleased and impressed the Governor was by Mary Ellen's rapid mastery of her new role. Governor Glendening recalls:

> Mary Ellen had a strong sense of the mix of policy and politics. I would often say "you can have good policy and bad politics and you will fail. Or you can have good politics and bad policy and you still fail." Mary Ellen was one of a talented team that repeatedly found the middle ground link between policy and politics.

The pace was not only fast, it was relentless. Dinner was either very late or the standard chicken plate served when representing the Governor at community events. The legal counsel to Governor Glendening had the

* Judge, Maryland Court of Special Appeals.

daunting responsibility of staying ahead of daily issues and "advising" the former professor, who earned his PhD at age 23 and typically, by 8:00 a.m., had already speed-read numerous national and local newspapers of general circulation and marked up his briefing papers from the prior day.

The issues that needed to be addressed were varied and mostly highly charged. Because of her fluid thinking and writing skills, Mary Ellen was able to draft speeches and briefing papers on legally and politically sensitive issues immediately—because they were always needed yesterday. Once, I recall, a few days after she arrived, I asked Mary Ellen to grab the blinking phone line as I ran out to address an urgent matter. On the line was a very unhappy cabinet secretary, and, unable to tee it up for her, the best I could do was say "good luck." I later learned that, like everything else, she handled it beautifully.

We worked with the Attorney General's Office on State agency matters and litigation filed against the State and the Governor. One case stands out because of the time it consumed, and the many laughs we shared working on it. In 1996, the Washington Post Company ("the Post") made a request under the Maryland Public Information Act ("MPIA") for the telephone (including cell phone) and scheduling records of the Governor and everyone on his staff for a two-year period. Most of the requests for records that were not already public were denied under executive privilege and various MPIA exemptions. Despite continued negotiations, in which the Governor's Office provided more records and the Post narrowed its requests, the parties hit an impasse when the Post filed suit in the Circuit Court for Anne Arundel County on December 4, 1997. Eventually, the matter reached the Court of Appeals.[1] The Court held, among other things, that while records of calls from telephones in Government House are not covered by the MPIA,[2] the Governor could not protect from disclosure the telephone and scheduling records from the Governor's office as personnel records under the MPIA,[3] or under a blanket claim of executive privilege.[4] Instead, the records were subject to *in camera* review to allow the court to discern whether, among other things, certain disclosures would interfere with the deliberative process in the Governor's Office.[5]

Throughout 1998 and 1999, Mary Ellen and I spent countless hours buried in the Shaw House under boxes of schedules and telephone bills. We had to review the call detail records to help then Deputy and Assistant Attorneys General Carmen Shepard and Larry Fletcher-Hill prepare for *in*

1. *See* Off. of the Governor v. Wash. Post Co., 360 Md. 520, 759 A.2d 249 (2002).
2. *Id.* at 538, 759 A.2d at 259.
3. *Id.* at 547–48, 759 A.2d. at 264.
4. *Id.* at 561–63, 759 A.2d at 271–73.
5. *Id.* at 562–64, 759 A.2d at 272–73.

camera review by the circuit court of "a proposed redacted version of those records with a detailed memorandum explaining why the redacted information was privileged."[6] As the Court of Appeals later noted, "[t]he telephone records from the State House are numerous and complex."[7] In describing one office suite served by eighteen separate telephone lines, the Court observed, "[b]ecause use of the different telephone instruments within the entire suite is not restricted, anyone within the suite can use any one of the instruments and, therefore, could access all eighteen lines."[8] In order to identify whether a particular call was privileged, we had to track not only who made the call, but who was called. With the technology at our disposal at the time, many numbers were impossible to figure out without calling them ourselves. "Hello. Who is this?" [Reply] "Who is this?" We tried many ways to explain, politely, that we just needed to identify to whom the telephone or cell phone that was called from the Governor's Office belonged. Some of the responses we received were hilarious, if not fit for publication. Mary Ellen was a champion at identifying callers because she has an innate sense of what to say and how to connect with people.

Under Governor Glendening, the Office of Legal Counsel was directly involved with, and sometimes directed, major policy initiatives. According to the Governor:

> Mary Ellen had a strong but diplomatic influence on major policies during my Administration that had extraordinarily positive impact in Maryland, many of which were very controversial. While she was always diplomatic with the legislature and the public, I think the strong part was sometimes reserved for our internal conversations. A look or a firm "now, Governor let's not forget . . ." often moved the conversation in a different direction.

Governor Glendening recalls several important initiatives that Mary Ellen was involved in, after she became Chief Legal Counsel, that led to policies that have impacted Maryland for decades. "One was my Administration's anti-gun violence bill in 2000. It was a strong bill, a complex bill with an array of angry opponents. Our team, on which Mary Ellen played an important role, put together a strong and diplomatic offense and an exciting mixture of good policy and politics." Indeed, Mary Ellen took the lead, along with then Deputy Legal Counsel, Sandra Benson Brantley, on staffing the Governor's Task Force on Childproof Guns.[9] The task force report laid the groundwork for legislation that required, among

6. *Id.* at 530, 759 A.2d at 255.

7. *Id.* at 541, 759 A.2d at 260.

8. *Id*. at 541, 759 A.2d at 260–61.

9. REPORT OF THE GOVERNOR'S TASK FORCE ON CHILDPROOF GUNS (1999), https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/004000/004181/unrestricted/20071019e.pdf.

other things, built-in locks on all guns sold in Maryland. The requirement was the first of its kind in the nation. President Bill Clinton attended the bill signing at the State House on April 12, 2000, where he declared, "I hope that the United States Congress is paying attention to this event today, because every child in America deserves the protection you have given Maryland's children."[10]

Mary Ellen also contributed significantly to the Governor's effort to prepare the State for an array of disasters that many feared would arise from Y2K. She had the legal office ready emergency executive orders in the event of logistical challenges and made other preparations.[11] Although no emergency issues arose from Y2K, those preparations significantly helped the Administration act quickly to respond to the tragic events on September 11, 2001.

Of course, Mary Ellen played a significant role in Governor Glendening's ongoing efforts to diversify the bench. The Governor recounts:

> It was, therefore, a certain poetic justice when I appointed Mary Ellen to the Court of Special Appeals in January 2002, not knowing that it would be the first step to her appointment by then Governor Martin O'Malley in 2013 to become the first woman Chief Judge of the Maryland Court of Appeals.

Judge Barbera became chief of the seven-member Court of Appeals and CEO of the judicial branch of government. The State Court Administrator, Pamela Harris, relates:

> Chief Judge Barbera's foresight and her intrinsic ability to assimilate quickly on matters affecting the $660,000,000 budget; addressing the legislature or executive branch with a cordial, yet unwavering approach; and her efforts, grounded in a living wage ideology, to increase wages for judiciary employees—all helped forge an effective administration to meet the challenges confronting the judiciary.

Chief Judge Barbera's valuable experience in the Governor's office—working on legislation and implementing and defending executive policies—contributed to her agility in managing the relationships between the judicial branch and the other branches of government. Chief Judge Barbera related to me that in one of her first meetings as Chief—with the "Lion of the Senate," President Mike Miller—he demanded, "what were you thinking when you appointed Morrisey Chief of the District Court?!" She responded, "isn't it good that the judiciary remain non-partisan and apolitical?" Senator

10. Thomas W. Waldron & Michael Dresser, *Clinton Puts Spotlight on Md. Gun Law; President Attends as Glendening Signs Landmark Legislation; 'Forefront of Change'; Congress Is Urged to Follow Suit, Pass Stalled Measure*, BALT. SUN, April 12, 2000, at 1B.

11. *See, e.g.*, Md. Exec. Order No. 01.01.1999.16 (June 2, 1999).

Miller smiled broadly and conceded that Chief Judge John Morrisey was "a very good guy."

Several years later, in 2018, Chief Judge Mary Ellen Barbera received the Maryland Senate's prestigious First Citizen's Award—the first time in more than two decades that the award had been given to a member of the Maryland Judiciary.[12] When presenting the award, Senate President Mike Miller said, "Chief Judge Barbera is a brilliant jurist, a teacher, and a leader who strives to better all of us in public service."[13]

After all of those years working with Governor Glendening and Mary Ellen to create better opportunities for women, I saw it as *the grand slam* when Governor Martin O'Malley appointed Judge Mary Ellen Barbera as the first woman to head the judiciary. I have admired Chief Judge Barbera's skill as an administrator and strength in protecting the independence of the judiciary, all while maintaining her outstanding scholarship as a jurist.

Ms. Harris, the State Court Administrator observes, "Judge Barbera's accomplishments over her eight years as Chief Judge are unparalleled and will be an extraordinarily strong foundation for those who next will have the privilege of building upon them."

The following observations by Governors O'Malley and Glendening sum up well Judge Barbera's tenure as Chief:

> In Mary Ellen Barbera, we found an outstanding jurist, a collaborative leader, and a deeply compassionate human being. Her honesty, integrity, and intellect were known throughout the legal communities of our State. But it was during the child refugee crisis of 2013 that I saw the true colors of her character. While other states' chief judges might "stand back and let it all be," Judge Barbera rallied the bar to recruit pro-bono legal representation for those traumatized and frightened kids. Mary Ellen understood that—in our country—laws are created to serve people, not vice versa. And she saw, in each child's case, the cause of justice—which is to say, the cause of human dignity.

Governor Martin J. O'Malley

> Chief Judge Barbera has repeatedly continued to use her strong but diplomatic personality and her wonderful understanding of the needed mix of policy and politics to solve major challenges facing the courts. Not the expected issues of law, but the unexpected challenges of the times—keeping the courts functioning during the

12. Press Release, Maryland Judiciary, Chief Judge Mary Ellen Barbera Honored by Maryland Senate as a "First Citizen" (March 26, 2018), https://www.courts.state.md.us/media/newsitem/2018/item20180326.

13. *Id.*

> COVID Pandemic, meeting new controversies like the excessive use of cash bail process or the needs of the Maryland judicial system during these times of demands for social and legal justice. Chief Judge Barbera's unique combination of skills and personality has helped lead the courts through these challenging times.

Governor Parris N. Glendening

CHIEF JUDGE MARY ELLEN BARBERA: MAKING A DIFFERENCE

DEBORAH SWEET EYLER*

> One might imagine that, were he with us to speak on the subject today, Thomas Aquinas, whose quoted words stand at the outset of the Majority's opinion, likely would conclude that the result reached by the Majority is neither just nor merciful. It is neither just nor merciful, much less compliant with the Eighth Amendment, that, currently in Maryland, a young teenager who commits a crime that leads to a life sentence is likely to spend the rest of his or her life in prison. And it is not justice to have on the books the "possibility of parole" yet provide a protocol for granting or denying parole that is without standards to guide those who are the decision makers: the Parole Commission and the Governor. Under the United States Constitution, a meaningful opportunity for release cannot exist in name only, as it now does in Maryland.[1]

With those words Chief Judge Barbera concluded her dissenting opinion in *Carter v. State.*[2] The majority she sharply criticized recognized that Maryland's parole eligibility statute[3] failed to afford juveniles sentenced to life in prison with the possibility of parole "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" as the Eighth Amendment requires.[4] With this she agreed. But the majority

* Judge (Ret.), Maryland Court of Special Appeals.

1. Carter v. State, 461 Md. 295, 371, 192 A.3d 695, 739 (2018) (Barbera, C.J., dissenting) (joined by Greene and Adkins, JJ.) (internal citations omitted). Chief Judge Barbera, joined by these same judges, concurred in part in another aspect of the *Carter* decision.

2. 461 Md. 295, 192 A.3d 695 (2018). Chief Judge Barbera, joined by these same judges, concurred in part in another aspect of the *Carter* decision.

3. MD. CODE CORR. SERVS. § 7-301 (2017).

4. *Carter*, 461 Md. at 306, 192 A.3d at 701 (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)). Beginning in 2005, the Supreme Court decided a series of Eighth Amendment cases in which it held that certain punishments, when applied to defendants who had committed their crimes as juveniles, were cruel and unusual or only could be imposed in exceptional circumstances. *See* Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting the death penalty for homicide offenders who were juveniles when they committed their crimes); *Graham*, 560 U.S. 48 (prohibiting life without parole for non-homicide offenders who were juveniles when they committed their crimes); Miller v. Alabama, 567 U.S. 460 (2012) (prohibiting life without parole as a mandatory sentence for homicide offenders who were juveniles when they committed their crimes); Montgomery v. Louisiana, 577 U.S. 190 (2016) (*Miller* applies retroactively to convictions that were final before it was decided). In *Miller*, the Court did not ban *discretionary* life without parole sentences for juvenile homicide offenders but made known its expectation that such a sentence only would be

satisfied itself that the constitutional defect was cured by regulations mandating the Parole Commission to consider special factors pertaining to juveniles and an Executive Order cabining the Governor's otherwise unfettered discretion over parole decisions for juvenile lifers. To Chief Judge Barbera, this patchwork, standard-less repair to a parsimonious parole scheme was insufficient to give juveniles sentenced to life with the possibility of parole the justice and mercy the Supreme Court envisioned.

Although Chief Judge Barbera only persuaded two, not three, judges to join her position in *Carter*, ensuing events reveal the power of her dissenting voice to effect change on a broader policy level. In its 2021 Session, the Maryland General Assembly, overriding vetoes, eliminated life without the possibility of parole as a sentencing option for those who committed homicide crimes when they were juveniles.[5] Moreover, it removed the governor from the parole process for all people sentenced to life in prison.[6] This legislation freed the Maryland parole system of some of the pitfalls Chief Judge Barbera identified in her *Carter* dissent—the same result that would have been obtained had a fourth judge converted her dissent into the majority opinion.

In eight years leading the Maryland Judiciary, Chief Judge Barbera authored many majority opinions on new and sometimes cutting-edge issues. A few examples include: *Lewis v. State*[7] (finding odor of marijuana itself is not sufficient to establish probable cause to suspect possession in criminal amount); *Romero v. Perez*[8] (establishing broad standards to be applied in Special Immigrant Juvenile Status cases); *State v. Jones*[9] (abrogating the common law accomplice corroboration rule); *Hackney v. State*[10] (adopting

imposed upon "the rare juvenile offender whose crime reflects irreparable corruption." 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68). These cases all were premised upon the concept, supported by science, that juveniles differ from adults in brain development and maturity, and therefore the considerations upon sentencing them should not be the same as those for sentencing adults. This year, in *Jones v. Mississippi*, No. 18-1259, slip op. (U.S. Apr. 22, 2021), the Supreme Court stepped back from that trend in Eighth Amendment jurisprudence, holding that a homicide offender whose crime was committed when he was a juvenile could be sentenced to life in prison without the possibility of parole. The Court did not require an express or implicit finding of permanent incorrigibility, so long as the sentencing scheme was not mandatory. In a dissenting opinion, Justice Sotomayor, joined by Justices Breyer and Kagan, asserted that the majority's opinion "distorts *Miller* and *Montgomery* beyond recognition." *Jones*, No. 18-1259, slip op. at 5 (Sotomayor, J. dissenting).

5. S.B. 494, 2021 Leg., 442d Sess. (Md. 2021) (adding to sections 6-235 and 8-110 of the Criminal Procedure Article). The bill also authorized courts to sentence juveniles convicted as adults to a sentence less than the prescribed minimum term.

6. S.B. 202, 2021 Leg., 442d Sess. (Md. 2021) (repealing and reenacting with amendments sections 4-305(b) and 7-301(d) of the Correctional Services Article).

7. 470 Md. 1, 233 A.3d 86 (2020).

8. 463 Md. 182, 205 A.3d 903 (2019).

9. 466 Md. 142, 216 A.3d 907 (2019).

10. 459 Md. 108, 184 A.3d 414 (2018).

the prison mailbox rule); *Cruz-Quintanilla v. State*[11] (permitting evidence of gang membership at sentencing under certain circumstances); *Moats v. State*[12] (requiring a warrant for search of cell phone under Fourth Amendment); *Twigg v. State*[13] (recognizing the concept of sentencing packages). In these cases, Chief Judge Barbera spoke for the Court, often in unanimous opinions.[14] As *Carter* demonstrates, however, Chief Judge Barbera's dissenting and concurring opinions give us an "up close and personal" understanding of her concepts of law and justice.

Before delving in to explore some of her writings, I pause to point out that only a few months after assuming her seat on the Court of Special Appeals, then-Judge Barbera experienced first-hand what can be the frustrating constraints of serving on an intermediate appellate court. As she knew from years spent handling criminal appeals for the Attorney General's Office, the Court of Special Appeals is an error-correcting body that is not designed to function as a change-agent. In her debut reported opinion, *Bozman v. Bozman*,[15] which concerned the doctrine of interspousal immunity, Judge Barbera confronted that limitation head on. She described the doctrine as "aged, if not antiquated," and, after recounting its history, including the laudable purposes it served in bygone times, concluded that it performs no valid function today.[16] "We remain unconvinced . . . that retention of this doctrine best reflects the will of the people in this State . . . ."[17] Nevertheless, in resignation, she wrote: "Regardless, we are bound to follow the dictates of the law as it presently exists in Maryland."[18] In less than a year, the Court of Appeals granted certiorari in *Bozman* and abrogated the doctrine.[19]

Judge Barbera's term of confinement ended with her ascension to the Court of Appeals in 2008. I was privileged to serve with her for six years on the Court of Special Appeals and in that time came to know her as a thoughtful colleague, direct and firm in her thinking, but always open to persuasion and attuned to trends in the law. Like the best of jurists, her "take"

11. 455 Md. 35, 165 A.3d 517 (2017).

12. 455 Md. 682, 168 A.3d 952 (2017).

13. 447 Md. 1, 133 A.3d 1125 (2016).

14. As Chief, Judge Barbera authored fifty-four opinions in non-Attorney Grievance Commission cases, forty of which were unanimous decisions, that is, without any dissenting or concurring opinions.

15. 146 Md. App. 183, 806 A.2d 740 (2002).

16. *Id.* at 185, 806 A.2d at 741 (quoting Linton v. Linton, 46 Md. App. 660, 661, 420 A.2d 1249 (1980)).

17. *Id.* at 195, 806 A.2d at 747.

18. *Id.* at 196, 806 A.2d at 747.

19. Bozman v. Bozman, 372 Md. 429, 813 A.2d 257 (2002).

on a difficult case was not readily predictable. She followed the law where it took her, carefully exploring the issues to find her path. Her opinions for our Court combined uncluttered narrative with teacherly guidance, and almost always began, blessedly, with a paragraph distilling the central issue and the Court's ultimate position on it. Never pretentious or overwritten, her opinions were refined, incisive, and to the point.

Those qualities remained hallmarks of Chief Judge Barbera's writing after she moved to the less limiting forum of the Court of Appeals. With that freedom came the challenge and burden of overseeing the development of Maryland law, whether through changes in the common law, as Judge Barbera could not accomplish in *Bozman*, or through constitutional and statutory interpretation. Especially in her dissents, we can witness her navigating the waters between faithful adherence to established principles and considered evolution of those principles, sometimes in the context of societal changes in outlook, or progress in science and technology.

On expansion of the scope of the constitutional rights recognized in the Maryland Declaration of Rights, for instance, Chief Judge Barbera has taken a path of thoughtful restraint, deviating when she found it necessary to protect essential rights. In *DeWolfe v. Richmond II*,[20] her first dissent after being appointed Chief, Judge Barbera methodically dissected the majority's holding that the due process protections afforded by Article 24 of the Maryland Declaration of Rights guarantee the right to counsel in an initial appearance before a District Court Commissioner. The holding was a rebuke to the legislature, which, after the Court of Appeals announced in its prior opinion in *DeWolfe v. Richmond I*[21] that the Public Defenders Act afforded that right, promptly amended the Act to eliminate it.

After pointing out that the cases the majority sought refuge in all involved in-court proceedings, conducted by a judge, in which the defendant faced the potential of a final, court-ordered term of incarceration, Chief Judge Barbera catalogued the ways in which an initial appearance before a district court commissioner shares none of those features. In contrast, she explained, the procedure reasonably balances the individual's need for a fair, informal process with the State's interest in a prompt assessment by a neutral party:

> The initial bail hearing before a Commissioner does not result in a final determination of incarceration because no decision made by a Commissioner will lead to a defendant's languishing in custody without judicial review. Indeed, the law affirmatively requires that the Commissioner's initial bail decision be reviewed quickly by a judge, at a formal, in-court proceeding, at which every defendant—

20. 434 Md. 444, 76 A.3d 1019 (2013) (Barbera, J. dissenting) (joined by Harrell and Adkins, JJ.).

21. 434 Md. 403, 76 A.3d 962 (2012).

> indigent or not—is entitled to representation by counsel. The very fact of speedy review of the Commissioner's preliminary determination, by a judge at a formal court proceeding where defense counsel can argue against the Commissioner's initial bail decision, negates any realistic concern about unfair procedural process.[22]

Chief Judge Barbera admonished against expanding the Article 24 due process right to counsel—traditionally broader than the Sixth Amendment right—to a limited, non-final proceeding subject to prompt review in a forum where the defendant would be represented by counsel.

In a similar vein, shortly before ascending to the Chief position, Judge Barbera took issue with the plurality's conclusion in *Doe v. Department of Public Safety*[23] that application of the then current version of the Maryland Sex Offender Registration Act violated the ex post facto clause of Article 17 of the Maryland Declaration of Rights. The defendant committed acts of child sexual abuse before the registration statute was enacted, but was convicted of his crimes afterward, when the statute was on the books but did not cover him. Under later amendments to the Act, he was required to register as a sex offender, and then to do so for life.

In dissent, Chief Judge Barbera emphasized that the Court of Appeals invariably had construed Article 17 on equal footing with the ex post facto clause in Article 1, Section 10 of the Federal Constitution, employing the same analytical rubric to determine whether it had been violated and giving persuasive value to federal cases interpreting the clause. She explained that the federal ex post facto clause prohibits a change in the punishment for a crime that inflicts a greater punishment than applied to the crime when it was committed. It does not apply, however, when the legislature's intention was to create a civil regulatory scheme—unless the effect of the scheme is so punitive as to negate the original intent. Pointing out that the Court of Appeals had applied this "intent-effects" test to uphold an earlier version of the Maryland Sex Offender Registration Act, and that the plurality was relying on a Supreme Court case that Court itself had discredited, Chief Judge Barbera found principled guidance in the Supreme Court's rejection of a similar ex post facto challenge to Alaska's Sex Offender Registration Act.[24] Once again, she heeded the precept that movement away from established principles only should be taken when necessary to protect essential rights, which was not the case with a statute creating a civil system to protect children from convicted sex offenders.

22. *Richmond II*, 434 Md. at 468–69, 76 A.3d at 1033 (Barbera, J. dissenting).
23. 430 Md. 535, 62 A.3d 123 (2013) (Barbera, J. dissenting).
24. Smith v. Doe, 538 U.S. 84 (2003).

By contrast, in other cases, Chief Judge Barbera dissented when she perceived the majority hobbling rights Maryland law affords that are more generous than similar rights conferred by federal law. Two *coram nobis* cases illustrate this. In *Miller v. State*,[25] Miller, a longtime resident of the United States but not a citizen, was detained upon attempting to return to the United States from his home country of Belize. Deportation proceedings were instituted against him under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[26] based on his guilty plea, many years earlier, to possession of cocaine with intent to distribute. In seeking *coram nobis* relief, he alleged that he did not plead guilty knowingly and voluntarily because his lawyer did not advise him on the record of the possible immigration consequences of pleading guilty.

After Miller was denied relief and during the pendency of his appeal, the Supreme Court decided *Padilla v. Kentucky*,[27] a post-conviction case applying *Strickland v. Washington*,[28] to hold that constitutionally competent defense counsel must inform a defendant that a conviction for drug distribution would subject him to automatic deportation; and then decided *Chaidez v. United States*,[29] holding that under the federal standard for retroactive application of newly decided cases, *Padilla* only applied prospectively.[30] The *Miller* majority concluded that *Chaidez* compelled the conclusion that *Padilla* did not apply retroactively to Miller's case.

Chief Judge Barbera observed in dissent that the Court of Appeals previously had rejected the limited federal standard for retroactive application of case law. Rather, in Maryland a judicial decision applies retroactively unless it overrules prior law and declares a new principle of law, in which case it only applies prospectively.[31] Indeed, only two years earlier, in *Denisyuk v. State*,[32] the Court held that under that standard, *Padilla* applied retroactively to postconviction claims challenging guilty pleas entered from April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, forward.[33]

25. 435 Md. 174, 77 A.3d 1030 (2013) (Barbera, C.J., dissenting) (joined by Greene, J. and Bell, C.J. (ret.)).

26. Pub. L. No. 104-208, 110 Stat. 3009 (eff. Apr. 1, 1997).

27. 559 U.S. 356 (2010).

28. 466 U.S. 668 (1984).

29. 568 U.S. 342 (2013).

30. The federal standard, established in *Teague v. Lane*, 489 U.S. 288 (1989), is whether the case announced a new rule of constitutional criminal procedure. The *Chaidez* Court held that *Padilla* did so, and therefore did not apply retroactively.

31. *See* State v. Daughtry, 419 Md. 35, 78, 18 A.3d 60, 86 (2011); Houghton v. County Comm'rs of Kent Cnty., 307 Md. 216, 219–20, 513 A.2d 291, 292–93 (1986).

32. 422 Md. 462, 30 A.3d 914 (2011).

33. *Id.* at 478–79, 30 A.3d at 923–24.

In the *Denisyuk* majority opinion, authored by then-Judge Barbera, the Court reasoned that *Padilla* did not declare a new principle of law but simply applied the law established in *Strickland* to a new set of facts. The effect of that holding, which was consistent with established Maryland legal principles, was to enable a generation of non-citizens facing deportation proceedings based on guilty pleas to seek relief through post-conviction or *coram nobis* proceedings. In *Miller*, Chief Judge Barbera took the position that cutting off access to that relief was not mandated by *Chaidez*, as the federal retroactivity standard did not apply in Maryland and flatly contradicted *Deniyuk* in an affront to stare decisis, all to the detriment of those whose guilty pleas had not been knowing and voluntary.[34]

In *State v. Smith*,[35] another *coram nobis* case stemming from deportation proceedings brought against a resident non-citizen of the United States who had pleaded guilty to a drug-related charge many years before, a fractured Court held, by one majority, that Smith had not waived her right to *coram nobis* relief, but by another majority, that her guilty plea had been knowing and voluntary. Chief Judge Barbera dissented from the second majority opinion. She explained that Maryland Rule 4-242 creates strict requirements for accepting a guilty plea that afford protection to a defendant beyond the basic constitutional due process standards established by the Supreme Court, including the process set out in subsection (c).[36] A prior conversation in which Smith's lawyer talked to her about the drug-related conspiracy charge she was facing was not sufficient to satisfy the Rule:

> [A]ny such discussion outside the plea hearing record, while arguably enough to satisfy the federal constitutional minimum of

34. Probably Chief Judge Barbera's most well-known discussion of the doctrine of stare decisis is her majority opinion in *State v. Waine*, 444 Md. 692, 122 A.3d 294 (2015), in which the State asked the Court to overrule its controversial decision in *Unger v. State*, 427 Md. 383, 48 A.3d 242 (2012). *Unger* concerned Article 23 of the Maryland Declaration of Rights, which states, in part, that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact." Specifically, the *Unger* Court held that in a prior rule implementing Article 23 by requiring judges to instruct juries in criminal cases the court's instructions on the law were advisory only. The *Unger* Court overruled prior cases interpreting Article 23 as being limited and "effectively opened the door to postconviction relief for persons tried during the era of the advisory only jury instruction." *Waine*, 444 Md. at 696, 122 A.3d at 296. In declining to overrule *Unger*, Chief Judge Barbera stated: "To hold otherwise would depart from the principles of stare decisis, generate uncertainty, and, ultimately, undermine trust and confidence in the rule of law." *Id.* at 695, 122 A.3d at 295.

35. 443 Md. 572, 117 A.3d 1093 (2015) (Barbera, J. dissenting) (joined by Greene and Adkins, JJ. (Part II)).

36. Maryland Rule 4-242(c) provides, in relevant part:

> Plea of guilty. The court may not accept a plea of guilty, including a conditional plea of guilty, until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea.

> due process accorded under *Bradshaw*,[37] should not carry the day under Rule 4-242(c). Again, the Rule requires more: the record of the plea itself must be such as to permit a *meaningful* determination by the court before whom the plea is presented that the defendant's plea is knowing and voluntary in that the defendant has had explained to him or her the rights that are forgone by the plea of guilty and willingly foregoes them; has had the nature of the crime addressed such that the defendant understands that to which he or she is pleading guilty; and that the facts support the plea.[38]

Especially in the area of constitutional criminal procedure, Chief Judge Barbera has championed faithful application of precedent and, when movement away from the strict application of the doctrine of stare decisis becomes necessary, proceeding properly.[39] Her dissent in *Agurs v. State*[40]—a case involving an exception to an exception—is a good example. The central issue there was whether the *Leon*[41] good faith exception to the Fourth Amendment exclusionary rule saved a search executed on a warrant issued without probable cause or whether the third exception to the *Leon* good faith exception applied. More specifically: Was the affidavit supporting the

37. Bradshaw v. Stumpf, 545 U.S. 175 (2005).

38. *Smith*, 443 Md. at 621, 117 A.3d at 1122.

39. Of the twelve dissenting opinions Chief Judge Barbera authored during her tenure on the Court of Appeals, all but one were in criminal law or procedure or "criminal-adjacent" cases (such as *coram nobis* proceedings, which are civil, but grow out of criminal cases). In addition to the dissents discussed in the body and footnotes of this article, all of which fall into those categories, Chief Judge Barbera dissented in part in *Spencer v. State*, 450 Md. 530, 572, 149 A.3d 610, 634 (2016), opining that a trial judge did not clearly err in rejecting as pretextual the supposedly race-neutral explanations the defendant's lawyer gave for exercising a pattern of peremptory challenges based on race, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Schreyer v. Chaplain*, 416 Md. 94, 5 A.3d 1054 (2010), another "criminal-adjacent" case, in which the Court was called upon to interpret statutes conferring immunity upon police officers exercising emergency powers under particular circumstances, then-Judge Barbera disagreed with the majority's narrow interpretation of "pursuing a violator," opining that the officer was doing just that even though the suspected violator did not know that was what the officer was doing. *Id*. at 121–25, 5 A.3d at 1069–72 (Barbera, J. dissenting) (joined by Harrell and Battaglia, JJ.).

The sole non-criminal or "criminal-adjacent" case in which then-Judge Barbera dissented nevertheless concerned a fundament right—to raise one's child. In *Mulligan v. Corbett*, 426 Md. 670, 45 A.3d 243 (2012), a man sought mandatory genetic testing under the Paternity Subtitle of the Family Law Article to determine the paternity of a child born to a woman he had had sexual relations with while she was married. The child was born after the mother was divorced. The majority held that the child was not born "out of wedlock," as that phrase is used in the Paternity Subtitle, and therefore the plaintiff was not automatically entitled to genetic testing. Instead, to rebut a presumption of legitimacy, he would have to show it was in the best interest of the child, who was living with the mother and her ex-husband, for him to obtain genetic testing. Judge Barbera, joined by Judge Raker, dissented on the ground that a child born after the mother is divorced is a child born out of wedlock, and that the majority was raising unreasonable stumbling blocks to a scientific determination of paternity where there was significant evidence that the plaintiff in fact was the child's father.

40. 415 Md. 62, 998 A.2d 868 (2010) (Barbera, C.J., dissenting) (joined by Adkins, J.).

41. United States v. Leon, 468 U.S. 897 (1984).

warrant application "so lacking in probable cause as to render official belief in its existence entirely unreasonable?"[42] The majority held that because the affidavit did not establish a direct nexus between Agurs, who was suspected of being a high-level drug distributor, and his house, no competent police officer could have executed the search warrant for that house with a reasonable belief that it was issued based on probable cause.

Assuming for the sake of the opinion that the warrant had been issued without substantial basis, Judge Barbera emphasized that the majority's analysis did not comport with United States Supreme Court precedent or reasoning. The Supreme Court adopted the good faith exception to the exclusionary rule, she explained, to encourage law enforcement to obtain and rely upon warrants; and it has narrowly interpreted the third exception to *Leon* to further that purpose. That exception only will apply if "no 'thoughtful and competent judge' could find that an officer could reasonably believe there was probable cause for the search."[43] In prior cases applying federal case law, the Court of Appeals had recognized that there need not be a direct nexus between the suspect and the place to be searched for the police to have acted in good faith. Rather, searches have been upheld when an experienced officer, taking the nature of the crime into account, normally and logically would expect to find items associated with that crime at the place to be searched.

The most telling feature of this dissent is not Judge Barbera's conclusion but her opening. She begins by observing that, unlike several other jurisdictions that have "rejected the good faith exception as incompatible with those states' constitutions," the Court of Appeals has not even "recognized an exclusionary rule for evidence seized in violation of Article 26 of the Maryland Declaration of Rights."[44] Indeed, this is so even though dissenting judges in other cases have urged that course.[45] Without its own exclusionary rule, the Court of Appeals has not had to face whether to adopt its own good faith exception, with exceptions to the exception, or to reject the good faith doctrine entirely. Instead of providing increased protections against execution of improperly issued warrants, beyond those afforded by the Fourth Amendment, the Court has interpreted Article 26 in lockstep with the Fourth Amendment:

> Unless and until this Court recognizes an Article 26-based exclusionary rule and disclaims any exception for "good faith"

42. Patterson v. State, 401 Md. 76, 104, 930 A.2d 348, 365 (2007) (quoting *Leon*, 468 U.S. at 923).

43. *Agurs*, 415 Md. at 108, 998 A.2d at 895 (quoting *Leon*, 468 U.S. at 926) (Barbera, J. dissenting) (joined by Adkins, J.).

44. *Id.* at 102, 998 A.2d at 891–92.

45. *Id.*

> violations of that state constitutional provision, I feel bound to follow the good faith doctrine as explicated and applied in *Leon*, *Sheppard*, and the cases that have applied that doctrine in Maryland. Faithful application of those cases, in my view, compels the conclusion that the police acted in good faith when they searched [Agur's] home pursuant to the search warrant.[46]

The primary message from Judge Barbera in this dissent is that when a change to the law is needed and can be accomplished on independent state grounds, that is the route that should be taken to bring it about. It should not be brought about by deviating without principle from the application of existing law.[47]

Besides *Carter*, two of Chief Judge Barbera's most fruitful non-majority opinions, one in dissent and one in concurrence, address how advances in hard science and social science fit in with and affect the development of established legal concepts.

In 2003, the General Assembly enacted the Maryland DNA Collection Act, which, among other things, permits certain law enforcement officers to compel those arrested for crimes of violence and other specified dangerous crimes to furnish DNA samples by cheek swab.[48] After arraignment, when probable cause is established, the DNA is entered into the Combined DNA Index System (CODIS). In *King v. State*,[49] King was charged with rape based on a CODIS DNA match. In a previous arrest for a crime of violence, his

46. *Id.* at 103, 998 A.2d at 892.

47. In two criminal procedure cases, Chief Judge Barbera dissented to express her view that the majority simply had misapplied established federal constitutional standards. In *State v. Baker*, 453 Md. 32, 160 A.3d 559 (2017), the majority held that the declaration of a mistrial was not supported by manifest necessity, barring retrial under the Double Jeopardy Clause of the Fifth Amendment. It criticized the trial court for not having articulated all the reasonable alternatives to a mistrial and the ground for rejecting each one. Chief Judge Barbera disagreed that some alternatives the majority had posited with the benefit of retrospect were reasonable and argued that "although consideration of reasonable alternatives is part of the manifest necessity determination, a trial judge's failure to exhaust and dictate on the record all of those alternatives, and its reasons for rejecting each alternative, should not render the declaration of a mistrial an abuse of discretion." *Baker*, 453 Md. at 67, 160 A.3d at 579 (Barbera, C.J., dissenting) (joined by Adkins, J.). She pointed out that neither the United States Supreme Court nor the Court of Appeals ever had required such an express finding. *Id.*

In *Brown v. State*, 452 Md. 196, 156 A.3d 839 (2017), the majority held that the defendant was in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), when he was transported from the hospital to the station house and interrogated in connection with a shooting. It affirmed the circuit court's order suppressing the statement the defendant gave before being given *Miranda* warnings. Chief Judge Barbera took issue with how the majority applied the totality of the circumstances standard to determine whether the defendant would have felt free to leave; specifically, she included in her recitation of events facts the majority had omitted that weighed in favor of the defendant's knowing he was free to leave. *Brown*, 452 Md. at 223–24, 156 A.3d at 854–55 (Barbera, C.J., dissenting) (joined by McDonald, J.).

48. MD. CODE § 2-504(a)(3) (2009).

49. 425 Md. 550, 42 A.3d 549 (2012) (Barbera, C.J., dissenting) (joined by Wilner, J. (retired)).

DNA was obtained and, upon being entered in CODIS, matched the DNA for the unsolved rape. King challenged the admission of the DNA match in the rape case, arguing, unsuccessfully, that the DNA Collection Act allowed unreasonable warrantless searches of arrestees, in violation of the Fourth Amendment. He was convicted and appealed, and the case reached the Court of Appeals.

The majority agreed with King. It held that the cheek swab was a search of King's body, performed without a warrant, when King only was an arrestee. Analyzing the totality of the circumstances by balancing King's privacy interests against the legitimate interests of the State served by the search, the majority concluded that the DNA search was unreasonable, and therefore violated the Fourth Amendment.

Then-Judge Barbera agreed that a cheek swab is a search of the person, although a minor one, and that it was performed on King without a warrant. She also agreed that whether the warrantless search, as permitted by the DNA Collection Act, violated the Fourth Amendment properly should be determined under the traditional totality of the circumstances test for reasonableness. She disagreed with the majority's conclusion that the search was unreasonable under that test. Concerning individual privacy, she detailed the many procedures arrestees already are subject to that are more intrusive than a cheek swab and explained that the limited nature of the DNA profile entered in CODIS, which does not reveal any personal traits or propensities of the arrestee, offers protection from misuse. On the other hand, she explained, the government has an interest in using DNA to most reliably identify the arrestee and to solve crimes and exonerate those who may have been convicted of crimes they did not commit. In her assessment, the privacy interest of a person arrested for a serious crime in being free from a minimal bodily invasion is outweighed by the government's interest in using a barely intrusive search to obtain the most up-to-date and trustworthy scientific identification evidence, and therefore the cheek swab search was reasonable.

The Supreme Court granted certiorari in *King*, and in an opinion authored by Justice Kennedy that employed much the same reasoning as Judge Barbera, reversed.[50] In doing so, it resolved a split in federal and state court decisions "as to whether the Fourth Amendment prohibits the collection and analysis of a DNA sample from persons arrested, but not yet convicted, on felony charges."[51]

50. Maryland v. King, 569 U.S. 435 (2013). Justice Kennedy was joined by Chief Justice Roberts and Justices Thomas, Alito, and Breyer. Justice Scalia wrote a dissenting opinion in which Justices Ginsburg, Sotomayor, and Kagan joined.

51. *Id.* at 442.

In 2019, Chief Judge Barbera authored a concurring opinion in *Small v. State*[52] on the issue of out-of-court eyewitness identifications of defendants. Starting in 2021, that opinion will have a significant impact on how juries assess such evidence.

The question before the Court in *Small* was whether an out-of-court identification of the defendant by the crime victim passed muster under federal due process grounds. The perpetrator, a male, attempted to rob and then shot the victim in the early morning hours at a bus stop. The victim included in his description of the assailant that he had a distinctive neck tattoo containing multiple letters, at least one of which was an "M." The police showed the victim two photographic arrays. In the first, Small was one of the six men depicted and the only one with a neck tattoo. The victim said Small's picture looked like his assailant, but he did not think it was him. In the second, all the men had neck tattoos. Small's picture was included and of course was the only one in the second array that also had been in the first array. In response to viewing Small's picture in the second array, the victim said, "That's him. That's who shot me."[53]

The circuit court ruled that the first photographic array was inadmissible but the second was not. A jury convicted Small of the crimes charged. The case reached the Court of Appeals. In deciding whether the photographic identification of Small satisfied federal due process standards,[54] a majority applied the reliability factors established by the Supreme Court in *Neil v. Biggers*[55] and *Manson v. Braithwaite*,[56] and adopted in Maryland in *Jones v. State*.[57] It concluded that the second array identification was unnecessarily suggestive but was admissible because the "indicia of reliability [were] strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances."[58]

Although Chief Judge Barbera agreed with the outcome within the due process framework the majority employed, she concurred to express disappointment that the Court had not seized the opportunity to expand that

52. 464 Md. 68, 211 A.3d 236 (2019) (Barbera, C.J., concurring) (joined by Adkins and McDonald, JJ.).

53. *Id.* at 79, 211 A.3d at 242.

54. When an extrajudicial identification of a defendant is conducted by law enforcement, the identification will not satisfy due process if the procedure used was unnecessarily suggestive and rendered the results not reliable. Perry v. New Hampshire, 565 U.S. 228, 235 (2012).

55. 409 U.S. 188 (1972).

56. 432 U.S. 98 (1977).

57. 310 Md. 569, 530 A.2d 743 (1987), *vacated on other grounds*, Jones v. Maryland, 486 U.S. 1050 (1988).

58. *Small*, 464 Md. at 93, 211 A.3d at 250 (quoting *Perry*, 565 U.S. at 232). There was additional evidence, beyond the second photographic array, that supported the reliability of the victim's identification of Small, including that the victim previously had encountered Small at the victim's job and recognized his voice.

framework for pre-trial assessment of reliability of extrajudicial identifications of a defendant beyond the *Biggers*/*Manson*/*Jones* factors. She lamented the Court's failure to consider and act on the far-reaching social science advances in the areas of human perception and memory that have "expose[d] the frailty of the *Manson* factors for eyewitness identification reliability" and have revealed that faulty eyewitness identifications are "the single greatest cause of wrongful convictions in this country."[59]

Chief Judge Barbera recommended that the Court follow the lead of the New Jersey Supreme Court in *New Jersey v. Henderson*,[60] which developed an assessment framework based on factors it categorized as "system" and "estimator" variables. The former are factors in the State's control and are geared toward how identification processes are assembled and administered. The latter are factors that usually relate to the incident, such as the weather and how long the witness had to observe what was happening; the eyewitness, such as intoxication, stress, or vision problems; or the perpetrator, such as whether the identification was cross-racial or whether the perpetrator wore a disguise, mask, or changed his appearance. As Chief Judge Barbera explained, the *Henderson* court also directed that jurors be informed about counterintuitive factors jurors will think correlate with accurate identifications but actually do not; adopted a new pretrial procedure for courts to use in evaluating the suggestiveness and reliability of out-of-court identifications, using system and estimator variables; and permitted expert testimony about the effect of certain variables on memory, so long as opinions are not offered on credibility of particular witnesses.

Ever mindful of the role of stare decisis, Chief Judge Barbera opined that, even though, four years earlier, the Court had "declined a similar invitation to adopt the *Henderson* 'theories and methodologies,'" finding the *Biggers*/*Manson*/*Jones* factors satisfactory, it was time for the Court, going forward, to revise its jurisprudence in this area to comport with scientific advancements in the understanding of memory and perception.[61] She closed her concurring opinion as follows:

> There is no reason Maryland cannot commit to a new framework. A variety of solutions could help Maryland courts, in ruling on a suppression motion, avoid the "primary evil" of "a very substantial likelihood of irreparable misidentification," and help jurors better determine the weight to be accorded to an identification offered at trial. For those purposes, I suggest that this Court direct the Rules

59. *Id.* at 105–06, 211 A.3d at 257–58 (Barbera, C.J., concurring) (joined by Adkins and McDonald, JJ.).

60. 27 A.3d 872 (N.J. 2011).

61. *Small*, 464 Md. at 115–16, 211 A.3d at 263–64 (Barbera, C.J., concurring) (joined by Adkins and McDonald, JJ.).

> Committee to craft and propose rules of procedure that bring scientific rigor to the assessment of an eyewitness identification that a defendant has challenged as unduly suggestive and, ultimately, unreliable. To that end, worthy of consideration is the *Henderson* court's new four-part procedure for evaluating suggestiveness and reliability. I also endorse the concept of leaving "to the trial court the decision whether to allow expert testimony in an individual case." Likewise, I suggest that this Court ask the Criminal Subcommittee of the Standing Committee on Maryland Pattern Jury Instructions to create a pattern jury instruction for use in the appropriate case, to better guide jurors. I await the day—which cannot come too soon—when this Court, prompted by the research on potential fallibility of eyewitness identification evidence, takes meaningful steps to improve Maryland's pretrial and trial-related procedures, so as to mitigate, if not eliminate, the present concerns that attend the admission of, and weight given to, such evidence in future cases.[62]

For its part, the MSBA Criminal Pattern Jury Instruction Committee took up the challenge. After much discussion and debate, the members crafted a revised MPJI-Cr 3:30, "Identification of Defendant." The new instruction incorporates many of the *Henderson* variables as factors to be considered by jurors assessing the accuracy and reliability of an out-of-court identification of the defendant.

Considering specific weaknesses in the *Biggers*/*Manson*/*Jones* factors Chief Judge Barbera focused on in her concurrence, two changes are most noteworthy. First, the revised instruction includes language cautioning jurors that just because a witness is certain of his or her identification, that does not mean the identification is reliable. "Certainty may or may not be a reliable indicator of accuracy. A person, in good faith, may be confident but mistaken."[63] And second, it affords jurors guidance about cross-racial identifications, for use when the defendant and the identifying witness are of different races:

> Some people have greater difficulty accurately identifying people of a different race than people of their own race. You should consider whether the difference in race between the defendant and the identifying witness affected the accuracy of the witness's identification [taking into account the witness' background and experience].[64]

62. *Id.* at 117, 211 A.3d at 264–65 (internal citations omitted).

63. MPJI-Cr 3:30 (5).

64. *Id.* at (8). The last phrase is bracketed for use when there has been evidence that the witness has had background and experience relevant to cross-racial identification.

The amended "Identification of Defendant" instruction became effective on July 1, 2021.

While a member of the Court of Appeals, and especially since becoming Chief Judge in 2013, Chief Judge Barbera has left her mark on the Maryland Judiciary in ways others will give tribute to, many of which are not related to her published words in the "beige books." However, her words, especially those written to express a difference of opinion, show the workings of a judicious mind aiming at substantial justice, and themselves have made a difference.

A TRIBUTE TO THE HONORABLE MARY ELLEN BARBERA

CLAYTON GREENE, JR*

Mary Ellen Barbera and I were appointed to the Court of Special Appeals, the state's second-highest court in 2002. I was elevated to the Court of Appeals in 2004, to fill the vacancy created by the retirement of the Honorable John C. Eldridge. In 2008, Judge Barbera was elevated to the Court of Appeals to fill the vacancy created by the retirement of the Honorable Irma Raker. Thus, Judge Barbera and I were colleagues on the Court of Special Appeals for two years and for eleven years on the Court of Appeals prior to my retirement in 2019. The record reveals that during our respective terms of court, we agreed more than we disagreed about the law and its application to the many cases that came before our Court for resolution.

Mary Ellen Barbera is a treasured colleague and educator who is forthright, gracious, industrious, warm-hearted, and friendly. Notably, she is the first woman in the history of the Maryland Judiciary to be appointed Chief Judge of the Maryland Court of Appeals. Given her many duties as Chief Judge and the enormous amount of reading that is required of appellate judges, Chief Judge Barbera is an adroit leader in striking the proper balance between her required reading assignments and focusing on other matters of interest. She maintains considerable respect for the welfare of others and for comradery and laughter among our colleagues and law clerks as demonstrated by our annual end of term of court "get together with the law clerks for lunch and bowling" designed to celebrate their contributions to the work of the Court of Appeals.

Mary Ellen Barbera, as Chief Judge of the Court of Appeals, and not as a bowler, demonstrates regularly her considerable talents as a jurist, administrator, and trailblazer in that she is not afraid to challenge the status quo; emphasizing that the way we have always done it (tradition) is not necessarily the way we are going to do it (going forward). One of the first policy changes implemented during her administration as Chief Judge was to establish a uniform deadline, with the unanimous consent of the Court, to file our written opinions with the Clerk of the Court no later than the end of the term of court in which the case was argued. This change in policy clearly has enhanced the public's perception of the work of the Court.

* Judge Greene retired from the Court of Appeals of Maryland effective July 1, 2019.

MEL, as she is affectionately known, probably would not describe herself as a trailblazer. She is far too modest. Instead, she would find a way to compliment others. I believe her focus would not be on herself as chief judge and administrator, but on the "the trailblazers who cleared a path for [our] generation."[1] The Chief has said that she wants to be remembered as "someone who furthered the rule of law and increased access to justice for everyone."[2]

In June 2020, Chief Judge Barbera wrote that "[t]he [mass] protests of the last several weeks have coalesced into a truth that cannot be ignored: people of color are being denied their rightful equality."[3] She reminded us of our collective responsibility, particularly as judges, "to make the guarantees embodied in [the Constitutions of the United States and Maryland] a reality for all people."[4] She urged that judges reexamine how we administer justice and "determine, along with the other branches of government, how to ensure that the protections and rights under law are afforded equally to all of us."[5] The Chief emphasized that "[w]e must assure that our courts do not suffer bias, conscious or unconscious. We must examine, together, the reasons for disproportionate impact upon people of color, and address those reasons."[6]

Chief Judge Barbera has inspired and challenged us. She said:

In Maryland, we have begun to address some of the systemic inequities that affect the poor and people of color more often and with greater detriment. We have begun pretrial reform, but still need pretrial services state-wide to eliminate the pretrial detention of those who do not pose a risk, but cannot afford even a low monetary bail. We have instituted mediation in landlord-tenant cases, but we need to address the manner in which the hundreds of thousands of landlord-tenant matters are filed and administered each year.

We are working to improve the justice responses to children involved with the courts. But we do still need to better address the problems of our young, our children, who have grown up in violence and poverty, far too many of whom are of color. We must recognize that their suffering is our suffering and their desperation, ours. As long as they are not afforded the stability and opportunity that all children deserve and require, we risk our collective stability as a state and as a nation.

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1. Gina Galluci-White, *Hon. Mary Ellen Barbera*, DAILY REC. (Nov. 8, 2018), https://thedailyrecord.com/2018/11/08/trailblazers-hon-mary-ellen-barbera/.

2. *Id.*

3. Statement from Mary Ellen Barbera, C.J., Ct. Appeals Md., Statement on Equal Justice Under Law 1 (June 9, 2020), https://mdcourts.gov/sites/default/files/import/coappeals/pdfs/statementonequaljustice060920.pdf.

4. *Id.* at 1–2.

5. *Id.* at 2.

6. *Id.*

We have been fortunate in Maryland to have had a longstanding commitment to a judiciary that looks like the people it serves—and an equal commitment to access to justice. We must, however, recognize the economic and racial disparities that persist in our justice system. We cannot eliminate them until we make certain that all voices are heard and respected and that the perspectives and experience of all realign our practices to make good the promise of equal justice under law.[7]

In another respect, looking forward, Chief Judge Barbera has been in the forefront of the movement to change the name of the appellate courts and the judges of those courts. In the interest of clarity and consistency with the overwhelming majority of other states, the Chief worked diligently to initiate renaming the Court of Appeals and the Court of Special Appeals of Maryland. The Court of Appeals would be designated as the Supreme Court of Maryland and the Court of Special Appeals would be designated as the Court of Appeals.[8] Under this change the judges of the Supreme Court would be identified as justices of the Court and judges of the Court of Appeals would be identified as judges of that Court. The heads of the respective appellate courts would be identified as Chief Justice and Chief Judge, respectively.

Chief Judge Barbera has also challenged the status quo in several of her opinions, notably, her concurring opinion in *Small v. State*.[9] I authored the majority opinion for the Court in *Small*. In that case, a victim had described his attacker as having the letter "M" tattooed on his neck; the victim was shown a photo array in which the suspect was the only person who had a visible tattoo on his neck.[10] The Court held that the visible tattoo served to emphasize the suspect's photograph as compared to the other photos, and, in conjunction with the fact that the suspect's photo was the only one repeated in a second photo array, law enforcement impermissibly suggested to the victim that he should identify the suspect's photo.[11] To reach its conclusion, the Court applied the framework for assessing the reliability of eyewitness identification as set forth by the United States Supreme Court in *Manson v.*

7. *Id.* at 2–3.

8. On April 6, 2021, the Maryland General Assembly passed HB 885 proposing an Amendment to the Constitution to change the names of the Maryland appellate courts and to change the name of a Judge of the Court of Appeals to be a Justice of the Supreme Court of Maryland. The proposed Amendment will be on the November 2022 ballot. H.B. 885, 2021 Leg., 442d Sess. (Md. 2021). Also, during Chief Judge Barbera's administration, the State Law Library was renamed as Thurgood Marshall State Law Library in Honor of Justice Thurgood Marshall. S.B. 594, 2019 Leg., 440th Sess. (Md. 2019).

9. 464 Md. 68, 102, 211 A.3d 236, 256 (2019) (Barbera, C.J., concurring) (advocating for courts to change how we handle the admission of eyewitness identification evidence).

10. *Id.* at 91, 211 A.3d at 249.

11. *Id.* at 91–92, 211 A.3d at 249.

Brathwaite,[12] and adopted by the Court of Appeals in *Jones v. State*.[13] The majority also acknowledged and clarified that the five *Biggers* reliability factors, in conjunction with the additional factors identified in *Henderson*[14]—many of which overlap with the *Biggers* factors—may be considered by the suppression court in assessing the totality of the circumstances when identification procedures are challenged.[15]

Chief Judge Barbera, in her concurring opinion, agreed that the Court had correctly applied the current law to the facts of the case.[16] Yet, her challenge was to the Court's failure to seize the opportunity to join those state supreme courts that embraced a far more comprehensive list of suggestiveness and reliability factors than that devised by the United States Supreme Court.[17] The Chief advocated for the Court to adopt the *Henderson* court procedure for evaluating suggestiveness and reliability by incorporating additional variables.[18] Believing that the targeted consideration of new variables and a new four-part inquiry would ameliorate the shortcomings of the *Manson* framework, Chief Judge Barbera contended that Maryland should adopt a new framework to "help jurors better determine the weight to be accorded to an identification offered at trial."[19] The Chief relied upon research studies that indicated "that, despite an eyewitness's belief that his or her identification is accurate, there is no statistically significant correlation between certainty and accuracy."[20] In addition, she took into consideration that the *Manson* test "treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors."[21] Ultimately, the Chief called for development of a "more rigorous protocol for assessing eyewitness identification reliability in Maryland."[22] To that end, in her concurrence, she asked the "Court [to] direct the Rules Committee to craft and propose rules of procedure that bring scientific rigor to the assessment of an eyewitness identification that a defendant has challenged as unduly suggestive and,

12. 432 U.S. 98 (1977).
13. 310 Md. 569, 530 A.2d 743 (1987).
14. 27 A.3d 872 (N.J. 2011).
15. *Small*, 464 Md. at 87, 211 A.3d at 246–47.
16. *Id.* at 103, 211 A.3d at 256.
17. *Id*.
18. *Id*. at 108–09, 211 A.3d at 259–60.
19. *Id*. at 117, 211 A.3d at 264.
20. *Id*. at 109, 211 A.3d at 260.
21. *Id*. (quoting NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 6 (2014)).
22. *Id.* at 114, 211 A.3d at 263.

ultimately, unreliable," in addition to other modification of procedures.[23] The *Small* concurring opinion is only one of Chief Judge Barbera's efforts to point the Court in another direction.

Chief Judge Barbera's contributions to the law and its development are monumental. Others will speak to them in their submissions on the occasion of the Chief's retirement. In my view, she is a jurist who has graced the Court of Appeals and the legal community with charm and commitment to meaningful change to promote fairness and justice under the law. I am thankful for Mary Ellen Barbera's tenure as Chief Judge in our State and for being a wonderful colleague and friend. We have all benefitted from her warm presence and meticulous leadership of the judiciary as she has embraced the relevant science and changed and clarified principles of law and policies of the Court, always "striv[ing] to take the good and make it better."[24]

23. *Id*. at 117, 211 A.3d at 264.

24. Gina Galluci-White, *Hon. Mary Ellen Barbera*, DAILY REC. (NOV. 8, 2018), https://thedailyrecord.com/2018/11/08/trailblazers-hon-mary-ellen-barbera/.

A TRIBUTE TO THE HONORABLE MARY ELLEN BARBERA

BRIAN E. FROSH*

When asked when there would be enough women on the Supreme Court, Ruth Bader Ginsburg famously responded: "When there are nine. For most of the country's existence, there were nine of the same sex and they were all men, and nobody thought that that was out of order."[1]

Chief Judge Mary Ellen Barbera has the historic distinction of being the first woman to serve as Chief Judge of the Court of Appeals of Maryland and the first person to preside over a Court of Appeals with a female majority (four women, three men). In a country where women represent over half of the population and for decades have made up more than half of law school students, these were important historic firsts.

Her historic milestone is an important part—but just the starting point—of Mary Ellen Barbera's legacy as Chief Judge. She has cemented her legacy with a long and impressive list of accomplishments as head of Maryland's judiciary. I want to focus here on two aspects of her service: the experience of the Assistant Attorneys General in my office with the Chief Judge, and the Chief Judge's dedication to promoting access to justice and equal justice for those impacted by Maryland's court system.

Since Chief Judge Barbera's 2008 appointment to the Court of Appeals, attorneys in my office have appeared before her in hundreds of cases. Because the Office of the Attorney General handles all criminal appeals for State's Attorneys across the State, our Assistant Attorneys General are "frequent fliers" in the Court of Appeals, usually appearing for oral argument in at least one criminal appeal on every day the Court sits.

Apparent to the Assistant Attorneys General appearing before her is Chief Judge Barbera's love of appellate law. The Court under her leadership allowed for passionate advocacy, while keeping the focus where it should be in appellate proceedings, on precise legal analysis and the appropriate direction of Maryland law. As an alumna of the OAG Criminal Appeals Division herself, Chief Judge Barbera is a subject-matter expert on criminal law. She was always prepared with questions that cut to the heart of the matter, and certainly tested the mettle of the advocates who appeared before her. Yet she did so with unfailing courtesy and civility to attorneys appearing

* Maryland Attorney General.

1. ABA, *Justice Ginsburg Envisions a High Court of Nine Women Justices* (May 1, 2013), https://abanow.org/2013/05/justice-ginsburg-envisions-a-high-court-of-nine-women-justices/.

before her and to her colleagues. Any trepidation at appearing before her flowed from the knowledge that one needed to be fully prepared for her questioning; it was never a fear of tongue-lashing or a personal attack, which were simply absent from her repertoire.

Chief Judge Barbera's collegiality and good humor also left a lasting impression on the attorneys in my office. When the Supreme Court granted certiorari in *Maryland v. King*,[2] then-Judge Barbera, who wrote the Court of Appeals' dissenting opinion, traveled to Washington, D.C., to watch the oral argument in the Supreme Court with Judge Harrell, who wrote the majority opinion for the Court of Appeals. For the Assistant Attorneys General who worked on the case, the sight of the two judges sitting side-by-side, enjoying one another's company and the grandeur of appellate argument in the nation's highest court, sent a powerful signal about collegiality, friendship, and respect.

When an Assistant Attorney General retired after serving in the Criminal Appeals Division for nearly three decades, Chief Judge Barbera delighted in watching members of the Division pour into the courtroom to surprise her by attending her last argument. When the argument concluded, she gave the attorney a fond farewell from the bench that served as a memorable capstone to her career.

Chief Judge Barbera's legacy also includes her commitment to equality and justice. Under her leadership, the Maryland Judiciary created the Access to Justice Department to focus on supporting access to the courts for the self-represented. One important pillar of this effort is the judiciary's self-help centers, which serve more than 80,000 citizens annually.[3]

Chief Judge Barbera also took on the important issue of juveniles being shackled while appearing in courtrooms. Finding, among other things, that "placing children in shackles can be traumatizing and contrary to the developmentally appropriate approach to juvenile justice," the judiciary under her leadership adopted as policy "the presumption against the shackling of children during proceedings in the Juvenile Court" and ordered that a child in the court or hearing room "is to be unshackled and remain so absent a particularized security concern."[4]

While she fiercely respected the walls that must exist between judges and parties in cases, she always understood that others have important input

2. 569 U.S. 435 (2013).

3. MD. JUDICIARY, RESOURCES FOR SELF-REPRESENTED LITIGANTS IN THE MARYLAND COURTS 23 (2017), https://mdcourts.gov/sites/default/files/import/accesstojustice/pdfs/fy17srlreport.pdf.

4. RESOLUTION REGARDING SHACKLING OF CHILDREN IN JUVENILE COURT (Sept. 21, 2015), https://www.mdcourts.gov/sites/default/files/import/judicialcouncil/pdfs/resolutionregardingshackling20150921.pdf.

into the judicial system and the need to make sure its practices live up to the ideal we all share: "equal justice under law."[5] On these broader, systemic issues, she would always take my call, listen, question, and take action when she deemed it warranted.

Nowhere was her dedication to equal justice more apparent than in her actions to reform how bail is set in criminal cases. Decisions about who is released pending trial should be based on whether the person is a flight risk and/or a risk to the community—not on one's ability to pay. Nonetheless, hundreds of low-risk individuals were detained each day in Maryland jails because they were poor. In addition to being fundamentally unfair and of questionable constitutionality, the practice was costly and disproportionately impacted people of color, particularly Black people.

Chief Judge Barbera led the Court of Appeals in adopting a rule in 2017 to change this practice. Maryland Rule 4-216.1 makes clear both that "preference should be given to additional conditions without financial terms" and that "[a] judicial officer may not impose a special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition."[6]

Bail reform was a controversial and politically charged issue. The hearings before the Rules Committee and before the Court of Appeals included testimony from numerous witnesses including a former United States Solicitor General on one side and a former United States Attorney General on the other. Questions from the Court were pointed and incisive. It seemed clear that the Court was sharply divided.

Chief Judge Barbera adjourned the hearing before the Court took final action on the proposed rule. When it re-convened, modest amendments to the proposed rule were proposed and adopted. Then, the Court adopted the rule unanimously. The result was a clear measure of Chief Judge Barbera's skills as a bridge builder and as a leader.

As a follow-up to that rule change, Chief Judge Barbera organized training sessions for the judiciary and a statewide pretrial forum. She emphasized to the judiciary and to county officials the need for pretrial services, an essential component of any fair pretrial system that does not rely primarily on incarceration.

In the view of the Office of the Attorney General, the rule on bail reform was a watershed moment for criminal justice in Maryland. Jail populations dropped significantly. More work remains, but the rule, as it has been

5. Statement from Mary Ellen Barbera, Chief Judge, Ct. Appeals Md., Statement on Equal Justice Under Law 2 (June 9, 2020).

6. MD. RULES tit. 4, § 216.1 (2021).

applied, has already freed thousands of people to work, study and care for their families while they await trial. It has saved state and local governments millions of dollars, and there is no evidence that the rule has led to increases in the failure to appear rate or to crimes committed by individuals on pretrial release.

Socrates said: "Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially." Chief Judge Barbera has exemplified those Socratic ideals throughout her career. To use her own words, she well understood that "it is the happenstance of birth that can give us opportunities or not."[7] She also understood that "equal justice under law" is more than a motto—it's an ideal that requires our constant attention and work. For that, and so many other things, we applaud her service.

7. Andrea F. Siegel & Erin Cox, *Maryland's New Chief Judge Lauded as Forthright, Diplomatic*, BALT. SUN (July 3, 2013), https://www.baltimoresun.com/maryland/bs-xpm-2013-07-03-bs-md-barbera-20130701-story.html.

AN IRREGULAR ODE TO CHIEF JUDGE MARY ELLEN BARBERA

GLENN T. HARRELL, JR.*

I admit to a healthy bias regarding Chief Judge Mary Ellen Barbera. I love her like Gale Sayers loved Brian Piccolo.[1] It is a purely Arthurian love, like Lancelot for King Arthur (not like Lancelot's love for Queen Guinevere). It is a consequence of the time we spent together toiling in judicial vineyards.

I think our paths intersected meaningfully for the first time in 1999[2] when she was Deputy Legal Counsel to Governor Glendening, and I was a shortlisted candidate to fill a vacancy on the Court of Appeals.[3] The duties of the Office of Legal Counsel included sitting in on the Governor's interviews of judicial candidates and advising the Governor in the course of his post-interview deliberations. Frankly, I cannot recall whether she or Andrea Leahy, who was then Chief Legal Counsel,[4] sat in on my interview, but I am pretty sure she participated in the deliberations. My thanks to her are long overdue, even though she takes no credit for the outcome.

Chief Judge Barbera and I served together on the Court of Appeals from 2008 until I confronted in 2015 the same constitutional retirement she confronted in September of 2021. I acted as the Court's Senior Judge for internal court administration and, thus, as her surrogate. I think that I have, therefore, a sound basis from which to offer the views expressed in this tribute.

I have not served with a more collegial colleague over my thirty years as a judge. She is patient with her colleagues, attorneys, and court staff. She listens respectfully while you speak (abstaining from talking over you) and asks questions in an even and neutral tone. She laughs easily. Fairness in assigning opinion responsibilities is another of her hallmarks (which she shares with her predecessor, Chief Judge Robert M. Bell). Of some significance also, she never takes a victory lap when her opinion in a case

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1. BRIAN'S SONG (Columbia Pictures 1971).

2. A case may be made that she, while Deputy Chief of the Criminal Appeals Division of the Maryland Attorney General's Office (1989–98), appeared before me while I served on the Court of Special Appeals (1991–99); however, I am too lazy at present to perform the research necessary to confirm that.

3. Governor Glendening appointed me to that office on 17 August 1999.

4. She was appointed later to the Court of Special Appeals but was transitioning at that time to a position within a law firm.

prevails ultimately over your opinion. I can offer an example from personal experience illustrating a number of these traits.

The case is *King v. State*.[5] It arose from the State's collection of a DNA specimen from an arrestee, which the State used to connect the arrestee to an unrelated "cold case" committed years before King's arrest. King mounted a Fourth Amendment challenge. I wrote, for five judges of the Court, the majority opinion disapproving of the State's acquisition and use of the DNA. Judge Barbera wrote, for the remaining two members of the Court, a cogent, and almost as persuasive, dissent.

The State sought certiorari review by the U.S. Supreme Court. It was granted.[6] Oral argument was scheduled for 26 February 2013. Judge Barbera organized a field trip, together with our law clerks, to attend oral argument and lunch afterward at The Monocle Restaurant near the Court. Joining us at lunch was Jess Bravin, a Supreme Court journalist for *The Wall Street Journal* ("WSJ"). From some undisclosed source, he heard of our trip and wanted to write an article on appellate collegiality between judges holding opposing views in an important case. His article was published on 15 April 2013, in the print version of the WSJ, accompanied by a "lovey-dovey" photograph of Chief Judge Barbera and me, posed in our red robes in our Annapolis courtroom, laughing and talking, and a photograph of the boisterous lunch at The Monocle. The formal photo was captioned "Maryland Court of Appeals Judges Mary Ellen Barbera and Glenn Harrell remain friends despite disagreeing on a case before the Supreme Court."[7] This is how it is supposed to be.

On 13 June 2013, the Supreme Court filed its opinion overruling, by a five-to-four vote, my opinion for the Court of Appeals as well as approving of Judge Barbera's jurisprudence.[8] She barely raised an eyebrow at me and never initiated conversation about the outcome. I was the one who raised the topic, usually crying over the spilled milk of having failed to capture Justice Breyer with my reasoning. Yet, she remained chivalrous.

Chief Judge Barbera, as a law-giver, is highly principled and mindful that the Court be perceived in the same light by the bar and public. The best example of this trait that comes to mind involves the case of *State v. Waine*.[9] *Waine* presented an opportunity for a newly-configured Court to overrule a hotly-debated earlier decision in *Unger v. State*. I dissented in part in *Unger*,

5. 425 Md. 550, 42 A.3d 549 (2012), *rev'd on other grounds*, 133 S. Ct. 1958 (2013).

6. Maryland v. King, 133 S. Ct. 1958 (2013).

7. *See* Jess Bravin, *Maryland Judge Finds Tables Turned*, WALL ST. J., https://online.wsj.com/article/SB10001424127887323820304578411163911956102.html (Apr. 15, 2013, 3:45 PM ET).

8. *King*, 133 S. Ct. at 1965–66.

9. 444 Md. 692, 122 A.3d 294 (2015).

together with Judge Adkins. Chief Judge Barbera did not sit on *Unger*. Following *Unger*, three of the judges in the *Unger* majority departed the Court and had been replaced by the time *Waine* reached the Court. Thus, the holdover *Unger* judges were split 2-2, leaving the previously uncommitted new judges "up for grabs" vis-à-vis the State's patent objective to overrule *Unger*. Anticipating the possibility that I was a likely candidate to mount a campaign to attempt to sway the "new" Court to reject *Unger*, Chief Judge Barbera engaged me in a dialogue about the principles of the doctrine of *stare decisis*. I had claimed in my *Unger* dissent that the *Unger* majority paid mere lip service to *stare decisis* in overruling an earlier decision (of mine) in *State v. Adams*.[10] She convinced me that *stare decisis*—notwithstanding whether it may have been abused in *Unger*—if applied properly in *Waine*, compelled rejection of the State's offer to turn back the clock to overrule a debatably wrongly decided case. In short, she persuaded me to honor the rule of law and put aside my ideologic (sour grapes?) and pragmatic preferences.

Speaking further to the care and maintenance of the Court's reputation before the bar and public, Chief Judge Barbera demonstrated her sensitivity to that objective shortly after her appointment as Chief. She declared a policy that the Court would decide every case argued in a term within that term, absent extenuating circumstances. This remedial proclamation was needed because the Court had been called out in a series of articles in *The Daily Record* for an unacceptable tardiness in deciding a number of cases.[11] Although the Court caught up its opinion backlog before she became Chief Judge, her attention to the promotion of the public trust and confidence in the Court offered a commitment not to repeat what had occurred previously.[12]

A smile spreads over my face every time the Chief, usually when engaged in public speaking, lapses into what I call her "schoolmarm" persona. By "schoolmarm," I mean benevolently a born-and-bred teacher who adopts a relentlessly cheerful demeanor in the delivery of the day's lesson. This comes as no surprise because she taught in the Baltimore City public schools before attending law school and taught at the American University Washington College of Law (1993–2017) and at the University of Baltimore School of Law (1987–90, 1993–98). It appears that she subscribes,

10. 406 Md. 240, 958 A.2d 295 (2008); *see also Unger*, 427 Md. at 417, 48 A.3d at 261–62 (discussing the application of *stare decisis* to this case).

11. *See, e.g.*, Ed. Advisory Bd., *Md. High Court Decisions Too Long in Coming*, DAILY REC. (Aug. 21, 2011), https://thedailyrecord.com/2011/08/21/editorial-advisory-board-md-high-court-decisions-too-long-in-coming/.

12. Her leadership was also stellar in overseeing the ongoing implementation of MDEC (Maryland Electronic Courts, our statewide paperless filing initiative), the resumption of annual statewide judicial conferences, and adjusting court operations during the COVID-19 pandemic.

as a pedagogical principle, to the aphorism that "a spoonful of sugar helps the medicine go down."[13]

I agree completely with the praise heaped on the Chief in the other tributes appearing here. I conclude simply with the gist of a song by the singer James Taylor[14]—in Mary Ellen Barbera, the bench, bar, and public have a friend.

13. MARY POPPINS (Walt Disney Prod. 1964).

14. James Taylor, *You've Got a Friend, on* MUD SLIDE SLIM AND THE BLUE HORIZON (Warner Bros. 1971).

TRIBUTE TO CHIEF JUDGE MARY ELLEN BARBERA: A LAW CLERK'S PERSPECTIVE

REBECCA W. FOREMAN, ESQ.*

Over the course of Chief Judge Barbera's nineteen years as a judge on Maryland's appellate courts, dozens of lawyers have had the good fortune of serving as her law clerk. I was one of those lucky lawyers to obtain a clerkship with Chief Judge Barbera during the Court of Appeals' 2015 term, but our relationship goes back several years prior. I have the unique privilege of writing this tribute not just as a former law clerk, but also as a former student, intern, and, fondly, having her officiate my wedding. And, above all, I can speak on behalf of all of Chief Judge Barbera's law clerks in writing this tribute to her as a lifelong mentee. Chief Judge Barbera has singularly shaped the trajectory of my career, and those of undoubtedly many others, and we are all forever indebted to her and eternally grateful for her mentorship.

I first met Chief Judge Barbera in my second year of law school at the American University Washington College of Law when I enrolled in the Criminal Procedure course that she taught alongside her husband, now-retired Judge Gary Bair. Each week, Judge Bair gave the lectures on the assigned reading and Chief Judge Barbera presided over a mock suppression hearing based on an assigned prompt in which four students—two in the role of prosecutor and two as defense attorneys—argued whether certain evidence obtained by police should be suppressed under the principles discussed in lecture. Understanding that as a then-Associate Judge on the highest court in the State of Maryland, any student reasonably would find her intimidating, she made every effort not to be. I was immediately struck by her dynamism—she was engaging, enthusiastic, quick-witted, and kept the students on our toes. Yet she was eminently fair in her questioning and her constructive critiques of the students' advocacy and application of the relevant precedent. Her students learned not only the nuances of the Supreme Court's jurisprudence, but also the mechanics of how the law was applied in practice—a lesson that many doctrinal courses neglect to teach.

After completing Chief Judge Barbera's Criminal Procedure course, I sought and was fortunate enough to obtain an internship in her chambers that summer, followed by a clerkship a year after graduation. As expected, Chief

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Judge Barbera provided me with everything any young lawyer could ask for in an internship and clerkship. When I was an intern, she gave me the opportunity to do much more than discrete research projects and memoranda—as is common for law school interns serving on appellate courts. My workload and level of responsibility included both advising her on cases coming before the Court and taking the first pass at an opinion she was tasked with authoring. As a law clerk, Chief Judge Barbera continually set high expectations for my writing and critical thinking so that I always had new goals to surpass. With her high expectations, however, came the freedom to reach my own conclusions and a genuine respect for my opinion. Chief Judge Barbera does not hire law clerks to be rubber stamps; she often sought counsel from her clerks in debating the right outcome of a particular decision, and on more than one occasion has been swayed from her initial impression after reading a law clerk's bench memo or engaging with the clerk on his or her analysis. In assigning draft opinions to her clerks, she would instruct us on the mandate and high-level reasoning a majority of the Court had agreed upon, but she expected us to write the first draft of the opinion based on our own research and analysis. This responsibility and freedom is truly invaluable for a young lawyer—to be required to test the arguments made in briefs submitted to the Court by much more experienced lawyers, draw our own independent conclusions, and draft an opinion in the voice of the State's highest Court fosters a level of confidence and polish that is essential for a career in which critical thinking and persuasive writing are crucial components.

While my clerkship with Chief Judge Barbera was instrumental in honing my analytical and writing skills, foremost were the lessons I learned from her leading by example. She is a tireless worker—she was almost always the first one in chambers and the last to leave, unless she had a law school class to teach, a speaking engagement, or a meeting in Annapolis during the legislative session. During my summer internship, Chief Judge Barbera was elevated from Associate Judge to Chief Judge, and she balanced effortlessly her judicial obligations and the administrative duties required of the head of the Maryland Judiciary, which required her to wear many hats, often at the same time or in quick succession. As one example, she made productive use of her time during her trips from her home base in Montgomery County to the Court of Appeals building in Annapolis. Her law clerks would alternate driving with her to Annapolis on oral argument days, and during those trips she would re-read the briefs that were set for argument that day, take a call from a member of the legislature about a matter coming before the General Assembly, or connect with a colleague to persuade him or her to join her view on a case or discuss an upcoming Rules Committee meeting. Some of my favorite memories from my clerkship are those rides

to Annapolis, where I got an inside look at the inner workings of the Judiciary and how it interacts with the other branches of State government, and to interact with the Judge on a more personal level. Chief Judge Barbera also took that opportunity to press us about the bench memos we wrote for that day's cases, so we had to be prepared not just to transport this precious cargo safely to the Court of Appeals, but to do so while giving an impromptu oral argument on the key facts of those cases and why our analyses and recommendations were correct.

And no matter the myriad other responsibilities on her plate as judge, law school lecturer, and head of the Maryland Judiciary, Chief Judge Barbera paid attention to the smallest details. When working with her on a draft opinion, we would spend hours debating not just the correct result and analysis for a particular case, but also proper sentence structure and prose—to the extent there was any disagreement, we would pour through the Chicago Manual of Style until we were satisfied that every sentence was constructed correctly. She was also careful to ensure that her opinions were faithful to the authorities on which they were based. After a draft opinion was in essentially final form, the law clerks would gather together to read the draft word-for-word against the citations to the record and Maryland Reporters, so that we could confirm that every word of the opinion characterized the record properly and applied the relevant case law correctly. My co-clerk and I relished this exercise because we knew that the Court's published opinion would be accurate, precise, and without error as a result. Chief Judge Barbera's thoughtful and meticulous style taught us the power of our rhetoric, and that even the smallest details can have a profound impact.

Of course, Chief Judge Barbera is an impeccable writer with keen intellect, but most of all I admire her for her integrity. In my experience as her intern and law clerk, she continually managed to strike a balance between appreciating the broad-ranging impacts the Court's decisions have on people's lives, while eschewing the temptation to issue a ruling solely to reach a desirable outcome. On many occasions, I witnessed her wrestle with the weighty decisions the Court had to make, but, in the end, Chief Judge Barbera always made principled decisions based on what she truly believed to be consistent with the law.

Notwithstanding all of her professional obligations, Chief Judge Barbera also takes great interest in her mentees' lives. I felt such a strong connection to her even after my brief summer internship that when I got engaged and was set to be married early into my clerkship a year and a half later, I could think of no one better to officiate our wedding than Chief Judge Barbera. As should come as no surprise, she performed her duties brilliantly. She is every bit as dynamic and engaging an officiant as she is a judge and teacher. Many wedding guests approached me later to admire her disarming

and endearing nature, and to express their appreciation that she initiated conversations and made a genuine effort to get to know them. That anecdote embodies just who Chief Judge Barbera is as a person—though her charisma is understated, she is as sincere and radiant as she is brilliant. And though she is adamant not to take credit for her law clerks' successes—despite that we would not have achieved our various accomplishments without her mentorship—she has always been our biggest fan and cheerleader. Those of us who were fortunate enough to clerk for Chief Judge Barbera are forever a part of her family, including our children who become her "grand-clerks." It is a family that I am proud and honored to be a part of.

Judge, I speak for all of your former students, interns, and clerks in thanking you for all you have taught us and the impact you've had on our professional and personal lives. While the bench will not be the same without you, we know that your work is not completed, and that you will continue to find avenues to fulfill you and effect positive change on those around you and the broader legal community. On behalf of all of us, congratulations on your judicial career and this next chapter.

TRIBUTE TO CHIEF JUDGE MARY ELLEN BARBERA

CHARLES E. MOYLAN, JR.*

Initially, I found it hard to wrap my brain around the harsh reality that young and vibrant Chief Judge Mary Ellen Barbera had actually reached the age of mandatory retirement. As I struggled to comprehend the incomprehensible, however, a brighter revelation happily dawned. I realized that I have been lucky enough to have been sitting in the catbird seat, an observation post from which to have observed at very close hand (and, in some respects, even to have participated in) the entire professional trajectory that culminated in the Chief Judgeship. Accordingly, I leave to others any tribute to Judge Barbera's eight years as Chief Judge of Maryland or even to her thirteen-year stint on the Court of Appeals. My alternative salute will be to the longer thirty-seven-year professional journey that led to the Chief Judgeship. What were some of the key elements and who were some of the key players that went into the making of a Chief Judge? What were some of the key events that presaged later success?

Ironically, the professional journey that ended in Annapolis began in Annapolis. In September of 1984, I was delighted when my law school schoolmate, Robert L. Karwacki, who had been the administrative judge for the Circuit Court of Baltimore City (then still called the Supreme Bench), joined us on the Court of Special Appeals. What I did not yet fully appreciate was that he was bringing with him as his first appellate law clerk an eager and intellectually inquisitive Mel Barbera, fresh out of the University of Maryland Law School and embarking, as a first-year law clerk, on her first legal job. If you plan to end up on the Court of Appeals, there is no better way to prepare than by drafting appellate opinions, although I daresay she had not planned in that way.

The transformative influence of Judge Karwacki on future Judge Barbera cannot be over-emphasized. In addition to being a treasure trove of legal lore and wisdom, Judge Karwacki had a life-long commitment to seek out and to follow the better angels of the law. In that regard, Mel Barbera has been a worthy disciple of Judge Bob Karwacki. The influence of the law clerk's job was substantive as well. In her companion tribute, my colleague Judge Deborah Eyler has deftly traced and analyzed Judge Barbera's impact

* Judge, Maryland Court of Special Appeals (retired December 14, 2020).

on the law of Maryland. In all the cases analyzed, I found only a single one that was not in the area of criminal law or criminal-constitutional procedure.

This, I suggest, was inevitable. Judge Karwacki's area of special expertise was criminal-constitutional procedure, as could have been readily predicted from his pre-judicial life as an assistant attorney general arguing criminal appeals. The clerkship year of 1984–85, moreover, was one wherein the entire Court of Special Appeals was itself deeply immersed in criminal-constitutional procedure. In the early life of that Court, "Special Appeals" essentially meant "Criminal Appeals." That turbulent time was during the immediate wake of the Warren Court criminal law revolution. Maryland, with forty-nine other states, was frantically rushing to conform hundreds of years of pre-Warren Court practice and procedure to the suddenly imposed commands of the Fourth, Fifth, Sixth, and Eighth Amendments. Throw in the Equal Protection Clause for good measure. This was law clerk Barbera's intellectual seedbed. These were the seeds that inevitably grew.

A passing word in defense of areas of special expertise. Although appellate judges are in theory expected to be generalists, the appellate judge has not yet been born—from Lord Mansfield to John Marshall to Oliver Wendell Holmes—who did not have, and revel in, a comfortable retreat of special expertise.

Another significant influence on young Mel Barbera was extended interaction—over the years and in divergent venues such as law schools, bar association committee assignments, and the courtroom—with the inimitable Byron Warnken. Extended interaction with Byron is an education in and of itself, legal and otherwise. The special area of expertise of Byron, moreover, was criminal constitutional procedure.

It was only a little more than a year after her clerkship had concluded that I became personally aware that the fairy dust had, indeed, fallen on Mary Ellen Barbera, as she rapidly emerged as the star performer and later Deputy Chief of the Criminal Appeals Division of the Maryland Attorney General's Office. Her area of special expertise coincided with my own, as did her strategic deployment of that expertise. I looked forward to her appearances before me, knowing that we saw eye to eye. The hot topic of that half-decade was *Batson v. Kentucky*[1] and the pandemic racial implications of the peremptory challenge. *Batson v. Kentucky* was more than enough to keep both the Court of Special Appeals and the Criminal Appeals Division fully employed for three or four seasons, as an infinite variety of possible *Batson* applications cried out for prompt resolution. In responding to *Batson* particularly, I remember vividly the exhilarating, but scrupulously informal, collaboration between the opinion writing judge and the assistant attorney

1. 476 U.S. 79 (1986).

general. Sometimes the Court of Appeals agreed with us. Occasionally it went astray and did not, but the assistant attorney general and I always agreed. Once again, of course, the focus was on criminal-constitutional procedure.

It was during those years, moreover, that Mary Ellen Barbera first became a member of the Maryland State Bar Association's Committee on Pattern Jury Instructions: Criminal ("Irma's Committee"). The focus was, by definition, on criminal law and criminal-constitutional procedure. The business meetings were intellectually heavy, but the dinners that followed were more convivial. They provided the golden opportunity for the new and young lawyers to "join the club"—to get to know on an easy and casual basis Irma, Andy, Debby, Howard, Byron, and countless others. This, of course, is an indispensable stage of the maturing process. King's Contrivance and Chiapparelli's are meaningful rungs on the professional ladder.

Of all of the transformative influences that coalesced to mold the inquisitive young law clerk into the chief judicial officer in the state, the most catalytic without peer has been that of her husband, Judge Gary E. Bair. Gary had been the Chief of the Criminal Appeals Division when Mary Ellen was Deputy Chief. After a stellar career, he recently retired from the Circuit Court for Montgomery County. It has been the good fortune of bench and bar that the partnership between Mary Ellen and Gary has been not simply marital but also professorial. At Maryland and District of Columbia law schools, especially at American University, they have combined to teach senior seminars. They have been equally generous with their teaching skills at numerous judicial classes staged by the Maryland Judicial Institute. In a number of lecturing gigs myself, I was fortunate to have performed with Mary Ellen and Gary or under their aegis. For year after year, Judge Barbera and Judge Bair, Mel and Gary, have been a perfect teaching team. It goes without saying that their subject was criminal-constitutional law. After joining the Court of Appeals, Judge Barbera served for five years as the Chair of the Board of Directors of the Judicial Institute of Maryland.

The legal world has not adequately noted the fruitful correlation between judging and teaching. For some judges, opinion writing is a modality of teaching. The opinion writer is sometimes praised, undeservedly, for a felicitous turn of phrase or for the perfect *bon mot* as if that felicitous phrasing or the *bon mot* had been a burst of sudden inspiration. The opinion writer's well-kept secret is that the felicitous phrasing and the precise word selection may have been nothing more than the inevitable end product of repeated honing, trimming, and polishing semester after semester in the classroom. Effective expression sometimes needs a chance to marinate. As William Butler Yeats incisively described the craft of writing, "A line will take us hours maybe; Yet if it does not seem a moment's thought,

Our stitching and unstitching has been naught."[2] Judging and teaching are by no means divergent disciplines. The classroom and the lecture hall are simply Off Broadway. Some of the Chief Judge's opinions, therefore, may have sounded eerily familiar to her former students. Such is the synergetic cross-fertilization between the classroom and the courtroom. Before and while attending law school at night, incidentally, Mel Barbera had taught for nine years in the public school system of Baltimore City. Even years later, the fingerprints of a born teacher are indelible.

I had been saddened several years earlier when Mel Barbera left the Criminal Appeals Division for several years to take up other legal duties, because it aborted the plans we had tentatively been making to write a book together on the Criminal Law of Maryland. I was conversely overjoyed, therefore, on January 4, 2002, when she was sworn in as a member of the Maryland Court of Special Appeals. She was appointed, incidentally, to the very seat that I had recently vacated. I lingered on the Court as a Senior Judge, so Judge Barbera and I were colleagues on that Court for almost seven years.

From the outset, the tone and tenor of her opinions was inspirational. Those opinions did not merely explain the Court's decision, as important as that function may be. On what some of us consider to be a higher plane of opinion writing, they contributed to the incremental building and the concomitant teaching of the ever-growing common law of Maryland. Early in the twelfth century, a philosopher walked out onto the square of a provincial French town. Two workmen sat on the ground, each with a chisel in hand and each before a large block of stone. The foundations were being laid for Chartres Cathedral. The philosopher approached the first workman, "My good man, what are you doing?" He received the standard reply, "I'm chipping stone." The philosopher turned to the second workman, "And my good man, what are you doing?" The response reverberates to this day, "I am building a cathedral." As she broke from the starting gate, Judge Barbera knew that she was building a cathedral. Sir Frederick Pollock once expressed his reverence for such contributing to the building of the common law, "So magnificent is this living temple of justice, this immemorial yet freshly growing fabric of the common law, that the least of us will be happy hereafter if he can look back upon a single stone thereof and say, 'Yea, the work of my hands is there.'"

It was with the mixed emotion of pride and regret that I looked upon the period of December 2007 through September of 2008. It was within that nine-month span that the Court of Appeals cannibalized the Court of Special

2. WILLIAM BUTLER YEATS, *Adam's Curse*, *in* THE COLLECTED WORKS OF WILLIAM BUTLER YEATS 72 (1908).

Appeals by elevating, seemingly with one fell swoop, Mary Ellen Barbera, Sally Adkins, and Joe Murphy. We promptly enlisted Shirley Watts and Michele Hotten just to protect ourselves from further raiding. On the Court of Appeals there then proceeded to effervesce in Judge Barbera's opinions the seeds that had once been sown in the appellate briefs of the assistant attorney general. The dominant message remained in the language of criminal-constitutional law.

The final rung up the ladder for the promising young law clerk of 1984 was into the center chair on July 8, 2013. What does it mean when an associate judge becomes a chief judge? It means, inter alia, that an avalanche of administrative responsibilities will be piled onto an undiminished adjudicative load. Bench and bar alike, however, were electrified by Chief Judge Barbera's first and immediate administrative triumph, that of making the trains run on time—the prompt filing of appellate opinions within established filing deadlines.

At the apex of the entire judicial branch of government, the importance of the ceremonial role of the position of Chief Judge of the entire state cannot for a moment be overemphasized. One is not simply presiding over a collegial gathering of seven essentially like-minded people. That might have been true one hundred years ago. It no longer is. One is presiding over a vast administrative apparatus that reaches into every far-flung corner of the state from Deep Creek Lake to Assateague. The Chief Judge, of course, is the voice for over 300 judges and the 4,000 employees of the judicial branch, before the Governor, the General Assembly, the press, and the public. It is almost incomprehensible how one person, between arguing over the subtleties of a police interrogation technique and delving into the nuances of double jeopardy, can suddenly put those problems aside to determine how the entire state judiciary will respond to an international pandemic. Between the national demands of boards and meetings and seminars, on the one hand, and the compelling local demands of weddings and funerals and mandatory celebrations, on the other hand, how does one even pick up an appellate brief? Could young Mel Barbera have remotely anticipated any of this when she signed on as Bob Karwacki's first appellate law clerk? As the public voice of the Maryland judiciary, however, Chief Judge Barbera has staged a virtuosa performance. Bravo!

I have saved for the last an aspect of the education of the future Chief Judge that could too easily have been overlooked. In bits and pieces over the years, I have come to realize that Judge Barbera is, as am I, an inveterate old movie buff. For such old movie buffs, of course, our Valhalla is the Golden Age of Hollywood, from Gary Cooper to "Mrs. Miniver" and from Paul Newman to "All About Eve." Although parents and elders may have rued the so-called wasted hours spent "at the movies," many of those movies

constitute the great storehouse of Western thought and culture from which judicial opinions are merely emanations. Unfortunately, the official transcript fails to record the hours upon hours of graduate credit once earned at the Ideal or at the Hampden (with its Gottfried Organ) on 36th Street.

What a blinding epiphany it would have been if we could have looked in on a fifth-grade classroom at St. Thomas Aquinas Elementary School on Hickory Avenue at 37th Street sixty years ago and have seen a ten-year-old girl sitting in that classroom, the DNA of the future chief judicial officer of the state. From my catbird seat, I have witnessed an incredible thirty-seven-year journey. What words then are appropriate to pay tribute to such a rainbow arc trajectory? What words are appropriate to toast in a single breath both the duly honored Chief Judge who now stands at the far end of that rainbow bridge but also the inquisitive law clerk who once stood at the near end? I must try. As one old movie buff to another, let me raise a glass of Dom Perignon and salute the retiring Chief Judge and the aspiring law clerk alike with the inimitable words of Richard Blaine (Rick, of course, of Rick's Cafe), "Here's looking at you, Kid."[3]

3. CASABLANCA (Warner Bros. 1943).