Survey of Maryland Court of Appeals
Decisions 1974-1975

ATTORNEY DISCIPLINE

During the September Term, 1974, the Court of Appeals reviewed several decisions by three-judge Circuit Court panels in disciplinary proceedings brought against Maryland attorneys. Of particular importance was the court's holding in *Maryland State Bar Association, Inc. v. Sugarman* that testimony by an attorney in a criminal trial given under the protection of a federal immunity statute could, nonetheless, be used against the attorney in a disciplinary proceeding. In another important development, the court explored, in a series of 1974 Term cases, the types of extenuating circumstances that will justify the imposition of a sanction less severe than disbarment for misconduct involving fraud or moral turpitude.

"The Sugarman Decision"

In *Sugarman* the attorney had testified under a grant of immunity as a government witness in a federal criminal prosecution. He admitted that he had knowingly assisted a client in the wilful evasion of federal income taxes, an act which both the disciplinary panel and the Court

1. Charges of misconduct against an attorney generally are first heard by a three-judge panel designated by the Court of Appeals. See Md. R.P. BV 9-10. In 1975 the Court of Appeals adopted a new statutory structure for the investigation and prosecution of disciplinary violations by attorneys. See Md. R.P. BV 1-18. For an extensive review of the new disciplinary system see Comment, *Discipline of Attorneys in Maryland*, 35 Md. L. Rev. 236, 244-46 (1975).


3. 273 Md. at 318-19, 329 A.2d at 7.


5. See note 9 and accompanying text infra.


8. Specifically, Sugarman admitted that he had purchased and sold stock in his own name for the fraudulent purpose of assisting a client to avoid income taxes and
Maryland Court of Appeals concluded involved moral turpitude.\(^9\) Although Sugarman was protected from criminal prosecution by the use immunity grant, the Court of Appeals held that the testimony elicited under the immunity statute could form the evidentiary basis for disciplinary action against

had participated in a fraudulent scheme to launder funds and conceal custody of money received from his client. In furtherance of this scheme, Sugarman had also drawn up and delivered to his client false bills for services that had not been rendered, for the purpose of enabling his client to use such statements to support tax and business deductions. 273 Md. at 308-09, 329 A.2d at 2.

9. Id. at 319, 329 A.2d at 8. Md. Ann. Code art. 19, § 16 (1976), provides in part that:

Every attorney who shall, after having an opportunity to be heard, . . . be found guilty of professional misconduct, malpractice, fraud, deceit, crime involving moral turpitude, conduct prejudicial to the administration of justice, or of being a subversive person, . . . shall, by order of the judges finding him guilty, be suspended or disbarred from the practice of his profession in this state (emphasis added).

An inquiry under the statute necessitates determining whether a particular activity fits within one or more of the categories requiring sanction. Perhaps the most frequently applied category is “crime involving moral turpitude.” Moral turpitude has been defined as “an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” Braverman v. Bar Ass'n, 209 Md. 328, 344, 121 A.2d 473, 481 (1955). The Court of Appeals has, in the past, determined that a number of crimes involve moral turpitude. Together with Maryland State Bar Ass'n v. Lackey, Misc. Docket (Subtitle BV), Maryland Court of Appeals, December 2, 1974, and Bar Ass'n v. McCourt, 276 Md. 326, 347 A.2d 208 (1975), the Sugarman case discusses tax crimes as crimes involving moral turpitude.

Sugarman clearly establishes that assisting in the wilful evasion of income taxes constitutes a crime of moral turpitude, for the court noted that such activities reflected Sugarman's “lack of the basic moral character essential to membership in the legal profession.” 273 Md. at 319, 329 A.2d at 8. In Lackey the attorney had been convicted of wilful tax evasion following a guilty plea and had served an eight month jail sentence. Like Sugarman, he was disbarred by the Court of Appeals following a unanimous panel recommendation of disbarment. The foundation of Sugarman and Lackey is the notion that engaging in, or assisting another to engage in, the wilful evasion of income taxes through the intentional filing of false returns is conduct involving moral turpitude. These two cases can be profitably compared with McCourt; in the latter case disciplinary charges were filed against an attorney who had pled nolo contendere to charges of wilful failure to file income tax returns, but who was not disbarred. See notes 102 to 118 and accompanying text infra.

The element of fraud is crucial in explaining why Lackey and Sugarman were disbarred for wilful evasion of income taxes, while McCourt was only suspended for his offense of wilful failure to file income tax returns. The Court of Appeals has consistently held that misconduct involving fraud warrants disbarment. See, e.g., Maryland State Bar Ass'n v. Rosenberg, 273 Md. 351, 329 A.2d 106 (1974); Maryland State Bar Ass'n v. Kerr, 272 Md. 687, 326 A.2d 180 (1974); Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 318 A.2d 811 (1974); Fellner v. Bar Ass'n, 213 Md. 243, 131 A.2d 729 (1957); Klupt v. Bar Ass'n, 197 Md. 659, 80 A.2d 912 (1951); Rheb v. Bar Ass'n, 186 Md. 200, 46 A.2d 289 (1946). As the court stated in Agnew: “[W]hen a member of the bar is shown to be wilfully dishonest for personal gain by means of fraud, deceit, cheating or like conduct, absent the most compelling extenuating circumstances, . . . disbarment follow[s] as a matter of
Sugarman without infringing on his fifth amendment privilege against self-incrimination.10 The court adopted the panel recommendation and ordered Sugarman disbarred.11

A significant portion of the evidence offered against Sugarman in the disciplinary proceeding consisted of testimony that had been compelled by a court order issued pursuant to the federal immunity statute.12 That statute shields the witness by assuring that testimony compelled under it, or the fruits of such testimony, may not be used to obtain criminal penalties.
against him.\textsuperscript{18} Sugarman argued that the disciplinary proceeding against him sought a possible criminal or quasi-criminal sanction and that use of his compelled testimony in the disciplinary action was therefore prohibited by the immunity statute and the fifth amendment.\textsuperscript{14} Focusing on the question whether disbarment is a criminal or quasi-criminal penalty for purposes of asserting the fifth amendment privilege against self-incrimination,\textsuperscript{15} the Court of Appeals concluded that disbarment traditionally "is intended not as punishment, but as protection to the public."\textsuperscript{16} Consequently, the court determined that a disciplinary proceeding was not a criminal case covered by the fifth amendment or the federal immunity statute.

The fifth amendment privilege\textsuperscript{17} against self-incrimination ensures that a witness will not be compelled to give testimony which reveals that the witness himself has committed a crime.\textsuperscript{18} Under the interpretation developed by the Supreme Court, the self-incrimination clause seeks to protect a witness who is compelled to reveal information or give testimony that may lead to the imposition of criminal penalties for the acts discussed in the testimony.\textsuperscript{19} The Court has determined, however, that the constitutional privilege against self-incrimination may be displaced by a statute that grants a witness protection from criminal sanctions in exchange for his compelled testimony.\textsuperscript{20} Thus 18 U.S.C. § 6002 (1970)\textsuperscript{21} permits the

\begin{enumerate}
\item See note 12 supra.
\item The Sugarman court observed that "[a] 'criminal case' is one that may 'lead to the infliction of criminal penalties.'" 273 Md. at 310, 329 A.2d at 3, quoting from Kastigar v. United States, 406 U.S. 441, 461 (1972); see notes 41 to 47 and accompanying text infra.
\item 273 Md. at 309, 329 A.2d at 3.
\item 15. The court correctly observed that if disbarment is a criminal sanction, then a disciplinary action is a criminal proceeding in which testimony compelled under an immunity statute could not be used against the attorney. Id. at 310, 329 A.2d at 3.
\item 16. Id. at 318, 329 A.2d at 7.
\item 17. While the privilege at issue is consistently referred to as "the fifth amendment" privilege in this note, a more accurate label is the fourteenth amendment due process right, because Sugarman is a state case and the fifth amendment is incorporated into the fourteenth amendment, as applied against a state. See note 18 infra.
\item Both state and federal witnesses are protected under the self-incrimination clause from incrimination under either federal or state laws. See Murphy v. Waterfront Comm'n, 378 U.S. 52, 77-78 (1964); note 12 supra.
\item 20. See Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Counselman v. Hitchcock, 142 U.S. 547 (1892).
\item 21. See note 12 supra.
compulsion of testimony but prohibits the use of that testimony in any criminal case against the witness.\textsuperscript{22} In \textit{Kastigar v. United States},\textsuperscript{23} the Court, in upholding section 6002 against the claim that it did not meet constitutional standards, ruled that a grant of immunity need only be coextensive with the scope of the privilege against self-incrimination and that use and derivative use immunity offered adequate protection against the imposition of criminal penalties as a result of compelled testimony to meet the fifth amendment standard.\textsuperscript{24}

Sugarman relied on \textit{Kastigar} and on \textit{Spevack v. Klein}\textsuperscript{25} to support his contention that a disciplinary proceeding involved a criminal sanction that could not, consonant with the privilege against self-incrimination, be imposed on the basis of his testimony compelled under the immunity statute. In \textit{Spevack} an attorney refused to produce financial records in compliance with a subpoena duces tecum and to testify at a judicial proceeding on the grounds that such production and testimony would incriminate him.\textsuperscript{26} The Court observed that the threat of disbarment and its concomitant professional and financial disabilities are "powerful forms of compulsion to make a lawyer relinquish the privilege,"\textsuperscript{27} and concluded that

the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it.\textsuperscript{28}

Sugarman argued that \textit{Spevack} had established that a disciplinary proceeding was a criminal proceeding, and that he therefore could not be subjected to disciplinary proceedings based on information obtained under

\begin{itemize}
\item 22. Under 6002, testimony may be compelled by granting use and derivative use immunity, which immunizes the witness from any use of the compelled testimony or evidence derived from that testimony. \textit{See Kastigar v. United States}, 406 U.S. 441, 453 (1972). Transactional immunity, which would prohibit prosecution for any offenses to which the compelled testimony is related, is not required by the Constitution. \textit{Id.}
\item 23. 406 U.S. 441 (1972).
\item 24. \textit{Id.} at 453.
\item 25. 385 U.S. 511 (1967).
\item 27. \textit{Id.} at 516.
\item 28. \textit{Id.} at 514.
\end{itemize}

Four Justices joined in the opinion of the Court. Justice Fortas concurred in the judgment of the Court that Spevak could not be disbarred for asserting his privilege against self-incrimination, but added that

[i]f this case presented the question whether a lawyer might be disbarred for refusal to keep or to produce, upon properly authorized and particularized demand, records which the lawyer was lawfully and properly required to keep by the State as a proper part of its functions in relation to him as licensor of his high calling, I should feel compelled to vote to affirm . . . .

\textit{Id.} at 520.
a grant of immunity. As the Court of Appeals correctly observed, however, the Supreme Court in *Spevack* did not hold that a disciplinary proceeding was a criminal proceeding. The issue before the *Spevack* Court was the use of threatened disbarment as coercion to secure a waiver of the privilege against self-incrimination, and the Court merely concluded that disbarment could not be imposed as a price for asserting the privilege. As was recently stated in *Childs v. McCord*; "[the *Spevack*] decision therefore does not turn upon the nature of the disciplinary proceedings but upon the form of compulsion exerted upon an attorney to waive his Fifth Amendment privilege." Coercion designed to obtain a waiver of the privilege was not involved in *Sugarman* because the immunity grant preserved Sugarman's fifth amendment rights to protection from criminal sanctions based on his testimony.

The holding in *Spevack* does not, therefore, appear dispositive of the issue raised in *Sugarman*. Also not dispositive are statements by a number of state courts that an attorney cannot, through invocation of a fifth amendment privilege, refuse to answer questions posed during a bar


30. See Gardner v. Broderick, 392 U.S. 273, 277 (1968), where the Court, in discussing its holding in *Spevack*, stated that: "[W]e ruled that a lawyer could not be disbarred solely because he refused to testify at a disciplinary proceeding on the ground that his testimony would tend to incriminate him."


32. Id. slip op. at 10 n.10.

The Court of Appeals' explanation of *Spevack* seems less than complete. In *Sugarman* the court stated that the privilege against self-incrimination was at issue in *Spevack* only because the attorney's testimony would have subjected him to criminal prosecution. 273 Md. at 312, 329 A.2d at 4. While that characterization of *Spevack* is basically correct, it is also plausible that the issue whether the attorney in *Spevack* could be disbarred might have arisen even had there been no possibility of actual criminal prosecution; for the question was whether disbarment could be imposed because of the attorney's refusal to waive his privilege against self-incrimination. The Court answered that a threat of disbarment could not be used as a means to coerce a waiver of the fifth amendment privilege.

disciplinary proceeding on the basis that a response might supply grounds for disbarment where the response could not subject the attorney to the danger of criminal prosecution. The California Supreme Court, for example, has concluded that an attorney facing a disciplinary committee does not have a fifth amendment privilege coextensive with that of a defendant in a criminal case because a disciplinary proceeding is not a criminal proceeding; the attorney therefore cannot refuse to answer questions solely on the basis that a response could furnish grounds for his disbarment.

Nevertheless, Spevack and other cases do supply a background helpful to resolution of the precise issue faced by the Sugarman court: whether testimony compelled under an immunity grant may form the basis for disciplinary action. Although the Supreme Court has not yet squarely addressed this point, the highest courts of both New York and Illinois have summarily concluded that so long as there is immunity from use of the compelled testimony in a federal or state criminal prosecution, an attorney’s fifth amendment rights are not violated by subjecting him to disciplinary proceedings based upon the compelled testimony. This conclusion is supported primarily by the argument that disbarment is not a criminal sanction and by the argument that because the privilege against self-incrimination is limited to criminal proceedings, immunity from disciplinary sanctions is not constitutionally required. Preliminary to a determination that disbarment is not precluded by an immunity grant because it does not involve criminal sanctions, however, is the Supreme Court’s decision in Ullmann v. United States that the imposition of noncriminal sanctions based on testimony or information compelled under a grant of immunity is not prohibited by the Constitution.

In Ullmann immunity had been granted to compel testimony before a grand jury investigating Communism and its relation to espionage. The petitioner claimed that the immunity statute was unconstitutional because it would allow such disabilities as “loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium” to be imposed as a result of his testimony. The Court reaffirmed its position that if a grant of immunity is to survive a constitutional challenge, it need only remove the coercive threat of criminal sanctions.


38. Id. at 430.
sanctions, because the privilege against self-incrimination applies only where testimony may subject the speaker to criminal charges. The core question in analyzing Sugarman thus becomes whether disbarment is a "criminal" sanction.\(^9\)

The Sugarman court concluded that disbarment is not a criminal sanction because it seeks to protect the public rather than punish the attorney who acts unethically.\(^4\) This position is supported both by existing Maryland precedent and by decisions from other jurisdictions.\(^4\) Moreover, two federal decisions in closely analogous areas have reached the same result as the Sugarman court. In Napolitano v. Ward\(^4\) the United States Court of Appeals for the Seventh Circuit held that a state judge's privilege against self-incrimination had not been violated by his removal from the bench on the basis of immunized grand jury testimony, specifying that removal was not a criminal sanction.\(^4\) Recently, in the thorough and well-reasoned opinion of Childs v. McCord,\(^4\) the United States District Court for the District of Maryland concluded that the use of the immunized testimony of professional engineers in disciplinary proceedings before a state licensing and registration board would violate neither the fifth amendment privilege against self-incrimination nor the immunity conferred by the federal immunity statute.\(^4\) The Childs court reasoned that the pro-


The applicability of the privilege thus depends upon the criminality of a possible sanction imposed on the basis of the testimony, and not upon whether the proceedings during which the privilege is invoked are criminal proceedings. The Court has recognized that the privilege may be invoked in a variety of noncriminal proceedings where answers might lead to the imposition of criminal penalties. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); see, e.g., Baxter v. Palmigiano, 96 S. Ct. 1551 (1976) (prison disciplinary proceedings); Emspak v. United States, 349 U.S. 190 (1955) (legislative hearings); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (civil proceedings); ICC v. Brimson, 154 U.S. 447, 478-80 (1894) (administrative proceedings).

40. Alternatively, the issue can be framed as whether disciplinary proceedings are criminal proceedings.

41. 273 Md. at 318, 329A.2d at 7.


43. 457 F.2d 279 (7th Cir.), cert. denied, 409 U.S. 1037 (1972).

44. Id. at 284.


46. Id. slip op. at 13. The five plaintiffs sought to enjoin the state board from using their testimony in its disciplinary proceedings. All five had been witnesses along with Sugarman in United States v. Anderson, Crim. No. 73-0527-Y (D. Md., filed Mar. 15, 1974), aff'd, 506 F.2d 1398 (4th Cir. 1974), cert. denied, 420 U.S. 991 (1975), and all had testified involuntarily under immunity granted pursuant to 18 U.S.C. § 6002 (1970).
ceedings before the board did not focus on the illegality of alleged acts but rather on the fitness of these individuals to continue as registered professional engineers; the purpose of the proceedings was to protect the public and the profession, not to punish the individuals for their misconduct.\textsuperscript{47}

The Supreme Court in \textit{Baxter v. Palmigiano},\textsuperscript{48} its most recent discussion of this area, held that the fifth amendment privilege against self-incrimination does not prohibit the drawing of an adverse inference from an inmate's silence during prison disciplinary proceedings.\textsuperscript{49} The Court observed that "[p]rison disciplinary proceedings are not criminal proceedings;"\textsuperscript{50} rather, they are concerned with important interests other than conviction for crimes.\textsuperscript{51} Thus, so long as the inmate's silence during his disciplinary proceeding is not used in a criminal proceeding, there is no self-incrimination issue; the privilege does not protect him from an adverse inference drawn from his silence at the disciplinary proceeding.\textsuperscript{52} The Baxter Court distinguished the situation presented there from situations covered by a line of Supreme Court decisions that prohibited governmental attempts to compel interrogation about job performance or contract relations with the government through the threat of loss of employment or termination of contract eligibility.\textsuperscript{53} In those cases, the Court observed, mere failure to respond was taken as an admission of guilt, which resulted in termination of employment or of contract eligibility, whereas in Baxter the adverse inference drawn from silence was only a part of the evidence considered at the disciplinary proceeding.\textsuperscript{54}

\textsuperscript{48} 96 S. Ct. 1551 (1976).
\textsuperscript{49} \textit{Id.} at 1558. The Court noted the significance of the fact that under the applicable state law "an inmate's silence in and of itself is insufficient to support an adverse decision by the disciplinary board," since disciplinary decisions must be grounded on "'substantial evidence manifested in the record of the disciplinary proceedings.'" \textit{Id.} at 1557 (quoting Morris v. Travisono, 310 F. Supp. 857, 873 (D.R.I. (1970))).
\textsuperscript{50} 96 S. Ct. at 1557.
\textsuperscript{51} \textit{Id.} at 1558.
\textsuperscript{52} Justice White's opinion for the majority noted that if the state had sought to compel the inmate's testimony despite the fifth amendment claim, a grant of use immunity consistent with the Federal Constitution might have been employed. \textit{Id.} 1557-58.
\textsuperscript{53} \textit{See id.} at 1557.

This line of cases includes Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men v. Sanitation Comm'r, 392 U.S. 280 (1968); and Lefkowitz v. Turley, 414 U.S. 70 (1973). Moreover, Spevack v. Klein, 385 U.S. 511 (1967), can be included within the rationale of these decisions because it also was concerned with the coercive use of loss of employment (through disbarment) to promote a waiver of the privilege against self-incrimination. \textit{See} notes 25 to 27 and accompanying text \textit{supra}.
\textsuperscript{54} 96 S. Ct. at 1557.
Consistent with the analysis in Baxter, it does not seem that this line of cases supports a conclusion different from that reached by the Sugarman court. In Garrity v. New Jersey, which initiated the line, police officers were interrogated during a state investigation into alleged fixing of traffic tickets. The officers were warned in advance that if they chose to exercise their privileges against self-incrimination, they would be subject to removal from office. They answered the questions posed and subsequently were convicted in criminal prosecutions based in part on their answers. The Court held that the fifth and fourteenth amendments prohibited the use in subsequent criminal proceedings of statements coerced under a threat of removal from office, where the choice afforded was either to forfeit one’s job or to incriminate oneself. Likewise, in Lefkowitz v. Turley, the most recent in this line of decisions, the Court held that incriminating responses to inquiries into corruption relating to state contracts may not be compelled from state contractors by the threat of cancellation of existing contracts and ineligibility for future contracts, where no immunity from subsequent criminal prosecution has been granted. These and related decisions do not resolve the issue presented in Sugarman because, rather than declaring that immunized testimony cannot form the evidentiary basis for disciplinary proceedings, they instead condemn only improper forms of compulsion used to obtain the waiver of the privilege against self-incrimination. In the Garrity-Lefkowitz line of cases the Court has consistently invalidated statutes that seek, through threats of economic reprisal, to compel testimony that has not been immunized. As the court cogently observed in Childs v. McCord, "rather than prohibit disciplinary action based on compelled testimony, these decisions do no more than require that the employee have first been immunized from future criminal prosecution."

56. Id. at 500. The Court cited and followed its decision in Boyd v. United States, 116 U.S. 616 (1886), discussed infra at note 62 and accompanying text. 385 U.S. at 496-97.
58. Id. at 82-85.
59. See note 33 supra.
62. Id. slip op. at 13.

In a separate series of cases, the Supreme Court has established the principle that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be in civil form, are in their nature criminal," and the privilege against self-incrimination is fully applicable to such proceedings. Boyd v. United States, 116 U.S. 616, 634 (1886); accord, Lees v. United States, 150 U.S. 476 (1893); see United States v. United States Coin & Currency, 401 U.S. 715 (1971). While these cases do recognize an extension of the privilege against self-incrimination to proceedings and sanctions not equivalent to traditional criminal prosecutions, they are premised on the strongly criminal nature of civil proceedings used to enforce criminal statutes or recover
The Sugarman court's conclusion that disbarment is not a criminal sanction and that immunized testimony therefore can be used in disciplinary proceedings is sound, although the depth of the court's analysis is not commensurate with the complexity of the problem. Determining whether a sanction is criminal or noncriminal is often a difficult task, and the Supreme Court has used two distinct techniques when faced with the question. Under one approach, the Court has relied upon a test of the penalties for criminal violations. These forfeiture cases do not support the position that disciplinary proceedings are criminal proceedings for purposes of the applicability of the fifth amendment privilege. See Childs v. McCord, Civil No. H-75-498, slip. op. at 6-9 (D. Md., filed Sept. 29, 1976).

While the weight of authority seems to support the Sugarman result, some commentators have argued that disciplinary proceedings are at least quasi-criminal in that penal-type sanctions may be imposed, and that consequently the privilege against self-incrimination is as fully applicable to disciplinary proceedings as it is to criminal prosecutions. See Note, Self-Incrimination: Privilege, Immunity, and Comment in Bar Disciplinary Proceedings, 72 Mich. L. Rev. 84, 88-108 (1973); Comment, Black v. State Bar, supra note 33.

On one occasion the Supreme Court has labeled bar disciplinary proceedings as "adversary proceedings of a quasi-criminal nature." In re Ruffalo, 390 U.S. 544, 551 (1968). The Court's discussion of the issue is quite superficial, however, and the term "quasi-criminal" was not further clarified. Furthermore, the context in which the issue was presented in Ruffalo was whether adequate notice of all disciplinary charges prior to the proceedings in which they were eventually considered is required by due process. The Court did not consider what additional requirements might be necessary to afford due process to an attorney facing disciplinary proceedings, and therefore the privilege against self-incrimination was not considered.

The Sugarman court considered Ruffalo inapposite to its inquiry, stating that the issue before it was whether disbarment is a criminal sanction which cannot be imposed on the basis of compelled testimony, and "[n]othing in ... In re Ruffalo bears precisely upon the point." 273 Md. at 311, 329 A.2d at 3 (citation omitted). No further reference to Ruffalo was made by the Sugarman court.

Ruffalo was also considered in two other disciplinary cases decided by the Court of Appeals during the 1974 term. In Maryland State Bar Ass'n v. Hirsch, 274 Md. 368, 335 A.2d 108 (1975), the evidence submitted was the attorney's testimony given in four judicial proceedings. The testimony included the admission of "conspiracy to obstruct justice, bribery, [and] false pretenses." 274 Md. at 371, 335 A.2d at 110. The panel found that the charges were supported by clear and convincing evidence, and that Hirsch's conduct violated certain disciplinary rules; accordingly, disbarment was unanimously recommended. Id. at 373, 335 A.2d at 111. Hirsch filed several exceptions, including the contention that the charges against him should have been proved beyond a reasonable doubt in the disciplinary hearing. The court disagreed, upholding Maryland precedent that applies the "clear and convincing evidence" standard of proof in disciplinary proceedings. Id. at 374, 335 A.2d at 112. See Maryland State Bar Ass'n v. Frank, 272 Md. 528, 538-39, 325 A.2d 718, 724 (1974); Bar Ass'n v. Marshall, 269 Md. 510, 516, 307 A.2d 677, 680-81 (1973). Ruffalo was found inapposite because, while it extended procedural due process, including fair notice of the charges, to attorney disciplinary proceedings, it did not require a standard
intent of the sanction, examining prior legislative history and judicial application. If the statute imposes a sanction for the purposes of punishment, it is considered criminal; if, on the other hand, the statute, although imposing a disability, is designed to accomplish a legitimate governmental goal other than punishment, the statute is considered noncriminal. By a second technique, the Court has looked beyond the legislative or judicial characterization of the proceedings and instead has balanced the government function involved against the private interests that have been affected by governmental action.

Under the first approach, disbarment should certainly be characterized as noncriminal. Disbarment has traditionally been viewed as a necessary means of protecting the public rather than as a punishment. Thus, the

of proof other than clear and convincing. 274 Md. at 375, 335 A.2d at 112. See In re Ruffalo, 390 U.S. at 550.

In Bar Ass'n v. Cockrell, 274 Md. 279, 334 A.2d 85 (1975), the hearing panel found that Cockrell had committed both the serious violation of misappropriating a client's funds and the charged misconduct of extending improper monetary advances to his client. The former misconduct had not been charged in the original complaint. The Bar Association was granted leave to amend the petition to include the additional charges; a second panel was chosen and they considered the new charges in the amended complaint, having as evidence the entire transcript from the first panel's hearing, including Cockrell's self-incriminating statements. The Court of Appeals determined that this procedure violated the Ruffalo directive regarding fair notice to the accused: "The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh." In re Ruffalo, 390 U.S. at 551. The situation in Ruffalo mirrored that in Cockrell and the court felt constrained to limit Cockrell's accountability for professional misconduct to the charges in the original petition for disciplinary action. In so ruling, however, the Court of Appeals noted with apprehension that if strictly construed, Ruffalo might cripple the effectiveness of disciplinary proceedings in protecting the public:

[O]nce an attorney is brought before a disciplinary tribunal for some minor offense he can take the stand and make known every other professional indiscretion (perhaps even those of a more serious nature) he ever perpetrated and, in this way, immunize himself from any potential professional censorship for them because, under Ruffalo, "due process" would prevent an amendment of the initial allegations.

274 Md. at 286, 334 A.2d at 88-89.


66. See, e.g., In re Gault, 387 U.S. 1, 49-50 (1967); cf. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). The balancing approach has resulted in holdings that a proceeding may be found to be criminal for purposes of certain procedural safeguards, but not criminal for purposes of other due process considerations. Compare In re Gault, 387 U.S. 1 (1967) (juvenile proceedings are criminal for purposes of the privilege against self-incrimination), with McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (juvenile proceedings are not sufficiently criminal to warrant extending to them the right to trial by jury).

67. See, e.g., Ex parte Wall, 107 U.S. 265, 288 (1882); In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970); Balliet v. Baltimore County Bar Ass'n, 259 Md. 474, 478,
Sugarmann court correctly observed that disbarment is intended to safeguard the public from the evils of attorney misconduct and not to punish the attorney for such misconduct.68

Disbarment might also be viewed as a noncriminal sanction under the second approach, although the affected interests of the individual attorney are substantial. Disbarment deprives a lawyer of his means of livelihood; it forecloses all job opportunities as an attorney. It also deprives him of his professional and personal reputation and may impose a stigma that is, for all practical purposes, indistinguishable from that imposed by a criminal conviction. Although disbarment does not result in imprisonment, the Supreme Court has held that serious sanctions not involving imprisonment are criminal for purposes of certain constitutional safeguards.69 There can be no doubt that disbarment is a very serious sanction for the individual attorney. Yet, while disbarment substantially affects the attorney's interests, the interests of the state are also substantial. The special roles of the attorney as officer and representative of the court and fiduciary of his client demand the highest ethical standards.70 Because he occupies a position of control over important aspects of his clients' lives, the attorney must be trustworthy; the court, in its supervisory capacity, has the obligation to protect the public from the unscrupulous attorney. The function of the court in disciplinary proceedings is to examine the fitness of the attorney so as to determine whether he has maintained the moral and ethical standards necessary to remain an officer of the court.71 Disbarment is imposed, therefore, not for punishment, but as a means of protecting society from one who no longer possesses qualities necessary for the fulfillment of one's responsibilities as an attorney. In this light, the sanction of disbarment can be viewed as remedial and non-criminal, as the Sugarmann court found.

270 A.2d 465, 468 (1970); In re Rouss, 221 N.Y. 81, 84-85, 116 N.E. 782, 783 (1917); In re Cannon, 206 Wis. 374, 383, 240 N.W. 441, 444 (1932). But cf. In re Ruffalo, 390 U.S. 544, 550 (1968) ("[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer"), discussed at note 64 supra.

68. The court emphasized the frequently cited language of Lord Mansfield's opinion in Ex parte Brounsall, 98 Eng. Rep. 1385 (1778):

[T]he question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . [Disbarment] is not by way of punishment; but the Court, on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not.

See 273 Md. at 314, 316, 329 A.2d at 5, 6.


70. See MARYLAND CODE OF PROFESSIONAL RESPONSIBILITY, EC 1-5, DR 1-102, published at Md. R.P. 1007-08 (App. F).

The Sugarman decision does not seem inconsistent with existing law on the applicability of the privilege against self-incrimination in bar disciplinary proceedings. Although disciplinary proceedings approximate criminal proceedings in certain aspects, disbarment should not be viewed as a criminal sanction so as to require the full protection of the privilege as it applies to criminal prosecutions. A grant of immunity to an attorney will not, under Sugarman, preclude subsequent disciplinary proceedings based upon the immunized testimony. Thus, the anomalous consequence apprehended by the Sugarman court is averted:

If Sugarman's contention were to prevail, then the decision as to whether an individual would continue to be a member of the bar of this Court might well pass from this Court to the prosecutor empowered to grant immunity, be he State or Federal, because by such a holding this Court could be powerless in the future to protect the public after a grant of immunity to an attorney, no matter how outrageous his conduct might be.  

**Extenuating Circumstances**

In Bar Association v. Agnew and Bar Association v. Callanan the Court of Appeals established that unless "compelling extenuating circumstances" have been demonstrated, the proper sanction for misconduct involving moral turpitude or fraud is disbarment. During the 1974 Term, the court considered the types of extenuating circumstances that might justify the imposition of a sanction other than disbarment. As the opinion in Bar Association v. Siegel particularly demonstrates, the Court of Appeals apparently is not likely to recognize such mitigating circumstances for crimes traditionally requiring disbarment.

The attorney in Siegel had pleaded nolo contendere to a felony charge of wilfully and knowingly attempting to evade payment of federal income taxes. The plea was accepted only after the judge fully interrogated Siegel as to his understanding of the charges and the voluntariness of the plea. The plea operated as conclusive proof of Siegel's guilt, and, since the crime charged involved moral turpitude, disbarment was a possible sanction. In response to an order to show cause why he should not be disbarred, Siegel proffered several extenuating circumstances: (1) two

72. 273 Md. at 318, 329 A.2d at 7.
75. 275 Md. 521, 340 A.2d 710 (1975).
76. Id. at 522-23, 340 A.2d at 711.
79. 275 Md. at 524, 340 A.2d at 711.
prominent former United States Attorneys had recommended that the prosecution be abandoned; (2) the prosecution was overzealous and prompted by animosity towards Siegel; (3) his plea of nolo contendere was necessitated by severe health problems that made undergoing trial extremely hazardous; and (4) his professional record was unblemished.

The Court of Appeals rejected each claim of extenuating circumstances and ordered Siegel disbarred.

In rejecting these circumstances, the court concluded that the only considerations that might qualify as extenuating circumstances for an attorney who has been convicted of a crime involving moral turpitude are those which may cause this Court to view the conviction in a light which tends to show that the [attorney's] illegal act, committed in violation of a criminal statute, resulted from intensely strained circumstances or that the magnitude and the nature of the crime are not so severe as to compel disbarment.

Excluded from this category are all circumstances proffered in order to impeach the integrity of the conviction itself. These, in direct consequence of Rule BV 10(e)(1), must be rejected as constituting a collateral attack on the finding of guilt. Mitigating circumstances are those that

80. Stephen H. Sachs and George Beall. Id. at 525, 340 A.2d at 712.
81. Id. at 525, 528, 340 A.2d at 712, 714.
82. Id. at 528-29, 340 A.2d at 714.
83. Id. at 527, 340 A.2d at 713. *But see* Prince George's County Bar Ass'n v. Vance, 273 Md. 79, 84, 327 A.2d 767, 770 (1974). In *Vance* the court accepted as factors militating against disbarment the attorney's otherwise unblemished record and the esteem in which he was held in his community. Both of these factors were expressly rejected as extenuating circumstances in *Siegel*. The *Siegel* court stated that their responsibility to the public to insist upon the maintenance of the integrity of the bar could not be "shaken by our respect for an individual attorney's reputation, by our recognition of the longevity of his career at the bar, or by our appreciation for his service to the community." 275 Md. at 528-29, 340 A.2d at 714.
84. Md. R.P. BV 10(e) (1) states in part:

In a hearing of charges pursuant to this Rule, a final judgment by a judicial tribunal in another proceeding convicting an attorney of a crime shall be conclusive proof of the guilt of the attorney of that crime. A plea or verdict of guilty, or a plea of nolo contendere followed by a fine or sentence, is a conviction within the meaning of this Rule.
85. Cases applying this rule include Maryland State Bar Ass'n v. Rosenberg, 273 Md. 351, 329 A.2d 106 (1974); Maryland State Bar Ass'n v. Kerr, 272 Md. 687, 326 A.2d 180 (1974); Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 318 A.2d 811 (1974). *See also* the concurring opinion in *In re Braverman*, 271 Md. 196, 212, 316 A.2d 246, 253 (1974) (Digges, J., concurring). In *Rosenberg*, disciplinary proceedings were brought against an attorney who had been convicted of perjury before a federal grand jury. Among the exceptions to the panel recommendation of disbarment was the claim that BV Rule 10(e)(1), formerly BV Rule 4(f)(1), which states that a "final judgment by a judicial tribunal in another proceeding convicting an attorney of a crime shall be conclusive proof of the guilt of the attorney of such crime," deprived him of due process. 273 Md. at 354, 329 A.2d at 107. Rosenberg asserted that because the rule provided for a hearing, the hearing must be meaningful,
in some manner explain or justify the commission of the crime itself, not those that challenge the trial or the conviction. Thus, examining judges will disregard evidence that seeks to undermine the trial court's finding of guilt.

Evaluating the proffered circumstances in light of these principles, the court experienced little difficulty in rejecting Siegel's arguments. The first circumstance, that two United States Attorneys recommended against prosecuting the indictment, was rejected on the reasoning that even if this indicated a weak case against Siegel, these misgivings would not diminish his admitted guilt. There are many possible reasons behind a suggestion not to prosecute an indictment. Technical errors by police may necessitate dropping the case, or crowded dockets may lead a prosecutor to enter a noll prosequi. Plea bargaining may underlie a decision not to prosecute; or, as was the case in Sugarman, a grant of immunity may preclude prosecution. None of these reasons reflect on the guilt or innocence of the accused. Thus, the recommendation was properly rejected by the court as an extenuating circumstance. Likewise, Siegel's contention that the charges against him had been generated by the animosity of certain federal law enforcement officials was properly rejected. Even if this allegation were true, it "does not erase the crime's occurrence or diminish the criminality of one's participation in it."

Siegel also asserted that his poor health, evidenced by two heart attacks, was largely, if not solely, the cause of his nolo contendere plea. The court observed, however, that the heart attacks occurred after the criminal activity and thus could not serve as a basis to attack the gravity of the offense. Siegel's final proffered circumstance, his unblemished record as an attorney, was also rejected. His record of more than 40 years good service only meant that the court's responsibility and duty to disbar was "more distasteful."

Because Siegel had demonstrated an inability to maintain the requisite standard of conduct, the court's duty to ensure that an attorney's character remain above reproach mandated his disbarment despite his prior impeccable record.

and therefore must entail a determination of the ultimate fact — whether perjury had indeed been committed by him. Id. at 354, 329 A.2d at 107. The court answered that [t]he requirements of due process having been satisfied at the criminal trial, and the attorney's guilt having been established beyond a reasonable doubt at that proceeding, a new or other inquiry into the guilt of the attorney for disciplinary purposes is not mandated by either the State or federal constitutions.

Id. at 355, 329 A.2d at 108.

86. 275 Md. at 525-26, 340 A.2d at 712-13.
87. Id. at 526, 340 A.2d at 713.
88. Id. at 527, 340 A.2d at 713; see Maryland State Bar Ass'n v. Callanan, 271 Md. 554, 557, 318 A.2d 809, 810 (1974).
89. 275 Md. at 528, 340 A.2d at 714.
90. Id. at 528-29, 340 A.2d at 714.
Judge Levine, with Judges Singley and Eldridge concurring, dissented in Siegel.91 The dissent stated that the circumstances, though not acceptable as an attack on the guilt of the attorney, were legitimate mitigating forces that should have been considered in determining the appropriate sanction. The dissent felt that Siegel was confronted with a Hobson’s choice:

[E]ither run a serious risk of losing his life by going to trial on a case acknowledged by virtually everyone officially associated with it to be a weak one; or face certain disbarment by pleading nolo contendere in reliance upon the sound medical and legal advice which he had received.92

Whereas the majority had concluded that the extenuating circumstances offered by Siegel were precluded by Rule BV 10(e)(1) as an attempt to dispute his guilt, the dissent stated that, assuming guilt, the fact that a plea entry is mandated by forces beyond the attorney’s control should result in a different sanction than that imposed in the absence of such circumstances. Thus, because Siegel’s plea might be considered involuntary,93 the dissent insisted that it should not result in the same penalty as a freely given plea. Nevertheless, an inquiry into the circumstances surrounding the entry of the plea amounts to a questioning of the validity of the plea. That, in turn, may be a questioning of the attorney’s guilt, a challenge specifically foreclosed by Rule BV 10(e)(1).94 That rule is unqualified — it forbids such an inquiry during all stages of the disciplinary proceeding. The approach advocated by the dissent would, despite the unqualified language of Rule BV 10(e)(1), allow the plea to operate as conclusive proof of guilt in that stage of the proceeding determining the issue whether there has been any misconduct, but not as conclusive proof of guilt in that stage determining the proper sanction to be imposed. The majority’s approach, which precludes consideration of such circumstances even in the stage of a disciplinary proceeding where a sanction is imposed unless those circumstances demonstrate that the criminal activity, as opposed to a plea, was attributable to extenuating circumstances, seems the sounder one.

In Bar Association v. Snyder,95 the Court of Appeals concluded that the absence of personal gain is not an extenuating circumstance. Disciplinary proceedings were brought against Snyder, who had plead nolo contendere to federal charges of fraudulent receipt of monies from a savings and loan association96 and making a false statement of material fact to a

91. Id. at 529, 340 A.2d at 714.
92. Id. at 533, 340 A.2d at 716-17.
93. A fundamental question is whether in most cases it is possible to determine why a certain plea actually was entered, and whether the plea can be considered voluntary.
94. The text of Rule BV 10(e)(1) is set out in note 84 supra.
96. This was a violation of 18 U.S.C. § 2 (1951) and 18 U.S.C. § 1006 (1961).
government agency. Snyder conceded that his plea operated as conclusive proof of guilt for the purposes of disciplinary proceedings and that his offense involved moral turpitude, but asserted as an extenuating circumstance his failure to realize personal gain. He relied upon the statement by the Court of Appeals in Bar Association v. Agnew that an attorney will be disbarred, absent the most compelling circumstances, if "shown to be willfully dishonest for personal gain by means of fraud, deceit, cheating or like conduct." The Snyder court responded, however, that "[t]he fact that Snyder's share of the surplus was paid to his brother does not negate the concept of personal gain." Thus, Snyder makes clear that one cannot use as a mitigating circumstance the fact that money wrongfully obtained was not kept for one's own use; so long as an attorney has secured money through fraud or deceit, it is irrelevant whether he personally enjoyed the receipts.

97. Snyder defrauded the government by making false statements to the Federal Home Loan Bank Board; he did not disclose receipt of the fraudulently obtained monies on a questionnaire he was required to submit annually to the Board. He arranged to route illegally charged fees through a real estate agency, the result of which was either to defraud the savings and loan association of income to which it would otherwise have been entitled, or to saddle borrowers with fees for which they ought not have been liable. 273 Md. at 535-36, 331 A.2d at 48.

98. Id. at 536, 331 A.2d at 48.

99. Id. at 536-37, 331 A.2d at 48. Other circumstances advanced by Snyder were that the scheme was devised in order to bring the savings and loan association into conformity with the new usury law, id. at 536-37, 331 A.2d at 48, and that his conduct was the consequence of inadvertence rather than of criminal intent, id. at 537, 331 A.2d at 48. Both were summarily rejected as not being in any way extenuating.

100. Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 553, 318 A.2d 811, 817 (1974) (emphasis added); see Maryland State Bar Ass'n v. Callanan, 271 Md. 554, 556, 318 A.2d 809, 810 (1974); cf. Prince George's County Bar Ass'n v. Blanchard, 276 Md. 207, 345 A.2d 60 (1975). In Blanchard the attorney was charged with violating DR 1-102A(4) by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation. Specifically, during the period from April or May 1969 until January 1972, in approximately 1826 cases, Blanchard had charged clients higher survey fees than he remitted to the surveyor, ultimately keeping about $17,090.00. The padded fee, however, was less than the going rate for such services. Blanchard retained the balance, usually $10.00 though sometimes only $5.00, in accordance with an agreement with the surveyor for services rendered in aid of the surveyor's work. The client was totally uninformed as to this arrangement. The Court of Appeals merely reprimanded the attorney. The panel noted:

[T]his would appear to be an arrangement beneficial to all parties in that [the attorney] would get quick house location service, [the surveyor] would have a good survey practice receiving fair compensation for his work in view of assistance given by [the attorney]; and the client would really receive a discounted survey charge of $5.00 less than the going rate.

276 Md. at 210, 345 A.2d at 62. Nevertheless, the panel concluded that the practice could not be condoned: "the professional conduct of an attorney should not be reduced to this type of rebate without advising the client." Id. at 211, 345 A.2d at 62. The Court of Appeals, in a per curiam opinion, adopted the recommendation of the panel and issued a reprimand.

101. 273 Md. at 537, 331 A.2d at 48.
In contrast to Siegel and Snyder, the Court of Appeals in Bar Association v. McCourt\textsuperscript{102} apparently accepted the extenuating circumstances proffered by the attorney. McCourt was convicted of one count and pleaded nolo contendere to three other counts of willful failure to file federal income tax returns.\textsuperscript{103} The Bar Association of Baltimore City recommended that he be suspended from practice for a reasonable period, and the three-judge disciplinary panel subsequently recommended to the Court of Appeals a one year suspension. In a per curiam opinion, with Judges Smith and Digges dissenting,\textsuperscript{104} the Court of Appeals adopted the panel's memorandum opinion and recommendation and ordered McCourt suspended from practice in Maryland for one year.\textsuperscript{105}

The memorandum opinion of the panel acknowledged that willfully failing to file income tax returns is an act involving fraud or deceit and moral turpitude, and one which normally requires disbarment absent "compelling extenuating circumstances."\textsuperscript{106} In recommending only suspension, the panel was apparently persuaded by two considerations: the Bar Association recommendation against disbarment and "other factors proffered in mitigation."\textsuperscript{107} Neither the Court of Appeals nor the disciplinary panel discussed the weight that should properly be given in an attorney disciplinary proceeding to a recommendation of a specific sanction by the charging body. Subtitle BV of the Maryland Rules of Procedure, which governs the procedures for disciplining Maryland attorneys,\textsuperscript{108} does not discuss the role of a Bar Association, acting through the Bar Counsel,\textsuperscript{109} in recommending sanctions to the Court of Appeals or to the panel appointed by the Court of Appeals.\textsuperscript{110} Further, Subtitle BV does not indicate whether a recommendation of a particular sanction should influence the decision of the panel or the court.\textsuperscript{111} Certainly such a recommendation is not irrelevant; nevertheless, the reasons supporting a recommendation would seem to be of greater value to the court or panel. Such underlying reasons were not evident, however, in McCourt. If, as may well be the case, the reasons behind the Bar Association's recommendation were the same extenuating circumstances presented to and apparently considered by the disciplinary panel, then the Bar Association recommendation would not appear to constitute an independent factor that could justify the lesser sanction of suspension.

\footnotesize{102. 276 Md. 326, 347 A.2d 208 (1975).}
\footnotesize{103. McCourt's failure to file tax returns was a violation of 26 U.S.C. § 7203 (1968).}
\footnotesize{104. 276 Md. at 327, 347 A.2d at 208.}
\footnotesize{105. Id.}
\footnotesize{106. See id. at 331-32, 347 A.2d at 211.}
\footnotesize{107. Id. at 332, 347 A.2d at 211.}
\footnotesize{108. See note 1 supra.}
\footnotesize{109. See Md. R.P. BV 1(c).}
\footnotesize{110. See Md. R.P. BV 9(b).}
\footnotesize{111. See Md. R.P. BV 9-11.}
Unfortunately, it is not clear what extenuating circumstances the panel and, by adoption, the Court of Appeals relied upon in determining the proper sanction to impose. While the panel opinion stated expressly that "other factors proffered in mitigation" helped to make suspension the proper sanction,\(^1\) neither the panel nor the court indicated precisely what factors had persuaded them. Two possible extenuating circumstances are mentioned in the panel opinion,\(^2\) neither of which, however, seems sufficient to justify the substitution of a one year's suspension for the normal sanction of disbarment.

One possible extenuating circumstance mentioned was the suspended sentence received by McCourt, following the prosecution’s recommendation of probation.\(^3\) However, since an attorney need not be convicted before disbarment is imposed,\(^4\) the absence of a jail sentence should have no bearing on whether an attorney should be disbarred. The absence of a jail sentence is not an extenuating circumstance; rather, it is merely an insignificant \textit{attendant} circumstance. An \textit{extenuating} circumstance is one that explains or justifies the attorney's \textit{commission} of the misconduct;\(^5\) the imposition of probation instead of imprisonment neither explains why the attorney committed the offense nor justifies the conduct.

The second extenuating circumstance discussed by the panel was the conclusion in a psychiatric report that McCourt suffered from a neurotic personality disorder, manifested by emotional immaturity, dependency, and procrastination.\(^6\) Nevertheless, the examining doctor found that "at the time of the due dates of the tax returns in question, Mr. McCourt did not lack the capacity to appreciate the wrongfulness of his conduct or

\(^{112}\) 276 Md. at 332, 347 A.2d at 211.

\(^{113}\) The panel expressly rejected as a mitigating circumstance the fact that a very small tax liability was involved. 276 Md. at 332, 347 A.2d at 211.

\(^{114}\) The federal court suspended sentences under all counts and ordered McCourt placed on one year's probation. \textit{Id.} at 330, 347 A.2d at 210. The prosecution recommendation of probation apparently was prompted by the prospect of lengthy hearings on the issue of the use of "tainted" evidence against McCourt, and the fact that if this evidence were excluded virtually no tax liability would have remained. The Court of Appeals observed that only "non-tainted" facts had been considered by the sentencing judge. \textit{Id.} at 330, 347 A.2d at 210.


\(^{116}\) Bar Ass'n v. Siegel, 275 Md. 521, 527, 340 A.2d 710, 713 (1975); \textit{see} note 85 and accompanying text \textit{supra}.

Circumstances that demonstrate that an act is not serious enough to require disbarment may also be considered extenuating. \textit{See} Bar Ass'n v. Siegel, \textit{supra} at 527, 340 A.2d at 713; note 83 and accompanying text \textit{supra}. Nevertheless, the crime of which Siegel was convicted clearly was of sufficient severity to warrant disbarment. \textit{See} notes 86-90 and accompanying text \textit{supra}.

\(^{117}\) 276 Md. at 330-31, 347 A.2d at 210.
strictly speaking, to conform his conduct to the requirements of the law.’’

It is startling that the panel apparently relied upon a debilitating disorder as a circumstance mitigating against disbarment. An attorney who is neurotic yet responsible, and who can therefore control his actions, should not be excused from accountability for his actions because he is neurotic. An attorney who is neurotic but not responsible, and who thus cannot control his actions, is clearly untrustworthy and should not be treated so as to ease his return to the practice of law. In both situations, the attorney’s conduct has demonstrated his unfitness to practice law. The panel, in relying upon the presence of a neurotic disorder as an extenuating circumstance supporting suspension, confused the issue of culpability with mitigation. A neurotic disorder may make McCourt less responsible and therefore less reprehensible, but it should not mitigate against disbarment or suspension from practice for a period longer than one year. Suspension for a short period provides no assurance that the attorney will be trustworthy and responsible upon termination of the period and thus could defeat the main purpose of the disciplinary action: protection of the public from the unfit practitioner.119

118. Id. at 331, 347 A.2d at 210. McCourt apparently had sought no further treatment or evaluation of his disorder. Id. at 331, 347 A.2d at 210.

119. But whatever the merits of the possible extenuating circumstances relied upon in McCourt, the panel and the Court of Appeals did not meet their obligation under Rule BV 11 (a) (1) to provide a “written statement of . . . the recommendation of the court, and its reasons therefor.” Mn. R.P. BV 11 (a) (1). The “other factors proffered in mitigation” should have been identified with greater specificity.
BROKERS' COMMISSIONS

Actions for the recovery of real estate brokers' commissions are among the most common court dockets. Although the broad principles governing brokers' commissions are relatively clear, application of those principles depends on the particular facts at issue and the relevant statutory structure. In Maryland, section 14–105 of the Real Property Article of the Maryland Annotated Code governs the entitlement of a real estate broker to a commission. By its terms, however, the statute applies only absent a special agreement between the real estate broker and his employer, and a significant portion of the litigation involving brokers' commissions is concerned with the interpretation of such contractual agreements. Brokers' commissions cases decided by the Court of Appeals during the September Term, 1974, presented questions of both statutory and contractual interpretation.

Section 14–105 provides that if a broker secures a purchaser or lessee who ultimately enters into an enforceable written contract with the broker's employer, then "the broker is deemed to have caused the customary or agreed commission" in the absence of an agreement to the contrary. Two 1974 Term cases involved attempts by brokers to recover commissions under this statutory provision. In Steward Village Shopping Center v. Melbourne a real estate broker who had not entered into a listing agreement with the property owner sought the recovery of a commission for procuring a tenant for a commercial property. After consideration of

2. See generally F. Gross, The Law of Real Estate Brokers (1917) ; Walker, Real Estate Agency (2d ed. 1932); Mechem, The Real Estate Broker and His Commission, 6 Ill. L. Rev. 145 (1911).

   In the absence of special agreement to the contrary, if a real estate broker employed to sell, buy, lease, or otherwise negotiate an estate, or a mortgage or loan secured by the property, procures in good faith a purchaser, vendor, lessor, lessee, mortgagor, mortgagee, borrower, or lender, as the case may be, and the person procured is accepted by the employer and enters into a valid, binding, and enforceable written contract, in terms acceptable to the employer, of a sale, purchase, lease, mortgage, loan, or other contract, as the case may be, and the contract is accepted by the employer and signed by him, the broker is deemed to have earned the customary or agreed commission. He has earned the commission regardless of whether or not the contract entered into is performed, unless the performance of the contract is prevented, hindered, or delayed by any act of the broker.
4. See note 3 supra.
5. 274 Md. 44, 332 A.2d 626 (1975).
6. Id. at 46–47, 332 A.2d at 627. The broker acted pursuant to the owner's oral permission to show the premises. See Glaser v. Shostock, 213 Md. 383, 131 A.2d 724 (1957) (oral contract with broker for sale of business is sufficient); Heslop v. Diendonne, 209 Md. 201, 120 A.2d 669 (1956) (employment may be implied when owner permits broker to show property).

(372)
expert testimony on the amount of a "customary" commission,\(^7\) a jury awarded the broker a lump sum commission based on the gross amount of rent collectable under the lease. The property owner did not contest on appeal that the broker was the procuring cause of the lease, which is a statutory prerequisite to recovery of a customary commission under section 14-105,\(^8\) but did contend (1) that the amount of commission recoverable should have been limited to a percentage of the rents actually collected, and (2) that the actual time expended by the broker in procuring the tenant was relevant to the amount of commission due.\(^9\) The Court of Appeals rejected both contentions in affirming the judgment awarding a customary commission paid in a lump sum.\(^10\)

Expert testimony in *Steward Village* indicated that the customary real estate broker's commission was approximately five percent of the gross rent collectable under the lease.\(^11\) The court observed that further testimony established that when a commission was paid in a lump sum at the outset of the lease period, instead of being paid as rent was collected each month, the customary amount was one-half the total of such periodic payments.\(^12\) Noting that expert evidence was properly before the jury, the court rejected the property owner's contention that the trial court should have instructed the jury that the commission recoverable was limited to a percentage of rents actually collected; the custom seemed to be that lump sum commissions were computed on the basis of the total rent that could be collected under the original term and all renewal option terms. Because

---

7. 274 Md. at 47-48, 332 A.2d at 627-28. Both the broker and the owner also introduced testimony by licensed real estate brokers that there was a customary commission for processing a lease.

8. See note 3 supra. The burden of proof on the procurement issue is on the broker. See Steele v. Seth, 211 Md. 323, 127 A.2d 388 (1956). The broker's efforts are the procuring cause of a lease or sale if they are the proximate cause of the agreement. See Weinberg v. Desser, 243 Md. 347, 355, 221 A.2d 66, 70 (1966).

9. 274 Md. at 48, 332 A.2d at 628.

10. Id. at 51, 332 A.2d at 629.

11. Id. at 47, 332 A.2d at 627. The lease provided for an original term of three years, with two renewal options for five years each. Total minimum rental for the thirteen year period would be $228,800, a five percent commission on which would come to $11,440. Id.

12. Id. at 48, 332 A.2d at 628. Thus, the jury award of $5700 is explainable as being approximately one-half the $11,440 commission based on five percent of the gross collectable rental. Id. at 49 n.1, 332 A.2d at 629 n.1.
the broker relied exclusively on the provisions of section 14–105 for its standard of recovery, rather than suing in quantum meruit, the Steward Village court also concluded that the actual time spent by the broker in procuring a tenant was not relevant, the standard being the “customary” commission and not the reasonable value of the broker’s services.\(^{13}\)

The second case involving section 14–105, Eastern Associates, Inc. v. Sarubin,\(^{14}\) concerned the liability of a lessor to a broker who had procured a tenant for a commercial property. A listing agreement between the broker and the property owner that included a specified commission schedule had expired prior to the procurement of the tenant.\(^{15}\) The lessor had paid the broker a commission based on the original lease but refused to pay an additional commission when the lease was renewed. Eastern, relied upon section 14–105 and sought recovery of the customary commission. The trial judge concluded that the broker could not recover a commission based on rent paid under a renewal option exercised by the tenant.\(^{16}\) Without citation to its earlier opinion in Steward Village, the Court of Appeals remanded the case to the trial court for further proceedings on the question whether the broker was entitled to a commission upon a lease renewal pursuant to an option in the lease, when the broker played no role in procuring the renewal.\(^{17}\) The court stated, however, that the broker had the burden of establishing that the customary commission for a procurement of a commercial tenant in Baltimore City includes a commission on rent paid under a renewal not procured by the broker, and that this custom was either known to the parties or “so uniform and notorious that they must be supposed to have contracted with reference to it.”\(^{18}\)

Expert testimony in Steward Village convinced the jury that the customary commission included a percentage of the rents that would be paid under an exercised renewal option, a determination which the Court of Appeals affirmed on appeal. The trier of fact in Eastern Associates, however, failed to make specific findings whether a broker’s commission on renewal rents was customary and whether the property owner actually knew or should have been presumed to know of that custom,\(^{19}\) despite the presentation of testimony that the usual real estate broker’s commission in Baltimore City did in fact include a percentage of the rents under a lease renewal.\(^{20}\) Nonetheless, these cases are consistent in establishing that the award of customary commission under section 14–105 may include

---

13. Id. at 50–51, 332 A.2d at 629. See Nily Realty, Inc. v. Wood, 272 Md. 589, 598, 325 A.2d 730, 736 (1974) (“A real estate broker is employed not to expend time and effort but to accomplish a particular result . . . .”).


15. Id. at 380, 336 A.2d at 767.

16. Id. at 379, 336 A.2d at 765.

17. Id. at 403, 336 A.2d at 778.

18. Id.

19. Id. at 402, 336 A.2d at 778.

20. Id. at 381–82, 336 A.2d at 767.
a commission based on rent paid under a renewal option, the exercise of which is not procured or induced in any way by the broker, so long as the evidence establishes that payment of such a commission is customary. It is apparent, however, that the custom may vary with the type of lease and the geographical market involved, given the emphasis in *Eastern Associates* on the practices customary in Baltimore City commercial lease transactions.21 Substantial evidentiary requirements were placed on the broker by the court in *Eastern Associates*, as the broker must meet the burden of demonstrating to the trier of fact both that the customary commission includes a percentage of rent paid under a renewal option and that this custom was either actually known or sufficiently notorious to put the parties on constructive notice. But when that burden is met, as it presumably was in *Steward Village*, section 14–105 significantly benefits real estate brokers by providing for recovery of the commission that would normally be earned, even when no express enforcement agreement between the parties provides for the payment of such a commission.

The remaining brokers’ commissions cases involved express contractual agreements for commissions, and therefore section 14–105 was inapplicable.22 In *Berman v. Hall*,23 a contract for sale contained a brokerage agreement providing that a commission was “due and payable upon the settlement of this Contract.”24 The contract was signed, but the settlement never occurred because the sellers and the purchaser later executed a mutual release of obligations.25 The broker argued that, notwithstanding the language of the agreement, the parties intended that while physical payment of the commission was to be postponed until settlement, a right to the commission vested when the contract for sale was executed. Under this construction of the agreement the right to a commission accrued at the same time as it would under section 14–105; it was therefore claimed that the statute applied, because the brokerage agreement did not create a special agreement contrary to the statutory provision.26 The trial court sustained the sellers’ demurrer to the declaration, holding that the broker could recover a commission only “if the sale had been consummated or if the purchaser had defaulted,” and finding that neither had occurred.27 The Court of Appeals affirmed, relying on prior cases which construed nearly identical contract language as requiring a completed settlement as a condition precedent to acquiring a right.

---

21. See id. at 381–82, 403, 336 A.2d at 767, 778.
24. Id. at 435, 340 A.2d at 252 (emphasis removed).
25. Id. at 436, 340 A.2d at 252. No allegations were made that the purchaser had defaulted by breaching the sales contract.
26. Id. at 436–37, 340 A.2d at 252–53.
27. Id. at 436, 340 A.2d at 252.
to a commission. Thus, the court found the statute inapplicable since there was a "special agreement" within the meaning of section 14–105.

The issue of contract construction addressed in Berman illustrates a significant problem concerning effective drafting of brokerage agreements. Courts have generally adopted either of two views in interpreting this type of qualifying language in sales contracts or brokerage agreements. Under the "time" rationale the qualifying words are viewed as referring only to the time when physical payment will occur; this was the position argued by the broker in Berman. One commentator has said that such a view

accord[s] with the rule governing contracts generally: Where a debt has arisen, liability will not be excused because, without fault of the creditor and due to happenings beyond his control, the time for payment, as fixed by the contract, can never arrive.

On the other hand, the "condition precedent" approach, the view taken by Maryland courts, treats the contract as creating a specific event or condition the occurrence of which is a prerequisite to earning the commission. This rationale is likewise supported by a contract law maxim — contract ambiguities should be construed against the drafter; thus, any ambiguity in the payment clause must be resolved against the broker, who prepared the contract.

While most jurisdictions have elected to follow the "condition precedent" approach, rigid adherence to that position may yield inequitable results. For example, under a strict interpretation the seller may be permitted to deny a commission to the broker even when the seller has deliberately defaulted. It is not clear that parties to each brokerage agreement intend to lock themselves into the rigid position required by the condition precedent rationale. If the time approach were available for application, a court would have more leeway to consider the meaning of the contract language together with the intent of the parties. Cases such as Berman may indicate that the Court of Appeals is not receptive to the time rationale, but it should be noted that Berman and the cases cited therein all concerned language which indicated fairly clearly that

31. See text accompanying note 26 supra.
32. Wallace, supra note 29, at 304.
33. See note 28 and accompanying text supra.
35. See Wallace, supra note 29, at 297.
no obligation to pay a commission would arise until settlement actually occurred.\textsuperscript{37} In any event, it would seem wise for brokers to draft brokerage agreements carefully to avoid all ambiguities as to when the right to receive payment of a commission vests under the agreement. By so doing, the intent of the parties can better be met, and real estate brokers can avoid results such as that reached in \textit{Berman}.

On three occasions during the 1974 Term the Court of Appeals considered the effect of contract provisions governing the payment of brokers' commissions when settlement is not consummated because of a default by the purchaser after a contract for sale has been executed. In two cases, \textit{Chas. H. Steffey, Inc. v. Derr}\textsuperscript{38} and \textit{Prince Georges Properties, Inc. v. Rogers},\textsuperscript{39} the respective listing agreement and contract for sale provided that in the event of default by the purchaser and a subsequent declaration by the seller of a forfeiture of the purchaser's deposit, the broker would be entitled to one-half the deposit as a commission.\textsuperscript{40} In both cases the broker procured a purchaser, a contract for sale was executed, a deposit was delivered by the purchaser to be held in escrow by the broker, and the purchaser later failed to make settlement in breach of the sales contract.

In \textit{Steffey} the purchasers demanded the return of the deposit, and the seller likewise demanded the deposit, following an attempt to declare a forfeiture.\textsuperscript{41} Cognizant of its duties under Maryland law\textsuperscript{42} and the Code of Ethics of the Real Estate Commission,\textsuperscript{43} the broker refused the con-

\begin{itemize}
\item \textsuperscript{37} See notes 24 \& 27 and accompanying text \textit{supra}.
\item \textsuperscript{38} 275 Md. 121, 338 A.2d 262 (1975).
\item \textsuperscript{39} 275 Md. 582, 341 A.2d 804 (1975).
\item \textsuperscript{40} Chas. H. Steffey, Inc. v. Derr, 275 Md. 121, 122, 338 A.2d 262, 264 (1975); Prince Georges Properties, Inc. v. Rogers, 275 Md. 582, 584, 341 A.2d 804, 805 (1975).
\item \textsuperscript{41} 275 Md. at 122, 338 A.2d at 264.
\item \textsuperscript{42} MD. ANN. CODE art. 56, § 227A (Cum. Supp. 1976) provides in part:
\begin{itemize}
\item (a) In any case in which a licensee hereunder is entrusted with, or receives and accepts, or otherwise holds, deposit moneys or other trust moneys, of whatever kind or nature, or instruments representing the same, concerning transactions involving real estate within the State of Maryland, such moneys or instruments, in the absence of proper written instructions to the contrary, shall be expeditiously deposited in [a bank account] maintained by the broker as a separate account for funds belonging to others, and said funds shall be retained in such account until the transaction involved is consummated or terminated, or until proper written instructions have been received by the broker directing the withdrawal and other disposition of such funds, at which time all such funds shall be promptly and fully accounted for by the broker. . . .
\end{itemize}
\item \textsuperscript{43} The Code of Ethics of the Real Estate Commission of Maryland, art. 9 (1976) provides:
In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the licensee from his statutory obligations towards the other parties to the transaction.
\end{itemize}

A similar provision of this code was in force at the time of the \textit{Steffey} decision. See 275 Md. at 127–28, 338 A.2d at 267.
flicting demands, retained the deposit in escrow, and filed an action for declaratory relief, later amended to include a request for damages, in an attempt either to satisfy payment of its commission out of the escrow deposit or to recover a judgment against the purchasers or the seller for compensation for its services. Demurrers to the broker's declarations were sustained on the grounds that no cause of action entitling the broker to relief had been stated. The purchasers then acquired a court order requiring the broker to return the full amount of the deposit to them. The broker subsequently filed suit against the seller for recovery of a commission. The trial court found that the purchaser had defaulted and the seller had attempted to declare a forfeiture, but that the broker had prevented the forfeiture by its failure to turn over the deposit to the seller upon demand. This refusal, the court concluded, was a breach of the broker's fiduciary duty and constituted a waiver of the right to a commission. The Court of Appeals, however, reversed the judgment for the seller and awarded the broker a commission equal to one-half the deposit. The court held that under the existing statutory and regulatory provisions, the broker acted in a reasonable manner when, faced with conflicting claims to the deposit, it retained the deposit in escrow and petitioned a court for instructions, and that in returning the deposit to the purchaser the broker was properly complying with a court order.

In contrast to the circumstances in Steffey, the seller in Prince Georges Properties took no action to forfeit the deposit after settlement arrangements failed, and the broker returned the deposit to the purchaser on its own initiative. The broker then sued the seller for a commission based upon a percentage of the sale price as set forth in the contract for sale. The trial court found that the purchaser had defaulted and that the broker's return of the deposit to the purchaser without the consent of the seller amounted to a waiver of the right to demand a commission from the seller. The Court of Appeals affirmed on the ground that by returning the deposit without instructions from the seller the broker terminated any rights to possession it had in the deposit and thus waived its right to a commission "by surrendering up the only fund out of which it could be allowed its commission."

44. 275 Md. at 123–24, 338 A.2d at 264–65.
45. Id.
46. Id. at 124–25, 338 A.2d at 265.
47. Id. at 129, 338 A.2d at 267.
48. Id. at 128, 338 A.2d at 267. The court distinguished the rule in Goss v. Hill, 219 Md. 304, 149 A.2d 10 (1959), where the court determined that a broker's actions in returning a deposit to a purchaser without the seller's consent had not been reasonable.
49. 275 Md. at 128–29, 338 A.2d at 267.
50. 275 Md. at 585–86, 341 A.2d at 806.
51. Id. at 587, 341 A.2d at 807.
The lessons of *Steffey* and *Prince Georges Properties* are clear. In order for a broker to recover a commission in compensation for services rendered when settlement is never consummated, the broker must be careful in dealing with the deposit it holds in escrow so as to assure that its actions do not constitute a waiver of any right to a commission. Moreover, under such provisions as were at issue in *Steffey* and *Prince Georges Properties*, it is apparent that the broker’s right to a commission collected out of an escrow deposit following a purchaser’s default is entirely dependent upon a declaration of forfeiture by the seller.

Some discussion of precisely what is required to constitute a forfeiture was offered by the Court of Appeals in *Casey v. Jones*,53 where the brokerage agreement provision considered was identical to that in *Prince Georges Properties*.54 The purchaser signed a sales contract and deposited a check with the broker. However, when the purchaser became disenchanted and decided to withdraw from the deal, he refused to make good on the check, which had been returned after presentation by the broker due to an insufficiency of funds.55 The broker then brought suit against the purchaser, seeking to obtain the commission he believed would have been due out of the deposit. The Court of Appeals affirmed the trial court judgment denying the broker a commission, holding, first, that because no settlement was consummated the broker’s right to a full commission under the contract did not accrue,56 and, secondly, that the broker had no right to a commission out of the deposit check since the sellers had not actually declared a forfeiture, a condition precedent to the broker establishing any ownership rights in the deposit.57

The *Casey* court relied on established principles that forfeiture must be by express declaration of the seller, and that mere default or breach by the purchaser does not constitute an operative forfeiture.58 There is considerable justification for construing forfeiture provisions in this manner. As one commentator has phrased the argument, “[T]he usual language is that, in accordance with general contract principles, the listing agreement is to be construed against the maker (almost always the broker) . . . .”59 Viewed in this light, the parties are merely being held to the terms of their contractual agreement. The paradox is that while forfeiture provisions were obviously intended to ensure brokers some compensation for their efforts when transactions which they have arranged fall through, the effect has been to raise a bar to recovery when a seller refuses to elect a forfeiture. Thus, a broker is in a worse position than he would have been in had there been no special agreement, as then he

54. *See* note 40 and accompanying text *supra*.
55. 275 Md. at 204, 339 A.2d at 34.
56. *Id.* at 205, 339 A.2d at 34.
57. *Id.* at 206–07, 339 A.2d at 35.
58. *Id. See*, e.g., Chasanow v. Willcox, 220 Md. 171, 151 A.2d 748 (1959).
could have relied on the provisions of section 14–105. This problem could be remedied by a simple language change in drafting the forfeiture provision. The agreement might provide, for example, that forfeiture will occur automatically on default by the purchaser.60 One writer, in proposing alternative sources of recovery for the broker by means of additional contractual provisions, has observed that “[b]rokers have exacted considerably worse terms from sellers on many occasions . . . .”61 One can hypothesize that sellers might object to automatic forfeitures, but in most instances, at least at the outset of the transaction, a seller who voluntarily employs a broker should also be willing to assure the broker reasonable compensation for services rendered. Moreover, forfeiture would generally appear to be the most satisfactory and efficient means for the seller to recover whatever damages are suffered as a result of a purchaser’s default. It is surprising, therefore, that there apparently have been few attempts by brokers at redrafting these provisions in terms more favorable to brokers.

60. See, e.g., Huber v. Gershman, 300 S.W.2d 501 (Mo. 1957) (seller could not waive earnest money that “automatically” became forfeited upon default until the sum due the broker under the contract was paid).
EVIDENCE

During the September Term, 1974, the Court of Appeals decided three cases involving significant evidentiary issues. In *Smith v. State,* the court examined the circumstances in which extrinsic evidence of a prior inconsistent statement was admissible for impeachment. The court, in *Harrison v. State,* considered whether the privilege protecting confidential attorney-client communications could be waived by a witness on cross-examination. Finally, in *Patterson v. State,* the court ruled on the discretionary power of a trial court to call and examine witnesses and focused on the circumstances in which such a procedure could properly be invoked.

*Smith v. State*¹

Defendant Smith was convicted of the second degree murder of her former husband. In defense she had attempted to show at trial that the shooting had been accidental; however, this theory was contradicted by the testimony of the two investigating policemen.² On cross-examination, one of the policemen, Officer Brown, was asked whether he recalled informing an investigator for the Public Defender, Watkins, that the victim had said in a hospital interview that the shooting was an accident. While Brown remembered a telephone conversation with Watkins, he said that he did not recall telling him about the alleged hospital statement by the decedent.³ At the conclusion of its case-in-chief, the defense proffered Watkins' testimony in order to impeach Officer Brown's credibility by a prior inconsistent statement. The trial judge sustained the state's objection to the proffer and ruled that the proffered testimony was double hearsay and inadmissible for purposes of impeachment because the alleged statement by the victim to Brown did not qualify under the dying declaration exception to the hearsay rule.⁴ The Court of Special Appeals affirmed the conviction, reiterating the settled rule barring impeachment by extrinsic

¹ 273 Md. 152, 328 A.2d 274 (1974).
² 276 Md. 122, 345 A.2d 830 (1975).
¹* 273 Md. 152, 328 A.2d 274 (1974).
³ Id.
⁴ Id. at 160-61, 328 A.2d at 279. At the time the alleged statement was made, the decedent, despite his critical condition, clearly expected to live and was not conscious that death was near or certain. *Id.* at 156-57, 328 A.2d at 277. His statement therefore was not a dying declaration. *See* Connor v. State, 225 Md. 543, 551, 171 A.2d 699, 703-04 (1961); C. McCormick, EVIDENCE § 282 (2d ed. 1972); S J. Wigmore, EVIDENCE §§ 1430-52 (Chadbourn rev. 1974).
evidence on a collateral matter. Following the leading case of Attorney General v. Hitchcock, the court ruled that impeachment was permissible only when the evidence contained in the prior inconsistent statement would have been admissible for a purpose other than impeachment. The court concluded that the proffered testimony in Smith, inadmissible as direct evidence because of the hearsay rule, concerned a collateral matter and thus had properly been excluded.

The Court of Appeals reversed. In an opinion by Judge Levine, the court endorsed the general rule against collateral impeachment as stated by the Court of Special Appeals. The court, however, rejected Hitchcock and held that the correct test for determining when a statement concerned a collateral matter was

whether the fact as to which the error is predicated is relevant independently of the contradiction; and not whether the evidence would be independently admissible in terms of satisfying all the rules of evidence.

The court concluded that the victim's alleged statement was highly relevant independent of the contradiction and therefore admissible under the formulated test, and ruled that the trial judge had erred in excluding the proffered testimony. In a dissenting opinion joined in by Judge O'Donnell, Judge Smith disagreed with the majority, feeling that any statement that could not be admitted as direct, substantive evidence was, by definition, collateral and therefore unavailable for purposes of impeachment. The dissent therefore would have upheld the trial judge's refusal to accept the proffer.


7. 20 Md. App. at 260, 315 A.2d at 79-80.

8. 273 Md. at 161, 328 A.2d at 280.

9. Id. at 162, 328 A.2d at 280 (emphasis added).

10. Id. at 163, 328 A.2d at 280; see Note, Impeachment of Witnesses on Collateral Matters, 45 Ky. L.J. 332, 338 (1956-1957), which states the Smith holding in a slightly different fashion: "If the matter to be contradicted is such that a timely objection to its relevancy should have been sustained, it is collateral, and contradiction may not be allowed."

11. 273 Md. at 163, 328 A.2d at 280.

12. Id. at 166, 328 A.2d at 282.

13. Id.
Prior to Smith no Maryland appellate court had defined the term "collateral" specifically in the context of impeachment; however, only when the subject matter of the excluded testimony was not relevant to any issue in the case had the Court of Appeals refused to permit impeachment by a prior inconsistent statement. And, as the Smith court noted with respect to jurisdictions applying the Hitchcock test, each time proffered evidence was excluded it was because the facts were not independently relevant.

The majority would apply Hitchcock only where the evidence contained in the out-of-court statement was not independently relevant. Exclusion of such evidence furthers the primary policy reasons behind exclusion by preventing the loss of time, unfair surprise to the witness, and confusion of issues that usually accompany the introduction of irrelevant evidence. Yet the court reasoned that a mechanistic application of Hitchcock was inappropriate where, as in Smith, the inadmissibility of the prior statement rested on a ground other than irrelevancy. In such a circumstance, "different considerations govern" the admissibility of the proffered testimony because the underlying objectives of the rule against collateral impeachment already are satisfied. Taking into account the fundamental purposes of the rule against impeachment on a collateral matter, the Smith court weighed the strong probative force that evidence

14. Id. at 159-60, 328 A.2d at 279. For an early review of the Maryland authorities, see Kauffman, Impeachment and Rehabilitation of Witnesses in Maryland, 7 Md. L. Rev. 118, 133 n.68 (1943).

15. See 273 Md. at 158-59, 328 A.2d at 278, citing Howard v. State, 234 Md. 410, 199 A.2d 611 (1964); Quimby v. Greenhawk, 166 Md. 335, 345, 171 A. 59, 63 (1934). For other examples of decisions excluding a prior inconsistent statement on grounds of irrelevancy, see Baltimore Transit Co. v. State ex rel. Castranda, 194 Md. 421, 71 A.2d 442 (1950); Consolidated Beef & Provision Co. v. Witt & Co., 184 Md. 105, 112, 40 A.2d 293, 298 (1944); Baltimore City Pass. Ry. v. Tanner, 90 Md. 315, 320, 45 A. 188, 189 (1900). The Smith court viewed these decisions as foreshadowing the relevancy test it established in Smith. 273 Md. at 162, 328 A.2d at 280. See Kauffman, supra note 14, at 133 n.68.

16. The court indicated that Hitchcock is the majority rule in the United States. 273 Md. at 160, 328 A.2d at 279. But while the decision is accepted as controlling in most of the jurisdictions which follow a specific rule as to impeachment on a collateral matter, perhaps a majority of states do not apply any particular test, but rather define what is collateral on a case-by-case basis. See Note, Impeachment of Witnesses, supra note 10, at 333; cf. Slough, Impeachment of Witnesses: Common Law Principles and Modern Trends, 34 Ind. L.J. 1, 17 & n.73.

17. 273 Md. at 162, 328 A.2d at 280.


19. See 273 Md. at 162, 328 A.2d at 280.


21. 273 Md. at 161, 328 A.2d at 280.

22. See notes 18-19 and accompanying text supra.
of the prior inconsistent statement was likely to have in discrediting Brown against the possibility that admitting such evidence would result in a confusion of issues or unfair surprise to the witness, and concluded that the proffered testimony should not have been excluded. The majority also observed that Brown’s prior statement was not technically hearsay because it was not offered to prove the truth of its contents, “but only to impeach [Brown’s] testimony by showing that he made such a statement which he now denies.” Extending this logic, the court found that the victim’s alleged statement to Brown also was not strictly hearsay because it likewise was offered solely for the fact that it was made and not to show its truth.

In holding that the facts contained in a prior inconsistent statement need only be independently relevant, the majority appears to be oversimplifying the rule against collateral impeachment and ignoring several possible ramifications of abandoning Hitchcock and its requirement of independent admissibility. The court reasoned that impeachment evidence is considered by the jury solely for purposes of assessing witness credibility; therefore, whether the evidence contained in the prior statement is otherwise admissible is inconsequential because only the fact that the statement was made is at issue. This rationale rests largely on an assumption that an instruction to the jury on the limited purpose of impeachment evidence offers adequate protection against the danger of the evidence being considered by the jury for its truth. Most courts and commentators agree, however, that limiting instructions of this kind are rarely effective — a jury often will give substantive evidentiary value to an impeaching statement theoretically aimed only at credibility. Knowing that a jury fre-

23. 273 Md. at 162, 328 A.2d at 280.
25. 273 Md. at 161, 328 A.2d at 279.
26. In this instance the alleged statement by Brown to Watkins was the prior statement.
27. See text accompanying note 24 supra.
28. The Smith court did not mention the necessity of a jury instruction on the limited use of impeachment evidence, but such instructions are generally given. See 4 Md. L. Rev. 193, 200 (1940), citing Mason v. Poulson, 43 Md. 161 (1875). Failure to give such an instruction may constitute reversible error. See McCormick, supra note 4, § 251 n.62; Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 249 (1967). Admonishing the jury to consider the testimony solely for purposes of impeachment is the only method available to prevent the jury from giving the evidence substantive weight. See Bartley v. United States, 319 F.2d 717, 720 (D.C. Cir. 1963); McCormick, The Turncoat Witness: Previous Statements as Substantive Evidence, 25 Texas L. Rev. 573, 580 (1947).
29. See, e.g., United States v. De Sisto, 329 F.2d 929, 933 (2d Cir.), cert. denied, 377 U.S. 979 (1964); Nash v. United States, 54 F.2d 1006 (2d Cir.), cert. denied, 285 U.S. 556 (1932); Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir.), cert. denied, 268 U.S. 706 (1925); Ladd, Some Observations on Credibility: Impeachment of
quently disregards a limiting instruction, an attorney can attempt to introduce an extrajudicial statement, ostensibly as impeachment evidence, in the hope that the statement will be considered by the jury for its truth.\(^{30}\) Given these considerations, it is arguable that a prior inconsistent statement should be received for impeachment only when the facts contained in the statement satisfy the test of independent admissibility. Admitting prior statements which themselves contain hearsay that a party could not successfully offer in another context may, as the dissent argued, encourage a party to circumvent the rules of evidence.\(^{31}\) If a limiting instruction is ineffective and the impeaching evidence is considered on the merits, the extrajudicial statement poses an added danger because of its unreliability as hearsay.\(^{32}\)

There are, nevertheless, countervailing considerations. An attack on the credibility of a witness by proof that he has made a statement on another occasion inconsistent with his present testimony is probably the most effective and frequently employed means of impeachment.\(^{33}\) In a typical case,\(^{34}\) an impeaching statement will be admitted despite the danger that it will be considered by the jury for its truth. This danger is tolerated


Dean McCormick wrote:

Such an instruction ... is a mere verbal ritual. The distinction [between considering the impeaching evidence as relating solely to credibility and as going to the substantive issues in the case] is not one that most jurors would understand. If they could understand it, it seems doubtful that they would attempt to follow it. ... [T]rial judges seem to consider the instructions a futile gesture.

McCormick, supra, at 580.


31. Judge Smith warned that:

[t]he precedent ... opens the door for ingenious counsel by a clever question on cross-examination of a state's witness to suggest the whole defense and then ... bolster that defense in the minds of the jury by evidence of no probative value. The majority's ruling ... seriously undermines the rules of evidence.

273 Md. at 166, 328 A.2d at 282.

32. Cf. MCCORMICK, supra note 4, § 246, at 586.

33. Id. at § 33.

34. While Smith involves two levels of hearsay — the victim's alleged remark to Brown, and the statement by Brown to Watkins — most impeachment by prior inconsistent statement involves a single out-of-court statement made by the witness-declarant that a party seeks to introduce in order to contradict the witness' present testimony.
because, in most instances,\textsuperscript{35} it is thought to be outweighed by the value of the evidence for impeachment. Hence, courts endorse the use of limiting instructions even though they are perhaps incapable of preventing a jury from giving substantive weight to impeaching evidence; they provide a method of bypassing the exclusionary rules of evidence where to do so, on balance, advances the search for truth.\textsuperscript{36} While Watkins' proffered testimony would clearly have been inadmissible as double hearsay if offered for a purpose other than impeachment, the \textit{Smith} court found that the strong probative force of the proffered testimony in discrediting Brown outweighed the danger that the jury might give it substantive evidentiary value. There was certainly a possibility that the jury would consider Brown's statement to Watkins for its truth,\textsuperscript{37} but that danger is common to all out-of-court statements regardless of form.

The result in \textit{Smith} is to relax the rule against collateral impeachment by admitting for impeachment a prior inconsistent statement containing relevant but otherwise inadmissible evidence; however, it is unclear to what extent \textit{Smith} departs from the \textit{Hitchcock} standard, as the court failed to mark adequately the new boundary between collateral and noncollateral facts. There are two possible interpretations of the \textit{Smith} holding. Specific language in the opinion indicates that the majority may have intended to establish a simple relevancy test.\textsuperscript{38} Impeachment under such a standard would be permitted whenever the fact contained in the statement has any evidentiary value independent of the contradiction. While relevancy should certainly be a prime consideration, a test based solely on a requirement that the statement be independently probative would be excessively broad. As the relationship of the impeaching evidence to the central issues of a case becomes attenuated, the force of the prior statement in discrediting the witness weakens, but the administrative trial burdens — confusion of issues, undue time consumption, unfair surprise — become increasingly onerous. After a point, the admission of the prior statement might be

\begin{quote}
\textsuperscript{35} For a circumstance in which the danger of misuse may be too great, see text accompanying note 52 \textit{infra}.
\end{quote}

\begin{quote}
\textsuperscript{36} \textit{See} Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), \textit{cert. denied}, 285 U.S. 556 (1932).
\end{quote}

\begin{quote}
\textsuperscript{37} The dissent suggested that the defense hoped the jury would take the victim's statement for its truth. \textit{See} 273 Md. at 164, 328 A.2d at 281. It would certainly be difficult for the jury to discount completely the decedent's alleged remark once it had been brought to its attention.
\end{quote}

\begin{quote}
\textsuperscript{38} \textit{See} text accompanying note 9 \textit{supra}.
\end{quote}

\begin{quote}
\textsuperscript{39} In the vast majority of cases, consideration of a statement's independent relevancy will be dispositive. \textit{See} notes 15 & 16 and accompanying text \textit{supra}. Courts and commentators clearly view the relevancy requirement as the primary factor in defining the term collateral in its impeachment context. \textit{See}, e.g., Hampton v. United States, 318 A.2d 598, 601 (D.C. Ct. App. 1974); State v. Mangrum, 98 Ariz. 279, 285-86, 403 P.2d 925, 929-30 (1965); State v. Kouzounas, 137 Me. 198, 17 A.2d 147 (1941); \textit{McCormick}, \textit{supra} note 4, § 36; Kaufman, \textit{supra} note 14, at 133; Ladd, \textit{supra} note 28, at 253; Slough, \textit{supra} note 16, at 17; Note, \textit{supra} note 10, at 338-39.
\end{quote}
counterproductive, defeating the policies the rule against collateral impeachment was designed to serve. The *Smith* court adds to the confusion when it indicates that “different considerations govern” the use of extrinsic evidence that is independently relevant but not independently admissible, yet then proceeds to test the proffered evidence against the same policy considerations it previously said were satisfied by independently relevant evidence.

Closer examination, however, reveals that a second view of the court's holding is possible, one which utilizes a balancing process. Before concluding that the proffered testimony was admissible to impeach, the majority weighed the probative force of the prior inconsistent statement in discrediting Brown against the possibility that admission would cause confusion of the issues, undue consumption of time, or unfair surprise to the witness. Thus, it is conceivable that the court will allow impeachment only when, in addition to meeting an independent relevancy requirement, the probative value of the statement for impeachment is determined, in the discretion of the trial judge, to outweigh the administrative burdens that would result from admitting the statement. Applying this two-step test to the *Smith* facts, the court's conclusion to permit impeachment seems proper. Officer Brown's prior inconsistent statement was independently relevant and of considerable value in impeaching his testimony, while the administrative trial burdens to be weighed against the strong probative value for impeachment were minimal. The prior statement focused on the primary issue of the case — whether the shooting was accidental — and thus would not lead to confusion of the issues. Moreover, the risk of unfairly surprising Brown was small, because he undoubtedly was aware that defense counsel might question him about the victim's alleged hospital statement. Finally, little time would be consumed by taking Watkins' testimony.

Regardless of which test was actually intended, the Court of Appeals failed in *Smith* to mention one factor that may be significant in other situations. It is noteworthy that the proffered evidence was offered by a defendant who sought to impeach a prosecution witness by a prior inconsistent statement that contained exculpatory evidence decidedly favorable to her defense. The significance of this factor is underscored by two recent cases from other jurisdictions in which impeachment was disallowed because the

40. See text accompanying notes 18 & 19 *supra*.
41. See notes 18–23 and accompanying text *supra*.
42. The *Hitchcock* standard is inflexible in its requirement of complete independent admissibility. The proposed *Smith* test, however, is consistent with Dean McCormick's view that the "elaborate system of rules regulating the practice and scope of impeachment should be applied with less strictness and ... simplified by confining the control less to rules and more to judicial discretion." *McCormick, supra* note 4, § 34, at 67.
43. 273 Md. at 162, 328 A.2d at 280.
44. *Id.*
prior statement was introduced by the prosecution and was prejudicial to the defendant. In *Commonwealth v. Crews* the defendant’s girl friend told police that she had heard the defendant admit his guilt. She later claimed she had been coerced into making the statement and indicated that she would not testify against the defendant at trial. Called as a court witness, she denied having heard the defendant make any self-incriminating remarks; the prosecution then introduced for impeachment a prior statement she had made to a third party inconsistent with her trial testimony. The Supreme Court of Pennsylvania reversed, holding that because evidence of the witness’ prior inconsistent statement was hearsay and therefore inadmissible on the merits, it was error to allow the prosecution to “bring to the knowledge of the jury through the back door that which it was precluded from bringing in through the front door; namely, the damaging contents of her prior inconsistent statements.” The Supreme Judicial Court of Massachusetts took a similar view in *Commonwealth v. Ferrara.* In reversing a manslaughter conviction, the court held that the prosecution could not impeach its own witness by proof of a prior inconsistent statement that would have been inadmissible if offered on the merits because it contained evidence of the witness’ opinion as to the defendant’s guilt. The court also ruled that a limiting instruction did not offer the defendant sufficient protection against the highly prejudicial effect of such a statement.

It is clear from these two cases that a prior inconsistent statement may be independently relevant under *Smith,* yet be so prejudicial to a criminal defendant that it should nevertheless be excluded when offered for purposes of impeachment. When the statement contains damaging evidence that would not otherwise be admissible, the danger that the jury will consider the statement for its truth weighs more heavily in the balance than the admitted usefulness of the statement for impeachment: “the risk that the jury will not, or cannot, follow [limiting] instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.”

46. For a discussion of the court witness rule, see this issue at 399-404.
47. 429 Pa. at 23, 239 A.2d at 354.
50. The court stated that there was no evidence that the witness witnessed the shooting; therefore, if the “content of [her] allegedly inconsistent statement . . . had been offered substantively at the trial . . . it would have been . . . an expression of an inadmissible inference on her part . . . .” *Id.* at 845.
51. *Id.* at 845; *cf.* *Bruton v. United States,* 391 U.S. 123 (1968).
52. This is the reverse of the normal situation where the danger is tolerated because of the greater value of the evidence for impeachment. *See* text at notes 34-36 *supra.*
Prosecution use of extrajudicial statements for impeachment may also infringe upon a defendant's sixth amendment right to confront witnesses against him so as to require exclusion. Although there were no constitutional impediments to the admission of the prior inconsistent statements in Crews or Ferrara, a statement containing more than a single level of hearsay may raise confrontation problems. The confrontation clause appears to require that the first declarant be available to testify as to whether he made the statement attributed to him. If the declarant is totally unavailable for cross-examination by the defendant and if his statement does not come within any hearsay exception, the introduction of an incriminating prior inconsistent statement, while theoretically limited to impeachment use and therefore not technically hearsay, could result in a denial of the defendant's right to confront the witnesses against him should the jury consider the statement for the truth of its contents. The majority opinion in Smith, however, does not explicitly indicate that the court would exclude a prior inconsistent statement were the facts reversed: that is, were the prosecution to attempt to impeach a witness by a prior inconsistent statement that would be inadmissible double hearsay if offered on the merits.

The result in Smith seems proper even though the court may not have fully taken into account considerations beyond the independent relevance of the proffered testimony. If the majority opinion is viewed as simply requiring that the proffered testimony have independent probative

54. U.S. Const. amend. VI provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The confrontation clause was made applicable to the states through the fourteenth amendment in Pointer v. Texas, 380 U.S. 400 (1965). For a good review of Supreme Court decisions since Pointer, see Comment, The Hearsay Rule and the Right to Confrontation: State’s Leeway in Formulating Evidentiary Rules, 40 Fordham L. Rev. 595 (1972).


56. In both cases the prior inconsistent statement consisted of only one level of hearsay — the alleged statement by the defendant to his girl friend in Crews qualifying as an admission — and the declarant was, by hypothesis, present and available for cross-examination by the defendant.

57. The second declarant will always be present and available for cross-examination since he is the witness who is being impeached.


59. Cf. Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965). In most, if not all, instances, the out-of-court statement can be excluded on the ground that it is so highly prejudicial to the defendant that the danger that the jury will take the statement for its truth outweighs the value of the statement for impeachment. See text accompanying notes 52-53 supra. Nevertheless, there may be situations where although the impeaching statement is not so prejudicial as to require its exclusion on such a ground, it still should be excluded because it would deny the defendant his right to confrontation.
value, the test is difficult to justify.\textsuperscript{60} It is more likely that the court has, in addition, adopted a second requirement: that the trial judge balance the probative force of the impeaching evidence against the likelihood of issue confusion, time wastage, and unfair surprise and, in the exercise of his discretion admit only prior inconsistent statements whose evidentiary value outweighs these administrative trial burdens. In a situation such as presented in \textit{Smith}, where it is the defendant who seeks to introduce impeaching evidence, a prior inconsistent statement satisfying these two requirements should be admissible. But such a test may be troublesome in other impeachment situations, especially those that would require consideration of a criminal defendant's sixth amendment right to confront witnesses against him.

\textsuperscript{60} See text following note 39 \textit{supra}. 
Harrison v. State

The defendant was indicted after he allegedly robbed and shot a man to death. Following arraignment, he was placed in a holding cell in the Baltimore City Jail with several other prisoners, including William Strait, a purported eyewitness to the murder who positively identified Harrison at trial as the killer. To impeach Strait's testimony Harrison testified that during their brief confinement together Strait admitted that his accusations against Harrison were false and that he knew the identity of the actual assailant. When the trial judge asked Harrison to explain the absence of further conversations, the defendant stated that he had been unable to talk to Strait after they were removed from the holding cell because each was placed in a different section of the jail. He added that he had “told [his] lawyer all about it.” On cross-examination Harrison was asked, without objection, whether he had ever informed his first attorney of the conversation with Strait, and he answered that he had. When called in rebuttal, Strait refuted Harrison’s story and stated that when he had been deposed the defendant’s attorney had not questioned him about the alleged conversation. The defendant’s former counsel then testified over strenuous objection that defendant’s attorney-client privilege was being violated, that Harrison had not informed him of the conversation with Strait. The defendant was subsequently convicted of first degree murder and sentenced to life imprisonment. The Court of Special Appeals affirmed the conviction. It found that Harrison had waived by implication the protection of the attorney-client privilege by

1. 276 Md. 122, 345 A.2d 830 (1975).
2. Strait was being held as a state’s witness in default of bail pursuant to Md. R.P. 732. 276 Md. at 125 n.3, 345 A.2d at 833 n.3.
3. 276 Md. at 129, 345 A.2d at 835.
4. Harrison was represented at trial by a court-appointed public defender after his first counsel struck his appearance. Id. at 128 & n.10, 345 A.2d at 834 & n.10.
5. Id. at 129-30, 345 A.2d at 835.
6. Strait admitted that he had been in a holding cell with Harrison, but denied that he had talked to him alone or made any statement to him. Id. at 128, 345 A.2d at 834.
7. The prosecution was allowed to reopen its case in order to call the attorney. Id.
8. The trial judge held that although communications with counsel were privileged, the absence of communication was not. Finding support for this distinction in Morris v. State, 4 Md. App. 252, 242 A.2d 559 (1968), he ruled that testimony by Harrison’s attorney was admissible because it did not deal with “‘the disclosure of a communication as such [but was] . . . merely testimony that no such communication was ever made between the client and the attorney.’” 276 Md. at 130, 345 A.2d at 835. The Court of Appeals rejected the reasoning of the trial judge, and concluded that the holding in Morris did not support a “distinction concerning what is within or without a ‘conversation.’” Id. at 152, 345 A.2d at 847.
testifying about the conversation on direct examination and then admitting on cross-examination that he had informed his former counsel of its existence. 11

The Court of Appeals reversed. 12 In an opinion by Judge O'Donnell, the majority held that Harrison did not waive by implication his privilege against disclosure of confidential attorney-client communications 13 simply by admitting in response to a question on cross-examination that he had told his former lawyer about the conversation with Strait. 14 The court determined that it therefore was prejudicial error for the trial court to allow Harrison's previous attorney to testify about confidential communications. The majority stated that waiver could not be implied simply from the fact that the defendant took the stand and waived his privilege against self-incrimination. 15 It noted that it would be unfair to permit the prosecution to force the defendant to admit the existence of a privileged communication that related to the subject matter of his direct testimony, and then to allow the prosecution to call the attorney to contradict the defendant; by disclosing privileged matters in this manner the defendant could not be said to have “distinct[ly] and unequivocal[ly]”

11. Id. Alternatively, the Court of Special Appeals stated that the alleged conversation at the jail between the defendant and Strait, even if in fact communicated by the defendant to his attorney, was communicated not in confidence but rather for the express purpose of making it public at trial. Id. The state, however, abandoned this argument before the Court of Appeals. 276 Md. at 136, 345 A.2d at 838-39.

12. 276 Md. at 158, 345 A.2d at 850. Judge Smith filed a dissenting opinion in which Chief Judge Murphy concurred in part. Id. The majority also found reversible error in the admission of evidence of Harrison's alleged possession of marijuana at the time of his arrest twenty days after the homicide. The court stated that because the prosecution failed to show that this evidence was in any way related to the crime charged, its admission was prejudicial to the defendant and denied him a fair trial. Id. at 153-58, 345 A.2d at 847-50.


14. 276 Md. at 152, 345 A.2d at 847.

15. Id. at 143-44, 345 A.2d at 842-43, citing People v. Moore, 42 App. Div. 2d 268, 346 N.Y.S.2d 363 (1973). This view is taken by a majority of courts. See C. McCormick, Evidence § 93 (2d ed. 1972); C. Torcia, Wharton's Criminal Evidence § 561 (13th ed. 1973). In People v. Shapiro, 308 N.Y. 453, 459-60, 126 N.E.2d 559, 562 (1955) (citations omitted), the New York Court of Appeals stated that [i]n logic and reason a distinction should be made between the waiver deemed to have been made when the defendant witness is interrogated on the issue of his guilt and the rules of evidence relating to privileged communications between himself and his attorney, the disclosure of which would serve to assure the prosecutor a verdict of guilt.

See 8 J. Wigmore, Evidence § 2327, at 637 (McNaughton rev. 1961); 16 Minn. L. Rev. 818, 823-24 (1932).
intended to waive the privilege. Finally, the court felt that to imply a waiver in such a circumstance would undercut the essential policy of the attorney-client privilege — encouraging clients freely to consult with and confide in their attorneys because a client would be less likely to be candid if he thought his attorney might be compelled to disclose theretofore privileged information once the client took the stand.

The Court of Appeals noted that a witness who voluntarily testifies at trial about specific communications with his lawyer is generally held to have waived by implication the privilege of confidentiality. The majority conceded that in applying this rule the commentators generally make no distinction between testimony given on direct and on cross-examination. But the court also observed that in most cases waiver has occurred as a result of voluntary disclosure of privileged communications on direct examination. The majority found that Harrison did not waive his right to invoke an attorney-client privilege by virtue of his response — "I told my lawyer all about it" — to the trial court's question concerning his inability to converse further with Strait. Harrison's answer, the court reasoned, was ambiguous, and it was "a general statement which did not disclose, or purport to disclose what words were used — or what the conversation was — nothing which was confidential was thereby revealed." While waiver has on occasion been implied on cross-examination, the majority indicated that Harrison's simple, affirmative answer

17. See McCormick, supra note 15, § 87; 8 Wigmore, supra note 15, § 2291.
18. 276 Md. at 145, 345 A.2d at 843, quoting from Tate v. Tate's Executor, 75 Va. 522, 533 (1881).
19. The privilege is waived as to all communications with the attorney on the same subject. 276 Md. at 136-37, 345 A.2d at 839, citing McCormick, supra note 15, § 93; 8 Wigmore, supra note 15, § 2327; 3 Wharton's, supra note 15, § 561; Annot., 51 A.L.R. 2d 521, 529-37 (1957).
20. 276 Md. at 137, 345 A.2d at 839; see McCormick, supra note 15, § 93, at 194 n.15, 195. Dean McCormick thought that absent a showing that a client was surprised or misled, the usual rule of waiver, see note 31 and accompanying text infra, should be enforced on cross-examination, and he viewed as unsupportable the decisions distinguishing between direct and cross-examination. Id. at 195.
21. 276 Md. at 129, 345 A.2d at 835 (emphasis removed).
22. The court argued that although the statement could be construed to mean that Harrison had informed his lawyer of both the alleged Strait conversation and his inability to talk further with him at the jail, the answer could as easily be interpreted as indicating only that he told his lawyer that he had been unable to talk to Strait because they had been placed in different cell blocks. Id. at 150-51, 345 A.2d at 846.
24. 276 Md. at 138-39, 345 A.2d at 840, citing Steen v. First Nat'l Bank, 298 F. 36, 41-42 (8th Cir. 1924) (at preliminary hearing client testified on cross-examination to numerous statements made to and conversations with his attorney); Pinson v. Campbell, 124 Mo. App. 260, 101 S.W. 621 (1907) (witness disclosed on cross-examination all discussions with an attorney with respect to instituting criminal
to the question posed lacked the substantive detail of the disclosures in those cases. Thus, the court apparently found Harrison to be factually distinguishable.

The Harrison court contended, moreover, that the "better-reasoned cases" supported the view that a defendant does not waive by implication his attorney-client privilege by testifying about privileged conversations on cross-examination, regardless of the detail of the testimony. The majority placed special reliance on People v. Kor, a California case holding that when a defendant divulged privileged communications in direct response to questions on cross-examination, such disclosures were involuntary and could not form the basis of a claim that he intended to waive the protection of the attorney-client privilege. Because Harrison admitted telling his first lawyer about the alleged conversation with Strait only during questioning by the prosecution on cross-examination, the majority reasoned that the disclosure was involuntary and that a waiver by implication had not occurred. The Court of Appeals considered it significant that the court in Kor had refused to accept as a ground for implying a waiver the argument that the attorney-client privilege should cease whenever it is thought the client is using the privilege to conceal the truth. The Harrison court implicitly recognized that the defendant's story about his conversation with Strait could have been viewed as a pure fabrication. But it agreed with the Kor court that to find a waiver in such a circumstance would leave the privilege devoid of practical meaning because the truth of any client's testimony can be, and usually is, brought into question.

25. 276 Md. at 152, 345 A.2d at 847.
28. Id. at 445, 277 P.2d at 100. The defendant in Kor testified on direct examination that he told his lawyer "what had happened and how it happened." On cross-examination he was asked several questions about specific communications with his counsel, to which he responded without objection. Several commentators have criticized the Kor holding. See McCormick, supra note 15, § 93, at 194 n.15; Note, Attorney-Client Privilege in California, 10 Stan. L. Rev. 297, 315 (1959); 2 U.C.L.A. L. Rev. 573 (1955). But see Gardner, Principles of Waiver, Attorney-Client Privilege, 35 Calif. St. B.J. 262, 265 n.6 (1960).
29. 276 Md. at 142, 345 A.2d at 841-42.
30. Id.; see notes 46-47 and accompanying text infra.
While a witness generally waives the attorney-client privilege by implication if he does not immediately claim the privilege when testimony touching upon confidential communications is offered, the Harrison court was unwilling to conclude that a waiver occurred when the defendant did not refuse to answer the prosecutor’s questions on cross-examination and his counsel failed to interpose an objection. The court noted that because a prejudicial inference could arise from a claim of privilege, such a claim might be as damaging to the defendant as would be a waiver. Indeed, in several instances courts have found prejudicial error where a trial court merely allowed a party to question a witness on cross-examination about confidential communications made to a lawyer. The Harrison court interpreted these cases as buttressing its contention that an objection itself would have been prejudicial because, if sustained, it would have conveyed to the jury the impression that the attorney would have contradicted the witness had he been allowed to testify. The Court of Appeals concluded that the involuntary and non-substantive nature of Harrison’s responses on cross-examination, the possibility that he was surprised or misled by the questions posed, and the extreme importance of protecting the confidentiality arising from the attorney-client relationship combined to compel its finding that Harrison did not waive by implication the protection of the attorney-client privilege.

In a dissenting opinion, Judge Smith stated that it was “abundantly plain” that a waiver of the privilege had occurred by implication when Harrison failed to invoke its protection and admitted telling his former lawyer about the alleged conversation with Strait. Judge Smith rejected the distinction drawn by the majority between direct and cross-examination, and argued that the waiver was no less effective or voluntary because it took place on cross-examination. Relying on dictum in Shawmut Mining Co. v. Padgett, the dissent contended that it was unfair to allow Harrison first to disclose the existence of the confidential communications and then to withhold the substance of those communications, and that by permitting

32. 276 Md. at 148, 345 A.2d at 845; see Burgess v. Sims Drug Co., 114 Iowa 275, 280-81, 86 N.W. 307, 309 (1901). But see note 20 supra.
33. 276 Md. at 150, 345 A.2d at 846; see Gardner, supra note 28, at 268. See also McCormick, supra note 15, § 76.
35. See note 20 supra.
36. 276 Md. at 159, 345 A.2d at 850; accord, Steen v. First Nat’l Bank, 298 F. 36, 43 (8th Cir. 1924); Finson v. Campbell, 124 Mo. App. 260, 101 S.W. 621 (1907); Raleigh & C.R.R. v. Jones, 104 S.C. 332, 88 S.E. 896, 898 (1916); see note 20 supra.
37. 132 Md. 397, 104 A. 40 (1918). The Shawmut court observed that “while the privilege is for the protection of the client, he may waive the privilege, and this may be done by implication, for instance, he can not be allowed, after disclosing as much as he pleases to withhold the remainder.” Id. at 404, 104 A. at 43 (emphasis added).
him to do so the majority had turned the attorney-client privilege from a
"shield... into a sword." 38

This reasoning is unacceptable. It is difficult to ignore, as the dissent
did, the critical difference between direct examination and cross-examination
in the waiver context. When a witness reveals on direct examination the
substance of a privileged discussion with his lawyer and implies that the
attorney will corroborate his testimony, the opposing party should be
permitted to test the witness' truthfulness by calling the attorney to the
stand. One can logically assume that a witness who discloses a significant
part of a privileged communication in his direct testimony does so volun-
tarily; even if he does not intend to waive the protection of the privilege
it would be unfair to allow him to insist on the privilege after he has used
a partial disclosure to his advantage. 39 But common sense and policy
considerations dictate a different result when the disclosure comes in re-
response to a question on cross-examination. There the witness has little
control over how much of his privileged communications are disclosed, for
the amount revealed will depend largely on the questions posed by the
cross-examiner. 40 It is difficult to interpret his responses — especially non-
substantive answers 41 — as a purposeful attempt to gain an advantage
from the attorney-client privilege by employing his lawyer as an unseen
corroborating witness. It would therefore be unfair to allow the opposing
party to call an attorney as a witness in order to prevent that attorney's
present or former client from using the privilege as a sword when in fact
the party could prevent the client from gaining such a supposed advantage
by not raising the point in the first place. 42

38. 276 Md. at 159-60, 345 A.2d at 851; see Note, Attorney-Client Privilege in
California, 10 STAN. L. REV. 297, 315 (1958).
39. See, e.g., MCCORMICK, supra note 15, § 93.
40. The witness has little choice but to object to the question or give a yes or no
answer. If the cross-examiner's question goes into great detail about a specific com-
munication, and the witness admits making such a communication, the amount of privi-
leged matter disclosed still depends on the question and not on the witness' response.
41. Of course, if the witness volunteers a response that clearly goes beyond what
is necessary to answer the question thus providing a substantive and detailed dis-
closure of privileged communications, he may be held to have waived by implication
the protection of the privilege. His disclosure would then be voluntary, and it would
be unfair to allow him to insist on the privilege after he has made a partial disclosure.
See notes 24-25 and accompanying text supra. The majority in Harrison clearly did
not establish a rigid rule barring waiver by implication on cross-examination, but
merely concluded that such a waiver could not be implied when the responses were
simple and nonsubstantive.
42. It appears unlikely that Harrison's story, in the absence of his lawyer's im-
peachment testimony, actually gave him an unfair advantage. The jury could judge
his credibility effectively in light of Strait's rebuttal testimony that he had never made
the statements Harrison attributed to him and had not been asked about any such
remarks when he was deposed. See notes 5-6 and accompanying text supra.
43. A party might be required to take the answer given if it saw fit to inquire
into privileged communications on cross-examination of the witness, by analogy to
the rule against collateral impeachment. See, e.g., Smith v. State, 273 Md. 152, 328
In addition, a finding of waiver in the Harrison circumstances would have serious policy implications. If a lawyer could be called as a witness following cross-examination of his client, the latter might be reluctant to discuss his case frankly with counsel, and might not be willing to risk taking the stand for fear that his lawyer might then be compelled to testify against him. The Harrison dissent apparently believed that the benefits gained from the full disclosure of pertinent facts outweighed the damage done to the attorney-client privilege. But given the adverse impact a finding of waiver would have on the privilege in general, and given that in Harrison the attorney's testimony probably was not necessary to prevent a miscarriage of justice, the mere fact that exclusion might tend to place Harrison's story of his alleged conversation with Strait in a false light before the jury does not seem a sufficiently compelling reason for implying a waiver.

In Harrison the Court of Appeals has departed from the usual waiver rule and adopted a position criticized by commentators and rejected by many courts. But the majority justifiably is reluctant to force a defendant to make Hobson's choice between responding on cross-examination to a question infringing upon privileged attorney-client communications, thereby waiving the privilege, and refusing to respond, thereby suffering an adverse inference from the claim of privilege. In providing a witness with the option of responding without elaboration to the question without being held to have waived the privilege voluntarily, the court is supported both

---

A.2d 274 (1974), discussed in this issue at 381-90. There is dicta in the majority opinion to support this view. See 276 Md. at 148, 345 A.2d at 845, quoting Burgess v. Sims Drug Co., 114 Iowa 275, 280-81, 86 N.W. 307, 309 (1901); see Gardner, supra note 23, at 268.

44. Dean McCormick has noted that the tendency of a client when giving his story to counsel to omit all that which he suspects might be unfavorable to him, is a matter of everyday professional observation. MCCORMICK, supra note 15, § 87, at 176.

45. See notes 17-18 and accompanying text supra.

46. This argument was rejected by the majority. See notes 29-30 and accompanying text supra.

47. See note 42 supra. Dean McCormick has suggested that [t]he present privilege against disclosure of [privileged] communications in judicial proceedings should be made subject to the exception that the trial judge may require a particular disclosure if he finds that it is necessary in the administration of justice. Notwithstanding such a change, the present reluctance of lawyers to call an opposing counsel for routine examination on his client's case would continue as a restraining influence. The duty to the client of secrecy would still be recognized and protected in the ordinary course, but the lawyer's duty as an officer of the court to lend his aid in the last resort to prevent a miscarriage of justice would be given the primacy which a true balancing of the two interests would seem to demand.

MCCORMICK, supra note 15, § 87, at 177.

48. The majority opinion does not preclude the alternative of objecting to a question that might infringe upon privileged communications.
by logic and by policy. In refusing to allow the privilege to be "whittled away by means of specious argument that it has been waived," the *Harrison* court has adopted a preferable alternative to rigid application of the standard waiver rule, in a context where a more flexible approach seems necessary.

Defendant Patterson was convicted of the second degree murder of her husband. Her mother, the only eyewitness to the homicide, gave contradictory accounts of the incident before trial. She was called as the court’s witness at the prosecution’s request, because the state could not vouch for her veracity and had alleged the possibility of a miscarriage of justice should she fail to testify. The Court of Special Appeals affirmed the conviction, rejecting Patterson’s argument that the trial court had abused its discretion. On certiorari, the Court of Appeals held that under the circumstances the trial judge had not abused his discretion by calling the defendant’s mother for direct examination by the court and cross-examination by both the prosecution and the defense.

The Court of Appeals observed that the discretionary authority of a trial court in a criminal prosecution to call a witness on its own motion or at the request of one of the parties is recognized in all jurisdictions where the question has been raised. Even though no prior Maryland decision had ruled on the point, the court regarded the rule as well-settled, and therefore focused on the exercise of judicial authority under the Patterson facts. The procedure clearly was invoked in response to the voucher rule, which presumes in theory that a party guarantees to the trier of fact the veracity of the witnesses it calls. In application, the

2. Id. at 565–67, 342 A.2d at 662–63.
3. For a discussion of the voucher rule see note 9 and accompanying text infra.
4. The state filed a motion for appropriate relief under Md. R.P. 725(a), which requires that all pre-trial defenses and objections be raised by either a motion to dismiss or a motion for appropriate relief.
6. 275 Md. at 568, 342 A.2d at 664; see Annot., 67 A.L.R.2d 538 (1959).
7. Id. at 568, 342 A.2d at 663–64. In Wilson v. State, 20 Md. App. 318, 315 A.2d 788 (1974), the trial court allowed three eyewitnesses to a shooting to testify as court witnesses on motion by the prosecution after finding that they had been intimidated and the state could not vouch for their veracity. Although the ruling was not at issue on appeal, the Court of Special Appeals approved the court witness procedure in dictum, recognized the authority of a trial judge to call and examine witnesses in his discretion and of his own accord under “appropriate circumstances.” Id. at 321 n.1, 315 A.2d at 790 n.1.
8. The defendant conceded the authority of the court to call its own witnesses. 275 Md. at 570, 342 A.2d at 664–65.

The basis for the voucher rule has been regarded as more historical than logical. See McCormick, supra, § 38, at 75; Ladd, supra at 77; 4 Md. L. Rev. 193,
rule prevents a party from impeaching its own witness, absent proof either of surprise, with subsequent damage from the witness' testimony, or of the witness' hostility. The prosecution in Patterson declined to vouch for the veracity of the defendant's mother because of material variations between her oral statement to investigating officers on the night of the incident, her subsequent testimony before the grand jury, and her statement to defense counsel. Because the state was well aware of the witness' conflicting accounts of the homicide, it could not have claimed that surprise necessary to overcome the effect of the voucher rule.

195 (1940). Its origin has been traced to medieval England where witnesses were not called to testify to the controverted facts, but were regarded as partisan "oath-helpers" who swore that based upon their general knowledge of the litigant's character, his contention or claim was valid and just. Ladd, supra, at 69-70. The rule has been criticized as irrational, archaic, and potentially destructive of the truth-gathering process in the context of a modern system of adversary trials. See Chambers v. Mississippi, 410 U.S. 284, 295-97 (1972); McCormick, supra, § 38, Kauffman, supra, at 120; Ladd, supra, at 77-78. In Chambers the Supreme Court was particularly critical of the voucher rule:

Whatever validity the "voucher" rule may have once enjoyed, and apart from whatever usefulness it retains today in civil trial process, it bears little present relationship to the realities of the criminal process. It might have been logical for the early common law to require a party to vouch for the credibility of witnesses he brought before the jury to affirm his veracity. Having selected them especially for that purpose, the party might reasonably be expected to stand firmly behind their testimony. But in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them.


11. 275 Md. at 565-67, 342 A.2d at 662-63.

12. Id. at 572, 342 A.2d at 666; see Young v. United States, 97 F.2d 200 (5th Cir. 1938); 4 MD. L. REV. 193, 198-99 (1940). In addition, the prosecutor probably would have been unable to show that the witness' testimony was damaging or prejudicial to its case. Cf. Travelers Ins. Co. v. Hermann, 154 Md. 171, 140 A. 64 (1938).
cution could have called her mother and used the "tradition options" to impeach her. The court further observed that impeachment, even if an available option, was an extremely limited remedy: the prior inconsistent statements would have been admissible only to impeach the witness' credibility, not as substantive evidence.

The *Patterson* court observed that in a substantial number of cases decided on similar facts, appellate courts had found no abuse of discretion by trial judges who had invoked their authority to call witnesses. The witness called was usually an eyewitness or one in possession of particularly relevant evidence. In most instances the prosecution had refused to vouch for the witness' veracity, and in nearly all cases the witness was

---

13. 275 Md. at 572, 342 A.2d at 666.

15. 275 Md. at 573, 342 A.2d at 666.
17. See, e.g., People v. Hinderhan, 405 Ill. 435, 91 N.E.2d 430 (1950) (witness at scene of crime shortly after defendant took indecent liberties with a minor child); People v. Routt, 100 Ill. App. 2d 388, 241 N.E.2d 206 (1968) (witness possessed material and relevant knowledge of homicide).
either a relative, companion, or close associate of the defendant.\textsuperscript{19} Many courts had exercised their power to call witnesses when it was alleged that a miscarriage of justice would result from the failure of the witness to testify.\textsuperscript{20} Drawing on these precedents, the Court of Appeals concluded that the trial court had ample support for its ruling.\textsuperscript{21}

The \textit{Patterson} court rejected the defendant's claim that the trial judge had erred procedurally by examining the witness before, instead of after, the close of the state's case-in-chief. It stressed that the judge had been "scrupulously careful to preserve an attitude of impartiality"\textsuperscript{22} in limiting his interrogation to fact-eliciting questions. The court could find no judicial authority to support the defendant's view that the judge's role as impartial arbiter was diminished in the eyes of the jury by the timing of the examination.\textsuperscript{23} On the contrary, the court found the procedure followed by the trial court to be "judicially most fair." It argued that calling the witness prior to the close of the state's case-in-chief avoided a possible directed verdict and a resultant miscarriage of justice.\textsuperscript{24} Moreover, calling the defendant's mother after the prosecution had rested and

\begin{itemize}
\item \textsuperscript{20} See, e.g., People v. Banks, 7 Ill. 2d 119, 129 N.E.2d 759 (1955), \textit{cert. denied}, 351 U.S. 915 (1956); People v. Bennett, 413 Ill. 601, 110 N.E.2d 175 (1953); People v. Touhy, 361 Ill. 332, 197 N.E. 849 (1935).
\item \textsuperscript{21} 275 Md. at 578, 342 A.2d at 669.
\item \textsuperscript{22} Id. at 580, 342 A.2d at 670. The state's motion to have the defendant's mother called as the court's witness was made after the jury had been excused for its luncheon recess. The jury was not informed of the state's refusal to vouch for her credibility or that she was called as the court's witness. Examining the judge's questions, the Court of Appeals found "no suggestion of unfairness or [partiality] . . . nor from any of them . . . any semblance of an opinion concerning the appellant's guilt or innocence." \textit{Id.} The court warned, however, that a trial judge, in questioning a court witness, must
\item guard against giving the jury any impression that the court was of the opinion that defendant was guilty. The opinion of the judge, on account of his position and the respect and confidence reposed in him and his learning and assumed impartiality is likely to have great weight with the jury, and such fact of necessity requires impartial conduct on his part.
\item \textit{Id.} at 579, 342 A.2d at 669-70, \textit{quoting from} Gomila v. United States, 146 F.2d 372, 374 (5th Cir. 1944).
\item \textsuperscript{23} 275 Md. at 581, 342 A.2d at 670-71. As the court observed, in each of the cited cases involving similar circumstances, \textit{see} notes 16-20 \textit{supra}, the testimony of the court witness was given before the close of the prosecution's case. \textit{Id.} at 581, 342 A.2d at 671.
\item \textsuperscript{24} 275 Md. at 581, 342 A.2d at 671. The state may have been unable to introduce legally sufficient evidence on the basis of which the jury could find the defendant guilty beyond a reasonable doubt. \textit{See} Wilson v. State, 261 Md. 551, 276 A.2d 214 (1971).
\end{itemize}
the defendant had already testified might have unfairly emphasized the conflicts in their testimony.\textsuperscript{25}

In embracing the concept of court witnesses, the \textit{Patterson} decision is unexceptional: it merely confirms explicitly a dictum from a recent Court of Special Appeals decision\textsuperscript{26} and adds Maryland to the substantial list of states adopting the rule.\textsuperscript{27} Given the existing evidentiary framework in Maryland that requires a party to vouch for its witnesses, generally prohibits that party from impeaching them, and proscribes the substantive use of impeachment evidence, the power of the court to call witnesses improves the adversary system by admitting highly relevant evidence that otherwise would be excluded.\textsuperscript{28} While the Court of Appeals had little difficulty approving the specific exercise of this judicial authority, there is dicta in \textit{Patterson} that indicates the trial judge's discretionary power to call witnesses may extend well beyond the \textit{Patterson} facts. The court intimated that the discretion was not limited to the calling of eyewitnesses, but extended to non-eyewitnesses as well. This would be a liberal position for which there is little judicial support.\textsuperscript{29} In addition, the court implied that a judge could call a witness although neither party had requested him to do so, and stated that use of the procedure was not conditioned on a refusal by one of the parties to vouch for the veracity of the witness.\textsuperscript{30}

The \textit{Patterson} court showed awareness that the court witness procedure is useful in avoiding the ban against impeaching one's own witness.\textsuperscript{31} But it recognized that the rule's primary utility is in making available to the trier of fact testimony that might significantly influence a verdict. While revealing a willingness to apply the court witness concept in a

\begin{itemize}
\item \textsuperscript{25} 275 Md. at 581, 342 A.2d at 671.
\item \textsuperscript{26} \textit{See note 7 supra.}
\item \textsuperscript{27} \textit{See note 6 and accompanying text supra.}
\item \textsuperscript{28} \textit{See notes 10–14 and accompanying text supra; Comment, Impeaching One's Own Witness, 49 VA. L. REV. 996, 1016 (1963). The same result achieved through use of the court witness procedure could be accomplished by allowing a party to impeach his own witness and receiving the impeaching evidence on the merits. See note 14 supra. The advantage of the court witness procedure is in limiting the substantive use of the prior inconsistent statements to situations where the need for giving the jury essential information about the crime outweighs the danger that the prior statement will prove unreliable. Cf. Note, Prior Statements, supra note 14, at 658–59.}
\item \textsuperscript{29} 275 Md. at 575, 342 A.2d at 667. \textit{See Comment, Impeaching One's Own Witness, supra note 28, at 1015–16 n.17. Obviously, however, in order to be called as the court's witness the individual must possess relevant and material information that would not otherwise be available to the trier of fact. Eyewitnesses usually possess unique information that in the interest of justice should not normally be excluded, while few non-eyewitnesses possess such vital information. The court witness procedure therefore will nearly always involve the former. The practice of calling a non-eyewitness as a court witness is apparently followed only in Illinois. \textit{Ste}, e.g., People v. Siciliano, 4 Ill. 2d 581, 123 N.E.2d 725 (1955); People v. Hinderhan, 405 Ill. 435, 91 N.E.2d 430 (1950).
\item \textsuperscript{30} 275 Md. at 575, 342 A.2d at 668; see \textit{Fed. R. Evid.} 614(a).
\item \textsuperscript{31} \textit{See notes 24–25 and accompanying text supra.}
\end{itemize}
variety of factual contexts, the court stressed that "a trial judge should call a witness as a 'court witness' only when the adversary system fails to produce the necessary facts and a miscarriage of justice would likely result." The decision to call a court witness clearly must rest in the sound discretion of the trial judge. He can best gauge the importance of the offered testimony and assess the probability that exclusion will result in a miscarriage of justice. The Patterson court unquestionably was correct in finding that there existed a "strong likelihood" that such a miscarriage of justice would result from the failure of Patterson's mother to testify as a court witness. The jury would have been severely handicapped in their quest for a just verdict without her testimony and prior statements. The Court of Appeals has indicated in Patterson that it will take a flexible attitude toward the court witness doctrine. Following the traditional view that vests broad discretion in the trial judge to call witnesses when party presentation is incomplete, the court apparently will allow liberal use of court witnesses to avoid restrictive applications of the voucher rule or the ban against substantive use of impeachment evidence.

32. 275 Md. at 577, 342 A.2d at 669 (emphasis in original). The Patterson court appears to be following the Illinois practice of limiting the calling of court witnesses to cases where it is shown that there might otherwise be a miscarriage of justice. See, e.g., People v. Moriarity, 33 Ill. 2d 606, 213 N.E.2d 516 (1966).

33. See, e.g., United States v. Brandt, 196 F.2d 653 (2d Cir. 1952); Young v. United States, 107 F.2d 490, 494 (5th Cir. 1939); State v. Hines, 270 Minn. 30, 40-41, 133 N.W.2d 371, 378 (1964); Commonwealth v. Crews, 429 Pa. 16, 22-23, 239 A.2d 350, 353 (1968); McCormick, supra note 9, § 8; Fed. R. Evid. 607.
JUVENILE LAW

During the September Term, 1974, the Court of Appeals decided two cases that involved juvenile law issues. In *Wiggins v. State* the court considered the circumstances under which retroactive application of a constitutional decision is proper, and *In re Spalding* the court considered the applicability of the fifth amendment privilege against self-incrimination to a child in need of supervision proceeding.

*Wiggins v. State*

In *Wiggins v. State* the Court of Appeals considered whether the holding in *Long v. Robinson* should be applied retroactively in Maryland state courts. *Long* had invalidated on equal protection grounds portions of the Maryland Annotated Code and the Public Local Laws of Baltimore City whereby an accused under the age of eighteen was treated as a juvenile offender everywhere in the state except in Baltimore City, where only those under the age of sixteen were treated as juveniles. The Court of Appeals held in *Wiggins* that *Long* would not be applied retroactively in Maryland.

Wiggins was convicted on six counts of burglary in two trials during 1960 and 1961 in the Criminal Court of Baltimore City. He was under eighteen years of age when the burglaries were committed but was tried as an adult offender in regular criminal proceedings. Although the Maryland Juvenile Causes Act defined a juvenile as a person under the age of eighteen at the time of Wiggins' trial Baltimore City was exempted from the age requirements of the Act and had established sixteen as the juvenile age limit. Under the Act, juvenile courts had original and exclusive jurisdiction over juveniles alleged to be delinquent, but the juvenile court judge could waive jurisdiction and order the juvenile held for regular

* 275 Md. 689, 344 A.2d 80 (1975).
1. 275 Md. 689, 344 A.2d 80 (1975).
6. 275 Md. at 691, 344 A.2d at 81.
7. Id. at 691, 344 A.2d at 81–82.
9. Ch. 797, § 48U, [1945] Laws of Md. Also exempted from the age requirement of the Act by this provision were Allegany, Montgomery and Washington Counties.
criminal proceedings. Because Wiggins' crimes were committed within Baltimore City, trial on those charges arising after his sixteenth birthday took place directly in criminal court without the requirement of a waiver by a juvenile court.

In Long v. Robinson, decided nine years after Wiggins was convicted, the United States District Court for the District of Maryland held unconstitutional those provisions of the Maryland Juvenile Causes Act and the Public Local Laws of Baltimore City that excluded Baltimore City from the otherwise uniform definition of a juvenile in Maryland as a person under eighteen years of age. Finding the provisions "arbitrary, unreasonably discriminatory, and not related to any legitimate state objective," the court held them to be in violation of the equal protection clause of the fourteenth amendment. The court ordered all persons aged sixteen and seventeen who had been arrested in Baltimore and were awaiting trial as adults turned over to juvenile authorities with their records expunged; thus, those juveniles could not be tried in criminal proceedings without a waiver hearing. Subsequent to the Long decision, Wiggins filed a bill of complaint in the Circuit Court of Baltimore City to have his convictions declared null, his record expunged, and any civil disabilities suffered as a result of his convictions removed. The trial court ruled that Long should not be applied retroactively and therefore denied relief, a judgment which was affirmed by the Court of Special Appeals.

The Court of Appeals, two judges dissenting, likewise declined to apply Long retroactively, thus disagreeing with the decision in Woodall v. Pettibone by the United States Court of Appeals for the Fourth Circuit. The Wiggins majority determined that the rule announced in Long did not fit within any of the three circumstances the Supreme Court has

13. In the three counties exempted from the age requirement of the Juvenile Causes Act, see note 5 supra, a juvenile was defined as a person under the age of eighteen by separate acts of the General Assembly. See Ch. 151, [1955] Laws of Md.; Ch. 976, [1945] Laws of Md.; Ch. 526, [1941] Laws of Md.
15. Id. at 28.
16. Id. at 30-31.
17. Wiggins v. State, 275 Md. 689, 692, 344 A.2d 80, 82 (1975). Wiggins no longer was incarcerated, id. at 691, 344 A.2d at 81. Had his case been decided in juvenile court rather than criminal court, he would not have been found guilty of a crime and, therefore, would have no criminal record. Instead, he would have been adjudged a delinquent. Delinquents do not receive criminal records and are not subject to civil disabilities such as loss of the right to vote. See Md. Crs. & Jud. Pao. Code Ann. § 3-824 (Cum. Supp. 1975).
18. 275 Md. at 692, 344 A.2d at 82.
20. Judge Eldridge filed a dissenting opinion in which Judge Levine concurred.
21. Id. at 716, 344 A.2d at 95.
recognized as mandating retroactive application of a constitutional decision:23 where the old rule affected the integrity of the fact-finding process,24 where no trial was constitutionally permissible,25 or where the punishment imposed was not constitutionally permissible.26 The court then analyzed the Long holding under the balancing test announced in Linkletter v. Walker,27 which, in the court's view, governed all remaining retroactivity cases.28 The three factors to be balanced under the Linkletter test are the purpose of the new rule, the reliance placed on the old rule, and the effect of retroactive application on the administration of justice.29 Defining the purpose of the Long holding as to ensure that "thenceforth all individuals in Maryland under the age of 18 years would be dealt with on the same basis,"30 the court considered this factor together with the justifiable reliance by the state on the old rule31 and the burden on the administration of justice that retroactive application of Long would cause.32 The Wiggins court concluded that under the Linkletter test Long should be applied prospectively in Maryland state courts.33

Judge Eldridge, in dissent, read the Supreme Court cases on retroactivity somewhat differently. While he agreed that the Linkletter three-pronged balancing test governs most retroactivity questions,34 he differed from the majority with respect to identifying the circumstances that mandate retroactive application of a decision without reference to the test. He found that a threshold inquiry must be made to determine whether the ruling at issue declared a new principle of constitutional law or merely applied settled principles to a particular situation; retroactive application would be mandated unless a new rule had been announced.35 In Judge Eldridge's view, Long did not announce a new principle of constitutional law and therefore retroactive application was required.36 In the alternative, he argued that because under the Long decision Wiggins would not initially

23. 275 Md. at 701–10, 344 A.2d at 87–92.
27. 381 U.S. 618 (1965).
28. 275 Md. at 701, 344 A.2d at 87.
29. 381 U.S. at 636.
30. 275 Md. at 710–11, 344 A.2d at 92.
31. Id. at 712, 344 A.2d at 93.
32. Id. at 714–15, 344 A.2d at 94–95.
33. Id. at 716, 344 A.2d at 95.
34. Id. at 718, 344 A.2d at 96.
35. Id. at 719, 344 A.2d at 96.
36. Judge Eldridge believed that because Long was decided by rational basis equal protection analysis, no new principle of law was announced. He pointed out that Maryland has long required a rational basis for territorial classifications. Id. at 729–32, 344 A.2d at 102–04. Most of his discussion was devoted to establishing the existence of a new rule threshold test. Id. at 719–24, 344 A.2d 97–102. The majority discussed neither the existence nor the applicability to the Long holding of such a test.
have been subject to criminal prosecution and punishment as an adult, retroactive application was mandated. Moreover, even if the balancing test were appropriate, Judge Eldridge disagreed with the majority’s result. He considered the purpose of Long to be directly concerned with the fairness of verdicts and sentences, with one purpose of juvenile proceedings being to remove the taint of criminality from juvenile offenders. Observing that the purpose prong is the most important of the three, Judge Eldridge concluded that the purposes of the rule announced in Long favored retroactive application and outweighed what he considered unreasonable state reliance on the old rule and a minimal impact on the administration of justice.

In Woodall v. Pettibone the Fourth Circuit adopted yet another approach to determining whether Long should be applied retroactively. The Woodall court stated that “the basic factor considered in deciding whether to apply a decision retroactively has been the effect [the former practice] might have had on the accuracy of the guilt-determining process in prior trials.” At a waiver proceeding in juvenile court, an accused may endeavor to show that he would benefit from rehabilitative treatment as a juvenile and that he therefore should not be waived into criminal court. Characterizing waiver proceedings as “the only opportunity an accused has to plead the defense of his diminished responsibility as a juvenile,” the Fourth Circuit held that denying this “defense” to sixteen and seventeen year-olds in Baltimore, while allowing it everywhere else in Maryland, was so unfair as to “render unreliable the guilty verdicts obtained.” Hence, retroactive application of Long was required.

Modern retroactivity doctrine in criminal litigation began with the Supreme Court’s consideration in Linkletter v. Walker of the retroactive application of Mapp v. Ohio. Mapp held that evidence seized in

37. Id. at 732-37, 344 A.2d at 104-07.
38. Id. at 737-41, 344 A.2d at 107-09.
40. Id. at 51.
42. 465 F.2d at 52, quoting Kemplen v. Maryland, 428 F.2d 169, 177 (4th Cir. 1970).
43. 465 F.2d at 52.
44. Id. A fourth analysis of essentially the same problem is presented in Radcliff v. Anderson, 509 F.2d 1093 (10th Cir. 1974), cert. denied, 421 U.S. 939 (1975). Radcliff gave retroactive effect to Lamb v. Brown, 465 F.2d 18 (10th Cir. 1972), which invalidated on equal protection grounds an Oklahoma statute defining a juvenile as a woman under the age of eighteen or a man under the age of sixteen. Radcliff was decided on a balancing test analysis with the purpose of Lamb identified as to end sex discrimination in juvenile proceedings. 509 F.2d at 1095. This purpose was held to be concerned with basic fairness and essential justice, thus requiring retroactive application, particularly in the absence of evidence that such a result would have a severe impact on the administration of justice. 509 F.2d at 1095-96. Radcliff and Woodall are discussed in 43 Fordham L. Rev. 1057 (1975).
45. 381 U.S. 618 (1965).
violation of the fourth amendment must be excluded in state criminal prosecutions. The *Linkletter* Court analyzed prior retroactivity doctrine and found that in appropriate cases a rule could be given prospective application. A three-pronged balancing test was proposed to aid in determining the propriety of prospective application. Applying the test to the *Mapp* decision, the Court held that prospective application was proper.

Although the *Linkletter* balancing test was formulated in the context of the retroactivity problem presented by an exclusionary rule decision, the test has been applied in other contexts. The Supreme Court has recognized, however, that the test is inappropriate when certain non-procedural guarantees are at issue. *Furman v. Georgia*, striking down specific state death penalty statutes as unconstitutional, was given retroactive application without reference to the *Linkletter* test, thus indicating that a decision holding a particular punishment unconstitutional must be given retroactive application. A second exception is exemplified by *Waller v. Florida*, barring on double jeopardy grounds a state prosecution subsequent to a municipal prosecution for the same act. *Waller* was applied retroactively without reliance on the balancing test on the ground that a decision that serves to prevent the occurrence of a trial must be given retroactive application. Examples of a third exception are *Marchetti v. United States* and *Grosso v. United States*, which precluded criminal prosecutions of gamblers who properly asserted their fifth amendment privileges against self-incrimination as a reason for failure to comply with the disclosure provisions of the gambling tax law. In applying *Marchetti* and *Grosso* retroactively without relying on the balancing test, the

---

47. 381 U.S. at 622–29.
48. *Id.* at 628.
49. *See* text accompanying note 29 *supra*.
50. *Id.* at 636.
53. 408 U.S. 238 (1972).
Supreme Court indicated that a decision declaring specific conduct constitutionally immune from punishment must be applied retroactively. Although these three exceptions are clear, the Court has suggested that it is unable to formulate a comprehensive explanation why some cases are not governed by the balancing test.

Prior to the recent Supreme Court decision in United States v. Peltier, it seemed clear that as a prerequisite to prospective application a decision must have announced a new principle of constitutional law. Most Supreme Court decisions that have been applied prospectively have overruled previous decisions of the Court, thereby clearly creating new rules. While a precise test for deciding whether a particular decision announced a new rule has never been formulated, it was evident that a sharp break with clear precedent was required. The determination whether a new rule had been announced was made as a threshold inquiry.

The continued viability of the threshold new rule test is questionable, however, after Peltier. The issue in Peltier was whether to give retroactive effect to the holding in Almeida-Sanchez v. United States that a warrantless automobile search by border patrol agents, conducted twenty-five miles from the Mexican border and without probable cause, violated the fourth amendment. The Peltier Court, in refusing to apply Almeida-Sanchez retroactively under a balancing test analysis, failed to discuss the threshold new rule test. Dissenting, Justice Brennan accused the majority of thereby discarding the test. He argued that the Almeida-Sanchez holding did not represent a sharp break from prior Supreme Court decisions, and in fact merely reaffirmed longstanding precedent.

63. 409 U.S. at 509.
64. 422 U.S. 531 (1975).
65. See, e.g., Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) ("First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . .") ; Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 496 (1968) ("There is, of course, no reason to confront [prospectivity] unless we have before us a situation in which there was a clearly defined judicial doctrine . . . overruled in favor of a new rule . . . ."). See generally Note, Constitutional Law — Retroactivity — Application of the "New Rule" Threshold Test Before Determining the Retroactivity of Almeida-Sanchez, 53 Texas L. Rev. 586 (1975).
68. See id. at 589.
69. 413 U.S. 266 (1973).
70. See 422 U.S. at 537-42.
71. Id. at 547. Justice Brennan was joined by Justice Marshall. Justice Douglas wrote a separate dissenting opinion. Id. at 543.
72. Almeida-Sanchez was the first roving border patrol case to be heard by the Supreme Court. 422 U.S. at 541-42. Nonetheless, Justice Brennan argued that
Justice Brennan therefore contended that prospective application should not even have been considered. The majority of the Court, however, held that because the arresting officers had acted in good faith reliance upon a validly enacted statute that had been supported by decisions in three United States Circuit Courts of Appeals, the deterrent purpose of the exclusionary rule would not be served by applying the Almeida-Sanchez holding retroactively. Because the majority did not discuss the application of the threshold new rule test to the circumstances in Peltier it is unclear whether the test actually was discarded as Justice Brennan suggested. Possibly the Court intended to create an exception for exclusionary rule cases, based on the special nature of the exclusionary rule. Thus, Peltier may reflect only the Court's refusal to apply the exclusionary rule unless a clear deterrent purpose will be served, leaving the threshold new rule test intact in other areas.

Wiggins presents a difficult retroactivity issue. Assuming that the threshold new rule test remains viable outside the exclusionary rule context, the initial step in retroactivity analysis must be to determine whether the holding in question announced a new rule of constitutional law, and would thus qualify for prospective application. The Wiggins dissent argued that Long merely applied settled principles of constitutional law to the facts of the case and found the statutes in question unconstitutional because there was no rational basis for the discrimination against youths arrested in Baltimore City. Judge Eldridge concluded that be-

Almeida-Sanchez was merely a reaffirmation of previous Supreme Court holdings. Id. at 547. Indeed, the Almeida-Sanchez Court seemed to recognize that it was not making new law, as it cited Carroll v. United States, 267 U.S. 132 (1925), for the proposition that "[a]utomobile or no automobile, there must be probable cause for the search." 413 U.S. at 269 (1973).

73. 8 U.S.C. § 1357 (a) (3) (1971).

74. See United States v. Peltier, 422 U.S. 531, 540 n.8 (1975), citing United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973); United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir. 1971), rev'd, 413 U.S. 266 (1973); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970); Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969); Kelly v. United States, 197 F.2d 162 (5th Cir. 1952).

75. 422 U.S. at 542.

76. The test for invalidating legislatively drawn territorial classifications is stated in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911): "The equal protection clause of the Fourteenth Amendment . . . avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary." In Long the district court concluded:

Whatever may have been the original justification for the exclusion of sixteen and seventeen year olds arrested in Baltimore City from the scope of the Juvenile [Causes] Act, the uncontroverted evidence is that such basis no longer exists, and the exception is arbitrary, unreasonably discriminatory, and not related to any legitimate State objective.

316 F. Supp. at 28.

It was stressed in Long that the place of arrest, rather than the place of residence, determined whether a youth was subject to the Baltimore City definition of a juvenile. Id. at 26-30. Arguably, such a system could never be sustained against
cause no new principle of constitutional law had been announced, retro-
active application of Long was required. However, it would seem that Long did announce a new principle. The Supreme Court in the past had been reluctant to strike down intrastate territorial classification schemes on equal protection grounds. While not announcing a new standard of equal protection analysis, the Long court reached a novel result in light of this precedent. Further, the system condemned in Long did not face an equal protection challenge until more than twenty years after its in-
ception, persuasive evidence that the system was not generally considered unconstitutional. Finally, the constitutionality of the system was upheld in Graves v. State, a 1967 decision of the Maryland Court of Special Appeals, and the first case in which the system was attacked. Although Graves had no value as precedent because it was unreported, it nonetheless adds weight to the other factors, supporting the conclusion that the system condemned in Long would have been upheld as constitutional over most of its history. Thus, retroactive application of Long could not be mandated under the threshold new rule test even assuming that the test has survived Peltier.

The next step in the Wiggins retroactivity analysis is to determine whether the Long holding fits within a recognized exception to the Linkletter balancing test approach. The punishment exception is inappli-

an equal protection challenge, as the place of arrest is largely fortuitous. No essential difference among juveniles, necessary to constitute a rational basis for the system, can be postulated that leads some to arrest in the city and others to arrest in the counties. Responding to this argument, the Wiggins majority noted, as a justification for the statutes, that the General Assembly probably believed that the vast majority of crimes committed in Baltimore City were committed by residents of the city, with a similar situation prevalent in the counties. The majority further noted that the General Assembly regarded Baltimore City youths as reaching adult maturity earlier than their county peers. 275 Md. at 711 & n.5, 344 A.2d at 92 & n.5. However, the Long decision rested on the lack of any difference between city and county youths, see 316 F. Supp. at 27-28. It was therefore not necessary for the Long court to decide whether, if there were a difference, the statutes were nonetheless invalid because the place of arrest, and not the arrestee's residence, was determinative.

77. 275 Md. at 732, 344 A.2d at 104.

78. See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961), in which the Supreme Court upheld against an equal protection challenge a Maryland statute permitting retail sales on Sunday of certain items in one county, while disallowing it in others. The Court stated: “With particular reference to the State of Maryland, we have noted that the prescription of different substantive offenses in different counties is generally a matter for legislative discretion. We find no invidious discrimination here.” Id. at 247. See Horowitz and Neitring, Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State, 15 U.C.L.A.L. Rev. 787, 793-97 (1968) ; Note, Strengthening Equal Protection Analysis in Maryland: Territorial Classification and In Re Trader, 35 Md. L. Rev. 312, 325-30 (1975).


80. See Md. R.F. 1092(b).
cable. Although, as the dissent observed,\textsuperscript{81} \textit{Long} was concerned with the manner in which criminal punishment was imposed on Baltimore City youths, it did not announce an absolute ban on the punishment of sixteen and seventeen year-olds as adult criminals. Even those youths granted relief under \textit{Long} could be punished as adults provided that the juvenile court waived jurisdiction. Because it neither held a particular form of punishment unconstitutional nor ensured that a particular punishment would no longer be imposed, \textit{Long} does not fit within the punishment exception to the balancing test analysis. For similar reasons the "no trial" exception is inapplicable. The \textit{Wiggins} dissent noted that under \textit{Long}, Wiggins would not have been initially subject to criminal trial.\textsuperscript{82} Yet, unlike the double jeopardy decisions that created the exception,\textsuperscript{83} retroactive application of \textit{Long} would not serve as an absolute ban on criminal trials because the possibility of waiver would still exist. Moreover, the double jeopardy decisions that were applied retroactively held that the persons involved should not have been subject to any prosecution regarding the issues previously litigated.\textsuperscript{84} Under \textit{Long}, juveniles arrested in Baltimore City are either waived, and prosecuted in criminal court, or not waived, and proceeded against in juvenile court. In either event a juvenile faces a form of prosecution, thereby distinguishing \textit{Long} from the cases composing the "no trial" exception to the balancing test analysis.\textsuperscript{85} Finally, \textit{Long} did not declare any conduct to be constitutionally protected, and therefore does not fit within the "conduct immune from punishment" exception.\textsuperscript{86}

Because no recognized exception is applicable, the retroactivity of \textit{Long} should properly be determined under a balancing test analysis. The first consideration is whether the major purpose of \textit{Long} was to overcome an aspect of the criminal trial that substantially impairs the truth-finding function and raises serious doubts about the accuracy of past guilty verdicts. The Supreme Court has held that neither good faith reliance nor severe impact on the administration of justice is sufficient to compel prospective application of such a decision.\textsuperscript{87} Both the \textit{Wiggins} dissent\textsuperscript{88} and the Fourth Circuit in \textit{Woodall}\textsuperscript{89} attempted to fit \textit{Long} into the line

\textsuperscript{81} 275 Md. at 737, 344 A.2d at 106–07.
\textsuperscript{82} Id.
\textsuperscript{83} See notes 56–57 and accompanying text supra.
\textsuperscript{87} See Williams v. United States, 401 U.S. 646, 653 & n.6 (1971).
\textsuperscript{88} 275 Md. at 738–39, 344 A.2d at 107–08.
\textsuperscript{89} 465 F.2d at 51–52.
of cases applied retroactively on this basis. These cases have been described as concerning the "integrity of the fact-finding process." The Wiggins dissent argued that this concept was broader than "whether or not the defendant engaged in a particular action;" instead, Judge Eldridge would have extended the concept to include the unfairness of subjecting Wiggins to a criminal trial without a waiver hearing. But the "integrity of the fact-finding process" label is misleading: this line of retroactivity cases all involved the accuracy with which the specific facts of a case were determined at trial. The Fourth Circuit held that Long should be applied retroactively on the ground that pre-Long guilty verdicts were unreliable, although conceding that the accuracy of the fact-finding process was not impaired. Both the Wiggins dissent and the Woodall court gave a broader scope to the "integrity of the fact-finding process" cases than appears warranted.

Because Wiggins was tried in criminal court, the fact-finding process may well have been more carefully conducted than it

91. 275 Md. at 739, 344 A.2d at 108.
92. Id.
93. See, e.g., cases cited in Williams v. United States, 401 U.S. 646, 653 n.6 (1971). The Wiggins dissent cited three cases in support of its position that the "integrity of the fact-finding process" is a broader concept than mere accuracy in determining facts: Mackey v. United States, 401 U.S. 667 (1971); McConnell v. Rhay, 393 U.S. 2 (1968) ; and Witherspoon v. Illinois, 391 U.S. 510 (1968). 275 Md. at 739, 344 A.2d at 108. However, these decisions do not support the dissent's position. Mackey held that retroactive application of Marchetti v. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968), should be limited to prior prosecutions for failure to file a gambling tax return. See notes 58-62 and accompanying text supra. Marchetti and Grosso held that a person could not be compelled to file a gambling tax return. However, if a person had done so and been convicted of income tax evasion with the return used as evidence against him, Mackey held that the person so convicted should be denied retroactive application of Marchetti and Grosso because the introduction of the return was both probative and relevant and produced no doubts "about the accuracy of the guilty verdict." Mackey v. United States, 401 U.S. 667, 675 (1971). Thus, Mackey was decided on accuracy of the fact-finding process grounds.

McConnell applied Mempa v. Rhay, 389 U.S. 128 (1967), retroactively. Mempa required that felony defendants be afforded counsel at post-trial proceedings for revocation of probation and imposition of deferred sentence. Retroactive application was required because of counsel's role in marshalling facts and evidence of mitigating circumstances and in presenting the defendant's case. McConnell v. Rhay, 393 U.S. 2, 4 (1968). Accuracy in the fact-finding process was, therefore, the primary element necessitating retroactive application.

Witherspoon held that a sentence of death could not be carried out if veniremen had been excluded from the jury imposing the sentence because of their general objections to the death penalty. The Court held that such a jury was incapable of exercising neutral judgment. 391 U.S. 510, 521 (1968). The opinion stated that it was to be applied retroactively, 391 U.S. at 523 n.22. Although the Court spoke in terms of "integrity," id., it seems clear that accuracy was an important element.

94. 465 F.2d at 52.
would have been in juvenile court. Hence, the major purpose of _Long_ was not to correct an aspect of the criminal trial that impaired its fact-finding function.

The _Long_ court did not state the purpose for its decision. The _Wiggins_ majority identified the purpose of _Long_ as insuring that "thenceforth all individuals in Maryland under the age of 18 years would be dealt with on the same basis." It is question begging, however, to define the purpose of a holding in terms that limit it to future applicability, when the issue is retroactivity. Yet the broad purpose of every equal protection decision, and indeed the purpose of the equal protection clause itself, is to ensure equal treatment. Retroactive application of _Long_ would serve to effectuate equal treatment for Wiggins in so far as he would lose his criminal record and civil disabilities, the indicia of his earlier unequal treatment. But in ordering the relief which it did, the _Long_ court was also effectuating the purposes of the Maryland Juvenile Causes Act. The _Long_ court essentially applied the Act to those persons who previously were unconstitutionally denied its application. It would seem that if the purposes of the statute would be served by retroactive application of _Long_, then the purpose of _Long_ would also be served thereby. Because Wiggins was not a juvenile facing proceedings at the time of his suit, only one of the purposes stated in the statute, "[t]o remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior," would be served by retroactive application of _Long_. Nevertheless, because one substantial purpose of the statute, as well as the

---

97. _Id._ at 710-11, 344 A.2d at 92.
   (a) The purposes of this subtitle are:
   (1) To provide for the care, protection and wholesome mental and physical development of children coming within the provisions of this subtitle; and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest;
   (2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior;
   (3) To conserve and strengthen the child's family ties and to separate a child from his parents only when necessary for his welfare or in the interest of public safety;
   (4) If necessary to remove a child from his home, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents;
   (5) To provide judicial procedures for carrying out the provisions of this subtitle.
   (b) This subtitle shall be liberally construed to effectuate these purposes.

The language of the statute was substantially the same at the time of the _Long_ decision. See ch. 432, § 2, [1969] Laws of Md.
purpose of the equal protection clause (to ensure equal treatment), can be served by retroactive application of Long, the purpose prong of the balancing test weighs in favor of retroactivity.

The reliance prong, however, weighs in favor of prospective application of Long. As discussed above, there are strong indications that the system condemned in Long would have been upheld as constitutional over most of its history. It was reasonable, therefore, for the state to have relied on the constitutionality of its system.

There is some question about the extent to which retroactive application of Long would burden the administration of justice. The Wiggins majority, in apparent reference to Franklin v. State, stated that even if it were now determined at a waiver hearing that a person would originally have been waived into criminal court, a new trial would be necessary. In Franklin the Court of Appeals held that Baltimore City juveniles who were tried without a waiver hearing, and whose appeals were not yet finally determined on May 15, 1969, the effective date of Long, must be given waiver hearings and new trials. The court reasoned that because Long established that sixteen and seventeen year-old Baltimore City youths were juveniles, and because the legislature had intended that waiver hearings precede trials for juveniles, criminal courts had no jurisdiction to try juveniles without a prior waiver hearing. It seems doubtful, however, that the legislature intended that there be no jurisdiction to try sixteen and seventeen year-olds in Baltimore without a prior waiver hearing in the event waiver hearings for those youths somehow became required. The legislature undoubtedly never considered the question, and in fact did not originally intend for these juveniles to have waiver hearings at all. The Franklin court's interpretation of the jurisdictional ramifications of Long on the Juvenile Causes Act thus seems questionable. New trials would serve no purpose in the circumstances presented in Wiggins except to further burden the administration of justice. The burden prong of the balancing test should be calculated without including new trials as a necessary element. All that would seem necessary is a determination whether the juvenile would have been waived. If so, he would not be entitled to expungement.

Burdens that would be imposed by retroactive application of Long include the expense and inconvenience of conducting waiver hearings, which would necessitate combing police and court files for evidence bearing on the issue of waiver, and the expense and inconvenience of expunging

100. See text and accompanying notes 78-79 supra.
102. 275 Md. at 714-15, 344 A.2d at 94.
103. 264 Md. at 69, 285 A.2d at 619.
104. Id. at 67, 285 A.2d at 618.
105. The Fourth Circuit in Kemplen v. Maryland, 428 F.2d 169, 178 (4th Cir. 1970), did not find new trials to be necessary in an analogous situation.
the records of those persons whom it is determined would not have been waived. The majority and dissenting opinions in *Wiggins* differed over whether this burden was substantial. The majority felt that it was, calling the files "countless." The dissent, however, pointed out that all the files are in one clerk's office and termed the burden involved in examining them not insuperable. It should also be noted that retroactive application would not create the possibility of freeing many guilty persons from jail, because very few persons convicted under the pre-*Long* system are presently incarcerated.

The Supreme Court has indicated that the purpose prong is the most important element of the balancing test. In fact, in no case has the purpose prong clearly indicated retroactivity yet been outweighed by the other two prongs. In *Wiggins* the purpose prong weighs heavily in favor of retroactivity, and it is not offset by reasonable state reliance and a not insurmountable burden on the administration of justice. Thus, the balance in *Wiggins* calls for retroactive application of *Long*.

106. 275 Md. at 715, 344 A.2d at 94.
107. Id. at 741, 344 A.2d at 109.
108. Id.
In Re Spalding\(^1\)

In *In re Gault*\(^2\) the Supreme Court invoked the due process clause of the fourteenth amendment to confer on juveniles in state delinquency proceedings\(^3\) significant federal constitutional rights, including the fifth amendment privilege against self-incrimination.\(^4\) Subsequent to *Gault*, Maryland developed a new response to juvenile misconduct designed to complement the existing mechanisms of juvenile delinquency proceedings\(^5\) and, in very serious cases, adult criminal proceedings.\(^6\) The introduction of a new category, the child in need of supervision (CINS),\(^7\) was intended to allow

2. 387 U.S. 1 (1967).
3. *Gault* was expressly limited to proceedings to determine “delinquency” where the consequence of that determination might be commitment of the juvenile to a state institution. *Id.* at 13.
4. “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V. The *Gault* Court stated: “We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.” 387 U.S. at 55. Those constitutional guarantees extended to juveniles by *Gault* consisted of adequate notice of the charges, *id.* at 31–34, the right to counsel, *id.* at 34–42, the privilege against self-incrimination, *id.* at 42–55, and the right to confront and cross-examine witnesses, *id.* at 56–57.
5. Pursuant to Md. Cts. & Jud. Pro. Code Ann. § 3–804(a) (Cum. Supp. 1975), the juvenile court has exclusive jurisdiction over a child alleged to be delinquent. Section 3–801(c) defines a “child” as a person under eighteen years of age. A delinquent act is defined in section 3–801(i) as an act “which would be a crime if committed by an adult,” and in section 3–801(j) a delinquent child is defined as one who “has committed a delinquent act and requires guidance, treatment, or rehabilitation.” These sections do not differ materially from Ch. 432, [1969] Laws of Md., which was in effect at the time of the *Spalding* hearing.
6. In accordance with Md. Cts. & Jud. Pro. Code Ann. § 3–817(a) (Cum. Supp. 1975), the juvenile court may waive its exclusive jurisdiction with respect to a petition alleging delinquency of a child fifteen years or older, or a child not yet fifteen years old who is charged with an act that would be punishable by death or life imprisonment if committed by an adult. Section 3–817(d) lists the factors which the juvenile court must consider in determining whether jurisdiction should be waived. Section 3–807 removes the bar on criminal prosecution of a child within the jurisdiction of the juvenile court if jurisdiction has been waived, while section 3–804(d) enumerates various instances where the juvenile court does not have jurisdiction over a child.

“Child in need of supervision” is a child who needs guidance, treatment, or rehabilitation because

- He is required by law to attend school and is habitually truant; or
- He is habitually disobedient, ungovernable, and beyond the control of the person having custody of him without substantial fault on the part of that person; or
- He deports himself so as to injure or endanger himself or others; or
- He has committed an offense applicable only to children.

The definitional language at the time of the *Spalding* CINS hearing was not substantially different. See Ch. 432, [1969] Laws of Md.

(418)
the state to deal with less serious forms of misconduct formerly handled in delinquency proceedings, thereby avoiding the harsh consequences that often follow an adjudication of delinquency. In *In re Spalding* the Maryland Court of Appeals concluded that the privilege against self-incrimination, made applicable to delinquency proceedings by *Gault*, should not be further extended to a CINS proceeding.

Spalding, then thirteen years old, was brought before a juvenile master on February 1, 1973, pursuant to a petition of the Department of Juvenile Services charging that she was a "delinquent child" and a child "in need of supervision." The petition alleged that

on 1–31–73 . . . an investigation by the Baltimore County Police Department revealed that the respondent had consumed controlled and prohibitive [sic] narcotics and engaged in acts of sexual intercourse and sexual perversion with an unknown number of male and female adults for a period of more than one year. The respondent is ungovernable and beyond the control of her parent, deports herself in such a manner as to be a danger to herself and others and is in need of care and treatment.

The petition was based on statements made to the police by Spalding and another child who was similarly charged. Spalding's mother had brought her to the police station in response to a telephone call from an officer who was investigating a complaint brought by the parents of the other child. The children there described a year long series of early morning parties at which they had been given narcotic pills and had engaged in various sexual activities with adults. Spalding stated that she put sleeping pills, supplied by one of the adults, into her mother's coffee and thus was able to attend the parties without her mother's knowledge. The juvenile master at the adjudicatory hearing found both children to be in need of

---


It is evident, we think, that an important purpose of the legislative revision of the juvenile code was to insulate certain forms of juvenile misconduct from the consequences of an adjudication of delinquency as described in *Gault*. The creation of the category of CINS reflects a studied design of the legislature to insure that treatment of children guilty of misconduct peculiarly reflecting the propensities and susceptibilities of youth, will acquire none of the institutional, quasi-penal features of treatment that in *Gault's* view had been the main difference between the theory and the practice of the juvenile court system.

10. Id. at 709, 332 A.2d at 257.
11. Id. at 693–94, 332 A.2d at 248.
13. 273 Md. at 692–93, 332 A.2d at 247–48. The girls had engaged in sexual relations with a number of adults, both male and female. The adults subsequently were prosecuted for statutory rape or perverted practices.
supervision, but he did not find them delinquent.14 At a disposition hearing before a different juvenile master on March 7, 1973, both girls were committed to the custody of the Department of Juvenile Services.15

Upon the filing of exceptions to the master's decision by the juveniles, the Circuit Court of Baltimore County, sitting as a Juvenile Court, heard both cases de novo on May 3, 1973.16 Over objection, the written and oral statements made by Spalding to the police were admitted into evidence against her; cross-examination of the officer who had taken the statements, with respect to either their voluntariness or the issuance of Miranda warnings,17 was not permitted. Spalding was then called by the state as a witness and was compelled to testify over her counsel's strenuous objection.18 At the conclusion of the hearing the court determined that Spalding and the other girl were children in need of supervision, and both were committed to the Department of Juvenile Services for placement in foster homes.19 The Court of Special Appeals affirmed the Circuit Court decision.20

The Court of Appeals affirmed, holding that the privilege against self-incrimination and other federal constitutional guarantees that accompany ordinary criminal proceedings did not apply in Spalding's case.21 The court found in Gault and its progeny22 a two-pronged test for determining when the safeguards of the criminal process are applicable to juvenile proceedings. First, the juvenile must be charged with an act that would be a crime if committed by an adult; and second, he must face the possibility of commitment to a state institution.23 The Court of Appeals

14. Id. at 693-94, 332 A.2d at 248. The delinquency charge in the petition was apparently dropped at this point. See id. at 694 n.4, 332 A.2d at 248 n.4.
15. Id. at 694-95, 332 A.2d at 249.
16. Id. at 695, 332 A.2d at 249. Md. R.P. 908 permits juvenile masters to hear such cases as are assigned by the court. If exceptions are filed a de novo hearing before a judge is required.
17. Miranda v. Arizona, 384 U.S. 436 (1966), requires that prior to police questioning, an individual in custody must be warned that there is a right to remain silent, that anything said can be used against him in a court of law, that there is a right to the presence of an attorney, and that if an attorney can not be afforded one will be appointed, upon request, prior to questioning.
18. 273 Md. at 695-97, 332 A.2d at 249-50.
19. Id. at 698, 332 A.2d at 250.
20. In re Carter, 20 Md. App. 633, 318 A.2d 269 (1974). The Carter girl was released to her parents following the Court of Special Appeals decision and did not appeal further. In re Spalding, 273 Md. 690, 698 n.6, 332 A.2d 246, 250 n.6 (1975).
21. 273 Md. at 704-05, 709, 332 A.2d at 254, 256-57.
23. The Gault Court limited its consideration to delinquency proceedings that could result in the juvenile being committed to a state institution. 387 U.S. at 13. Gault was charged with committing an act which would have been a crime if committed by an adult. Id. at 29. In Ivan v. City of New York, 407 U.S. 203 (1972), which applied retroactively the holding in In re Winship, 397 U.S. 358 (1970) (proof beyond reasonable doubt required in the adjudicatory stage of a delinquency hearing),
determined that Spalding was merely a "victim" of sex crimes committed by adults and that she had been charged only with being "ungovernable." The court therefore concluded that she had not been charged with an act that would be a crime if committed by an adult. Because the first prong of the test was not satisfied, the court held that the privilege against self-incrimination did not apply to Spalding's CINS proceeding. The court found it unnecessary to consider whether Spalding faced commitment to a "state institution," a determination that would have satisfied the second prong of the test.

The reasoning by which the Court of Appeals determined that the circumstances in Spalding did not meet the first prong of the Gault test is questionable. On close analysis the Spalding facts seem to fall within both the language and the policy of Gault. The term "charged" is crucial in this regard: What acts was Spalding "charged" with committing, and where should one look to ascertain the acts "charged"? The Court of Appeals reasoned that with the elimination of the delinquency "charge" . . . the claims of alleged "criminal" conduct, on which it was premised, vanished with it. What remained was the single allegation that appellant " . . . is un-governable and beyond the control of her parent, deports herself in such a manner as to be a danger to herself and others and is in need of care and treatment." From that time forward, at least, appellant was not charged in this proceeding with any acts which would constitute a crime if committed by an adult.

The court looked only to the conclusions expressed in the petition to find the acts charged, apparently treating the petition as it would an indict-

---

24. 273 Md. at 708-09, 332 A.2d at 256-57. "Ungovernable" is used herein to represent the following language from the petition in Spalding: "ungovernable and beyond the control of her parent, deports herself in such a manner as to be a danger to herself and others and is in need of care and treatment." See text accompanying note 12 supra.

25. 273 Md. at 708-09, 332 A.2d at 256-57.

26. Id. at 709, 332 A.2d at 257.

27. Judge Eldridge, in a vigorous dissent, accused the majority of making the labels "victim" and "CINS" determinative. In his view, Spalding satisfied both prongs of the Gault test and consequently was entitled to the fifth amendment privilege against self-incrimination. Id. at 709-16, 332 A.2d at 257-60.

28. Id. at 709, 332 A.2d at 256-57.

29. The petition also contained allegations of perverted sexual activities and consumption of narcotics. See text accompanying note 12 supra. The court did not mention these allegations in the summary paragraph at the conclusion of its opinion. See text accompanying note 28 supra.
ment, which must contain "the specific offense with which the defendant is charged." However, the court may have misapplied the Gault test by looking solely to the conclusions contained in the petition; in determining that Spalding was charged only with being ungovernable, the court did not identify correctly the acts charged.

The Gault Court found the privilege against self-incrimination and other constitutional safeguards applicable to Gault's case even though it was unclear from the petition whether Gault was charged with acts that would have been criminal if committed by an adult. The petition stated that Gault was under the age of eighteen and in need of the protection of the court, and concluded that "said minor is a delinquent minor." As defined in Arizona at that time, a delinquent minor included a minor who had violated a law of the state, was uncontrolled by his parents, was habitually truant, or had deported himself so as to endanger the morals of himself or others. At the hearing conducted pursuant to the petition, the state attempted to prove that Gault had made a lewd telephone call, a violation of state law, and that he was therefore a delinquent minor under the appropriate statutory provision. Under the language of the same petition the state could have attempted to prove that Gault disobeyed his parents by staying out late on several occasions, and that he was therefore delinquent under another section of the statute because he was not controlled by his parents. Assuming that no Arizona law prohibited an adult from staying out late, it would seem that the Supreme Court could not have determined whether Gault was charged with acts that would have been criminal if committed by an adult by looking only to the petition. In considering what acts Gault was charged with committing, the Supreme Court focused on the specific factual allegations that the state had attempted to prove at the hearing. The specific factual allegations underlying the conclusion of delinquency expressed in the petition thus constitute the acts charged for purposes of the Gault test.

In Spalding, as in Gault, it cannot be determined solely from the language of the petition whether criminal or non-criminal activity was involved. While the allegations of perverted practices and consumption of narcotics could constitute acts which would be crimes if committed by an adult, the Court of Appeals ignored these allegations. In the summary paragraph of its opinion the court stated that Spalding was charged only with being "ungovernable," and concluded that she therefore had not

31. 387 U.S. at 5.
33. See 387 U.S. at 5-9.
35. See 387 U.S. at 5-9, 29.
37. See notes 40-43 and accompanying text infra.
been charged with "criminal" acts. Yet ungovernable behavior could as easily include armed robbery as it could staying out late against parental orders. Consistent with Gault and its progeny, the Spalding court should have looked to the specific factual allegations underlying the petition, those which the state later attempted to prove at the hearing, in order to determine the acts charged for purposes of the first prong of the Gault test.

The state attempted to prove that Spalding had engaged in perverted sexual practices. The specific acts she was charged with committing included participation in sexual activities with women. It is apparent that those acts would have been criminal under Maryland law if committed by an adult. The state also attempted to prove that Spalding drugged her mother with a narcotic given to her by one of the adults involved in the parties. It is a crime for an adult to possess or administer to another any controlled narcotic. Based on these factual allegations, which appear to have been the only specific instances of "ungovernability" at issue in Spalding's CINS proceeding, it seems clear that the first prong of the Gault test was satisfied. The Spalding court, however, held that the test was not satisfied, advancing seemingly inconsistent rationales.

The court applied the Gault test to the charge that Spalding was "ungovernable" and held that ungovernability was not an act that would

38. See text accompanying note 28 supra.
39. That armed robbery is also a delinquent act, see note 5 supra, does not mean that it cannot fit within the statutory language defining CINS behavior. See note 7 supra.
40. See Joint Record Extract at 29–30, [Records and Briefs], In re Spalding, 273 Md. 690 (1975).
41. See Md. Ann. Code art. 27, § 554 (1976). Because all the adults who engaged in the perverted practices with Spalding were prosecuted, it is likely that were she an adult Spalding also would have been prosecuted. Although the court referred to Spalding as a victim, only her age seems to distinguish her situation from that of the prosecuted adults. As the term normally is used in the context of a prosecution for perverted practices, "victim" denotes one who did not consent to the act. See, e.g., Saldivera v. State, 217 Md. 412, 420, 143 A.2d 70, 74–75 (1958). At no stage of the proceedings was a specific finding made that Spalding did not consent to participating in sexual activities with the adults, and it would seem anomalous for her to be adjudged a CINS on the basis of acts which she committed involuntarily. See note 7 supra.
42. Spalding apparently admitted to these allegations in her statements to the police on January 31, 1973. See 273 Md. at 693, 332 A.2d at 248. Her statements were subsequently introduced into evidence by the state at the CINS hearing before the Juvenile Court. Id. at 695–96, 332 A.2d at 249.
43. Although the name of the drug Spalding used is not mentioned in the record, the petition alleged that she had consumed prohibited narcotics, see text accompanying note 12 supra. These pills apparently were of the same type given to her to use at home. See 273 Md. at 692–93, 332 A.2d at 248. Assuming the petition was correct in describing the drug as a controlled narcotic, then under Md. Ann. Code art. 27, § 287 (1976), it would have been a crime for her to "possess or administer" them. See 273 Md. at 711–12, 332 A.2d at 258 (dissenting opinion).
44. See 273 Md. at 711–12, 332 A.2d at 258 (dissenting opinion).
45. See text accompanying note 28 supra.
be a crime if committed by an adult. As noted above, however, either criminal or non-criminal acts may be considered ungovernable behavior. In looking only to the conclusion that a juvenile is ungovernable and in ignoring the underlying acts which contribute to that conclusion, the Spalding court’s application of the Gault test fails to distinguish between those juveniles who have committed criminal acts and those who have not. Under this approach, neither group satisfies the test and Gault rights are denied in both situations. This application allows the state to circumvent the requirements of Gault by proceeding under a CINS petition, no matter how “criminal” the acts underlying the petition actually are. The Supreme Court noted in Gault that the availability of the protection against self-incrimination should not turn on whether a proceeding is labeled “civil,” as many juvenile proceedings were and still are, or “criminal.”"46 Likewise, the “delinquency” or “ungovernability” labels should not be determinative, yet the application of the Gault test by the Spalding court, in focusing on the conclusion in the petition that the child was ungovernable rather than on the allegations underlying such a conclusion, allows the availability of Gault constitutional rights to turn in part on the use of conclusory labels by the state.47

In addition to holding that Spalding was not charged with any acts that would be criminal if committed by an adult, the court also seemed to conclude that she had not committed any criminal acts. There is some inconsistency in even considering the nature of Spalding’s participation in the sex and drug activities: given the court’s conclusion that Spalding was charged only with being ungovernable, and not with any acts that would satisfy the Gault test, it would appear unnecessary to also consider the specific factual allegations which in the court’s view, were not the acts

46. See 387 U.S. at 49-50.
47. The court implied that, had the allegation of delinquency not been dropped, see note 14 supra, the Gault test might have been met. 273 Md. at 709, 332 A.2d at 256-57.

The Court of Appeals itself observed that labels should not determine the availability of constitutional guarantees, see id. at 703, 332 A.2d at 253, although language at the conclusion of the opinion appears to indicate otherwise. See text accompanying note 28 supra. The role of labels was considered in In re H., 5 Cal. App. 3d 781, 85 Cal. Rptr. 359 (Ct. App. 1970), where a juvenile accused of beating another child to death confessed under circumstances which violated the rule of Miranda v. Arizona, 384 U.S. 436 (1966). The juvenile originally was charged under the California equivalent to the Maryland delinquency statute, see note 5 supra, and the confession therefore would have been inadmissible under Gault. See 387 U.S. at 55, 56 & n.97. However, the petition was amended and the juvenile was charged under the California equivalent to CINS. See note 7 supra. The judge then admitted the confession into evidence, apparently on the theory that Gault did not apply in that proceeding. The appellate court held this reversible error, stating, “The courts may not alter or eliminate constitutional rights of a minor in such a manner.” 5 Cal. App. 3d at 791, 85 Cal. Rptr. at 365. See also In re R., 274 Cal. App. 2d 749, 79 Cal. Rptr. 247 (Ct. App. 1969); In re Rombeau, 266 Cal. App. 2d 1, 72 Cal. Rptr. 171 (Ct. App. 1968).
charged. Yet Spalding’s participation in these activities was considered and it was determined that she was a “victim” in the context of the events described.\(^{48}\) The court concluded that she therefore had not committed any acts that would be criminal if committed by an adult,\(^{49}\) reasoning that because it would not be criminal for an adult to be the victim of a sex or drug crime,\(^{50}\) the state’s attempts to show that Spalding was the victim of sex and drug crimes did not amount to allegations of criminal acts. Apparently the court used the term “victim” to indicate that Spalding lacked \textit{mens rea}, and for that reason was not guilty of “criminal” participation in the illegal activities, as her acts clearly would have been crimes if committed by an adult who had the \textit{mens rea} required for conviction of the crimes discussed above.\(^{51}\)

The court’s “victim” analysis appears unsound. The CINS category was created to allow the treatment of children “guilty of misconduct peculiarly reflecting the propensities and susceptibilities of youth.”\(^{52}\) In finding Spalding to be a CINS, by implication the court did not consider entirely innocent her participation in the illegal sex and drug activities. It is anomalous to consider Spalding sufficiently culpable to be found guilty of misconduct in a CINS proceeding based on her use of narcotics and participation in perverted practices, and yet to hold that she was not sufficiently culpable to have been found guilty of the crimes of perverted practices and possession of narcotics had she been an adult. The \textit{victim} of sexual mistreatment would hardly seem guilty of misconduct, while one whose misconduct consisted of committing acts which are illegal would seem to have committed a crime. The only significant results of Spalding’s victim status were that she was adjudged a CINS instead of a delinquent\(^{53}\) and that she was denied \textit{Gault} constitutional guarantees. Under the \textit{Spalding} court’s analysis the state can circumvent the requirements of \textit{Gault} in any proceeding against a juvenile who has engaged in criminal behavior with adults.\(^{54}\) The juvenile can be labeled a victim of the adults, CINS proceedings can be instituted, and the juvenile thus can be found to have committed the criminal acts involved without receiving the safeguards

---

\(^{48}\) See 273 Md. at 708-09, 332 A.2d at 256.

\(^{49}\) The court referred to an “absence of suggested criminality” on Spalding’s part and found no unexplained allegations of delinquency in the record. \textit{Id.} at 708-09, 332 A.2d at 256-57.


\(^{51}\) \textit{See} notes 40-43 and accompanying text \textit{supra}.


\(^{53}\) The court stated that “since [Spalding] was, in fact, a victim, the charge of ‘delinquency’ in the petition must be regarded as simply an unexplained anomaly.” 273 Md. at 708, 332 A.2d at 256.

\(^{54}\) A Baltimore newspaper recently reported the arrest of six persons on charges stemming from alleged sexual relations with children. A sixteen year old male, apparently associated with the six, was being held as a possible CINS. \textit{See} The \textit{Evening Sun} (Baltimore), June 16, 1976, \S C, at 1, col. 6.
required by Gault. Speaking in terms of fifth amendment protections, the Supreme Court addressed this situation in Gault:

It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. . . . To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. 55

Similarly, to hold that Spalding's statements were not protected by the fifth amendment in the CINS proceeding because she was charged with acts which, because of her mental state, constituted only misconduct and not criminal involvement, seems again to be disregarding substance in favor of the "victim" label attached to her.

Because the Spalding court held that the first prong of the Gault test was not satisfied, it did not consider whether under the second prong Spalding faced possible commitment to a state institution. 56 It is clear that this prong would have been satisfied under the law in effect at the time of Spalding's proceedings, because a juvenile court judge was authorized to commit

any child in need of supervision . . . to the custody of the Secretary of Health and Mental Hygiene, or to any public or private institution or agency other than the Department of Health and Mental Hygiene or to the custody of a person selected by said judge. 57

Limitations on this broad authority provided that no CINS child could be placed in an institution "designed or operated for the benefit of delinquent children." 58 However, exceptions to this limitation existed so that it was possible for CINS children to be confined in such institutions. 59 Under these exceptions Spalding clearly faced possible commitment to a state institution, thus satisfying the second prong of the Gault test.

A harder question concerns the application of the second prong of the Gault test to future CINS proceedings in Maryland. Since the time of the Spalding hearing, the Maryland Code has been amended to prohibit

---

55. 387 U.S. at 49-50.
56. See 273 Md. at 709, 332 A.2d at 257.
59. Ch. 515, [1971] Laws of Md., amending ch. 432, [1969] Laws of Md., provided that the limitation on confining CINS children in institutions or other facilities designed or operated for the benefit of delinquent children would not apply to facilities designated by the State Department of Juvenile Services of the Department of Health and Mental Hygiene. Ch. 616, [1971] Laws of Md., amending ch. 432, [1969] Laws of Md., provided that a CINS child shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses or for children adjudicated or alleged to be delinquent unless (1) adequate facilities have not been established, and (2) it appears to the satisfaction of the court or other person designated by the court that public safety and protection reasonably require such detention.
absolutely the commitment of CINS children either to penal institutions used for the confinement of adults charged with or convicted of crimes or to facilities used for the confinement of delinquent children. Yet the Code does allow CINS children to be committed to the custody of the Juvenile Services Administration, to a local Department of Social Services, to the Department of Health and Mental Hygiene, or to a public or licensed private agency. The issue in applying the second prong of the Gault test to present CINS proceedings in Maryland is whether, in light of existing limitations on the places to which a CINS child may be committed, there is a commitment involving a possible deprivation of liberty sufficient to trigger the Gault constitutional safeguards.

The negative aspects of life in an institution for delinquents that were cited in the Gault opinion as restraints on a juvenile's liberty included forced physical confinement, separation from parents and friends, and enforced association with other juveniles confined for anything "from waywardness to rape and homicide." Only the latter consideration has been remedied significantly by the limitations on CINS commitments in Maryland. A CINS child no longer can be institutionalized with delinquent children, thus helping to shield CINS children from forced association with delinquent children confined for more serious offenses. There is no statutory prohibition, however, against either forced physical confinement or separation from parents and friends in institutional surroundings. These aspects of juvenile liberty remain in jeopardy in a CINS proceeding.

Further, a stigma attaches when a child is adjudged a CINS that certainly impinges on a juvenile's liberty to the extent that it may make future employment difficult to obtain. The fact of adjudication, regardless whether the juvenile is institutionalized, creates this stigma, and it is therefore outside the liberty considerations measured by the second prong of the Gault test; however, it still should be weighed in determining whether a juvenile has a sufficient liberty interest at stake in a CINS proceeding to require Gault constitutional safeguards. While the current Code limits the places to which a CINS child may be committed, a child still faces possible institutionalization and stigmatization, and the liberty interest at stake would seem sufficient to require the same constitutional safeguards afforded delinquent children. The only apparent distinction in Maryland

---

62. Although "commit" is defined in the Code as "to transfer legal custody," see Md. Cts. & Jud. Pro. Code Ann. § 3-801(g) (Cum. Supp. 1975), the pertinent Gault standard of "commitment to a state institution" is used to signify a deprivation of liberty sufficient to require constitutional safeguards in the proceeding in which the liberty is at stake, see In re Gault, 387 U.S. 1, 27-29 (1967).
63. 387 U.S. at 27.
64. See note 60 and accompanying text supra.
between an adjudication of CINS and a adjudication of delinquency in terms of infringement on liberty is that commitment is to different kinds of institutions. 66

Spalding appears to have been improperly decided on the first prong of the Gault test. 67 In the process, the court has created routes that would allow the state to avoid the requirements of Gault in CINS proceedings. Under Spalding the state can bring CINS proceedings against a juvenile who has committed an act that would be a crime if committed by an adult and yet not afford the child constitutional protections, either by charging him only with being ungovernable or by labeling him a victim. Further, by deciding Spalding solely on the basis of the first prong of the Gault test, the court avoided the difficult issue posed under the second prong of Gault.

66. See In re Carter, 20 Md. App. 633, 653, 318 A.2d 269, 281 (1974) ("[C]orrection and rehabilitation [of a CINS child] are designed to take place in an environment — of the group home, the foster home, or like unit — which duplicates as nearly as possible the intimacy, closeness and wholesomeness of the natural family environment."). That atmosphere may be different from a training school, but the question is whether the juvenile has lost his liberty. Whether committed to a foster home, a group home, or a similar unit, the juvenile nonetheless is confined in a state institution away from his home, parents, and friends.

67. Perhaps the Court of Appeals' refusal to apply the fifth amendment privilege against self-incrimination in a CINS proceeding reflects the court's doubt about the soundness of the Gault holding. If application of Gault principles to Spalding required an expansion of the Gault holding, then doubts about Gault's soundness would justify a refusal to extend it. However, application of the fifth amendment privilege in Spalding would not have required an expansion of Gault, as evidenced by the Spalding court's failure to meaningfully distinguish the two cases.
SEARCH AND SEIZURE

I. CHALLENGING PROBABLE CAUSE FOR A SEARCH

A criminal defendant has an established fourth amendment\(^1\) right to challenge a search or arrest made pursuant to a warrant on the ground that the officer who obtained the warrant presented insufficient evidence to the issuing magistrate to support an independent judicial determination of the existence of probable cause.\(^2\) A similar challenge to the existence of probable cause is allowed when an officer conducts a warrantless search or arrest.\(^3\) In either case a successful challenge results in exclusion from the defendant’s trial of the fruits of the constitutional violation.\(^4\) However, whether an accused may also contest the lawfulness of the officer’s source of information has not been so clearly determined, and whether he may further attack the veracity of that information remains largely an open question. The Maryland Court of Appeals considered these problems in a series of cases decided during the September Term, 1974.\(^5\)

A. Search Warrants

In *Carter v. State*\(^6\) the defendant was convicted of possession of heroin with intent to distribute. The evidence against him consisted of a quantity of heroin seized from his apartment pursuant to a search warrant. The warrant had been issued upon an application and accompanying affidavit of a police officer, based chiefly on information obtained from a “reliable confidential source of information” which was not further identified.\(^7\) At a pretrial suppression hearing\(^8\) counsel for the defendant proffered evidence that the information used as a basis for the affidavit had been obtained by illegal electronic surveillance. The proffer was refused and

1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.


7. *Id.* at 413-19, 337 A.2d at 417-20.

8. See Md. R.P. 729.
the motion to suppress denied, the trial judge ruling that the defendant could not inquire beyond the confines of the affidavit to challenge the existence of probable cause. The ensuing conviction was affirmed by the Court of Special Appeals, which held that direct police observations enumerated in the affidavit clearly established probable cause and were "not even arguably the fruits of some poisonous tree." Furthermore, even if an unlawful eavesdrop could have been shown, the Court of Special Appeals considered it questionable whether evidence of such illegality would "diminish facially adequate probable cause." The Court of Appeals reversed. Besides finding a direct statutory basis for its decision in sections 2515 and 2518(10)(a) of the Omnibus Crime Control and Safe Streets Act of 1968, the Carter court relied on constitutional doctrine developed in two lines of Supreme Court decisions. The Court established modern guidelines for electronic eavesdropping in three cases decided during the 1960's. These decisions established that conversation is within the protection of the fourth amendment and the use of electronic devices to capture conversation is a search within the meaning of the amendment. A second series of cases developed the "fruit of the poisonous tree" doctrine, defining principles to be used in determining whether evidence derived from an unconstitutional arrest or search must be excluded. The rule which has emerged is that

9. 274 Md. at 419-21, 337 A.2d at 420-21.
11. These observations consisted of visual surveillance of frequent trips by Carter from his apartment to another address where he remained only for short periods of time and similar surveillance of visits by others to Carter's apartment. The visits were considered by the investigating officers to be occasions for narcotics deliveries. 274 Md. at 413-19, 337 A.2d at 417-20.
13. Id.

After early statements by the Court of Appeals to the effect that the "fruit of the poisonous tree" doctrine was not applicable to the states, see, e.g., Mefford v. State, 235 Md. 497, 511, 201 A.2d 824, 831 (1964), cert. denied, 380 U.S. 937 (1965), the court now recognizes that the doctrine is of constitutional origin and is applicable to state prosecutions. Everhart v. State, 274 Md. 459, 480-81 n.4, 337 A.2d 100, 112 n.4 (1975). See Brown v. Illinois, 422 U.S. 590 (1975).
"'knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively,"\textsuperscript{18} unless the connection between the primary illegality and the use of the knowledge has "become so attenuated as to dissipate the taint."\textsuperscript{19} The \textit{Carter} court concluded from these two lines of cases that

if any conversation of Carter or any conversation overheard upon his premises . . . was subjected to a "search and seizure" by the use of any wire tap or eavesdropping device, in violation of his rights under the Fourth Amendment, . . . any information garnered as "fruits" of such primary illegality and "come upon" by the "exploitation" of that illegality cannot . . . be used as derivative evidence for an application for a search and seizure warrant . . . .\textsuperscript{20}

The court held, therefore, that Carter was entitled to present evidence of an allegedly illegal eavesdrop in an attempt to show that such illegality tainted the facts set forth in the affidavit; if such taint were shown, the evidence seized under the search warrant would have to be suppressed.\textsuperscript{21}

\textit{In Everhart v. State}\textsuperscript{22} the court made it clear that the \textit{Carter} decision could stand solely on constitutional grounds. Narcotics and narcotics paraphernalia seized from the defendant's residence pursuant to a search warrant were used as evidence to convict him of maintaining a common nuisance and possessing marijuana. The warrant was issued on the basis of an affidavit which alleged that police officers had visited the farmhouse which Everhart leased and "obtained" narcotics that had been reported stolen.\textsuperscript{23} At a pretrial suppression hearing Everhart contended that the

\begin{itemize}
\item \textsuperscript{19} Nardone \textit{v. United States}, 308 U.S. 338, 341 (1939).
\item \textsuperscript{20} 274 Md. at 438-39, 337 A.2d at 431. \textit{Cf.} Alderman \textit{v. United States}, 394 U.S. 165, 177 (1969) (If police make an illegal search, "[n]othing seen or found on the premises may legally form the basis for an arrest or search warrant or for testimony at the homeowner's trial, since the prosecution would be using the fruits of a Fourth Amendment violation.").
\item \textsuperscript{21} 274 Md. at 438-40, 337 A.2d at 431-32. Unlike the Court of Special Appeals, the Court of Appeals did not conclude that there was sufficient untainted information in the affidavit to establish probable cause. \textit{Id.} at 442-43, 337 A.2d at 433. The court ruled that its holding in Gill \textit{v. State}, 265 Md. 350, 289 A.2d 575 (1972), required a new trial rather than a restricted remand for an evidentiary hearing. 274 Md. at 443, 337 A.2d at 433-34.
\item \textsuperscript{22} 274 Md. 459, 337 A.2d 100 (1975).
\item \textsuperscript{23} \textit{Id.} at 462-63, 337 A.2d at 102-03. Two other allegations were based on information obtained from an informant: that the informant had previously visited the farm in an effort to purchase heroin, and that another resident of the farmhouse had sold heroin to a known drug user. The Court of Appeals found these allegations insufficient to establish probable cause. The first was held to be "per se factually innocuous," raising "no more than a suspicion or possibility." \textit{Id.} at 473, 337 A.2d at 108. The second allegation was found lacking in that it failed to indicate the informant's "basis of knowledge" for the claim, as required by \textit{Aguilar \textit{v. Texas}}, 378 U.S. 108 (1964). 274 Md. at 474, 337 A.2d at 109.
\end{itemize}
narcotics to which the affidavit referred had been obtained by an illegal search and seizure and that such evidence could not be used to support the existence of probable cause for a search warrant. A motion to suppress was denied on the ground that the application as a whole contained ample facts to establish probable cause. The Court of Special Appeals affirmed without reaching the issue of possible taint resulting from the allegedly illegal search. The Court of Appeals, however, reversed, holding that the "fruit of the poisonous tree" doctrine, as applied in Carter, controlled. If the information set forth in the affidavit was come upon or derived as a result of an illegal search and seizure, such primary illegality — in the absence of evidence of attenuation or a source independent of such "taint" — precludes the use of such derivative evidence from being a valid basis for establishing the existence of probable cause, under the doctrine of the "fruit of the poisonous tree." Because the court was unable to determine from the record whether an illegal search had in fact occurred, the case was remanded for a new trial in order to afford Everhart an opportunity to establish the alleged illegality.

24. 274 at 463-64, 337 A.2d at 103.
25. Id. at 466-67, 337 A.2d at 104-05.
26. 20 Md. App. 71, 315 A.2d 80 (1974). The Court of Special Appeals found that the taint issue had not been procedurally preserved for judicial review, construing the record as demonstrating that the defendant acquiesced in the ruling of the trial judge. Id. at 78-80, 315 A.2d at 86-87. The Court of Appeals held that the lower court had misconstrued the record and that the ruling was properly reviewable under Md. R.P. 729(g) (2); "A pre-trial ruling, denying a motion or petition to suppress, exclude or return property seized, shall in any event be reviewable on appeal to the appropriate appellate court or on a hearing on a motion for a new trial." 274 Md. at 470-72, 337 A.2d at 107-08.
27. 274 Md. at 480, 337 A.2d at 112.
28. During Everhart's trial it was shown that the warrantless search in question had been conducted by two officers who, upon approaching the farmhouse, noticed a number of trash bags outside, opened one, and found narcotics. Id. at 469, 337 A.2d at 106. The Court of Appeals held that on remand it would be necessary to determine whether the seized items were abandoned property, and hence not within the protection of the fourth amendment, or were in a location and of such a nature as to fall within the zone where Everhart had a "legitimate expectation of privacy." Id. at 483, 337 A.2d at 114; see Katz v. United States, 389 U.S. 347, 353 (1967).
29. 274 Md. at 483, 337 A.2d at 114. The Everhart court decided that the proper manner for a criminal defendant to challenge evidence obtained under a warrant which was issued on the basis of an allegedly illegal search is by a motion to suppress made under Maryland Rule 729; thus, an illegal search is not a ground for dismissal of an indictment even where the indictment was based on tainted evidence. Id. at 486-87, 337 A.2d at 116. The court thereby abandoned its holding in State v. Siegel, 266 Md. 256, 292 A.2d 86 (1972) (sustaining dismissal of an indictment because of an invalid order authorizing electronic surveillance), in favor of the reasoning of the Supreme Court in United States v. Blue, 384 U.S. 251, 255 (1966) (exclusion of evidence is an adequate remedy for violations of constitutional rights, whereas barring prosecution altogether is too drastic an interference with the public interest in seeing the guilty
The trial courts in *Carter* and *Everhart* each relied on the “four corners” rule as a basis for their decisions that a defendant, in challenging the legality of a search, could not inquire beyond the confines (four corners) of an affidavit that demonstrated facially adequate probable cause. The rule, as stated in *Smith v. State* and consistently followed since that decision, is that “consideration of the showing of probable cause should be confined solely to the affidavit itself, and the truth of the alleged grounds stated in the affidavit cannot be controverted...” The second phrase of the statement may be read as qualifying the first, thereby limiting operation of the rule to cases involving challenges to truth; the Court of Appeals has applied the rule only in such circumstances. However, the scope of the rule apparently had been broadened by lower courts, as in *Carter* and *Everhart*, to prohibit attacks on the source of an affiant’s information as well. While the *Carter* and *Everhart* decisions held impermissible this extension of the four corners rule to cases involving


*Carter* and *Everhart* establish procedural guidelines for suppression hearings held under Maryland Rule 729. In order to inquire beyond the face of an affidavit when challenging the legality of the source of the information set forth therein, a defendant must support his motion to suppress with “precise and specific factual averments and not conclusory allegations.” *Everhart v. State*, 274 Md. 459, 488, 337 A.2d 100, 117 (1975). The defendant is then entitled to an adversary proceeding at which he may cross-examine appropriate officials. *Carter v. State*, 274 Md. 411, 443–44, 337 A.2d 415, 434 (1975). If he goes forward with evidence to establish that the source of the information was an illegal search, the burden then shifts to the prosecution to show that the facts alleged in the affidavit were discovered independently or that the connection between the illegality and the use of the illegally obtained information had become “so attenuated as to dissipate the taint.” *Id.* at 443, 337 A.2d at 434; see *Alderman v. United States*, 394 U.S. 165, 183 (1969); *Nardone v. United States*, 308 U.S. 338, 341 (1939). In cases involving electronic eavesdropping, the prosecution must disclose to the defendant the intercept logs and all materials and records of those overheard conversations which it was not entitled to use against him. *Carter v. State*, supra at 443, 337 A.2d at 434; see *Alderman v. United States*, supra at 183. Disclosed conversations must include any in which the defendant participated, or which took place on his premises, or with respect to which he otherwise has standing as an “aggrieved person.” *Carter v. State*, supra at 443, 337 A.2d at 434; see *Alderman v. United States*, supra at 176; 18 U.S.C. § 2510 (11) (1970).


33. 191 Md. at 335, 62 A.2d at 289.

34. One situation to which the four corners rule has been held not to apply is that of a challenge based on an allegation that the named affiant did not in fact swear to the affidavit. *Smith v. State*, 191 Md. 329, 336, 62 A.2d 287, 289–90 (1948), cert. denied, 336 U.S. 925 (1949).
the legality of the source, the Court of Appeals maintained that the rule, properly limited to challenges to truth, retained viability.\(^{35}\)

However, to hold that an accused may challenge the legality of the source of information contained in an affidavit but may not challenge the truth\(^{36}\) of that information may lead to anomalous results. For example, if the defendant in \textit{Carter} had alleged not that the "reliable confidential source" named in the affidavit was a wiretap,\(^{37}\) but rather that no source existed at all, he would not have been permitted to inquire beyond the four corners of the affidavit. Furthermore, questions of source and truth frequently merge; if the source in \textit{Carter} were indeed a wiretap, not identifying it as such was a deception on the part of the affiant.\(^{38}\) A falsehood may be employed to conceal a prior illegal search; it may happen that a search previously unknown to the defendant will be revealed only upon a challenge to a known misrepresentation. An additional concern is that an announced rule permitting challenges to affidavits based on illegal sources but not to those containing falsehoods may, while deterring the former, further encourage the latter. Either type of official misconduct seems offensive to fundamental notions of fairness and judicial integrity.\(^{39}\)


36. Courts and writers considering the question would permit challenges to certain categories of unintentional misstatements, if material to the showing of probable cause, as well as to intentional falsehoods, whether material or not. See, e.g., United States v. Carmichael, 489 F.2d 983, 989 (7th Cir. 1973) (reckless material misstatement); United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973) \textit{cert. denied}, 423 U.S. 844 (1975) (any material misstatements); Kipperman, \textit{Inaccurate Search Warrants as a Ground for Suppressing Evidence}, 84 Harv. L. Rev. 825, 831-33 (1971) (negligent material misstatements); Comment, \textit{The Outwardly Sufficient Search Warrant: What If It's False?}, 19 U.C.L.A. L. Rev. 96, 139-46 (1971) (any material misstatements). Given that the primary purpose of the exclusionary rule is the deterrence of official misconduct, see, e.g., Stone v. Powell, 96 S. Ct. 3037, 3048 (1976), there would appear to be little justification for excluding evidence when an affidavit contains innocent misstatements. Suppressing evidence obtained as a product of inaccuracies stated negligently or recklessly may, however, serve to encourage more carefully drawn affidavits, thus perhaps justifying application of the exclusionary rule.

37. \textit{See} note 7 and accompanying text \textit{supra}.

38. Carter did assert in his motion to suppress that a "deception" had been practiced upon the issuing court. The Court of Appeals, however, found the "principal thrust" of his argument to be that the facts in the affidavit were derived from an illegal source, and therefore disregarded Carter's alternative claim of deception. Carter v. State, 274 Md. 411, 440, 337 A.2d 415, 432 (1975).

39. Indeed, courts that do permit challenges to the veracity of an affidavit apparently consider the inclusion of perjured statements to be, in a sense, a more serious act of governmental wrongdoing than the presentation of information obtained from an unlawful search. It is universally recognized that when an affidavit is based at least in part on an unlawful search, only those statements tainted by the illegality must be excised; if untainted information sufficient to establish probable cause remains, the warrant is upheld. See, e.g., United States v. Hunt, 496 F.2d 888, 894 (5th Cir. 1974); James v. United States, 418 F.2d 1150, 1151-52 (D.C. Cir. 1969); United States v. Sterling, 369 F.2d 799, 802 (3d Cir. 1966); Chin Kay v. United
To allow searches to be authorized on the basis of false affidavits raises substantial fourth amendment concerns. The problem differs from that raised in *Carter* and *Everhart*, where the focus was on fourth amendment violations occasioned by searches which allegedly preceded applications for warrants. There, the major concern was to deter the initial unconstitutional acts; it was found, under the "fruit of the poisonous tree" doctrine, that deterrence could only be effectuated by the suppression of all evidence derived, through subsequent warrant-authorized searches, from those initial violations. Where the truth of an affidavit is challenged, attention should shift from the intrinsic nature of the initial act of state officers to the ultimate effect of that act on the warrant-issuing process. Making false statements in an affidavit is not by itself an unconstitutional act, but the problem of the overall effect on fourth amendment guarantees remains.

The fourth amendment commands that in order for a warrant to issue there must be a factual showing from which a neutral and detached magistrate can make an independent determination of the existence of probable cause. It has been said that "the obvious assumption is that there will be a truthful showing," and indeed, the assumption of truthfulness seems basic to the warrant procedure. It is doubtful whether it can be said that a magistrate truly made an independent determination when the facts upon which his decision was based were false — *i.e.*, it is questionable whether a determination based on misrepresentations is really a determination at all. A magistrate may not, of course, rely on conclusory allegations to decide the existence of probable cause; neither should he rely on false allegations. In either case there is interference with what should be an independent decisionmaking process. Permitting searches authorized on the basis of false affidavits to go unchallenged essentially subverts the fourth amendment warrant requirement. If a warrant may be issued on the basis of a false affidavit, there is little reason for requiring that a warrant be obtained; the basic determination would already have been made by "the officer engaged in the often competitive enterprise of

States, 311 F.2d 317, 321–22 (9th Cir. 1962); *Carter v. State*, 274 Md. 411, 442, 337 A.2d 415, 433 (1975). However, if an affidavit contains any perjured statement, even if nonessential to the showing of probable cause, the warrant is rendered totally invalid. See, e.g., United States v. Belculfine, 508 F.2d 58, 63 (1st Cir. 1974); United States v. Hunt, 496 F.2d 888, 894 (5th Cir. 1974); United States v. Carmichael, 489 F.2d 983, 989 (7th Cir. 1973).

40. See notes 20 & 27 and accompanying text *supra*.


ferreting out crime." \[44\] As the United States Court of Appeals for the Fifth Circuit recently stated in permitting challenges to the veracity of affidavits:

A contrary rule would leave the warrant requirement embodied in the fourth amendment open to circumvention by overzealous officials willing to make erroneous affidavits in the hope that the resultant search or arrest will yield conclusive proof of criminal conduct. The warrant procedure operates on the assumption that statements in the affidavit presented to the issuing magistrate are at least an accurate representation of what the affiant knows though possibly inadequate to show probable cause. It would quickly deteriorate into a meaningless formality were we to approve searches or arrests based upon misrepresentation or incorrect factual statements. Thus when an affidavit contains inaccurate statements which materially affect its showing of probable cause, any warrant based upon it is rendered invalid. \[45\]

Nevertheless, the four corners rule, although abandoned by most federal circuits \[46\] and frequently criticized by commentators \[47\] continues to be followed by numerous states. \[48\] The reasons given in justification of the rule are less than satisfying. One argument often advanced in support of the rule is that judging the truth of the information in an affidavit is a matter for the judicial officer who issued the warrant; his determination affords sufficient protection to the accused, and to permit a subsequent

hearing on the issue would detract from his judicial function.\textsuperscript{49} However, even assuming the magistrate has a sincere interest in attempting to investigate the truth of the allegations in an affidavit,\textsuperscript{50} he can seldom make an effective \textit{ex parte} inquiry because he generally has no factual basis for doubting their veracity. In most circumstances only the accused possesses both the interest and the knowledge necessary to challenge the truth of the facts alleged in an affidavit; therefore, an investigation made in his absence cannot effectively uncover falsehoods. Furthermore, review of a magistrate’s determination of veracity detracts no more from his function than does review of his decision on sufficiency, a review to which the accused has an established right.\textsuperscript{51} Fears have been expressed that a hearing on veracity would approach a trial on the merits\textsuperscript{52} and that to permit such hearings would place a significant added burden on the criminal justice system.\textsuperscript{53} But surely courts possess the competence and flexibility to resolve such problems; they have already adapted so that they may consider challenges to the sufficiency of evidence in the affidavit.\textsuperscript{54} Expanding such hearings to allow challenges to veracity, while creating some additional burden, would seem justified given the fourth amendment interests involved. Many of the supposed difficulties could be obviated by placing an initial burden on the accused to advance specific allegations in support of his challenge before a hearing is granted.\textsuperscript{55} It has also been suggested that allowing challenges to veracity would lead to disclosure of the identities of informants who have provided information used in affidavits.\textsuperscript{56} However, the issue at a suppression hearing would be the veracity of the affiant, not the veracity of the informant; only deterrence of false statements by the affiant, the officer of the state, should be sought.\textsuperscript{57}

\begin{itemize}
  \item \textsuperscript{50} The amount of scrutiny to which an application for a search warrant is customarily subjected is open to question. \textit{See} Grano, \textit{A Dilemma For Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury}, 1971 U. Ill. L.F. 405, 414-15.
  \item \textsuperscript{51} \textit{See} note 2 and accompanying text \textit{supra}.
  \item \textsuperscript{52} State \textit{v.} Petillo, 61 N.J. 165, 177, 293 A.2d 649, 655 (1972), \textit{cert. denied}, 410 U.S. 945 (1973).
  \item \textsuperscript{53} \textit{Id}.
  \item \textsuperscript{54} \textit{See} text accompanying note 2 \textit{supra}.
  \item \textsuperscript{55} \textit{See}, e.g., United States \textit{v.} Carmichael, 489 F.2d 983, 988 (7th Cir. 1973); United States \textit{v.} Dunnings, 425 F.2d 836, 840 (2d Cir. 1969), \textit{cert. denied}, 397 U.S. 1002 (1970).
  \item \textsuperscript{57} Assurances of the informant’s veracity are sought by the tests of Aguilar \textit{v.} Texas, 378 U.S. 108 (1964), and Spinelli \textit{v.} United States, 393 U.S. 410 (1969). A number of decisions have distinguished between the veracity of the affiant and the veracity of the informant. \textit{See}, e.g., Theodor \textit{v.} Superior Court, 8 Cal. 3d 77, 501
Although the judge conducting the suppression hearing may have the discretion to require disclosure of an informant's identity when necessary to advance the inquiry, it is certainly not clear that such disclosure would be routinely required.

Another major argument presented in support of the four corners rule is that a prosecution for perjury is a sufficient deterrent to the making of false statements in an affidavit. However, aside from the fact that this argument assumes that there ought to be no sanction for unintentional misstatements, the threat of possible prosecution for perjury is simply not an effective deterrent. A criminal defendant will generally have little interest in attempting to initiate a perjury prosecution; his chief concern is, of course, with his own criminal charges, and he does not personally benefit from prosecution of the officer who allegedly committed perjury. Problems of convincing prosecutors to conduct investigations and initiate prosecutions and of establishing proof of guilt beyond a reasonable doubt also contribute to make perjury convictions highly unlikely. Although the value of the exclusionary rule has been the subject of increasing scrutiny and controversy, as yet there has been no fundamental retreat from the use of the rule as a deterrent to official wrongdoing. In the absence of other effective deterrents, resort to the exclusionary rule as a remedy for false affidavits seems appropriate.

The policy considerations, whatever their validity, that courts have cited in rejecting challenges to the truth of facts alleged in an affidavit are equally valid in situations involving the source of the allegations. When faced with a challenge to the source of an affidavit, a court that followed the four corners rule would be concerned with the propriety of reviewing the magistrate's decision, with the potential burden placed on the judicial system, and with determining an appropriate sanction. In deciding Carter and Everhart as it did, the Court of Appeals apparently


59. See note 36 supra.


61. See, e.g., Stone v. Powell, 96 S. Ct. 3037 (1976); United States v. Janis, 96 S. Ct. 3021 (1976). In Stone v. Powell the Court, while limiting the jurisdiction of federal courts to hear fourth amendment claims raised by habeas corpus petitions, declined an invitation by state officials to restrict the scope of the exclusionary rule itself.
concluded that when the legality of the source of the affidavit is challenged these policy reasons must yield to other considerations, the fourth amendment requirements embodied in the "fruit of the poisonous tree" doctrine. Why the policy considerations should not also yield to the fourth amendment concerns raised by false allegations in an affidavit has not been adequately answered.

The *Carter* and *Everhart* decisions, by expressing clearly the rule that evidence obtained from an illegal search cannot be used as a basis for a subsequent warrant, should aid in the elimination of a practice which makes the fourth amendment warrant requirement an empty formality. No longer will it be permissible in Maryland to legitimize an illegal search by later obtaining a warrant. It is to be hoped that the Court of Appeals will continue its development of the law in this difficult area. A complete reexamination, and perhaps abolition, of the four corners rule itself would seem desirable.

**B. Warrantless Searches**

In *Waugh v. State* the *Carter-Everhart* analysis was extended to a warrantless arrest and search. A Maryland State Police Officer, Corporal Pitt, received a telephone message from Detective Schwartz of the Tucson, Arizona, police department that Waugh would be arriving at Friendship International Airport (now Baltimore-Washington International Airport) with two suitcases containing marijuana. Pitt testified at a pretrial suppression hearing that Schwartz had informed him that, acting on the basis of a tip from a "reliable confidential informant," Schwartz went to the Tucson airport, observed Waugh's luggage, and smelled what from his past experience he recognized to be marijuana. He then opened the suitcases, observed marijuana, and removed some. Acting on the basis of this information, Pitt made a warrantless arrest when Waugh arrived at Friendship; a subsequent search of Waugh's luggage revealed marijuana. Waugh's motion to suppress the marijuana was denied. A renewed motion to suppress made at the start of the trial, based on an allegation that Schwartz had in actuality smelled a substance such as talcum powder rather than marijuana, was similarly denied, the trial judge ruling that

62. *See* notes 17-20 & 27 and accompanying text *supra.*

63. This rule has been recognized by other courts, including the Supreme Court, but its constitutional basis has seldom been expressed in detail. *See, e.g.,* Alderman *v. United States,* 394 U.S. 165, 176-77 (1969); *United States v. Hunt,* 496 F.2d 888, 894 (5th Cir. 1974); *United States v. Nelson,* 459 F.2d 884, 888-90 (6th Cir. 1972).

64. 275 Md. 22, 338 A.2d 268 (1975).

65. *Id.* at 24-25, 338 A.2d at 269-70. During the four hours between receipt of the information from Schwartz and the defendant's arrival, Pitt determined the arrival location of Waugh's flight and established surveillance of the baggage claim area. *Id.* at 25, 338 A.2d at 270.

66. *Id.* at 26, 338 A.2d at 270.
the matter had been conclusively determined at the suppression hearing. Pitt's testimony at trial confirmed Waugh's allegation: a subsequent written report received from Schwartz stated that the only odor he had smelled was that of a substance such as talcum powder, often used to conceal the smell of marijuana. Nevertheless, the defendant was convicted of possession of marijuana with intent to distribute, and his motion for a new trial was denied, the judge reiterating that he considered himself bound by the ruling on Waugh's motion to suppress. The conviction was affirmed by the Court of Special Appeals.

The Court of Appeals reversed. The court made the following assumptions: (1) apart from any question of taint arising from a prior illegal search, the information that Pitt received by telephone from Schwartz was sufficient on its face to establish probable cause for Waugh's arrest, and Pitt's warrantless search of the suitcases was constitutionally permissible either as a search incident to a lawful arrest or as a search justified by exigent circumstances; (2) if Schwartz had probable

67. Id.
68. Id. at 26-27, 338 A.2d at 271.
69. Id. at 27, 338 A.2d at 271.
71. 275 Md. at 29-30, 338 A.2d at 272.
73. It has been recognized since Carroll v. United States, 267 U.S. 132 (1925), that there are limited exigent circumstances where the usual warrant requirement of the fourth amendment is inapplicable. The exigent circumstances exception has been applied most often to automobile searches, but some state and lower federal courts have held that the doctrine also applies to searches of luggage in circumstances where it is clear that, because of mobility, the opportunity to search will pass if officers must wait to obtain a warrant. See, e.g., United States v. Valen, 479 F.2d 467, 470-71 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974); United States v. Johnson, 467 F.2d 630, 639 (2d Cir. 1972), cert. denied, 413 U.S. 920 (1973); United States v. Mehciz, 437 F.2d 145, 147 (9th Cir.), cert. denied, 402 U.S. 974 (1971); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972), cert. denied, 411 U.S. 931 (1973).

The Court of Appeals applied the Carroll doctrine in England v. State, 274 Md. 264, 334 A.2d 98 (1975), holding a warrantless search of an automobile justified by exigent circumstances. Police officers discovered the car parked outside the defendant's residence several days after he had been taken into custody. The court reasoned that because police officers had been searching for the auto for several days, it must be inferred that they had searched unsuccessfully at the England residence previously; hence, the discovery in effect was fortuitous. Id. at 268, 334 A.2d at 102. The car was mobile and accessible to England's confederate, to his family, and to others. The court concluded that these circumstances met the three criteria necessary for exigency derived from Carroll and stated in Chambers v. Maroney, 399 U.S. 42, 51 (1970): the car was movable, one of its former occupants was alerted, and the car's contents might never have been found again if a warrant were obtained. 274 Md. at 269, 334 A.2d at 103. Thus, the court reasoned, this case fell closer on its facts to the open highway stop in Carroll than to the situation described in Coolidge v. New Hampshire, 403 U.S. 443 (1971), where a warrant was held necessary to validate
cause to believe that the suitcases contained marijuana, his warrantless search was also constitutional under the exigent circumstances doctrine; and (3) Schwartz would have had probable cause if he had actually smelled marijuana. However, the court concluded that because Schwartz had not smelled marijuana, he did not have probable cause to search Waugh's luggage. Therefore, the information obtained and subsequently relayed to Pitt, being fruit of an unconstitutional search, could not, under the Carter-Everhart rationale, be used by Pitt to establish probable cause for an arrest and search. The court reasoned that because Pitt had no other basis for determining that probable cause existed the evidence obtained through his search of the suitcases must be suppressed. The court held that the trial judge had abused his discretion under Maryland Rule 441.

a search of an automobile immobilized and under observation for some time in a private driveway. 274 Md. at 270-73, 334 A.2d at 102-03. See also South Dakota v. Opperman, 96 S. Ct. 3092 (1976); Texas v. White, 423 U.S. 67 (1975) (per curiam); Cardwell v. Lewis, 417 U.S. 583 (1974); Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835 (1974). In Opperman the Court, acknowledging the inadequacy of the mobility factor as a rationale for decisions upholding inventory searches of automobiles, stated a new factor: "[T]he expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." 96 S. Ct. at 3096.

The court stated that smelling the odor of an ordinary cosmetic such as talcum powder from a suitcase does not constitute probable cause to search for marijuana, despite the fact that such a substance is frequently used as a cover for marijuana, for it is not uncommon that the suitcases of innocent travelers contain talcum powder. 275 Md. at 33-34, 338 A.2d at 274. Cf. Spinelli v. United States, 393 U.S. 410, 414 (1969) (existence of two telephones in an apartment is insufficient to establish probable cause to search a suspected gambling operation).

The court also found that the informant's tip to Schwartz was inadequate to establish probable cause for his search. 275 Md. at 32-33, 338 A.2d at 274. Apparently, the only evidence presented by the state regarding the informant consisted of information that Schwartz gave to Pitt by telephone and by a subsequent written report. Schwartz stated only that he had received information from a "reliable confidential informant." The court was presented neither with information concerning the underlying circumstances from which the informant concluded that Waugh was carrying marijuana nor with any basis for a determination that the informant was credible or his information reliable. Thus, neither part of the two-prong test set forth in Spinelli v. United States, supra, and Aguilar v. United States, 378 U.S. 108 (1964), was satisfied.


75. The court stated that smelling the odor of an ordinary cosmetic such as talcum powder from a suitcase does not constitute probable cause to search for marijuana, despite the fact that such a substance is frequently used as a cover for marijuana, for it is not uncommon that the suitcases of innocent travelers contain talcum powder. 275 Md. at 33-34, 338 A.2d at 274. Cf. Spinelli v. United States, 393 U.S. 410, 414 (1969) (existence of two telephones in an apartment is insufficient to establish probable cause to search a suspected gambling operation).

76. 275 Md. at 30-32, 388 A.2d at 272-74.
by not granting a hearing on Waugh's renewed motion to suppress the evidence.\textsuperscript{78}

The situation in \textit{Waugh} is distinguishable from that in \textit{Carter} and \textit{Everhart} in two respects. First, Pitt acted without a warrant; the existence or nonexistence of probable cause was determined solely by him rather than by a magistrate. Secondly, in contrast to the officers in \textit{Carter} and \textit{Everhart}, Pitt acted completely in good faith; knowledge of the illegality of Schwartz's prior search came long after Pitt had mistakenly determined that probable cause for his arrest and search existed. However, as the court implicitly recognized, these distinctions are not determinative. The Supreme Court has consistently held that "the standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of [a] challenged [warrantless] arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment" in a warrant situation; less stringent standards would "discourage resort to the procedures for obtaining a warrant."\textsuperscript{79} That good faith reliance does not alone justify a warrantless arrest or search was made clear by the Court's decision in \textit{Whitely v. Warden}.\textsuperscript{80} The Court held invalid a warrantless arrest made by an officer who relied in good faith on a police radio broadcast that was based on an arrest warrant when it was subsequently determined that the complaint made to support the warrant was insufficient to establish probable cause. While observing that police officers called upon to aid other officers in executing an arrest warrant are initially entitled to assume the validity of the warrant, the Court held that where it is later found that the warrant was not based on probable cause, "an otherwise illegal arrest cannot be insulated from challenge by the decision of the investigating officer to rely on fellow officers to make the arrest."\textsuperscript{81} Thus, \textit{Whitely} supports the \textit{Waugh} court's conclusion that a warrantless search conducted on the basis of information obtained through a prior unlawful search is invalid even when the officer conducting the second search mistakenly believed the prior search to be lawful.\textsuperscript{82}

\textsuperscript{77} Md. R.P. 729(g)(2) provides in pertinent part: "If [a] motion or petition [to suppress] is denied prior to trial of the criminal case, the pre-trial ruling shall be binding at the trial unless the trial judge, in the exercise of his discretion grants a hearing \textit{de novo} on the defendant's renewal of his motion or objection."

\textsuperscript{78} 275 Md. at 35, 338 A.2d at 275.


\textsuperscript{80} 401 U.S. 560 (1971).

\textsuperscript{81} Id. at 568.

\textsuperscript{82} That \textit{Whitely} involved reliance on a warrant issued on the basis of insufficient cause whereas \textit{Waugh} concerned reliance on information obtained by an unlawful search is insignificant. The key consideration in each case is that the instigating officer could not have lawfully arrested or searched the accused.
II. Wiretapping

On two occasions during the September Term, 1974, the Court of Appeals was confronted with cases requiring interpretation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Title III was enacted as a congressional response to Supreme Court decisions in *Osborn v. United States*, *Berger v. New York*, and *Katz v. United States*, and was an effort to protect the privacy of wire and oral communications while delineating the circumstances and conditions under which interception of such communications would be authorized. Title III permits electronic surveillance by law enforcement officials when judicially authorized and when conducted in accordance with specified procedures. Although Supreme Court decisions have interpreted various provisions of Title III, the question of its constitutionality has not come before the Court. However, despite severe criticism of Title III by some legal commentators, the federal courts of appeals without exception have held it constitutional. The Maryland Court of Appeals also has concluded

86. 388 U.S. 41 (1967).
that Title III is constitutional and has held that it has been implemented in Maryland.98

In *Carter v. State*94 the Court of Appeals used two sections of Title III as an alternative basis for its holding that Carter was entitled to move to suppress any evidence derivatively obtained from an unlawful wiretap.95 The court found the result to follow directly from sections 251596 and 2518(10)(a),97 which mandate the suppression not only of the contents of any conversation intercepted in violation of the Act but also of evidence "derived therefrom."98

The Court of Appeals considered certain provisions of Title III in greater detail in *Spease v. State.*99 Police officers investigating a narcotics conspiracy obtained a court order100 for a wiretap on the home telephone of defendant Ross, suspected of being a major narcotics dealer. The order permitted a continuous wiretap for a period of two weeks. Authorization was given to intercept conversations between Ross and his suppliers or buyers which related to business transactions between them. The order included the statutory directives for minimization101 and service of in-

---


95. Id. at 424-29, 337 A.2d at 423-26. See notes 14-21 and accompanying text supra.

96. § 2515 provides:

*Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.*

97. § 2518(10)(a) provides in pertinent part:

*Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—*

(i) the communication was unlawfully intercepted.


100. The order was obtained in compliance with 18 U.S.C. § 2518 (1970).

101. 18 U.S.C. § 2518(5) provides in pertinent part:

*Every order and extension thereof shall contain a provision that the authorization to intercept... shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter....*
Progress reports were to be made to the court every five days. Based on information obtained from the wiretap, Ross and Spease, a codefendant, were convicted of conspiracy to distribute cocaine. The convictions were affirmed by the Court of Special Appeals.

The two issues before the Court of Appeals had been raised unsuccessfully by the defendants at a pretrial suppression hearing. The defendants contended that the state violated the court's wiretap order and Title III by failing to minimize the interception of innocent communications as required by section 2518(5) and failing to serve inventories as required by section 2518(8)(d). The second issue was the easier to resolve. At the suppression hearing Ross testified that he, as a person named in the wiretap order, did not receive the inventory required by the order and by section 2518(8)(d). However, the police officer in charge of the investigation testified that he had personally served Ross with a search warrant and attached affidavit containing all information statutorily required to be set forth in the inventory. Because Ross thereby received actual notice of the wiretap within the time period specified in the court order, the issue before the court was whether strict compliance with the section 2518(8)(d) inventory requirement was necessary.

In *State v. Siegel* the Court of Appeals, in reversing a conviction because of a gross failure of a court wiretap order to comply with the requirements of sections 2518(4)(e) and 2518(5), stated that "[t]he statute sets up a strict procedure that must be followed and we will not

---

102. 18 U.S.C. § 2518(8)(d) provides in part:

Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

1. the fact of the entry of the order or the application;
2. the date of the entry and the period of authorized, approved or dis-approved interception, or the denial of the application; and
3. the fact that during the period wire or oral communications were or were not intercepted.

103. 275 Md. at 94-95, 338 A.2d at 288.
104. Id. at 90, 338 A.2d at 286.
106. 275 Md. at 95-96, 103-04, 338 A.2d at 288-89, 293.
107. See note 101 supra.
108. See note 102 supra.
109. 275 Md. at 103, 338 A.2d at 293.
110. 266 Md. 256, 292 A.2d 86 (1972).
111. The wiretap order in question did not contain statements, as required by sections 2518(4)(e) and 2518(5), that the interception terminate upon attainment of its authorized objective. Id. at 272-73, 292 A.2d at 95.
abide any deviation, no matter how slight, from the prescribed path.'\textsuperscript{112} However, the Supreme Court has made it clear that not "every failure to comply fully with any requirement provided in Title III would render the interception of wire or aural communications 'unlawful';\textsuperscript{113} rather, suppression is required only for violations of provisions which "directly and substantially implement"\textsuperscript{114} the congressional intent to impose limitations on electronic surveillance.\textsuperscript{115} The purpose of the inventory requirement is to eliminate as much as is practicable the possibility of completely secret eavesdropping and to grant the subject of a wiretap an opportunity to seek redress for abuses.\textsuperscript{116} The Spease court found this purpose satisfied when there is notification of the wiretap by means of any document "reasonably calculated to transmit the required information within the specified time."\textsuperscript{117} When the accused receives actual notice within a reasonable time period, absent prejudice or deliberate governmental wrongdoing, failure to comply strictly with the formal specifications of Title III is not so serious an infraction as to require the drastic remedy of suppression of the wiretap evidence.\textsuperscript{118}

Spease was in a different position than Ross in that he had not been named in the wiretap order.\textsuperscript{119} Therefore, service of the inventory on him

\textsuperscript{112} Id. at 274, 292 A.2d at 95.
\textsuperscript{114} Id. at 527.
\textsuperscript{117} 275 Md. at 106, 338 A.2d at 294.
\textsuperscript{119} It was not required that Spease be named because his identity was not "known" at the time of the application for the order. 275 Md. at 109, 338 A.2d at 296; see 18 U.S.C. § 2518(1) (b) (iv) (1970).

The Supreme Court recently held that a person is "known" within the meaning of section 2518(1) (b) (iv), and, therefore, must be named in a wiretap application, when the government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept his conversations. United States v. Donovan, 45 U.S.L.W. 4115, 4119 (U.S. Jan. 18, 1977). The Court further held, however, that an unintentional failure to identify a "known" person in a wiretap application does not render interception of his conversations unlawful. Hence, suppression of evidence gathered against individuals "known," but unnamed in the wiretap application, is not justified, at least absent intentional govern-
was required only if found, by a discretionary decision of the court, to be in the "interest of justice." Spease was represented by the same attorney as was Ross, had actual notice of the wiretap some six months prior to trial, and had received copies of the application, affidavit, order, and recorded conversations three weeks prior to trial. Because Spease had received actual notice and was not shown to have suffered prejudice, the Court of Appeals found that the issuing judge acted within his discretion in not requiring that Spease be served with an inventory.

The minimization issue in Spease raised more substantial problems. The purpose of the minimization requirement of section 2518(5) is to circumscribe electronic surveillance as much as possible in the circumstances of each case. In the absence of clear congressional guidance as to what constitutes compliance with the minimization requirement, lower federal courts have sought, in the circumstances presented, to assess "the reasonableness of the agents' efforts in light of the purpose of the wiretap and mental misconduct. Id. at 4121 & n.23. Citing Chavez v. United States, 416 U.S. 562 (1974), the Court found the identification requirement to have no central role in the Title III statutory scheme. Id. at 4121–22.


121. 275 Md. at 109, 338 A.2d at 296. Thus, the requirements of section 2518(9) were satisfied:

The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.


122. 275 Md. at 108–09, 338 A.2d at 296. In United States v. Donovan, 45 U.S.L.W. 4115 (U.S. Jan. 18, 1977), the Supreme Court held that the prosecution has a duty to provide the judge supervising the wiretap with at least a general description of persons not named in the order but whose conversations were overheard. Id. at 4119–20. However, absent either a deliberate attempt by the prosecution to frustrate the inventory requirement or prejudice suffered by the accused, see id. at 4121 n.26, breach of this duty does not justify suppression of evidence obtained from the wiretap. Id. at 4122.


the information available to them at the time of interception." Courts have taken into consideration a wide range of factors in deciding whether "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." Because of the nature of the objects sought to be seized, i.e., conversations, the issue of reasonableness in the circumstances of a given case can be quite complicated. Whether a particular conversation is pertinent to the crime being investigated is not generally apparent until at least a portion of that conversation has been overheard; therefore, the propriety of an interception often can be determined only after the interception has been made.

In *Spease* the testimony at the pretrial suppression hearing revealed that connected to the monitoring device on Ross's telephone line was a tape recorder that was activated automatically when the telephone receiver was picked up. The police officer who conducted the tap testified that all calls were monitored in their entirety, but the tape recorder was turned off as soon as it was determined that a call was of a purely personal nature. According to his testimony, no privileged conversations were intercepted and no attention was paid to calls between children, although they were monitored. The officer also testified that the parties to calls on Ross's telephone often talked in code. No other evidence was produced.

While noting that the record was "woefully weak or silent" on many points, the Court of Appeals agreed with the Court of Special Appeals that the officers who conducted the tap "made a reasonable and good faith effort

---


128. It is this perhaps unmanageable quality of electronic surveillance which has led some to conclude that no electronic eavesdropping is constitutionally permissible. See note 91 supra.

129. The sole testimony came from the officer in charge of the investigation, who was called by the defendants. 275 Md. at 95, 338 A.2d at 289.

130. *Id.* at 96, 338 A.2d at 289. Apparently there were no such conversations to be intercepted. *Id.* at 112 n.1, 338 A.2d at 298 n.1.

131. *Id.* at 95-96, 338 A.2d at 289.

132. *Id.* at 100, 338 A.2d at 291.
to minimize the interception of unauthorized communications." Judge Eldridge dissented on three grounds: (1) because a failure to record

133. Id. at 103, 338 A.2d at 293.

It was thus not necessary for the court to consider the further issue of to what extent evidence must be suppressed when there has been a failure to minimize. The Court of Special Appeals stated in an extended dictum that an inadequate but good faith effort to minimize would require suppression of those conversations which should not have been intercepted. 21 Md. App. at 281-93, 319 A.2d at 567-73. This position is in agreement with federal decisions applying the rule of Marron v. United States, 275 U.S. 192 (1927) (some items were properly seized and some not; only those items which were improperly seized need be suppressed), to wiretap evidence. See, e.g., United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972) (dictum), cert. denied, 417 U.S. 918 (1974) ; United States v. Sisca, 361 F. Supp. 735, 746-48 (S.D.N.Y. 1973), aff'd, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974) ; United States v. Mainello, 345 F. Supp. 863, 874-77 (E.D.N.Y. 1972) ; United States v. King, 335 F. Supp. 523, 543-45 (S.D. Cal. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir.), cert. denied, 414 U.S. 846 (1973). However, because of their potentially broad sweep, electronic surveillance techniques present different and greater dangers to fourth amendment rights than do physical searches. See Berger v. New York, 388 U.S. 41, 56 (1967). It has been reasoned that the stricter remedy of total suppression is appropriate for failures to minimize. United States v. Focarile, 340 F. Supp. 1033, 1046-47 (D. Md.) (dictum), aff'd sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), aff'd, 416 U.S. 505 (1974). It is not clear if or in what circumstances those courts which have advocated partial suppression might require total suppression; the Court of Special Appeals did not foreclose the possibility that blatant failure to minimize might require the stricter remedy, 21 Md. App. at 281, 319 A.2d at 567. Taking a middle position between partial suppression in all instances and total suppression in all instances are several decisions holding partial suppression proper when there was an inadequate effort to minimize, but stating that total suppression would be required in cases involving failure to make a bona fide attempt to comply with the minimization requirement. See, e.g., United States v. Curreri, 363 F. Supp. 430, 437 (D. Md. 1973) ; United States v. Lanza, 349 F. Supp. 929, 932 (M.D. Fla. 1972). See also United States v. Principio, 531 F.2d 1132, 1139-41 (2d Cir. 1976), petition for cert. filed, 44 U.S.L.W. 3672 (U.S. April 1, 1976) (No. 75-1393).

If one accepts the need for electronic surveillance, total suppression seems too drastic a remedy to apply in all cases of inadequate minimization, regardless of good faith efforts by monitoring agents. Clearly, however, this sanction must be available at some point to enforce the minimization requirement; otherwise, there would be little incentive to minimize because officers could proceed to monitor all calls with the knowledge that only improperly seized conversations would later be suppressed. Therefore, a flexible approach seems preferable, with the degree of suppression depending upon the degree of compliance with the minimization requirement. See Comment, Post-Authorization Problems in the Use of Wiretaps: Minimization Amendment, Sealing, and Inventories, 61 CORNELL L. REV. 92, 122-25 (1975) ; Note, Minimization and the Fourth Amendment, 19 N.Y.L.F. 861 (1974) ; Note, Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies, 26 STAN. L. REV. 1411, 1435-38 (1974) ; Note, Minimization: In Search of Standards, 8 SUFFOLK U.L. REV. 60, 76-83 (1973).

134. 275 Md. 88, 110, 338 A.2d 284, 296.
when it is possible to do so is a violation of section 2518(8)(a), turning off the tape recorder could not possibly constitute compliance with the minimization requirement; (2) the majority incorrectly placed the burden of proof for the minimization issue on the defendants; and (3) there was in sum no compliance with the statutory minimization requirement. The majority's finding of adequate minimization rested primarily on the fact that the investigating officers turned off the tape recorder for personal calls, for, other than listening unattentively to the calls of children, the officers made no additional attempt to minimize interception. The court argued that an "intercept" under Title III includes acquisition of a conversation either by listening or by recording and that recording...
is a greater invasion of privacy than is listening; hence, refraining from recording was a good faith effort to minimize interception.\(^{139}\)

However, because there was no indication that it was not possible for the officers conducting the wiretap to record all conversations that they overheard, their failure to record was an apparent violation of section 2518(8)(a).\(^{141}\) It is difficult to understand how an action which violates one section of Title III can be viewed as constituting compliance with another section. It is true that recording a monitored conversation entails some additional invasion of privacy. Section 2518(8)(a) may be viewed, however, as a congressional judgment that when an intercept occurs, the benefits of recording the communication outweigh the harm that is caused.\(^{142}\) Proper recording of all intercepted conversations ensures that their contents will not be edited or distorted,\(^{143}\) that possible exculpatory conversations will not be omitted,\(^{144}\) and that evidence will be preserved for taint hearings and for possible use in seeking civil damages for violations of Title III.\(^{145}\) In addition, recording preserves evidence relevant to the issue of minimization.\(^{148}\)


139. Although good faith on the part of the monitoring agents is relevant to the determination whether minimization was achieved, the decisive consideration is the objective reasonableness of the interceptions. See United States v. Scott, 516 F.2d 751, 756 n.12 (D.C. Cir. 1975), cert. denied, 96 S. Ct. 1519 (1976). As observed in Scott, it is possible that even if agents seek to comply with the minimization requirement, the interceptions may be so unreasonable as to require suppression; conversely, interceptions may be reasonable despite a lack of subjective good faith. Id.

The factors which generally are considered in determining whether minimization was achieved, see note 126 supra, implicitly recognize that the determination is chiefly an objective one. See United States v. Quintana, 508 F.2d 867, 874-75 (7th Cir. 1975); United States v. James, 494 F.2d 1007, 1018-21 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974). But see United States v. Armocida, 515 F.2d 29, 44 (3d Cir.), cert. denied, 423 U.S. 858 (1975).

140. 275 Md. at 101, 338 A.2d at 292.

141. See note 135 supra.

142. As a safeguard, section 2518(8)(a) provides that all recordings be sealed by the court. See note 135 supra. By thus treating recordings as "confidential court records," S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968), the section places a limitation on the invasion of privacy caused by the act of recording. In addition, it has been suggested that upon proper application by parties affected, a court may order erasure of nonpertinent recorded conversations. United States v. Manfredi, 488 F.2d 588, 600 n.9 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

143. See note 135 supra.


Even if section 2518(8)(a) is ignored, it is doubtful that merely not recording some conversations when all are monitored can be considered an act of minimization. Assuming that recording is a type of intercept,\textsuperscript{147} dual interceptions occurred in \textit{Spease}. While turning off the tape recorder may then be viewed as an attempt to minimize the interceptions consisting of recordations, there nevertheless was no effort to minimize the interceptions occasioned by the acts of listening.

If the action of not recording all conversations cannot be considered an adequate attempt to minimize, the question remains whether the minimization requirement was nonetheless satisfied in \textit{Spease}. Given the circumstances — the investigation was of a sophisticated and extensive narcotics conspiracy, code words were often used, the wiretap was authorized for a relatively short period of time, and progress reports to the court were required — it may be, as the Court of Appeals found, that interception of all calls in their entirety was justified.\textsuperscript{148} However, it is questionable whether the record in this case was sufficient to justify such a conclusion. Courts considering the minimization problem have found it appropriate to examine breakdowns of the proportions of pertinent and nonpertinent calls intercepted,\textsuperscript{149} as well as evidence relating to other factors relevant to the minimization determination.\textsuperscript{150} No such evidence was presented at the suppression hearing in \textit{Spease}.\textsuperscript{151} The Court of Appeals, while recognizing this fact, nevertheless resolved to consider the issue "on the evidentiary record made by [Ross and Spease] on their motion to suppress."\textsuperscript{152}

\begin{itemize}
  \item \textsuperscript{147} See note 138 \textit{supra}. If recording is not an intercept, the act of turning off the tape recorder could certainly not be considered an attempted minimization technique.
  \item \textsuperscript{150} See note 126 \textit{supra}.
  \item \textsuperscript{151} See notes 129-31 and accompanying text \textit{supra}.
  \item \textsuperscript{152} 275 Md. at 101, 338 A.2d at 291.
\end{itemize}
The court thereby placed the burden of proof on the defendants, a conclusion contrary to federal decisions that have considered the issue. As the dissent argued, it is logical to place the initial burden of proving compliance with the minimization requirement on the prosecution. Title III imposes upon the state a duty to minimize, and the key factors pertinent to the issue are within the knowledge of the state, not the accused. Because the record in Spease was "woefully weak or silent" on many of the factors important to a resolution of the minimization question, it would have been more appropriate to remand the case for a new trial than to proceed on the basis of an inadequate record.

Even if the court's decision did not result in substantial injustice under the Spease circumstances, an unfortunate precedent has been established. By approving the failure to record monitored conversations as a proper minimization technique, the decision encourages a procedure that directly conflicts with one section of Title III and discourages attempts to comply fully with another. Additionally, by placing on the defendant the burden of establishing noncompliance with the minimization requirement, the Spease result removes an incentive for careful compliance and documentation by the state, and impedes challenges to improper governmental activities. Because "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices," the court's relaxation of protective measures against abuses of electronic surveillance is regrettable.

153. The federal decisions uniformly state that the prosecution must make a prima facie showing of compliance with the minimization requirement; following such proof, the burden shifts to the defense to rebut the prosecution's evidence and demonstrate that further minimization could reasonably have been accomplished. See United States v. Armocida, 515 F.2d 29, 45 (3d Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Quintana, 508 F.2d 867, 875 (7th Cir. 1975); United States v. Rizzo, 491 F.2d 215, 217 (2d Cir.), cert. denied, 416 U.S. 990 (1974); United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

154. 275 Md. at 115-16, 338 A.2d at 300.

155. See note 132 and accompanying text supra.


159. Secure in the knowledge that in many cases merely turning off a tape recorder will constitute sufficient compliance with the minimization requirement of section 2518(5), police officers will be discouraged from further efforts to minimize interception.

SENTENCING

In *Henry v. State*\(^1\) the court of appeals considered whether it was permissible for a judge to consider at sentencing the defendant’s involvement in related crimes which he had been acquitted.

Henry had been convicted by a jury of larceny of an automobile\(^2\) and receiving stolen property,\(^3\) but found not guilty of murder, assault with intent to murder, and the armed robbery of a grocery store.\(^4\) The trial judge prefaced his sentencing remarks by indicating his disagreement with the verdicts of acquittal and on the basis of unrebutted evidence implicating the defendant in the robbery and homicide, sentenced Henry to consecutive maximum terms on the two convictions.\(^5\) On appeal the defendant contended that the sentencing procedure had denied him due

---

2. See Md. Ann. Code art. 27, § 348 (1976). In addition, the jury initially returned a guilty verdict on a charge of unauthorized use of the same vehicle in violation of Md. Ann. Code art. 27, § 349 (1976). However, upon being reassembled shortly after its discharge, the jury rendered a guilty verdict on the larceny count alone, acquitting the defendant of unauthorized use. In affirming the larceny conviction, the Court of Special Appeals rejected Henry’s contention that the two initial verdicts were inconsistent and held that unauthorized use was a lesser offense included within the crime of larceny, which therefore merged into the larceny conviction. Henry v. State, 20 Md. App. 296, 298-99, 315 A.2d 797, 801 (1974). The Court of Appeals disagreed, holding that because the intent elements of the crimes differed there was no merger. 273 Md. at 134-38, 328 A.2d at 297-98; See also 35 Md. L. Rev. 535 (1975). The court ruled, however, that the defendant’s failure to object at trial to the reassembling of the jury constituted a waiver, and it therefore affirmed the larceny conviction. 273 Md. at 139, 328 A.2d at 299. See McCarson v. State, 8 Md. App. 20, 22, 257 A.2d 471, 473 (1969).
3. See Md. Ann. Code art. 27, § 467 (1976). Shortly after the robbery and murder for which Henry was indicted, one of the defendant’s companions handed Henry sixteen dollars. The defendant said he was unaware that the money came from the robbery. He was fully cognizant, however, that his companions were unemployed, and he took the money knowing that they had just robbed a grocery store. 273 Md. at 145-47, 328 A.2d at 301-03.
4. Henry’s two companions were convicted in a separate proceedings of murder in the first degree. 273 Md. at 140, 328 A.2d at 299. Henry had picked them up, driven them to the grocery store, and waited in the car while they entered the store. He then heard three shots and saw his companions run from the store and get back into the car, at which point he drove away from the scene. Id. at 143-44, 328 A.2d 301.
5. Id. at 140-42, 328 A.2d at 299-300. The judge imposed a fifteen year sentence for the larceny count and a three year term for the receipt of stolen property count. Id. at 142, 328 A.2d at 300. The sentences were reviewed and left unchanged by a panel of three trial judges acting pursuant to Md. Ann. Code art. 27, §§ 645J-A-645JG (1976). 273 Md. at 142, 328 A.2d at 300.

(454)
process of law in violation of the fourteenth amendment. He argued that maximum sentences for the larceny and receipt of stolen property convictions had been imposed because the judge believed the defendant also was guilty of the more serious charges. The Court of Special Appeals rejected this challenge and affirmed the convictions and sentences.

On certiorari the Court of Appeals held that in setting sentence, it was permissible for the trial judge to consider evidence of the defendant's involvement in the homicide and robbery "at a level less than would warrant his conviction of those crimes." The court concluded that the sentencing judge did not intend the maximum sentences as punishment for the crimes of which Henry was acquitted; however, the court vacated the sentence on the larceny count because it exceeded the maximum allowed by statute and remanded for imposition of a valid sentence.

Writing for a unanimous court, Judge Smith noted that although a trial judge is afforded sweeping discretion in sentencing and is not


7. 273 Md. at 140-42, 328 A.2d at 299-300.

8. Henry v. State, 20 Md. App. 296, 315 A.2d 797 (1974). The majority held that in passing sentence the trial judge had properly considered Henry's involvement in the murder and robbery 'only in terms of its aggravating effect upon the larceny.' Id. at 308, 315 A.2d at 804. Judge Davidson, dissenting, found that the judge's remarks raised a substantial doubt whether the sentence had been based on an impermissible consideration. She argued that the case should have been remanded to the trial court for further consideration of the sentences. Id. at 317-18, 315 A.2d at 809.

9. 273 Md. at 150, 328 A.2d at 305.

10. Id. at 148, 328 A.2d at 303.

11. Id. at 151, 328 A.2d at 305. The trial judge incorrectly sentenced Henry under the general larceny statute, Md. ANN. CODE art. 27, § 340 (1976), which permits a fifteen year maximum, instead of under the specific statute for larceny of an automobile, Md. ANN. CODE art. 27, § 348 (1976), which provides for a fourteen year maximum sentence. 273 Md. at 133-34 n.1, 151, 328 A.2d at 295 n.1, 305; cf. Maguire v. State, 192 Md. 615, 623, 65 A.2d 299, 302 (1949).

bound by the strict rules of evidence that govern during trial, a judge may not base a sentence on inaccurate or unreliable information or on "impermissible considerations." A judge may consider neither a bald accusation of criminal conduct that has resulted in a clear acquittal nor a mere rumor of a defendant's prior criminal acts; in both instances the information is excluded from the sentencing process because of its inherent unreliability. However, the Henry court indicated that reliable reports of a defendant's opprobrious but non-criminal conduct, as well as evidence of prior criminal activity for which he was not indicted, are properly receivable. Similarly, because an acquittal may reflect only the prosecution's failure to prove guilt beyond a reasonable doubt and "does not have the effect of conclusively establishing the untruth of the evidence introduced


14. See United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948). In Townsend the trial judge, setting sentence without counsel present, failed to distinguish the defendant's prior convictions from charges that resulted only in dismissal or acquittal. The Court vacated the sentence and specifically held that in such a situation the absence of counsel at sentencing was a denial of due process. Yet Townsend has been interpreted more broadly as holding that due process requires that a sentence be based on accurate information. See United States v. Metz, 470 F.2d 1140, 1141 (3d Cir. 1972), cert. denied sub nom. Davenport v. United States, 411 U.S. 919 (1973); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); Note, Appellate Review of Sentences and the Need for a Reviewable Record, 1973 DUKE L.J. 1357, 1361; Note, Procedural Due Process, supra note 13, at 826, 845–46. For a discussion of Townsend and a review of recent federal and Maryland sentencing cases, see Note, Toward a Probable Cause Standard, supra note 6, at 140–47.


17. See Driver v. State, 201 Md. 25, 92 A.2d 570 (1952) (by implication).

18. See Note, Toward a Probable Cause Standard, supra note 6, at 147.

19. Until recently no Maryland case had set forth a reliability standard for sentencing information. The determination rested largely within the discretion of the trial judge. One commentator has argued that Nickens v. State, 17 Md. App. 284, 301 A.2d 49 (1973), should be viewed as establishing such a test based on a probable cause standard. See Note, Toward a Probable Cause Standard, supra note 6.

against the defendant,” the Court of Appeals held that the sentencing judge may consider reliable evidence of a defendant’s participation in a crime of which he has been acquitted. The court observed that the trial judge was able to draw on highly trustworthy evidence “from Henry’s own lips” placing him at the scene of the grocery store robbery and murder. The court therefore concluded that the judge could consider Henry’s involvement in those crimes as significantly increasing the gravity of the larceny and receipt of stolen property convictions.

The Fourth Circuit faced a similar sentencing problem in United States v. Eberhardt. While awaiting sentencing with several others following convictions on charges of destroying government property and interfering with the Selective Service System, two defendants participated in a second war protest in which draft board records were burned. At sentencing the two received longer terms than their co-defendants. They contended on appeal that the extra length of their sentences was attributable only to a desire by the trial judge to punish them for the subsequent offenses in which they had been implicated. The Fourth Circuit affirmed the convictions but remanded for reconsideration of the sentences. The court stated that the sentencing judge was not required to ignore evidence.

22. 273 Md. at 148, 328 A.2d at 303. Accord United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972); Bell v. State, 57 Md. 108, 116-17 (1881); cf. Scott v. State, 238 Md. 265, 208 A.2d 575 (1965). The Court of Special Appeals viewed Scott as authority for the conclusion that the trial judge was permitted to consider evidence of Henry’s involvement in the robbery and murder despite the acquittals. 20 Md. App. at 306-07, 315 A.2d at 803. Judge Davidson noted in her dissent that Scott was inapposite because it involved a revocation of probation proceeding that did not require a finding of guilt beyond a reasonable doubt. Id. at 316-17, 315 A.2d at 808-09. The Court of Appeals opinion did not discuss Scott.
23. 273 Md. at 150, 328 A.2d at 304. The defendant testified on direct and cross-examination that he had lived in the neighborhood for a long time; that he twice drove his companions to the grocery store for suspicious reasons, the second time parking the stolen auto three car lengths up the street when there were closer spaces available; and that he waited for his friends after hearing shots and seeing them flee from the store. Id. at 143-47, 328 A.2d at 300-02. While the reliability of this testimony was not an issue on appeal, it has been suggested that evidence of this kind “may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn, since unlike hearsay, the evidence involved here was given under oath and was subject to cross-examination and the judge had the opportunity for personal observation of the witnesses.” United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972).
24. 273 Md. at 151, 328 A.2d at 305.
26. The defendants were subsequently convicted of mutilating government records, destruction of government property, and interference with the administration of the Selective Service System; these convictions were affirmed on appeal. United States v. Berrigan, 417 F.2d 1002 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970).
27. 417 F.2d at 1015.
of subsequent misconduct, and suggested that it had "no reason to think that the judge undertook to impose a penalty for the second offense." 28 Nevertheless, the court was unwilling to speculate on precisely what passed through the trial judge's mind at sentencing, 29 and therefore considered it "fair and in the interest of justice" to require the trial judge to reevaluate the sentences and reduce them if he actually had an improper sentencing motive. 30

It is implicit in Eberhardt that an appellate court has a limited function when reviewing a sentence on due process grounds. 31 To justify a remand, the reviewing court need not be completely persuaded that the judge had an improper sentencing motive, although it must have some objective basis for believing that he may have had one. 32 It is unclear whether the Henry court applied such a standard in reviewing the defendant's sentences because it did not explicitly engage in a substantive analysis of the sentencing judge's remarks, but instead stated its findings in a conclusory fashion. 33 However, the court appears justified in holding that the remarks of the trial judge, when considered as a whole, 34 did not constitute sufficient evidence of an improper sentencing motive. While the defendant might find some support for his position through a selective and out-of-context reading of isolated passages of the sentencing statement, 35 a reading of the full text convinced the Court of Appeals that

28. Id.
29. Id. Apparently the district court judge did not state his reasons for imposing longer sentences on two of the defendants.
30. Id.
31. See United States v. Metz, 470 F.2d 1140 (3d Cir. 1972), cert. denied sub nom. Davenport v. United States, 411 U.S. 919 (1973). In remanding the cases for further consideration of the sentences, Judge Sobeloff noted that if the trial judge undertook to penalize the defendants for an offense other than the one of which they were convicted, he would have placed them in double jeopardy. 417 F.2d at 1015. This argument would seem equally applicable to the Henry facts.
32. See Johnson v. State, 274 Md. 536, 538, 336 A.2d 113, 115 (1975). In Johnson the Court of Appeals found evidence in a colloquy between the trial judge and the defendant at sentencing that the judge may have considered the defendant's plea of not guilty when setting sentence. The court stated that although we cannot be sure to what extent it actually affected the judge's ultimate determination, if at all, we think that certain remarks made by the sentencing judge ... indicate that he may have imposed sentence in this case based upon an impermissible consideration.

Id.
33. The court did not believe that the trial judge had sentenced based on a belief that Henry was guilty of the crimes of which he had been acquitted, stating simply that "[w]e do not see it that way." 273 Md. at 148, 328 A.2d at 303.
34. The court analogized to the rule requiring that a judge's instructions to a jury be considered as a whole. Id. at 150, 328 A.2d at 304, citing Wood v. Abell, 268 Md. 214, 235, 300 A.2d 665, 676 (1973); Baltimore & O.R.R. v. Plews, 262 Md. 442, 462, 278 A.2d 287, 297 (1971).
35. The trial judge referred to the defendant as the "commander of the troops and the pilot of the automobile," and later characterized him as the person who "masterminded and engineered the holdup." 273 Md. at 141, 328 A.2d at 299.
the judge did not intend the maximum sentences as punishment for crimes of which Henry had been acquitted.\textsuperscript{36}

In reaching this result, the court determined that \textit{Eberhardt} was distinguishable on its facts.\textsuperscript{37} The trial judge in \textit{Henry} was able to rely on the defendant's own admission of involvement in the robbery and homicide;\textsuperscript{38} the judge in \textit{Eberhardt}, however, apparently did not possess at the time of sentencing any reliable evidence of the defendants' involvement in burning the draft records. Furthermore, in \textit{Eberhardt} the trial judge failed to state his reasons for imposing longer terms on the two defendants.\textsuperscript{39} The Fourth Circuit therefore was forced to evaluate the district court judge's sentencing motives without a complete record.\textsuperscript{40} Given the possibility of an improper sentencing motive,\textsuperscript{41} the Fourth Circuit was justifiably reluctant to affirm the sentence on sheer conjecture, and remanded "in the interest of justice" rather than resolving any lingering doubt against the defendant. By contrast, the trial judge in \textit{Henry} fully articulated his reasons for imposing the maximum sentences.\textsuperscript{42} He was careful to limit his criticism of the jury's verdict to an introductory remark,\textsuperscript{43} and then correctly considered the overwhelming evidence of the defendant's participation in the robbery and murder only in determining sentences for the related offenses. The Court of Appeals properly concluded that there was no objective basis for believing that the trial judge had been improperly motivated in setting these sentences.

\begin{enumerate}
\item[36.] While the Court of Appeals merely stated its conclusion, \textit{see} note 33 and accompanying text \textit{supra}, the Court of Special Appeals observed that [the judge] was painstakingly careful . . . to consider the murderous conduct only in terms of its aggravating effect upon the larceny. He made his purpose preeminently clear and carefully touched all bases. 20 Md. App. at 308, 315 A.2d at 804.
\item[37.] \textit{273} Md. at 150, 328 A.2d at 304.
\item[38.] \textit{See} note 23 and accompanying text \textit{supra}.
\item[39.] \textit{See} 417 F.2d at 1015.
\item[40.] \textit{See} note 29 \textit{supra}.
\item[41.] The disparate sentences furnished the Fourth Circuit with at least some indication that the harsher sentences may have been imposed in response to the defendants' later draft protests and therefore were intended as punishment for crimes for which they had not yet been tried and convicted.
\item[42.] \textit{273} Md. at 140-42, 328 A.2d at 299-300.
\item[43.] \textit{Id.} at 140, 328 A.2d at 299.
\end{enumerate}
STATE AND LOCAL GOVERNMENT

In Wilson v. Board of County Commissioners the Court of Appeals reviewed, for the first time, the current provisions of Article 41 of the Annotated Code of Maryland (hereinafter the Act) authorizing local bond issues to finance the purchase or construction of industrial facilities. Under the Act, municipalities and counties are empowered to “borrow money by issuing negotiable revenue bonds for the purpose of financing the cost of acquiring any industrial building or buildings or port facilities, either by purchase or construction.” Wilson involved Allegany County revenue bonds that were to be issued in conjunction with the installation of pollution control devices at a paper processing plant; the company had previously consented to orders issued by the Maryland Department of Water Resources and the Division of Air Quality Control of the Maryland Environmental Health Services designed to implement pollution abatement measures. The company requested that the County Commissioners issue bonds to finance the pollution control facilities as allowed by the


Industrial development revenue bonds work as follows: The municipality or county issues bonds and the proceeds are used to finance the acquisition or construction of industrial facilities for a private corporation. Although the governmental entity owns the project, the corporation rents it for an amount that equals the payments of principal and interest to the bondholders. Generally, the governmental entity neither supports the bond with its faith and credit nor assumes liability for the payment of principal or interest; the bondholders must depend on the income of the project for payment. Essentially, the governmental entity uses its ability to borrow funds at a low rate of interest (since such interest is rendered tax-exempt to bondholders through utilization of the entity’s taxing power to benefit the private corporation). 15 E. MCQUILLIN, MUNICIPAL CORPORATIONS §§ 43.11 & 43.43 (3d ed. 1970); I S. SURREY, W. WARREN, P. MCDANIEL & H. AULT, FEDERAL INCOME TAXATION CASES AND MATERIALS 287-88 (1972).

With a general obligation bond, unlike a revenue bond, the issuing governmental entity assumes liability for the payment of principal and interest. The issuance of a general obligation bond requires a public purpose because the funds used for repayment come from tax revenues. See City of Frostburg v. Jenkins, 215 Md. 9, 15-16, 136 A.2d 852, 855 (1957); Md. Const., Declaration of Rights art. 15; 15 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 43.05 (3d ed. 1970). See generally note 14 infra. Since the taxing power is at the heart of both types of bond issuances, it is arguable that the public purpose necessary to support each is the same. See note 20 infra.

4. The statutory definition of “industrial building” or “port facility” includes “pollution control facilities,” id. § 266A(c), which in turn are defined as “any building, structure, machinery, equipment or facility designed for the control, reduction, prevention or abatement of pollution of the natural environment by gaseous, liquid, or solid substances, discharges or radiation, (including adverse thermal effects therefrom), noise or any combination thereof,” id. § 266A(d).
5. 273 Md. at 36-37, 327 A.2d at 491-92.
Act, although the Act had been passed after execution of the consent orders and after commencement of the construction of the facilities. Two county residents challenged the $22,700,000 bond issue proposed by the Allegany County Commissioners on a variety of grounds, but the Wilson court upheld the validity of the bond issue.

The authorizing language of the Act, which permits municipalities or counties to raise funds for financing the acquisition of industrial buildings or port facilities by issuing revenue bonds, expresses the legislature's desire that the bonds be used to accomplish the purposes delineated in the Act. The legislature has identified five purposes: (1) relieving unemployment, (2) encouraging additional industry and a balanced economy in Maryland, (3) assisting in the retention of existing industry by means of pollution control, (4) promoting economic development, and (5) protecting natural resources. In turn, these enumerated legislative purposes are premised on findings by the legislature that unemployment exists in Maryland, that industrial development is needed to relieve unemployment and to establish a balanced economy, that the development of industrial buildings and port facilities under the Act will promote the general welfare, and that pollution control or abatement is necessary to attract new and retain old industry in order to promote economic development and the general welfare.

Under the Act, the municipality or county must adopt an ordinance or resolution specifying certain information necessary for financing the proposed undertaking by a revenue bond issue. It is expressly provided that should there be a subsequent challenge to the bond issuance, all findings by the legislative body of the municipality or county in regard to unemployment conditions, pollution control, industrial and economic development, the protection of natural resources, or the promotion of the

6. The plaintiffs were residents, citizens and taxpayers of Allegany County. A number of parties who relied heavily upon revenue bonds to finance pollution abatement intervened on behalf of the county, most significantly the State of Maryland, which argued that a substantial public interest was involved in the implementation of this and similar resolutions authorizing local bond issues to finance pollution abatement. 273 Md. at 39-42, 327 A.2d at 493-94.


9. Id. § 266B(a).

10. Id. § 266B(d).
general welfare shall be conclusive. In Wilson, the Allegany County Board of Commissioners resolved that the revenue bond issue requested by the paper processing company would assist in the acquisition of pollution control facilities for the company, and found:

The construction and acquisition of the facilities by the Company and the financing thereof by the County (a) promote the declared legislative purposes of the Act through furtherance of the control, reduction or abatement of pollution of the environment and (b) facilitate compliance with the requirements of federal, State and local laws and regulations governing the control, reduction or abatement of pollution of the environment, and thus (i) sustain jobs and employment opportunities and aid in maintaining employment, thus relieving conditions of unemployment in the State of Maryland and in the County; (ii) encourage the increase of industry and a balanced economy in the State of Maryland and in the County; (iii) assist in the retention of existing industry in the State of Maryland and in the County; (iv) promote economic development; (v) protect natural resources; and (vi) promote the health, welfare and safety of the residents of Allegany County, Maryland, and the State of Maryland . . . .

Subsequently, the County undertook to issue bonds, in an amount not to exceed $22,700,000, pursuant to the Board decision to finance the construction of facilities designed to abate air and water pollution at the plant.

The validity of the bond issue and proposed expenditure of funds was challenged on four grounds: (1) that the project lacked sufficient public purpose; (2) that even if the construction of pollution abatement facilities were a sufficient public purpose, this public purpose would not be served because the company was already under an enforceable order to construct the facilities; (3) that the Act’s timing constraints would be violated by this issuance because construction commenced prior to the effective date of the Act’s authorization of financing of pollution abatement facilities and because construction began prior to the County resolution, and (4) that bonds could not be issued by Allegany County to finance construction of facilities in West Virginia or Garrett County. The Court of Appeals addressed these challenges seriatim, concluding in each instance that the proposed bond issue was valid notwithstanding Wilson's

11. Id. § 266B(f). The text of this provision is printed in note 36 infra.
12. 273 Md. at 38, 327 A.2d at 492-93.
13. Id. at 32, 327 A.2d at 490.

The court did not phrase the issues in terms of the “legitimate means” and “legitimate ends” of governmental action. However, in cases raising the issue whether a use of the state’s police power serves a public purpose, the court will consider the ends of that use, the means employed, the legitimacy of both the ends and the means, and the rationality of the relationship between the two. See Salisbury Beauty Schools v. State Bd. of Cosmetologists, 268 Md. 32, 300 A.2d 367 (1973).
arguments because the issue served a substantial public purpose and complied with the statutory requirements.14

14. The court was not presented with the issue whether the Act violated the "credit clause" of Md. Const. art. III, § 34, which states:

The credit of the State shall not in any manner be given, or loaned to, or in aid of any individual association or corporation; nor shall the General Assembly have the power in any mode to involve the State in the construction of works of internal improvement, nor in granting any aid thereto which shall involve the faith and credit of the State....

A bond issue may be invalid because it lacks public purpose or because it extends the state's credit to a private group. These are distinct issues and should not be confused in analysis; the presence of one deficiency does not necessarily indicate the existence of the other. Problems have arisen because of a misunderstanding over what constitutes an extension of state credit. The state may use its borrowing powers and give the money to a private group without violating the credit clause. In Johns Hopkins Univ. v. Williams, 199 Md. 382, 86 A.2d 892 (1952), the court held that the credit clause had not been violated where the state borrowed money and gave the cash proceeds to a private school, although the state was still liable for the debt. This was a use of borrowed funds, not a lending of credit. "The generally accepted meaning of a pledge of the faith and credit of a political entity is that the governmental body is unconditionally liable for the payment of the debt, if sufficient money is not otherwise made available." Maryland Indus. Dev. Financing Auth. v. Meadow-Croft, 243 Md. 515, 522, 221 A.2d 632, 637 (1966). Rephrased, this means that the "credit clause" disallows a suretyship obligation incurred by the governmental entity, but it permits a primary obligation assumed by that entity. See 28 Md. L. Rev. 411, 416 (1968). The rationale for the enactment of the "credit clause," as explained in Johns Hopkins University, was to prevent the careless use of state credit to support private corporations whose operations might serve a public purpose.

The Maryland Industrial Development Financing Authority and the Development Credit Corporation, see note 7 supra, have been held to conflict with the "credit clause," and the statutory provisions creating those bodies were declared unconstitutional for pledgeing the state's faith and credit in violation of Md. Const. art. III, § 34. See Maryland Indus. Dev. Financing Auth. v. Helfrich, 250 Md. 602, 243 A.2d 869 (1968), noted in 28 Md. L. Rev. 411 (1968); Development Credit Corp. v. McKean, 248 Md. 572, 237 A.2d 742 (1968). See also Maryland Indus. Dev. Financing Auth. v. Meadow-Croft, 243 Md. 515, 221 A.2d 632 (1966).

The Act specifically provides that a pledge of faith and credit by the county or municipality is prohibited. Md. Ann. Code art. 41, § 266D(d) (Cum. Supp. 1976). The trial court in Wilson concluded:

The revenue bonds are not an obligation of the County and will be repaid solely from the repayments from Westvaco to Allegany County. Neither the full faith and credit nor the taxing power of the County is in any way pledged to the repayment of these bonds.

Purchasers of these bonds rely solely on the credit of Westvaco for repayment. The purchasers in no way consider that the County is liable to repay the bonds. The issuance of these pollution control revenue bonds in no manner impairs or uses up the County's capacity to issue its own general obligation bonds. 273 Md. at 42, 327 A.2d at 494-95. This statement fails to fully consider the possibility that issuance of revenue bonds by a governmental entity might jeopardize its borrowing ability and credit status. See text accompanying notes 45 to 47 infra. Nevertheless, the Court of Appeals has consistently held that revenue bonds issued
Historically, formulating a definition of public purpose has proven an elusive task for the Court of Appeals. Discussing the application of the principle (of public purpose) in *City of Frostburg v. Jenkins*, the court noted:

"What is a public purpose for which public funds may be expended is not a matter of exact definition; it is almost entirely a matter of general acceptation." We may add that the line of demarcation is not immutable or incapable of adjustment to changing social and economic conditions that are properly of public and governmental concern.

The act upheld in *Frostburg* empowered the city to issue up to $100,000 in general obligation bonds in order to erect a building for a manufacturing company that had agreed to locate in the city if this were done. The company entered into a purchase agreement to buy the building from the city over twenty-five years. As did the court in *Wilson*, the *Frostburg* court rejected the argument that the bonds were invalid because they benefited a private corporation: "The fact that incidental benefits are passed on to the locating corporation is not fatal, if there are substantial without the faith and credit of the issuing body are constitutional. See *Waring v. Board of Trustees of St. Mary's College*, 243 Md. 513, 221 A.2d 631 (1966); *Lacher v. Board of Trustees of State Colleges*, 243 Md. 500, 221 A.2d 625 (1966); *Lerch v. Maryland Port Auth.*, 240 Md. 438, 214 A.2d 761 (1965); *Castle Farms Dairy Stores, Inc. v. Lexington Market Auth.*, 193 Md. 472, 67 A.2d 490 (1949); *Wyatt v. Beall*, 175 Md. 258, 1 A.2d 619 (1938); cf. *Mayor of Baltimore v. Gill*, 31 Md. 375 (1869) (declaring unconstitutional a bond issue that pledged existing governmental property as security, thereby creating a debt which might result in additional burdens on citizens).


16. *Id.* at 16, 136 A.2d at 855 (citation omitted) (quoting *Finan v. Mayor of Cumberland*, 154 Md. 563, 565, 141 A.2d 269, 270 (1928)). *Finan* in turn relied upon *Citizens' Savings & Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1875), in which the Supreme Court stated:

[1]In deciding whether . . . the object for which the taxes are assessed falls upon the one side or the other of [the public purpose] line, [courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government . . . .

*Id.* at 665.

Because the people in a republican form of government manifest their beliefs through their legislature, a judicial desire to permit the public to decide whether a governmental action requiring a public purpose does in fact serve such a purpose justifies deference to the legislative judgments. See notes 36 to 40 infra and accompanying text.
public benefits to support the action taken." Despite the numerous cases involving the public purpose requirement, the Court of Appeals has not articulated a more precise definition of the term.

Although the county contended that a public purpose was not necessary in order to validate the bond issue, the *Wilson* court assumed,

17. 215 Md. at 17, 136 A.2d at 856; *accord*, John A. Gebelein, Inc v. Milbourne, 12 F. Supp. 105, 114 (D. Md. 1935) (stating the same rule but reaching a different result on the facts); *Marchant v. Mayor of Baltimore*, 146 Md. 513, 521, 126 A. 884, 886 (1924).

Judge Prescott delivered a strong dissent in *Frostburg*, criticizing the proposed bond issue as serving a private purpose and posing a threat to the free enterprise system. He considered the benefit to the public welfare an incidental by-product of direct aid to the private sector. One might rebut these contentions, as did the majority, by arguing that the private profit incidentally results from the public effort to foster employment. Judge Prescott's analysis implies that his main concern was with what he felt was an unconstitutional extension of the city's credit. But *Frostburg* involved a general obligation bond on which the city would be primarily liable; because the city did not act as a surety, the credit clause of the Maryland Constitution was not violated. *See* note 14 *supra*.

18. The September 1974 Term case of *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 339 A.2d 278 (1975), discussed the inability of the court to formulate a definition of "public use" in cases concerning the exercise of eminent domain. The court noted that doing so might be unwise, even if it were possible, because of the ever changing condition of the world. *Id.* at 181-82, 339 A.2d at 284; *see* *Riden v. Philadelphia B. & W.R.R. Co.*, 182 Md. 336, 340-41, 35 A.2d 99, 101 (1943).

One is thus left to one's inductive abilities to glean from various fact patterns a general sense of what means and ends might be viewed favorably. *See*, e.g., *Lerch v. Maryland Port Auth.*, 240 Md. 438, 214 A.2d 761 (1965) (upholding proposed issue of revenue bonds to finance construction of a building to serve as an International Trade Center, potentially increasing trade, even though parts of the building were to be leased to private parties for non-maritime purposes); *Fian v. Mayor of Cumberland*, 154 Md. 563, 141 A.2d 269 (1928) (upholding proposed issue of general obligation bonds to finance the erection and maintenance of a public hospital as well as a hospital owned by a private eleemosynary corporation). *See also Town of Williamsport v. Washington County Sanitary Dist.*, 247 Md. 326, 231 A.2d 40 (1967); *St. Mary's Indus. School for Boys v. Brown*, 45 Md. 310, 331-32 (1876).

Cases which have considered the issue whether exercise of the eminent domain power had been employed to condemn property for a "public use" are also apposite. *See*, e.g., *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 339 A.2d 278 (1975) (approving condemnation of land to create a private industrial park to promote employment); *Flaccomio v. City of Baltimore*, 194 Md. 275, 71 A.2d 12 (1950) (approving city's condemnation of property to be turned over to a private museum). *Collington Crossroads* is particularly important because it marks the first time that the Court of Appeals approved a condemnation "of land for industrial or commercial purposes in contexts other than those associated with railroads, public utilities, or port development." 275 Md. at 189, 339 A.2d at 288.

19. 273 Md. at 43, 327 A.2d at 495.

The county argued that a public purpose was not required because the bond issue did not involve general obligation bonds which would use public funds and be payable out of the county's general revenues. The court observed that the extension of a tax-exempt status to the bondholder under the Act, *see* Md. Ann. Code art. 41,
without so deciding, that a public purpose must be established.\textsuperscript{20} The court later explained that classification of a matter as one of public concern is not a static process, as demonstrated by the court's frequent recognition that evolving notions of public concern have engendered legislation encompassing such modern phenomena as shorter work weeks, improved sewage and waste disposal, and automobile pollution control devices.\textsuperscript{21} Thus, while elimination of air and water pollution might not have been a conceivable public purpose in the past, environmental protection and industrial development to aid in combating unemployment are currently major public concerns; therefore, a bond issue under the Act intended to facilitate the reduction of industrial pollution and to enable industry to remain in the community could serve a modern-day public purpose.\textsuperscript{22} Agreeing with the courts of a number of other jurisdictions,\textsuperscript{23} the Court of Appeals concluded in Wilson that a public purpose was served by a bond issue designed to abate pollution as well as to enable an industry to remain in the county and state.\textsuperscript{24}

\textsuperscript{20} 273 Md. at 44, 327 A.2d at 495.

Wilson involved the application of the public purpose test in validating the issuance of revenue bonds. However, the court's failure to distinguish between revenue bonds and general obligation bonds in requiring a public purpose implies that the court would apply the same standards in its assessment of a general obligation bond issue. Moreover, since the tax exemption was a significant factor in Wilson justifying application of the public purpose test, the method of analysis used here would apply whenever a tax exemption was at issue. See note 19 supra. That there is but one public purpose test is supported by the court's practice of using bond cases as authority when deciding the public use issue in eminent domain cases. See Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 190 n.6, 339 A.2d 278, 288 n.6 (1975).

\textsuperscript{21} 273 Md. at 46-47, 327 A.2d at 496-97.

\textsuperscript{22} See id. at 47-50, 327 A.2d at 497-98; Early, Financing Pollution Control Facilities Through Industrial Development Bonds, 27 TAX LAWYER 85 (1973); Harwell, Lawyer and State Development Agencies, 60 A.B.A.J. 1098 (1974); 61 A.M. JUR. 2d Pollution Control § 4 (1972). See also 15 E. McQUILLIN, MUNICIPAL CORPORATIONS §§ 43.31 & 43.32a. (3d ed. 1970).


\textsuperscript{24} 273 Md. at 51, 327 A.2d at 499.
The Wilson court upheld the use of revenue bonds as a legitimate means to implement pollution control plans even though the state, through its police power, already had ordered abatement. According to the plaintiffs, the bonds did not enable the public to obtain any sufficient benefits to which it was not already entitled because the bonds induced neither the construction of the pollution facilities nor the location or retention of the company in Maryland; instead, the county's action would spend public resources to aid a private party in meeting a legal obligation, and also provide that party with improved facilities. The trial court had dismissed this argument by finding that the facilities would neither increase the productive capacity of the plant nor benefit the plant owners through increased profits. This response is not wholly satisfactory, however, because it ignores the effect of the abatement orders. In contrast, the ends-oriented approach of the Court of Appeals correctly considered this factor, stating that the proper concern was not whether the company would benefit but whether society would benefit through the cooperative effort. The court concluded that incidental benefits to private parties did not preclude a finding of public purpose.

Although directly concerned with the technical requirements of the Act and resolution, the plaintiffs' third challenge presented the court with an opportunity to strengthen its preceding conclusions by showing that federal regulations encouraged such bond issues. The court rejected the contention that loan proceeds could not be applied to finance facilities begun before the effective date of the Act or construction completed prior to the date of the resolution. The General Assembly had specifically included within the Act's authorization the financing of "pollution control facilities which can be financed by bonds determined to be tax exempt under provisions of the Internal Revenue Code of 1954." The court determined that the applicable Treasury Regulations effectively incorporated by the Act probably would confer a tax exemption upon holders of the bonds in question. Bonds meeting the federal guidelines a fortiori

25. See text accompanying note 5 supra.
27. 273 Md. at 40-42, 327 A.2d at 493-94.
28. Id. at 51-52, 327 A.2d at 499.
29. Md. ANN. CODE art. 41, § 266A(d) (Cum. Supp. 1976). The Act would be virtually useless if the federal tax exemption were not available. See 273 Md. at 53, 327 A.2d at 500.
30. I.R.C. § 103(c)(4), as modified by Treas. Reg. § 1.103-8(a)(5) (1973), gives a federal tax exemption for interest on pollution control revenue bonds issued to finance facilities begun after September 2, 1972. In addition, the same treatment is provided for bonds issued to finance facilities begun before that date if the authorizing ordinance is adopted "prior to the date the entire facility is first placed in service." The Regulations further explain that "placed in service shall not be earlier than the date on which — (a) [the facility] has reached a degree of completion which would permit operation at substantially the level for which it is designed, and (b) it is, in
satisfy the statute's requirements. Proceeding to discuss the statutory language allowing bond issues to finance the cost of “acquiring” pollution control facilities, the court adopted the reasoning of other jurisdictions31 that have interpreted statutes empowering a county to “acquire” facilities as including the ability to acquire the plant at any stage of construction, or even after completion, so long as the financing serves a public purpose.32

Finally, the court rejected the argument that bond proceeds could not be used to finance portions of the planned construction that were constructed in another county in Maryland or outside of the state. In *Grinnell Co. v. City of Crisfield,*33 the court considered the contention that a plant addition financed by a bond issued pursuant to the same Act could not serve a public purpose if that plant were located outside of the city issuing the bonds. The court held that the extraterritoriality of the development did not preclude it from serving a public purpose: “The applicable provisions of [the Act] contain no such geographic limitation on the location of a project and we feel that to judicially draft one would be contrary to the intent of the legislature . . . .”34 That rule was applied in *Wilson.* Once again the court focused on the benefit conferred by the project as a whole on the governmental entity issuing the bonds. Evidently, a benefit conferred upon a neighboring city, county, or state may be a permissible by-product in the achievement of the public goal similar to any incidental benefit conferred upon private industry.35

Although the Act creates a framework within which any bond issue serving a public purpose will be upheld, some bond issues ostensibly serving public purposes may nonetheless be unwarranted where the public benefit is insignificant in comparison with the competitive advantages realized by the private beneficiary. Under section 266B(f) of the Act,
the legislative body of the issuing municipality or county has virtually absolute and unreviewable discretion over the propriety of issuance because the findings of that body with respect to local economic or environmental conditions are made conclusive in any proceeding challenging the validity of a bond issue.\textsuperscript{86} The Wilson court recognized the primacy of the local legislative judgment and deferred to the issuing body, employing a narrow test for reviewing the validity of the county resolution: "it is only necessary that the legislative determination to spend a particular amount of public funds be reasonable and based on an honest judgment of those officials charged with care of the public purse that the expenditure is for the best interests of the city."\textsuperscript{87} In City of Frostburg v. Jenkins\textsuperscript{38} the court employed a similar test, requiring only that the legislation serve a public purpose and have "a substantial relation to the public welfare."\textsuperscript{39}

Minimal judicial involvement in the issuance of revenue bonds is appropriate because the function of weighing and balancing the factors that determine the propriety of a bond issue is better performed by the legislature than by the courts.\textsuperscript{40} Proper consideration of the pertinent


In any suit, action, or proceeding involving the validity or enforceability of any bond issued under this subheading or the security therefor, any finding by the legislative body of the municipality or county in regard to the existence or relief of conditions of unemployment, the increase of industry in this State, the retention of existing industry in this State, the control and abatement of pollution, the promotion of economic development, the creation of a balanced economy, the protection of natural resources, and the promotion of the health, welfare and safety of the residents of such municipality or county shall be conclusive.


38. 215 Md. 9, 136 A.2d 852 (1957).

39. Id. at 19, 136 A.2d at 857. See C. Antieau, Municipal Corporation Law § 15.04 (1973). The Court of Appeals has frequently deferred to the legislative judgment in cases involving the issuance of revenue bonds to finance private facilities that would benefit the public. See, e.g., Williamsport v. Washington County Sanitary Dist., 247 Md. 326, 231 A.2d 40 (1967); Lerch v. Maryland Port Auth., 240 Md. 438, 214 A.2d 761 (1965) (acquisition and construction of international trade center); Wyatt v. Beall, 175 Md. 258, 1 A.2d 619 (1938) (construction of roads and bridges); Finan v. Mayor of Cumberland, 154 Md. 563, 141 A. 269 (1928) (financing of private hospital). But see Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 182, 339 A.2d 278, 284 (1975) (quoting New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537, 560 (1873)) ("[W]hether the use, in any particular case, be public or private, is a judicial question; for otherwise, the constitutional restraint would be utterly nugatory ... "). For an example of a court stating that it would not be bound by the legislative findings despite the great weight given them and that it would therefore itself examine and study the enactment for a public purpose, see State ex rel. Hammermill Paper Co. v. LaPlante, 58 Wis. 2d 32, 50, 205 N.W.2d 784, 795 (1973).

40. See City of Frostburg v. Jenkins, 215 Md. 9, 17, 136 A.2d 852, 856 (1957) ("[W]hether ... private benefits outweigh the public benefits accruing from the location of the plant within the municipality seems to us to be primarily a legislative
economic and social factors might require hearings, expert studies and analyses, substantial statistical data, and possibly even a sampling of public opinion on the issues. Gathering and assimilating such information could not be accomplished adequately by the courts in the rigid context of the adversary system. Thus, it is imperative that a legislative body deliberating upon a possible revenue bond issue pursuant to the Act assess carefully the relationship of the contemplated statutory means to the desired ends by comprehensive analysis of the relative costs and benefits that would result from the bond issue.

In determining whether a revenue bond issue will serve a public purpose, the public benefits generally are apparent — e.g., a balanced economy and increased employment resulting from industrial development, protection of the environment, and general economic development in the county and state. Such public benefits may even be quantifiable. The benefit accruing from the expenditure of resources that lures new industry into the state may be greater than that which only makes it more likely that an existing industry will not relocate outside the state. Similarly, facilities constructed extraterritorially are likely to provide less public benefit to the issuing county than a plant built within the issuing county, since non-county residents would probably be employed at the former and local tax revenues generated by it would be less substantial.

The public costs that must be endured to secure the typical benefits are not as evident. The need for public and private services may rise as increased employment opportunities attract people into the county, thus necessitating either increased taxes or a reduction in the quality of services. The Wilson court observed that the county's credit status can be jeopardized by the use of revenue bonds because, although the county is not liable for the debt, a default by the lessee corporation would result in a default in the bonds, making it more difficult for the county to sell its bonds in the future. Local government use of revenue bonds involves other cost factors not discussed in Wilson. Revenue bonds compete with regular municipal bonds, forcing the interest rates on the latter to increase; this rise in interest rates burdens the city by decreasing its ability to finance rather than a judicial problem.


45. 273 Md. at 44-45, 327 A.2d at 495-96.
public services. The governmental issuer may also injure private lending institutions by affording favorable financial treatment to private industry.

Possible reduction in economic efficiency resulting from revenue bond issues should be weighed as a public cost. This cost is magnified where the benefited private company already was under an order to abate pollution, as was the case in Wilson. The private company benefits by receiving funds loaned to it at a low interest rate, which is made possible by the exemption of the bondholders' interest from federal and state taxation. If the company could obtain only private financing, its costs would be greater. Nevertheless, pollution would be abated, and the resultant increase in the price of the company's product would reflect its true cost. Such internalization of costs could lead to a more efficient allocation of society's resources by driving inefficient enterprises out of the market. If the desired public benefit were only the abatement of pollution, the public costs might often outweigh the benefits where a company is already subject to an enforceable abatement order. However, the Act seeks to promote public goals in addition to pollution abatement, such as industrial development and reduced unemployment. A project's contribution to achievement of these public purposes may swing the balance in favor of a bond issue, even where the private entity is already under an abatement order.

The intense interest of the public, government, and industry in industrial development and the abatement of pollution, weighed against the costs which society could incur if revenue bonds were indiscriminately used to accomplish such goals, mandates close legislative scrutiny of proposed bond issues. A Maryland municipality or county presented with repeated requests for bond issues under the Act may eventually reach a point of diminishing returns where the costs of additional projects do not provide meaningful benefits to the community.


47. See generally 1 S. Surrey, W. Warren, P. McDaniel & H. Ault, Federal Income Taxation Cases and Materials 276-89 (1972). The authors argue that the federal government's allowance of a tax exemption promotes a highly inefficient and inequitable way of aiding the states. The present system benefits private industry at the expense of the federal and state governments. Id. at 276-83, 287-89.


The Court of Appeals in *Supervisor of Assessments v. Peter & John Radio Fellowship, Inc.* affirmed an order of the Tax Court granting an exemption from taxation under section 9(4) of Article 81 of the Annotated Code of Maryland for nearly 473 acres of property located in Carroll County, Maryland. Section 9(4) exempted from assessment and taxation two categories of property; buildings used exclusively for public worship, and the grounds appurtenant to such buildings if shown to be necessary for the use of the buildings. The Fellowship, a non-profit corporation organized under the laws of Maryland, operated a nondenominational religious bookstore in Baltimore. The bookstore sold only those books and records doctrinally acceptable to Fundamentalists. While this store was not operated at a profit, the court determined that it was in competition with other church-operated bookstores that were subject to personal property taxes on their inventories. At the time of the assessment, exemptions were granted for "buildings and the ground . . . appurtenant thereto, equipment and furniture used exclusively for . . . charitable . . . institutions or organizations," ch. 362, § 1, [1967] Laws of Md., codified at the time of this case at Md. Ann. Code art. 81, § 9(7) (1969). Such equipment and furniture is now exempt only if it is "actually used exclusively for and [is] necessary for charitable . . . purposes . . . in the promotion of the general public welfare of the people of the State." Md. Ann. Code art. 81, § 9(e) (Cum. Supp. 1976). The Tax Court has affirmed the assessment of the Supervisor, finding that the operation was "more commercial than religious, charitable or educational." 274 Md. at 366, 335 A.2d at 100. The Court of Appeals likewise affirmed, observing that the Tax Court's findings were supported by substantial evidence and were not arbitrary, capricious, or unreasonable. Id. See note 12 infra.

1. 274 Md. 353, 335 A.2d 93 (1975).
2. Ch. 226, § 7(5), [1929] Laws of Md., codified at the time of this case at Md. Ann. Code art. 81, § 9(4) (1969), has since been revised. See note 4 infra.
3. In a second appeal, the court upheld the Tax Court's denial of an exemption for a religious bookstore operated by the Peter & John Radio Fellowship, Inc. [hereinafter referred to as the Fellowship] in Baltimore. The bookstore sold only those books and records doctrinally acceptable to Fundamentalists. While this store was not operated at a profit, the court determined that it was in competition with other church-operated bookstores that were subject to personal property taxes on their inventories. At the time of the assessment, exemptions were granted for "buildings and the ground . . . appurtenant thereto, equipment and furniture used exclusively for . . . charitable . . . institutions or organizations," ch. 362, § 1, [1967] Laws of Md., codified at the time of this case at Md. Ann. Code art. 81, § 9(7) (1969). Such equipment and furniture is now exempt only if it is "actually used exclusively for and [is] necessary for charitable . . . purposes . . . in the promotion of the general public welfare of the people of the State." Md. Ann. Code art. 81, § 9(e) (Cum. Supp. 1976). The Tax Court has affirmed the assessment of the Supervisor, finding that the operation was "more commercial than religious, charitable or educational." 274 Md. at 366, 335 A.2d at 100. The Court of Appeals likewise affirmed, observing that the Tax Court's findings were supported by substantial evidence and were not arbitrary, capricious, or unreasonable. Id. See note 12 infra.
   
   The following shall be exempt from assessment and from State, county and city taxation in this State, each and all of which exemptions shall be strictly construed:
   
   (4) Churches, parsonages, etc. — Houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith, and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof.

   This language remained unchanged from its enactment in 1929 until the section's repeal and reenactment in 1972. It is now codified at Md. Ann. Code art. 81, § 9(c) (1975). This revision resulted in extensive changes: all property, real or personal, is exempted if it is "actually used exclusively for public religious worship." In addition, real property need no longer be "appurtenant" to buildings to qualify for exemption. For a discussion of the consequences of this revision see note 34 infra.
5. By charter, the Fellowship may broadcast religious programs, hold conferences, and conduct bible and children's camps. 274 Md. at 356, 335 A.2d at 95.
tional bible camp for eight weeks each summer. This camp, known as the River Valley Ranch, had a western frontier setting with a stage depot, stage coach, frontier jail, rodeo arena, and other similar facilities. Of the 473 acres, thirteen comprised the camp, five were woodlands used to guard against encroachment, and the remainder were farmed primarily to provide hay and feed for the camp's animals. Other groups were permitted to rent the facilities during the off-season.

The Supervisor of Assessments for Carroll County refused to grant an exemption based on section 9(4), finding that the camp's barns, storage sheds, kitchens, and other structures were not "buildings used exclusively for public worship," and that the rodeo arenas, swimming pools, and lands used for farming or to guard against encroachment were not appurtenant grounds necessary for an exclusively public worship use of the buildings. The Maryland Tax Court viewed the case differently; based on the testimony of the Fellowship's president and camp director it granted an exemption, finding that "[t]he entire property . . . provides the setting for planned and spontaneous religious activities."

Following an appeal by the Supervisor, the Court of Appeals affirmed the Tax Court. The court did not attempt to determine whether the

6. Id.
7. Id. These groups, with the exception of the Carroll County Board of Education, were all religious in nature.
8. The Supervisor assessed a tax of $147,295 on the property for the tax year ending June 1971. 274 Md. at 354, 335 A.2d at 94.
9. Id. at 357, 335 A.2d at 95. It is a well settled rule of construction in Maryland that the word “exclusively,” when used as in section 9(4), is to be read as “primarily.” “This construction is but a recognition of reality with respect to the operation of modern churches.” Ballard v. Supervisor of Assessments, 269 Md. 397, 404, 406 A.2d 506, 510 (1973). See Murray v. Comptroller, 241 Md. 383, 401, 216 A.2d 897, 907 (1966); Maryland State Fair v. Supervisor of Assessments, 225 Md. 574, 587, 172 A.2d 132, 137-38 (1961). Consequently, the fact that the land was not used solely for public worship, see notes 6 & 7 and accompanying text supra, would not alter the Fellowship's tax status.
10. The Maryland Tax Court's authority to review and change assessments on real property is granted in Md. Ann. Code art. 81, § 229A (1975).
11. 274 Md. at 363, 335 A.2d at 98.
12. Prior to reviewing the orders of the Tax Court, the Court of Appeals discussed the scope of appellate review it could exercise. The court first noted that ch. 385, [1971] Laws of Md., which had mandated an affirmation of the Tax Court's determinations unless "erroneous as a matter of law or unsupported by substantial evidence," was repealed and reenacted in 1971, the new codification not specifying a fixed scope of review. See Md. Ann. Code art. 81, § 229(1) (1975) (subsequently ruled unconstitutional in Shell Oil Co. v. Supervisor of Assessments, 276 Md. 36, 343 A.2d 521 (1975), on the ground that it effectively granted original jurisdiction to the appellate courts). It was determined that a decision should be affirmed if supported by substantial evidence and not arbitrary, capricious, or unreasonable. 274 Md. at 355, 335 A.2d at 94. This language would suggest that the court treated the record as presenting a question of fact. See, e.g., K. Davis, Administrative Law § 29.01 (3d ed. 1972). The court found that the Tax Court's decision was supported by substantial evidence, 274 Md. at 363, 335 A.2d at 98, yet proceeded to discuss Maryland case law.
isolated use of each camp facility satisfied the requirements of section 9(4); instead, it concluded that the facilities comprising the camp and the religious worship and instruction provided at the camp were “inseparable because of the philosophy underlying the activities.”13 While it would be difficult to classify such specific acts as riding in a stage coach or swimming as public worship, the court had little difficulty finding that these activities, when considered in light of the camp's purpose of encouraging the development of religious beliefs,14 provided an environment of public worship that encompassed all camp activities.

In support of its position, the court relied on Morning Cheer, Inc. v. County Commissioners.15 In that case a thirty-five acre tract16 owned by a Pennsylvania corporation that made religious broadcasts and invited listeners to its Maryland retreat was held exempt from taxation under a predecessor to section 9(4).17 Morning Cheer's facilities and activities were somewhat different from the Fellowship's: the buildings included a tabernacle, a lodge, a house for the minister, and several cottages; card games and smoking were prohibited; and the retreat was described as “a purely spiritual enterprise where people come for spiritual help and guidance.”18 The exemption was based on a finding that the entire thirty-five

Because such a discussion would be unnecessary if there were a dispute only as to the sufficiency of the evidence, this would suggest that the court felt that a question of law was presented as well.

Judge Smith, in a dissent joined by Chief Judge Murphy, properly concluded that the Tax Court “erred as a matter of law.” Id. at 368, 335 A.2d at 101. As the breadth of section 9(4) was unclear and in need of judicial definition, a question of law clearly was presented.

13. 274 Md. at 365, 335 A.2d at 99.
14. Id. at 357-58, 335 A.2d at 95-96. The president of the Fellowship explained the camp's philosophy:

There are many ways to attract young people. . . . We realized that young people are not running with glee to hear the Gospel or going to church. . . . And the attraction to these young people, we felt, was a subtle way, under God, to get these young people under the sound of God's Holy Word.

Id.

15. 194 Md. 441, 71 A.2d 255 (1950).

16. Morning Cheer owned a tract of 227.25 acres, all but thirty-five of which were undeveloped woodlands. It had sought an exemption under ch. 387, § 5(8), [1939] Laws of Md., the predecessor to Md. ANN. CODE art. 81, § 9(e) (Cum. Supp. 1976). As this statutory exemption was limited to 40 acres, Morning Cheer only requested that the developed thirty-five acre tract be exempted. The Court of Appeals chose to apply ch. 226, § 7(5), [1929] Laws of Md., printed in pertinent part at note 4 supra. Although this section had no acreage limit, the court considered only the exemption claimed — the thirty-five acres. Consequently, Morning Cheer was silent on the status of undeveloped land under the exemption in ch. 226, § 7(5), [1929] Laws of Md. See text accompanying notes 23 & 24 infra.

17. Ch. 226, § 7(5), [1929] Laws of Md., printed in pertinent part at note 4 supra. Morning Cheer was decided under the 1939 codification of this act, Md. ANN. CODE art. 81, § 7(4) (1939).

18. 194 Md. at 445, 71 A.2d at 256.
acre tract was necessary for the use of the buildings for public worship. The Peter & John Radio court felt that "[t]o extend this rationale to ... the instant case, when there is testimony that the entire area is devoted to bible study and the religious experience is continued while riding, hiking, camping, is fully compatible with Morning Cheer."20

The soundness of this extension is questionable as there are several important distinctions between the Peter & John Radio and Morning Cheer cases. First, the functional use of the land in each case was different. Morning Cheer, essentially a retreat, emphasized spiritual activities, while the Fellowship, basically a summer camp, emphasized recreational activities. Because section 9(4) requires that property be used primarily for public worship to qualify for exemption, this distinction is important. It is arguable whether horseback riding and similar activities, regardless of the context in which conducted, may ever be validly termed a form of public worship. But even if they may, the focus of activity in a religious retreat differs so markedly from that in a summer camp that the treatment of the latter as simply an extension of the former is unwarranted. Certainly the determination that the Fellowship's summer camp was operated with the primary purpose of engaging in public worship required closer analysis than that given by the court.

Secondly, the property exempted in Morning Cheer actually was used in a manner similar to the Fellowship's use of the thirteen acre ranch, each being the site of buildings and other facilities. But in Peter & John Radio the court extended the rationale of Morning Cheer to exempt an additional 460 acres of farm and woodlands, finding this land necessary for the use of the ranch for public worship.23 Because the Morning Cheer court did not examine the tax status of farm and woodlands tangentially used to support a religious organization's main facilities, the extension of Morning Cheer to sustain the exemption in Peter & John Radio for such supporting lands also required closer analysis.24

Finally, the vast difference in the size of the tracts is itself important. While the exemption of a relatively small retreat clearly is within the

---

19. Id. at 447, 71 A.2d at 257.
20. 274 Md. at 363-64, 335 A.2d at 98-99.
21. 194 Md. at 445, 71 A.2d at 256.
22. See note 9 supra.
23. The Peter & John Radio court viewed the two cases as presenting analogous situations: both dealt with exemptions of relatively small tracts of land that contained buildings and supporting facilities (one to two acres in Morning Cheer, thirteen acres in Peter & John Radio) "used exclusively for public worship" that were then extended to include land "necessary" for the use of the buildings for public worship (the remainder of the thirty-five acres in Morning Cheer, 460 acres in Peter & John Radio). While the cases are analogous, they are also distinguishable. The "core" of each camp, that land on which the buildings and main facilities were located, included the entire thirty-five acres of Morning Cheer, but only the thirteen acre ranch of Peter & John Radio. Beyond this "core" area it would seem difficult to show that the land was "necessary" for the use of the buildings.
24. See text accompanying note 33 infra.
scope of the statute, the proposition that 460 acres of farm and woodlands may be considered "grounds necessary" for public worship is a startling one.\textsuperscript{25} While this disparity in size should not be determinative, it should subject the exemption to close scrutiny. The court's failure to closely examine the "necessity" requirement as it related to these 460 acres is even more troublesome in light of the statutory requirement that the language of section 9(4) be strictly construed.\textsuperscript{26}

Even if the court's extension of \textit{Morning Cheer} to the Fellowship's farm and woodlands is presumed valid on its face, the granting of the exemption for those tracts is still subject to question. It is quite clear that there was no basis for exempting the five acres of woodland. The court properly should have found that this tract was not necessary for a public worship use of the ranch acreage, because it was used for no purpose other than to guard against encroachment. The decision to exempt the farmlands presents a more difficult problem. The Supervisor argued, on the basis of \textit{Bullis School, Inc. v. Appeal Tax Court},\textsuperscript{27} that the farmland did not qualify for exemption. In \textit{Bullis} a boys' preparatory school purchased a large tract of land as a future site for the school. In the interim the land was farmed, with the produce used primarily to feed the students.\textsuperscript{28} The Court of Appeals declined to hold this use of the land to be one necessary

\textsuperscript{25} This was the basic thrust of Judge Smith's dissent. He felt that, in light of the requirement that all exemptions be strictly construed, \textit{see note 4 supra}, \textit{Morning Cheer} had stretched the exemption to its "outer limits" — limits that were then exceeded in \textit{Peter & John Radio}. 274 Md. at 366, 335 A.2d at 100. Judge Smith further argued that an exemption for 460 acres was beyond the intent of the legislature for two reasons. First, the language of this exemption was drafted prior to the 1948 Amendment to the Maryland Declaration of Rights. \textit{Md. Const., Declaration of Rights} art. 38 (1972). As Judge Smith noted, prior to this amendment legislative consent was required for a "'gift, sale or devise of land . . . to any Religious Sect, Order or Denomination' other than for 'any sale, gift, lease or devise of any quantity of land, not exceeding five acres, for a church, meeting-house, or other house of worship . . . ." 274 Md. at 367, 335 A.2d at 101. Judge Smith contended that because the legislature did not intend to allow the transfer of more than five acres of realty to religious organizations without legislative consent, it could not have intended to permit tax exemptions on large tracts of property owned by such organizations. This argument is only partially convincing given the tenuous relationship between these legislative motives. Secondly, Judge Smith felt "morally certain" that since 1948 the General Assembly "has not contemplated that a tract more than ten times the size of that exempted in \textit{Morning Cheer} . . . would be exempted from taxation as necessary for 'buildings used exclusively for public worship.'" \textit{Id.} at 368, 335 A.2d at 101. Such use of legislative silence to set limits upon the proper interpretation of the scope of a statute again seems somewhat questionable.

\textsuperscript{26} \textit{See ch. 226, § 7(5), [1929] Laws of Md., printed in pertinent part at note 4 supra.}

\textsuperscript{27} 207 Md. 272, 114 A.2d 41 (1955).

\textsuperscript{28} Some use was made of the land for school purposes: the main building was the headmaster's residence, a few students were tutored there during the summer, and three school social functions were held on the grounds each year. \textit{Id.} at 275, 114 A.2d at 42.
for educational purposes, concluding that the school's use of the land would not have been different had it merely sold the produce and used the proceeds for school purposes. In Peter & John Radio the Supervisor argued that since the Fellowship's farmland was used primarily to provide feed for its animals, it could also have sold that produce and used the proceeds to defray the operational costs of the camp. There is no apparent explanation of how such a use can be one necessary for religious purposes, yet not be one necessary for educational purposes. The court, however, did not consider this contradiction. It concluded that the Bullis court was correct in recognizing that the Morning Cheer doctrine was inapplicable to the Bullis facts and implied that since Morning Cheer was applicable in Peter & John Radio, Bullis was not.

Leaving such a crucial analytical step to implication seems unfortunate. In Morning Cheer the property in issue was that containing the central concentration of the retreat's facilities, while the property in issue in Bullis was farmland used to support the school's central concentration of facilities. Because the use of the facilities in the two cases was different, the Peter & John Radio court was quite correct in noting that Morning Cheer did not control in Bullis. But Peter & John Radio is a case in which both these uses appear — it involved a tract containing facilities, as in Morning Cheer, and a tract containing supporting farm-land, as in Bullis. Consequently, while the court correctly concluded that Bullis was not applicable in determining the tax status of the ranch acreage, it was too hasty in dismissing that case's relevance for determining the tax status of the farmlands. In fact, it is difficult to reconcile granting an exemption to the Fellowship's farmlands with denying such status to the farmlands in Bullis — each was used to provide farm products for the use of the respective facilities. The Bullis rationale that the agricultural use of the land was not necessary for educational purposes because the products could have been sold on the market applies with equal force under the public worship use present in Peter & John Radio. While the Fellowship may have used the farmlands in continuation of their effort to further public worship, by providing riding trails and feed for the animals, the principal use of the land was so similar to that in Bullis that to treat the tracts differently for tax purposes is unwarranted. Peter & John

29. The exemption was claimed on the basis of ch. 27, § 1(8), [1950] Laws of Md., presently codified, in part, at Md. ANN. CODE art. 81, § 9(e) (Cum. Supp. 1976), which excluded from assessment buildings of educational institutions and grounds appurtenant to those buildings and necessary for their educational use.

30. 207 Md. at 277, 114 A.2d at 43. Because this land was located seven miles from the site of the school, it seemingly was not "appurtenant" to the institution, a point not considered in Bullis, but noted in Peter & John Radio. See 274 Md. at 364, 335 A.2d at 99.

31. See 274 Md. at 364, 335 A.2d at 99.

32. Id.

33. Some nonagricultural use of the land was made in Bullis as well. See note 28 supra.
Radio therefore appears to be both an unjustified extension of Morning Cheer and an unsupportable deviation from Bullis.34


(a) Generally; exemptions strictly construed. — The following real and tangible personal property shall be exempt from assessment and from State, county and city ordinary taxation, except as otherwise stated herein, each and all of which exemptions shall be strictly construed;

(c) Churches. — Property owned by a religious group or organization and actually used exclusively for public religious worship, including parsonages and convents, and property owned by any such group or organization and actually used exclusively for educational purposes.

In the context of the current discussion, two important statutory changes were made: the words "used exclusively" were changed to "actually used exclusively," and the language "the grounds appurtenant . . . and necessary" was eliminated. There are three plausible readings of the addition of the word "actually." First, it may signal the end of the rule of construction requiring "primarily" to be substituted for "exclusively." See note 9 supra. While the same factors that led the court to adopt the "primarily" interpretation still exist, the legislative addition may be interpreted as an intent to give added force to the prerequisite of exclusive use. The property thus would be exempt if used solely for public religious worship; if any group were to use the property for a non-religious purpose, the exemption would not be available. This reading would require the Fellowship to pay taxes on the Carroll County property given the non-religious use by the County Board of Education. See note 7 supra.

Alternatively, rather than emphasizing the word "exclusively," courts could decide that an emphasis on "actually" is mandated — even if some use of the entire property is not for public religious worship, the exemption will be granted as long as the property is actually, as well as primarily, used for public religious worship. Groups not engaged in public religious worship may use the property sometimes, and groups engaged in a series of activities, the primary activity being public religious worship, may use the property at any time. Such a reading would give this section the same meaning attributed to the predecessor provision at issue in Peter & John Radio.

Finally, the section could be interpreted to mean that the property will be exempted only if it is used solely for public religious worship without any form of contemporaneous use. Thus, if an owner were to conduct a summer camp and promote public religious worship at the same time, the property would not qualify for exemption. Such a reading, of course, would require that the Fellowship pay taxes on the Carroll County land.

The removal of the clause requiring that the grounds be appurtenant and necessary would also alter the result in Peter & John Radio. Under the revised statute, real property is exempt if "owned by a religious group or organization and actually used exclusively for public religious worship." Prior to revision, the section required only that property be necessary for the public worship use of the buildings to qualify for exemption; under the revised section, the property itself must now be used for public religious worship. While the 460 acres of farm and woodland may have been necessary for the use of the buildings, as the court determined, they clearly were not used primarily for public religious worship of any form.
TORTS — PRODUCTS LIABILITY

The ever growing law of products liability accounted for two especially significant decisions during the September Term, 1974. In the area of automobile collision cases, the Court of Appeals expanded on an earlier decision in holding that causes of action under breach of warranty could lie against both an automobile manufacturer and a dealer for injuries received in a "second collision" and caused by design defects. In the second case, not discussed in the Survey, the court dealt extensively with the foreseeability of use requirement in products liability cases.

FRERICHS V. GENERAL MOTORS CORP.

In Friericks the Court of Appeals extended its holding in Volkswagen of America, Inc. v. Young to cover causes of action for breach of warranty as well as for negligence. Young held that an automobile manufacturer could be liable in negligence for design defects causing or enhancing injuries in second collision cases. Following the rationale expressed in Young, the court in Friericks held that allegations of secondary impact injuries caused by design defects were sufficient to state causes of action against an automobile manufacturer in negligence and against both the manufacturer and the dealer for breach of warranty.

The plaintiff was injured when the Opel Kadett in which he was a passenger overturned into a ditch after going off the road, allegedly because the driver was speeding. Plaintiff claimed that the injuries he received were enhanced as a result of two defects in the design of the car: (1) the tilting mechanism of the front seat in which he was sleeping at the time of the accident failed, causing the seat-back to tilt downward to a nearly horizontal position, and (2) the rear roof supports gave way as the car rolled.

2. A "second collision" is generally one that occurs within the automobile between an occupant and some part of the automobile, as opposed to the initial collision between the automobile and some other object.
4. Id. at 290, 336 A.2d at 120, 127.
7. Young did not consider whether a cause of action for breach of warranty had been stated. The automobile in Young had been purchased in Alabama, and the law of that state therefore controlled any warranty issue. Id. at 220, 321 A.2d at 747.
8. Id. at 216, 321 A.2d at 745.
9. 274 Md. at 306, 336 A.2d at 128.
10. Id. at 290, 303, 336 A.2d at 120, 127.
over into the ditch. 11 In addition, Frericks claimed that General Motors had failed to test adequately the allegedly defective items and that the defects could have been corrected. 12 Suit was brought in negligence, breach of warranty and strict liability 13 against both the manufacturer and the dealership that had sold the car. 14 The trial court sustained demurrers to plaintiff's amended declaration for failure to state a legal theory on which relief could be granted. 15 The Court of Special Appeals affirmed in an opinion written prior to the decision of the Court of Appeals in Young. 16

In an opinion by Judge Eldridge, the Court of Appeals vacated the judgment of the Court of Special Appeals. Following Young, the court held that a manufacturer could be liable in negligence for a design defect that it could have foreseen would cause or enhance injuries in a second collision. 17 Then, reasoning that the elements of causes of action in negligence and warranty are essentially equivalent, the Frericks court held that the principles of Young are to be used to evaluate the sufficiency of a cause of action in warranty. 18 Thus, the declaration was determined to have stated causes of action against both the manufacturer and the dealer for breach of warranty.

Debate concerning a manufacturer’s liability in negligence for second collision injuries caused or enhanced by design defects resulted in two seminal federal decisions in the late 1960’s. In Evans v. General Motors Corp. 19 the Seventh Circuit held that an automobile manufacturer has no duty to design a car that will minimize injuries or be reasonably safe when

11. Id. at 291, 336 A.2d at 120–21. Plaintiff’s head, thrust toward the rear of the car when the seat mechanism failed, was crushed by the roof when the supports gave way.

For a discussion of products that are defective because constructed with materials of inadequate strength, see Noel, Manufacturer's Negligence of Design or Directions for Use of a Product, 71 YALE L.J. 816, 827–30 (1962). For a collection of cases on the duty of a manufacturer to test for weak or defective materials, see Annot., 6 A.L.R.3d 91, 142–55 (1966).

12. 274 Md. at 302, 336 A.2d at 126–27.

13. The Frericks court, following Young, did not adopt the doctrine of strict liability in tort. 274 Md. at 298–99, 336 A.2d at 124; see Volkswagen of America, Inc. v. Young, 272 Md. 201, 220–21, 321 A.2d 737, 747–48 (1974). However, the Court of Appeals has recently adopted the strict liability theory contained in RESTATEMENT (SECOND) OF TORTS § 402A (1965). See Phipps v. General Motors Corp., ___ Md. ___, 363 A.2d 955 (1976). The Phipps court explained that § 402A had not previously been rejected; rather, strict liability was simply inapplicable in prior cases in which the issue had been raised. Id. at ___, 363 A.2d at 960.

14. 274 Md. at 290–91, 336 A.2d at 120. Plaintiff also sued the driver of the car and his parents based on allegedly negligent driving. That action was settled before the appeal to the Court of Appeals. Id. at 293, 336 A.2d at 121.

17. 274 Md. at 297, 336 A.2d at 124.
18. Id. at 300–01, 336 A.2d at 125–26.
involved in collisions. Under general negligence principles, the duty of a manufacturer is to design and manufacture products that are safe for their intended purposes. The Evans court and those courts that followed it refused to extend an automobile manufacturer’s duty of due care beyond the responsibility of designing and manufacturing automobiles that will not cause accidents. The express rationale for the court’s position was that “[t]he intended purpose of an automobile does not include its participation in collision with other objects, despite the manufacturer’s ability to foresee the possibility that such collisions may occur.”

The Eighth Circuit, in Larsen v. General Motors Corp., rejected the Evans reasoning. The Larsen court agreed that the duty of a manufacturer is to design automobiles that are reasonably safe for their intended uses. The concept of intended use, however, was broadened to include those uses reasonably foreseeable to the manufacturer. The court reasoned that collisions incident to the normal use of an automobile are “statistically inevitable” and thus “clearly foreseeable,” and therefore concluded that an automobile manufacturer has “a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision.”

Faced for the first time with the issue of liability for second collision injuries, the Court of Appeals adopted the Larsen rationale in Volkswagen of America, Inc. v. Young. Writing for a unanimous court, Judge Eldridge noted that liability for injuries caused by latent design defects had been imposed on manufacturers in Maryland. Moreover, the court observed, under traditional tort principles a party is held liable where injuries are

---

20. 359 F.2d at 824.
24. 391 F.2d 495 (8th Cir. 1968).
25. Id. at 501.
26. Id. at 502.
28. Id. at 215, 321 A.2d at 744 (citing Babylon v. Scruton, 215 Md. 299, 138 A.2d 375 (1958)).
caused by both his negligence and a foreseeable intervening cause. Thus, the fact that the design defect did not cause the initial collision should not relieve the negligent party from liability if the design defect is a cause of the eventual injury.\(^29\)

In second collision situations, a manufacturer's alleged negligence consists of manufacturing and selling an automobile that it knows, or should know, is defectively designed. A secondary injury is then caused by the joint action of an intervening collision and the design defect. The *Young* court followed *Larsen* in concluding that the intended use of an automobile is to provide reasonably safe transportation,\(^30\) and that since frequent collisions are foreseeable as a matter of law, “the intended purpose of all . . . parts of the vehicle is to afford reasonable safety when those collisions occur.”\(^81\) Applying the negligence principles it had reviewed, the court held that “an automobile manufacturer is liable for a defect in design which the manufacturer could have reasonably foreseen would cause or enhance injuries on impact, which is not patent or obvious to the user, and which in fact leads to or enhances the injuries in an automobile collision.”\(^82\)

The *Frericks* court applied *Young* directly and held that the allegations in the declaration were sufficient to state a cause of action in negligence against the manufacturer.\(^33\) The plaintiff in *Frericks* also sought recovery

\(^{29}\) *Id.* at 215-16, 321 A.2d at 744-45; *see* Howard County v. Leaf, 177 Md. 82, 95, 8 A.2d 756, 761-62 (1939); Bolm v. Triumph Corp., 33 N.Y.2d 151, 159, 305 N.E.2d 769, 773-74, 350 N.Y.S.2d 644, 650-51 (1973).

\(^{30}\) 272 Md. at 206, 321 A.2d at 740; *see* Larsen v. General Motors Corp., 391 F.2d 495, 501-02 (8th Cir. 1968).

\(^{31}\) 272 Md. at 217, 321 A.2d at 745.

\(^{32}\) *Id.* at 216, 321 A.2d at 745. Of course, a plaintiff can recover from the party responsible for the design defect only damages for those injuries caused or aggravated by the second collision. Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968). Evidence must be presented by which a jury can apportion damages between injuries caused by the initial collision and injuries resulting from the second collision. Yetter v. Rajeski, 364 F. Supp. 105, 109 (D.N.J. 1973).

\(^{33}\) 274 Md. at 302-03, 336 A.2d at 126-27.

The *Young* court did not reach the issue of liability for breach of warranty. The automobile in *Young* had been purchased in Alabama, and the court followed the general rule that the law of Alabama, the place of sale, would govern the claims for breach of warranty. 272 Md. at 220, 321 A.2d at 747. Maryland law governed the negligence claim in *Young* because the accident had occurred in Prince George's County, Maryland. *See*, e.g., Wilson v. Fraser, 353 F. Supp. 1, 4 (D. Md. 1973); Harford Mutual Ins. Co. v. Brunchev, 248 Md. 669, 238 A.2d 115 (1968); White v. King, 244 Md. 348, 223 A.2d 763 (1966).

A different conflict of laws problem appeared in *Frericks*, because although the automobile had been purchased in Maryland, the accident occurred in North Carolina. The warranty claims clearly were governed by Maryland law, the law of the place of sale. The law of North Carolina, however, would seem to control as to any cause of action in negligence, as the *Frericks* court properly observed, *see* 274 Md. at 296-97, 336 A.2d at 123-24, and North Carolina perhaps would follow *Evans* and preclude recovery for secondary injuries resulting from design defects. *See*
under a negligence theory from the automobile dealer.\textsuperscript{34} Observing that no allegation had been made that the dealer knew or should have known of the design defects, the court concluded that no cause of action in negligence against the dealer had been stated.\textsuperscript{35} The court differentiated between a manufacturer and a dealer where a design defect is alleged. An allegation of negligent design may, standing alone, state a cause of action against the manufacturer, because the manufacturer is also the designer and can be presumed to have knowledge of a defective design.\textsuperscript{36} But that presumption is invalid with respect to a dealer, since a dealer is not involved in the design of an automobile. Knowledge of the defect, either actual or based on discovery that would result from the exercise of reasonable care, must therefore be specifically alleged in order to state a cause of action in negligence against a dealer. No such allegation was made in the declaration in \textit{Frericks}.\textsuperscript{37}


Nonetheless, the \textit{Frericks} court followed Maryland law and applied \textit{Young} to decide the negligence claims. The court refused to take judicial notice of North Carolina law, because the defendants had not complied with the statutory requirement of giving the court and opposing parties notice of an intention to rely on foreign law, see Md. Cts. & Jud. Proc. Code Ann. § 10-504 (1974), and because the lower courts therefore had proceeded on the assumption that Maryland law governed. 274 Md. at 296-97, 336 A.2d at 123-24. The court did observe, however, that upon remand, opportunity to give such notice would be available, and that the application of North Carolina law might then preclude any recovery in negligence. \textit{Id.} at 297, 336 A.2d at 123-24.

34. The basis of the negligence claim against the dealer was that the dealer sold the vehicle with a design defect to the injured plaintiff's parents, and that the dealer was negligent in failing to warn of the design defects and failing to use adequate methods of recall of vehicles with design defects. 274 Md. at 291-92, 336 A.2d at 121.

35. \textit{Id.} at 304-06, 336 A.2d at 128. Allegations and subsequent proof of actual or constructive knowledge of a defect are normally required to establish a lack of due care on the part of any supplier. \textit{See, e.g.}, Woolley v. Uebelhor, 239 Md. 318, 325, 211 A.2d 302, 305-06 (1965).

36. The presumption that a manufacturer knows of a design defect should not be an irrebuttable one, however. A manufacturer's familiarity with the general design of an item does not necessarily mean the manufacturer knew or should have known the design was defective (unreasonably dangerous) in one of its specifics. The manufacturer's duty is to conduct tests that it "should recognize as reasonably necessary to secure the production of a safe article." \textit{Restatement (Second) of Torts} § 395, Comment f (1965); \textit{see Ford Motor Co. v. Zahn}, 265 F.2d 729, 731-32 (8th Cir. 1959); \textit{Babylon v. Scruton}, 215 Md. 299, 303-04, 138 A.2d 375, 377-78 (1958); \textit{W. Prosser, Law of Torts} § 96, at 644 (4th ed. 1971). Thus, the manufacturer's responsibility should extend to those defects that reasonable safety inspections would have discovered. The presumption that a manufacturer knows of design defects shifts to the manufacturer the burden of demonstrating that it did in fact conduct reasonable tests and inspections yet did not discover the alleged defect. Access to the information needed to establish this fact certainly lies more with the automobile manufacturer than with the consumer.

37. 274 Md. at 305, 336 A.2d at 128.
The holding of the *Frericks* court that causes of action for breach of warranty were stated against both the manufacturer and the dealer was grounded on the express rationale that in second collision cases "the elements of a breach of warranty action are essentially the same as those of a negligence action." The court observed that *Young* established that in a negligence action manufacturers have a duty to manufacture and design cars suitable for their intended use, including the provision of a reasonable measure of safety for the inevitable occurrence of collisions. To recover under a warranty theory, it must generally be shown that a warranty existed, that the representations made in the warranty were breached because the product sold did not conform to the representations, and that the nonconformity resulted in injury to the plaintiff. The Maryland Annotated Code, by its adoption of the Uniform Commercial Code, creates an implied warranty of merchantability in contracts for the sale of goods, which provides that goods are "fit for the ordinary purposes for which such goods are used." The *Frericks* court simply equated the representations of this warranty with the negligence standards developed in *Young*, reasoning that an implied warranty of merchantability includes an assurance of reasonable safety when collisions, which are inevitable, occur. Thus, the court concluded that the principles established in *Young* for a negligence action also controlled the evaluation of claims of breach of warranty. Applying these principles to the allegations of design defects in *Frericks*, the court determined that causes of action for breach of warranty had been stated against both the manufacturer and the dealer.

Both the approach and the conclusions of the *Frericks* court appear sound. By its language the implied warranty of merchantability closely approximates the standards set forth in *Young*, and in both instances the

---

38. Id. at 301, 336 A.2d at 126.
39. Id. at 294, 336 A.2d at 122.
41. Md. Com. Law Code Ann. § 2-314(2)(c) (1975). Allegations were made in *Frericks* that the defendants breached both the implied warranty of merchantability, see Md. Com. Law Code Ann. § 2-314 (1975), and an express warranty that the automobile was safe for its intended purpose, see Md. Com. Law Code Ann. § 2-313 (1975). 274 Md. at 299 n.3, 336 A.2d at 125 n.3. The *Frericks* court considered both alleged warranties together, interpreting each as warranting that the automobile was fit for its ordinary or intended purpose — to provide reasonably safe transportation. No issue of privity was raised, given the provisions of Md. Com. Law Code Ann. §§ 2-314(1) (a) & (b) and 2-318 (1975), which abolish any privity requirement between buyer and seller and extend express and implied warranties to cover injured third parties. 274 Md. at 299 n.4, 336 A.2d at 125 n.4.
42. 274 Md. at 301, 336 A.2d at 126.
43. Id. at 302-03, 336 A.2d at 126-27.
guiding principle is that transportation, the intended use of an automobile, should be reasonably safe. The underlying concept is that the intended use of an automobile includes, inevitably, collisions, and that this aspect of automobile travel is foreseeable to manufacturers and suppliers. Therefore, reasonably safe transportation, even when collisions occur, is a part of the warranty given by manufacturers and dealers as well as being a part of a manufacturer's duty under general negligence principles. As the United States Court of Appeals for the Fourth Circuit has observed, "it makes little or no real difference whether liability is asserted on grounds of negligence, [or] warranty . . . ; the applicable principles are roughly the same in any case."44 Other courts, as the Frericks court noted, have applied the negligence analysis of Larsen to second collision actions in warranty, drawing no distinction between the principles applicable to negligence and warranty claims.45

The primary effect of Frericks is to make a dealer vulnerable to liability for injuries received in a second collision and resulting from design defects in the automobile. To support a cause of action in negligence against an automobile dealer, a plaintiff must demonstrate that the dealer knew or should have known of the alleged design defect.46 Thus, as was the case in Frericks, a cause of action in negligence against the dealer may be difficult to establish. However, a dealer's knowledge of the design defect and lack of due care need not be alleged and proved in an action based in warranty.47 Thus, an element of proof that often prevents recovery from a dealer under negligence principles is unnecessary in warranty.

Under either negligence or warranty theory, a design defect must be proved.48 There is no duty placed upon a designer to create a perfectly

46. See notes 36 & 37 and accompanying text supra.
47. Frericks v. General Motors Corp., 274 Md. 288, 301, 336 A.2d 118, 126 (1975). Although the courts are occasionally confused about the matter, warranty . . . is not a concept based on fault or on the failure to exercise reasonable care . . . Liability in warranty arises where damage is caused by the failure of a product to measure up to express or implied representations on the part of the manufacturer [or dealer].
48. For extensive discussions of the considerations relevant to proving design defects see Powell & Hill, Proof of a Defect or Defectiveness, 5 U. BALT. L. REV. 77
safe product.\textsuperscript{49} Rather, as the Court of Appeals has observed, the existence of a design defect is a question of the degree of care and reasonableness of action taken by a designer, and "it is wholly illogical to speak of a defective \textit{design} even though the manufacturer has 'exercised all possible care' in the preparation of his product."\textsuperscript{50} One test that has evolved for determining the reasonableness of a design contemplates "a balancing of the likelihood of harm, and the gravity of harm if it happens against the burden of the precautions which would be effective to avoid the harm."\textsuperscript{51}

Many factors would seem to affect this balance. The style and purpose of the automobile are particularly pertinent.\textsuperscript{52} Reasonableness of design may also vary with the price of a vehicle and with the additional cost required to implement a specific design feature.\textsuperscript{53} The conditions and circumstances of the accident may bear on the reasonableness of design,\textsuperscript{54} as neither a manufacturer nor a supplier can design to prevent all possible

\begin{itemize}
  \item \textsuperscript{49} See, e.g., Warner v. Kewanee Machinery & Conveyor Co., 411 F.2d 1060, 1066 (6th Cir. 1969); Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968); Volkswagen of America, Inc. v. Young, 272 Md. 201, 217, 321 A.2d 737, 745-46 (1974).
  \item \textsuperscript{50} Volkswagen of America, Inc. v. Young, 272 Md. 201, 221, 321 A.2d 737, 747 (1974).
  \item \textsuperscript{51} Larsen v. General Motors Corp., 391 F.2d 495, 502 n.3 (8th Cir. 1968), (quoting Noel, \textit{Manufacturer's Negligence of Design or Directions for Use of a Product}, 71 \textit{YALE L.J.} 816, 818 (1962)); \textit{accord}, Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1071 (4th Cir. 1974).
  \item \textsuperscript{52} Volkswagen of America, Inc. v. Young, 272 Md. 201, 219, 321 A.2d 737, 746; \textit{see} Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1071-72 (4th Cir. 1974); Dyson v. General Motors Corp., 298 F. Supp. 1064, 1073 (E.D. Pa. 1969).
  \item The vehicle involved in the accident in \textit{Dreisonstok}, a Volkswagen microbus, was designed to provide maximum cargo space in a low priced and easy handling vehicle, with the front seat placed as far forward as possible. The court observed that this was the vehicle's primary feature, one which accounted for its popularity and utility. 489 F.2d at 1074. Given these circumstances, it was not reasonable to expect the manufacturer to design into the microbus the same protection in front end collisions as could reasonably be expected in a standard passenger car. \textit{Id.} at 1075.
  \item \textsuperscript{53} Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1072-73 (4th Cir. 1974); Volkswagen of America, Inc. v. Young, 271 Md. 201, 219, 321 A.2d 737, 746-47 (1974). The \textit{Larsen} court observed that the state of technology at the time the automobile was produced limited the safety features a manufacturer reasonably can be expected to include in the design of an automobile. Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968); \textit{accord}, Yetter v. Rajeski, 364 F. Supp. 105, 109 (D.N.J. 1973).
types of accidents or provide for all imaginable contingencies. In short, "to impose liability, the trier of the facts must be able to conclude that the design was unreasonable in light of all of the relevant considerations." Thus, the \textit{Frericks} court observed that facts such as the speed of the automobile and possible negligence of the driver might be relevant to the determination of whether an automobile design was reasonable, although the court also noted that manufacturers can foresee that accidents will result from speeding or other negligent acts by a driver, and that such driver negligence "does not abrogate the manufacturer's duty to use reasonable care in designing an automobile to reduce the risk of 'secondary impact' injuries."

If a driver has negligently contributed to an accident, the applicability of the defense of contributory negligence becomes an issue in a suit brought against a manufacturer or dealer for injuries sustained or enhanced in a second collision. Clearly, a passenger's recovery under either negligence or warranty theories is not barred by the contributory negligence of a driver when the passenger has not been negligent in any way. It is the settled rule in Maryland that the negligence of a driver may not generally be imputed to his passenger. Such a rule is particularly appropriate in second collision cases, since negligent driving is a circumstance that is, or ought to be, contemplated by manufacturers in considering accidents as a foreseeable incident of the intended use of an automobile.

A manufacturer or dealer may be more successful in raising the defense of contributory negligence in a suit brought by the driver. The \textit{Frericks} court stated that contributory negligence should preclude a driver's recovery under a count for negligence. The court did not clearly indicate, however, whether the driver would be similarly barred from recovering in warranty. It is not certain that negligence of a driver in causing an initial collision should bar recovery for injuries sustained or enhanced in a second collision resulting from a design defect. The reasoning that the

---

56. 274 Md. at 303, 336 A.2d at 127.
57. \textit{Id.} at 304, 336 A.2d at 127.
60. \textit{See} note 57 and accompanying text supra.
61. 274 Md. at 304, 336 A.2d at 127.
62. The court merely referred to its decision in \textit{Erdman} v. Johnson Bros. Radio & Television Co., 260 Md. 190, 271 A.2d 744 (1970), as setting forth the court's position on contributory negligence in warranty actions. 274 Md. at 304 n.7, 336 A.2d at 127 n.7. In \textit{Erdman} the plaintiffs' continued use of a television set after discovery of an obvious defect barred recovery under a claim for breach of implied warranty, for such continued use meant that any breach of warranty was not the proximate cause of the damage. 260 Md. at 203, 271 A.2d at 750.
Frericks court applied concerning a passenger's recovery, that negligence is a foreseeable circumstance in the intended use of an automobile,64 applies equally to a driver's recovery. Although the negligence of a driver may be relevant to the determination whether a design was reasonable,65 there would seem to be no compelling reason why such negligence should totally relieve automobile manufacturers and dealers from the duties concerning design defects recognized in Young and Frericks.66

64. See note 60 and accompanying text supra.
65. See note 56 and accompanying text supra.