ATTORNEY GENERAL v. WALDRON — THE MARYLAND JUDICIARY'S EXPANSIVE POWER TO REGULATE THE BAR UNDER THE SEPARATION OF POWERS ARTICLE; INTERMEDIATE SCRUTINY UNDER MARYLAND'S NEW EQUAL PROTECTION "CLAUSE"

In 1974 the Maryland General Assembly enacted section 56(c), which prohibited retired judges who receive a pension from practicing law for compensation. The Maryland Court of Appeals declared the statute unconstitutional in Attorney General v. Waldron. The court ruled that section 56(c) violated: (1) the separation of powers article of the Maryland Constitution; and (2) the equal protection guarantees of the state and federal constitutions. The court's separation of powers analysis expands judicial authority to an extent unprecedented in Maryland. In the course of its equal protection analysis the court made new law by holding that the Maryland Constitution contains an equal protection component and that certain important rights invoke an intermediate standard of review under equal protection. The court then treated following one's chosen profession as such a right.

Section 56(c)'s statutory predecessor permanently barred a retired judge from receiving his pension if he chose to practice law for compensation. By contrast, section 56(c) prohibited practice for compensation if a judge elected to receive a pension.

The Honorable Richard Waldron retired in 1977 after serving ten years as a judge of the District Court in Prince George’s County, Maryland. Upon notice of Judge Waldron’s retirement, the Maryland Em-

1. 1974 Md. Laws ch. 483, § 2 (codified at Md. Ann. Code art. 73B, § 56(c) (1978)). Section 56(c) provides in relevant part: “A judge who retires and accepts the pension provided by this subtitle may not, thereafter, engage in the practice of law for compensation . . . .”


5. 289 Md. 686, 426 A.2d at 931. Judge Waldron sought but did not receive reappointment. Appellee’s Brief at 2. The Court of Appeals did not address the involuntary nature of Judge Waldron's retirement. In an earlier case concerning judicial pension benefits, however, the court construed the term "retired" to contemplate both voluntary and involuntary retirement of a judge. See Walker v. Montgomery County Council, 244 Md. 98, 101-02, 223 A.2d 181, 183-84 (1966).
ployee Retirement System started his pension benefits. Subsequently, Judge Waldron began practicing law for pay, provoking the Attorney General to seek an injunction. The trial court denied the injunction and held that section 56(c) was unconstitutional. The Court of Appeals affirmed.

I. SEPARATION OF POWERS

The court characterized section 56(c)'s prohibition as a legislative attempt "to regulate the legal profession" in violation of the separation of powers principle. Although conceding that the legislature had a limited authority to regulate the bar, the court maintained that permissible legislative regulations are restricted to those "aid[ing] the judiciary" or establishing "minimum standards for admission to the [bar]." It is not clear whether the court was claiming that judicial authority encompasses most regulation of the bar — all except that falling within a narrow legislative preserve — or whether it was asserting an exclusive authority, which it shares with the legislature only as a matter of comity. Under either interpretation, the court's analysis is problematic. Had the court accurately identified the sources of legislative and judicial power to regulate the bar, it would have upheld section 56(c) as a legitimate exercise of legislative authority.

A. Legislative Authority to Regulate the Bar and Article 8

Section 56(c) arguably was an exercise of the General Assembly's

7. Judge Waldron also wanted to resume legal practice, so he sued the Employees' Retirement System's Chairman, arguing that § 56(c) was either unconstitutional or did not bar his practice for compensation. In Chairman of the Bd. v. Waldron (Waldron I), 285 Md. 175, 401 A.2d 172 (1979), the Court of Appeals vacated the trial court's judgment that § 56(c) denied Judge Waldron equal protection under the law and construed § 56(c) to prohibit the practice of law. Id. at 180–81, 401 A.2d at 175. Because § 56(c) prohibited practice only by a retired judge receiving a pension, and because a judge may elect when to begin receiving his pension, see Appellant's Brief at 8 (quoting testimony of Retirement System official), a court plausibly could construe § 56(c) to permit deferral of pension. Indeed, that is how the Retirement System interpreted § 56(c). See id. Judge Waldron, however, elected to receive his benefits, thus invoking § 56(c)'s prohibition of practice. Because the Chairman had no authority to enforce § 56(c), the court dismissed the action for failure to join the necessary parties. 285 Md. at 180–82, 401 A.2d at 175. The court thus did not reach the constitutional issues in Waldron I.

8. See 289 Md. at 686–87, 426 A.2d at 932.
9. See id. at 687, 426 A.2d at 932.
10. As in Waldron I the Court of Appeals again granted appellant's petition for certiorari before consideration by the Court of Special Appeals. Id.
11. Id. at 688, 426 A.2d at 932. The court reasoned that § 56(c) was a regulation, because it purported to prescribe "additional prerequisites" for "otherwise qualified practitioners." Id.
12. Id. at 700–01, 426 A.2d at 939.
police power. The Court of Appeals has broadly defined the police power as the authority to prescribe "reasonable regulations, which are necessary to protect the public health, comfort, order, safety, convenience, morals and general welfare."\textsuperscript{13} The legislature's power derives not from any particular provision of the Maryland Constitution,\textsuperscript{14} but from the governmental structure that document creates. The constitution creates the legislature and then defines the limits of legislative power. The court has described legislative power as plenary except as limited by the constitution.\textsuperscript{15} The legislature thus has full power to regulate in any area, absent a constitutional prohibition.\textsuperscript{16}

Policy arguments supporting the legislative power to regulate the bar stem from the central premise of democratic rule — that public policy decisions should be made by the public's representatives. The decisionmaking process is more acceptable if members of the public can participate in the process, and the legislature has the institutional machinery to gauge public sentiment, hold hearings, call witnesses, and develop "tailor made" regulations.\textsuperscript{17} Finally, normal political processes make it easy to check legislative power.


14. MD. CONST. art. III, § 1 merely provides "[t]he Legislature shall consist of two distinct branches; a Senate, and a House of Delegates, and shall be styled the General Assembly of Maryland."


16. "[P]lenary power in the Legislature for all purposes of civil government is the rule, a prohibition to exercise a particular power is an exception, and can be founded only on some constitutional clause plainly giving rise to it." Leonard v. Earle, 155 Md. 252, 260, 141 A. 714, 717, aff'd, 279 U.S. 392 (1928); accord Hennegan v. Geartner, 186 Md. 551, 555, 47 A.2d 393, 394 (1946).

17. Regulation is preeminently a legislative function because it is lawmaking — enacting general rules to effectuate public policy. In a democracy, the primary authority for formulating public policy belongs to the representative branch because the framers designed it to receive public input from diverse sources and then balance society's numerous competing and interrelated interests. See, e.g., Salisbury Beauty Schools v. State Bd. of Cosmetologists, 268 Md. 32, 47-48, 300 A.2d 367, 377 (1973). The judiciary, on the other hand, is poorly suited to the task of regulation. See, e.g., Tomlinson, Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland, 35 MD. L. REV. 414, 432 (1976) ("The subordination of judge-made law to statutory law on nonconstitutional questions reflects the superior capacity of the legislative branch to resolve questions of expediency and public policy in the course of declaring the law."); see also Cannon v. University of Chicago, 441 U.S. 677, 742-43 (1979) (Powell, J. dissenting) (judicial resolution of public policy questions violates separation of powers principles). Courts do, of course, develop the common law, in the absence of controlling precedent or statutes, according to the judge's view of social goals and needs. Id.
Waldron relied upon Maryland's separation of powers provision—article 8 of the Declaration of Rights—to limit legislative authority to regulate the bar. Article 8 provides: "That the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." On its face this provision appears to forbid usurpation of one branch's power by another. Additionally, because each branch must

18. MD. CONST. DECLARE. OF RTS., art. 8.

Although article 8's language appears to require a government of watertight compartments, the court has stated that "the separation of powers concept may constitutionally encompass a sensible degree of elasticity and should not be applied with doctrinaire rigor." Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 220, 334 A.2d 514, 521 (1975). The court has acknowledged that the complexities and exigencies of modern life have required a looser application of the separation of powers doctrine. See Shell Oil Co. v. Supervisor of Assessments, 276 Md. 36, 47, 343 A.2d 521, 527 (1975).

The court has concluded that the separation of powers provision was designed to apply "only so far as comport with free government." Mayor of Baltimore v. State, 15 Md. 376, 460 (1860) (quoting Crane v. Meginnis, 1 G. & J. 463, 476 (Md. 1829)). Although most state constitutions expressed a strict separation of powers similar to Maryland's, "the full potentialities of a system of sharply divided powers were never realized." M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 143 (1967). "If we look into the constitutions of the several States, we find that...there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." THE FEDERALIST No. 47, at 141 (J. Madison) (R. Fairfield ed. 1981). The federal Constitution was likewise not designed to forbid the departments from exercising "partial agency in, or...control over, the acts of each other." Id. at 140 (emphasis in original). Moreover, a theory requiring a governmental system of sharply defined spheres of power would prove unworkable. In addition to conceptual problems inhering in vague terms like "power," modern government's complexity and need for collectivist activities requires the combined and coordinated efforts of all three branches. Indeed, a "pure" separation of powers doctrine would foreclose judicial review. The real principle at work is a system of checks and balances that preserves liberty while achieving the flexibility vital to effective government. See M. VILE, supra at 7–8, 14; see also Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—a Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1012–16 (1924) (practical demands of government preclude separation of powers' doctrinaire application). The need for overlap of governmental activities is evident in the development of administrative agencies. For a review of this development, see County Council v. Investors Funding Corp., 270 Md. 403, 428–36, 312 A.2d 225, 239–45 (1973). The interrelationship of functions between coordinate branches demonstrates that the court should develop a workable separation of powers analysis, and resist the temptation to resort to rigidity and literalism.

19. The court has described the purpose of this provision as to parcel out and separate the powers of government, and to confide particular classes of them to particular branches of the supreme authority. That is to say, such of them as are judicial in their character to the judiciary; such as are legislative to the legislature, and such as are executive in their nature to the executive. Within the particular limits assigned to each, they are supreme and uncontrollable. Wright v. Wright's Lessee, 2 Md. 429, 452 (1852). The decision in Wright predates the 1851 amendment of article 8. In Board of Supervisors v. Todd, 97 Md. 247, 262–63, 54 A. 963, 965 (1903), the court regarded the 1851 amendment, which prohibits persons exercising the
remain independent, no branch may constitutionally inhibit another's exercise of its constitutional powers. Otherwise, all power would gravitate to the branch imposing the greatest interference, subjugating the other branch. Legislation affecting the judiciary, then, does not violate the separation of powers principle unless it usurps or inhibits judicial authority. The question whether article 8 prohibits section 56(c) thus turns on the nature of judicial authority to regulate the bar.

B. Judicial Authority to Regulate the Bar

In analyzing the source of judicial authority to regulate the bar,
the *Waldron* court claimed (1) that authority to regulate the bar is inherent in, or ancillary to, the court’s adjudicatory power; and (2) that regulation of the bar is essentially a judicial function and thus included in article IV’s grant of judicial power. The court correctly concluded that Maryland’s governmental structure supports its first claim; analysis shows, however, that judicial power is narrower than the court maintained. The court primarily relied on history to support its second claim, but that foundation is weak.

1. *The Inherent Judicial Power to Regulate the Bar* — Article IV of the constitution vests “judicial power” in the Maryland courts. Although the Maryland Constitution does not define “judicial power,” the judiciary’s “core power” is nonetheless identifiable — it is the power to adjudicate.

Many courts and commentators have reasoned that ancillary or inherent in a separation of powers provision and the constitutional

22. 289 Md. at 694–95, 426 A.2d at 935–36.
23. *Id.* at 692, 426 A.2d at 934.
24. MD. CONST. art. IV.
26. Of course, the *function* generally associated with the judicial branch is adjudication, i.e., finding facts and applying law. In view of the acknowledged constitutionality of delegating factfinding and law applying authority to administrative agencies, further refinement of “judicial power” is necessary. *Cf.* County Council v. Investors Funding Corp., 270 Md. 403, 441, 312 A.2d 225, 245–46 (1973) (quasi-judicial powers exercised by the Commission on Landlord-Tenant Affairs were only incidental to regulatory powers and therefore not a violation of article 8). The Court of Appeals has determined that “the essence of judicial power is the final authority to render and enforce a judgment.” Attorney Gen. v. Johnson, 282 Md. 274, 286, 385 A.2d 57, 64, *appeal dismissed*, 439 U.S. 805 (1978). In Dal Maso v. Board of County Comm’rs, 182 Md. 200, 206, 34 A.2d 464, 467 (1943) the court distinguished legislative from judicial functions. The legislative function concerns the prospective “‘formation and determination of future rights’”; the judicial function is to determine “‘existing facts and resultant and controverted rights and duties.’” *Id.* (quoting Judge Miller of Iowa’s brochure on ADMINISTRATIVE LAW OF THE AMERICAN BAR ASSOCIATION).

Other jurisdictions have also described the judicial power. *See* Eastin v. Broomfield, 116 Ariz. 576, 582, 570 P.2d 744, 750 (1977) (judicial power is the power of the court to decide and pronounce a judgment and carry it into effect); Galloway v. Truesdell, 383 Neb. 13, 20, 422 P.2d 237, 242 (1967) (“‘Judicial Power’ is the authority to hear and determine justiciable controversies”); *In re* Opinion of the Justices, 115 Vt. 524, 529, 64 A.2d 169, 172 (1949) (the judicial power is limited to deciding cases or controversies; advisory opinions are thus outside its scope). *But see* Frankfurter & Landis, *supra* note 18, at 1017 (“judicial power” is not a “technical term of fixed and narrow meaning”).

27. Although the *Waldron* court, like most courts and commentators, used the term “inherent power,” this Recent Decision calls “ancillary” that power arising out of the court’s need to discharge effectively its constitutional duties. *See* 289 Md. at 691 n.6, 426 A.2d at 934 n.6 (difference between “inherent” and “implied” powers is one of name only); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law — A Proposed Delinea-
grant of judicial power is the power to engage in nonadjudicatory activities necessary to perform the judiciary's constitutional duties.28 This theory, then, would sanction judicial regulation of the bar if such regulation was necessary to enable a court to perform its adjudicatory responsibilities.29

The Waldron court, like many courts, reasoned that the structure of the justice system entails an ancillary judicial power to regulate the bar.30 The Court of Appeals also concluded that such regulation is an exclusively judicial prerogative except for a narrow area of legislative


29. See generally J. CRATSLEY, supra note 28, at 2. If a legislature refuses to appropriate sufficient funds for court administration, the judiciary may need to rely on its ancillary power. Unless the judiciary is fiscally secure and independent it will not be able to perform its constitutional function free of legislative or executive control. See Note, Judicial Financial Autonomy and Inherent Power, 57 CORNELL L. REV. 975, 986-87 (1972); see also In re Clerk of Court's Comp. v. Lyon County Comm'r's, 308 Minn. 172, 177, 241 N.W.2d 781, 784 (1976); Annot., 59 A.L.R.3d 569 (1974); Commentary, Inherent Power and Administrative Court Reform, 58 MARQ. L. REV. 133, 136-44 (1974) (inherent power applied to appointment, dismissal and compensation of court personnel).

Courts have recognized that inherent judicial power is limited to self-preservation. See In re Clerk of Courts' Comp. v. Lyon County Comm'r's, 308 Minn. 172, 177, 241 N.W.2d 781, 784 (1976) ("At bottom, inherent judicial power is grounded in self-preservation."); Galloway v. Truesdell, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967) (a court's inherent "power must relate back and be directly derived from the basic judicial power and the basic judicial function."). For a concise analysis of a court's inherent or incidental power in the nonadjudicatory areas of rules of procedure, contempt of court, jurisdiction, and judicial administration, see Note, Admission to the Bar and the Separation of Powers, 7 UTAH L. REV. 82, 91-94 (1960) [hereinafter cited as Note, Admission to the Bar]; see also J. CRATSLEY, supra note 28, at 37-44 (application of inherent power doctrine to non-fiscal court needs).

control. The court's major premise is certainly supportable, but the court's conclusion does not follow.

A competent and trustworthy bar is crucial to effective judicial functioning. A court depends upon the adversary system, and hence a competent bar, to discharge its duties of deciding cases and of developing the law. Moreover, a court's strength lies in the public respect accorded it. An inept or unscrupulous bar thus could devastate the integrity of the justice system. Furthermore, attorneys, as officers of the court, plainly share in the responsibility for administering justice beyond their role as advocates. Because a regulated bar is essential to the administration of justice, the judiciary has the ancillary power to regulate it to the extent necessary to perform its constitutional duties.

This structural argument does not demonstrate, however, that the judiciary possesses an exclusive power to regulate. Each branch of government, indeed organized society itself, depends upon attorneys as counselors, planners and advocates. More importantly, the court failed to explain why the legislature, which is responsible for regulating other professions, is incapable of adequately supervising the bar. Of course, in the absence of adequate legislative regulation, a court may provide the necessary supervision. Because legislation significantly reducing the availability of qualified attorneys would impair the judici-

31. See, e.g., In re Application for License to Practice Law, 67 W. Va. 213, 219, 67 S.E. 597, 599 (1910) (quoting In re Goodell, 39 Wis. 232, 240 (1875)).


33. For discussion of the importance of public reliance on an attorney's honesty, see Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 549, 318 A.2d 811, 814 (1974).

34. The legal profession's impact on the administration of justice and the development of the law is far-reaching. Without the assistance of an able bar, an appellate court's ability to render well-crafted opinions would suffer considerably. The law thus would develop in a haphazard fashion depriving future courts and the bar of coherent caselaw. Predictability and stability in the law would be lost. Moreover, because the parties would perceive that the issues had not been litigated fully and fairly, public confidence in the judicial system would wane. See Reynolds, The Court of Appeals of Maryland: Roles, Work and Performance Part II: Craftsmanship and Decision-Making, 38 Md. L. Rev. 148, 184-85 (1978).


37. See 1 E. Thornton, Attorney at Law 33 (1914); Note, Admission to the Bar, supra note 29, at 90-91.
ary's ability to function, the court legitimately could declare such legislation invalid under article 8. The court did not suggest, however, that section 56(c) threatened efficient judicial functioning. Rather, the court seemed to regard section 56(c) as an usurpation of judicial authority. The judicial authority that is ancillary to the court's adjudicatory power, however, is only the authority to regulate the bar in the absence of adequate legislative regulation. Accordingly, unless the judiciary's authority to regulate is more than an incident of its adjudicatory power — i.e., unless the authority is essentially judicial — section 56(c) was not an usurpation.38

2. Regulation of the Bar as an Essentially Judicial Power — The Waldron court claimed that regulation of the bar is "essentially judicial in nature and, accordingly, [is] encompassed in the constitutional grant of judicial authority to the courts of this State."39 The court based this claim on historical evidence that regulation of the bar was an "uniquely judicial responsibility" in England and in the early years of American history.40 The court seemed to reason that the power to perform a task is "essentially judicial" if the task is one for which the courts traditionally have had exclusive responsibility. Regardless of whether this is a reliable test, regulation of the bar does not satisfy it. In fact, a thorough examination of the historical record41 reveals that courts often have shared this responsibility with the legislative branch. In England,42 first the Crown and later Parliament set standards for the

38. The distinction between ancillary and essential judicial power is not always clear. See Note, The Inherent Power of Judicial Review and Constitutional Restrictions on Arbitrary and Capricious Administrative Action — State Department of Assessments and Taxation v. Clark, 38 Md. L. Rev. 242, 250 (1978); see also Wayne Circuit Judges v. Wayne County, 383 Mich. 10, 21, 172 N.W.2d 436, 440 (1969) ("The inherent power of the judiciary is a judicial power, but only in the sense that it is a necessary concomitant to the judicial power."). modified and opinion substituted, 386 Mich. 1, 190 N.W.2d 228 (1971), cert. denied, 405 U.S. 923 (1972).

39. 289 Md. at 692, 426 A.2d at 934.

40. Id. at 693, 426 A.2d at 935; cf. LeRoy v. Special Indep. School Dist., 285 Minn. 236, 241-42, 172 N.W.2d 764, 768 (1969) ("A recognized test of whether a function is judicial is whether it is one that courts have historically been accustomed to perform.").

41. The history is recounted in, e.g., In re Cannon, 206 Wis. 374, 384-92, 240 N.W. 441, 445-48 (1932); In re Day, 181 Ill. 73, 83-85, 54 N.E. 646, 648-50 (1899); Note, Admission to the Bar, supra note 29, at 83-84; Comment, supra note 30, at 720-21.

42. English legal practices are distinguishable from American practices. The English legal profession historically consisted of two general groups: attorneys and barristers. An attorney substituted for the party to a suit, usually when the litigation occurred a long distance from the party's home. The barrister appeared with a litigant as an advocate to plead the case. See Note, Admission to the Bar, supra note 29, at 83; H. COHEN, HISTORY OF THE ENGLISH BAR 126 (1929 & photo. reprint 1967). The bifurcation persists today. The attorney's modern counterpart is the solicitor. Clients consult him directly on such matters as contract and will drafting, conveyancing and incorporations. The client retains a barrister if
litigation is necessary. He drafts the pleadings and conducts the litigation. See id. at 326 & n. p; A. KIRALFY, POTTER'S INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 82 (4th ed. 1962).

43. Until the thirteenth century, an attorney could appear only upon a writ from the King. In response to a proliferation of unqualified individuals representing clients, Edward I issued an ordinance in 1292 limiting the number of attorneys and placing their appointment under supervision of the justices. 1 Rot. Parl. 84 (1292); see 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 194 (2d ed. 1923). Note, Admission to the Bar, supra note 29, at 83. The problem of unqualified and unscrupulous individuals appearing in court persisted. In 1402 Parliament required the justices to examine all attorneys before entering their names into the roll, 4 Hen. IV, c. 18 (1403); see Note, Admission to the Bar, supra note 29, at 83, to remove any attorneys lacking in virtue or good fame, and to replace those who died or were removed, see 1 J. ALEXANDER, BRITISH STATUTES 279–80 (W. Coe ed. 1912). Subsequent statutes established conditions for a prospective attorney's admission and authorized the courts to appoint examiners to determine his fitness for practice. 6 & 7 Vict. c. 73; see Comment, supra note 30, at 720. The nature and origins of judicial control over barristers is less clear. A barrister's admission to appear and argue in court is governed by the Inns of Court, which are independent, voluntary educational associations. To attain the rank of barrister, one first must become a member of an Inn, residing there until the Benchers (the governing body of the Inn) summon him to the bar. The Inns generally are not regulated by statute. The court's relation to the Inns and appointment of barristers is less definite than in the case of attorneys. However, the practice of visitation by the judges suggests some influence. See 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 434–35 (3d ed. 1923 & photo. reprint 1966).

44. See supra note 43.

45. Although early English law recognized distinct governmental agencies and tasks, all power was regarded as judicial in nature as late as the seventeenth century. The medieval mind considered law an "unchanging pattern of divinely inspired custom." M. VILE, supra note 18, at 24. The law giver — first the King and his council, and later Parliament — was viewed as clarifying rather than making law. Id. at 24–25. Distinct legislative and executive powers were not recognized until after the English civil war, when Parliament emerged as the supreme repository of power. Id. at 73–74; Kaufman, supra note 25, at 677–78.


Due to the differences between American and British government structures, commentators have disagreed over the historical evidence's applicability to the separation of powers question. Compare, e.g., Note, Admission to the Bar, supra note 29, at 83–85 ("Extreme caution is required in applying the facts of early professional evolution to the separation of powers concept" in America; history inconclusive) with Comment, supra note 30, at
Maryland history is likewise inconclusive. Although courts un-

720-21 (Because Parliament exercises judicial as well as legislative power, history shows regulation is judicial in nature.). See also Dowling, supra note 36, at 638 (History is unsatisfactory; although courts exercised control, much of it was pursuant to statute. Parliament is supreme and the judiciary is a branch of the legislature). Some courts, however, have relied upon the distinction between Parliament's unlimited power and American constitutional legislatures to buttress the historical argument. In In re Cannon, 206 Wis. 374, 240 N.W. 441 (1932), quoted in Waldron, 289 Md. at 691, 426 A.2d at 934, the court compared Parliament with a constitutional convention. The court considered the English statutes directing the court to manage the legal profession, see supra note 43, a constitutional mandate. 206 Wis. at 385, 240 N.W. at 446. In In re Day, 181 Ill. 73, 54 N.E. 646 (1899), the Illinois court took a different approach. Acknowledging the difference between Parliament and American legislatures, the court reasoned that the English history demonstrated that admission to the bar was a judicial function. Because the court viewed its constitutionally granted power as exclusive, it concluded that separation of powers principles required the judiciary to control admission to the bar. Id. at 83-84, 54 N.E. at 648-49.

In contrast to Day's formalistic approach, In re Cooper, 22 N.Y. 67 (1860) was sensitive to the distinction between power and function. Cooper first considered whether the admission of attorneys was a judicial proceeding. The court held that the essential nature of a judicial act is to rule on the existence and enforcement of rights; admission to the bar met that jurisdictional test. Id. at 98. In addressing the constitutional issue, the court concluded that appointment of attorneys historically was not a judicial power in America or England. Id. at 91. The court pointed out that the legislature had not deprived the court of its jurisdiction over the question but merely had prescribed standards for competent evidence. Although Day acknowledged the cogency of Cooper's analysis, it also pointed out that the great majority of jurisdictions had not followed Cooper. 181 Ill. at 92, 54 N.E. at 651. The conclusion is almost irresistible that courts have rejected Cooper more for its result than its reasoning. But see Note, Admission to the Bar, supra note 29, at 85 (suggesting Cooper's analysis is shallow).

47. The Waldron court's use of history is unclear. Although the court claimed that regulation of the bar was an article IV power, the opinion did not connect its historical references to an interpretative theory of "judicial power." Prior cases, however, have provided a theory of constitutional interpretation. In Perkins v. Eskridge, 278 Md. 619, 366 A.2d 21 (1976), the Court of Appeals said "[i]n interpreting the Constitution the first thing to be got at is, what was the purpose of the framers?" Id. at 639, 366 A.2d at 33 (quoting Johns Hopkins Univ. v. Williams, 199 Md. 382, 387, 86 A.2d 892, 894-95 (1952)). Perkins indicates that Maryland follows an "intent theory" of constitutional construction: i.e., a court should construe the document in accordance with the intention of the framers. "Intent theory" is distinguished from "ongoing history," which views the past as demonstrating the "currents and lessons of experience." C. Miller, The Supreme Court and the Uses of History 26 (1969). The court has, however, expressed a willingness to adapt its theory of interpretation to account for changing times. See Perkins, 278 Md. at 639-41, 336 A.2d at 33-34.

Waldron fails to place article 8 in accurate historical context. See supra notes 38-46 and accompanying text; infra notes 47-55 and accompanying text. Furthermore, reliance on historical practices as evidence of the framers' intentions regarding article 8 is questionable: scholars disagree over the degree to which colonial and post-revolutionary American courts recognized and enforced the separation of powers. Compare, e.g., Corwin, The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention, 30 AM. HIST. REV. 511, 514-21 (1925) (frequent legislative interference in judicial proceedings and judgments; the legislatures adjudicated rights) and L. Friedman, A History of American Law 36 (1973) ("As in England, separation of powers was notably absent. Functions were assigned to institutions without regard to the idea that courts ought to be independent bodies, distinct from the legislature and the executive.") with
questionably have played an important role in admitting, supervising and disbarring attorneys in this state since its founding, the evidence demonstrates that the legislature had always shared this responsibility.48 Beginning in 1666, the colonial legislature issued a series of statutes regulating attorney's conduct, duties and fees.49 These statutes were consolidated in the Act of 1715, providing comprehensive regulation and directing the "Justices of the several Courts . . . to admit and suspend [attorneys]."50 Later pre-Revolution acts also regulated attorneys, especially attorneys' fees.51 The first major post-Revolution development was the Act of March 10, 1832, standardizing educational requirements and providing for an appeal to the Court of Appeals from a lower court's denial of admission to practice.52 Finally, in 1898 the General Assembly created the State Board of Bar Examiners and required all applicants to petition the Court of Appeals for admission to the bar.53 Some courts have attempted to dismiss such statutes as merely "declaratory" of a pre-existing judicial authority to regulate the

M. VILE, supra note 18, at 134 & passim (disagreeing with Corwin's conclusions). In Maryland, the legislature interfered directly with specific cases as late as 1841. See C. BOND, THE COURTS OF APPEALS OF MARYLAND, A HISTORY 133 (1928).

48. See 1 A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 241-42 (1965). 1657-1670 was a formative period for the Maryland legal profession, and during this period the first regulations of attorneys appeared. Pursuant to statute, Maryland courts began to "denominate" or admit attorneys to practice. Id. at 245-46. Judicial control was far from exclusive, however. For example, in 1669 John Morecroft, a denominated attorney, was brought before the Upper House of Delegates to be impeached. He challenged the House's authority, maintaining that "as Attorny [sic] and Minister of the Provincial Court the Matter was & is only examinable & punishable by the honorable Justices of the Provincial Court Who are his Masters and to which Court he is a Minister." Id. at 248. The House implicitly rejected Morecroft's defense. Furthermore, in 1669 the Provincial Court consisted of the Governor and his Council — the executive; the judiciary did not become independent until 1694. Id. at 241-42.

49. See 1 A. CHROUST, supra note 48, at 249-50; 52 TRANSACTIONS OF THE MARYLAND BAR ASS'N 152, 154-55 (1947); 4 TRANSACTIONS OF THE MARYLAND BAR ASS'N 87, 90-93 (1899).

50. See 1 A. CHROUST, supra note 48, at 253; see also 52 TRANSACTIONS OF THE MARYLAND BAR ASS'N 152, 155 (1947); 4 TRANSACTIONS OF THE MARYLAND BAR ASS'N 87, 93 (1899).

51. See 1 A. CHROUST, supra note 48, at 254-55.

52. Ch. 268, 1831 Md. Laws (frequently cited as the Act of 1831); see 52 TRANSACTIONS OF THE MARYLAND BAR ASS'N 152, 156 (1947).

That argument lacks force, however, because it fails to provide independent evidence of such judicial power.

Regulation of the bar therefore does not satisfy the court’s test for a constitutionally vested judicial power. The historical evidence shows that such regulation has not been an “uniquely judicial responsibility.” The historical evidence does not suggest, then, that the judiciary’s authority to regulate the bar is any greater than that which it possesses as an incident of its adjudicatory power. Legislative regulation cannot usurp that power, because that power arises only in the absence of effective legislative regulation.

3: Precedent for a Judicial Power to Regulate the Bar — The Waldron court relied primarily on two prior Maryland cases to support its assertion of judicial power. In 1969, the court decided Public Service Commission v. Hahn Transportation, Inc. and Maryland State Bar Association v. Boone, claiming for the first time that regulation of the bar was an essentially judicial function. Hahn involved a challenge to a Public Service Commission regulation requiring counsel to represent the parties when the Commission operated in its quasi-judicial capacity. Invoking the separation of powers doctrine, the court asserted that defining and regulating the practice of law “is, and essentially and ap-


55. Although one early case refers to regulation of the bar as a judicial power, its evidentiary weight is doubtful. State v. Johnston, 2 H. & McH. 160 (Md. 1786). In Johnston, the General Court quashed a writ of certiorari in an appeal by the Attorney-General protesting the county court’s admission of an attorney who had refused to take loyalty oaths during the Revolution. The court did not issue an opinion, but reprinted the argument of counsel. Counsel contended that the court was limited to powers vested by the statutes of 1715 and 1783. “Because there is no power given by the law” to review the lower court’s decision, counsel argued that the court lacked jurisdiction. Id. at 170–71 (emphasis in original). Counsel went on to say, “Upon the whole, the several Courts have, time out of mind, exercised the power of determining who were qualified to be attorneys of their respective Courts. The several statutes and acts of assembly confirm the same.” Id. at 171. The quoted language appears more a recognition of the court’s historical practice of admitting and disbarring than a claim of essential constitutional power, especially when considered in light of the argument that the court’s jurisdiction was limited to the remedies authorized by statute. Id. at 168.

56. 253 Md. 571, 583, 253 A.2d 845, 852 (1969). See also In re Application of Allan S., 282 Md. 683, 689, 387 A.2d 271, 275 (1978), in which the court noted that “the primary and ultimate responsibility for regulating the practice of law” falls on the court.

appropriately should be, a function of the judicial branch of government." The Commission's quasi-judicial status was held sufficient to empower it to issue the regulation. Hahn did not identify the source of judicial power to regulate the bar, and the opinion does not illuminate the nature of that power. Hahn described the judiciary and legislature as enjoying a "comfortable accommodation" in regulating the bar. This language suggests that either (1) the court was claiming that the judiciary's role in regulating the bar is preeminent and any legislative regulation is at the judiciary's grace; or (2) the court was simply noting that both branches share in the responsibility for regulating the bar, without specifying the boundaries of their respective responsibilities.

Boone aggravated the confusion over the source of judicial power to regulate the bar. In granting the bar association standing to appeal a circuit court's decision to reinstate an attorney, the court said that "[s]ince the passage of Ch. 139 of the Laws of 1898 . . . the Court of Appeals in the exercise of its inherent and fundamental judicial powers has supervised, regulated and controlled the admission of lawyers . . . ." Despite the reference to inherent powers, "fundamental judicial powers" suggests that the court thought regulation of the bar was within the constitutional grant of judicial power.

Although Waldron relied on Hahn and Boone to support its claim that regulation of the bar was essentially a judicial function, neither case justified that position. Furthermore, Hahn and Boone are not

58. 253 Md. at 583, 253 A.2d at 852. Judge Barnes' dissent criticized the court for its implicit departure from the court's recognition of delegated powers in Bastian v. Watkins, 230 Md. 325, 329-30, 187 A.2d 304, 306 (1963). He reminded the court that the General Assembly delegated the power to admit applicants to the bar, but not the power to define the unlawful practice of law; in fact, the legislature "has exercised this power itself, beginning with Chapter 48 of the Acts of 1715." 253 Md. at 594-95, 253 A.2d at 858; see Md. Ann. Code art. 10, §§ 1, 32 (1981).
59. 253 Md. at 580-81, 253 A.2d at 850.
60. Id. at 583, 253 A.2d at 852.
61. In Hahn the court stated that the judiciary shall decide "what does and what does not constitute the practice of law." The court noted that the statute prohibiting the unauthorized practice of law used broad language and thus intended to leave it to the courts to make the final determination of what constituted practice, thus leaving the source of the courts' power obscure. 253 Md. at 583, 253 A.2d at 852.
62. 255 Md. at 431-32, 258 A.2d at 443.
63. Id. at 429, 258 A.2d at 443.
64. 289 Md. at 692-93, 426 A.2d at 934-35. Cases have followed Boone on varying theories. See, e.g., Attorney Grievance Comm'n v. Reamer, 281 Md. 323, 331, 379 A.2d 171, 176 (1977) (court has inherent and fundamental power to act in attorney disciplinary proceedings); Attorney Grievance Comm'n v. Andresen, 281 Md. 152, 159, 379 A.2d 159, 163 (1977) (duty of the court to protect the public from unscrupulous attorneys). In Boone the court cited 52 TRANSACTIONS OF THE MARYLAND STATE BAR ASS'N 152, 154-59 (1947),
precedent for striking down legislative regulation of the bar as violating the separation of powers provision. Neither case involved a direct conflict with legislative authority. *Hahn* upheld the Commission's statutory rulemaking power, albeit in terms of inherent or ancillary judicial power. *Boone* dealt with the respective roles of the circuit court and Court of Appeals in attorney reinstatement proceedings.

The *Waldron* court also attempted to reconcile its decision with the court's prior acceptance of legislative regulation of the legal profession. All of those regulations, explained the court, were permissible because they were calculated to aid the court in performing its constitutional duties or because they established minimum standards for admission to the bar. This explanation, of course, does not justify the limits that the *Waldron* court imposed on legislative authority. At best, it suggests that the legislature has never before enacted a regulation like section 56(c); it does not establish that section 56(c) was beyond the limits of legislative authority.

The *Waldron* court noted that the courts of most other jurisdic-

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Adkins, *What Doth the Board Require of Thee?*, 28 MD. L. REV. 103 (1968), and Bastian v. Watkins, 230 Md. 325, 329–30, 187 A.2d 304, 306 (1963) to dispose of history before the 1898 Act granting to the Court of Appeals the authority to admit and disbar. 255 Md. at 429, 258 A.2d at 443. Citing State v. Johnston, 2 H. & McH. 160 (Md. 1786), discussed supra at note 54, Adkins suggested that the Act of 1715, see supra note 49 and accompanying text, established the right in courts to admit and disbar attorneys. *Hahn* also cited 52 TRANSACTIONS OF THE MARYLAND STATE BAR ASS'N 152, 152–81 (1947) and Bastian for its “comfortable accommodations” standard. 253 Md. at 583, 253 A.2d at 852.

65. In re Maddox, 93 Md. 727, 50 A. 487 (1901) relied on the General Assembly's power to regulate admission to the bar in denying a woman's petition under a statute construed as limiting membership to males. Id. at 730, 50 A. at 488. *Maddox* quoted from In re Taylor, 4 Md. 28 (1877), in which the court had refused to admit a black man under a statute limiting applications to free white citizens: "The privilege of admission to the office of an attorney...is governed and regulated by the Legislature, who may prescribe the qualifications required and designate the class of persons who may be admitted." 93 Md. at 728, 50 A. at 487 (emphasis in original). See also Bastian v. Watkins, 230 Md. 325, 330, 187 A.2d 304, 307 (1962) (admission to the bar is a "legislative, not a judicial function" and the right "may constitutionally be regulated by statute"). Bastian involved a challenge to the Montgomery County Circuit Court's local rule regulating who may file pleadings. Attorneys were required to maintain a bona fide local office, address and telephone listing. The court noted that the rule "has the effect of disbarring some duly qualified Maryland attorneys from practicing law in Montgomery County." Nevertheless, the court upheld the lower court's authority to issue such restrictions to the extent the restrictions did not conflict with existing general public law and rules of the court. Id. at 331–32, 187 A.2d at 307–08. See also Comment, *Discipline of Attorneys in Maryland*, 35 MD. L. REV. 236, 237–41 & n.15 (1975) (reviewing Maryland cases that recognize judicial power to regulate the bar).

66. 299 Md. at 703, 426 A.2d at 940; see Hahn, 253 Md. at 583, 253 A.2d at 852; see also Lukas v. Bar Ass'n, 35 Md.App. 442, 447, 371 A.2d 669, 672, cert. denied, 280 Md. 733 (1977) (power to regulate and define practice of law vested solely in judiciary; statutes providing sanctions for unauthorized practice were merely in aid of and not a substitute for court's right to regulate).
tions also claim a judicial power to regulate the bar. When the legislature has failed to supervise the bar adequately, many courts have asserted an ancillary power to regulate. The limits most courts set on legislative authority, however, often correspond with the definition of adjudication. For instance, many courts will draw the line where a statute seeks to admit or disbar an individual. To the extent admission or disbarment constitutes adjudication, legislative pronouncements on the rights of individual attorneys amounts to usurpation. Waldron, although purporting to follow the majority rule, extended the concept of fundamental judicial power beyond the point justified by separation of powers principles.


68. See, e.g., In re Greathouse, 189 Minn, 51, 55, 248 N.W. 735, 737 (1933) (although legislation does not prohibit disbarred attorney's "unethical" practice, court can regulate because of its inherent self-protective power); In re Integration of the Nebraska State Bar Ass'n, 133 Neb. 283, 287, 275 N.W. 265, 268 (1937) (court has inherent power to promulgate rules for the integration of the bar without legislative action). Because an unsupervised bar or attorney misconduct embarrasses a court's functioning, the judiciary should invoke its inherent power in the face of legislative inaction. See supra notes 30-35 and accompanying text.

69. See, e.g., In re Cannon 206 Wis. 374, 397-98, 240 N.W. 441, 450 (1932) (statute reinstating disbarred attorney held unconstitutional).

70. The Court of Appeals has distinguished disbarment and disciplinary proceedings from the trial of an action at law as "an exercise of the disciplinary jurisdiction which a court has over its officers." Braverman v. Bar Ass'n, 209 Md. 328, 336, 121 A.2d 473, 477 (1955), cert. denied, 352 U.S. 830 (1956). Even if admission or disbarment is not adjudication, however, a court's interest in a competent and reliable bar arguably suggests that the court should have the final word whether an individual is admitted or disbarred.

71. Waldron's result resembles the minority of jurisdictions who expressly claim an exclusive power to regulate the bar. Those jurisdictions regard any legislation purporting to regulate attorneys as usurping judicial power. The weakness of this position has been exposed. See supra notes 36-38 and accompanying text. In Wajert v. State Ethics Comm'n, 491 Pa. 255, 261-62, 420 A.2d 439, 442 (1980), the Pennsylvania court struck down a statute analogous to § 56(c), which prohibited a former official from representing a person in any matter before the governmental body with which he had been associated for one year after he left that body. 65 PA. CONS. STAT. ANN. § 403(e) (Purdon 1980). As applied to a former judge, the court held the statute an unconstitutional infringement on the court's "inherent and exclusive power to govern the conduct of those privileged to practice law in this Commonwealth." 491 Pa. at 262, 420 A.2d at 442. The court did not elaborate on its holding, resting solely on its asserted power. In a footnote, however, the court did suggest that the statute could impair its functioning if applied to attorneys. The statute could have the effect
Analysis of governmental structure, history and judicial precedent thus indicates that the judicial authority to regulate the bar is narrow in scope. Judicial power to regulate the bar derives only from the judiciary's need to ensure effective performance of its adjudicatory duties. A broader power would arguably constitute an usurpation of legislative power, because legislative power to regulate is plenary, and is limited only by constitutional prohibitions.

C. Did Section 56(c) Violate Article 8?

The court held that section 56(c) violated the separation of powers provision because it neither aided the courts nor set minimum standards for admission to the bar. The court's analysis was incomplete even on its own terms, because the court did not explain why a statute designed to preserve the appearance of judicial impartiality was not an aid to the court. In any event, the court applied the wrong standard. Because regulation of the bar is neither an exclusive nor essential judicial power, separation of powers principles do not forbid unhelpful legislative regulations, only harmful ones. Unless section 56(c) adjudicates or inhibits judicial functioning, it does not violate the separation of powers doctrine. Section 56(c) did not usurp the court's trad-
tional function of deciding individual cases, as it did not admit, disbar, or adjudicate the rights of any individual. It did prohibit certain persons from practicing law; but it did so by defining a class, membership in which caused legal consequences to attach. Moreover, section 56(c), like typical legislative regulations, attempted to balance legitimate competing interests, viz., encouraging a reputable bench while maintaining a palatable retirement system. Nor did section 56(c) handicap the judiciary by drastically reducing the availability of qualified attorneys; the section applies to a relatively minute fraction of all Maryland lawyers, and its prohibition apparently was at their election anyway.

D. Implications

Waldron's ultimate impact is difficult to gauge. Taken at face value, the court's broad language leaves very little to legislative control — only the establishment of minimum standards for admission to practice. Because the court's assertion that section 56(c) "cannot realisti-

75. See supra notes 25–26 and accompanying text.
76. Whatever the legislature's intention, § 56(c) was an improvement over its predecessor, § 55(e), discussed supra at notes 4–5 and accompanying text. Both statutes plainly prescribed concurrent remunerative practice and pension receipt. Under § 56(c), electing to receive a pension foreclosed the option of practice for compensation; practice under § 55(e) sacrificed any further pension benefits. Although § 56(c) may have appeared more rigorous to a judge contemplating retirement, it presumably provided the option of deferring pension benefits if the retiring judge desired to return to practice, but was willing to forego immediate receipt of benefits. See supra note 7. Section 55(e), on the other hand, is less flexible. Section 56(c) thus balanced several competing interests. A retired judge may have chosen to practice following retirement (when he is more likely to be so inclined) although the state would not support his choice by paying him a pension at that time. On the other hand, the legislature may have wished to avoid § 55(e)'s draconian consequence of total pension forfeiture in later, post-practice years. Waldron even acknowledged the distinction between the legitimate establishment of minimum standards and the court's need to retain the power to adopt additional requirements. See 289 Md. at 699, 426 A.2d at 938.
78. See supra note 7; see also Case Comment, The Speedy Trial Act and Separation of Powers: United States v. Howard, 91 HARV. L. REV. 1925, 1929 & n.46 (1978) (potentially coercive impact of legislation conflicting with U.S. Const. art. III's guarantee of reliable compensation). The problem of inducing qualified attorneys "to make the enormous sacrifice of disbanding a carefully nurtured practice" to seek a judgeship has become increasingly serious. The Sun (Baltimore), Jan. 5, 1982, at A8, col. 4. Nevertheless, § 56(c) represents, if anything, a step towards remedying this situation. See supra note 76. Moreover, the court has recognized that pension benefits are "usually predicated on a condition that the pensioner should not resume the practice of law." Walker v. Montgomery County Council, 244 Md. 98, 102, 223 A.2d 181, 183 (1966).
79. See 289 Md. at 700–01, 426 A.2d at 939.
cally be considered a provision to aid the judiciary"80 conflicts with the statute's acknowledged purpose — preserving judicial integrity81 — Waldron does not define Hahn's "comfortable accommodation" between the legislature and the judiciary.82 A subsequent opinion suggests that Waldron does not herald a broad judicial redefinition of the court's powers; rather, the court appears eager to limit Waldron to regulation of the legal profession. In Commission on Medical Discipline v. Stillman,83 Dr. Stillman challenged, under the separation of powers provision, legislative authority to prohibit judicial stays of Commission orders revoking medical licenses. Although the issue became moot prior to decision, the court nevertheless made a point of discussing ancillary judicial powers. The court cited Waldron, noting that ancillary judicial power is self-protective in nature.84 The court went on to state: "'[Ancillary power] comprehends all authority necessary to preserve and improve the fundamental judicial function of deciding cases. . . . The test is not relative needs or judicial wants, but practical necessity in performing the judicial function. The test must be applied with due consideration for equally important executive and legislative functions.'"85 Although it is difficult to see how regulation of the legal profession is more inherently an exercise of judicial power than issuance of a stay pending appeal,86 Stillman suggests that Waldron is unlikely to have much effect on the overall balance of power between the legislature and the judiciary beyond regulation of the bar.

Despite Waldron's apparently limited reach, it remains a disturbing precedent. Because section 56(c) did not interfere with judicial functioning, the court's holding did nothing to preserve the integrity of a tripartite governmental system; rather, it only frustrated representative government. The court appeared to invalidate section 56(c) because it did not like the statute, thus substituting its own wishes for

80. Id.
81. See supra note 76 and accompanying text.
82. See supra notes 58-61 and accompanying text.
84. Id. at 400, 435 A.2d at 752-53.
85. Id. at 401, 435 A.2d at 753 (emphasis in original) (quoting Clerk of Court's Comp. v. Lyon County Comm’rs, 308 Minn. 172, 180-82, 241 N.W.2d 781, 786 (1976)).
86. The court in Stillman concluded that "[t]he power to issue a stay is not an inherent judicial power in the sense that it may never be limited or denied by legislative enactment. A stay is simply a tool that a court may use in the proper exercise of its authority." 291 Md. at 402, 435 A.2d at 753. One other Maryland case citing Waldron is In re Barton, 291 Md. 61, 432 A.2d 1335 (1981). In granting a disbarred attorney's petition for reinstatement, Barton cited Waldron for the proposition that it is the court's "ultimate responsibility to superintend the conduct of the Bar," although no constitutional question was raised. Id. at 63, 432 A.2d at 1336.
those of the public's representatives. Furthermore, the court actually may have damaged the judicial institution. Although insulating the judiciary from responsibility to the public aids the impartial decision of cases, *Waldron* actually could undermine public confidence in the judiciary because it smacks of self-interest.87

II. EQUAL PROTECTION

*Waldron* also held that section 56(c) violated the equal protection component of both the fourteenth amendment of the United States Constitution and article 24 of the Maryland Declaration of Rights.88 In so ruling, the Court of Appeals laid down new law. Considering it settled that the due process provision of article 24 has an equal protection component,89 the court concluded that both the state and the federal equal protection components require a statute regulating "important" rights to relate substantially to its purposes.90 The court apparently classified the right to pursue one's chosen profession as an important right warranting an intermediate standard of review.91

A. Equal Protection Under the Fourteenth Amendment

1. Rationale for Equal Protection — The fourteenth amendment's equal protection clause demands that legislators treat similar persons in similar ways.92 The legislature must determine that people are similar in relevant respects before it legitimately can treat them as a class for the purpose of pursuing a state goal. When reviewing a statute under equal protection, the court questions whether the statutory classifications are based on characteristics relevant to furthering legitimate state goals. In other words, the court asks how closely the statutory means fit the statutory ends.93

Only occasional statutes achieve a perfect fit between the statutory means and any particular state goal. Most are under-inclusive, over-

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87. See Kaufman, *supra* note 25, at 692–93 (impartial judiciary is the "hallmark of every true judicial tribunal"); Comment, *supra* note 27, at 800.
88. 289 Md. at 728–29, 426 A.2d at 954.
89. *Id.* at 704, 426 A.2d at 940–41. MD. CONST. DECL. OF RTS. art. 24 states: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."
90. 289 Md. at 713–14, 426 A.2d at 946.
91. *Id.* at 717–22, 426 A.2d at 948–50.
inclusive, or both,\textsuperscript{94} because the legislature often has subsidiary goals such as administrative convenience. An under-inclusive classification includes only those individuals who are similarly situated, but does not include others who are also similar for the statute's purposes.\textsuperscript{95} Conversely, over-inclusive laws affect all persons who are alike under the law, plus people who lack the relevant characteristics.\textsuperscript{96}

2. Statutory Regulation of Classes and Rights — The Court subjects a law regulating "suspect classes" to "strict scrutiny."\textsuperscript{97} Suspect classes are those groups who have "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."\textsuperscript{98} The Supreme Court has recognized race,\textsuperscript{99} alienage,\textsuperscript{100} and ancestry as suspect classes.\textsuperscript{101}

Laws subject to strict scrutiny violate the equal protection clause unless the state demonstrates that such laws are "necessary to promote a compelling governmental interest."\textsuperscript{102} Because the state carries such a heavy burden in these cases, very few statutes survive strict scrutiny.\textsuperscript{103}

Several Supreme Court decisions have suggested that a statute may warrant an intermediate standard of review if it burdens certain classes that, though not "suspect," share some of the characteristics of suspect classes.\textsuperscript{104} Thus the only classes to qualify for this middle tier scrutiny are those based on gender and illegitimacy.\textsuperscript{105} A statute satis-

\textsuperscript{94} Tussman & tenBroek, supra note 92, at 344–53.
\textsuperscript{95} Id. at 348.
\textsuperscript{96} Id. at 351.
\textsuperscript{97} The Supreme Court coined "suspect" class and "rigid scrutiny" in Korematsu v. United States, 323 U.S. 214, 216 (1944).
\textsuperscript{100} Graham v. Richardson, 403 U.S. 365, 372 (1971).
\textsuperscript{101} Oyama v. California, 332 U.S. 633, 640 (1948).
\textsuperscript{102} Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original).
\textsuperscript{103} Korematsu v. United States, 323 U.S. 214 (1945), is one of the few instances where the Court upheld a state classification based on race.
\textsuperscript{104} These classes generally are defined by immutable traits, are underrepresented in the political branches, and are the victims of stereotypes that have nothing to do with their actual ability. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).
fies intermediate scrutiny when the statutory means substantially promote important state ends.\textsuperscript{106}

Most classes, however, merit only "rational basis" scrutiny. Courts find a rational basis if the statutory means further the state ends.\textsuperscript{107} The court will invalidate the statute only if the legislative means are "wholly irrelevant to the achievement of the State's objective,"\textsuperscript{108} or if the statute has no legitimate purpose.\textsuperscript{109} Such laws are presumed valid and the party challenging the statute has the burden of proving it unconstitutional.\textsuperscript{110} The court defers to the legislature as the more appropriate body to determine the choice of means in pursuing a legitimate state goal.\textsuperscript{111} In \textit{Waldron}, for example, the burdened class — state judges — bore more of the traits that suspect or near suspect classes share.

The Supreme Court conducts a similar review of statutes impinging on certain rights. Like suspect classes, "fundamental rights" are subject to strict scrutiny.\textsuperscript{112} The Court defines fundamental rights as those found explicitly or implicitly in the Constitution.\textsuperscript{113} Rights thus
far deemed fundamental are first amendment rights,\textsuperscript{114} the right to vote in state elections,\textsuperscript{115} the right of interstate travel,\textsuperscript{116} the right of equal access to a criminal appeal,\textsuperscript{117} and the right to procreate.\textsuperscript{118}

The Supreme Court subjects non-fundamental rights to "rational basis" scrutiny. In contrast to its treatment of classes, the Court has not created an intermediate tier for quasi-fundamental or important rights.\textsuperscript{119}

Indeed, recent Supreme Court decisions seems to reject all attempts to identify additional rights deserving special protection.\textsuperscript{120} The Court's reluctance to identify "important rights" triggering heightened scrutiny under the equal protection clause may be based on a careful reading of that clause. On its face, the clause contemplates equal treatment of various classes, not special treatment for certain rights. The fourteenth amendment was designed to insure that rights extended to whites would also extend to blacks. It did not guarantee blacks any

weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

While some fundamental rights do not easily fit this dichotomy, \textit{Rodriguez} does indicate that the Court will not search for new rights.

\textsuperscript{114} Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 (1972) (explicitly guaranteed by Constitution).


\textsuperscript{117} Griffin v. Illinois, 351 U.S. 12, 18–19 (1956) (difficult to ground in the Constitution; more understandable as historically fundamental in American society).

\textsuperscript{118} Skinner v. Oklahoma \textit{ex rel.} Williamson, 316 U.S. 535, 541 (1942) (difficult to ground in the Constitution; more understandable as historically fundamental in American society).

\textsuperscript{119} Professor Tribe claims that the Court has treated "preferred" interests with intermediate scrutiny. L. Tribe, \textit{supra} note 105, § 16–31, at 1089–90. He characterizes Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), as a case that warranted intermediate scrutiny, because "ineligibility for employment in a major sector of the economy" is a preferred interest. However, \textit{Hampton} was invalidated under strict scrutiny because it involved a suspect classification. \textit{Id.} at 102–17. Tribe describes Bell v. Burson, 402 U.S. 535, 539–40 (1971), as protecting the important right of the individual "in retaining drivers' licenses." However, \textit{Bell} stands for the proposition that a licensee must be afforded an opportunity to be heard on the question of his liability for an accident before losing his driver's license. \textit{Id.} at 539–40. Tribe describes Vlandis v. Kline, 412 U.S. 441 (1973), as a case supporting the right to obtain "a higher education at an affordable tuition." While Justice White discussed this in his concurrence, the majority opinion invalidated the statute under rational basis on the grounds that an irrebuttable presumption is arbitrary and unreasonable. \textit{Id.} at 445–54. Eisenstadt v. Baird, 405 U.S. 438 (1972), was also couched in rational basis language, though a more demanding standard was actually employed. The \textit{Waldron} court described this collection as "Professor Tribe's amorphous characterization." 289 Md. at 711, 426 A.2d at 944.

\textsuperscript{120} \textit{See supra} note 113.
specific rights, though it has forced states to afford blacks the same rights they afford whites.\textsuperscript{121}

Although commentators generally favor some form of intermediate scrutiny,\textsuperscript{122} critics of intermediate scrutiny agree that the courts are pre-empting legislative prerogatives when they use this standard, which is less sharply defined than those involved in strict or rational basis scrutiny. As Justice Rehnquist said:

Even assuming that a court has properly accomplished the difficult task of identifying the "purpose" which a statute seeks to serve, it then sits in judgment to consider the so-called "fit" between that "purpose" and the statutory means adopted to achieve it. In most cases, and all but invariably if the court insists on singling out a unitary "purpose," the "fit" will involve a greater or lesser degree of imperfection. Then the Court asks itself: How much "imperfection" between means and ends is permissible? In making this judgment it must throw into the judicial hopper the whole range of factors which were first thrown into the legislative hopper . . . .

The fundamental flaw . . . is that there is absolutely nothing to be inferred from the fact that we hold judicial commissions that would enable us to answer any one of these questions better than the legislators to whose initial decision they were committed. Without any antecedent constitutional mandate, we have created on the premises of the Equal Protection Clause a school for legislators, whereby opinions of this Court are written to instruct them in a better understanding of how to accomplish their ordinary legislative tasks.\textsuperscript{123}

In any event, the Supreme Court consistently has relegated statutes affecting the right to employment to rational basis review.\textsuperscript{124} Accord-


\textsuperscript{123} Trimble v. Gordon, 430 U.S. 762, 784 (1977) (Rehnquist, J., dissenting); see also J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 32-33 (1980) (neither the constitutional text nor the intent of the framers tell us anything about which equal protection tier to adopt).

\textsuperscript{124} In Vance v. Bradley, 440 U.S. 93, 97, 108-09 (1979), the Court upheld a statute that required people in the Foreign Service to retire at age 60, even though Civil Service employ-
ingly, the Maryland Court of Appeals wrongly concluded that, because section 56(c) could not withstand heightened scrutiny, it was void under the fourteenth amendment's equal protection clause.

B. Equal Protection Under Article 24

Although the Maryland Constitution does not include an express equal protection clause, Waldron "deem[ed] it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights." The court relied upon two sources. First, the court cited earlier Court of Appeals decisions that purportedly agreed that article 24 has an equal protection component. Yet none of those cases are dispositive because the court avoided the issue by either assuming for the sake of argument that Maryland has an equal protection clause, or by declining to say precisely which constitutional provision invalidated the statute. Second, Waldron cited...
Maryland cases suggesting that article 24 and the fourteenth amendment apply in like manner and to the same extent. The significance of this analogy was suggested in a footnote, where the court explained that the process of incorporating an equal protection component into article 24 due process was "similar" to the analysis in *Bolling v. Sharpe*, in which the Supreme Court implied an equal protection element in the fifth amendment's due process clause.

Thus the court seemed to rely on the following syllogism: article 24 contains a due process requirement; *Bolling v. Sharpe* established that the fifth amendment's due process clause has an equal protection element; therefore, article 24, like the fifth amendment, has an equal protection component that will invalidate legislation affecting important rights unless the legislative means are substantially related to an important state objective.

The court's major premise is difficult to evaluate. Although prior Maryland cases construed article 24's "law of the land" clause as the equivalent of a due process clause, that construction is questionable. Yet even if article 24 is equivalent to the fifth amendment's due process clause, that equivalence does not justify the Waldron decision.

privileges and immunities of non-residents of this State . . . ."). Although the court in *Waldron* claimed that Cohen v. Frey & Sons, Inc., 197 Md. 586, 80 A.2d 267 (1951), rested on equal protection under article 24 alone, *Cohen* did not involve equal protection issues.

128. 289 Md. at 704-05, 426 A.2d at 941. Earlier case law was careful to limit the similarity to its effect on property. See, e.g., Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, 156, 321 A.2d 748, 755 (1974).

129. 289 Md. at 704 n.8, 426 A.2d at 941 n.8.


131. There is some doubt whether a court properly may equate article 24's "Law of the land" clause with the fifth amendment's due process clause. See Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 372, 464 (1911); Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 278-79 (1975); see also Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 412 (Md. 1838) (Although construing "the Law of the land" to mean "by the due course and process of the law," the court envisioned strictly procedural "due process" under article 24). Furthermore, commentators have criticized the notion that due process has a substantive element. See, e.g., Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976) (procedural due process can ensure a democratically accountable government, but it is misdirected to give it substantive content). There is also evidence that the framers attempted to draft precise, easily interpreted provisions that do not lend themselves to expansive constructions.

[A]bstractions are dangerous things to insert in the great organic law. Upon them new theories may be built, and around them novel doctrines generated, which may, in time, destroy all the fair proportions and harmony of the law itself, and finally war with its very vitality . . . . [T]he instrument . . . submitted for ratification, should be clear and explicit — free from all abstraction — free from all doubt and obscurity — so plain that he "who runs might read," and at a glance comprehend all its simple provisions. *Debates and Proceedings of the Maryland Reform Convention* 161 (Annapolis 1851).
The court's minor premise is true, but controversial. The Supreme Court decided *Bolling v. Sharpe* \(^{132}\) and *Brown v. Board of Education* \(^{133}\) on the same day. In *Brown*, the Supreme Court held that the fourteenth amendment's equal protection clause prohibited the states from maintaining racially segregated public schools. *Bolling* involved comparable discrimination in the District of Columbia school system, a federal organ exempt from the fourteenth amendment. \(^{134}\) *Bolling* held that the fifth amendment's due process clause, which governs the federal government, has an implicit equal protection element. The Supreme Court did not analyze available constitutional evidence, but said simply that "the concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive." \(^{135}\) The Court apparently reasoned that due process has an equal protection component because, in guaranteeing fairness, it requires that similarly situated people be similarly treated. \(^{136}\) Thus, the Court concluded that discrimination may be "so unjustifiable" that it is tantamount to a denial of due process.

Commentators have criticized the *Bolling* decision for its unprincipled constitutional analysis. \(^{137}\) But even if the Supreme Court properly

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\(^{133}\) 347 U.S. 483 (1954).

\(^{134}\) 347 U.S. at 498–99.

\(^{135}\) Id. at 499.

\(^{136}\) For discussion of the emptiness of the concept of treating similar people similarly, see Weston, *supra* note 121.


A literal reading of the fifth amendment indicates that due process emphasizes "process," not substantive rights. Even Professor Brest, a staunch defender of the result in *Bolling*, admits that it "is not supported by even a generous reading of the fifth amendment." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 233 (1980). Professor Ely has said:

I therefore confess I would have strained sorely to side with the Chief Justice had the language of the Fifth Amendment been able to bear his construction.

It's hard to see how it can, however. What is more, the fact that "due process," read responsibly, means due process is something we may be able to shrug off in the context of the Fourteenth Amendment, which contains other phrases that do seem to mean what "due process" has wrongly been read to mean. In the Fifth Amendment, however, the Due Process Clause stands alone.

J. Ely, *supra* note 123, at 32.

Although in *Bolling*, the Supreme Court stressed that the phrases "equal protection of the laws" and "due process of law" are not interchangeable, 347 U.S. at 499, the Court has since treated them as virtually interchangeable. *See* Vance v. Bradley, 440 U.S. 93, 94 (1979); United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 532–33 (1973).
implied an equal protection element in the fifth amendment's due process clause, the Supreme Court never has subjected the right to work to heightened scrutiny. Thus, Waldron's conclusion that article 24 contains an intermediate equal protection standard is questionable.

C. The Waldron Court's Equal Protection Analysis of Section 56(c)

Waldron indicated that certain classes of rights are subject to intermediate scrutiny. The opinion suggests that "when important personal rights, not yet held to merit strict scrutiny but deserving of more protection than a perfunctory review would accord, are affected by a legislative classification, a court should engage in a review consonant with the importance of the personal right involved." Although the court did not explicitly acknowledge that it was using an intermediate standard in reviewing section 56(c), the court's analysis demonstrates that it was using such a standard.

In defense of section 56(c), the Attorney General cited three state objectives, the satisfaction of any one of which would have enabled the statute to survive rational basis scrutiny. First, the Attorney General compared the judicial pension system to the Social Security system and argued that both systems were designed to replace earnings lost after income only if the beneficiary lacked outside income (substitute earnings rationale). Second, he argued that section 56(c) promoted the state interest in saving money (saving money rationale). Third, he noted that section 56(c) prevented the appearance of, and actual impropriety that may result from an ex-judge practicing before his former

138. 289 Md. at 713, 426 A.2d at 946. Middle tier language appears throughout the opinion. See, e.g., id. at 704, 426 A.2d at 940 ("However, when an enactment invades protected rights to life, liberty, property or other interests secured by the fundamental doctrines of our jurisprudence, there is reason to be especially vigilant in the exercise of our constitutional duty."); id. at 709, 426 A.2d at 943 ("important private interests or burdened classes;" court will "not speculate as to hypothetical justifications" for the statute); id. at 717, 426 A.2d at 948 ("vital personal interests . . . [that] are substantially affected by statutory classification"); id. at 718, 426 A.2d at 948 ("preferred status"); id. at 727-28, 426 A.2d at 953 ("When, as here, the burden created by the enactment denies persons a basic and important personal right, the inequality resulting from patchwork legislative demarcations expands to constitutional dimensions and cannot be sanctioned under the equal protection guaranties [sic]"). But see id. at 717, 426 A.2d at 948 ("We accordingly consider the statutory classification before us . . . under that broad generality of equal protection analysis already referred to as rational basis review."); id. at 727, 426 A.2d at 953 ("the General Assembly has drawn distinctions between persons which simply bear no relationship to the provision's objective.").


140. 289 Md. at 722-23, 426 A.2d at 950.

141. Id. at 724, 426 A.2d at 951.
colleagues (prevention of impropriety rationale).\textsuperscript{142}

The Court of Appeals rejected these ends as insufficient to sustain section 56(c). The court rejected the substitute earnings rationale because: (1) section 56(c) did not reduce benefits in proportion to the judge's outside income (so it did not in fact operate like Social Security), and (2) section 56(c) prevented judges from receiving their pensions while they practiced law or were employed by the federal, state, or local government, but did not limit income from other private sources.\textsuperscript{143} However, this did not make the statutory scheme irrational, merely under-inclusive. The Supreme Court has yet to invalidate a statute involving the right to employment, much less the right to practice law, on the grounds that it was under-inclusive.\textsuperscript{144} A legislature may draft an under-inclusive statute rather than sacrifice a subsidiary objective such as saving money or administrative convenience.

The court next rejected the saving money rationale as requiring a "virtual abdication [of] our duty to exercise judicial review."\textsuperscript{145} The court said that when important interests are involved, it would evaluate only "those purposes that are obvious from the text or legislative history of the enactment, those plausibly identified by the litigants, or those provided by some other authoritative source."\textsuperscript{146} The court refused to accept the saving money rationale as anything other than a justification after the fact, and hence, neither "plausible" nor "authoritative." Arguably, that rationale is "obvious from the text," because states generally do not want to spend more money than necessary.\textsuperscript{147} Although saving money alone does not justify line-drawing, section 56(c) is arguably rational because its limits on a pension are triggered only if the judge elects to practice.\textsuperscript{148}

The court also rejected the prevention of impropriety rationale. The court argued that section 56(c) was under-inclusive because it neither prevented judges from practicing before the bench without compensation, nor barred from practice those judges who declined their pension. As long as those two groups continued to practice, the
court contended, there was no rational basis for barring judges who practice for compensation and wish to receive their pension.\footnote{149}

There are, however, legitimate distinctions between the two classes sufficient to survive a deferential analysis. Although section 56(c) cannot prevent a judge from practicing for free, by proscribing compensation, it discourages such practice and therefore avoids the appearance of impropriety. Section 56(c) also eliminates the appearance of impropriety by severing a judge’s financial ties with the state.

Finally, the court reasoned that the statute was under-inclusive, because it did not prohibit other attorneys who receive state pensions from appearing before the court,\footnote{150} and over-inclusive because it prevented those judges who will never practice in the courtroom from practicing at all if they accept the pension.\footnote{151} Neither under-inclusiveness nor over-inclusiveness would have been fatal under rational basis scrutiny. When reviewing legislation under that more deferential standard, the Supreme Court has held that a legislature may choose to eliminate an evil one step at a time.\footnote{152} Also, it may choose overbroad means rather than abandon an end entirely,\footnote{153} because of the undue sacrifice of subsidiary goals.

The \textit{Waldron} court denied the legislature the power to balance goals. Although the legislature could have tailored section 56(c) to eliminate its over-inclusiveness, it would have sacrificed the goals of saving money and administrative convenience. The court prevents the best balancing when it intervenes on behalf of only one of the interests that the legislature considered when drafting the statute.

The court’s treatment of section 56(c) demonstrates that the court adopted an intermediate scrutiny. \textit{Waldron} apparently presumed the statute invalid, and placed the burden of proof on the state.\footnote{154} In a thorough analysis, Professor Tribe characterized intermediate scrutiny

\begin{itemize}
\item \footnote{149} 289 Md. at 724–25, 426 A.2d at 951–52.
\item \footnote{150} Id. at 725–26, 426 A.2d at 952.
\item \footnote{151} Id. at 726–27, 426 A.2d at 953.
\item \footnote{152} New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (quoting Katzenbach v. Morgan, 384 U.S. 641, 657 (1966)).
\item \footnote{153} Vance v. Bradley, 440 U.S. 93, 109 (1979). It is arguable that section 56(c) satisfies even a heightened review, because its means are less restrictive than its predecessor section 55(e), \textit{discussed supra} at note 4–5 and accompanying text. The state interests in exact compensation and the prevention of impropriety are greater than mere administrative convenience, and are arguably “important governmental interests.” It may well be that the degree of fit between the means and the ends is not “fair and substantial,” but the court does little to explain its basis for invalidating the statute.
\end{itemize}
as demanding (1) that the state end be important, (2) that there be a close fit between legislative means and ends, (3) that a statute be justified on the basis of a current articulation of legislative goals, and (4) that the state objective not be merely a post-hoc rationalization of the legislation.\textsuperscript{155} As the above discussion indicates, Waldron's equal protection analysis conforms to Tribe's description of intermediate scrutiny.

Tribe also suggested that courts using intermediate scrutiny may require "that the legal scheme under challenge be altered so as to permit rebuttal in individual cases even if the scheme is not struck down altogether.\textsuperscript{156}" This technique could have accommodated Judge Waldron in the instant case. The court could have said that in view of the tenuous fit between section 56(c) and the impropriety rationale, for example, the legislature must either eliminate the classification or adopt procedures to determine whether Judge Waldron will commit the mischief at which the impropriety rationale is actually aimed (i.e., whether he will later argue before the courts). The Court of Appeals may adopt this approach in future cases.\textsuperscript{157}

D. Does Article 24 Provide Greater Protection Than the Fourteenth Amendment?

Although the court was not justified in subjecting section 56(c) to intermediate scrutiny under the fourteenth amendment, it might have been justified in employing a heightened scrutiny if article 24 provides greater protection to Maryland residents than the fourteenth amendment does.\textsuperscript{158} Federal interpretations of the federal Constitution do not restrict state courts in construing their own constitution.\textsuperscript{159} Although the Court of Appeals stated that article 24 may extend more protection than the fourteenth amendment does, it claimed in Waldron to be providing parallel protection. No prior Maryland case has held that article 24 limits the General Assembly's action more severely than the four-

\textsuperscript{155} L. Tribe, \textit{supra} note 105, at 1082–86.

\textsuperscript{156} Id. at 1088.

\textsuperscript{157} Cf. Perkins v. Eskridge, 278 Md. 619, 635–46, 366 A.2d 21, 29–35 (1976) (state constitutional provision conflicting with federal Constitution may be construed "to remove the flaw and yet preserve our organic law to the fullest extent possible").


\textsuperscript{159} A state court does remain bound to its state constitution. \textit{See} Beauchamp v. Somerset County Sanitary Comm'n, 256 Md. 541, 547, 261 A.2d 461, 464 (1970).
teenth amendment does. 160 In fact, prior cases suggest that article 24 demands only that legislation not be arbitrary, i.e., that it have a rational basis. 161 Although some Maryland cases purported to require a "fair and substantial relation" between legislative ends and means, the Court of Appeals has said that it used the phrases "rational relationship" and "fair and substantial relation" interchangeably. 162 Accordingly, the Maryland court has never before subjected a statute to heightened scrutiny under article 24. The court did not justify its decision to do so now.

Even if article 24 has an implied equal protection element that justifies an intermediate standard of review, the right to pursue one's chosen profession does not warrant heightened scrutiny. Other state courts have gone beyond the scope of federal protection because their state constitutions endowed interests with special importance. 163 Maryland courts have consistently followed the rational basis test of Lindsley v. Natural Carbonic Gas Co.:

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify . . . but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.


land's constitution contains no special provision concerning the right to work. The court suggested that Maryland case law has been especially solicitous of the right to work, yet the court cited only five cases from the last half-century, all of which applied a rational basis standard, not intermediate scrutiny. It is difficult to see how the solicitous dicta of prior Court of Appeals decisions can create a right "vital to the history and traditions" of Marylanders or justify invalidating rational legislative value choices. Furthermore, statutes affecting the right to work involve issues of great complexity; they rest on a balancing of diverse values and legislatures can appropriately perform this balancing. There are no judicially manageable standards for balancing these values. Thus, rational basis scrutiny is the appropriate standard for reviewing statutes affecting the right to work.

Finally, Waldron's brand of intermediate scrutiny raises significant problems. Strong dicta suggest that the court adopted a sliding scale for determining the standard of review. This requires the court to fashion ad hoc standards of review commensurate with the importance of the infringed liberty, thereby maximizing the potential judicial usurpation of legislative choices. The court's standard for defining rights warranting some intermediate level of review is equally vague: "Article 24 acts to vindicate important personal rights protected by the Maryland Constitution or those recognized as vital to the history and traditions of the people of this State." But what standards will guide the court in identifying these rights? How long must a tradition exist? How many people must follow the tradition? What are the proper

164. 289 Md. at 720–21, 426 A.2d at 949–50.
165. See Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973) (statute treating female cosmetologists different from barbers held invalid); Bruce v. Director, Dep't of Chesapeake Bay Affairs, 261 Md. 585, 276 A.2d 200 (1971) (unreasonable to forbid Maryland crabbers and oystermen to practice throughout state waters), construed in Salisbury Beauty Schools v. State Bd. of Cosmetologists, 268 Md. 32, 60–61, 300 A.2d 367, 384 (1973) ("[A]ppellants' . . . reliance upon our holdings in Bruce . . . is misplaced. In Bruce, we held . . . that the statutes in question were invalid in that they represented 'an unreasonable exercise of police power' . . . ; we nonetheless recognized that 'the constitutional need for equal protection does not shackle the Legislature. It has the widest discretion in classifying those who are regulated and taxed. Only if the group is without any reasonable basis, and so entirely arbitrary, is it forbidden . . . .' "); Dasch v. Jackson, 170 Md. 251, 183 A. 534 (1936) (unreasonable to restrict paperhanging licenses geographically when occupation does not involve health or other valid exercise of police power).
166. See Gunther, supra note 122, at 24.
167. See supra note 138 and accompanying text.
168. 289 Md. at 715, 426 A.2d at 947.
sources for determining traditions? Why does an historical practice not found in the constitution justify the anti-democratic act of invalidating the legislative will of the majority? Waldron does not provide answers to these questions.169

E. Implications of Waldron's Equal Protection Analysis

By construing article 24 to include an equal protection component that will sometimes invoke an intermediate standard of review, Waldron clearly invites litigants to pursue equal protection claims.170 In a footnote, the court even reminded parties to raise both state and federal constitutional claims.171 Future litigation will likely revolve around which rights warrant heightened scrutiny under article 24.

The task of discerning those rights warranting special protection under article 24 may well prove Herculean. The most likely candidates are those grounded in the Maryland Constitution or Declaration of Rights.172 For instance, Maryland's Equal Rights Amendment qualifies gender for suspect class status.173 Although a dictum in Waldron suggests that the right to education is not fundamental,174 it may be eligible for intermediate scrutiny175 because article III, section 1 of the Maryland Constitution provides for "a thorough and efficient system of Free Public Schools."176

Another possibility is welfare rights. Article 43 of the Declaration of Rights provides "[t]hat the Legislature ought to encourage . . . the

169. For a further discussion of the problems surrounding a traditional values test, see J. ELY, supra note 123, at 75-78.

170. See J. ELY, supra note 123, at 32 (a litigant can frame nearly any suit as a federal equal protection action). The court's reminder that article 24 and the fourteenth amendment rarely vary, see 289 Md. at 704-05, 714, 426 A.2d at 941, 946, will control some of the potential litigation because parties are more likely to litigate when their rights are uncertain.

171. 289 Md. at 714 n.20, 426 A.2d at 946 n.20.

172. See supra note 113. Rights grounded in the Declaration of Rights are probably more supportable than the provisions in the Maryland Constitution, since the constitution per se only creates a government. See Anderson v. Baker, 23 Md. 531, 628 (1865).

173. "Equality of rights under the law shall not be abridged or denied because of sex." MD. CONST. DECL. OF RTS., art. 46.

174. 289 Md. at 724, 426 A.2d at 951.

175. See Somerset County Bd. of Educ. v. Hornbeck, No. 119A (Md. Baltimore City Cir. Ct. May 19, 1981) (wealth held sensitive or suspect, education held fundamental or important), cert. granted, No. 93 (Md. Oct. 14, 1981). But see 62 Op. Md. Att'y Gen. 338, 347 (1977) ("An examination of the history underlying [the 'education clause'] reveals that the framers of the 1867 Constitution were concerned with ensuring local control over the educational process and envisioned a system in which the quality of educational opportunity might vary according to the wishes of residents of different localities.").

176. MD. CONST. art. III, § 1.
general melioration of the condition of the People." This may be read more as an exhortation to the legislature, however, than a command.

Problems are likely to arise with regard to article 45 (Maryland's "little ninth amendment") of the Declaration of Rights, which states: "This enumeration of Rights shall not be construed to impair or deny others retained by the People." Although the framers deemed it a "mere assertion that there were rights not enumerated in the declaration of rights . . . that . . . were retained by the people," article 45 may well keep any imaginative claimant in court. Thus far, Maryland courts have not questioned whether article 45 is a source of substantive rights. Article 45, however, might justify a heightened scrutiny for statutes affecting a "right" of privacy.

If article 45 does not prove to be a Pandora's box, Waldron will. Waldron based the right to follow one's chosen profession on past Court of Appeals dicta, not on the constitution or earlier substantive law. The only limits suggested by Waldron are expressed in a single sentence: "Article 24 acts to vindicate important personal rights protected by the Maryland Constitution or those recognized as vital to the history and traditions of the people of this state."

CONCLUSION

With the resurgence of federalism, the Court of Appeals is understandably concerned with establishing its identity. Unfortunately, the Waldron decision was a poor mechanism for achieving this goal. One can sympathize with a state court that champions its state constitution, but not with a state court that exceeds its constitutional powers and thereby frustrates representative government.

179. See, e.g., Neville v. State, 290 Md. 364, 430 A.2d 570 (1981) (suggesting in dictum that a court can imply protected rights in the Maryland Constitution); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975) (although the trial court relied inter alia on article 45 to strike down an ordinance, the Court of Appeals relied on other constitutional provisions to overturn the statute). Recent scholarship suggests that despite a history of neglect, the ninth amendment can be a source of substantive rights. See J. Ely, supra note 123, at 34-41.
180. In Roe v. Wade, 410 U.S. 113, 153 (1973), the Court based the right to privacy on the fourteenth amendment, although the district court relied on the ninth amendment.
181. 289 Md. at 715, 426 A.2d at 947 (emphasis added). The Supreme Court has abandoned the practice of looking beyond the Constitution for important or fundamental rights. See supra note 113.
The dual holding was both unnecessary and dangerous. A mistaken constitutional holding cannot be corrected unless the constitution is amended or the court later overrules itself. In contrast, when a court invalidates a statute or changes the common law, the legislature can correct these errors in the ordinary course of business. Because constitutional error is more difficult to correct, courts should restrict themselves to one constitutional ground for any decision.

The court is under a duty to make no more law than the case requires. The separation of powers holding is arguably narrower because: (1) it rests on an express clause in the Maryland Constitution; and (2) it is confined to a closely circumscribed area — regulation of the bar. By relying only on the narrower holding, the court would have minimized the impact of any constitutional error.\textsuperscript{182}

\textsuperscript{182} See, e.g., W. Reynolds, supra note 32, at 148, 157–63.
XEROX CORP. V. COMPTROLLER—STATE INCOME TAXATION OF MULTISTATE CORPORATIONS

In Xerox Corp. v. Comptroller, the Court of Appeals of Maryland held that Maryland had properly taxed Xerox's royalty income and its interest income from loans to subsidiaries, even though the agreements providing for the payments were entered into and administered outside of Maryland. In reaching its decision, the Court of Appeals relied on two recent Supreme Court cases - Mobil Oil Corp. v. Commissioner of Taxes and Exxon Corp. v. Wisconsin Department of Revenue. Like Xerox, both Mobil and Exxon involved challenges to state taxation of income arguably earned outside of the taxing state.

Xerox Corporation is incorporated in and has its principal place of business in New York. During the years in question, its activities in Maryland were confined to selling and renting xerographic equipment and providing maintenance services. From its offices in New York and Connecticut, Xerox licensed the use of some of its patents, trademarks, copyrights, and business know-how to non-American subsidiaries and to nonaffiliated corporations in return for royalties. The Connecticut headquarters and Xerox's non-American subsidiaries also entered into interest bearing loan agreements whereby Xerox loaned the subsidiaries money when they were otherwise unable to secure loans. Xerox administered the royalty and loan agreements from its New York and Connecticut offices.

Xerox excluded the royalty and interest income from its Maryland income tax base, but the Comptroller of the Treasury disallowed the exclusion, assessing $102,559 additional tax for the years 1972, 1973 and 1974.

2. Id. at 131, 428 A.2d at 1212.
3. Id. at 148, 428 A.2d at 1220.
6. 290 Md. at 132, 428 A.2d at 1212. The parties stipulated the facts and the Court of Appeals ordered the record sealed on October 24, 1980. All facts relating to Xerox's activities come only from the court's opinion. Brief of Appellee at 7.
7. 290 Md. at 132, 428 A.2d at 1212. There was no allegation that these loans were not legitimate, arm's-length transactions.
8. Id. at 131-32, 428 A.2d at 1212.
9. Id. at 131, 428 A.2d at 1212. Xerox filed Maryland Corporation Income Tax Return (Form 500). Md. ANN. CODE art. 81, § 288(b), (c) (1980) imposes an annual income tax on the net income of every corporation having income allocable to Maryland. Art. 81, § 295 requires that a return be filed. Art. 81, § 280A(a) provides that Maryland taxable income is based on federal taxable income, modified by certain additions and subtractions set forth in...
1974. Xerox unsuccessfully appealed the assessment to both the Maryland Tax Court and the Circuit Court for Baltimore County. After Xerox had appealed to the Court of Special Appeals, the Court of Appeals granted certiorari before hearing by the intermediate appellate court.

Xerox argued, among other things, that in taxing the royalty and interest income Maryland violated the due process clause of the fourteenth amendment because the income was not related to Xerox's copier operations in Maryland. This argument was premised on Xerox's claim that the royalty and interest income did not stem from Xerox's interstate activity as a unitary business.

In taxing corporate income, Maryland, like most states, distinguishes between unitary and non-unitary businesses. A "unitary business" is one business conducted by the same corporation in several states. Problems arise in determining exactly what constitutes a uni-

§ 280A(b) and (c). Art. 81, § 316 determines the allocation of net income between Maryland and other states in which a corporation carries on business.
10. 290 Md. at 132, 428 A.2d at 1212.
12. This Recent Decision will deal only with Xerox's challenge regarding the nexus between a state and a corporation required by due process. In addition, Xerox argued that former MD. ANN. CODE art. 81, § 280A(c)(4) (repealed 1976), allowed subtraction of the interest income; that art. 81, § 316(c) intended there be a stronger nexus between Maryland and a corporation than the nexus required by federal due process; that the Maryland apportionment formula was "grossly inappropriate"; and that the Comptroller had abused his discretion in failing to make additional modifications to the apportionment formula as permitted by MD. ANN. CODE art. 81, § 316(c) (1980). See 290 Md. at 134–35, 428 A.2d at 1213.
13. U.S. CONST. amend. XIV, § 1 (emphasis added) states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." A corporation is a "person" within the meaning of the fourteenth amendment. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886).
17. Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 HASTINGS L.J. 42, 46 (1960). The unitary business principle was first developed to value interstate railroad systems for purposes of assessing ad valorem property taxes. The theory was that "a railroad must be regarded for many, indeed for most purposes, as a unit. The track of the road is but one track... and, except in its use as one track, is of little value... . It may well be doubted whether any better mode of determining the value of that portion of the
tary business, however, because there is no one generally accepted definition of the term.\(^8\) There are, instead, two generally accepted tests for identifying unitary businesses.\(^9\)

The first, called the "three unities test," classifies an interstate business as unitary if it reflects "(1) unity of ownership; (2) unity of operation as evidenced by central purchasing, advertising, accounting and management divisions; and (3) unity of use in its centralized executive force and general system of operation."\(^{10}\) According to the second test, "[i]f the operation of the portion of the business done within the state is dependent upon or contributes to the operation of the business without the state, the operations are unitary."\(^{21}\)

Most states have developed special formulas for taxing unitary businesses operating within their borders.\(^{22}\) These formulas reflect the realization that the profits a unitary business earns in a particular state track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." State R.R. Tax Cases, 92 U.S. 575, 608 (1876).

For a discussion of the development of the unitary concept in the area of ad valorem property taxes, see Dexter, The Unitary Concept in State Income Taxation of Multistate- Multinational Businesses, 10 URB. L. 181, 184-92 (1978); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 318-19 (1978); J. Hellerstein & W. Hellerstein supra note 16, at 520. The property tax concept was adopted to justify apportionment of income taxes.

18. See Hellerstein, supra note 16, at 148-51; see also Peters, Sup. Ct.'s Mobil Decision on Multistate Income Apportionment Raises New Questions, 53 J. TAX'N 36, 38 (1980) ("These conflicting and overlapping definitions of a unitary business have led the person most responsible for developing the concept to cast doubt on its meaningfulness as a means of limiting the applicability of an apportionment formula.") (citing Keesling, A Current Look at the Combined Report and Uniformity in Allocation Practices, 42 J. TAX'N 106, 109 (1975)).

19. Hellerstein, supra note 16, at 149. For a discussion of additional tests, see Dexter, supra note 17, at 192-98.


21. Edison Cal. Stores, Inc. v. McColgan, 176 P.2d 697, 702 (Cal.), aff'd. on rehearing, 30 Cal. 2d 472, 481, 183 P.2d 16, 21 (1947). Although the "contributes to or depends upon" test of Edison Cal. Stores, Inc. v. McColgan is often applied to determine whether one corporation is unitary, e.g., Xerox Corp. v. Comptroller, 290 Md. at 139, 428 A.2d at 1216, the Edison Stores case involved parent and subsidiary corporations. 30 Cal. 2d at 474, 183 P.2d at 18.

For a discussion of the "depends upon or contributes to" test, see G. Altman & F. Keesling, ALLOCATION OF INCOME IN STATE TAXATION 101 (2d ed. 1950). But see Keesling & Warren, supra note 17, at 48 ("If the activities within a given state are only dependent upon the activities out of the state, and do not contribute to the earning of income, they should not be credited with any portion of the income derived from productive activities outside the state."). For an application of the test, see Chase Brass & Copper Co. v. Franchise Tax Bd., 10 Cal. App. 3d 496, 95 Cal. Rptr. 805 (1970) (California Court of Appeal discussed specific aspects of a business showing the existence of a unitary business.), aff'd on rehearing, 70 Cal. App. 3d 457, 138 Cal. Rptr. 901 (1977).

may not reflect fairly the *income* arising from its in-state activities. For example, if a corporation manufactures goods in state A but sells all of its goods in state B, state A would receive no income tax if the measure of income were the profits earned in the state, even though state A provides all of the services connected with manufacturing.\(^2\) Similarly, if a corporation has its headquarters and factory in state A, warehouses the finished product in state B and sells the goods in states A, B, C and D, it is difficult to determine where the sales take place - in state A where the orders are accepted, state B from which the orders are shipped, or states A, B, C and D where the goods are delivered?\(^2\)

The impossibility of otherwise determining the fair share of income allocable to each state prompted states to apportion income from a unitary business by formula.\(^2\) The theory behind this allocation is that certain factors, such as property, payroll, and sales, accurately reflect the portion of income allocable to each state.\(^2\) Although the formula applies to all of the corporation's income, formulary apportionment does not seek to tax income earned outside the state. Rather, the formula is designed to utilize in-state and out-of-state factors to measure the income earned in the taxing state.\(^2\)

The Maryland apportionment formula is typical.\(^2\) It is based on three factors, each given equal weight\(^2\) and requires a corporation to calculate the ratios of property, payroll and sales values within Maryland to those of the corporation as a whole. These three ratios are aver-

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23. The Supreme Court rejected the idea that state taxation imposed such a burden on interstate commerce that it should be free from taxation. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918). The Court recognized that state taxes represented payment for the services provided by the states, Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940), and were necessary to make interstate "commerce bear a fair share of the cost of the local government whose protection it enjoys," National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756 (1967) (quoting Freeman v. Hewit, 329 U.S. 249, 253 (1946)). See also Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), which overruled Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951), thereby eliminating Spector Motor's distinction between taxes imposed on the privilege of doing business and those imposed on income.


27. A state may not give its tax laws extraterritorial effect. *See* J. Hellerstein & W. Hellerstein, *supra* note 16, at 695-96. But "income which cannot be taxed directly may be used as a tax measure." *Id.* at 525.


aged to yield the "Maryland Apportionment Factor,"\textsuperscript{30} which is then multiplied by the total income of the corporation (the "income base") to produce the amount of income allocable to Maryland.\textsuperscript{31} To illustrate: suppose a corporation with an income base of $250,000 has property with a value of $3x located in Maryland, total property everywhere (including the property in Maryland) of $6x, payroll in Maryland of $3x, total payroll for all operations of $4x, sales in Maryland of $lx, and total sales of $10x. The property factor would be $3x/$6x, or 0.5; the payroll factor, $3x/$4x, or 0.75; and the sales factor, $lx/$10x, or 0.1. The average factor (0.5 + 0.75 + 0.10 = 1.35, divided by three) would be 0.45. Income allocable to Maryland would be $112,500 (0.45 multiplied by $250,000 income base).

The Supreme Court has held that taxation by apportionment is consistent with due process if (1) there is "a rational relationship between the income attributed to the State and the interstate values of the enterprise," and (2) there is "a 'minimal connection' between the interstate activities and the taxing State."\textsuperscript{32} Thus the amount of income taxed cannot be arbitrary\textsuperscript{33} and there must be a "nexus" to give the state jurisdiction to tax the corporation.\textsuperscript{34}

To prove that a state has not fulfilled the "rational relationship" requirement, a taxpayer must show "by clear and cogent evidence"\textsuperscript{35} that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted . . . in that State.'\textsuperscript{36} The Court does not demand mathematical precision,\textsuperscript{37} allowing states considerable latitude in selecting their apportionment formulas.\textsuperscript{38}

\textsuperscript{30} The term "Maryland Apportionment Factor" can be found in Comptroller of the Treasury, Form 500 Maryland Corporation Income Tax Return 2 (1980).

\textsuperscript{31} Md. Admin. Code tit. 3, § .04.01.03 (1977).


\textsuperscript{33} Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 121 (1920); see J. Novak, R. Rotunda & J. Young, supra note 17, at 322.

\textsuperscript{34} See National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756 (1967); Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954) (there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax").


\textsuperscript{37} Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 455 (1979).

\textsuperscript{38} Moorman Mfg. Co. v. Bair, 437 U.S. 267, 274 (1978)(upholding a one-factor formula based only on sales made within the state). An income tax apportionment formula has been
The nature of the nexus required to satisfy the second prong of the due process test is not entirely clear. The Supreme Court frequently has said the nexus is satisfied "if the corporation avails itself of the 'substantial privilege of carrying on business' within the State." However, two recent Supreme Court cases suggest that the unitary business principle supplies the requisite nexus between the state and the corporation's interstate income, even when the corporation conducts some facet of its business entirely outside the taxing state.

The Supreme Court examined the nexus required by due process in Exxon Corp. v. Wisconsin Department of Revenue. Exxon divided its operations into functional departments and separately determined the profits of each. The corporation conducted only marketing in Wisconsin, not exploration and production, refining, or any activities of the other functional departments. Exxon conceded that the requisite nexus obtained between Wisconsin and the income from the corporation's marketing activities. It argued, however, that such nexus was in-

成功地挑战了仅一次由作为向该州分配不相称的收入。在Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 (1931), 纳税人证明平均17%的收入是归属于该州的，而66%到85%的收入被分配。Id. at 127-28. See also Norfolk & W. Ry. v. Missouri State Tax Comm'n, 390 U.S. 317, 326-27 (1968), in which a property tax formula was found to have produced a disproportionate amount of tax.


The sole constitutional test . . . is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business . . . here . . . given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction.

Although what constitutes "carrying on business" is determined under state law, 15 U.S.C. § 381 (1976) limits state taxation when the only activities within the state are "solicitation of orders . . . sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State." For a discussion of 15 U.S.C. § 381, see P. Hartman, supra note 15, at 479-86; Hartman, "Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course, 29 Vand. L. Rev. 353 (1976).

40. Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207, 225 (1980); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 439-40 (1980); see Hellerstein, supra note 16, at 121-22; see also 66 Cornell L. Rev. 805, 808 (1981) ("The unitary business concept enables states to establish the requisite minimum connection to a multistate integrated corporation, and hence to subject both its in-state and out-of-state income to taxation.").

41. 447 U.S. 207 (1980).

42. Id. at 211-12.

43. Id. at 212-13. Exxon Corp. was incorporated in Delaware and its general offices were located in Texas. Id. at 210-11.
sufficient to subject all of its operating income to apportionment. Exxon sought to use its separate accounting records (showing profits for each functional department) to establish that part of the income attributed to Wisconsin by formula was not in fact attributable to the state. The Supreme Court rejected Exxon's argument, noting that "a company's internal accounting techniques are not binding on a State for tax purposes." The Court pointed out that separate accounting failed "to account for contributions to income resulting . . . from the operation of the business as a whole, [so that] it becomes misleading to characterize the income . . . as having a single identifiable "source."

To exclude income from the apportionment formula, the Court held, a corporation must prove the income was derived from an "unrelated business activity" which constitutes a "discrete business enterprise." In other words, the court must find that the disputed activities and the business conducted in the state are not unitary. If, on the other hand, a corporation is a unitary business, the taxing state apparently may apportion the entire income. Exxon thus suggests that the unitary business principle provides the nexus to those activities not conducted in the state.

In Mobil Oil Corp. v. Commissioner of Taxes, the Supreme Court held that Vermont could apply its apportionment formula to dividends paid by subsidiaries and affiliates that formed "part of Mobil's integrated petroleum enterprise." Mobil Oil Corp. engaged in a worldwide petroleum business, handling its overseas business through subsidiaries. Mobil conducted only retail sales activities in Vermont.

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44. Id. at 220. All of the disputed income in Exxon was operating income. During the years in question, Wisconsin did not include dividends in the tax base of a nondomiciliary corporation. Hellerstein, supra note 16, at 141 (citing Wis. Stat. Ann. §§ 71.07(1)-07(2) (West 1969 & Supp. 1980)).

45. 447 U.S. at 220. Separate accounting means the company determines its gross profits by (1) computing the actual cost of, e.g., manufacturing, and then adding a "reasonable" profit (based on comparisons with other corporations, or simply on estimates), or (2) using prices at which the manufactured goods could be purchased from other corporations. Actual in-state costs and a percentage of general out-of-state costs are then subtracted from gross profits. See J. Hellerstein & W. Hellerstein, supra note 16, at 433-34. For a criticism of separate accounting, see Hellerstein, The Unitary Business Principle and Multicorporate Enterprises: An Examination of the Major Controversies, 27 Tax Executive 313, 315-17 (1975).

46. 447 U.S. at 221.
47. Id. at 222 (citation omitted) (quoting Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. at 438); see Butler Bros. v. McColgan, 315 U.S. 501, 508 (1942) ("centralized purchasing results in more favorable prices being obtained than if the purchases were separately made for the account of any one branch.").
48. 447 U.S. at 222.
49. 445 U.S. at 435, 439.
50. Id. at 428.
51. Id. Mobil is incorporated in, and has its commercial domicile in, New York. Id. at 427.
and excluded from its Vermont tax return dividends paid to the parent corporation by the non-American subsidiaries, arguing in part that the dividends should be allocated to the state of its commercial domicile because the dividends lacked sufficient nexus to Mobil's business activities in Vermont.

The Court first considered whether the income's foreign source precluded Vermont from including the income in the apportionment formula. It observed that assigning income to a "source" in the case of a unitary business was "misleading" because it failed to take into account "contributions to income resulting from functional integration, centralization of management, and economies of scale." Noting that the "linchpin of apportionability in the field of state taxation is the unitary business principle," the Court reasoned that because Mobil had not proven that the income was derived from a discrete business enterprise, the "income's foreign source did not destroy the requisite nexus with in-state activities."

The Court then questioned whether the form of Mobil's dividend income precluded Vermont from taxing it. Mobil had included all of what it considered to be its operating income in the Vermont tax base. Operating income is defined as income from the trade or business conducted by the corporation. Mobil excluded dividends received from its non-American subsidiaries, contending they represented nonbusiness income, or income derived from property not used in connection with the trade or business. Typical examples of nonbusiness income include rental income, dividends, interest, and gains and losses on sale of

52. Id. at 430.
53. Id. at 436; see Hellerstein, supra note 16, at 118. Mobil's state of commercial domicile, New York, imposed no tax on the dividends. 445 U.S. at 444. New York taxes dividends only to the extent the payor corporation conducts business in the state. Peters, supra note 18, at 38.
54. 445 U.S. at 438. The Court cited Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'r, 266 U.S. 271, 282 (1924) as foreclosing any argument that the non-American source of the income was sufficient to exclude the income from the apportionment formula. 445 U.S. at 438-39.
55. 445 U.S. at 439.
56. Id. at 439-40.
57. Id. at 437.
58. J. Hellerstein & W. Hellerstein, supra note 16, at 490. "Operating income" and "business income" are synonymous and used interchangeably.
60. Keesling, supra note 59, at 91.
capital assets.\textsuperscript{61} Traditionally, operating income has been apportioned among the states in which the corporation conducts its business, while nonbusiness income has been allocated to the state of commercial domicile.\textsuperscript{62}

The Supreme Court suggested that there is some continuing vitality to this distinction between operating and nonbusiness income by saying Mobil could not exclude the dividends unless it could "demonstrate something about the nature of this income that distinguishes it from operating income."\textsuperscript{63} Although the dividends represented income from stock arguably not \textit{used} by Mobil in its petroleum operations, the Court saw no reason to treat the dividends differently from operating income in this case. It said,

\begin{quote}
so long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must \textit{look} principally \textit{at the underlying activity, not at the form of invest-
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item J. \textsc{Hellerstein} \& W. \textsc{Hellerstein}, \textit{supra} note 16, at 490-91.
\item The distinction between operating (or business) income and nonbusiness income stems from early twentieth century notions of jurisdiction based on situs within the state. Each state was deemed to have the power "to tax income from property located and business done within their borders." J. \textsc{Hellerstein} \& W. \textsc{Hellerstein}, \textit{supra} note 16, at 490. Operating income (or business income) was earned by the business carried on in the state and was therefore apportionable among the states in which the unitary business was conducted. Nontaxable income, on the other hand, was derived from property not used in the business, and could only be taxed by the state having jurisdiction over the property. Nonbusiness income from real or tangible personal property was allocated to the state in which the property was physically located. Intangible assets were deemed to have their situs at the domicile of the owner (the business headquarters, or "commercial domicile") and the income from the intangible assets followed the situs of the assets pursuant to the maxim, "mobilia sequuntur personam" (moveables follow the person). Hence nonbusiness income was allocated to the state of commercial domicile. \textit{Id.} at 490-92; see \textsc{Appellant's Brief} at 29, \textsc{Mobil}; \textsc{Keesling}, \textit{supra} note 59, at 88-89; L. \textsc{Hale} \& P. \textsc{Kramer}, \textit{supra} note 16, at 31-33; see also \textsc{Dexier}, Taxation of Income from Intangibles of Multistate-Multinational Corporations, 29 \textsc{Vand. L. Rev.} 401, 421 (1976) (concluding that income from intangibles should be apportioned).
\end{enumerate}
\end{footnotesize}
ment, to determine the propriety of apportionability.64

Apparently the Court viewed the subsidiaries' activities as the source of the income, for it observed that "these foreign activities [of Mobil's affiliates and subsidiaries] are part of appellant's integrated petroleum enterprise."65 It might have viewed Mobil's ownership and management of the subsidiaries as the source of the dividend income. Mobil argued that the income stemmed from holding company activity and that, as such, it should not be subject to apportionment because the holding company was not part of the unitary business operating in Vermont. The Court, however, did not pay much attention to this argument, saying simply, "[n]or do we find particularly persuasive Mobil's attempt to identify a separate business in its holding company function."66 Without deciding the question, the Court noted that "[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business."67 The Court then concluded that Mobil had failed "to sustain its burden of proving any unrelated business activity on the part of its subsidiaries and affiliates that would raise the question of nonapportionability."68

Mobil's treatment of the due process issue implies that a parent corporation and its subsidiaries must be unitary for a state to include income received from a subsidiary in the parent corporation's apportionable income. Several commentators and the New Mexico

64. 445 U.S. at 440 (emphasis added).
65. Id. at 439.
66. A holding company is "a company that confines its activities to owning stock in, and supervising management of, other companies. A holding company usually owns a controlling interest in . . . the companies whose stock it holds." BLACK'S LAW DICTIONARY 865 (5th ed. 1979).
67. 445 U.S. at 440.
68. Id. at 442.
69. Id.
70. See Keesling, supra note 59, at 91 ("The Court . . . concluded that the dividends . . . were declared from worldwide unitary business income."); Peters, supra note 18, at 37 ("The Court found that many of the subsidiaries and affiliates . . . were engaged in business enterprises that formed part of Mobil's integrated petroleum business. Apparently, this was sufficient to establish a unitary business relationship, or, at least, to find that Mobil had not sustained its burden of [proof] . . . ."); Hellerstein, supra note 16, at 125 ("As the Court approached the case, then, Vermont's power to include Mobil's foreign source dividends in the company's apportionable tax base turned on the question whether such dividends constituted income from a worldwide unitary business . . . ."); Rudy, The California Unitary Tax Concept as Applied to the Worldwide Activities of Foreign Corporations: A Modern Commerce Clause Analysis, 15 U.S.F. L. Rev. 371, 390 (1981) ("The Court regarded the entire business of the taxpayer as an integrated unit . . . ."); 66 CORNELL L. Rev., 805, 805 (1981) ("Mobil . . . minimizes the importance of corporate form.").
Supreme Court\textsuperscript{71} have so interpreted \textit{Mobil}. However, other commentators\textsuperscript{72} and the Idaho Supreme Court\textsuperscript{73} have viewed \textit{Mobil}'s language regarding the relationship of the parent and subsidiaries as dicta. In their estimation, the Court's holding was based upon a determination that Mobil (i.e. the parent corporation) was unitary. The dispute as to the meaning of \textit{Mobil} is central to the question whether the Maryland Court of Appeals properly decided \textit{Xerox}.\textsuperscript{74}

\textbf{THE XEROX CASE}

Relying on \textit{Exxon} and \textit{Mobil}, the Court of Appeals of Maryland rejected Xerox's claim that Maryland lacked sufficient nexus to its royalty and interest income.\textsuperscript{75} The court determined that Xerox's American operations were unitary, but did not examine the relationship between the parent and subsidiary corporations. The court saw no need to conduct such an examination because it interpreted \textit{Mobil}'s holding as applicable only to "certain kinds of investment income, such as dividend income."\textsuperscript{76} Because \textit{Xerox} did not involve dividend income, the court concluded that, as in \textit{Exxon}, "[t]he appropriate due process inquiry here centers around the relationship between the activities that produced the royalty and interest income and Xerox's business activities in Maryland rather than on the relationship between Xerox and the

\begin{footnotesize}
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\item Dexter, \textit{Tax Apportionment of the Income of a Unitary Business: An Examination of Mobil Oil Corp. v. Commissioner of Taxes of Vermont}, 1981 B.Y.U. L. Rev. 107, 116 ("Although some of the language in \textit{Mobil} clouds the resolution of these questions . . . \textit{Mobil} does not support the proposition that the apportionability of dividend income depends upon the income being received from payor corporations conducting businesses related to the payee corporation."); Corrigan, \textit{Mobil-izing Interstate Taxation}, Tax Notes, Oct. 12, 1981, at 803, 805 n.6 ("The Court found it easy to consider the dividends in \textit{Mobil} to be apportionable business income because they were received by Mobil from other corporations with which it was engaged in a unitary business. But \textit{Mobil} provides no basis for thinking that dividends received by Mobil would not have been considered to be apportionable business income even if they had been received from corporations with which Mobil was not engaged in a unitary business.").
\item N. Borden, R. Rombro, C. Shelton, \textit{Maryland Taxes} (Md. Inst. for Continuing Professional Educ. of Lawyers, Inc. 1981) seems to support this interpretation of \textit{Mobil}. \textit{Id.} at 4-13 ("The Court in \textit{Xerox} [Corp. v. Comptroller, 290 Md. 126, 428 A.2d 1208 (1981)] relied upon . . . \textit{Mobil} . . . where, in the absence of proof of a discrete business enterprise, unrelated to the unitary business of the parent corporation, foreign source dividend income of the parent was held subject to Vermont apportionment.").
\item See \textit{infra} notes 85-90 and accompanying text.
\item 290 Md. at 145, 428 A.2d at 1219.
\item \textit{Id.} at 143, 428 A.2d at 1218.
\end{enumerate}
\end{footnotesize}
In finding that the activities conducted in Maryland were part of the unitary business conducted by Xerox in America, the Court of Appeals looked first to the "three unities test." The court noted that the copier operations and the activities producing the royalty and interest income were not the activities of separate corporate entities, but the activities of one corporation. It pointed out that the royalty and interest producing activities were not even conducted by a separate corporate division. Hence there was unity of ownership and operation. In addition, the court found that Xerox had failed to show there was no unity of use: it dismissed Xerox's arguments that the copier operations generated income in excess of its business needs so that income from the royalties and loans was not used to meet operational needs, and that there was no economic interdependence between the copier operations and the activities resulting in the licenses and loan agreements.

Turning to the "contributes to or depends upon test," the court reasoned that some of the know-how licensed to the subsidiaries must have been used in Xerox's domestic copier operations and that Xerox's domestic operations were enhanced by treating the intangibles giving rise to the royalties as assets on balance sheets. The court also observed that at least a portion of the money used both to develop the intangibles and to provide the principal loaned to the subsidiaries must have come from the copier business. Finally, the court pointed out that Xerox made the loans to its subsidiaries when they were otherwise unable to secure financing, and this arrangement benefited Xerox because the "continued vitality" of the non-American subsidiaries was of obvious importance to Xerox. The Court of Appeals then concluded that Maryland properly had included Xerox's royalty and interest income in the apportionment formula because Xerox had failed to

77. Id. at 144, 428 A.2d at 1218.
78. Id. at 140, 428 A.2d at 1216, discussed supra at note 20 and accompanying text. The term "unitary business" as used in Md. Ann. Code art. 81, § 316(c) (1980) is not defined in either the statute or the regulations.
79. 290 Md. at 140, 428 A.2d at 1216.
80. Id. at 140-41, 428 A.2d at 1216-17, discussed supra at note 19 and accompanying text.
81. 290 Md. at 140-41, 428 A.2d at 1216, accord Montgomery Ward & Co. v. Commissioner of Taxation, 276 Minn. 479, 151 N.W.2d 294 (1967); Great Lakes Pipe Line Co. v. Commissioner of Taxation, 272 Minn. 403, 410, 138 N.W.2d 612, 617 (1965) (credit standing of company improved by showing investments as assets), appeal dismissed, 384 U.S. 718 (1966).
82. 290 Md. at 141, 428 A.2d at 1216; see also Qualls v. Montgomery Ward & Co., 266 Ark. 207, 216, 585 S.W.2d 18, 25 (1979)("The funds for loans... come from Ward's working capital cash.").
“prove that the income was derived from unrelated business activity that constituted a discrete business enterprise.”

The Court of Appeals interpreted Mobil as based on the “finding that the foreign payor corporations and Mobil were part of a unitary business.” However, the court read Mobil as requiring an examination of the relationship between a parent corporation and subsidiary only in cases involving “certain kinds of investment income such as dividend income.” Xerox’s royalty and interest income were not considered by the court to be this kind of investment income, so the court did not examine the underlying relationship between Xerox and its non-American subsidiaries. The court should have questioned more carefully whether there was any reason to distinguish Xerox’s interest income from Mobil’s dividend income.

The dividends in Mobil superficially appeared to be nonbusiness income, as they represented income from stock not used in the petroleum business. Similarly, Xerox’s interest appeared to represent income from loans not used in its copier business (whereas the royalties were income from know-how used in the copier business).

84. 290 Md. at 145, 428 A.2d at 1219. The Court of Appeals could have cited Comptroller v. Diebold, Inc., 279 Md. 401, 369 A.2d 77 (1977), aff’d, Diebold, Inc. v. Comptroller, [2 Md.] St. Tax Rep. (CCH) ¶ 200-750 (T.C. Apr. 24, 1975), as an example of a “discrete business enterprise.” Diebold, which manufactured and sold bank and office equipment, acquired Young and Selden, an existing company that printed checks and business forms. The Tax Court held that the two did not form a unitary business because Young and Selden continued to maintain separate accounting, sales and management functions, and the two companies manufactured and sold different products. Diebold, ¶ 200-750, at 10,738. The Tax Court viewed Butler Bros. v. McCollan, 17 Cal. 2d 664, 106 P.2d 334 (1941), aff’d, 315 U.S. 501 (1942), as requiring such a degree of interdependence that the individual stores “could not function” without their regional warehouses and central management. Diebold, ¶ 200-750 at 10,738. Diebold did not have “the unity of use, management, ownership and purchasing which characterizes a unitary business.” Id. The unusual facts in Diebold probably explain the Xerox court’s failure to examine Diebold. Young and Selden was purchased as an existing business, continued as a separate business, and sold as an existing business four years later. Id. at 10,737-38.

85. 290 Md. at 143, 428 A.2d at 1218.
86. Id. The Supreme Court’s opinion reveals no reason for such a limitation. See Dexter, supra note 72, at 119.
87. 290 Md. at 144, 428 A.2d at 1218.
88. Keesling, supra note 59, at 97 (“the Mobil holding . . . should also be applicable to . . . interest on loans to subsidiaries”). But see Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 430 n.6 (1980) (“Appellant . . . no longer presses its claim that interest . . . should have been excluded from Vermont’s preapportionment tax base.”).

The Court of Appeals may have been persuaded by the Comptroller’s argument that “[a] dividend is not operational. It is a direct measure of profit of a subsidiary . . . .” Xerox’s interest and royalty income were fixed amounts, payable before the profits of the subsidiaries were calculated. Brief of Appellee at 47-48.

89. See Keesling, supra note 59, at 91 n.12 (“Income from the sale of licensing of copyrights or patents developed and used in a business likewise constitutes apportionable busi-
mine the apportionability of the dividend income, *Mobil* looked to see if the parent corporation and its subsidiaries were parts of the same unitary business.\textsuperscript{90} It would appear that the Court of Appeals should similarly have examined the relationship between the parent and subsidiary corporations involved in *Xerox* to determine the apportionability of the interest income.

Even if *Mobil* means that the apportionability of income that superficially appears to be nonbusiness income depends upon the relationship between the parent and subsidiary corporations, the question remains whether the apportionability of such income should be tested by a different standard than that applied to operating income. The distinction between the two types of income is illusive and is based on the obsolete notion that jurisdiction to tax depends upon situs of the property taxed in the state.\textsuperscript{91} *Mobil* itself suggests that, at least in certain circumstances, nonbusiness income should be equated with income from a non-unitary business function.\textsuperscript{92}

William D. Dexter, general counsel for the Multistate Tax Commission, has argued persuasively that *Mobil* does not require that the payor and payee corporations be unitary.\textsuperscript{93} He pointed out that, although the Supreme Court based its decision upon "the relationship between Mobil's unitary operations and the businesses of its affiliated corporations,"\textsuperscript{94} the Court specifically stated that it was not deciding the issue of apportionability "[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State."\textsuperscript{95} Dexter saw "no reason to conclude *Mobil* would limit the apportionability of dividends to only those cases . . . where the payor corporations and payee corporation are engaged in related business activities."\textsuperscript{96} Instead he argued that the determinative issue should be whether the recipient corporation is a unitary business.\textsuperscript{97} The cases relied on by the *Mobil* Court in setting forth its "general princi-
pies" of state taxation of income earned in interstate business all looked to the unitary nature of the recipient of the income. Although all of these cases involved a single corporation, Dexter found "nothing in Mobil that conflicts with these holdings." Thus

all income related to the conduct of a unitary trade or business, irrespective of its nature or source, is subject to fair apportionment among the states. Both the [Mobil] Court's conclusion that the unitary concept is the linchpin of apportionability and the cases the Court relied on specifically support this proposition.100

If, contrary to Dexter's reasoning, Mobil does require a showing that the parent and subsidiary are unitary, then the Supreme Court has departed radically from the theory underlying apportionment, namely that a taxpayer must be unitary. Unless a state has adopted combined apportionment,101 only the parent is subject to state taxation, not the subsidiary. Although dividends represent earnings of the subsidiaries, they also represent a return on the parent's investment in stock of the subsidiary.102 As such, they are income to the parent. Because dividends are income to the parent, the unitary business doctrine should give a state the right to tax dividends if the state has sufficient nexus to the interstate activities of the unitary corporation.103

98. 445 U.S. at 436-37.
100. Id. at 131.
101. If several affiliated corporations are part of a unitary business, combined apportionment (combined reporting) treats them together to determine the tax liability of the corporation(s) conducting business in the state. The income base is the total net income of all of the corporations, with inter-company transactions (such as dividends) eliminated. The property, payroll and sales values of all of the affiliated corporations are included in the denominator of the factors. The numerator of the three-factor fractions is the value of property, payroll and sales located in the taxing state. See Keesling, supra note 18, at 106 ("the purpose of the combined report is to insure that the income of a business . . . shall be determined and apportioned in the same manner regardless of whether the business is conducted by one corporation or by two or more affiliated corporations."); Corrigan, supra note 72, at 807-08 (illustration of computations of tax using combined reporting). See also L. HALE & R. KRAMER, supra note 16, at 79-105; J. HELLERSTEIN & W. HELLERSTEIN, supra note 16, at 520-26.

If the state combines corporations operating beyond the continental United States, the method is referred to as worldwide combination. See id. at 538-41. Compare the Maryland apportionment formula, discussed supra at text accompanying notes 29-31, which taxes only separate corporate entities. It is unlikely that Maryland courts could adopt combined reporting because MD. ANN. CODE art. 81, § 295 (1980) requires affiliated corporations to file separate returns.

103. American Smelting & Refining Co. v. Idaho State Tax Comm'r, 99 Idaho 924, 938,
In *ASARCO Inc. v. Idaho State Tax Commissioner*, the Idaho Supreme Court recently adopted this reasoning, stating:

Those dividends are clearly part of ASARCO's income and it is unquestioned that there is a sufficient connection between ASARCO and this state to constitutionally permit the state to tax its proper share of ASARCO’s income . . . . The due process clause . . . [is satisfied when] the acquisition, management or disposition of the underlying asset [i.e., Mobil's “holding company function”] . . . is an integral or necessary part of the taxpayer's unitary business, a part of which is conducted in this state.¹⁰⁴

The Supreme Court has granted certiorari in *ASARCO* and will soon hear oral argument.¹⁰⁵ If the Court upholds the Idaho decision, it will clarify its opinion in *Mobil*, negating any suggestion there that the parent and subsidiary corporations must be unitary for a state to tax income of the parent from the subsidiary. Such a decision would justify Maryland's continuation of the practice ratified by the Court of Appeals in *Xerox* - apportioning all income of a unitary business operating within the state.


¹⁰⁴. *Id.* at 938, 592 P.2d at 53 (emphasis added). The Multistate Tax Commissioner sought to apportion only dividends from payor corporations conducting businesses related to ASARCO's non-ferrous metals business. According to the Multistate Tax Commissioner's Brief, quoted in *TAX NOTES*, Oct. 12, 1981, at 840, this limitation was consistent with *Mobil*: “*Mobil* does not limit the apportionability of dividends to only those cases or circumstances where the payor corporations and the payee corporations are engaged in a single unitary business or in similar lines of business, but rather, all 'net income' received from stock investments held in connection with the payee's unitary business operations is subject to apportionment.” It is arguable that *Mobil* could be so read, and it is clear that the dividend payors selected by the Multistate Tax Commission engaged in businesses connected with ASARCO. However, the wording of the *ASARCO* opinion is not so limited.

¹⁰⁵. *ASARCO Inc. v. Idaho State Tax Comm'r* will be argued together with *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 95 N.M. 519, 624 P.2d 28 (1981), *cert. granted*, 102 S. Ct. 86 (1981). The New Mexico court held that Woolworth's dividends from non-American subsidiaries were properly included in the tax base because “Woolworth was conducting a unitary business with its foreign subsidiaries . . . .” *Woolworth*, 95 N.M. at 533, 624 P.2d at 38 (emphasis added).
In Poffenberger v. Risser\(^1\) the Maryland Court of Appeals held that in all civil actions the discovery rule is generally applicable to determine when a cause of action accrues under the statutes of limitations.\(^2\) In other words, the cause of action accrues and the statute begins to run when the plaintiff knew or reasonably should have known of the wrong done to him by the defendant.\(^3\) The court also determined that actual knowledge,\(^4\) not constructive knowledge,\(^5\) of the wrong was necessary to trigger the running of the statute of limitations.\(^6\) This case represents the final step in a long judicial process\(^7\) expanding the application of the discovery rule\(^8\) in statute of limitations controversies in Maryland.

2. The particular statute in Poffenberger was the three year statute of limitations defined in MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1980), which provides: “A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.” Nevertheless, the holding of the case apparently applies to all statutes of limitations which allow the court to determine when a cause of action accrues. See infra note 24. Consequently, other statutes of limitations, such as § 5-105 (one year limitation for libel, slander, assault, battery) and § 3-904 (wrongful death statute with limitation of three years), apparently are included in the broad Poffenberger holding.
3. 290 Md. at 636, 431 A.2d at 680.
4. The Poffenberger opinion defines actual knowledge as direct information communicated to the party or the existence of circumstances that should lead a diligent party to the knowledge of a principal fact. Id. at 637, 431 A.2d at 681.
5. Constructive knowledge is a legal presumption that a party cannot controvert. Baltimore v. Whittington, 78 Md. 231, 235-36, 27 A. 984, 985 (1893). For example, deeds properly recorded, information in public records, judicial and probate proceedings of which a party should be aware, and letters received by a party are considered information providing constructive notice. See Symposium on Statutes of Limitation, 9 U. KAN. L. REV. 179, 189-92 (1960-1961). Because the information from such sources creates a strong presumption of actual knowledge, the law holds the knowledge to exist. See 58 AM. JUR. 2D Notice § 6 (1971).
6. 290 Md. at 637, 431 A.2d at 680.
7. Over 50 years of decisionmaking was required to expand the discovery rule generally to all plaintiffs in civil actions. See infra notes 49-70 and accompanying text.
8. The discovery rule, as defined in Poffenberger, states that a plaintiff’s cause of action arises when he has actual knowledge of the harm done to him by the defendant. 290 Md. at 636, 431 A.2d at 680.

Harm may be defined in common terms as an injury to person or property, Lauerman, The Accrual and Limitation of Causes of Action for Nonapparent Bodily Harm and Phys...
The dispute between Poffenberger and Risser stemmed from a series of events that began in 1972. In the summer of that year, Poffenberger purchased an unimproved lot subject to a development restriction requiring that no building be located within fifteen feet of any side lot line. Shortly thereafter he contracted with Risser to construct a home in compliance with the side lot restrictions. The home, which was to be located in the center of the lot, was completed in December, 1972, and the plaintiff took up residence in January, 1973. Three years later, Poffenberger's neighbor surveyed an adjoining parcel in preparation for building a home. As a result of the survey, Poffenberger discovered that his house had been built only eight feet from the south line of the adjoining lot. He therefore brought suit against Risser in May, 1977, alleging negligence and breach of contract.

In a motion for summary judgment, defendant Risser raised the three-year statute of limitations as a bar to the suit. The Circuit Court for Washington County, in granting summary judgment, held that a reasonably diligent person would have discovered that a wrong had occurred in January, 1973, the date Poffenberger took up residence in his new home. Therefore, the statute of limitations barred the cause of action which was brought four years after the date it accrued.

The Court of Special Appeals found that a factual dispute existed as to when the plaintiff could have diligently discovered the wrong, but nevertheless, affirmed the circuit court and cited three grounds supporting the grant of summary judgment. First, it observed that the general rule in Maryland was that the statute of limitations begins to run from the time the injury occurs, not from the time the wrong is discovered. Finding that the wrong occurred, at the latest, in January, 1973,
the court held that the statute of limitations barred the plaintiff's suit.15 Second, the court stated that a property owner had the burden of constructive notice regarding the location of his property lines.16 Thus, the court reasoned that even if the discovery rule applied in this case, the constructive notice provided by the plats recorded in 1972 triggered the running of the limitation period.17 Finally, the court noted that the violation of the setback restriction was so obvious that a diligent plaintiff should have discovered it.18

The Court of Appeals granted Poffenberger's petition for certiorari and explicitly rejected each of the three findings of the lower appellate court. First, it held that the discovery rule, not the time of injury rule, applies generally in all civil actions.19 Second, it determined that constructive notice is not sufficient to trigger the running of the limitation period.20 Third, it remanded the case for a resolution of the factual dispute concerning when the plaintiff knew, or through an exercise of due diligence should have known, of the setback encroachment.21

If the court had simply applied the discovery rule to the facts of this case, the decision would not have been very significant, for the court recently has been applying that rule in an increasing variety of cases.22 In Poffenberger, however, the court has announced a principle of general application.23 Thus Maryland has become one of the few jurisdictions to pinpoint the date of discovery, rather than the date of injury, as the accrual date24 for civil causes of action.25 By rejecting the

15. 46 Md. App. at 606, 421 A.2d at 94.
16. Id. at 605, 421 A.2d at 93. For a discussion of constructive notice, see supra note 5.
17. 46 Md. App. at 606, 421 A.2d at 93.
18. Id.
19. 290 Md. at 636, 431 A.2d at 680.
20. Id. at 637, 431 A.2d at 681.
21. Id. at 638, 431 A.2d at 681.
22. See cases cited infra note 56.
23. 290 Md. at 639, 431 A.2d at 681 (Rowadowsky, J., concurring).
24. "The typical statute of limitations provides that the period within which an action may be brought is to be computed from the time the 'cause of action accrues.'" On the accrual date there exists the necessary "combination of facts or events which permits [the] maintenance of a lawsuit." Developments in the Law - Statutes of Limitation, 63 HARV. L. REV. 1177, 1200 (1950) [hereinafter cited as Developments].
traditional formula for determining the accrual date, the Court of Appeals has alleviated possible unfairness to plaintiffs, but it perhaps has compromised the legitimate objectives of a statute of limitations.

Statutes of limitations are designed to insulate defendants and the judicial system from stale claims. The time of injury rule provided them effective protection. When triggered by the occurrence of an injury, the statute precisely limited the defendant's exposure to liability, enabling him to preserve evidence, protecting him from litigating stale claims, and eliminating unfair surprise. Maryland courts consistently have recognized the need to protect the defendant's reasonable expectation of repose.

The time of injury rule, however, failed to assure fair treatment of some plaintiffs. It forced them to bring suit within an arbitrarily determined period of time and did not discriminate between just and un-
just claims, or between avoidable and unavoidable delay. If the plaintiff slumbered on his rights for any reason, the suit could be barred.

The harshness of this rule prompted both the legislature and the courts to create exceptions to it. Some of the exceptions may have been mandated by Maryland's constitutional provision guaranteeing reasonable access to the courts. Because every person is to be granted reasonable access to the courts, and because the statutes of limitations are designed to provide an adequate period of time for a person of ordinary diligence to bring suit, suspensions that recognize a plaintiff's diligence and allow reasonable access within a reasonable period of time are inherently logical and necessary. Accordingly, the legislature has suspended limitations when a defendant's absence from the state or his fraudulent conduct prevented a plaintiff from pursuing a

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32. See infra notes 35-40 and accompanying text.
33. MD. CONST. DECL. OF RIGHTS, art. 19 requires:
That every man, for any injury done to him in his person or property, ought to have a remedy by the course of the Law of the land and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.

35. Under MD.CTS. & JUD. PROC. CODE ANN. § 5-205(a) (1980), if a person, after incurring a debt, moves or leaves the state making it difficult for his creditors to find him, that person cannot rely on the statute of limitations to protect him. See Maurice v. Worden, 52 Md. 283, 294-95 (1879) for an application of the statute.
36. MD.CTS. & JUD. PROC. CODE ANN. § 5-105(b) (1980), provides that if a person is absent from the state when a cause of action arises against him, the plaintiff can file suit within three years of the defendant's return. See Osborn v. Swetnam, 221 Md. 216, 219-20, 156 A.2d 654, 656 (1959).
37. MD.CTS. & JUD. PROC. CODE ANN. § 5-203 (1980), suspends the statute when a party is kept in ignorance of his cause of action by the defendant's fraud. If the plaintiff has exercised ordinary diligence to discover and protect his rights, the statute begins to run only at the time of discovery of the fraud. See, e.g., Piper v. Jenkins, 207 Md. 308, 318, 113 A.2d 919, 923-24 (1955); Wear v. Skinner, 46 Md. 257, 267-68 (1877).

It seems likely, as the Poffenberger concurrence suggests, that the general application of the discovery rule will render § 5-203 immaterial in many, if not most, civil actions at law. 290 Md. at 640, 431 A.2d at 682 (Rodowsky, J., concurring). Fraudulent concealment of a
cause of action, or when a plaintiff's own disability interfered with his bringing suit within the statutory period.\textsuperscript{37} Similarly, judicially created suspensions of the statute — such as the continuing events theory,\textsuperscript{38} the maturation of harm doctrine,\textsuperscript{39} and the discovery rule\textsuperscript{40} — have recognized the need to provide diligent plaintiffs with reasonable access to the courts within a reasonable time. Of these three judicial exceptions, the discovery rule has gained the widest acceptance in Maryland.\textsuperscript{41}

The discovery rule was first applied in Maryland in \textit{Hahn v. Claybrook},\textsuperscript{42} perhaps the first case in the nation to embrace the discovery

\textsuperscript{37.} MD. CTS. & JUD. PROC. CODE ANN. § 5-201(a) (1980), protects minors and mental incompetents from losing their causes of action during the time they are unable to bring suit. See Funk v. Wingert, 134 Md. 523, 527, 107 A. 345, 346 (1919) (statute does not run against infant or lunatic even though represented by committee).

\textsuperscript{38.} The continuing events theory is applied in cases “where there is an undertaking which requires a continuation of services, or a party’s right depends upon the happening of an event in the future. . . . [T]he statute begins to run only from the time the services can be completed or from the time the event happens.” Washington, B. & A. Elec. Ry. v. Moss, 130 Md. 198, 204-05, 100 A. 86, 89 (1917). For example, if a contract does not indicate a period of employment, but implies continuous, although interrupted, employment, the statute will not begin to run until the work is completed. See Vincent v. Palmer, 179 Md. 365, 374, 19 A.2d 183, 189 (1917). Similarly, in medical malpractice actions when a course of treatment runs continuously and is related to the original medical condition, the statute begins to run when the treatment is ended. See Waldman v. Rohrbaugh, 241 Md. 137, 141, 215 A.2d 825, 828 (1966); see also Developments, supra note 24, at 1205-06.

The continuing events theory is also commonly applied in employment discrimination cases governed by Title VII of the Civil Rights Act. See generally Note, \textit{Title VII and the Continuing Violation Theory: A Return to Congressional Intent,} 47 FORDHAM L. REV. 894 (1978-1979).

\textsuperscript{39.} The maturation of harm doctrine is premised on the proposition that harm is an essential element in a negligence action and, therefore, the statute should not run until there is an incidence of harm. See Developments, supra note 24, at 1201.

Maryland courts have rejected the maturation of harm doctrine. Leonhart v. Atkinson, 265 Md. 219, 224, 289 A.2d 1, 4 (1972). In each case in which the court has considered the doctrine it has chosen to disregard it and apply the discovery rule instead. See, e.g., Watson v. Dorsey, 265 Md. 509, 512-13, 290 A.2d 530, 533 (1972) (harm discoverable when plaintiff's lawyer lost case, not after loss of appeal); Feldman v. Granger, 255 Md. 288, 294-96, 257 A.2d 421, 423-24 (1969) (harm discoverable when plaintiff received notice of tax deficiency, not after administrative remedies exhausted); Mattingly v. Hopkins, 254 Md. 88, 95-96, 253 A.2d 904, 908 (1969) (harm discoverable when plaintiff noticed plot line discrepancy; not after loss of subsequent court cases).

\textsuperscript{40.} See supra note 8.

\textsuperscript{41.} As noted above, Maryland courts have rejected the maturation of harm doctrine. See supra note 39. The continuation of events theory is limited to cases in which the relationship between plaintiff and defendant continues over some period of time. See supra note 38. Only the discovery rule is flexible enough to encompass every type of dispute.

\textsuperscript{42.} 130 Md. 179, 100 A. 83 (1917).
principle.\footnote{43} That 1917 decision involved a medical malpractice action brought by a plaintiff whose skin became permanently discolored by an overdose of argentum oxide. The court decided that the plaintiff's cause of action accrued on the date she should have discovered her injury. Thus, because the plaintiff should have known of the injury and its cause more than four years before she initiated her suit, the court held that the statute of limitations barred her action.\footnote{44}

The discovery rule was not widely used in the years following \textit{Hahn}.\footnote{45} In fact, it was not until 1945, in \textit{Callahan v. Clemens},\footnote{46} that the court resurrected \textit{Hahn} and again applied the discovery rule.\footnote{47} \textit{Callahan} involved the faulty construction of a retaining wall, and the court ruled that the plaintiff had notice of the faulty construction in 1939 when he purchased the property. As a result, his suit, brought five years after discovery, was barred by limitations.\footnote{48}

Although the plaintiffs' actions in both \textit{Hahn} and \textit{Callahan} were barred, the cases established precedent for the use of the discovery rule by any diligent plaintiff. But it was not until the late 1960's and early 1970's that the Maryland courts actually began to accept and apply the discovery rule with regularity.\footnote{49}

The first case to fully articulate the rule and the reasoning behind it was \textit{Waldman v. Rohrbaugh},\footnote{50} a malpractice action for negligent care of a broken ankle. The court noted that \textit{Callahan} and two federal district court opinions\footnote{44} had applied the discovery rule, using \textit{Hahn} as

\footnote{43. See Note, \textit{The Statute of Limitations in Actions for Undiscovered Malpractice}, 12 Wyo. L.J. 30, 34 (1957), cited in \textit{Poffenberger}, 290 Md. at 634, 431 A.2d at 679.}
\footnote{44. 130 Md. at 187, 100 A. at 86.}
\footnote{46. 184 Md. 520, 41 A.2d 473 (1945).}
\footnote{47. \textit{Id.} at 527, 41 A.2d at 476.}
\footnote{48. \textit{Id.} at 528, 41 A.2d at 476-77.}
\footnote{49. From 1940 to 1960, the most frequent invocation of the discovery rule came in cases alleging fraudulent concealment. \textit{See, e.g.}, Giessman v. Garrett County Comm'rs, 185 Md. 350, 362, 44 A.2d 862, 868 (1946) (finding plaintiff had not pleaded sufficient facts to prove fraud); Piper v. Jenkins, 207 Md. 308, 319, 113 A.2d 919, 924 (1955) (because replication did not state all elements of fraud, court held it to be deficient); Gloyd v. Talbot, 221 Md. 179, 185, 156 A.2d 665, 668 (1960) (reversing lower court's application of discovery rule because plaintiff's lack of knowledge was not induced by defendant's inequitable conduct). For a discussion indicating that proof of fraud may no longer be necessary under \textit{Poffenberger}, see supra note 36.}
\footnote{50. 241 Md. 137, 215 A.2d 825 (1966).}
Finding further support in other jurisdictions, the court held that a patient's right of action for injury from medical malpractice accrues when the patient knows or should know he has suffered an injury. Because it was impossible for the patient, unskilled in medicine, to know he had been legally injured, the court reasoned that he should have had a full three years after the date of discovery to bring suit. After Waldman, the court extended the discovery principle to all cases in which negligent professionals harmed blamelessly ignorant plaintiffs.

Just as Hahn provided the precedent for application of the discovery rule in professional malpractice cases, Callahan provided precedent for its application in "non-professional" negligence cases. In Harig v. Johns-Manville Products, a latent disease case, the initial injury was inherently unknowable, and thus the statute of limitations did not begin to run until the plaintiff learned of the nature and cause of his injury.

Two years later the court applied the discovery rule in Sears, Roebuck & Co. v. Ulman, a defamation action for a false credit report. The court found the plaintiff could not have known until he attempted to get credit that Sears had filed a false credit report. The court therefore allowed the plaintiff to bring suit more than three years from the time the tort occurred, stating that fairness to a plaintiff who has not slept on his rights justifies exceptions to the general rule.

Thus Maryland case law prior to Poffenberger was replete with exceptions to the general time of injury rule. The court's decision to
replace the time of injury rule with the discovery rule now provides a clear and concise statement of the law, which in turn, provides the predictability and consistency that was lacking under the general rule and its exceptions. If as Justice Holmes stated, "prophesies of what the courts will do in fact . . . are what [is meant] by the law," then Maryland statute of limitations case law should reflect how and on what principles the court will decide when limitations begin to run. By stating that the discovery rule is applicable generally in civil actions, the court has given each litigant, and counsel, information to accurately judge the extent of his exposure to liability. In addition, the decision now provides lower courts with a standard rule to apply in all cases, further enhancing predictability and consistency. Finally, our judicial system is based on the principle that like cases should be treated alike. Thus all plaintiffs arguably should receive the same consideration in statute of limitations cases. Now all plaintiffs will meet with similar treatment.

Nonetheless, general application of the discovery rule may burden defendants and the court system by causing both to invest time and resources in litigating stale claims. As the Poffenberger concurrence pointed out, the discovery rule, because it may increase the costs of defense and of liability insurance, undercuts the protection afforded defendants by the statute of limitations. The average length of time be-

63. 290 Md. at 640, 431 A.2d at 682 (Rodowsky, J., concurring).

In addition, the concurrence finds difficulty in the fact that the decision applies both in actions ex delicto and ex contractu. It is difficult to understand how Poffenberger will affect cases involving breach of contract for sale of goods governed by Md. Com. Law Code Ann. § 2-725 (1980). The problems involved in applying § 2-725 are beyond the scope of this paper. For illustrative cases, see Levin v. Friedman, 271 Md. 438, 317 A.2d 831 (1974) (discussing differences in accrual dates for indemnity and regular contracts); Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976) (illustrating application of § 2-725 in breach of warranty suits and comparing use of § 5-101 in strict tort liability actions).


In addition, the concurrence points to a conflict between the legislature and the judiciary in extending the discovery rule. 290 Md. at 639, 431 A.2d at 682. For example, in 1975 the Maryland legislature created a special statute of limitations for health care providers which shortened their period of potential liability. Md. Cts. & Jud. Proc. Code Ann. § 5-109 (1980) now provides that a malpractice claim must be filed within five years of the time the injury was committed or within three years of the time the injury was discovered, whichever is the shorter time period. This statute was one response to the dramatic increase in the number of medical malpractice cases during the early and middle 1970's. See generally Medical Malpractice Ins. Study Comm., Report to the President of the Senate and Speaker of the House (1976). By enacting § 5-109, the legislature has repealed, in
tween the occurrence of a tort and the initiation of suit probably will be greater under the discovery rule than it would have been under the time of injury rule. Thus defendants may incur greater costs in retaining records for longer periods of time and in trying to locate witnesses. In addition, insurers may increase premiums to cover the cost of defendant's extended exposure to liability.\textsuperscript{64}

Moreover, general application of the discovery rule may interfere with the administration of justice and with a party's ability to defend a claim. Because the rule will allow courts to hear claims that accrue long after the time of injury, it will increase the danger that evidence will be stale by the time of trial. Defendants may be unable to locate witnesses; witnesses may forget relevant facts; records may be lost. As the time between the injury and the trial increases, the legitimacy of the fact finding process thus may decrease, in actuality and in the eyes of the public.

Although prior to \textit{Poffenberger} arbitrary limitations statutes unfairly burdened plaintiffs, now the general application of the discovery rule may burden defendants, and concommittantly the courts. The Court of Appeals recognized that general application of the discovery rule would cause some hardship to defendants and the courts, but it concluded that fairness to the plaintiff outweighed such hardship.\textsuperscript{65} But not every belated discovery should justify an application of the discovery rule.\textsuperscript{66} To assure that defendants and the courts will not be unduly burdened by stale claims, the Court of Appeals should carefully part, the use of the discovery rule in malpractice actions, hoping to reduce the number of claims burdening the profession. The legislature also extended protection from the effect of the discovery rule to architects and professionals by enacting MD. CTS. \& JUD. PROC. CODE ANN. § 5-108(b) (1980).

When it carved out those classes of defendants from the general three-year statute of limitations, the legislature did not further restrict the court in defining when a cause of action accrues in other tort actions. Conversely, the \textit{Poffenberger} decision does not imply that the legislature is deprived of its right to define when a cause of action accrues, that the legislature cannot respond to the decision by enacting further restrictive legislation. By providing a clear statement of the law, \textit{Poffenberger} permits the legislature to evaluate and change, if necessary, the courts' general application of the discovery principle. Legislative deference is an insubstantial reason to perpetuate confusion over whether the time of injury or the time of discovery governs the accrual of a cause of action. Comment, \textit{Accrual of Statutes}, supra note 25, at 123-24.

\textsuperscript{64} By 1973, insurance fees in the medical malpractice field had increased from 100 to 600\%, Heintz, \textit{Arbitration of Medical Malpractice Claims: Is It Cost Effective?}, 36 MD. L. REV. 533, 533 (1977). It is likely, however, that other factors, unique to the medical malpractice field, affected the increase to a much greater extent than did the discovery rule. Abraham, \textit{Medical Malpractice Reform: A Preliminary Analysis}, 36 MD. L. Rev. 489, 501-03 (1977).

\textsuperscript{65} 290 Md. at 636, 431 A.2d at 680.

allocate the burdens of pleading and proof of discovery; in this way the court could restore, to some extent, the balance of equities between the parties.

Prior to *Poffenberger*, the defendant apparently had the responsibility to both plead and prove that the statute of limitations, triggered at the time of injury, barred the plaintiff’s claim. Only if the plaintiff asserted an exception to the time of injury rule did he bear the burden of proving the facts necessary to escape the statute’s bar. Although *Poffenberger* now makes the time of discovery the general rule for accrual, the decision seems to retain the traditional burdens of pleading and proof. These burdens now should shift to the plaintiff.

The Court of Appeals should rule that under the general application of the discovery rule, there is a presumption that a reasonable plaintiff would have discovered the injury when it occurred. This presumption accurately reflects the time of discovery in most cases. For instance, in most cases the occurrence of the injury, the knowledge of it, and the maturation of harm are simultaneous events. Thus the court should require a plaintiff who discovers the injury after it occurs to plead and prove that he was reasonably diligent in discovering the wrong.

67. See Md. R. P. 342(c)(1)(d), 2(a) (requiring defendant to specially plead the statute); see also Kolker v. Biggs, 203 Md. 137, 145, 99 A.2d 743, 746 (1953) (party declaring that statute of limitations extinguished ground rent has burden of proof).

But see MD. CTS. & JUD. PROC. CODE ANN. §§ 3-901-904 (1980) (Maryland wrongful death statute). By enacting this statute, the legislature created a cause of action, not existing at common law, which gives a deceased person the right to sue for injuries resulting in death. Filing suit within three years of the death is one of the elements of the cause of action and a condition precedent to bringing suit. Thus the plaintiff has the burden of pleading and proving that the suit was timely filed. See, e.g., Slate v. Zitomer, 275 Md. 534, 542, 341 A.2d 789, 794 (1975), cert. denied, 432 U.S. 1076 (1976); Donnally v. Welfare Bd., 200 Md. 534, 541, 92 A.2d 354, 357 (1952).


69. This is the current practice in California. See, e.g., G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 26, 122 Cal. Rptr. 218, 220 (3d Dist. 1975). One commentator has indicated that this presumption of discovery at injury and effective allocations of burdens of pleading and proof will enable a trial court to sift out unreasonable claims prior to trial. Comment, *supra* note 25, at 117.


This recommendation does not represent a step back toward the time of injury rule. Presuming that discovery occurs when the plaintiff is injured does not preclude the plaintiff from proving that discovery occurred at a later time, thus invoking the benefits of the discovery rule.

71. Although the court will consider many factors in determining whether a discovery is reasonable, previous decisions indicate that most courts find that discovery occurs when the nature and cause of the injury are known to the plaintiff. See, e.g., Harig v. Johns-Manville
The *Poffenberger* court recognized the importance of the plaintiff's actual knowledge and held that the statute would not run against a plaintiff until he knew of his injury or had access to facts sufficient to alert him to the wrong. Because the court required actual notice, the plaintiff now will be the only party with knowledge of the time and reasonableness of discovery. It is inherently fair to allocate the burdens of pleading and proof to the party who controls the facts. Yet even this proposal may not adequately protect defendants. The court should also allow a defendant to plead and prove that his case has been prejudiced by the plaintiff's delay, albeit unavoidable, in bringing suit. In extreme cases, the death of major witnesses or the destruction of all written documents may make the production of favorable evidence impossible for the defendant. Usually, however, the delay will have a less devastating effect on the defense, simply reducing a defendant's chances of success without destroying them. Of course, prejudicial factors will vary from case to case, but certainly the availability of witnesses and evidence should be considered by the court.


The level of the plaintiff's skill in ascertaining the injury may be of interest to the court in determining the date a plaintiff should have discovered a wrong. The more knowledgeable the plaintiff, the more strict the court is likely to be in determining when discovery occurred. See, e.g., Mettee v. Boone, 251 Md. 332, 339, 247 A.2d 390, 394 (1968); Waldman v. Rohrbaugh, 241 Md. 137, 145, 215 A.2d 825, 830 (1966).

72. 290 Md. at 637, 431 A.2d at 680.
74. At least one previous Court of Appeals decision, Harig v. Johns-Manville Prod. Corp., 284 Md. 70, 394 A.2d 299 (1978), suggests the possibility that some late claims would be prejudicial to defendants. Harig noted five factors to consider in determining prejudice: 1) the nature of plaintiff's injury; 2) the availability of witnesses and written evidence; 3) the time that had elapsed since the injury occurred; 4) whether the delay in bringing suit had been to any extent deliberate; 5) whether the delay unusually prejudiced the defendant. Id. at 77 n.2, 394 A.2d at 303 n.2 (citing Lopez v. Swyer, 62 N.J. 267, 276, 300 A.2d 563, 568 (1973)). Four of the five factors, when viewed closely, are not extremely relevant. For example, the nature of the plaintiff's injury and the time which elapsed since the injury occurred are factors relevant to the inquiry concerning the plaintiff's diligence in bringing suit. Similarly, if the delay in bringing suit is found to be deliberate, the court will likely find that the plaintiff has been non-diligent. See *infra* note 76 for a discussion of the dilatory plaintiff problem. The final factor stated, unusual prejudice, is a restatement of the inquiry, not a
In deciding whether a defendant has been so prejudiced that allowing a delayed claim to proceed would be unjust, the court should note that delay also provides defendants with a hidden monetary benefit. Over a period of time, inflation will lower the actual value of a plaintiff's monetary claim. Similarly, the longer the delay, the longer the defendant has had use of that money. In other words, a defendant found liable on a delayed claim will suffer less of an economic loss than he would have sustained had he been found liable in an earlier adjudication.

Accordingly, in deciding whether prejudice to the defendant should bar a plaintiff's claim, the court should consider both the advantages and disadvantages accruing to the defendant from delay. Obviously the court will be unable to follow a formulary approach — the relevant factors are difficult to quantify. Because the discovery rule evolved from equitable considerations, however, it should be modified so that it will be flexible enough to ensure fairness to the defendant as well as fairness to the plaintiff.

In simply extending the benefits of the discovery rule to all plaintiffs, Poffenberger unnecessarily disadvantaged defendants. By requiring the plaintiff to bear the burdens of pleading and proof as to the time and reasonableness of discovery and allowing defendants to plead and prove prejudice, the court could preserve the goals of the statute of limitations — expediency and repose — while guaranteeing access to the courts for every diligent plaintiff. Thus modified, the discovery rule would balance more fairly the interests of plaintiffs and defendants.

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factor in the inquiry. Thus only the availability of witnesses and written evidence remains as obvious factors in determining prejudice.

75. Part of a plaintiff's claim will include a prayer for actual damages. Actual damages can include reasonable expenses occurring as a result of the wrong, Sezzin v. Stark, 187 Md. 241, 256-58, 49 A.2d 742, 749-50 (1946), lost wages and future earnings, Adams v. Benson, 208 Md. 261, 271, 117 A.2d 881, 885 (1955), and losses from destruction or depreciation of property, Mullan v. Hacker, 187 Md. 261, 270, 49 A.2d 640, 644 (1946).

76. Because the plaintiff's losses have occurred some years prior to the initiation of the suit and because inflation has devalued U.S. currency, late payment of a pecuniary loss is not always commensurate with the current value of his actual damages.

Although authorities cite the dilatory plaintiff problem as a reason for the harshness of statutes of limitations, see, e.g., Special Project, supra note 24, at 1018, it is less than likely, given the effects of inflation, that plaintiffs will, because of the latitude provided them by the discovery rule, intentionally delay bringing suit.

77. Lopez v. Swyer, 62 N.J. 267, 273-74, 300 A.2d 563, 566-67 (1973). The discovery rule tempered with the right of the defendant to plead prejudice resembles the doctrine of laches developed in courts of equity. The mere lapse of time is not sufficient to bar a suit under the laches doctrine; there must also be a showing of prejudice to the opposing party making it inequitable to bring suit. Miner v. Hanson, 217 Md. 298, 309, 142 A.2d 798, 803 (1958).

78. See supra notes 26-28 and accompanying text.
POLLOKOFF v. MARYLAND NATIONAL BANK — MULTIPLE PLAINTIFFS MAY NOT AGGREGATE THEIR CLAIMS TO MEET THE JURISDICTIONAL AMOUNT

In Pollokoff v. Maryland National Bank,¹ the Court of Appeals of Maryland refused to let class-action plaintiffs add together their individual claims to meet the jurisdictional amount necessary to bring an action in circuit court. The amount in controversy, the court held, must be "measured without aggregating separate and distinct claims of multiple plaintiffs."² The court thus joined the federal courts and several state courts in adopting the "general rule" against aggregation.³ Had the court properly construed the Maryland statutes, however, the court would have been compelled to reach the opposite conclusion.

The Courts and Judicial Proceedings Article sets the jurisdictional boundaries for the Maryland trial courts. The circuit courts are trial courts of general jurisdiction empowered to exercise jurisdiction over all cases unless jurisdiction has been "limited or conferred exclusively" upon another court.⁴ The district courts are courts of limited jurisdiction. They have jurisdiction over contract and tort actions if the damages claimed do not exceed $10,000,⁵ but a plaintiff may elect to file suit in either district or circuit court if the "amount in controversy" exceeds $2,500.⁶ The issue in Pollokoff concerned the proper construction of the "amount in controversy" language of the jurisdictional statute.

In 1973, Robert and Phyllis Pollokoff opened a time deposit savings account with Maryland National Bank. In 1978, approximately two months after the account matured, the Pollokoffs withdrew the entire balance. A dispute arose as to whether the bank owed the Pol-

¹. 288 Md. 485, 418 A.2d 1201 (1980). A motion for reconsideration was denied. Id. at 486-87, 418 A.2d at 1202.
². Id. at 491-95, 498-500, 418 A.2d at 1205-07, 1208-10. See infra notes 22 and 47-57 and accompanying text.
³. MD. CTS. & JUD. PROC. CODE ANN. § 1-501 (1980) provides:
The circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State. Each has full common-law and equity powers and jurisdiction in all civil and criminal cases . . . except where by law jurisdiction has been limited or conferred exclusively upon another tribunal.
⁴. Id. § 4-401 (Cum. Supp. 1981) (effective July 1, 1981). At the time that the Pollokoffs filed their suit, district court jurisdiction was limited to cases involving less than $5,000. Id. § 4-401(1) (1980) (repealed).
When the bank refused to pay any interest for the interim period, the Pollokoffs filed a class action in circuit court. They maintained that the sum of the claims of all class members exceeded the $2,500 minimum amount required for the court to exercise jurisdiction. The trial court, however, refused to look beyond the Pollokoffs' individual claim, estimated by the bank at $27.62, and dismissed the suit for lack of subject matter jurisdiction. The Court of Special Appeals and the Court of Appeals affirmed the trial court.

The Court of Appeals held that the "amount in controversy" could not be measured by aggregating the separate and distinct claims of multiple plaintiffs. The court initially observed that a court-promulgated rule of procedure does not alter the jurisdictional boundaries set by statute. Thus the class action rule, which allows several plaintiffs to bring their separate claims in a single suit, could not convert the separate contract claims advanced by the Pollokoffs into a single cause of action. Noting that the Maryland trial courts' authority to hear cases derives from the jurisdictional statutes, the court examined those

7. The original time deposit account allegedly called for the transfer of any funds from the matured account into a regular passbook account. The bank refused to honor the interest demand because, under the bank's terms for a regular passbook account, funds in such an account earn interest only if they are deposited by the second day of January or July and remain on deposit for a full six-month term. Because the plaintiffs did not deposit their funds until March and withdrew them by May, the bank claimed that the plaintiffs were entitled to no interest. 288 Md. at 487, 418 A.2d at 1201. The plaintiffs argued that the time deposit contract was printed in small type and that the language was unclear. Appellants' Reply Brief at 2-3. They implied that their case involved a contract of adhesion and noted further that the 4½% interest rate for a passbook account was unduly low. Id. at 3.

8. The Pollokoffs sued under the Maryland class action rule for themselves and an indeterminate number of unnamed others who had maintained a time deposit account with the bank for a period of time subsequent to maturity of the account and to whom the bank had refused to pay interest. The class action rule, Md. R.P. 209(a) provides:

When there is a question of law or fact common to persons of a numerous class whose joinder is impracticable, one or more of them whose claims or defenses are representative of the claims or defenses of all and who will fairly and adequately protect the interests of all may sue or be sued on behalf of all.

9. 288 Md. at 488, 418 A.2d at 1203.

10. See id. at 487-88, 418 A.2d at 1203. The bank's estimate was based on the 4½% interest rate for the regular passbook account. The Pollokoffs may have expected that the higher rate for the time deposit account would apply. Id. at 488 n.1, 412 A.2d at 1203 n.1. 11. Id. at 486, 418 A.2d at 1202.


14. Id.

15. Id. at 488-89, 418 A.2d at 1203. The court cited Md. R.P. 1(i) (current version at Md. R.P. 1(h)) which states: "These rules shall not extend, limit, or affect the jurisdiction of any court." Accord FED. R. CIV. P. 82.

16. 288 Md. at 500-01, 418 A.2d at 1210.
statutes to determine whether aggregation was permissible. Its decision turned on the meaning of the term "amount in controversy."

In analyzing the meaning of this language, the court looked first to Maryland case law for guidance. Despite cases holding that plaintiffs may aggregate claims in other contexts, the court decided that the question in Pollokoff was distinguishable from those involved in prior cases. A previous Maryland case also had established that, in the context of a taxpayers' suit, the sum of the individual monetary losses defined the amount in controversy. Yet the court reasoned that a small claims class action is not analogous to a taxpayers' suit, because the latter seeks to redress a public wrong while the former is concerned with merely enforcing private rights.

The Pollokoff court also heavily relied on the substantially settled federal case law and decisions in state courts precluding aggregation of claims. Echoing the federal courts, the Maryland court reasoned that

17. Id. at 488-89, 418 A.2d at 1203-04.
18. In Bringe v. Collins, 274 Md. 338, 335 A.2d 670, application for stay denied, 421 U.S. 983 (1975), a landlord's action to recover possession of premises, the landlord-plaintiff was denied a jury trial because, inter alia, he failed to satisfy the $500 "amount in controversy" requirement. See Md. Cts. & Jud. Proc. Code Ann. § 4-402(e) (1980); Md. Const. art. XV, § 6. If the landlord had valued his right to possession at more than $500 or claimed money damages exceeding $500, he would have been entitled to a jury trial. 274 Md. at 347, 335 A.2d at 676.

In Purvis v. Forrest St. Apartments, 286 Md. 398, 408 A.2d 388 (1979), the statutory provision in question required that in a case in which the amount in controversy exceeds $500, "an appeal shall be heard on the record made in the District Court." Md. Cts. & Jud. Proc. Code Ann. § 12-401(d) (1980). The amount required was exceeded by the sum of the landlord's two separate demands, one for back rent and the other for possession. 286 Md. at 403-05, 408 A.2d at 390-92.
19. "[T]here appears to be no decision of this Court directly on that point." 288 Md. at 496, 418 A.2d at 1207.
21. 288 Md. at 496-98, 418 A.2d at 1207-08.
22. The court relied primarily on Snyder v. Harris, 394 U.S. 332 (1969), the leading case establishing the rule that class action claims may not be aggregated to satisfy federal diversity jurisdiction. For discussion and analysis of the court's reliance on federal case law, see infra note 47-57 and accompanying text. The Maryland court specifically endorsed the rationale of only one other state court, the Kentucky Court of Appeals. 288 Md. at 499-500, 418 A.2d at 1209. In Kentucky Dept. Store v. Fidelity Phenix Fire Ins. Co., 351 S.W.2d 508 (Ky. 1961), the Kentucky court cited their uniform rule against aggregation and refused to alter the rule in the class action context. Maryland, of course, has no such precedent. See supra note 19. This Kentucky holding may also be explained on the theory that in 1961, Kentucky's class action rule required that "common relief" be requested. Compare Ky. R. Civ. P. 23.01(3) (repealed) with Ky. R. Civ. P. 23.01 (current version) (no longer requiring common relief). Damages, varying with each class member, may not be "common relief." 1 H. Newberg, Class Action 334 (1977); Starrs, The Consumer Class Action - Part II; Considerations of Procedure, 49 B.U.L. Rev. 407, 422 (1969). Maryland has no such common relief requirement. See Md. R.P. 209(a).

The state courts have taken every conceivable posture in response to attempts to
allowing aggregation in class actions, and ultimately joinder actions, would subvert the purpose of the jurisdictional amount.23 The general rule against aggregation, the court concluded, applied to any trial court, federal or state, with a minimal jurisdictional amount.24

There are several problems with the Pollokoff analysis. The court concluded that aggregation was impermissible because the legislature intended “amount in controversy” to refer to each individual claim.25 Its reasoning was circular, however, assuming the answer to the question posed — whether the “amount in controversy” language referred to the amount of each separate claim or to the sum total of all the claims before the court. By using a monetary figure to identify the jurisdiction of the circuit and district courts, the legislature relieved the circuit courts of less important cases involving relatively small amounts of money. In a case involving multiple plaintiffs, however, aggregation arguably serves the purpose of a minimum jurisdictional amount. For instance, the Pollokoffs’ individual claim was small, but the sum allegedly at stake in their class action was substantial.26 All class members would have been bound by any judgment the Pollokoffs obtained;27 moreover, from the defendant’s viewpoint, the amount in controversy was the aggregate of all the claims. Similarly, in joinder actions,28


For decisions supporting aggregation of class action claims, see infra note 58.

23. 288 Md. at 495, 501, 418 A.2d at 1207, 1210. The court noted that aggregation of class action claims is “logically indistinguishable” from aggregation of claims joined under Md. R.P. 313 (joinder of claims).
24. 288 Md. at 495, 418 A.2d at 1207.
25. Id. at 486-87, 418 A.2d at 1202.
26. The Pollokoffs claimed $3,000,000 for the class as a whole. Id. at 486, 418 A.2d at 1202.
27. See Wright, Class Actions, 47 F.R.D. 169, 183 (1969). Rule 209 does not say explicitly that the judgment binds all class members. Nor has any Maryland case addressed this question. However, Rule 209(b) does provide that a trial court may “declare the nonrepresentative character of the action” and determine that “only the parties to the action are bound.” This would imply that were the suit representative, the judgment would bind the whole class (and not just the named parties).
28. Several plaintiffs may join their claims in one action against a defendant “whenever
when the claims of the multiple plaintiffs pose common questions of law or fact, the court disposes of all the plaintiffs' claims in a single action. The combined claims, in total, may be of a significant amount. Cases involving multiple plaintiffs, therefore, may qualify as the relatively significant cases that the legislature would consider appropriate for the circuit court. At the very least, then, the statutory "amount in controversy" language is ambiguous and could be construed to mean either the amount of each individual claim or the sum of all the plaintiffs' claims to be adjudicated in a single action.

The structure of the jurisdictional statute resolves any ambiguity in the "amount in controversy" language. Section 1-501 of the Courts and Judicial Proceedings Article designates the circuit courts as the highest trial courts with original subject-matter jurisdiction in all cases except where jurisdiction has been limited by law. The district courts, on the other hand, are courts of limited jurisdiction. They have jurisdiction only if the statute expressly provides for it. The statute, then, establishes a presumption that the circuit court, the state's primary trial court and a court of general jurisdiction, is to hear all cases brought before it, unless the statute specifically confers jurisdiction on another court. The presumption cuts in favor of the circuit court's retaining jurisdiction over the case and, therefore, in favor of interpreting the amount in controversy language to refer to the entire sum at stake, the aggregate of the claims.

The court's treatment of prior Maryland cases was somewhat puzzling. Faced with decisions holding that jury trial and appeal provisions are triggered when an individual plaintiff's aggregated claims exceed the requisite "amount in controversy," the court noted that those cases did not apply to cases involving multiple plaintiffs. Although those cases were not concerned with aggregating the claims of multiple plaintiffs, they did suggest that "amount in controversy" re-
fers to the total amount at stake in the particular action. Nevertheless, the Pollokoff court refused to read these decisions to suggest that several plaintiffs with common claims could aggregate to reach amount in controversy.

Another Maryland decision also provides support for this interpretation of the statutory language. In Sun Cab Co. v. Cloud, several taxpayers sued on behalf of themselves and all other taxpayers to enjoin a public referendum, alleging that the expense of the referendum would illegally increase their individual tax burdens. The circuit court's equity jurisdiction is limited to suits in which the “debt or damages” totalled at least twenty dollars, which was more than the damage to any single taxpayer. The court held, however, that when one taxpayer sues “in representation of all,” the amount involved is the aggregate loss to all the taxpayers.

The Pollokoff court distinguished Sun Cab as a taxpayer's suit, but the distinction is elusive. As Pollokoff noted, a taxpayer's suit is a single legal title and had a common interest in recovery on the bonds, the amount in controversy was measured by the total value of the bonds in trust. Focusing on dictum in Bullard, 290 U.S. at 187-88, the Pollokoff court noted that the suit would not have succeeded if each bondholder had been the legal owner of his own separate bond; the value of each separate claim would have fallen below the jurisdictional minimum and separate claims would not have been aggregated. 288 Md. at 491, 418 A.2d at 1205. Contrary to the Pollokoff court's suggestion, however, Purvis did not deal with the issue whether separate claims of multiple plaintiffs might be aggregated. Purvis did not adopt the Bullard dictum; therefore, neither Purvis nor Bullard were grounds for rejecting aggregation of the claims of multiple plaintiffs.

35. 162 Md. 419, 159 A. 922 (1932).
37. 162 Md. at 426-27, 159 A. at 925.
38. Id. at 427, 159 A. at 925. One commentator has suggested that the aggregation of claims in a taxpayer's class action was a method for surmounting the minimum jurisdictional requirement. Brown, The Law/Equity Dichotomy in Maryland, 39 Md. L. Rev. 427, 439-40 (1980).
39. 288 Md. at 497, 418 A.2d at 1208.

The Pollokoff court also distinguished Sun Cab as “directed to the question of standing and not to jurisdiction over the subject matter.” 288 Md. at 497, 418 A.2d at 1208. Indeed, as the Pollokoff court noted, “Sun Cab has been viewed as addressing the issue of requisite special damage or special interest.” Id. (citing Citizen Planning & Housing Ass'n v. County Executive, 273 Md. 333, 339-40, 347, 329 A.2d 681, 684-85, 689 (1974)). But the Sun Cab court clearly concerned itself with whether the class of taxpayers had sufficient interest so that a court of equity might obtain subject-matter jurisdiction. 162 Md. at 426-27, 159 A. at 925. The Sun Cab court noted that in Kenneweg v. Comm'r's of Allegheny County, 102 Md. 119, 62 A. 249 (1905), the loss of a single taxpayer, who sued only for himself, was “too small to come within the statutory limitations,” and the suit was dismissed. 162 Md. at 427, 159 A. at 925. In Sun Cab, however, because the individual taxpayers sued on behalf of all “similarly situated” taxpayers, the jurisdictional amount was satisfied. Id.; see Stovall v. Secretary of State, 252 Md. 258, 263, 250 A.2d 107, 110 (1969).
analogous to a shareholder's derivative action — the plaintiffs in these suits represent not themselves as individuals, but the taxpayers or the corporation as a whole. A taxpayer's suit, like a shareholder's suit, rests on the notion that the named plaintiff represents a larger group with a common interest in the relief sought. But class-action plaintiffs also have a common interest in obtaining relief and in determining a pattern of wrongful conduct. And taxpayers and shareholders, like class-action plaintiffs, have individual interests in any recovery. Thus, just as the Sun Cab court measured the minimum "debt or damages" required at equity by aggregating the taxpayer plaintiffs' claims, the Pollokoff court should have measured the "amount in controversy" to allow aggregation in a class action.

In sum, then, the court was faced with a statutory presumption against divesting the circuit court of jurisdiction and Maryland case law that supported construing the statutory language to allow multiple plaintiffs to aggregate their claims to reach the jurisdictional amount. Moreover, there was no Maryland case law or legislative history to support the conclusion that the "amount in controversy" language might indicate that the legislature has expressed a desire for flexibility with respect to aggregation.

40. 288 Md. at 498, 418 A.2d at 1208.

41. A suit on behalf of all taxpayers is a "public proceeding" that state courts traditionally allow in the interest of controlling the wrongful acts of local governments. Sun Cab, 162 Md. at 427, 159 A. at 925 (citing J. Dillon, Commentaries on Municipal Corporations § 1587 (5th ed. 1911)). For a short explanation of the historical background of the derivative action, see Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 541-48 (1948).

42. Since the court argues that the decision on aggregation of claims is one for the legislature, it is interesting to note that the stockholder derivative suit remains a creature of case law rather than statute in Maryland. In 1945, the legislature codified the derivative action, Md. Ann. Code art. 16, § 240A (Cum. Supp. 1947), but repealed it in 1951, 1951 Md. Laws, ch. 136. The repealing act stated that the legislature's purpose was not to abolish the action but to re-establish it as a flexible rule of judicial decision, subject to a "balancing of the equities" in individual cases. See H. Brune, Maryland Corporation Law & Practice § 255 at 271 & n.95 (1953). Similarly, any ambiguity in the "amount in controversy" language might indicate that the legislature has expressed a desire for flexibility with respect to aggregation. See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 684 (1941) (grouping the class action and the derivative action together in terms of purpose and procedure); Vasquez v. Superior Court, 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971) (the underlying policies of the derivative action are highly significant in considering the necessity and propriety of class actions).

43. The court said that the issue of aggregation by multiple plaintiffs to satisfy "amount in controversy" had never been addressed before in Maryland. 288 Md. at 496, 418 A.2d at 1207. But the court implied that Maryland had a "traditional interpretation" of "amount in controversy" language like the federal courts. See Snyder v. Harris, 394 U.S. 332 (1969). The court noted that several circuit courts assumed aggregation would not be permitted. 288 Md. at 495, 418 A.2d at 1207. It cited two circuit court cases, Little v. Tinley, Daily Record, Dec. 14, 1977, at 3, col. 1 (Md. Cir. Ct. Anne Arundel County Nov. 9, 1977), and Siegrist v. Continental Ins. Co., Daily Record, Nov. 27, 1972, at 2, col. 1 (Md. Sup. Bench Baltimore City Nov. 10, 1972). But see Habrat v. Washington Homes, Law No. 3724 (Md. Cir. Ct. Calvert County, July 30, 1974). The circuit court in Habrat stated:

It is the Court's understanding that the use of class actions should be reserved for those
suggest the opposite result — the one the court reached.

The Pollokoff court’s reliance on federal case law also presents difficulties. Although the Maryland class action rule closely resembles the federal rule, and diversity jurisdiction, like the jurisdiction of Maryland circuit courts, depends on a minimum monetary amount, the Maryland court should not have regarded federal case law as authoritative.

In Snyder v. Harris, the leading federal case on aggregation, the Supreme Court addressed the question whether class action plaintiffs might aggregate their separate claims to satisfy the statutory requirement that the “matter in controversy” in diversity cases exceed $10,000. The Supreme Court conceded that it was “linguistically possible” to interpret the “matter in controversy” language to mean the sum of all the claims united in a single class action. The Court held, however, that the class action rule did not alter the traditional interpretation of the “matter in controversy” language, an interpretation that precluded aggregation of the separate claims of multiple plaintiffs. The Court reasoned that Congress had ratified the longstanding judicial interpretation when it amended the jurisdictional statute several times, changing only the minimum monetary figure.

Citing judicial and matters which involve relatively small money amounts for individual parties coupled with a large number of prospective parties making it impractical [and economically infeasible] for each to seek individual redress because each individual claim involves such a small prospective recovery.

Id. at 5.

44. See Johnson v. Chrysler Credit Corp., 26 Md. App. 122, 127, 337 A.2d 210, 213 (1975) (“Although the rules are not dissimilar, Federal Rule 23 goes into substantially more detail than does our own.”).

45. 28 U.S.C. § 1332 (1976) confers diversity jurisdiction on a federal district court when the amount in controversy exceeds $10,000.

46. The Pollokoff court found federal decisions a “logical, but not a binding” reference in their “search for guidance in the application of ‘amount in controversy’ to the [Pollokoff] facts.” 288 Md. at 491, 418 A.2d at 1205.


48. In the companion case to Snyder, Zahn v. International Paper Co., 414 U.S. 291 (1973), the Supreme Court extended the Snyder rationale to hold that each class-action plaintiff’s separate claim, standing alone, must satisfy the jurisdictional amount.

49. Snyder, 394 U.S. at 338.


51. Snyder, 394 U.S. at 339. But in his dissent, Justice Fortas took the Court to task for their dubious reliance on congressional silence as manifesting Congress’s adoption of a judicial doctrine. Id. at 348–50.
congressional concern about the rising federal caseload, the Court also pointed out that a relaxed rule would "seriously undercut" the congressional goal of limiting access to federal courts. Finally, the Court noted, allowing federal courts to hear "numerous local controversies involving exclusively questions of state law" would compromise the limited nature of federal jurisdiction.

The Snyder decision should not have persuaded the Maryland court. Maryland had no well-entrenched rule against aggregation. Accordingly, the legislature could not be said to have adopted such a rule when it enacted the jurisdictional statute.

More important, the Court of Appeals failed to recognize fundamental distinctions between the federal and state court systems. The federal trial courts are courts of limited jurisdiction, empowered to hear only such cases as are allocated to them by jurisdictional grant. A federal plaintiff must overcome a presumption against subject-matter jurisdiction for his claim. The state circuit court, on the other hand, is a court of general jurisdiction; it is presumed that the circuit court has jurisdiction unless the statute has conferred it on another court. Furthermore, the federal courts are bound to exercise restraint, particularly in diversity cases, because those cases involve questions of state law more appropriate for determination in a state court. The Maryland circuit courts, on the other hand, are the state's primary trial courts. Thus, the considerations that support the Snyder decision are unique to the federal system. Quite different considerations obtain in a state court system.

52. Id. at 341; see also The Supreme Court, 1968 Term, 83 HARV. L. REV. 7, 205 (1969) ("Limiting federal caseload... is a cogent rationale for a restrictive interpretation of 'matter in controversy.'").
53. 394 U.S. at 340. The Supreme Court reasoned that an exception to the aggregation doctrine would inevitably spread to cases of simple joinder. Id.
54. Id.
55. C. WRIGHT, supra note 50, § 7 at 17, § 69 at 326. Because the federal courts have only limited jurisdiction, jurisdiction must be affirmatively pleaded. No such requirement exists in Maryland circuit courts; courts of original jurisdiction are presumed to have jurisdiction.
56. See supra note 4; text accompanying note 29.
57. See Healy v. Ratta, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."). Federal courts alleviate the potential problem of having to litigate in a hostile forum of a foreign state through diversity jurisdiction. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816); see Note, Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers, 18 U.C.L.A. L. REV. 1002, 1006 n.32 (1971). As Snyder noted, "citizens of the same State... have nothing to fear from trying the lawsuit in the courts of their own State." 394 U.S. at 340. Congress therefore excluded from federal court "local controversies involving exclusively questions of state law." Id. at 340.
Other state courts have recognized this distinction and have not regarded *Snyder* as dispositive.58 These courts focused instead on the nature of their two-tier trial court system when considering whether class action plaintiffs might aggregate claims to meet the amount required to invoke the jurisdiction of the higher trial court.

Michigan's two-tier court system closely parallels the one in Maryland.59 In *Paley v. Coca Cola Co.*,60 the Court of Appeals for Michigan held that the aggregate value of the claims of all the class members determined the amount in controversy. The *Paley* court based its holding in part on the fact that the district courts were not designed for sophisticated class action proceedings. The district court rules were molded by a careful consideration of the litigation its narrowly limited jurisdiction would attract,61 and indeed there was no district court rule for class actions. The same reasoning would apply in Maryland where the class action rule is a circuit court rule only.62 A Maryland district court is not equipped to deal with complex class actions.63 Thus in

58. In Paley v. Coca Cola Co., 389 Mich. 583, 209 N.W. 2d 232 (1973), the evenly divided Supreme Court of Michigan affirmed the Court of Appeals which said:

We do not find the jurisdictional requirements in a case of Federal diversity analogous to those of our circuit courts. . . . [T]he Federal . . . district courts are courts of limited jurisdiction . . . . [The state circuit court] conversely is the court of original jurisdiction[,] . . . the basic trial court of the State.


In considering the jurisdictional question in federal court, the *Snyder* court found no "compelling reason . . . to overturn a settled interpretation" in light of the fact that the two cases were being litigated individually or as a class action in state court. 394 U.S. at 341. Some state courts have specifically allowed aggregation on the theory that the state courts were to fill in the gap left by the federal courts' refusal to permit aggregation of class action claims. *E.g.*, Judson School v. Wick, 108 Ariz. 176, 177, 494 P.2d 698, 699 (1972); Thomas v. Liberty Nat'l Life Ins. Co., 368 So. 2d 254, 256 (Ala. 1979).


61. Id. at 383–84, 197 N.W.2d at 481.

62. See Md. R.P. 1a(1) (providing that rules in the 100 to 600 series — which includes the class action rule, Rule 209 — do not apply in the district courts). The *Pollokoff* court would not decide whether a class action might nevertheless be maintained in the district court. 288 Md. at 498, 418 A.2d at 1208. In the absence of a formal rule, however, the plaintiffs would bear the burden of establishing a "common law class action." See Kirkpatrick, *Consumer Class Litigation*, 50 OR. L. REV. 21, 24–35 (1970); Starrs, *supra* note 22, at 425–28. Even if a "common law class action" were acceptable, the district court clearly is not equipped to handle the complexities of a class action. See infra note 63 and accompanying text.

63. Procedural safeguards are not as strict in the district courts. No formal pleadings are
Maryland as in Michigan, unless the circuit court has jurisdiction over the class action, the class action would not be heard at all.

The *Paley* court noted that Michigan's class action rule was in force when the legislature created the District Court and raised the jurisdictional minimum for the circuit courts.64 The Michigan court reasoned that the legislature's action was not intended to render the class action rule useless65 for the large number of class actions encompassing small separate claims. Similarly, in Maryland, the class action rule predated legislation establishing statewide district courts and setting out a uniform monetary division between circuit court and district court jurisdiction.66 Accordingly, the *Pollokoff* court should have concluded that the legislature did not intend the amount in controversy requirement to make the class action rule useless.67

Because the *Pollokoff* rule against aggregation is not likely to be overruled, the question remains — under what circumstances might plaintiffs with small claims be able to proceed with a class action in a Maryland circuit court. The *Pollokoff* court indicated that plaintiffs might aggregate their claims in one situation — where the plaintiffs

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64. 39 Mich. App. at 384, 197 N.W.2d at 481.
65. Id.
67. In affirming the court of appeals, the Supreme Court of Michigan provided an additional reason for permitting the class action to proceed in circuit court. In Michigan, jurisdiction over actions "historically equitable in nature" is retained in the circuit court by statute. MICH. COMP. LAWS § 600.8315 (Cum. Supp. 1980). *Paley* reasoned that even if a class action is an action at law, jurisdiction is retained in the circuit court because of the "equitable nature" of the class action procedure. The circuit court was not to be divested of its equity jurisdiction absent a clear legislative intent. 389 Mich. at 588-94, 209 N.W.2d at 233-36.

The same argument can be made for Maryland. The Maryland statute does not speak of actions "historically equitable in nature" but equity jurisdiction is specifically reserved to the circuit court by statute. MD. CTS. & JUD. PROC. CODE ANN. § 4-402(a) (Cum. Supp. 1981). It is also clear that the Maryland Rules Committee regarded the class action as a procedure grounded in equity. Letter and Memorandum from Neil Tabor, Assistant Reporter to the Maryland Rules Committee, to Clinton Bamberger and William Adkins of the Rules Committee (June 5, 1961) (adopted as the Subcommittee Report in the Minutes of Meeting of Court of Appeals Standing Committee on Rules of Practice and Procedure (July 10, 1961)).
hold a common interest in a single title or right. Plaintiffs might also attempt to evade the relatively high jurisdictional minimum for contract and tort claims by joining an equitable claim to a request for damages. The minimum amount required to invoke equity jurisdiction is only $20, and the circuit court has exclusive jurisdiction at equity. A request for a declaratory judgment would evade the rule against aggregation altogether. A declaration of "rights, status, and other legal relations" is available "whether or not relief is or could be claimed" and without regard to the monetary amount involved. The district court does not have the power to render a declaratory judgment, leaving plaintiffs like the Pollokoffs free to bring their case in circuit court.

Ultimately, evasion of the Pollokoff rule is unsatisfactory. The General Assembly should provide for aggregation in a class action by statute. The policy considerations that support aggregation especially in the class-action context are compelling. Depriving small-claims plaintiffs of a class action in circuit court forecloses those plaintiffs' only effective remedy. The individual small claims action is not a viable alternative. A single plaintiff's claim rarely warrants the expense of the litigation.

68. The Pollokoff court appeared to approve the result in Bullard v. Cisco, 290 U.S. 179 (1933). 288 Md. at 490–91, 418 A.2d at 1204–05. In Bullard, bonds of individual holders were bound by an express trust of which the plaintiffs were trustees. Because the plaintiff trustees together held a single legal title, the amount in controversy was measured by the total of the bonds in the trust.

69. Subsequent to the Pollokoff decision, the Maryland Rules Committee met to study implications of the decision and to ascertain if revisions were needed. The tactic of combining an action for injunctive or declaratory relief with one at law was discussed. Judge Ross, Chairman of the Committee, responded that a trial court would "see through such a plan and . . . dismiss for lack of jurisdiction." Minutes of Meeting of Court of Appeals Standing Committee on Rules of Practice and Procedure at 14 (Nov. 1980); see Snow v. Ford Motor Co., 561 F.2d 787, 790–91 (9th Cir. 1977).

71. Id. § 3-403(a) (1980).
72. Id.
73. The Rules Committee has declined to address the aggregation issue, specifically leaving it to the legislature. Minutes of Meeting of Court of Appeals Standing Committee on Rules of Practice and Procedure at 13–18 (Nov. 21, 1980).
74. "[T]he jurisdictional objection [is not] merely legalistic, for it too contains policy considerations in conflict with considerations supporting a more liberal and permissive approach to class actions." Note, Aggregation of Claims in Class Actions, 68 Colum. L. Rev. 1554, 1558 (1968).
75. By its very nature, the small claims court has a limited capacity for vindicating widespread wrongdoing. The Pollokoffs allege that there are numerous depositors who have sustained similar damages. Potentially thousands of consumers are subjected to patterned abuse in commercial transactions. Report of National Advisory Commission On Civil Disorders 275–76 (Bantam ed. 1968). Research has shown that only informed and sophisticated individuals avail themselves of such remedies, however. Id.
76. "The claim is far too small to render an individual suit economically feasible. The
voluntarily advancing their claims together is dim. The class action, available "where joinder is impracticable,"77 was designed to meet this problem. A small-claims class action may seek to affect a widespread pattern of commercial abuse, or raise legal theories that may clarify or redefine standards for business conduct.78 Piecemeal actions cannot successfully deter the defendant from illegal conduct that has widespread aggregate, but small individual, impact. To permit only individual suits is to insulate the defendant from exposure to damages in the full amount by which he is unjustly enriched.79 Moreover, even if motivated plaintiffs do pursue their individual claims, the courts face a succession of virtually identical suits. A single action would better serve the interests of judicial economy and efficiency. Amending the amount in controversy provision to allow aggregation of claims would serve these important interests.80

CONCLUSION

In Pollokoff v. Maryland National Bank, the court erred in adopting the rule against aggregating the claims of multiple plaintiffs to sat-
isfy the minimum jurisdictional amount of the circuit court. The state circuit court is a court of general jurisdiction. The presumption against divesting the circuit court of jurisdiction is a presumption in favor of allowing plaintiffs to aggregate their claims. The federal rule against aggregation is justified because the federal trial courts are courts of limited jurisdiction and because of a longstanding federal tradition. These considerations were not relevant in *Pollokoff*. Had *Pollokoff* been properly resolved as a question of statutory interpretation, the court would have concluded that "amount in controversy" referred to the sum total of the claims before the court. Sound public policy favors trying claims involving common factual or legal questions in one single action. The legislature should act, therefore, to amend the jurisdictional statute to make aggregation possible.
BERNSTEIN v. KAPNECK — UNAMBIGUOUS PERSONAL INJURY RELEASE BARS SUIT FOR SUBSEQUENTLY DISCOVERED INJURIES

In Bernstein v. Kapneck the Maryland Court of Appeals addressed whether a court may reform or void a personal injury release upon discovery of injuries subsequent to its execution. Refusing to follow the vast majority of American jurisdictions, the court held that when a release specifically includes such future injuries, plaintiffs will be held strictly to the terms of the agreement.

In 1975, Irene Schulman, then age five, was injured seriously in an automobile accident, and her mother settled with the defendants, the car’s owner and driver, on Irene’s behalf. The settlement agreement

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3. The Court of Appeals had previously held in different circumstances that the objective theory of contracts applied to releases.


4. The child suffered severe facial injuries, nasal fracture, non-displacement of the shoulder, and moderately severe traumatic neurosis. 290 Md. at 453-54, 430 A.2d at 603.
5. Barbara Sue Sussman, the car’s owner, and Dean Raum Kapneck, the operator, were defendants in the original action which was filed in 1977. Bernstein v. Sussman, No. 47,694 (Md. Cir. Ct. Montgomery County Mar. 2, 1978).
   (a) In general — Any action, including one in the name of the state, brought by a next friend for the benefit of a minor may be settled by the next friend.
   (b) Limitation — If the next friend is not a parent or person in loco parentis of the child, the settlement is not effective unless approved by the parent or other person responsible for the child.

Infants’ claims pose difficulties because infants normally lack capacity to contract. See
provided:

Helen M. Bernstein, individually and as parent and natural guardian of Irene Schulman, a minor, hereby releases and forever discharges [defendants] from any and all claims, demands, damages, actions, causes of action, or suits of whatsoever kind or nature, and particularly on account of bodily injuries, known and unknown, and which have resulted or may in the future develop, sustained by Irene Schulman.7

The agreement became part of the record when the court enrolled judgment by consent against the defendants in 1978.8

After later tests revealed additional injuries,9 plaintiffs petitioned the Montgomery County Circuit Court to declare the release void.10


7. 290 Md. at 454-55, 430 A.2d at 604 (emphasis added).


The role of consent judgments in the settlement process often is unclear. See Dobbs, Conclusiveness of Personal Injury Settlements: Basic Problems, 41 N.C.L. REV. 665, 678-80 (1963) (While consent judgments have both judicial and contractual aspects, they are ordinarily treated as a "stronger document than a contract." Most judgments are not successfully attacked on mistake grounds since they represent court action and additionally are accorded res judicata effect); infra text accompanying note 26. Professor Dobbs further suggests consent judgments are upheld because plaintiff ordinarily has counsel, and the formal procedures for entering such a judgment eliminate premature settlements. Moreover, the parties, and frequently the judge, have considered all the variables in the case, thus equalizing the parties' bargaining positions.


10. See infra text accompanying note 11. The plaintiffs filed the action at law. The Court of Special Appeals indicated that they found the case to be in a somewhat confusing posture given the presence of equitable issues. The court stated that evidently appellants had filed their petition at law to have the court revise the earlier judgment under Maryland Rule 625[a]. At some point, however, the appellants sought equitable relief based on mutual mistake. Since the parties had argued both issues before the lower court at law without objection and had briefed and argued similarly on appeal, the Court of Special Appeals decided to hear both issues. Bernstein v. Kapneck, 46 Md. App. 231, 238, 417 A.2d 456, 460 (1980), aff'd, 290 Md. 452, 430 A.2d 602 (1981). See generally Brown, The Law/Equity Di-
Plaintiffs argued that since Irene's brain disorder was unknown when the release was executed, the parties had made a mutual mistake of fact regarding the extent of the child's injuries. They also contended that this lack of knowledge constituted a mistake under Maryland Rule 625[a], thus permitting the court to revise the earlier judgment. However, the circuit court judge found the parties had deliberately intended to settle for such possible injuries and denied relief. He also noted that plaintiff's lack of knowledge did not qualify as a "mistake" under Rule 625[a]. The Court of Special Appeals affirmed on Rule 625[a] grounds.

chotomy in Maryland, 39 MD. L. REV. 427 (1980). Md. R.P. 515, which requires courts to transfer cases to the appropriate division, has eliminated some of these difficulties.


11. Md. R.P. 625 (emphasis added) states in part:

For a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within such period, the Court shall have revisory power and control over such judgment. After the expiration of such period the court shall have revisory power and control over such judgment, only in the case of fraud, mistake or irregularity.

12. See 290 Md. at 455–56, 430 A.2d at 605. The Court of Appeals observed:

[S]ince Judge McAuliffe specifically found as a fact that [the parties intended to settle all possible claims] which resulted or might develop in the future as a consequence of the accident, even in most of the jurisdictions following the liberal view, this factual finding would prevent the further pursuit of damages.


The trial judge further found that the child's injuries existed at the time of settlement and that the parents had exercised reasonable care and diligence in attempting to ascertain the full extent of the injuries. He commented, however, that application of the oft encountered injury/consequence distinction is judicially difficult, see infra note 46, and militates against acceptance of the majority rule. He also noted that Maryland's traditional objective approach led him to conclude that Maryland appellate courts would give such a release final effect. Record Extract at 40–41.

On certiorari, the Court of Appeals affirmed. The court framed the issues as whether a court may void a release of all claims for personal injuries if the plaintiff later discovers that unknown wounds existed when he executed the agreement; and, if so, whether a court may vacate under Maryland Rule 625[a] an enrolled consent judgment arising from the release as mistakenly entered. The court held that later-discovered injuries are not grounds for avoidance in Maryland, where releases qualify as contracts, and thus are governed by traditional contract principles. Accordingly, the court did not reach the Rule 625[a] issue.

Having concluded that traditional principles should govern the Bernstein release, the Bernstein majority noted that Maryland contract law requires a court to determine the parties' intentions from the actual wording of the agreement, and to give the language its ordinary meaning. The court also observed that parol evidence is inadmissible to interpret contracts unless the agreement's language is unclear or there

guished the case and decided the case on the narrow Rule 625[a] issue. Relying on Hughes v. Beltway Homes, Inc., 276 Md. 382, 347 A.2d 837 (1975), the court upheld the trial judge's ruling that the parties' lack of knowledge regarding the extent of the child's injuries did not constitute a mistake within Rule 625[a]. The type of mistake that Rule 625[a] contemplates is extrinsic and jurisdictional in nature. In Hughes, the court observed:

The type of situation in which mistake might be applicable is demonstrated by Miles v. Hamilton, 269 Md. 708, 309 A.2d 631 (1973), (no valid service of process) and Ashe v. Spears, 263 Md. 622, 284 A.2d 207 (1971), cert. denied, 406 U.S. 958 (1972), (a contention of no valid service of process). It is further demonstrated by two cases arising before the adoption of Rule 625, Harvey v. Slacum, 181 Md. 206, 210-11, 29 A.2d 276 (1942), (default judgment entered where there had been no valid service of process), and May v. Wolvington, 69 Md. 117, 14 A. 706 (1888), (judgment by default entered for lack of a plea when appropriate pleading had in fact been filed).


16. 290 Md. at 453, 430 A.2d at 603. While the contract mistake issue was technically one of first impression, it is interesting that neither appellate court mentioned Clark v. Elza, 286 Md. 208, 406 A.2d 922 (1979). The Clark court held that defendant could use an executory oral agreement that plaintiff has breached to prevent a plaintiff from suing. The court noted that plaintiffs had argued in their brief that a mutual mistake of fact concerning the extent of the party's injuries justified avoiding the agreement. The court found that the parties had not properly raised the issue but nonetheless observed: "[E]ven if it were properly before us, there would be no basis in the record for finding a mutual mistake of fact." Id. at 219 n.4, 406 A.2d at 928 n.4. See Beall, The Settlement Which . . . Became Unstuck, Md. B.J., Sept. 1981, at 6.

With respect to executory accords, see generally 6 A. CORBIN, CORBIN ON CONTRACTS § 1268, at 51 (1951) [hereinafter cited as CORBIN]; CALAMARI & PERILLO, supra note 6, § 21-4; Gold, Executory Accords, 21 B.U.L. REV. 465 (1941); Comment, Executory Accord, Accord and Satisfaction, and Novation — The Distinctions, 26 BAYLOR L. REV. 185 (1974).

17. 290 Md. at 465, 430 A.2d at 609.
18. See supra note 3.
is evidence of fraud, accident, or mutual mistake. Proponents of this approach, sometimes referred to as the objective theory of contracts, argue that it promotes judicial efficiency and ensures predictability in business transactions. Convinced of the propriety of this approach, the majority applied objective principles to the release at issue in Bernstein, and concluded that the release could not possibly be "more clear, more specific, more complete, more all-inclusive or more all embracing. It would require turning the English language on its head to conclude that... the releasors did not... exhibit a clear desire to extinguish the claim for damages they now seek." 

The court also noted two Maryland statutes permitting releasors to escape the effects of personal injury releases if they sign away their rights shortly after being injured. The Bernstein court concluded that, because the legislature had not modified or avoided all personal injury releases, the legislature "neither considered exoneration of unknown injuries to be against public policy nor discerned that releases of this type presented particular difficulties requiring some form of legislative control or regulation. We perceive no compelling reasons why this


20. 290 Md. at 464, 430 A.2d at 609; see Emery v. Mackiewicz, 429 Pa. 322, 325, 240 A.2d 68, 70 (1968); ("The above-quoted general and specific release of all claims, demands and actions for bodily injuries could not possibly be clearer or more specific, or more completely all-inclusive and all-embracing. ... It would make a mockery of the English language and of the Law to permit this release to be circumvented or held to be nugatory."). Maryland's current test to ascertain contracting parties' intentions is found in Board of Trustees v. Sherman, 280 Md. 373, 380, 373 A.2d 626, 629 (1977) ("[W]hen the language of a contract is clear, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."). See Billmyre v. Sacred Heart Hosp., 273 Md. 638, 642, 331 A.2d 313, 317 (1975); Bernstein, 46 Md. App. at 244, 417 A.2d at 463.

21. MD. ANN. CODE art. 79, § 11 (1980) makes a release of claims for personal injuries, or contracts for legal representation in connection with the pursuit of damages, arising out of a tort and executed within five days of the incident voidable at the option of the injured party any time within the next 60 days. MD. ANN. CODE art. 79, § 12 (1980) enables releasors to escape the effects of releases in certain circumstances when the release is executed within 15 days of the mishap. Accord CONN. GEN. STAT. ANN. § 52-572a (1960). Legislation enacted in several jurisdictions provides that general releases will not cover claims unknown or unsuspected at the time of execution, if such claims would have materially affected the settlement. See, e.g., CAL. CIV. CODE § 1542 (West 1954), construed in Casey v. Proctor, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal. Rptr. 307 (1963); S.D. CODIFIED LAWS § 47.0241 (1960) (current version at id. § 20-1-11 (1978)), construed in Boman v. Johnson, 83 S.D. 265, 158 N.W.2d 528 (1968).
court should do more."^{22}

Finally, the Bernstein court criticized the majority of jurisdictions for refusing to acknowledge that their decisions were based, not on contract law, but on policy considerations that the Maryland court found unpersuasive. Judge Digges, writing for the Bernstein majority, observed that in these cases courts must balance the need for predictability and judicial efficiency against considerations "largely stemming from compassion."^{23} These considerations include notions that tortfeasors should adequately compensate victims, and that traditional contract law is inapplicable because the human body is not an article of commerce.^{24} The court concluded that the advantages of enforcing traditional contract principles outweighed these policies, and stressed that voiding such releases would increase litigation and discourage out-of-court settlements.^{25} The court also commented that no principled distinction exists between the rationales underlying the doctrine of res

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^{22} 290 Md. at 464, 430 A.2d at 608-09; see also Ranta v. Rake, 91 Idaho 376, 385, 421 P.2d 747, 752 (1966) (construing Idaho Code § 29-113 (1961) as indicative of legislative concern for plaintiffs' protection and granting relief).
^{23} 290 Md. at 458, 430 A.2d at 605.
[In these release cases] it is not an article of commerce that is involved, but the human mind and body, still the most complicated and mysterious of all things that are upon or inhabit the earth. Here, mistakes are easily made and the consequences are more serious than in any other of the affairs of man. . . . Yet, a man cannot and does not live in dread of these [dire] possibilities. He accepts assurances that all will be well, even though ultimate consequences cannot be appraised as in matters involving property or services.

One can argue strongly that plaintiff's uncertain condition gives rise to the inference that the risk was expressly assumed. See Havighurst, Effect Upon Settlements of Mutual Mistake as to Injuries, 12 DEF. L.J. 1, 3-4 (1963). Applying principles of "conscious ignorance" to personal injury releases, Havighurst observes:

It is well known that, for a considerable period after a serious injury is suffered, it is impossible even for medical experts to determine with certainty its nature and final outcome, and in all but the rarest instances both parties realize that there is doubt concerning the future course of the injury. It would thus appear that the releasee should take the risk that the payment might be excessive in view of later developments and that the claimant should take the risk that it might be inadequate.

Id. at 4.

judicata and the principle of favoring binding settlements. Thus the court apparently reasoned that it should not place plaintiffs who settle out of court in a better position than plaintiffs who have expeditiously litigated their cases only to discover additional injuries after judgment.26

The Bernstein court unequivocally rejected the approach taken by the majority of American jurisdictions. Generally other courts have justified decisions voiding releases by invoking the mutual mistake doctrine. Although these courts carelessly attach the "mutual mistake" label to their decisions, in reality these courts are employing two distinct contract theories. Some courts apply "classic" mutual mistake of fact doctrine, which focuses upon the shared mistaken assumptions upon which the contracting parties base their agreement.27 Other jurisdictions appear to focus upon the parties' conflicting understandings of the actual contract.28

Clancy v. Pacenti29 illustrates the basic underlying assumption approach to personal injury releases. In Clancy, the Illinois Appellate Court observed:

Releases of claims for personal injuries have frequently been held voidable for mistake, on the ground that the claimant was unaware of the nature and extent of his injury when he assented to a settlement. Sometimes advantage has been taken of his weakness and ignorance; and the possibility of this, even though not definitely proved, has made courts readier to hold that the release was executed on a mistaken basic assumption as to the nature of the injury.30

The Clancy court stressed that both parties believed the injuries in-

26. 290 Md. at 463, 430 A.2d at 608.
27. Mistake in [underlying] assumptions is one of the most significant types, both because it happens so often and because it raises the most difficult problems in the law of mistake. . . . In the typical situation, such a mistake does not affect a person's awareness of what he is doing but only the reasons why he is doing it. . . . As a useful legal category, mistake in assumptions is concerned for the most part with situations presenting the question whether an initially valid contract may be rescinded.

28. See infra notes 34-44 and accompanying text.
30. Id. at 175, 145 N.E.2d at 804 (quoting 3 CORBIN, supra note 16, § 598, at 3587 (emphasis added)); cf. 13 WILLISTON, supra note 27, § 1551.
volved were minor when instead they were serious, and concluded that this mutual mistake voided the general release.\(^{31}\)

However, as the Maryland Court of Appeals observed,

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\text{[T]he "mistake" found is the fact that the parties did not know the extent of the injuries suffered, notwithstanding that the releasor expressly assumed the risk (as parties to all contracts inevitably do) of the lack of omniscience as to what might develop in the future, by an express release of all unknown claims.}^{32}\]

Thus, courts that use basic assumption analysis to avoid a release allow plaintiffs to explicitly assume risks, but then shirk this responsibility when the risks are not resolved in their favor.\(^{33}\)

Other majority jurisdictions reform releases when convinced that the parties did not share the same understanding. They allow plaintiffs to argue that they did not understand the agreement as a release of claims for future and unknown injuries. This analysis differs from the basic assumption approach because the parties’ understanding of the contract itself is at issue, not the assumptions upon which it was based.\(^{34}\)

Unfortunately, most courts in the majority have been preoccupied with justifying the creation of “special doctrine” or have applied principles of mutual mistake incorrectly. Only a few have realized that the question is ultimately one of intent.\(^{35}\) The Bernstein court is to be

\(^{31}\) See supra note 24.

\(^{32}\) 290 Md. at 462, 430 A.2d 607.

\(^{33}\) In Smith v. Loos, 78 N.M. 339, 431 P.2d 72 (Ct. App. 1967), the court also criticized the mutual mistake approach. There the plaintiff testified that he fully understood the terms of the release prior to execution. The court concluded that in such situations it is obvious that the parties have voluntarily chosen to allocate expressly the risk that plaintiff might have undiscovered ailments. The court correctly observed that “the law does not and cannot operate in retrospect to relieve a party from contractual obligations, deliberately and intentionally assumed, because of the development of unfortunate and unfair results.” Id. at 343, 431 P.2d at 76.

\(^{34}\) “The distinction parallels that between the statements ‘I did not intend to [mean] this’ and ‘I did intend to [mean] this but it was because I mistakenly believed the facts were thus and so.’” MISTAKE AND UNJUST ENRICHMENT, supra note 27, at 6. Palmer also notes that when the issue turns on misunderstanding, mutual or unilateral mistake analysis is not helpful. In misunderstanding cases each party is mistaken as to the other party’s intentions. Consequently, the question of mutual assent turns on whether the court holds one party to the understanding of the other. 3 G. PALMER, supra note 27, § 16.1 at 458–59 (1978); Palmer, The Effect of Misunderstanding on Contract Formation and Reformation Under the Restatement of Contracts Second, 65 MICH. L. REV. 33, 56 (1966).

\(^{35}\) Failure to distinguish mutual mistake from misunderstanding analysis has led to confusion. For example, the Supreme Court of Minnesota observed that a release is incontestable only when the parties intentionally settled for the unknown injuries. Consequently, the court found that whether the parties “assumed as a basis for the release known injuries or whether they intended to compromise claims for all injuries known or unknown,” is a question of fact. Larson v. Sventek, 211 Minn. 385, 388, 1 N.W.2d 608, 610 (1941). The
commended not only for its refusal to embrace the misguided mutual mistake approach, but for recognizing that the crux of the issue is the parties' intent.\textsuperscript{36}

The court apparently reasoned that the written document was conclusive evidence of the parties' understanding since integrated writings presumably reflect the parties' intent under Maryland's objective theory of contracts.\textsuperscript{37} Maryland courts follow Williston's approach\textsuperscript{38} and court stated that if the circumstances indicate that, despite the wording of the release, the parties only contracted with reference to unknown injuries and a "material, unknown injury subsequently develops, mutual mistake exists." \textit{Id.} at 389, 1 N.W.2d at 610. The opinion suggests that the court mixed both questions of what was assented to (understanding) and why (basic assumptions). The Minnesota court later simplified its position, holding that a release does not bar recovery for unknown injuries that the parties did not contemplate when they settled. Aronovitch v. Levy, 238 Minn. 237, 56 N.W.2d 570 (1953), \textit{see also} Gleason v. Guzman, 623 P.2d 378, 385–86 (Colo. 1981) (court confuses misunderstanding and mutual mistake analysis).

For examples of courts incorrectly applying \textit{unilateral mistake} doctrine to deny relief, see Randolph v. Ottenstein, 238 F. Supp. 1011, 1014 (D.D.C. 1965), \textit{aff'd}, 355 F.2d 839 (D.C. Cir. 1965); Gumberts v. Greenberg, 124 Ind. App. 138, 146, 115 N.E.2d 504, 507 (1953) (court refused to void release because of unilateral mistake). \textit{But see Wells v. Rau, 393 F.2d 362, 364–65 (D.C. Cir. 1968) (distinguished Randolph; emphasized that Randolph had been affirmed on misrepresentation grounds only); Beaver v. Harris' Estate, 67 Wash. 2d 621, 628, 409 P.2d 143, 148 (1965) (release will be voided only if \textit{mutual} mistake is shown).}

36. 290 Md. at 461, 430 A.2d at 607.

37. A misunderstanding argument should not succeed even in the most liberal jurisdictions given the \textit{Bernstein} scenario. In \textit{Bernstein}, plaintiffs had been represented by counsel and had participated in the negotiation and consent decree process; thus they clearly were aware of the document's terms. \textit{See supra} notes 8 and 12 and accompanying text. A court can correctly apply misunderstanding doctrine only when a party is ignorant or confused about the contents of a release. Wheeler v. White Rock Bottling Co., 229 Or. 360, 363, 366 P.2d 527, 528–29 (1969). Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962) illustrates the distortions in the majority position. In \textit{Dansby}, the Arizona Supreme Court found that a plaintiff could seek additional monetary relief although he fully comprehended the contents of the release. The court acknowledged that the plaintiff "had signed the release with full knowledge of its legal implications," \textit{id.} at 8, 373 P.2d at 6, but concluded, "the parties intended to pay and receive, respectively compensation on the basis of damages then known," \textit{id.} at 9, 373 P.2d at 6. Such a position is entirely unprincipled, for it enables parties to assume known risks and later argue that they did not intend what they originally intended. \textit{See also} Witt v. Watkins, 579 P.2d 1065, 1069–70 (Alaska 1978). As one judge has observed, "True, there was a mutual ignorance of injury to the brain, ... but there was neither mutual ignorance of tenor of the release, nor any deception perpetrated upon plaintiff inducing him to sign without reading." Larson v. Sventek, 211 Minn. 385, 389–90, 1 N.W.2d 608, 610 (1941) (Stone, J., dissenting); \textit{accord} Barilla v. Clapshaw, 306 Minn. 437, 441, 237 N.W.2d 830, 832 (1976); Sanger v. Yellow Cab, 486 S.W.2d 477, 481 (Mo. 1972).

38. \textit{See generally} 4 WILLISTON, supra note 27, §§ 631-46; CALAMARI & PERILLO, supra note 6, § 3-3 to -7, -10.

After determining that the writing is integrated, courts espousing Williston's approach would then interpret the contract's language as a reasonably intelligent person would. Thus, if the language is clear, extrinsic evidence on intent is inadmissible. 4 WILLISTON, supra note 27, § 603, at 344.
admit evidence on intent only if the writing's language is unclear or if a party alleges fraud, accident or mutual mistake. This strict version of the parol evidence rule precludes parties from arguing misunderstanding when a contract is deemed to support only one interpretation, for that interpretation is presumed to have been mutually understood.

There is another respected polar approach to parol evidence and contract interpretation. Corbin's approach to parol evidence and contract interpretation is very different from Williston's, and it also commands considerable respect. Under Corbin's theory, courts always should consider evidence on the understanding and intent of each party. If the understandings are congruent, there is a contract; if they differ materially, the court, after a comparative fault analysis, should enforce the contract according to the more reasonable understanding.

39. See supra note 19.

40. Maryland narrowly qualifies its parol evidence rule. In Binder v. Benson, 225 Md. 456, 171 A.2d 248 (1961), the court held, "A qualification of the [strict] rule is that an apparent manifestation of assent will not operate to make a contract if the other party knows, or as a reasonable person should know, that the apparent acceptor does not intend what his words or other acts ostensibly indicate." Id. at 461, 13 A.2d at 250. While the language appears to be broad, the court evidently will use the exception only where an affirmative act of plaintiff or defendant demonstrates mistake. For an example of a case where the exception could have been invoked but was not, see Gingell v. Backus, 246 Md. 83, 227 A.2d 349 (1967). The fact that this exception was not applied to the extreme circumstances in Gingell suggests the standard approximates fraud.

41. It is obvious . . . that there is no unanimity as to the content of the parol evidence rule or the process called interpretation, and that the rules are complex, technical and difficult to apply. It would, however, be a mistake to suppose that the courts follow any of these rules blindly, literally or consistently. As often as not they choose the standard or the rule that they think will give rise to a just result in the particular case. We have also seen that often under a guise of interpretation a court will actually enforce a rule of "public policy" which is nothing more than an attempt to do justice.

42. 1 CORBIN, supra note 16, § 104; 3 id. § 599. See generally Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 CORNELL L.Q. 161 (1965); RESTATEMENT (SECOND) OF CONTRACTS §§ 200, 201, 209-10, 212-15 (1981). The parol evidence rule is essentially a jury control device. See Murray, The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts, 123 U. PA. L. REV. 1342 (1975). Murray discusses various arguments as to what the trier of fact should consider. He observes,

[...] certainly it can be argued that juries must not be permitted such leeway because they are not sufficiently sophisticated to accord the written evidence its sacred place. Simply put, juries may not be trusted with such a task, regardless of awesome instructions from the court, but must be shielded from evidence of any prior agreements if the parties intended the writing to be the final and complete manifestation of their agreement. The security and stability of transactions demand this protection.

Id. at 1346 (footnotes omitted).

McCormick noted that in most cases involving a conflict between a writing and an alleged oral agreement "the one who sets up the spoken against the written word is economi-
In a jurisdiction accepting this approach, a plaintiff in a release case could argue that he understood the release to cover only injuries known at the time of settlement, and that this understanding is the most reasonable.\(^\text{43}\) One can easily imagine a scenario where this understanding is more reasonable — for instance where plaintiff receives payment and hastily signs a standardized form without the benefit of counsel. If defendant witnessed such a signing and there had been no concrete negotiations, plaintiff might argue persuasively that his belief that the release included only known injuries was the most reasonable. In other situations, however, plaintiff's argument might not persuade the court, particularly when he participated in negotiations or hired counsel.\(^\text{44}\)

In a concurring opinion Judge Davidson suggested a somewhat different approach.\(^\text{45}\) Arguing that the special circumstances surrounding releases render contract doctrine inapplicable, she stressed that lay persons lack bargaining strength and are not in the position to adequately defend their interests. She advocated a special rule allowing plaintiffs to void releases when unforeseen injuries develop after an agreement is executed.\(^\text{46}\)

\(^{43}\) The average jury will . . . lean strongly in favor of the side which is threatened with possible injustice and certain hardship by the enforcement of the writings.” McCormick, *The Parol Evidence Rule as a Procedural Device For Control of the Jury*, 41 Yale L.J. 365, 366 (1932).


To ascertain the parties' intentions, courts generally consider the amount of consideration paid, the length of time between the injury and settlement, the competence of the releasor, and the presence or absence of counsel. See, e.g., Schmidt v. Smith, 299 Minn. 103, 109-10, 216 N.W.2d 669, 673 (1974).

\(^{46}\) Judge Davidson essentially adopted the reasoning of and quoted at length from Judge Frank's concurrence in Ricketts v. Pennsylvania R.R., 153 F.2d 757, 760-70 (2d Cir. 1946). Judge Frank argued that difficulties with both subjective and objective theories rendered contract doctrine inapplicable to these situations. Although Judge Davidson quoted Judge Frank's reasoning with approval, she concurred with the Bernstein majority on the basis of Rule 625[a].

Apparently Judge Davidson distinguishes, as do most courts, between later discovered injuries and subsequently developing consequences of known injuries, and would grant relief only in the former case. This distinction can be partially attributed to the majority's reliance on mistake doctrine. These courts generally require that the mistake be one of isolated fact rather than a "mistaken expectation" concerning the healing of a known disorder. See Dansby v. Buck, 92 Ariz. 1, 6-7, 12, 373 P.2d 1, 4, 5-8 (1962); Melvin v. Stevens, 10 Ariz. App. 357, 361, 458 P.2d 977, 981 (1969); Ruggles v. Selby, 25 Ill. App. 2d 1, 14, 165 N.E.2d 733, 740 (1960); Tewskburg v. Fellsway Laundry, Inc., 319 Mass. 386, 388-89, 65 N.E.2d 918, 919 (1946); Aronovitch v. Levy, 238 Minn. 237, 246, 56 N.W.2d 570, 576 (1953);
Although the Bernstein decision conforms to and logically flows from previous Maryland case law, Maryland's strict rules on parol evidence and contract interpretation should be slightly modified in personal injury release cases because, as Judge Davidson argued in her concurrence, the major rationale for the objective theory is not compelling in these situations. Proponents of the strict approach contend that it ensures predictability and stability in business transactions. Execution of a personal injury release, however, is not a traditional commercial transaction. It usually is a transaction, not between two commercial enterprises, but between an insurance company and an individual. Furthermore, releases typically are standard form contracts, with which insurance companies are, but claimants are not, Mangini v. McClurg, 24 N.Y.2d 556, 565-66, 249 N.E.2d 386, 393, 301 N.Y.S.2d 508, 515-16 (1969); Harvey v. Robey, 211 Va. 234, 238, 176 S.E.2d 673, 675 (1970).


Certainly the sensation of pain in the hip area cannot be considered constructive notice of the injury to the femur. Even where a releasor has knowledge of the causative trauma, it has been held that there must be actual knowledge of the injury. Knowledge of injury to an area of the body cannot cover injury of a different type and gravity. Id. at 565, 249 N.E.2d at 392, 301 N.Y.S.2d at 515.

47. See supra notes 3 and 19.

48. The problems inherent in standardized form contracts have been frequently discussed. See CALAMARI & PERILLO, supra note 6, §§ 9-44 to -46, at 336-47; 1 CORBIN, supra note 16, § 107, 3 CORBIN, supra note 16, § 559; K. LLEWELLYN, THE COMMON LAW TRADITION 362-71 (1960); Murray, supra note 42, at 1372-89; Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 HARV. L. REV. 529, 529 (1971) (“The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.”); RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981) (The drafters of the Restatement observed, “A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms.”) RESTATEMENT (SECOND) OF CONTRACTS § 211, comment b (1981)). Nevertheless, the modern world probably could not function without standardized form-pad agreements. Still, there is no “meeting of the minds,” in the traditional sense if one of the parties did not read or understand the written terms. Courts and commentators have developed rules to protect the parties and preserve the stability of such transactions:

Standardized writings are particularly suspect in identifying the true intent of the parties.Absent an understanding of most boilerplate provisions, there can be no conscious assent to such terms. Conscious assent can be given only to “dickered” terms, the terms reasonable parties normally and consciously negotiate. As to the boilerplate, ...
Use of standard form contracts drastically decreases the likelihood that the terms conform to both parties’ understanding. In fact, the Maryland statutes allowing injured parties to void hastily signed releases seem to suggest that these parties are vulnerable. Their vulnerability makes the more liberal method of interpretation attractive in release cases.

Maryland need not completely reject its traditional approach in these cases or adopt the “special rule” that Judge Davidson suggested in her concurring opinion. But the court should refuse to apply the

“blanket assent” will not be presumed as to “indecent” or, in the language of the Restatement (Second), “bizarre or oppressive” boilerplate provisions. Murray, supra note 42, at 1374 (footnote omitted). See, e.g., Hurt v. Leatherby, 380 So. 2d 432, 434 (Fla. 1980) (“Manifestation of intent must be more explicit than signing a printed form which happens to contain broad, general release language. . . ”).

For Llewellyn the problem is closely tied to traditional notions of the freedom of contract. He argues that freedom of contract presupposes free bargaining and that in the typical standardized form situation where bargaining is absent, “the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.” K. LLEWELLYN, supra, at 367 (citations omitted). Hence there are two contracts in Llewellyn’s view: the dickered agreement and the enforceable boilerplate, which reasonably supplements the “dickered” terms.

Defendants might argue that standardized form analysis is inappropriate because presumably there are no supplemental terms at all in releases; instead, the writing is a manifestation of the “dickered” agreement. This distinction is not meaningful since the risk of misunderstanding and of binding an unknowing or confused party to oppressive terms is still present.

49. Apparently these arguments have not impressed Maryland courts. There has been a general trend in insurance law to honor the insured’s “reasonable expectations” even when contrary to written policy provisions. See R. Keeton, Insurance Law § 6.3(a), at 350–61 (1971); Abraham, Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured, 67 Va. L. Rev. 1151 (1981). Despite this general trend, Maryland continues to strictly enforce these agreements. National Grange Mut. Ins. Co. v. Pinkney, 284 Md. 694, 704–07, 399 A.2d 877, 882–83 (1979); Government Employees Ins. Co. v. DeJames, 256 Md. 717, 720, 261 A.2d 747, 749 (1970). However, an ambiguity will be strictly construed against the insurer. Id. The Maryland court implicitly rejected this argument for a release in Gingell v. Backus, 246 Md. 83, 227 A.2d 349 (1967). In Gingell, a law student insurance agent had an uneducated 64 year-old laborer execute a release. The court noted the parties’ disparate bargaining positions, but upheld the release, concluding:

This is simply another case in which the untutored, but literate litigant did not make reasonable use of his intellectual attainments; meager though they might have been, but which nonetheless were at hand and available for use, and now asks the court to undo the harm he has brought upon himself. Id. at 92, 227 A.2d at 354.

Llewellyn has characterized cases such as Gingell this way: “[Courts] read the document for what it says, drop a word about freedom of contract, or about opportunity to read or improvident use of the pen, or about powerlessness of the court to do more than regret, . . . and proceed to spit the victim for the barbecue.” K. LLEWELLYN, supra note 48, at 364.

strict parol evidence rule in cases involving standard form releases unless (1) the releasor was represented by counsel or (2) the standard form release highlighted a provision explaining that the release granted immunity from future claims.\textsuperscript{51} If neither of these conditions is satisfied, the court should admit evidence that the releasor did not understand the immunity provision and that his understanding is more reasonable. In the face of this approach, insurance companies probably would modify their standard forms to preserve the benefits associated with keeping issues of interpretation from the jury.\textsuperscript{52} The burden on insurance companies would be negligible because modifying the form would not interfere with the release process. For insurance companies to argue otherwise would be tantamount to admitting that impermissible benefits had flowed from previous bargains. Furthermore, if the forms were modified, the proposed approach would not interfere with judicial efficiency. Any case involving a release with a highlighted immunity provision would be governed by the strict parol evidence rule.

In such cases the strict approach is equitable. When the releasee has satisfied the parol evidence rule's clarity requirement by highlighting the immunity provision, the presumption of mutual intent becomes more than a legal fiction.\textsuperscript{53} Courts perhaps can legitimately assume that after signing a release with a highlighted provision, a releasor should not be heard to argue that he did not understand the release to include claims for future injuries.

The Bernstein court correctly refused to adopt the incorrect reasoning of the majority of American jurisdictions. However, the court's preoccupation with preserving Maryland's traditional contract principles prevented the court from adopting a more equitable approach in light of the circumstances that surround the execution of release agreements. The court should have limited its holding to cases like Bernstein, where plaintiffs have the benefit of counsel. At the next opportunity the Court of Appeals should distinguish Bernstein and adopt a more flexible and equitable position in the resolution of these cases by refusing to grant defendants the benefit of the traditional parol evidence rules unless the releasor is represented by counsel or the standard form release highlights the provision granting the releasee immunity from all potential future liability.

\textsuperscript{51} See Murray, supra note 42, at 1381. In another area of standardized agreements, the Uniform Commercial Code requires waivers of warranty provisions to be appropriately flagged. See U.C.C. § 2-316 (1981), which suggests that form contracts containing terms with potentially drastic consequences arbitrarily imposed by one party concerned the drafters.

\textsuperscript{52} See supra note 42.

\textsuperscript{53} See supra note 48.
In *State v. Priet* the Court of Appeals of Maryland held that a trial judge may consider the record as a whole in determining whether a criminal defendant understands the nature of the charge to which he pleads guilty. The court held that neither due process nor Maryland Rule 731(c) requires a trial judge to explain to a defendant the nature of the charge to which he is pleading guilty. Although *Priet* correctly concluded that the United States Constitution does not require such an explanation, the court’s construction of Rule 731(c) is questionable.

Appellee Priet pleaded guilty in the Circuit Court of Baltimore

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2. *Id.* at 291, 424 A.2d at 361.
3. In *Priet* the court interpreted the 1977 version of Rule 731(c), which stated:

   The court may not accept a plea of guilty without first questioning the defendant on the record to determine that the plea is made voluntarily, with understanding of the nature of the charge and the consequences of the plea. The court may accept the plea of guilty even though the defendant does not admit that he is in fact guilty if the court is satisfied that there is a factual basis for the plea. If the court refuses to accept a plea of guilty, the court shall enter a plea of not guilty.

   MD. R.P. 731(c) (repealed Jan. 1, 1982). The Court of Appeals amended Rule 731(c), effective January 1, 1982, so that it presently states:

   If the defendant tenders a plea of guilty, the court may not accept the plea until it determines, after an examination of the defendant on the record in open court by the court, by the State’s Attorney, by the attorney for the defendant, or by any combination thereof, that the plea is made voluntarily, with understanding of the nature of the charge and the consequences of the plea. The court may accept the plea of guilty even though the defendant does not admit that he is in fact guilty if the court is satisfied that there is a factual basis for the plea. If the court refuses to accept a plea of guilty, the court shall enter a plea of not guilty.

   MD. R.P. 731(c).

   The language in the 1977 version of Rule 731(c) might have led one to believe that the court must conduct the inquiry of the defendant to determine that the plea is valid. However, that interpretation of the rule was foreclosed by the Court of Appeal’s decision in *Priet*, upholding the acceptance of two guilty pleas in which the defendant’s counsel and the State’s Attorney respectively had conducted the questioning. 289 Md. at 291, 424 A.2d at 361.

   Amended Rule 731(c) resolves any doubt as to who may properly conduct the inquiry of the defendant by providing that, in addition to the trial judge, either the defendant’s attorney or the State’s Attorney may conduct the questioning. The language in the amended rule governing the method of questioning the defendant, however, does not appear substantially different from that of the old rule.

4. 289 Md. at 290-91, 424 A.2d at 361.
County and was convicted of robbery with a deadly weapon. The trial judge did not explain the offense to Priet — nor did he ask Priet whether he understood the nature of the charge against him — before concluding that his plea was voluntary and intelligent. The defendant, however, told the judge that he had discussed the plea, the facts of his case, and the possible defenses to the crime with his attorney. Priet appealed his conviction to the Maryland Court of Special Appeals where he contended that the trial court, in accepting his guilty plea, violated Rule 731(c) by not explaining the nature of the charge on the record. The Court of Special Appeals, relying on the Court of Appeals' decision in Countess v. State, reversed Priet's conviction and remanded for a new trial.

Countess, an interpretation of pre-1982 Rule 735(d), held that when a defendant elects to waive the right to a jury

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6. The pertinent part of the colloquy between the trial judge and defendant Priet was:

THE COURT: Have you discussed your guilty plea fully with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed all of the relevant facts and possible defenses about this case with Mr. Brennan?

THE DEFENDANT: Yes, sir.


7. Id.
10. 45 Md. App. at 5, 410 A.2d at 1109.
11. When Countess and Priet were decided, Rule 735(d) provided:

If the defendant elects to be tried by the court, the trial of the case on its merits before the court may not proceed until the court determines, after inquiry of the defendant on the record, that the defendant has made his election for a court trial with full knowledge of his right to a jury trial and that he has knowingly and voluntarily waived the right. If the court determines otherwise, it shall give the defendant another election pursuant to this Rule.

Md. R.P. 735(d) (repealed Jan. 1, 1982). Effective January 1, 1982, the Court of Appeals modified the rule governing the procedure for accepting a waiver of a jury trial. The new rule provides in pertinent part:

A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until it determines, after an examination of the defendant on the record in open court by the court, by the State's Attorney, by the attorney for the defendant, or by any combination thereof, that the defendant knowingly and voluntarily waived a jury trial.

Md. R.P. 735(b). The new rule no longer requires that the defendant make his election with "full knowledge of his right to a jury trial," language that Countess interpreted to mean "basic understanding of the nature of a jury trial." 286 Md. at 455, 408 A.2d at 1308. Because the Countess holding was based in part on this language, Countess may no longer dictate how much a defendant must know about the nature of a jury trial in order to make a valid election under Rule 735. However, the words "full knowledge of his right to a jury trial" seemed merely to explain the requirement that the defendant "knowingly" waive a jury trial. Thus, arguably, this language was eliminated because it was redundant. Since the
trial, the requisite inquiry must be addressed to the defendant in open
court, be recorded, and elicit the defendant's knowledge of his right to
a jury trial.\footnote{12} Emphasizing the analogy between Rule 731(c) and
735(d), the Court of Special Appeals in \textit{Priet} ruled that the trial judge
had not observed Rule 731(c) because he did not inquire, on the record,
whether Priet understood the charges to which he pleaded guilty.\footnote{13}

The Court of Appeals granted certiorari\footnote{14} to decide whether the
new rule retains the requirement that the defendant's waiver be knowing, \textit{Countess} probably
still provides the yardstick for measuring the knowledge required to make a valid election
under Rule 735.

12. 286 Md. at 454-55, 408 A.2d at 1307-08.
13. 45 Md. App. at 3, 410 A.2d at 1108.
14. \textit{State v. Priet} was a consolidated appeal of three criminal cases. In addition to \textit{Priet},

Appellee Pincus pleaded guilty to second-degree murder in the Criminal Court of
Baltimore City. The pertinent part of the colloquy between the Assistant State's Attorney
and the defendant prior to the trial judge's acceptance of the plea was:

\begin{verbatim}
MR. PREVAS: Is there anything that you don't understand that has been asked of you
today?
THE WITNESS: No.
MR. PREVAS: Do you feel comfortable that you are doing the right thing when you
are pleading guilty with Mr. Reddick's advice?
THE WITNESS: Yes.
MR. PREVAS: And you understand the difference between first degree murder, that
you could possibly get a life sentence, and second degree murder where the maximum
could have been thirty, but the State is recommending a maximum of fifteen, do you
understand that?
THE WITNESS: Yes.
MR. PREVAS: Is that one of the things you took into consideration when you pled
guilty to second degree murder?
THE WITNESS: Yes.
\end{verbatim}

City Apr. 30, 1979).

Vandiver pleaded guilty to robbery in the Criminal Court of Baltimore City. The
following colloquy between the defendant and his trial attorney prior to the court's accept-
ance of the plea is all the record reveals of Vandiver's understanding of the charge:

\begin{verbatim}
Q. Gary, you're pleading guilty under Alford which is a technical plea to the offense
of robbery and I discussed with you exactly what the elements of robbery are, did I not?
A. Yes.
Q. Now you understand what the offense of robbery consist [sic], what burden the
State would have to prove against you to convict you of robbery before either a Court
or jury?
A. Yes.
\end{verbatim}

City June 12, 1979).

The Court of Special Appeals reversed both convictions, citing \textit{Priet} and \textit{Countess}.
The court concluded that in each case the record did not disclose the requisite inquiry of the
State v. Priet

1982]

Court of Special Appeals had correctly interpreted Rule 731(c).15 In an opinion written by Chief Justice Murphy, the Court of Appeals reversed the lower court, holding that Maryland Rule 731(c) does not require a trial judge to inform a defendant of the legal elements comprising the offense or to follow any fixed procedure or ritual in determining whether a defendant understands the nature of the offense to which he is pleading guilty.16 Instead, the court said that a trial judge should make the required determination "on a case-by-case basis, taking into account the relevant circumstances in their totality as disclosed by the record, including among other factors, the complexity of the charge, the personal characteristics of the accused, and the factual basis preferred to support the court's acceptance of the plea."17 Finally, the court concluded that the record in this case provided a sufficient basis for the trial judge's determination that Priet understood the nature of the charge to which he pleaded guilty.18

Guilty pleas are estimated to account for more than seventy percent of all criminal convictions.19 Thus, a fair procedure for accepting them is critical to the just and accurate administration of criminal justice. A guilty plea is an admission of the material elements of the crime, as well as a waiver of several constitutional rights — the privilege against self-incrimination, the right to confront one's accusers, and the right to a jury trial.20 Therefore due process requires that, to be valid, a guilty plea be voluntary and intelligent.21 A number of Supreme Court decisions — most notably Boykin v. Alabama22 and Henderson v. Morgan23 — have discussed the safeguards necessary to ensure voluntariness of guilty pleas.

defendant mandated by Rule 731(c). Pincus, No. 813, slip op. at 4; Vandiver, No. 743, slip op. at 3-4.

15. 289 Md. at 269, 424 A.2d at 350.
16. Id. at 287-88, 424 A.2d at 359.
17. Id. at 288, 424 A.2d at 360.
18. Id. at 290-91, 424 A.2d at 360-61.
19. In Maryland, no state-wide statistics are available. However, in 1980 the Maryland Sentencing Guidelines Project conducted a study of circuit court cases in four jurisdictions: Baltimore City, Harford County, Prince George's County, and Montgomery County. This study showed that in 1979, 73.7% of convictions resulted from guilty pleas. The percentage probably would have been higher if the study had included the district courts as well as the circuit courts, since only the most serious cases originate in the circuit courts. Telephone interview with Charles H. Clemens, Jr., Research Analyst, Maryland Sentencing Guidelines Project (Nov. 9, 1981); See also DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS, ANNUAL REPORT A-74 (prelim. ed. 1981) (81% of federal convictions were obtained pursuant to pleas of guilty or nolo contendere during the 12-month period ending June 30, 1981).
In *Boykin v. Alabama*, the Supreme Court overturned a conviction based on a guilty plea because the record failed to show either that the judge had asked the defendant any questions or that the defendant had addressed the court.\(^{24}\) Justice Douglas, writing for the majority, ruled that the trial judge had erred in accepting the guilty plea without an "affirmative showing that it was intelligent and voluntary."\(^{25}\) He concluded that the Court would not presume voluntariness from a silent record.\(^{26}\) However, the Court provided virtually no guidance as to what must appear on the record to demonstrate that a plea is voluntary and intelligent.\(^{27}\)

In *Henderson v. Morgan*, the Court examined the validity of a guilty plea to a charge of second-degree murder. The defendant was below average in intelligence,\(^{28}\) and neither the court nor counsel had explained to him that intent to cause death was an essential element of the crime.\(^{29}\) The Court stated that "intent is such a critical element of the offense of second-degree murder that notice of that element is required" in order to assure that a plea is voluntary.\(^{30}\) However, the Court did not rule that a description of every element of the offense always is required.\(^{31}\) Rather, *Morgan* indicated that a trial court

\[\begin{align*}
24. & \quad 395 \text{ U.S. at } 239. \\
25. & \quad \textit{Id. at } 242. \\
26. & \quad \textit{Id. at } 242-43. \\
27. & \quad \text{Justice Douglas listed three constitutional rights — the right to a jury trial, the right to confront one’s accusers, and the privilege against self-incrimination — which he summarily concluded could not be presumed waived from a silent record. \textit{Id. at } 243. \text{ Nevertheless, *Boykin* has not been read to require a specific waiver of these three constitutional rights. See Davis v. State, 278 Md. 103, 116-17, 361 A.2d 113, 120-21 (1976).} \\
28. & \quad 426 \text{ U.S. at } 641-42. \\
29. & \quad \textit{Id. at } 640. \\
30. & \quad \textit{Id. at } 647 \text{ n.18.} \\
31. & \quad \textit{Id. The court suggested that acceptable alternatives are available. Referring to the intent element of second-degree murder it said:} \\
& \quad \text{There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent. \textit{Id. at } 646. \text{ Finally the Court stated that "it may be appropriate to presume that in most} \\
\end{align*}\]
"should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused." 32

Priet seems to comply with Boykin and Henderson, for the Maryland court held: "Necessarily, the required determination [of whether an accused understands the charge] can only be made on a case-by-case basis, taking into account the relevant circumstances in their totality as disclosed by the record . . . ." 33 Apparently neither Boykin nor Morgan demands any further safeguard for the voluntariness required by due process. 34 Although Boykin seems to require some record evidence of voluntariness, Henderson explicitly rejected any suggestion that a trial judge must explain to the defendant every element of the offense.

The Court of Appeals also implicitly held that Rule 731(c) does not require anything beyond compliance with due process. 35 In construing the language of the rule, the court looked to decisions interpreting two cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." Id. at 647.

32. Id. at 644.
33. 289 Md. at 288, 424 A.2d at 360.
34. See Note, supra note 27, at 110-20.
35. In Maryland, the earliest enunciated standard for accepting guilty pleas required that the record reflect that the plea was made by a competent person, "freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded." Lowe v. State, Ill Md. I, 15, 73 A. 637, 639 (1909) (emphasis in original). However, in applying this standard in the cases that followed, the Court of Appeals was reluctant to invalidate a guilty plea because of an inadequate record. See Davis v. State, 278 Md. 103, 108, 361 A.2d l3, l6 (1976). In 1966, the court held that a trial judge need not follow a specific ritual, James v. State, 242 Md. 424, 428, 219 A.2d 17, 20 (1966), nor personally address the defendant, in order to determine that a guilty plea was voluntary and intelligent, Owens v. State, 243 Md. 719, 721, 222 A.2d 838, 839 (1966). The trial court only had to satisfy itself — as opposed to having the record reflect — that the plea was entered voluntarily with an understanding of the offense and the consequences of the plea. James, 242 Md. at 428, 219 A.2d at 20.

It was not until Davis v. State, 278 Md. 103, 361 A.2d lll (1976), that the court considered the implications of Boykin and its progeny on the Maryland standard for accepting guilty pleas. In Davis the court ruled that after Boykin due process requires the record as a whole to disclose affirmatively that the defendant pleaded guilty voluntarily and intelligently. Id. at 114, 361 A.2d at 119. Additionally, the court stated that "Boykin does not stand for the proposition that the due process clause requires state trial courts to specifically enumerate certain rights, or go through any particular litany, before accepting a defendant's guilty plea." Id.

Davis was decided one year before the adoption of Rule 731(c). However, it is noteworthy that Priet, which gave the initial interpretation of the new rule, merely reiterated the Davis standard. Hence, the court's decision in Priet suggests that the Rule 731(c) requirement — that the defendant plead "with understanding of the charge" — is a nullity, for in light of Priet, this portion of the rule adds nothing to the existing common law standard for the acceptance of guilty pleas.
similarly worded rules — Federal Rule 11,36 which governs guilty pleas in federal courts, and Maryland Rule 735(d),37 which covered elections to waive the right to a jury trial in Maryland. The court found support for its interpretation of Maryland’s guilty plea rule in federal decisions holding that the corresponding federal rule does not require a federal court to explain the nature of the charge to which the defendant is pleading guilty.38

Although these decisions ordinarily might be persuasive, they lose much of their force in the face of Countess v. State,39 which construed pre-1982 Maryland Rule 735(d).40 Nevertheless, the Priet court concluded that the Countess construction of Rule 735(d) should not control the construction of Rule 731(c).41 This conclusion is questionable, however, because at the time of the decision the language of the two rules was very similar. Rule 735(d) stated: “If the defendant elects to be tried by the court,. . . the court may not proceed until the court determines, after inquiry of the defendant on the record, that the defendant has made his election for a court trial with full knowledge of his right to a jury trial . . . .”42 Rule 731(c) provided: “The court may not accept a plea of guilty without first questioning the defendant on the record to determine that the plea is made . . . with understanding of the nature of the charge . . . .”43

In Countess the court held that a defendant has “full knowledge” of a jury trial if he is aware that, before he is convicted in a jury trial, all twelve jurors must find him guilty beyond a reasonable doubt.44 Countess held further that the inquiry required by 735(d) to determine whether a defendant has this knowledge “must be addressed to the defendant in open court and recorded . . . so as to be available for appellate review if the election is questioned. . . . [T]he court must not only

36. Rule 11 provides in pertinent part:
Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands,
. . . the nature of the charge to which the plea is offered . . . .

FED. R. CRIM. P. II(c)(I).
37. See supra note 10.
40. See supra note 10.
41. 289 Md. at 289, 424 A.2d at 360.
42. MD. R.P. 735(d) (repealed Jan. 1, 1982) (emphasis added), quoted supra note 10.
43. MD. R.P. 731(c) (repealed Jan. 1, 1982) (emphasis added), quoted supra note 2.
44. 286 Md. at 455, 408 A.2d at 1308.
know what was told the defendant but be in a position to evaluate the responses of the defendant to the information imparted." Yet in *Priet*, the court held that a trial judge need only look at the record as a whole in determining that a defendant understands the nature of the charge. *Priet* mandates no inquiry of a defendant regarding the nature of the charge. The court did not explain why it interpreted these similarly worded statutes so differently.

Furthermore, as the Court of Special Appeals pointed out, there seems to be no justification for a stricter construction of the rule governing the waiver of a jury trial than of the rule governing guilty pleas. In fact, a defendant who waives a jury trial will receive a judge trial, while a defendant who pleads guilty waives the right to any trial. His need for protection is at least as great as that of a defendant who waives only his right to a jury trial.

Thus, although the two pre-1982 rules demanded different inquiries, as the Court of Special Appeals observed in *Matthews v. State*, there seems to be no reason to suppose that they contemplated different standards of compliance. Both explicitly required only that the trial judge inquire on the record whether the defendant has sufficient understanding for his action to be knowing and voluntary. Why then should the court have read Rule 735(d) to require more record evidence of the defendant's understanding than Rule 731(c)?

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45. *Id.* at 454, 408 A.2d at 1307.
46. 289 Md. at 291, 424 A.2d at 361.
48. *Id.*
49. It is conceivable that a flagrant violation of Rule 735(d) would harm a defendant more than a minor violation of Rule 731(c). For example, compare a defendant who would not have waived his right to a jury trial but for some significant violation of Rule 735(d) with a defendant who would have pleaded guilty anyway despite a minor departure from the requirements of Rule 731(c). Nevertheless, a defendant waives more constitutional rights when pleading guilty than when waiving a jury trial.
51. The court attempted to justify the variance between the *Priet* and *Countess* holdings by stating that because "the two rules are separate and distinct . . . the specifically delineated requirements of Rule 735(d) are not engrafted upon Rule 731(c)." 289 Md. at 289, 424 A.2d at 360. However, the Court of Special Appeals had applied a different construction, mandating only that the subject matter of both inquiries — though different — be shown affirmatively on the record. Matthews *v. State,* 46 Md. App. 172, 178, 416 A.2d 1314, 1317 (1980). This standard differs from the Court of Appeals' standard, which permits a trial judge to consider the record as a whole to determine whether a defendant understands the nature of the charge. 289 Md. at 291, 424 A.2d at 361. The intermediate appellate court's requirement of an "affirmative showing" suggests a strict construction of Rule 731(c) similar to the strict construction of Rule 735(d) enunciated by the Court of Appeals in *Countess*. By summarily concluding that the Court of Special Appeals erred in determining that the trial judge had not complied with Rule 731(c) in *Priet*, 289 Md. at 290, 424 A.2d at 360-61, the
The parallel language of Rules 735(d) and 731(c) suggests that the court should have interpreted these rules similarly. Furthermore, sound policy considerations would support a strict reading of Rule 731(c), requiring the trial judge to explain to the defendant the nature of the crime to which he is pleading guilty. In McCarthy v. United States the Supreme Court, construing the federal rule governing the acceptance of guilty pleas, stated that building a strong and complete record “not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate.” The Maryland Court of Appeals has undermined these goals by allowing a trial judge to resort to “assumptions,” instead of a record based on the defendant’s responses to questions regarding the nature of the charge. Moreover, requiring a more complete record would impose no substantial burden on trial courts, because a thorough voluntariness and accuracy inquiry is estimated to take ten minutes or less.

Other courts have required even more on the record than the Court of Special Appeals would have. In Commonwealth v. Ingram the Supreme Court of Pennsylvania held that the record must show that the trial judge outlined, in understandable terms, the elements of the charge. Observing that merely naming the crime is not sufficient, the court said: “While such terms clearly connote some meaning to the

court obfuscated the fact that the Court of Special Appeals had construed the rule more strictly.

Although the Court of Appeals garnered ample support for its Priet decision from precedents in Maryland and other jurisdictions, see 289 Md. at 274-88, 424 A.2d at 353-59, it did not explain adequately the reasons for the logical inconsistencies between its Priet and Countess holdings. It is noteworthy that the Court of Appeals recently has amended Rule 735 so that it may now be susceptible to an interpretation that would apply a less stringent standard for accepting jury trial waivers. See supra note 10. Query whether the court has exercised its rule-making authority to harmonize its interpretation of Rules 731 and 735.

52. See supra text accompanying notes 43-44.


55. Id. at 472.

56. See id. at 467.


59. Id. at 203-04, 316 A.2d at 80.
layman, this meaning does not always embrace the basic legal elements of the crime."60 Otherwise courts would not need to instruct juries on such points, "for certainly an average defendant cannot be presumed to understand more than an average juror."61 Furthermore, it is conceivable that unless the trial judge explains the elements of the charge, the defendant may plead guilty to a crime more serious than the one he actually committed.

CONCLUSION

Although Priet's flexible standard for compliance with Rule 731(c) meets minimum due process standards, it is a less than commendable standard. A preferable standard would require that the record disclose a direct discussion with the defendant eliciting his understanding of the nature of the charge. Strict construction of the rule would better serve to protect the defendant's rights and promote efficient and accurate reviews of guilty plea convictions. Furthermore, as one commentator noted: "[N]o judge can take pride in holding his procedure to the very minimum of fairness as required by the law."62 In the words of former Chief Justice Earl Warren: "It is . . . not too much to require that, before sentencing defendants to years of imprisonment . . . judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking."63

60. Id. at 203, 316 A.2d at 80.
61. Id.
63. McCarthy v. United States, 394 U.S. at 472.
In *State v. Rusk*,\(^1\) the Maryland Court of Appeals held that the evidence before the jury was legally sufficient to convict Edward Rusk of second degree rape under Article 27, § 463(a)(1).\(^2\) Although the court's decision was ostensibly correct, the analysis offered in support is incomplete, and so seems to suggest that Maryland courts have dispensed with, or at least ignored the mens rea requirement in dealing with this very serious crime against the person.

**THE VICTIM'S TESTIMONY**

At trial, the 21 year old victim, Pat, testified that on September 21, 1977, after a high school alumnae meeting, she and a girl friend, Terry, drove their separate cars to Fells Point to have a few drinks. Pat met the defendant, Edward Rusk, when he engaged her in conversation after exchanging greetings with her friend Terry.\(^3\) After talking to him for about twenty minutes, Pat told Rusk that she had to leave because it was a week night and she had to wake up with her two-year-old son early the next morning.\(^4\)

Rusk asked Pat which way she was going and then requested a ride to his apartment. Pat testified that although she did not know Rusk, she thought Terry did because she, Terry, had greeted him by name. Thus, Pat agreed to the defendant's request. On the way to her car, however, Pat warned Rusk that "I'm just giving a ride home, you know, as a friend, not anything to be, you know, thought of other than a ride."\(^5\)

Twenty minutes after leaving Fells Point they arrived at Rusk's apartment in the 3100 block of Guilford Avenue. Pat testified that she was totally unfamiliar with the neighborhood. She parked her car at the curb on the side of the street opposite the defendant's apartment, but did not turn off the engine. Rusk then invited Pat into his apartment three times. Pat refused three times. After her third refusal, Pat

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\(^{1}\) 289 Md. 230, 424 A.2d 720 (1981).


(a) *What constitutes* — A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

(1) By force or threat of force against the will and without the consent of the other person.

\(^{3}\) 289 Md. at 232, 424 A.2d at 721.

\(^{4}\) Id. at 233, 424 A.2d at 721.

\(^{5}\) Id.
said that she could not accompany Rusk even if she wanted to because she was separated from her husband and feared that a detective might be watching her. Pat testified that the defendant then leaned over, turned off the ignition and removed the keys. Getting out of the automobile, Rusk walked over to her side, opened the door and said, "'Now, will you come up?'" The victim testified that at this point she feared Rusk would rape her. She justified her fear by citing his "threatening" look and her unfamiliarity with the neighborhood.

Despite this fear, or because of it, Pat walked with Rusk across the street, into the dark row house, and followed him up the stairs. Pat testified that she did not see or hear anyone in the building. They entered his apartment, and Rusk turned on the light. The defendant sat on the bed while Pat sat in an adjacent chair. Several minutes later, Rusk left the apartment for a period of time which Pat estimated to be between one and five minutes. According to the victim's testimony, she did not attempt to leave, and she implied that she did not seek to draw any attention to her situation by screaming or making noise. She further testified she was unaware that there was a telephone in the room, and that upon returning to the room, Rusk turned off the light and sat on the bed. Although Pat requested that Rusk permit her to leave, the defendant expressed his desire that she stay. Pat testified that, at this point, Rusk still possessed her car keys.

Pat further testified that following this exchange, Rusk asked her to join him on the bed, pulling her towards him by her arms. He then removed her blouse and bra and unzipped her slacks, which she removed after he told her to do so. After she took off the remainder of her clothing, he requested that she remove his pants. The victim complied.

Pat testified that as the defendant proceeded to kiss her, she begged him to let her go, but that he refused. Then, prompted by an indescribable look in his eyes, she asked Rusk if he would let her leave without killing her if she did what he wanted. Pat testified that she then broke into tears, at which point Rusk placed his hands on her throat and started to "lightly choke her." She again asked, "'If I do what you want, will you let me go? '" The defendant said yes. Pat

6. Id.
7. Id. at 234, 424 A.2d at 721.
8. Id. at 234, 424 A.2d at 721-22.
9. Id. at 233, 424 A.2d at 721-22.
10. Id. at 234, 424 A.2d at 722.
11. Id.
12. Id. at 235, 424 A.2d at 722.
13. Id.
testified that Rusk then made her perform oral sex followed by sexual intercourse.14

Immediately following the intercourse Pat again asked to leave. Rusk agreed and they each got dressed. Rusk then returned Pat's car keys and walked her to her car. Before Pat left, Rusk asked if he could see her again. Although Pat said that he could, she emphasized at the trial that she had no intention of meeting the defendant again. After receiving directions out of the neighborhood, the victim left.15

THE DECISION

A Baltimore City jury found Rusk guilty of second degree rape.16 The Court of Special Appeals, however, reversed the conviction in an 8 to 5 decision, holding that the evidence of Rusk's guilt was insufficient to submit the case to the jury.17

On appeal, the Maryland Court of Appeals identified the controlling issue as whether, in light of Maryland precedent, there was legally sufficient evidence before the jury to establish that the defendant accomplished intercourse "by force or threat of force against the will and without the consent of the victim in violation" of the Maryland second degree rape statute.18 The court correctly explained that a reviewing court should not be influenced by its own perception of the case, but should ask whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found

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14. Id.
15. Id.
   (a) . . . — A person is guilty of rape in the first degree if the person engages in vaginal intercourse with another person by force or threat of force against the will and without the consent of the other person and:
   (1) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably concludes is a dangerous or deadly weapon; or (2) Inflicts suffocation, strangulation, disfigurement, or serious physical injury upon the other person or upon anyone else in the course of committing the offense; or (3) Threatens or places the victim in fear that the victim or any person known to the victim will be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping.

The apparent difference between § 462 and § 463 is that the former demands a stronger showing of violence. But one can easily confuse a violation of § 463(a)(1), the statute under which Rusk was convicted, with a violation of § 462(a)(1)–(3) due to the similar wording of the statutes. Arguably the state should have prosecuted Rusk under § 462 since his "light choking" of the victim was a significant factor in both the jury's conviction and the Court of Appeals' decision.

18. 289 Md. at 240, 424 A.2d at 725.
that the state had established the requisite elements of the offense.19

The Rusk case afforded the Court of Appeals its first discussion of Maryland rape law since Hazel v. State,20 a prosecution for common law rape. When the Maryland legislature codified detailed sexual offense laws in 1976,21 it recited, but did not define the elements of rape. In accordance with the statutory directive to give undefined terms their "judicially determined meaning," the court in Rusk relied on Hazel's definitions of the elements of rape.22 Citing Hazel, the Court of Appeals noted that

[i]f the acts and threats of the defendant were reasonably calculated to create in the mind of the victim — having regard to the circumstances in which she was placed — a real apprehension, due to fear, of imminent bodily harm serious enough to impair or overcome her will to resist, then such acts and threats are the equivalent of force.23

The court then concluded that the reasonableness of the victim's fear was an appropriate issue for jury resolution,24 and that the trier of fact in the case at bar could rationally have found "that the elements of force and non-consent had been established and that Rusk was guilty of the offense beyond a reasonable doubt."25 Thus, the Court of Appeals reversed the Court of Special Appeals' judgment and ordered that court to affirm the judgment of the Criminal Court of Baltimore City.26

19. Id. (citing Jackson v. Virginia, 443 U.S. 307 (1979)).
22. 289 Md. at 240, 424 A.2d at 725. MD. ANN. CODE art. 27, § 464 E (1982) provides: "Undefined words or phrases in this subheading which describe elements of the common-law crime of rape shall retain their judicially determined meaning except to the extent expressly or by implication changed in this subheading."
23. 289 Md. at 242, 424 A.2d at 726 (quoting Hazel v. State, 221 Md. at 469, 157 A.2d at 925). Because submission to the defendant's advances as a result of fear does not equal consent, the Rusk court concluded Hazel would allow evidence of the victim's fear to establish both the elements of force and non-consent. 289 Md. at 243, 424 A.2d at 726.
24. 289 Md. at 245, 424 A.2d at 727. The court held that if the victim's fear is reasonable, it will "obviate the need for proof of actual force on the part of the assailant or physical resistance on the part of the victim." Id. at 244, 424 A.2d at 727. The Court of Appeals cited 17 cases that supported its recognition of the "reasonable apprehension rule," as labeled by the Court of Special Appeals. However, in 14 of these cases, unlike in Rusk, the defendant unequivocally manifested his criminal intent via his acts and/or threats of violence. The use of the reasonable apprehension rule in a case with a factual setting such as that found in Rusk has its faults in that the court can overlook the requisite mens rea of the offense. For a further explanation of the confusion that can develop, see infra notes 36-54 and accompanying text.
25. 289 Md. at 246-47, 424 A.2d at 728.
26. Id. at 247, 424 A.2d at 427.
Judge Cole, while concurring in the majority's choice of standard for appellate review, dissented from the court's application of that standard. Specifically, he disapproved of the majority's determining that rational jurors could have found the victim's fear reasonable, before it questioned whether the jury could have concluded "that the defendant's conduct under the circumstances was reasonably calculated" to give rise to a fear on her part to the extent that she was unable to resist. . . ." Judge Cole stressed that "the conduct of the defendant, in and of itself, must clearly indicate force such as to overpower the prosecutrix's ability to resist or will to resist." Only after that requirement is satisfied, he maintained, should a court reach the question of the reasonableness of the victim's fear.

Judge Cole concluded that because the majority did not consider whether the defendant had "objectively manifested his intent to use physical force," it had declared "the innocence of an at best distraught young woman [but did not] demonstrate the defendant's guilt of the crime of rape."

DISCUSSION

The nature of the crime makes many rape cases difficult to resolve. Courts often find it hard to "distinguish an act of mutually desired sexual union from an act of forced, criminal sexual aggression." They can easily distinguish between the two acts when a woman physically resists the rapist's attack. Resistance not only places the attacker on notice that what he is doing is wrong (thereby establishing mens rea in the usual case); it also demonstrates to the court that the victim was not a willing participant.

27. For further discussion of the phrase "reasonably calculated" and the problems it creates, see infra note 47 and accompanying text.
29. 289 Md. at 248, 424 A.2d at 729 (emphasis added).
30. Id. at 255, 424 A.2d at 733.
31. Id. at 256, 424 A.2d at 733.
32. BROWNMILLER, AGAINST OUR WILL 384 (1975). "[R]ape is the only form of violent criminal assault in which the physical act accomplished by the offender . . . is an act which may, under other circumstances, be desirable to the victim." MODEL PENAL CODE § 231.1, at 279 (1980) quoting Note, Recent Statutory Developments in the Definition of Forcible Rape, 61 VA. L. REV. 1500, 1503 (1975).
33. See Note, supra note 32, at 1533:
The issue of mental culpability is often not a significant problem in a forcible rape case. Once the element of forcible or coercive physical conduct has been proven, some mental culpability is apt to be assumed, since it is unlikely that the use of force or coercion to accomplish sexual intercourse was accidental.
By contrast, significant problems can arise when a woman offers her attacker no physical resistance.\textsuperscript{34} In such cases the element of fear plays a vital role. As the \textit{Rusk} case emphasizes, if the woman reasonably fears for her life, the subsequent submission to the sexual intercourse is deemed to be non-consensual, regardless of whether the victim offered physical resistance.\textsuperscript{35} What the \textit{Rusk} court failed to emphasize, however, is that the reasonableness of the victim's fear is irrelevant unless the defendant's criminal intent has been established. By focusing exclusively upon the victim's state of mind, the court overlooked an essential element of the crime — the defendant's mens rea.\textsuperscript{36}

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34. \textit{See infra} notes 36-54 and accompanying text.
35. 289 Md. at 244-45, 424 A.2d at 727.
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[If in unusual circumstances, the victim does not manifest her lack of consent in any manner, and there is nothing else to give rise to an inference that she is not consenting, can anyone reproach the accused for failing to guess that she was not consenting? Is it possible that a victim could, because of her equivocal conduct, give a man the impression that she was consenting to intercourse, and cause him to be convicted subsequently by proving that inwardly she was refusing him? \textit{[T]he rule that mens rea is a required element of the crime cannot be ignored.}

Judge Wilner implicitly recognized that Maryland's rape law permits and even encourages courts to overlook the mens rea requirement in his dissent from the Court of Special Appeals' opinion. In his dissent Judge Wilner noted that the chief concern in Maryland rape cases such as \textit{Rusk} is the establishment of the victim's resistance that inherently involves a concentrated focus upon the victim's acts, as opposed to the defendant's. 43 Md. App. at 486, 406 A.2d at 629 (Wilner, J., dissenting). “[A]ttention is directed not to the wrongful stimulus, but to the victim's reactions to it.” \textit{Id.} at 486, 406 A.2d at 629 (One could infer from Judge Wilner's reasoning that by permitting courts to ignore the wrongful stimulus, Maryland law allows them to ignore the question whether the defendant was committing a wrongful act.). Wilner emphasized, however, that despite this unique and illogical approach of the Maryland law, he would accept it as binding until the Maryland Court of Appeals or the legislature initiated change. \textit{Id.} at 486, 406 A.2d at 629. After examining the reasoning in \textit{Rusk}, it becomes apparent that the court has deferred to the legislature.

This deferral raises a question of judicial propriety. \textit{See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law} 160-68 (tent. ed. 1958). Although the electorate generally precludes legislatures from engaging in wholly arbitrary behavior, courts are restrained by a different type of "political" check. Courts are obligated to elaborate their decisions in light of the justifications and reasons for their decisions. This process of reasoned elaboration is designed to create a system which is predictable, consistent and acceptable. It applies, therefore, to a wide spectrum of decisions, ranging from those that overrule precedent to those that extend established principles to create new law.

When the Court of Appeals reversed the Court of Special Appeals' decision, it was obligated to state why the law set forth by the intermediate appellate court was wrong, and why it must reverse that law. It derived its controlling reason from Judge Wilner's dissenting opinion, which was basically a two-pronged argument. A question of propriety arises, however, when one notes that the Court of Appeals totally ignored the second prong of Wilner's dissent that questioned the validity of Maryland's approach to rape. Because Wilner's latter inquiry raises questions of undeniably greater scope than does the first prong of
Maryland’s rape laws trace from English common law. English law has long recognized that “a wrongful intention or some other blameworthy condition of the mind (mens rea)” is an essential element of any common law crime,\(^3\) including rape.\(^3\) Through its Constitution, Maryland adopted the English common law of crimes in 1867.\(^3\) Thus, since that year, at least, mens rea has been an essential element of the crime of rape under Maryland common law. Arguably, the basic principles of fairness embodied in the United States Constitution\(^4\)

his argument, which was concerned with the standard of review the Supreme Court established in United States v. Jackson, 443 U.S. 307 (1979), arguably the Court of Appeals missed a precious opportunity to bring predictability, consistency and acceptability to Maryland rape law.


38. See F. Wharton, 1 Wharton’s Criminal Law § 682 (12th ed. 1932) (“The intent to use force, however, in case fraud or stupefaction should fail, is essential to the offense.”); accord Regina v. Wright, 176 Eng. Rep. 869 (Guilford Crown Ct. 1866) summarized in 15 The English and Empire Digest 1209 (repl. 1977):

On a charge of rape, where there has been some extent, assent, and it being doubtful whether the act has been completed, it is necessary that the jury should be satisfied, before they convict, either of a rape, or of an assault with intent to commit rape, that prisoner intended, not only to commit the act, but did commit it, notwithstanding any resistance on the part of the prosecutrix.

Although Wright notes the existence of some assent, that fact should not detract from the court’s emphasis on intent in the case. It required force, and an intent to use it against the victim’s resistance.


That the inhabitants of Maryland are entitled to the Common Law of England, . . . according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State.

“The common law of England is the common law of this state, excepting such changes as have been made by the Acts of the Legislature,” Coomes v. Clements, 4 H. & J. 480, 481 (Md. 1819). Consequently Maryland courts recognize mens rea as a necessary part of the general criminal law. See Borza v. State, 25 Md. App. 391, 400, 335 A.2d 142, 148 (1975) (“Mens rea, by definition, exists in the head of the perpetrator . . . .”). Although the Court of Special Appeals in Borza entertained an appeal for arson, it is clear from the context that its discussion of mens rea pertained to the general criminal law. See Ricketts v. State, 436 A.2d 906, 915 (Md. 1981) (Murphy, C.J., dissenting) (“There are, of course, two components of every crime — the actus reus (the guilty or criminal act) and the mens rea (the guilty mind or the mental state accompanying a forbidden act.”). For a more complete discussion of mens rea, see notes 36–54 and accompanying text.

40. There are inherent constitutional problems when a criminal statute omits a mens rea element. For example, in Smith v. People, 361 U.S. 147 (1959), the Supreme Court held that a Los Angeles ordinance that eliminated the need to prove the defendant’s criminal intent
would forbid the elimination of this element of the crime. Even if it were possible to remove the mens rea requirement, it is clear that only an express judicial decision or a statute could do so. Because neither the judiciary nor the legislature has attempted to effect such a change, one must conclude that intent remains an element of rape under Maryland law.

Neither Hazel nor Rusk, however, paid adequate attention to the defendant's intent. Hazel announced that the acts and threats of the

was constitutionally impermissible because it posed a threat to the defendant's first amendment right to freedom of expression. Id. at 155.

41. The Court of Appeals may alter the common law if the court is convinced that the law "has become unsound in the circumstances of modern law." Kline v. Ansell, 287 Md. 585, 590, 414 A.2d 929, 931 (1980).

42. It is arguable that no penal structure can ever delete the mens rea element from the definition of a serious crime and expect to survive. "'[A]s long as in popular belief intention and the freedom of the will are taken as axiomatic, no penal system that negates the mental element can find general acceptance. It is vital to retain public support of methods of dealing with crime.'" J. Goldstein, A. Dershowitz & R. Schwartz, Criminal Law: Theory and Process 770 n.14 (1974) (quoting Radin, Intent, General, 8 Enc. Soc. Sci. 130.

43. In Thompson v. State, 230 Md. 113, 117, 186 A.2d 461, 463 (1962) the Court of Appeals discussed the intent to rape:

As to the rape, since there was evidence that the defendant had a deliberate design to have intercourse with the intoxicated woman either with or without her consent, and also evidence that the intercourse had been accomplished by force and without her consent, there was a clear showing of the intent to rape.

If the element of mens rea no longer existed in rape then there would have been no need to discuss it in this common law prosecution for homicide and rape.

One finds strong evidence of the existence of criminal intent as an element of rape in Maryland by comparing Md. Ann. Code art. 27, § 463(a)(2) (1982) with id., § 463(a)(1). A person is not guilty of second degree rape when that person engages in sexual intercourse with one who is mentally defective, mentally incapacitated, or physically helpless, unless the person performing the act knows or should reasonably know of the other's mental or physical condition. Id. § 463(a)(2). If rape was a crime of absolute liability then the General Assembly would not have required that the defendant realize the wrongfulness of his acts. Because force or the threat of force usually does not exist in cases falling under § 463(a)(2), and because the substantive difference between § 463(a)(1) and (2) is the existence of violence, one can conclude that the legislature presumes the existence of mens rea in cases involving the elements of force or the threat of force.

Some legislative history may throw some light on the premise that a statutory crime in Maryland presumes the existence of mens rea. Legis. Council of Md., Proposed Criminal Code of Maryland, § 15.15(2) (1974) (emphasis added) provides:

Although no culpable state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the prescribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability.

44. In practical terms, Rusk presents more of a problem than Hazel. The latter case offered a situation where there was a greater manifestation of unequivocal conduct: the defendant entered the victim's home, put his arm around her neck, and threatened to kill her
defendant must be “reasonably calculated” to induce fear.\textsuperscript{45} This approach does not focus on the actor’s conduct and state of mind as clearly as does a requirement that the defendant intend his acts and threats to induce fear in the victim. While the latter approach clearly is directed to the “wrongful stimulus,”\textsuperscript{46} the “reasonably calculated” test shifts the focus from the actor to the hypothetical reasonable person.\textsuperscript{47} It appears to instruct the fact-finder to consider whether the reasonable person considers this conduct of a kind that would cause fear, rather than whether the defendant \textit{intended} the result.

Evidence that a reasonable person would expect the defendant’s conduct to cause fear is some evidence that a defendant intended his conduct to have that effect. It is also evidence that the victim’s fearful reaction was reasonable. It is not, however, conclusive evidence of the defendant’s intent. Because mens rea is an element of rape, it is essential that a court ask what the defendant actually intended. The Maryland approach allows courts to lose sight of this question.

The Maryland approach also tends to confuse evidence of intent with evidence that the victim was reasonably afraid. For example, the \textit{Rusk} court wrote that “[t]he jury could have reasonably concluded that the taking of [the victim’s] car keys was intended by Rusk to immobilize her alone, late at night in a neighborhood with which she was not familiar.”\textsuperscript{48} Although her lack of familiarity with the neighborhood may help to explain her fear as reasonable, it adds nothing to a consideration of the defendant’s intent unless he knew that she was unfamiliar with the neighborhood. Yet nowhere does the opinion suggest that

\begin{footnotesize}
\begin{enumerate}
  \item[45] 221 Md. at 469, 157 A.2d at 925.
  \item[46] \textit{Rusk}, 43 Md. App. at 486, 406 A.2d at 629 (Wilner, J., dissenting).
  \item[47] “[R]easonably calculated” does not adequately provide for the defendant’s mens rea. The central question is whether the defendant \textit{intended} that his acts and threats induce fear. Although the word “calculated” might be interpreted as a synonym for “intended,” G. WIL LIAMS, CRIMINAL LAW, THE GENERAL PART § 28 (2d ed. 1961), the use of the modifying word “reasonably” distorts the inquiry. It makes no sense to ask if the defendant \textit{reasonably} calculated that his acts and threats induce fear—either he \textit{did} or \textit{did not} intend to achieve such a result. The issue inappropriately becomes whether the reasonable person (or reasonable victim) would expect that such acts and threats were intended to induce fear. But this test does not address the question of what the defendant intended — it only requires proof of what the defendant was \textit{believed} to intend (through the eyes of the reasonable person or victim).
  \item[48] 289 Md. at 246, 424 A.2d at 728 (emphasis added).
\end{enumerate}
\end{footnotesize}
he knew this. This "finding" by the court is representative of the spirit of its entire analysis. The Court of Appeals ignored the principle that if a defendant has a reasonable but mistaken belief that he is not committing a criminal act, then clearly he does not possess the requisite mens rea.

The Court of Appeals in *Rusk* would have averted the plain defi-
ciency in its analysis had it asked, prior to considering the reasonableness of the victim's fear, whether, from the evidence presented, the jury could have found the requisite mens rea. To this end, the Court of Appeals should have asked whether the defendant knew of the victim's lack of familiarity with the neighborhood before concluding that the jury could have determined that he intended to make her fearful by immobilizing her in a strange area. It should have asked whether a rational jury could have assumed that the defendant had notice of Pat's non-consent when, after leaving her alone in the room for one to five minutes, he returned to find her still there. Finally, the court should have reflected upon the defendant's asking the victim for her telephone number after intercourse. Was that behavior consistent with intentional rape? The court should have considered all of these factors and then asked if it was reasonable for the jury to have found that the defendant possessed the requisite mens rea. If, and only if, this question was answered in the affirmative, should the court have proceeded to determine whether it was reasonable for the jury to have found that the victim's fear was reasonable.

CONCLUSION

Had the court properly addressed this question, it would probably have upheld Rusk's conviction just the same. The victim's testimony that Rusk agreed to let her go without killing her if she did what he wanted, and her testimony that the defendant "lightly choked" her gave the jury a reasonable basis upon which to find that the defendant possessed the requisite criminal intent to overcome her resistance with the threat of force.

Although the court may have reached a sound result, Rusk demonstrates that Maryland courts ought to consider the defendant's intent more carefully when the state seeks to establish that rape was perpetrated by means of a threat of force rather than by actual force. Criminal intent is generally obvious in cases where the defendant em-

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51. 289 Md. at 234, 424 A.2d at 722.
52. Id. at 235, 424 A.2d at 722.
53. Although a conviction involving the defendant's force can be firmly supported by the objective manifestations of his acts, a conviction dependent upon the threat of force necessarily entails a certain degree of subjectivity — the quality of the victim's fear. Although treatment of the former element of force virtually always accounts for the defendant's mental state as well as the victim's fear, the latter is subject to more manipulation by the jury and, therefore, can create one-sided results.
ploys actual force, but the element of intent is more difficult to prove when unequivocal force is lacking. In such cases courts should consider additional factors that bear directly on the defendant's state of mind. Until Maryland courts carefully separate questions regarding the victim's consent from questions about the defendant's intent, it is possible that men, innocent of rape, as it is supposed to be defined, may be convicted, or their convictions upheld as a consequence of wholly inadequate consideration of one fundamental principle — that is, criminal intent.

54. See supra note 33 and accompanying text.
In Poole v. State, the Court of Appeals of Maryland reaffirmed Maryland's "voucher rule," a longstanding prohibition against impeaching one's own witness absent surprise and affirmative damage. The unanimous court held that the state had impeached its witness by eliciting her prior inconsistent statement and that the prerequisites for invoking the exception to the prohibition were absent. Additionally, the court concluded that the statement was not harmless as merely cumulative to other evidence. Because the state's use of the prior inconsistent statement seriously impaired the defendant's ability to present his defense, the court reversed the defendant's murder conviction and set aside his death sentence.

Following a jury trial in the Circuit Court for Calvert County, Timothy Clyde Poole was convicted of premeditated murder, felony murder, robbery with a dangerous weapon, and the use of a handgun in a crime of violence. At trial, the state established that Poole, on the night of the murder, had signed out of his half-way house residence listing the address of his girl friend, Jennifer Lanier, as his destination. Testifying for the state, Lanier's roommate stated that Poole had not visited Lanier that night. However, Poole contended that he commonly signed out to Lanier's address when his destination was elsewhere. In

2. Historically, the "voucher rule" states that a party who produces a witness in court vouches for that witness's credibility and trustworthiness. See, e.g., Murphy v. State, 120 Md. 229, 234, 87 A. 811, 813 (1913); Patterson v. State, 275 Md. 563, 570, 342 A.2d 660, 665 (1975), noted in 36 MD. L. REV. 399 (1976). Commonly, commentators view the basis of the rule as more historical than practical. For a discussion of the rule's origins, see infra notes 31-38 and accompanying text.

However, the rule as applied in Maryland has the practical effect of prohibiting a party from impeaching its own witness. See, e.g., Proctor Elec. Co. v. Zink, 217 Md. 22, 32, 141 A.2d 721, 726 (1958); State ex rel. Chenoweth v. Baltimore Contracting Co., 177 Md. 1, 15-16, 6 A.2d 625, 632 (1939), noted in 4 MD. L. REV. 193 (1940). Because of the significance of this practical application, this recent decision refers to the "voucher rule" as the "prohibition against impeaching one's own witness."

3. 290 Md. at 118, 428 A.2d at 437.
4. Id. at 123, 428 A.2d at 439.
5. Id. at 123-24, 428 A.2d at 439-40.
6. Id. at 124, 428 A.2d at 440.
7. Id. at 115, 428 A.2d at 435.
8. Id.
9. On the evening of October 22, 1979, two men attempted an armed robbery of McCarty's Pharmacy. During the course of the robbery, one robber was shot by the proprietor, Dr. McCarty, who in turn was shot by the second robber. Both McCarty and the first robber later died.
fact, Poole claimed that he had been with Yvonne Bethea that night. Bethea testified to the same effect.\textsuperscript{10}

The prosecution's examination of its final witness, Lanier, "not only corroborated her roommate's testimony, but elicited a prior statement, inconsistent with Lanier's in-court testimony."\textsuperscript{11} Initially, Lanier

\textsuperscript{10} Poole based his entire defense on Bethea's alibi testimony, and, in fact, offered her as his sole witness.

\textsuperscript{11} The pertinent part of Lanier's examination follows:

\begin{verbatim}
Q. What was your conversation with Timothy Clyde Poole the
    morning of October 23, 1979?
A. Well, we just talked.
Q. Talked about what?
A. School and people.
Q. Did you have a conversation concerning his whereabouts on
    the day prior, October 22, 1979?
A. No.
Q. Had you ever indicated to anyone that you had that
    conversation concerning his whereabouts?
A. Yes.
Q. What was that, any conversation that you indicated?

Mr. Cardin: Objection.
Court: Overrule.
Mr. Anders: Q. Go ahead?

A. I had told the Officer that he had told me to say he was there
    the night before.
Q. Did you tell —

Court: Just a minute. Would you read the answer back, please, Mrs.
    Bates? The Jury didn't hear it.

Reporter: 'I told the Officer that he had told me to say he was there the
    night before.'

Mr. Anders: May we approach the bench, Your Honor?
Court: Yes, you may.

(Whereupon a conference at the bench is held with the
    defendant present and out of the presence of the Jury, and the
    following proceedings were had:)

Mr. Cardin: Your Honor, it would appear to me that the State is at this
    point trying to impeach his own witness. If that's what he is
    doing, I think it's incumbent upon the State to proffer to the
    Court that it is surprised, caught by surprise by the witness's
    testimony. Otherwise, I don't think it's proper for the State to
    impeach his own witness.

Mr. Anders: Well, the State's in the position where this witness has given
    several stories concerning what has occurred, and I'm really
    calling her to explain which is true and why. I don't know
    that I'm attempting to impeach her. I'm not claiming surprise
    because whereas Mr. Cardin has heard stories that she's told,
    she is a necessary witness and I'm calling her to explain what
    occurred and what she said before and why.

Court: Well, it seems to me in this case that although you may have
    had more than one story and Mr. Cardin objected, you didn't
    have any choice but to ask the question, and then having
    asked it you now — the matter which is inconsistent
\end{verbatim}
testified that she had spoken with Poole the morning after the crime and that they simply had discussed "school and people," but never talked about Poole's whereabouts on the day of the crime.\textsuperscript{12} The prosecution then asked whether she previously had told police that her conversation with Poole had included a discussion of his whereabouts that evening.\textsuperscript{13} She admitted that she had.\textsuperscript{14} Next, the prosecution inquired whether Lanier previously had told police that Poole had come to her house and requested that she tell the police that he had been there the evening before.\textsuperscript{15} Lanier admitted that she had made the previous statement, but affirmed her in-court testimony that their discussion had not included Poole's whereabouts.\textsuperscript{16}

Because Poole was sentenced, inter alia, to death,\textsuperscript{17} the Court of

Mr. Anders:  
Beg your pardon?

Court:  
I said I think it's pretty obvious to the Court that she is in a tough spot and it is certainly obvious to the Jury that she's in a tough spot. She apparently is trying to help the defendant if she can. It's only natural since they're boyfriend, girlfriend. To that extent I think you have demonstrated to the Court that you did have knowledge of another statement and she had said that she made other statements.

I sustained the objection that Mr. Cardin made when I thought he was right and I overruled it when I thought he was wrong. I don't think you're impeaching your witness by bringing out more than one story, which everybody knows.

(Whereupon the conference at the bench is concluded, and the following proceedings were had:)

Mr. Anders:  
Q. Jennifer, to clear this up, you indicated that you told the police originally that Timothy had come over to your house and asked you to tell the Police that he was at your house the night before, is that right?

A. Yes, sir.

Q. And he was not at your house before?

A. No.

Q. And your testimony today is that you just had a general conversation concerning what on October 23rd when he came over to your house?

A. School mostly, because I wasn't going to school that day.

290 Md. at 120–23, 428 A.2d at 438–39.

12. \textit{Id.} at 120, 420 A.2d at 438.

13. \textit{Id.}

14. \textit{Id.}


17. \textit{Id.} at 115, 428 A.2d at 435. Poole was also sentenced to life imprisonment, 20 years (concurrent) and 15 years (consecutive). \textit{Id.}
Appeals directly reviewed his case.° Focusing on Poole's argument that his conviction rested on improperly admitted impeachment evidence,° the Court of Appeals first acknowledged Maryland's adherence to the rule prohibiting a party from impeaching its own witness.° It observed that in Maryland recourse to impeachment is strictly limited to cases where the calling party has been prejudicially misled and surprised, or entrapped.° To avoid this prejudice, a trial court may exercise discretion to "permit a party to impeach its own witness upon a showing: (1) that the calling party is surprised; (2) that the witness' [present] testimony is contrary to prior statements made by this witness to a party, his attorney, or a person to be communicated to them; and (3) that the statement involves facts material to the case."° The court explained that this proof of a prior inconsistent statement is admissible to show why the party has called the witness, although it is not substantive evidence.°°

In analyzing the prosecution's examination of Lanier, the Court of Appeals noted that the prosecution knew before trial that Lanier's testimony would be inconsistent with her prior statement to the police. In fact, the state had specifically disclaimed surprise.°°° Furthermore, the court observed, Lanier's original in-court testimony regarding her conversation with the defendant had not prejudiced the state's case; it had been merely unhelpful.°° Although the state had additionally tried to argue that the prior statement was harmless as merely cumulative to other evidence,°°°° the court reasoned that the statement permitted the jury to infer not only that Poole had not been at Lanier's house, but that he had no "innocent explanation for his whereabouts."°°°°° Additionally, the prior statement undermined the credibility of Yvonne Bethea—if the jury believed that Poole had tampered with one witness, it also might conclude that he had prompted perjury in Bethea's testi-

20. Id. at 118, 428 A.2d at 437.
21. Id. The trial judge also has discretion to make exceptions for hostile or deceitful witnesses. See, e.g., Patterson v. State, 275 Md. 563, 342 A.2d 660 (1975); Proctor Elec. Co. v. Zink, 217 Md. 22, 141 A.2d 721 (1958).
22. 290 Md. at 118, 428 A.2d at 437.
23. Id. at 119, 428 A.2d at 437.
24. Id. at 119, 428 A.2d at 438.
25. Id. at 123, 428 A.2d at 439.
26. Id.
27. Appellee's Brief at 23.
28. 290 Md. at 124, 428 A.2d at 440.
29. Id.
mony.\textsuperscript{45} Because the admission of Lanier's statement was "fraught with prejudice,"\textsuperscript{30} the court reversed the judgments and granted a new trial.

Although the general prohibition against impeaching one's own witness has existed for centuries, its history is "singularly obscure."\textsuperscript{31} Most commentators theorize that it originated with the system of "oath helpers" at primitive trials by compurgation.\textsuperscript{32} At early common law, one who called a witness could not later object to the witness's competency.\textsuperscript{33} The rule that in a criminal trial a calling party could not discredit its witness evolved in the 1600's, and later emerged in civil cases as "notorious and unquestioned."\textsuperscript{34}

The common law rationales for the rule are equally obscure. Wigmore has offered three possibilities: 1) that the calling party was "morally" bound by his witness's statements;\textsuperscript{35} 2) that the party guaranteed his witness's general credibility;\textsuperscript{36} and 3) that courts would not grant a party the means to coerce his own witness.\textsuperscript{37} Commentators, however, generally have viewed these common law justifications as unpersuasive and have soundly criticized them.\textsuperscript{38}

As early as 1849, reformers unsuccessfully advocated a modification to allow impeachment by prior inconsistent statements.\textsuperscript{39} Yet criti-

\textsuperscript{30} Id.
\textsuperscript{32} See 3A J. Wigmore, supra note 31, § 896; Note, supra note 31 at 996. Trials by compurgation were somewhat analogous to the current use of character witnesses. The process consisted of some predetermined number of friends or relatives of a litigant swearing to the veracity of his statement. Once the witness had testified under oath, the calling party could not contradict him. Id. at 996 n.4. But see Ladd, supra note 31, at 70 (hypothesizing that the rule was probably a result of the transition from an inquisitorial trial method to an adversary system).
\textsuperscript{33} 3A J. Wigmore, supra note 31, § 896.
\textsuperscript{34} Id.
\textsuperscript{35} American courts initially accepted the rule prohibiting impeaching one's own witness, but gradually authorized restricted use of impeachment. See, Ladd, supra note 31, at 75 n.39. In Hickory v. United States, 151 U.S. 303, 309 (1894), the Supreme Court allowed limited exceptions for surprise and hostile testimony. Likewise, in Smith v. Briscoe, 65 Md. 561, 5 A. 334 (1886), the Court of Appeals of Maryland cited the general prohibition and noted that courts must stringently review the facts before allowing an exception, id. at 563–70, 5 A. at 336–37. Smith stated that because "not every light or trivial circumstance . . . would justify an exception," id. at 570, 5 A. at 337, a trial court should be satisfied that the calling party has been surprised, and that the statements concerned material facts, id. at 569–70, 5 A. at 336–37.
\textsuperscript{36} 3A J. Wigmore, supra note 31, § 897.
\textsuperscript{37} Id. § 898.
\textsuperscript{38} Id. § 899.
\textsuperscript{39} See infra notes 39–48 and accompanying text.
cism became strident only in the first half of this century. Dean Ladd’s seminal article on impeachment urged complete abolition of the common law prohibition, arguing that “restraint upon impeachment of a party’s own witness has burdened the courts from the Sixteenth Century to the present day.” Wigmore agreed, noting that the “dangers supposed to accompany its use are too speculative and trifling to merit consideration.” Additionally, he observed that excluding evidence unjustly deprives the calling party the opportunity to exhibit the truth, and leaves it the prey of a hostile witness.

Most criticism of the prohibition has focused on its early common law justifications. For instance, critics noted that in the actual conduct of trials neither party may know, much less be prepared to guarantee, the character and trustworthiness of its witnesses. In fact, parties often have little choice in calling their witnesses. An even more persuasive objection is that the ends of truth are “not to be subserved by binding the parties with guarantees and vouchings, and that it is the business of a court of justice, in mere self-respect, to seek all sources of correct information.” Because this search for truth is impeded by prohibiting the introduction of often reliable and material out-of-court statements to aid in evaluating a witness’s testimony, these critics argued, the common law prohibition had outlived whatever limited purposes it once served.

Responding to this criticism, Congress adopted Federal Rule of Evidence 607 in 1975. Rule 607 provides that “[t]he credibility of a witness may be attacked by any party, including the party calling

(1849) cited by Ladd: “The party producing a witness is not allowed to impeach his credit by evidence of bad character but he may contradict him by other evidence, and may also show that he has made at other times, statements inconsistent with his present testimony. . . .” Ladd, supra note 31, at 88 n.78.

40. Ladd, supra note 31.
41. Id. at 96.
42. 3A J. Wigmore, supra note 31, § 903, at 672.
43. Id.
44. See id., §§ 897-899, at 661-66; Ladd, supra note 31, at 76-80.
45. 3A J. Wigmore, supra note 31, § 898, at 662.
47. 3A J. Wigmore, supra note 31, § 898, at 662.
48. Note, Impeachment of One’s Own Witness Under Rule 607, 32 Okla. L. Rev. 393, 397 (1979); see also London Guarantee & Accident Co. v. Woelfle, 83 F.2d 325, 332 (8th Cir. 1936) (“The purpose of a trial, however, is to seek for and, if possible, find the truth and to do justice between the parties according to the actual facts and the law, and any rule which stands in the way of ascertaining the truth and thus hampers the administration of justice must give way.”).
This position recognizes that even if a party does not trust a witness's credibility, the party may have to call that witness to prove its case. The Advisory Committee Note to Rule 607 clearly addresses this situation:

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary.

Despite congressional adoption of the rule and the clear language of the Advisory Committee's Note, the debate in this area continues. Some commentators, aware that the traditional rationale underlying the prohibition does not withstand analysis, nevertheless have realized that rule 607 has certain disadvantages.

A literal application of rule 607 may allow a party to bring before the jury hearsay evidence that is otherwise inadmissible. Most prior inconsistent statements are considered hearsay under the federal rules. Normally, parties use rule 607 to circumvent the hearsay rules by offering the statement, not as evidence of its truth, but as evidence that the witness is not credible. For example, the state may place a

50. FED. R. EVID. 607.
52. FED. R. EVID. 607, Advisory Comm. Note.
55. FED. R. EVID. 801 (d)(1)(A) provides:
   (d) Statements which are not hearsay. A statement is not hearsay if —
   (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . .

As originally drafted, the rule would have excluded from hearsay all prior inconsistent statements of a witness available for cross-examination, on the theory that the present cross-examination would provide an adequate degree of reliability. See S. SALTZBURG AND K. REDDEN, supra note 51, at 457. In rejecting this proposal, the House of Representatives apparently reasoned that reliability would not be guaranteed sufficiently, and sought to restrict those prior inconsistent statements introduced for their truth to statements previously subject to cross-examination and made under oath. See id. at 458. The present rule emerged as a compromise. Thus, the liberal federal rules recognize prior inconsistent statements as inherently unreliable and admit them as substantive evidence in only limited circumstances.

56. See, e.g., Graham I, supra note 53, at 1615; Ordover, supra note 53, at 73.
witness on the stand ostensibly to impeach with an earlier inconsistent statement, but hoping that the jury will believe the prior statement. Commentators fear that despite limiting instructions, juries probably attach substantive weight to the impeaching statements and thereby reach a decision based on hearsay evidence. 57

To combat this problem, Professor Graham argues that rule 607 should incorporate the surprise and damage requirements. 58 Graham contends that the requirements properly function as prophylactic safeguards to prevent a party from calling witnesses solely to introduce otherwise inadmissible hearsay evidence under the guise of impeachment. 59

Alternately, some commentators suggest that the balancing test contained in Federal Rule of Evidence 403 might exclude a witness's prior statements when offered on the issue of credibility. 60 Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 61 Judge Weinstein suggests that the admissibility of a witness's prior inconsistent statement should not depend on the motive of the profferor, but on whether the statement could withstand scrutiny under Rule 403. 62 This approach, he maintains, is consistent with the underlying policies of the Federal Rules of Evidence. Under this test, the trial judge would determine and balance the prior statement's prejudicial effect against its probative value before deciding whether to admit it. 63 Weinstein, responding to criticism that this balancing leads to ad hoc determinations, 64 argues that balancing is still preferable to a

57. Professor Morgan has labeled this attempt at limiting instructions in these circumstances a "pious fraud" and has argued that a jury faces an impossible task when asked to accept a statement as bearing on a witness's credibility while ignoring its substantive content. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 193 (1948).


59. See supra note 58.

60. 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607, at 18 (1975).


62. 3 J. Weinstein & M. Berger, supra note 60, at 17.

63. Id.; see also United States v. De Lillo, 620 F.2d 939, 947 (2d Cir. 1980) (court balanced these elements and determined that the prosecution was entitled to impeach its own witness).

64. For a discussion of this criticism see infra notes 66–69 and accompanying text.
"wooden insistence" on surprise and damage that would mean a "return to the unsatisfactory mechanical approach which helped lead to the adoption of rule 607." 65

Graham, however, views balancing as a non-viable alternative to the surprise and damage criteria. 66 He warns that the balancing contemplated by rule 403 can be too difficult, uncertain, time-consuming and likely to result in rulings that allow subterfuge impeachment. 67 A balancing test, he asserts, "would lead in practice to divergent results based as much upon the personal predilections of particular judges as upon an actual balancing of probative value and prejudicial impact." 68 Furthermore, Graham notes that the key factors suggested in Weinstein's balancing test, probative value and prejudicial impact, appear to vary directly: the more probative a prior statement is of credibility, the greater the likelihood that the jury will improperly view it as substantive evidence; the less probative of credibility, the less the risk that jurors will improperly consider it. 69 At least, Graham contends, surprise and damage must be the controlling criteria in any balancing. 70

In Poole, the Court of Appeals did not mention the continuing debate involving impeachment of one's own witness. 71 However, the court is apparently sensitive to the issue. The Court of Appeals recently has granted certiorari in Cooper v. State 72 and has expressly requested that argument be addressed to the efficacy of retaining the prohibition in Maryland. 73

The present Maryland approach, like Graham's and Weinstein's suggestions, is premised on the assumption that, as hearsay, a witness's prior inconsistent statement is inherently unreliable. The traditional common law hearsay rule prohibits the use of a witness's prior out-of-court statement to prove the truth of the matter asserted. 74 This prohi-

65. 3 J. WEINSTEIN & M. BERGER, supra note 60, at 18.
66. See Graham I, supra note 53, at 1616; Graham III, supra note 58, at 578.
67. See Graham III, supra note 58, at 578.
68. Id. at 576.
69. Graham I, supra note 53, at 1616.
70. See Graham III, supra note 58, at 578; see also Ordover, supra note 53, at 70 (if the balancing test is employed, surprise and damage should be key determinants).
71. Because of Maryland's traditional adherence to the prohibition, the court probably saw no need for change. Moreover, the Court of Appeals was apparently reluctant to tinker with an established evidentiary rule that could determine the outcome in a capital case. Because the prosecutorial abuse was so blatant in Poole, the Court might have had difficulty justifying a contrary result. Cf. United States v. Morlang, 531 F.2d 183, 189 (4th Cir. 1975) (Court refused to accept voucher rule, but because of prosecutorial abuse, it disallowed government's impeachment of own witness. Decided before FED. R. EVID. 607 took effect.).
73. Id.
74. Graham I, supra note 53, at 1568.
bition is grounded on the fear that such a statement is unreliable because: (1) the statement was not initially made under oath; (2) the trier of fact had no opportunity to observe the witness's demeanor at the time the witness originally made the statement; and (3) the declarant was not subject to contemporaneous cross-examination before the trier of fact by the party against whom the statement now is being offered.75 Opponents of this orthodox rule argue that the jury can adequately assess the reliability of these statements if the witness is in court and subject to cross-examination.76 Proponents, however, contend that "prior inconsistent statements are often biased as a result of subtle influence, coercion, or deceit on the part of the person eliciting the statement, who is often an investigator or police officer."77 This danger justifies viewing prior inconsistent statements as unreliable. Because such statements are unreliable, the Maryland court properly has concluded that their admissibility for impeachment purposes should be strictly limited.78

Maryland permits a party to impeach its own witness only if the party has been surprised and damaged by the witness's in-court testimony.79 To satisfy the surprise requirement, a party must show that it relied on the witness's prior inconsistent statement and was unaware, prior to trial, that the witness intended to recant.80 In the absence of

76. See 3A J. Wigmore, supra note 31, § 1018.

The problems of inaccurate repetition, ambiguity and incompleteness of out-of-court statements may be found in both written and oral statements, although the problem is more acute in oral statements. But written statements are also subject to distortion. We are all familiar with the way a skilled investigator, be he a lawyer, police officer, insurance claim agent, or private detective, can listen to a potential witness and then prepare a statement for signature by the witness which reflects the interest of the investigator's client or agency. Adverse details are omitted; subtle changes of emphasis are made. It is regrettable but true that some lawyers will distort the truth to win a case and that some police officers will do the same to "solve" a crime, particularly one which has aroused the public interest or caused public controversy. Or the police officer may be seeking to put away a "dangerous criminal" who the officer "knows" is guilty but against whom evidence is lacking.

Id. at 1573 n.25.
78. See Mason v. Paulson, 43 Md. 161, 176–77 (1875) (prior inconsistent statements are the "loosest and most unreliable hearsay"); De Sobry v. De Laistre, 2 H & J 191, 219–20 (Md. 1807).
80. See Smith v. Briscoe, 65 Md. 561, 569, 5 A. 334, 336 (1866) ("If a plaintiff calls a witness, relying upon statements made to him or his attorney, and when on the stand he proves the defendant's case, we think that the principles of justice require that the plaintiff
surprise and damage, impeachment is inappropriate: if the witness does not give affirmatively damaging testimony, the party need not attack his credibility; if the witness's testimony does not surprise the calling party, it can refrain from eliciting the in-court statement. Impeachment is a tool for allowing a party to ask the jury not to believe a witness's testimony. When the party offering the witness can demonstrate surprise and damage, that party has a legitimate reason to show the jury why it called the witness and to ask the jury to disregard the witness's testimony. Under the circumstances, there is no danger that the calling party is seeking to introduce hearsay under the guise of impeachment. However, if the calling party knows beforehand that the witness will not repeat his earlier statement, "there seems to be no purpose for eliciting the trial statement except to impeach the witness, hoping the jury improperly will consider the hearsay statement as substantive evidence despite the judge's limiting instruction." Even under the current prohibition, however, a party may still call the witness to testify on other matters.

The possibility for abuse under a rule similar to federal rule 607 mandates retention, with certain modifications, of the current Maryland rule in all criminal trials. The rule 607 approach is especially dangerous when the calling party is the government and a defendant's life or liberty is at stake. Given juries' notorious inability to ignore the substantive content of evidence introduced solely for the purpose of impeachment, abandoning the surprise and damage requirements would unnecessarily risk a defendant's conviction on the basis of unre-
liable hearsay.\textsuperscript{86}

A rule adopting Weinstein's balancing approach in place of the current prohibition would be too difficult to administer and unlikely to lead to uniform, predictable results. Under Weinstein's criteria, a prior statement that directly contradicts a fact of consequence in the case and that a witness admits having made, but now asserts is untrue, would be very probative of credibility. Thus, the trial judge could not easily determine that the prejudicial impact outweighed the probative value. The jury, however, is likely to treat such a statement as substantive evidence.\textsuperscript{87} Also, use of a balancing test, even if it resulted in the exclusion of impeaching evidence, could consume valuable court time, while still permitting the jury, as a result of argument, to learn of the prior statement's existence.\textsuperscript{88} Additionally, time does not usually permit the type of analysis Weinstein envisions, and courts often resort to spontaneous evidentiary rulings on relatively complex matters.

Although the present Maryland rule is basically sound, a few minor modifications may be in order. The rule should not apply to defendants in criminal trials who have a constitutional right to confront and impeach any witness.\textsuperscript{89} Furthermore, if the prior statement is not hearsay, or falls within certain exceptions to the hearsay rule,\textsuperscript{90} a court already can admit it without a showing of surprise and affirmative damage. The only justification for excluding prior statements is that they may be unreliable. Thus, prior statements should be admissible if reliable — if, for instance, the statement was given under oath subject to the penalty of perjury at a trial or hearing. Additionally, in the interest of truth-gathering, some exception should be made to allow a party to "refresh" the recollection of its witness under oath, but out of the presence of the jury. In this manner, the unsurprised or undamaged party can attempt to bring forth the testimony it desires, but cannot use the occasion to present to the jury otherwise inadmissible and potentially prejudicial evidence.

In Poole, the Court of Appeals has once again reiterated its adherence to the common law rule prohibiting a party from impeaching its own witness unless the party first shows surprise and damage. However, the court's action in granting certiorari in Cooper indicates a will-

\begin{itemize}
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Graham III, \textit{supra} note 58, at 579.
  \item \textsuperscript{88} Id. at 578.
  \item \textsuperscript{89} See \textit{supra} note 84.
  \item \textsuperscript{90} Maryland recognizes a few exceptions to the hearsay rule, inter alia, admissions of a party opponent, see Lambros v. Coolahan, 185 Md. 463, 45 A.2d 96 (1946), and decedent's declarations against interest, see Western Md. R.R. Co. v. Manro, 32 Md. 280 (1870). \end{itemize}
ingness to reconsider the issue. Although the prohibition has been the
target of much criticism in the past, its practical effects warrant reten-
tion, albeit with minor modification.

ADDENDUM

On March 24, 1982, the Court of Appeals issued a per curiam
opinion dismissing the grant of certiorari in Cooper v. State.91 Although the court noted that the issues involved in the grant of certiorari
were "a matter of public importance," it determined that they were
"not presented on the facts of this case."92

91. No. 78 (Mar. 24, 1982) (per curiam).
92. Id., slip op. at 1. In Cooper's robbery trial, a key prosecution witness, allegedly
Cooper's accomplice, failed to identify a gun that the prosecutor had expected him to say
was the weapon used in the robbery. In rebuttal argument, the prosecutor remarked that the
witness had "spun" him and stated, "I'm not vouching for [his] credibility, but I think there
are some things that he brought out that are truthful." Id., slip op. at 2. Defense counsel
then sought a "curative instruction that the State is bound by the testimony of their own
witnesses." Id. However, after consulting the trial judge, the defense counsel apparently
withdrew the request. The court held that the issue was not preserved when the request for
an instruction based on the voucher rule was withdrawn. Id., slip op. at 4.
CONDORE v. PRINCE GEORGE'S COUNTY—IS THE NECESSARIES DOCTRINE NECESSARY?

In Condore v. Prince George's County, the Maryland Court of Appeals abolished both the state common law doctrine of necessaries and its statutory counterpart. The common law necessaries doctrine provided a remedy for creditors who sold goods or services to wives on the basis of their husbands' credit. The creditor proceeded against the husband for payment of delinquent accounts, relying on the husband's common law obligation to furnish his wife with "articles necessary to sustain life or to preserve decency." Maryland provided by statute that the husband's liability for debts incurred by the wife for necessities "shall be or continue as at common law."

Condore presented the question whether the state Equal Rights Amendment imposed on the wife a reciprocal and equal duty to pay for her husband's medical expenses, which traditionally have been classified as necessaries. In its five-to-two decision, the Court of Appeals held that the doctrine was "predicated upon a sex-based classification which is unconstitutional under [the state] ERA," and subsequently

2. Id. at 532-33, 425 A.2d at 1019. The statutory form was found at Md. Ann. Code art. 45, § 21 (1980).
3. See BLACK'S LAW DICTIONARY 928 (5th ed. 1979), which describes the doctrine of necessaries as: "One who sells goods to a wife or child may charge the husband or father if the goods are required for their sustenance or support." See also Brown, The Duty of the Husband to Support the Wife, 18 Va. L. Rev. 823, 824 (1932), noting that:
   The conception of the common law judges was that the duty [to support] was to be enforced through the merchants or other outside parties who have furnished the wife with necessaries. That is, the wife is to purchase the articles required, and the tradesman is then to collect for them from the husband.
4. Ewell v. State, 207 Md. 288, 292, 114 A.2d 66, 69 (1955); see also D. STEWART, HUSBAND AND WIFE, § 64 (1885) (common law binds a husband to support his wife).
   Nothing in the article shall be construed to relieve the husband from liability for the debts, contracts or engagements which the wife may incur or enter into upon the credit of her husband or as his agent or for necessaries for herself or for his or for their children; but as to all such cases his liability shall be or continue as at common law.
6. Md. Const. Decl. of Rts., art. 46. ("Equality of rights under the law shall not be abridged or denied because of sex.").
7. See Kern v. Eastern Dispensary & Casualty Hosp., 210 Md. 375, 379, 123 A.2d 333, 336 (1956); Anderson v. Carter, 175 Md. 540, 542, 2 A.2d 677, 678 (1938) (last illness and burial expenses); Stonesifer v. Shriver, 100 Md. 24, 59 A. 139 (1904) (last illness and burial expenses).
8. Rodowsky, J., joined in part by Davidson, J., dissented.
9. 289 Md. at 530, 425 A.2d at 1018.
abolished the common law doctrine, nullifying its statutory counterpart as well.

I. THE CONDORE DECISION

On November 4, 1976, Prince George's County General Hospital admitted the appellant's husband, Louis Condore, who received medical treatment there until he died on December 11th. His hospital insurer paid all but $3,435 of the bill. The county brought suit against the decedent's wife for the unpaid amount, arguing that the ERA modified the common law doctrine of necessaries, making the wife responsible for her husband's necessaries. The trial court granted summary judgment for the county and held that the ERA did expand the common law doctrine. The Court of Appeals' dissent, written by Judge Rodowsky, echoed the trial court's position. On appeal, however, the majority reversed, stating that "[t]he general purpose of the ERA to proscribe sex-based classifications offensive to its provisions is satisfied by eliminating the necessaries doctrine in its entirety."  

A. Historical Background

At common law the marriage union created one legal person; the wife was "covered by" her husband and she had no legal existence of her own. The effect of "coverture" was to deny the wife certain legal rights, including the right to contract. As a result of this disability, a

10. Id. at 532, 425 A.2d at 1019.
11. Apparently, the insurer refused to pay for services that were performed after the husband's death. See Appellant's Record Ext. at E-5. Mrs. Condore contended at trial, however, that the services actually had been performed prior to his death, but because of a billing error, the dates were incorrectly recorded. As was remarked by the attorney for the appellant, if a mistake were made so that fees purportedly for "blood transfusions, or something of that nature," were actually administered to a patient dead for two days, then this case might very well have been a "red herring." Id. at E-21. But the Court of Appeals held that whether the trial court erred on this question was irrelevant to the disposition of the appeal. 289 Md. at 520, 425 A.2d at 1013.
12. Brief and Appendix of Appellee at 4-8.
13. Circuit Court for Prince George's County.
14. See 289 Md. at 520, 425 A.2d at 1013.
16. Id. at 532, 425 A.2d at 1019.
17. See D. STEWART, supra note 4, §§ 38, 331.
18. A married woman's will was considered "a mere nullity." Id. § 341. She had no property rights and thus her deeds were also "nullities." Id. § 394. Likewise she had no right to sue individually and could maintain an action only if her husband was sued with her. Id. at § 431.
19. Id. § 357. At common law a married woman's individual contracts were considered "null and void." Also: The grounds of their invalidity were that a married woman had no legal existence,
married woman was unable to conduct business with creditors in her own name. She could, however, act as her husband's agent, and creditors then could look to her husband for payment on her accounts.\textsuperscript{20} The necessaries doctrine, however, entitled the creditor to payment only if the wife's purchases qualified as "necessaries," i.e., items "suitable to her situation and the husband's circumstances in life."\textsuperscript{21}

In the late nineteenth century, the Maryland General Assembly passed a series of Married Women's Acts\textsuperscript{22} that were designed to remove many of the common law disabilities married women bore. These statutes granted wives the right, among others, to contract in their own names;\textsuperscript{23} yet the necessaries doctrine remained in force de-

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\textit{Id.} § 357 (footnotes omitted).

20. "The liability of the husband for goods sold to the wife, upon his credit, and by his authority, or assent, either express or implied, cannot be questioned. In such cases she becomes his agent, and the principles of law incident to that relation, necessarily attach." Weisker v. Lowenthal, 31 Md. 413, 416 (1869), quoted in Noel v O'Neill, 128 Md. 202, 204, 97 A. 513, 513 (1916); see also Vaccarino v. Cozzubo, 181 Md. 614, 617–18, 31 A.2d 316, 318 (1943) (result of wife's agency in law is privity of contract between husband and merchant so as to give husband right of action against merchant where latter sold wife spoiled sausage).

Regarding the "attachment" of the "principles" of agency, one commentator states:

Agency is primarily consensual, and the husband who is compelled to pay for necessaries purchased by his wife against his own protest made known to the merchant, is held not because his wife acted as his agent, but because the law imposes upon him the duty to support her . . . . The truth is that this obligation of the husband is quasi-contractual in nature; in other words, it is an obligation imposed by law without . . . the husband's consent.

Brown, supra note 3, at 827; see Sharpe Furniture, Inc. v. Buckstaff, 99 Wis. 2d 114, 119, 299 N.W.2d 219, 222 (1980) (husband's liability is a quasi-contractual obligation).

Another rationale for liability is restitution. See Annot., 60 A.L.R.2d 7, 18 (1958) and cases cited therein; see also Dudley v. Montgomery Ward & Co., 255 Md. 247, 251 n.1, 257 A.2d 437, 440 n.1 (1969):

A person who has performed the non-contractual duty of another by supplying a third person with necessaries which in violation of such duty the other had failed to supply, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if he acted unofficiously and with intent to charge therefor. \textit{Id.} (quoting RESTATEMENT OF RESTITUTION § 113 (1966)).


22. \textit{See}, e.g., Act of 1898, ch. 457; Act of 1892, ch. 267 (current version at MD. ANN. CODE art. 45, §§ 1–5, 11, 15–21 (1980)).

23. MD. ANN. CODE art. 45, § 5 (Cum. Supp. 1981). A married woman was also granted the right to protect her property from the debts of her husband. \textit{Id.} § 1. This statute was in accord with MD. CONST. art. III, § 43, which protects the wife's property from her husband's debts. As noted by the majority, had the court expanded the doctrine, the constitutional provision would have had to "yield" to the ERA based holding. 289 Md. at 532, 425 A.2d at 1019. The wife also was granted the right to hold property for her separate use as though unmarried. MD. ANN. CODE art. 45, § 4 (1980).
spite wives' new freedom from coverture. Thus, although a wife now could contract in her own name, she was presumed to have pledged her husband's credit for the purchase of necessaries unless circumstances demonstrated that both she and the creditor intended her to be personally liable.

The Maryland Equal Rights Amendment, ratified in 1972, called into question the validity of laws that place different rights and obligations on men and women. One year after Maryland ratified the ERA, the Court of Special Appeals heard the case testing the amendment's affect on state marital support law. In Minner v. Minner a husband challenged the constitutionality of Maryland's alimony provisions, which allowed only the wife to sue for support upon divorce. As the husband himself was not suing for support, however, and thus had no standing to raise the issue, the court refused to label the alimony statute unconstitutional. In response, the General Assembly amended the statute to allow either spouse to sue for alimony.

In 1977, the Court of Appeals and the Court of Special Appeals each handed down a major decision responding to ERA mandates, and again these cases dealt with family support law. In Rand v. Rand the Court of Appeals held that both parents are to share, in accordance with their means, the parental obligation for child support. More-

24. See supra note 5.
25. See Annot., 60 A.L.R.2d 7, 19 (1958) (presumption, arising from fact of cohabitation, that the wife is the agent of the husband for the purpose of purchasing necessaries).
26. See, e.g., Farver v. Pickett, 162 Md. 10, 12, 158 A. 29, 30 (1932) (husband not liable for wife's necessary funeral expenses where provision in wife's will directed these costs to be paid out of her estate); Noel v. O'Neill, 128 Md. 202-03, 97 A. 513, 513 (1916) (wife may be held liable for necessary goods sold to her solely on her own credit); Jones v. Joel Gutman & Co., 88 Md. 355, 367, 41 A. 792, 795 (1898) (evidence showing creditor sold goods to wife alone will remove husband's presumed liability).
27. The amendment is now codified as Article 46 of the Maryland Constitution, Declaration of Rights. For further history, see GOVERNOR'S COMM'N TO STUDY IMPLEMENTATION OF THE EQUAL RIGHTS AMENDMENT: APPLICATION OF THE MARYLAND EQUAL RIGHTS AMENDMENT (1976).
29. MD. ANN. CODE art. 16, §§ 1-3, 5 (1973), repealed by 1980 Md. Laws 575. Although § 3 stated merely that "[i]n all cases where a divorce is decreed, alimony may be awarded," § 5 qualified this by adding: "[T]he court shall not award such alimony . . . unless . . . the wife's income is insufficient to care for her needs." (emphasis added).
31. MD. ANN. CODE art. 16, § 1(a) (1981) ("In granting a limited or absolute divorce, annulment, or alimony, the court may award alimony to either party. . . . "). Section 3 further states: "The court may from time to time . . . order one party to pay to the other a reasonable amount for the reasonable and necessary expenses, including suit money, attorney's fees, and costs [incurred in a proceeding instituted under this title]."
33. Id. at 516-17, 374 A.2d at 905. While the Court of Special Appeals had apportioned
However, the strong language of this decision suggested that the Maryland courts would join Washington and Pennsylvania as one of the few jurisdictions where ERA obligations are strictly enforced: 34 "The words of the ERA are clear and unambiguous. . . . This language mandating equality of rights can only mean that sex is not a factor." 35 Quoting this passage, the Court of Special Appeals later that year, in Coleman v. State, 36 held unconstitutional the state's criminal non-support statute as it penalized only men who refused to support their families. 37 The legislature subsequently expanded the crime and placed reciprocal responsibility for family support on the wife. 38

B. The Court's Holding

In approaching the question whether to expand or abolish the necessaries doctrine, the Condore court initially acknowledged its power to so modify the common law doctrine as to require a reciprocal, spousal liability, 39 yet it ultimately refused to take such action. First, the respective amounts according to a "net income after personal expenses" test, the Court of Appeals vacated that decision and remanded the case to the chancellor to determine the appropriate method. Id.

34. Pennsylvania's ERA provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. 1, § 28. In Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974), the court wrote: "That the purpose of this constitutional provision was to end discriminatory treatment on account of sex is clear. . . . In this Commonwealth, sex may no longer be accepted as an exclusive classifying tool." Id. at 296, 328 A.2d at 855; see Beck, Equal Rights Amendment: The Pennsylvania Experience, 81 DICK. L. REV. 395 (1977) (invoking strict scrutiny equal protection test).

Washington's ERA reads: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." WASH. CONST. art. 31, § 1. In Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975) (en banc), the court commented:

Presumably the people in adopting Const. art. 31 intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests.

Id. at 871, 540 P.2d at 889.

See Comment, The Maryland Equal Rights Amendment: Eight Years of Application, 9 U. BALI. L. REV. 342 (1980), where the author states that this "progressive minority of states," now joined by Maryland with the Rand decision, "have interpreted their states' equal rights amendments to prohibit any sex-based discrimination, thus indicating "their commitment to a clear break with sex stereotypes of the past." Id. at 350-51.

35. 280 Md. at 511-12, 374 A.2d at 902-03.


37. This statute provided that "[a]ny person who shall without just cause desert or wilfully neglect to provide for the support and maintenance of his wife shall be deemed guilty of a misdemeanor." MD. ANN. CODE art. 27, § 88(a)(1976) (emphasis added), amended by 1978 Md. Laws 921.


39. 289 Md. 516, 530, 425 A.2d 1011, 1018 (1981). Additionally the court reasoned:
the court was hesitant "to create a cause of action against a wife where none has previously existed."40 And second, the court felt that the choice between abolition and expansion was "a matter of such fundamental policy" that it should leave the decision to the legislature.41

Of course, by abolishing the necessaries doctrine the court made the fundamental policy choice it claimed to be avoiding. Perhaps the court stressed legislative responsibility for fundamental policy choices in an effort to encourage the legislature to focus on the necessaries doctrine. In fact, part of the majority's decision appears to be the court's recommendation for legislative action.

The majority quoted extensively from Jersey Shore Medical Center-Fikin Hospital v. Baum,42 in which the New Jersey Supreme Court modified that state's necessaries doctrine by imposing a secondary liability on the non-contracting spouse in the event the needy spouse was unable to pay the debts for necessaries.43 The Condore ma-

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40. 289 Md. at 532, 425 A.2d at 1019. Unfortunately, little authority supports the Maryland judiciary's power to expand the common law. In each of the three cases cited to support its power to "change" the common law, the court had eliminated old common law doctrines whose utility in modern society was suspect. In Kline v. Ansell, 287 Md. 585, 593, 414 A.2d 929, 933 (1980), the common law action for criminal conversation, in which the husband sues the wife's paramour for damages to his "property," was eliminated as being a "vestige of the past." In Lewis v. State, 285 Md. 705, 716, 404 A.2d 1073, 1077 (1979), the court, for reasons of "basic fairness," eliminated prospectively the common law rule precluding trial of an accessory until the principal is sentenced, and in Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979), the court abolished the common law rule of misprision of felony, in which one is liable for viewing yet not reporting a crime. Notably, the court concluded this opinion by stating: "[W]e are not free to usurp the power of the General Assembly by attempting to fashion [a rule] that would be [appropriate]." Id. at 352, 396 A.2d at 1078.

Perhaps the Condore court was more aware of this limitation than it admitted, because one of its reasons for not expanding the doctrine was its hesitation to extend an action against the wife. See infra text accompanying note 40. However, if this awareness was in fact the case, then the majority's assertion that it could extend an action represents a contradiction, and a flaw, in the opinion.

41. Id.

42. 84 N.J. 137, 417 A.2d 1003 (1980).

43. In ruling as such, the New Jersey court considered and eliminated two other options. The first was a "gender-neutral scheme under which each spouse is independent of the other." Id. at 149, 417 A.2d at 1009. The court eliminated this chore because "literal application of the act would leave creditors of a dependent spouse without recourse to the only realistic source of payment, the financially independent spouse." Id. (Of course, this is the "scheme" Maryland has adopted.) The second option was to expand the doctrine to transform individual necessary debts into joint obligations. The court termed this "equality with a vengeance," the result being "the immediate exposure of the property of one spouse for a
majority stressed that the New Jersey court had justified its decision by observing that “[a] modern marriage is a partnership. . . . Many women have shed their traditional dependence on their husbands for active roles as income earners.” The New Jersey court further observed that “[i]nterdependence is the hallmark of the modern marriage. The common law rule imposing liability on husbands, but not on wives, is an anachronism that no longer fits contemporary society.” As a result of this reasoning, the New Jersey court concluded that: “The common law must adapt to the progress of women in achieving economic equality and to the mutual sharing of all obligations by husbands and wives.”

Because the Court of Appeals neither questioned nor criticized any of the rationales for the Jersey Shore holding, it seems likely that the majority approved of this logic and cited it as a veiled recommendation to the Maryland legislature.

In his dissent, Judge Rodowsky noted that, following passage of the ERA, Maryland had made wives reciprocally liable for alimony, child-support, and criminal non-support. He concluded that these changes were evidence of a fundamental policy imposing joint obligations for family support. That policy, he argued, mandated extension of the necessaries doctrine. Consequently, the dissent recommended that “[a]n expanded application, on a prospective basis . . . should be the holding of this case.”

44. Jersey Shore, 84 N.J. at 147, 149, 417 A.2d at 1008, quoted in Condore, 289 Md. at 527–28, 425 A.2d at 1017.
45. 289 Md. at 528, 425 A.2d at 1017.
46. Id.
47. See supra notes 27–38 and accompanying text.
48. 289 Md. at 543–45, 425 A.2d at 1025–26. Judge Rodowsky commented: “[A] decision in the instant case to expand the doctrine to embrace necessaries furnished the male spouse will not be imposing a duty of support on the female spouse. The duty is already there, at least by statute.” Id. at 544, 425 A.2d at 1025.
49. Id. at 533, 429 A.2d at 1019.

Other states similarly have expanded the doctrine. In Florida, the state Court of Appeals expanded its necessaries doctrine to reciprocal liability, despite the legislature’s rejection of a state Equal Rights Amendment. Manatee Convalescent Center, Inc. v. McDonald, 392 So. 2d 1356 (Fla. Dist. Ct. App. 1980). The Florida court left open, however, the question whether the doctrine should be applied on a joint or secondary liability basis. Id. at n.1.

The dissent also relied on the reasoning, but not the holding, of Sharpe Furniture, Inc. v. Buckstaff, 99 Wis. 2d 114, 299 N.W.2d 219 (1980). In Sharpe, the Wisconsin Supreme Court upheld the traditional, one-sided operation of the doctrine:

The necessaries rule encourages the extension of credit to those who in an individual capacity may not have the ability to make these basic purchases. In this manner it
C. Assessment

Arguably the court could have found evidence of a clear fundamental state policy regarding family support in the strong language of Maryland's ERA and the state's expansion of alimony, child-support, and marital support obligations. Other states have done as much with less ammunition. For example, the Jersey Shore court drew support for its holding from New Jersey's expanded alimony statute. The court reasoned that this expansion indicated the legislature's intent that both spouses bear equitable burdens for marital support. Likewise, a Florida District Court of Appeals expanded the doctrine after noting the legislature's grant of alimony rights to both husbands and wives. And in Albert Einstein Medical Center v. Gold, the Pennsylvania court stated simply that the state ERA demanded that "those who seek to expand the equal rights concept . . . be prepared to accept the burdens as well as the benefits of such expansion." The court then held that a wife could be liable for her husband's necessary medical expenses. The Condore majority, however, implicitly rejected the dissent's con-

facilitates the support of the family unit. . . . The rule retains a viable role in modern society.

Id. at 119, 229 N.W. at 222. Thus, although the Wisconsin court reached a different conclusion, the dissent found this reasoning helpful.

Pennsylvania, a state whose rigid enforcement of ERA requirements has been compared to that of Maryland, see supra note 34 and accompanying text, also has expanded the obligations of the necessaries doctrine. In United States v. O'Neill, 478 F. Supp. 852 (E.D. Pa. 1979), the federal court, in applying the common law of the state, upheld a wife's payment for her husband's legal debts. Id. at 854; see also Albert Einstein Medical Center v. Gold, 66 Pa. D. & C.2d 347, 349-50 (1974) (wife cannot assert that she is not legally responsible for the husband's necessary medical expenses); Kurpiewski v. Kurpiewski, 254 Pa. Super. 489, 492 n.2, 386 A.2d 55, 57 n.2 (1978) (Pennsylvania ERA imposes a sex-neutral burden of support). But see Albert Einstein Medical Center v. Nathans, 27 Pa. Fiduc. 561, 564 (C.P. 1977) (decision to give reciprocal application to necessaries doctrine is best left to the legislature).

50. See supra note 6 (noting the mandatory tone of Maryland's constitutional provision).


52. 84 N.J. at 150–51; 417 A.2d at 1010. The New Jersey court went on to find the common law doctrine, as traditionally used, unconstitutional under the fourteenth amendment of the United States Constitution, id. at 144–48, 417 A.2d at 1007–08, and under art. 1, para. 1 of the New Jersey Constitution, 84 N.J. at 148, 417 A.2d at 1008, as a denial of equal protection. New Jersey has no Equal Rights Amendment.


55. Id. at 347.

56. See supra note 49.
tention that, in light of state policy, "[t]he duty is already there." Perhaps the majority felt the state policy was not firm enough. This is unlikely, however, given Maryland's progressive attitude toward ERA requirements regarding family support obligations.

The court's deference to the legislature nonetheless has some merit. Had the court undertaken to modify the common law, it would have had to choose between alternative methods of enforcing a reciprocal duty to supply necessaries. For instance, Maryland could establish reciprocal obligations by imposing primary liability on the contracting spouse and secondary liability on the other, by making the spouses jointly liable, or by making each spouse liable in proportion to his or her financial resources. The choice between these alternatives involves a balancing of advantages and disadvantages that normally characterizes legislative decisionmaking, and perhaps the court appropriately left this choice to the legislature.

Unfortunately, in choosing not to choose, the court has created a gap in the marital support laws. As the law stands now, the neglected spouse's primary recourses are to seek alimony or to persuade the state's attorney to bring a criminal non-support action against the neglectful spouse. If Maryland still had a necessaries doctrine, the

57. See supra notes 27-38 and accompanying text. As discussed supra note 39, the Maryland cases on court modification of the common law do not support a contention that courts may create new causes of action. However, were the marital duty to support viewed as already there, as concluded by Judge Rodowsky and (implicitly) by the New Jersey, Florida and Pennsylvania courts, then an expansion of the common law necessaries doctrine (in accordance with a firm mutual support policy) would not be creating a new cause of action against the wife. This interpretation is analogous to Rand where the court justified the extension of child support to the mother by asserting that the maternal duty to support already existed. Specifically, the Rand court pointed to Act of 1929, ch. 561 (codified as Md. Ann. Code art. 72A, § 1 (1978)), which stated: "The father and the mother are the joint natural guardians of their minor child and are equally charged with its care, nurture, welfare and education. They shall have equal powers and duties . . . ."

58. There are other possible remedies; e.g., a civil statute allowing suit for non-support, see infra note 68 and accompanying text, as well as the abolition of the doctrine, which was the Condore court's choice.

59. See State v. Brown, 21 Md. App. 91, 97, 318 A.2d 257, 261 (1974) ("Expression and weighing of divergent views, consideration of potential effects, and suggestion of adequate safeguards, are better suited to the legislative forum.").


Other remedies available to the wife include a contract with the husband for support, as sanctioned by Md. Ann. Code art. 16, § 28 (1981); withdrawal of joint bank account funds, Sody v. Sody, 32 Md. App. 644, 363 A.2d 568 (1976)(wife may retain money if it is used for its original purposes, here for family expenses, and not spent for items or services adverse to the husband); or contracts with suppliers based on agency in fact. This latter is different from agency by necessity (upon which the doctrine of necessaries is based) as here the supplier is viewed as contracting with the needy spouse solely on the basis of the non-
spouse who could persuade a supplier to provide goods or services on the basis of the other spouse's ability to pay could obtain the necessities of life without going to court. Had the court followed the dissent's suggestion, and probably its own preference, by adopting the Jersey Shore solution, it certainly would not have been treading on the legislative prerogative. The choice between alternatives ultimately would have remained with the legislature, for the legislature can always modify the common law.

II. Recommendation

The legislature should fill the gap left by the Condore decision, and it should also consider other means of protecting dependent spouses. Because any civil action for support necessarily entails the delays and expenses that generally attend court proceedings, the doctrine of necessaries should be expanded to allow the neglected spouse the benefit of its relatively speedy operation. A reciprocal necessaries doctrine would allow a dependent spouse to obtain necessaries immediately.

contracting spouse's indication to be liable for the contracting spouse's debts. In McFerren v. Goldsmith Stern Co., 137 Md. 573, 113 A. 107 (1921), the Court of Appeals stated that a husband may withdraw his "consent" (as based on his past payment to the merchant for his wife's debts) to his wife's agency, where he is already supplying her with sufficient alimony, thus removing her agency by necessity. Id. at 578-79, 113 A. at 109. Thus, a needy spouse who has some, yet not enough, of the independent partner's money, may contract with familiar suppliers, who expect payment from the independent spouse. The agency in fact exists, however, only until the paying spouse withdraws his or her consent to the agency status by informing the supplier of his or her unwillingness to pay in the future. See Restatement (Second) of Agency §§ 8, 27, 125 (1957)(discussing the creation and termination of apparent authority).

62. That is, assuming the majority interpreted the marital duty to support as mandating the extension of the necessaries doctrine.

63. This, however, might be different. If the independent spouse has refused to support and the doctrine is invoked as a remedy, "the tradesman is buying a lawsuit." Brown, supra note 3, at 844. "[M]erchants quite reasonably do not want to enter a family quarrel and rely on their right of a law suit against the husband for goods they give the wife." Sayre, A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services, 29 Va. L. Rev. 857, 861 (1943). The merchant's plight is further complicated by the burdens he must bear in court. Specifically, a creditor must prove the goods were received by the contracting spouse, that (s)he needed them, that they were in fact necessaries suitable to the couple's station in life, that credit was extended to the independent spouse and not to the partner, and that the independent spouse had failed to provide the necessaries or an allowance sufficient to buy them. Annot., 60 A.L.R.2d 7, 22 (1958). Perhaps out of fairness to the merchant a court might shift these burdens of proof to the contracting spouse if it expanded the doctrine. Cf. Dudley v. Montgomery Ward & Co., 255 Md. 247, 252-54, 257 A.2d 437, 440-41 (1969) (merchant's ignorance of wife's adultery, which was misconduct severing the husband's duty to supply necessaries, was irrelevant and immaterial; the merchant thus was barred from recovery).

64. See supra text accompanying note 62.
ately if he or she could persuade a supplier to extend credit, a process made even easier if the husband and wife have joint checking accounts or credit cards. Additionally, Maryland's Equal Credit Opportunity Act anticipates the use of the doctrine where the spouse applying for individual credit has no references or income of his or her own. Section 12-704 of the Commercial Law Article reads in part:

Discriminatory practices defined. Prohibited discriminatory practices include any:

(5) Request for or consideration of the credit rating of an applicant's spouse where the applicant is otherwise creditworthy and is not applying for a joint account unless the applicant lists credit references in the name of spouse or former spouse or has no individual prior credit history or the creditor permits the applicant to designate the applicant's spouse as an authorized purchaser on the account.

Thus, even if the needy spouse is applying for credit, the Maryland Annotated Code allows the creditor to look to the spouse's credit and determine creditworthiness on that basis. Finally, the legislature should expand the necessaries doctrine to operate on a basis equitable to the non-contracting spouse—perhaps on a primary-secondary liability basis, as the New Jersey version of the doctrine does.

The legislature should also retain the criminal non-support law. Because the state prosecutes these cases, success is not dependent on the needy spouse's financial ability to retain legal counsel. Furthermore, when the dependent spouse can persuade the state to prosecute, it is under constitutional compulsion to proceed quickly, and thus the neglected spouse can obtain quick, court decreed, ongoing support.

Finally, the legislature should consider the Uniform Civil Liability for Support Act. This act demands reciprocal support duties for spouses as well as for children and parents-in-need. It contemplates

65. Obviously, a genderless-based necessaries doctrine would provide a creditor's remedy against the independent spouse. The only issue, therefore, would be the form of the creditor's remedy; e.g., joint liability, secondary liability, or liability according to proportionate resources.


67. If a merchant has received information regarding the spouse's income in accordance with this statute, then his burden of proving reliance on that income is easier.

68. MD. CONST. DECL. OF RTS., art. 21: "[I]n all criminal prosecutions, every man hath a right . . . to a speedy trial . . . ."


enforcement by either the obligee or the state, and whenever the state provides support for the obligee, the state may bring an action against the obligor to recover the amount.

Together, these laws would provide a dependent spouse with truly necessary support as well as the means to obtain further support in accordance with the family's station in life. In the wake of Condore, the Maryland General Assembly should proceed quickly along these or similar lines.
In *Wallace v. Wallace* the Maryland Court of Appeals held that a wife's culpable conduct did not bar her from obtaining alimony in Maryland when she demonstrated (1) that she had grounds for divorce under Maryland's no-fault statute, and (2) that her husband had received a no-fault divorce in another state lacking personal jurisdiction over her. The court noted that either showing would have enabled her to seek alimony in Maryland, but stressed that her fault remained a factor in the alimony determination. Although *Wallace* somewhat eases the way for dependent spouses seeking alimony in Maryland, it unfortunately retains fault as a factor in determining those awards.

In March, 1976, after nine years of marriage, Dr. Wallace abandoned his wife and commenced an adulterous relationship with his dental assistant. Within two months, Mrs. Wallace also began an adulterous relationship. In March, 1977, she filed suit in the Circuit Court for Montgomery County, seeking a divorce *a mensa et thoro* on the ground of her husband's desertion. The court granted Mrs. Wallace an *a mensa* decree and ordered Dr. Wallace to pay alimony *pendente lite*. Following the entry of this order, Dr. Wallace moved to Virginia and, after establishing that state as his domicile, obtained a divorce *a vinculo matrimonii* based on Virginia's no-fault ground of

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2. *Id.* at 277-86, 429 A.2d at 239-44.
3. *Id.* at 267-68, 429 A.2d at 234.
4. A divorce *a mensa et thoro* [hereinafter referred to as a divorce *a mensa*], sometimes called "legal separation," is a limited type of divorce rather than an actual dissolution of the marriage. Though forbidden from living together, the parties remain married in the eyes of the law. *Atkinson v. Atkinson*, 13 Md. App. 65, 69, 281 A.2d 407, 409 (1971); *Black's Law Dictionary* 75 (5th ed. 1979). For a list of the causes for which a divorce *a mensa* may be decreed, see Md. Ann. Code art. 16, § 25 (1981). Divorce *a vinculo matrimonii* [hereinafter referred to as divorce *a vinculo*], on the other hand, is a complete severance of the marital ties. *Stewart v. Stewart*, 105 Md. 297, 302, 66 A. 16, 17 (1907); *Black's Law Dictionary* 124 (5th ed. 1979). For a list of the causes for which a divorce *a vinculo* may be decreed, see Md. Ann. Code art. 16, § 24 (1981). Thus following a divorce *a vinculo*, but not a divorce *a mensa*, the parties are free to remarry.

5. *Pendente lite* alimony is paid only during the course of the litigation, whereas “permanent alimony” is intended to provide support for a longer period. *Black's Law Dictionary* 1020 (5th ed. 1979). In addition to permanent and *pendente lite* alimony, Mrs. Wallace sought custody of the couple's two minor children, child support, and reasonable attorney fees. 290 Md. at 268, 429 A.2d at 234.

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statutory separation. Shortly thereafter, he stopped paying the temporary alimony, and as a result, Mrs. Wallace amended her complaint in the circuit court, seeking permanent alimony.

The chancery master recommended that the circuit court award Mrs. Wallace permanent alimony along with accrued alimony pendente lite and custody of the couple's two children. Over Dr. Wallace's objections, the circuit court substantially adopted the master's findings and recommendations, including the alimony award. The Court of Special Appeals affirmed the trial court's decree, and the Court of Appeals granted certiorari to consider whether alimony was proper in light of Mrs. Wallace's post-separation adulterous conduct. The court affirmed the judgment of the intermediate appellate court, holding that even though Mrs. Wallace's adultery was relevant to the determination of alimony, it was merely a factor and did not bar an alimony award.

Wallace represents another step in the long and gradual development of Maryland domestic relations law, a body of law rooted in the practices of the ecclesiastical courts of England. Divorce was unknown at common law, and is a creature of statute. Originally, the Maryland equity courts could grant only a mensa, or "partial," divorces, and could award alimony only in conjunction with such decrees. Then, in 1841, the legislature extended the power of the equity courts, authorizing them to award a vinculo, or "absolute," divorces.

Traditionally, a wife's entitlement to alimony stemmed from the husband's common law duty to support her. Although the legislature

7. VA. CODE § 20-91(9)(a) (1975); see infra note 38 and accompanying text.
8. In light of the Virginia decree, Mrs. Wallace's new complaint abandoned her prior claim for an adjudication of divorce by the Maryland court. She chose not to collaterally attack the Virginia decree. 290 Md. at 269, 429 A.2d at 235.
11. Id. at 280-83, 429 A.2d at 240-42.
12. See, e.g., Emerson v. Emerson, 120 Md. 584, 590, 87 A. 1033, 1035 (1913).
13. Emerson v. Emerson, 120 Md. 584, 589, 87 A. 1033, 1035 (1913). Originally, the legislature, rather than the courts, granted divorces in Maryland. Id., cited in Foote v. Foote, 190 Md. 171, 176, 57 A.2d 804, 807 (1948). However, an attempt by the legislature to grant alimony was held to be a judicial function and therefore unconstitutional. Crane v. McGinnis, 1 G. & J. 463, 477 (Md. 1829).

In some states, alimony was really a form of property disposition, by which the wife
empowered the equity courts to grant "alimony," no statute defines that term.17 In Wallingsford v. Wallingsford,18 however, the Court of Appeals defined alimony as "a maintenance afforded to the wife, where the husband refuses to give it or where from his conduct he compels her to separate from him."19

Although the authority to grant alimony is statutory, the standard governing its award is judicial.20 In 1940, the Timanus v. Timanus21 decision enumerated the factors that courts should consider in determining an appropriate award. The Court of Appeals said that, as a general rule, an alimony award should contemplate "the maintenance of the wife in accordance with the husband's duty to support her suitably, together with the husband's wealth and earning capacity."22 The court added that an award also should be based on such factors as the parties' "station in life, their age and physical condition, ability to work, the length of time they lived together, the circumstances leading up to the separation, the fault which destroyed the home, and their respective responsibilities for the care and support of the children."23

Initially a foreign divorce decree which did not award alimony barred an alimony award in Maryland, because the right to alimony was viewed as an incident of the marital relationship that was extinguished upon a decree of divorce a vinculo.24 This reasoning often put a dependant spouse in the manifestly unfair predicament of choosing between defending a divorce action in a foreign jurisdiction, often a

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17. Emerson v. Emerson, 120 Md. 584, 589, 87 A. 1033, 1035 (1913).
18. 6 H. & J. 485 (Md. 1825).
19. Id. at 488.
22. Id. at 642, 16 A.2d at 920.
23. Id. Although fault is a factor in determining permanent alimony, it is not considered in awarding alimony pendente lite. Dougherty v. Dougherty, 189 Md. 316, 320, 55 A.2d 787, 788 (1947).
24. In Upham v. Upham, 238 Md. 261, 265, 208 A.2d 611, 613 (1965), the court stated: "The rule in Maryland is that after the dissolution of the marital relationship, whether by decree of this or another state, the courts of this State are precluded from awarding alimony." See also Johnson v. Johnson, 199 Md. 329, 337-39, 86 A.2d 520, 523-24 (1952) (holding that the alimony provision of the wife's Maryland a mensa decree could not survive the later granting of an a vinculo decree to the husband by a Florida court).
distant state, or foregoing any alimony claim.\textsuperscript{25} Since 1978 when the Maryland Court of Appeals decided \textit{Altman v. Altman},\textsuperscript{26} Maryland has allowed the domiciliary spouse to pursue a claim to alimony in a Maryland court even though the other spouse has already obtained a foreign divorce decree.\textsuperscript{27}

An alimony award to either party may accompany any Maryland divorce decree.\textsuperscript{28} Thus although an alimony claimant was required to prove that he or she was entitled to a Maryland divorce either \textit{a mensa} or \textit{a vinculo},\textsuperscript{29} after \textit{Altman} the claimant did not actually have to obtain the divorce.\textsuperscript{30} In fact, a claimant may seek alimony without requesting a divorce decree.\textsuperscript{31}

\textsuperscript{25} Relatively wealthy husbands would take advantage of this rule by travelling to a state where a divorce could be easily obtained. \textit{See, e.g.}, \textit{Altman v. Altman}, 282 Md. 483, 386 A.2d 766 (1978); \textit{Dackman v. Dackman}, 252 Md. 331, 250 A.2d 60 (1969) (husbands went to Nevada to obtain divorce, attempting to preclude their wives from later seeking alimony in Maryland).

\textsuperscript{26} 282 Md. 483, 386 A.2d 766 (1978).

\textsuperscript{27} In 1969, the Court of Appeals for the first time awarded alimony to a wife who had already been divorced by her husband's foreign decree. \textit{Dackman v. Dackman}, 252 Md. 331, 250 A.2d 60 (1969). The court indicated, however, that it would award the wife support only from the husband's property that remained in Maryland, and expressly limited its holding to these particular facts. Because husbands merely removed all their property from Maryland prior to obtaining the divorce, this rule proved ineffective. Then in \textit{Altman v. Altman}, 282 Md. 483, 386 A.2d 766 (1978), the court expanded the \textit{Dackman} holding to allow alimony awards from \textit{all} of the ex-husband's property, so long as the Maryland court had obtained personal jurisdiction over him.

This problem is now expressly dealt with by statute. \textit{MD. ANN. CODE} art. 16, § 1(d) (1981).

\textsuperscript{28} Alimony in Maryland is now available to husbands as well as wives. \textit{See} \textit{MD. ANN. CODE} art. 16, § 1(a) (1981). In fact, the Supreme Court has held that a statute providing alimony only for women violates the fourteenth amendment to the United States Constitution. \textit{Orr v. Orr}, 440 U.S. 268 (1979).

\textsuperscript{29} The Maryland courts consistently have held that, as a prerequisite to receiving alimony, a claimant must prove that he or she is entitled to a divorce. \textit{See, e.g.}, \textit{Bender v. Bender}, 282 Md. 525, 529, 386 A.2d 772, 775 (1978); \textit{Stein v. Stein}, 251 Md. 300, 302, 247 A.2d 266, 267 (1968).

\textsuperscript{30} The \textit{Wallace} court stated that Maryland law requires that "[t]he spouse seeking the [alimony] award either obtain, or prove grounds that would entitle that party to, a divorce either \textit{a mensa et thoro} or \textit{a vinculo matrimonii}." 290 Md. at 272, 429 A.2d at 236. This statement, however, is misleading. Maryland law requires that an alimony claimant prove that he or she would be \textit{entitled} to a divorce \textit{a mensa} or \textit{a vinculo}. \textit{Bender v. Bender}, 282 Md. 525, 529, 386 A.2d 772, 775 (1978). Thus even if the claimant could prove fault grounds that otherwise would entitle him or her to a divorce, the alimony claim nonetheless would be barred if the claimant were guilty of recriminatory conduct.


Maryland's current alimony statute was not yet in effect when \textit{Wallace} was decided. \textit{See} 1980 Md. Laws ch. 575, § 3 (codified at \textit{MD. ANN. CODE} art. 16, § 1 (1981)) (statute applicable only to cases filed after July 1, 1980). The statute provides in part: "In granting a limited or absolute divorce, annulment, or alimony, the court may award alimony to either party, and the existence of a ground for divorce against the party requesting alimony shall
The doctrine of recrimination traditionally limited the availability of divorce, and therefore the availability of alimony. Recrimination precludes a spouse from obtaining a fault-based divorce if he or she has committed acts that would entitle the other spouse to a divorce.\textsuperscript{32} The conduct must be a ground for an \textit{a vinculo} divorce, not merely for a divorce \textit{a mensa}, but need not be the same ground as that charged by the divorce claimant.\textsuperscript{33}

The advent of no-fault divorce has radically altered the entire field of domestic relations law. No-fault statutes allow parties to obtain a divorce without reference to which party is responsible for the demise of the marriage.\textsuperscript{34} Currently, there are two major no-fault grounds for divorce in Maryland,\textsuperscript{35} voluntary separation and statutory separation. Voluntary separation allows parties to receive a divorce after they have voluntarily lived separate and apart, without hope of reconciliation. Voluntary separation is immediately grounds for a divorce \textit{a mensa}\textsuperscript{36} and after the separation has continued for one year, it entitles either party to a divorce \textit{a vinculo}.\textsuperscript{37} Statutory separation, on the other hand,
entitles either spouse to a divorce *a vinculo* upon proof that the parties have lived separate and apart for any reason for three years.\(^\text{38}\)

The addition of no-fault divorce grounds to Maryland's predominantly fault-oriented domestic relations law\(^\text{39}\) has raised many questions concerning the relationship between these grounds and concepts such as recrimination that are products of the older fault-oriented approach.\(^\text{40}\) By statute, recrimination does not bar a divorce sought on grounds of statutory separation.\(^\text{41}\) Moreover, the Court of Appeals consistently has held that legislative policy prevents the use of recrimination to defeat a divorce sought on the grounds of voluntary separation.\(^\text{42}\) Because a spouse's right to obtain alimony is contingent upon his or her entitlement to divorce,\(^\text{43}\) adoption of no-fault grounds dilates the factual circumstances that can form the foundation for an alimony award.\(^\text{44}\)

Although recrimination does not bar a divorce sought on no-fault grounds, initially it was unclear whether a spouse's culpable behavior bars an otherwise existing right to alimony. The Court of Appeals first addressed this question in 1957, in the landmark case of *Courson v. Courson*.\(^\text{45}\) Mrs. Courson received an alimony award in conjunction with a decree for divorce *a mensa* based on her husband's desertion. Mr. Courson subsequently filed suit, seeking a divorce *a vinculo* and

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\(^{38}\) See *MD. ANN. CODE* art. 16, § 24 (1981). Originally, a five year period of separation was required. See *1969 Md. Laws* ch. 656, § 1.

\(^{39}\) Even though technically there are five no-fault grounds for divorce (insanity, impotence, imprisonment, voluntary separation and statutory separation), see supra note 35, and two fault grounds for divorce (adultery and abandonment), see *MD. ANN. CODE* art. 16, § 24 (1981), fault considerations consistently pervade the dissolution process, even when the divorce is sought on no-fault grounds.

\(^{40}\) See infra notes 93-96 and accompanying text.

\(^{41}\) See *MD. ANN. CODE* art. 16, § 24 (1981) (“A plea of res judicata or of recrimination with respect to any other provisions of this section shall not be a bar to either party obtaining a divorce [based on statutory separation].”).


\(^{43}\) See *supra* notes 29-30.

\(^{44}\) 290 Md. at 274, 429 A.2d at 237.

\(^{45}\) 213 Md. 183, 129 A.2d 917 (1957).

The *Courson* case actually came before the Court of Appeals twice. The first time, the court, on the grounds of recriminatory conduct, reversed a divorce granted to the husband. *Courson v. Courson*, 208 Md. 171, 117 A.2d 850 (1955). It was not until the second time the court heard the case that the relationship between alimony and adultery was addressed.
suspension of his wife's alimony on the ground that Mrs. Courson had committed adultery after receiving her *a mensa* decree. In affirming a termination of Mrs. Courson's alimony, the court stated that:

The proper rule, supported by reason and authority, is that when a wife, who is living separate and apart from her husband due to his fault and who has obtained no more than a limited divorce from him, commits adultery, she *forfeits* her right to her husband's support and the future payments of alimony.46

The court again considered the relationship between fault and alimony in *Flanagan v. Flanagan*.47 Mr. Flanagan, who had received a divorce *a vinculo* on the no-fault ground of statutory separation, maintained that his wife's alleged recriminatory adultery barred her claim for alimony. Mrs. Flanagan argued that because the divorce was obtained on no-fault grounds, her fault should not be a factor in the alimony award. The Court of Appeals held that her fault could be a factor in determining a proper alimony award. *Flanagan* adopted a balancing test and held:

> [I]f there exists separation causing culpability other than adultery or abandonment on one side, or fault on both sides which caused the separation of the parties, the chancellor should consider the

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46. 213 Md. at 188, 129 A.2d at 920 (emphasis added). The *Courson* decision was reached by a narrow three-to-two vote, and contained a vigorous dissenting opinion. *See id.* at 189-94, 129 A.2d at 920-23 (Henderson, J., dissenting).

In *Atkinson v. Atkinson*, 13 Md. App. 65, 281 A.2d 407 (1971), the Court of Special Appeals refused to extend the *Courson* holding to conduct that occurred after an absolute divorce. Mr. Atkinson sought modification of his ex-wife's alimony award, based on allegations that she had sexual relations with her boyfriend. The court, however, rejected Mr. Atkinson's claim. The court noted that Mrs. Atkinson did not commence sexual relations until after she had received a divorce *a vinculo*, a decree which completely severed the marital bond and any duty of chastity which she may have owed to her ex-husband. Therefore, the court held that the *Courson* situation, which involved misconduct after a divorce *a mensa* but prior to a divorce *a vinculo*, did not apply. *Id.* at 71, 281 A.2d at 409.

The court, however, specifically noted that the chancellor found that Mrs. Atkinson's conduct was not "flagrant misconduct," and in dicta implied that a spouse may lose the right to alimony because of flagrant misconduct committed after a divorce *a vinculo*. *Id.* at 72-73, 281 A.2d at 410. But in *Meyer v. Meyer*, 41 Md. App. 13, 21, 394 A.2d 1220, 1224 (1978), the court rejected this dicta, holding that alimony awarded in a decree of divorce *a vinculo* may not be terminated or reduced on the basis of the claimant's unchaste conduct after the divorce.

47. 270 Md. 335, 311 A.2d 407 (1973). This case is the final case in a trilogy of reported decisions. It was litigated in the Court of Special Appeals twice before reaching the Court of Appeals. *See Flanagan v. Flanagan*, 17 Md. App. 90, 299 A.2d 520 (1973); *Flanagan v. Flanagan*, 14 Md. App. 648, 288 A.2d 225 (1972). For a discussion of these three cases, see generally Recent Decision, *Divorce - Alimony - Fault is to be Considered in Awarding Alimony in an Absolute Divorce Based on Five Years of Uninterrupted Separation - Flanagan v. Flanagan*, 33 MD. L. REV. 489 (1973).
parties' degree of blame as well as their relative guilt in those cases where applicable and, in conjunction with the factors [listed in Timanus], decide upon the proper award.48

Although Flanagan appeared to modify substantially the harsh rule established in Courson, the court completely ignored Courson in creating its new test.49 Apparently the only distinction between the two cases was that Courson involved alimony that rested on a fault-based divorce, whereas Flanagan dealt with alimony based on a no-fault divorce. This distinction does not seem to justify such different treatment of the wives. Under Courson, a wife who receives an a mensa divorce and who commits adultery after she was living apart from her husband is barred from obtaining alimony, while under Flanagan, a wife's adultery occurring prior to the parties' separation does not automatically bar her claim to such an award.50

The Wallace court nevertheless continued to observe the fault/no-
fault distinction. The court agreed with Dr. Wallace that his wife's adultery precluded her from claiming that his desertion supplied grounds for divorce and thus for alimony.\footnote{51} However, after finding that Mrs. Wallace had established voluntary separation as a ground for a divorce \textit{a mensa}, the court concluded that she was entitled to seek alimony on the same basis that Mrs. Flanagan had.\footnote{52} Although Dr. Wallace argued that \textit{Courson} barred any such award,\footnote{53} the court made it clear that \textit{Courson} only applied to alimony claims resting on grounds for a fault-based divorce.\footnote{54}

The fault/no-fault distinction is now less important under the new Maryland alimony statute, which became operative after \textit{Wallace}.\footnote{55} The statute specifies that "the existence of a ground for divorce against the party requesting alimony shall not be an automatic bar thereto."\footnote{56} Yet even though fault is minimized, by using the word "automatic" the legislature apparently intended that the existence of a fault ground against a claimant still can be a bar to alimony if a court desires.\footnote{57}

\footnote{51. 290 Md. at 270 n.l, 429 A.2d at 235 n.l; \textit{see supra} note 32 and accompanying text. Because Dr. Wallace's Virginia decree was given presumptive validity, and was not attacked by Mrs. Wallace, she was in the awkward position of having to establish grounds for a divorce notwithstanding the fact that she had already been validly divorced from her husband and therefore was not able actually to obtain a divorce from the Maryland court. \textit{Id.} at 274, 429 A.2d at 238. Nonetheless, this situation did not in itself defeat Mrs. Wallace's claim. \textit{See supra} note 30 and accompanying text.}

\footnote{52. 290 Md. at 277, 429 A.2d at 239. Reversing the chancellor, the court held that Mrs. Wallace could not satisfy the requirement for a divorce \textit{a vinculo}, because the separation had not been voluntary for the necessary 12 months before she filed suit. \textit{Id.; see supra} note 37. Because \textit{MD. ANN. CODE} art. 16, § 25 (1981) imposes no durational requirement, the court held that Mrs. Wallace had grounds for a divorce \textit{a mensa} based on voluntary separation. 290 Md. at 277, 429 A.2d at 239. Even though the separation began with Dr. Wallace's desertion, the subsequent development of a mutual intent to remain apart made the separation voluntary. 290 Md. at 276-77, 429 A.2d at 239. The court noted that although mere acquiescence to what one cannot prevent does not amount to a voluntary agreement, it is possible for a separation that begins with the abandonment of one spouse by the other, or with one spouse merely resigned to the reality of the division, to be converted subsequently into a disjunction that is voluntary. \textit{Id.} The court noted further that this apparently would be more likely where, as in \textit{Wallace}, it is the estranged spouse, rather than the deserter, who seeks the voluntary separation adjudication. \textit{Id.} at 277, 429 A.2d at 239.}

\footnote{53. 290 Md. at 280, 429 A.2d at 241.}

\footnote{54. 290 Md. at 283, 429 A.2d at 242. In adopting \textit{Flanagan}'s balancing approach, \textit{Wallace} reaffirmed the decision in \textit{Flanagan} that legislative policy mandates that recrimination is not a defense to divorce sought on either of the nonculpitory grounds. \textit{See} 290 Md. at 279-80, 429 A.2d at 240; \textit{supra} notes 41-42 and accompanying text.}

\footnote{55. \textit{See supra} note 31.}

\footnote{56. \textit{MD. ANN. CODE} art. 16, § 1(a) (1981).}

\footnote{57. \textit{See MD. ANN. CODE} art. 16, § 1(b)(7)(1981) (requiring the court, in determining an alimony award, to consider "[t]he facts and circumstances leading to the estrangement of the parties and the dissolution of the marriage").}
Thus, like Wallace, the statute tempers the harsh rule of Courson, but stops short of eliminating it altogether.

In Wallace the court also held that a spouse seeking alimony in Maryland need not always establish that he or she has grounds for a Maryland divorce. If the other spouse has obtained a no-fault divorce from a state lacking jurisdiction over the Maryland domiciliary, that foreign decree will support an alimony award in Maryland.\(^\text{58}\) Thus Wallace and the new alimony statute enable dependent spouses to obtain alimony in Maryland more easily. Now an alimony claimant’s fault will not automatically bar his or her claim, even when it is supported only by a foreign no-fault divorce.\(^\text{59}\)

However, neither Wallace nor the new alimony statute makes fault irrelevant to the alimony determination.\(^\text{60}\) Fault remains a significant, and apparently at times virtually dispositive, factor in determining alimony awards.\(^\text{61}\) It is important, therefore, to look beyond Wallace to

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\(^{58}\) 290 Md. at 284-85, 429 A.2d at 243. The issue, one of first impression, did not raise any question involving the accordance of full faith and credit to the Virginia decree, but concerned whether grounds for a divorce in Virginia would support an alimony award in a Maryland court. \textit{Id.} at 283-84, 429 A.2d at 242-43.

\(^{59}\) The court noted that in enacting the new alimony statute, “the General Assembly expressed the authority of the Maryland courts to award alimony under certain circumstances after a divorce or annulment has been granted by a court of another jurisdiction.” 290 Md. at 285 n.7, 429 A.2d at 243 n.7 (construing \textit{MD. ANN. CODE} art. 16, § 1(d) (1981)). Thus although the new statute was not applicable in Wallace, see supra note 31, the court employed the statute to bolster its interpretation of legislative intent.

\(^{60}\) Although Mrs. Wallace’s adultery alone did not preclude her from receiving alimony, the court reasoned that it was one of the relevant factors to be weighed in deciding whether to make such an award. 290 Md. at 282-83, 429 A.2d at 242. The court felt that Mrs. Wallace’s adultery was merely an “incidental contributing factor” to the marriage’s demise. \textit{Id.} Nonetheless, Wallace expressly reaffirmed the principle that post-separation conduct may be taken into account in determining an alimony award. \textit{Id.}; see Willoughby v. Willoughby, 256 Md. 590, 593-94, 261 A.2d 452, 453-54 (1970).

The new alimony statute does not use the word fault. Nevertheless, even though the statute provides that “[t]he existence of a ground for divorce against the party requesting alimony shall not be an \textit{automatic} bar thereto,” \textit{MD. ANN. CODE} art. 16, § 1(a) (1981) (emphasis added), it does not prohibit a court from using the ground as a bar if it chooses. See supra notes 56-57 and accompanying text. Moreover, the statute’s list of factors to be considered in determining an alimony award includes “[t]he facts and circumstances leading to the estrangement of the parties and the dissolution of the marriage,” \textit{MD. ANN. CODE} art. 16, § 1(b)(7) (1981), and “[s]uch other factors as the court deems it necessary or appropriate to consider in order to arrive at a fair and equitable award of alimony,” \textit{id.} § 1(b)(11). Either factor could well be interpreted to include evidence of marital misconduct. The new statute is ambiguous regarding the role of fault in the determination of alimony. However, because fault has traditionally played such an important role in Maryland domestic relations law, it is highly unlikely that the courts will read this ambiguity as an intent on the part of the legislature to remove considerations of fault altogether.

\(^{61}\) See Flanagan v. Flanagan, 270 Md. 335, 341, 311 A.2d 407, 411 (1973). It is not clear whether the new alimony statute incorporates the \textit{Flanagan} standards or is intended to replace them.
evaluate Maryland's domestic relations system in which fault plays such a vital role.

One obvious defect of a fault-oriented approach to alimony is that it heightens the hostilities attending dissolution of a marriage. By tying the future economic well-being of a spouse to proof of the other's wrongdoing, the fault approach encourages accusations of marital misconduct.62 The resulting litigation is not only longer and more expensive,63 but it maximizes the psychological hardships of divorce.64

Furthermore, the fault-oriented approach to alimony is based on several questionable assumptions. For instance, this approach traditionally contemplated one innocent party and one "at fault," while in reality the cause of a marriage's demise is rarely attributable solely to one of the two parties.65 Even under Flanagan's comparative fault approach it is exceedingly difficult to quantify each party's misconduct.66 Moreover, the grounds for divorce are usually the symptoms and manifestations of dead marriages, rather than the causes of their death.67

In order to evaluate the fault system, it is essential to examine the underlying purpose of alimony.68 Alimony traditionally has been seen as a statutory substitute for the common law duty of a husband to support his wife.69 Thus alimony is a type of maintenance or support for the dependent spouse, designed to allow her to maintain an acceptable standard of living without becoming a ward of the state.70 Even though that is its stated purpose, it is clear that courts nevertheless also are

65. Comment, Alimony Considerations Under No-Fault Divorce Laws, 57 NEB. L. REV. 792, 792 (1978). "The responsibility for the breakdown of the marriage is frequently shared by both spouses; hence, the present legal theory that one spouse is guilty and the other innocent is unrealistic." Clark, Divorce Policy and Divorce Reform, 42 U. COLO. L. REV. 403, 405 (1971) (citing PUTTING ASUNDER, THE REPORT OF A GROUP APPOINTED BY THE ARCHBISHOP OF CANTERBURY IN JANUARY 1964 30-31 (1966)).
66. Because it is difficult to quantify misconduct, "it is rarely clear which partner is more responsible for the breakdown of the marriage." Note, Economics of Divorce, supra note 62, at 144-45.
69. Emerson v. Emerson, 120 Md. 584, 87 A. 1033 (1913).
70. See Comment, supra note 65, at 793.
using alimony to punish the party at fault.\textsuperscript{71}

Alimony has been the subject of some fundamental misconceptions. For example, it often has been viewed as a gift or reward. This approach ignores the modern view of marriage as a partnership\textsuperscript{72} and disregards the nonmonetary contributions that even a financially dependent spouse makes to a marriage.\textsuperscript{73} Moreover, the public perception of alimony grossly exaggerates both the frequency and size of awards, a phenomenon that has been called "the alimony myth."\textsuperscript{74}

The fault approach to alimony has produced awards that are not commensurate either with the concept of alimony as a maintenance or with the economic realities of the parties' situation.\textsuperscript{75} Moreover, the standards for determining fault-based awards are extremely vague and conclusory, vesting a tremendous amount of discretion in the trial judge.\textsuperscript{76} Thus such alimony awards are extremely subjective, and are determined more by the individual judge's perception of "fault" than by his appreciation of the parties' needs and their abilities to pay.\textsuperscript{77}

Fortunately, the inadequacies of the fault-oriented approach to alimony have not gone unnoticed.\textsuperscript{78} The modern trend in the United

\textsuperscript{71} Comment, supra note 34, at 532-33.


\textsuperscript{73} Maryland law now requires that the courts consider these nonmonetary contributions as factors in both alimony awards and property disposition. See MD. ANN. CODE art. 16, § 1(b)(6) (1981); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-05(b)(1) (1980).

\textsuperscript{74} Weitzman & Dixon, supra note 63, at 142-46. These commentators state that the major explanation for this myth lies in the greater visibility and salience of the small number of divorce cases involving higher income families in which alimony is awarded. Id. at 181.

\textsuperscript{75} See Comment, supra note 65, at 794-95, 815.

\textsuperscript{76} Id. at 798; Clark, supra note 65, at 409.

\textsuperscript{77} See Note, Economics of Divorce, supra note 62, at 145; Wadlington, supra note 68, at 277-78 (A judge's "own concepts of morality may differ sharply from those of a substantial portion of the population."). The judge's discretion may at times operate to the detriment of either husband or wife. Although some judges are very reluctant to award alimony, see, e.g., Hopson, The Economics of a Divorce: A Pilot Empirical Study at the Trial Court Level, 11 U. KAN. L. REV. 107, 125 (1962), others may impose an excess burden on the payor, see, e.g., Graham v. Graham, 253 S.C. 486, 171 S.E.2d 704 (1970) (reversing the trial court's award of 94% of the husband's monthly income for combined alimony and child support).

\textsuperscript{78} See, e.g., Note, The No Fault Concept, supra note 62, at 959 ("In the past twenty years society has been screaming for more realistic divorce grounds.").
States favors the no-fault approach,\textsuperscript{79} which emphasizes economic circumstances rather than vague notions of morality. In fact, nearly one-third of the states now exclude by statute, either expressly\textsuperscript{80} or implicitly,\textsuperscript{81} the consideration of fault in the determination of alimony.

Opponents of the no-fault approach argue that dependent spouses should not be rewarded for their misconduct.\textsuperscript{82} However, that view completely ignores the maintenance function that alimony is designed to serve.\textsuperscript{83} In addition, opponents of no-fault criticize alimony for creating a disincentive for dependent spouses to support themselves.\textsuperscript{84} At one time, when the usual alimony award was "permanent," this criticism may have been valid.\textsuperscript{85} But the shift to no-fault has led to the rise of "transitional alimony," a limited grant providing support just long

\textsuperscript{79} See, e.g., Freed & Foster, Divorce in the Fifty States: An Overview, 14 Fam. L.Q. 229, 247 (1981); Wadlington, supra note 68, at 251.

Voluntary separation and statutory separation, see supra notes 36-38 and accompanying text, have not been the only no-fault divorce grounds. A number of states have chosen the "irretrievable breakdown" standard, which allows parties to receive an \textit{a vinculo} divorce without any minimum period of separation, so long as they can convince the court that the marriage is in fact beyond all reasonable hope of reconciliation. See Freed & Foster, supra at 241-43. Thus the irretrievable breakdown ground is similar to the Maryland voluntary separation provision for divorce \textit{a mensa}. See supra note 36 and accompanying text.


\textsuperscript{82} A typical reaction is: "If a woman has been a tramp, why reward her?" M. Wheeler, No-Fault Divorce 57 (1974).

A related criticism of the no-fault approach has been that it may permit a "serious marital offender" to escape the consequences of his or her acts. See Renner v. Renner, 16 Md. App. 143, 159-60, 294 A.2d 671, 679-80 (1972); Comment, supra note 34, at 531. Because the doctrine of interspousal tort immunity still exists in Maryland, see Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978); Recent Decision, Interspousal Immunity in Maryland, 41 Md. L. Rev. 181 (1981), the divorce may provide the only opportunity for the aggrieved spouse to seek redress. Some commentators have suggested the creation of an independent cause of action in tort for "abuse of the marital relationship." See, e.g., Schwartz, The Serious Marital Offender: Tort Law as a Solution, 6 Fam. L.Q. 219, 222 (1972). Although hostilities and extensive litigation would still result, at least fault would be removed from the determination of alimony.

\textsuperscript{83} See supra notes 69-70 and accompanying text.

\textsuperscript{84} See, e.g., Hofstadter & Levititan, Alimony — A Reformulation, 7 J. Fam. L. 51, 55 (1967):

Alimony was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent young women into an army of alimony drones, who neither toil nor spin, and become a drain on society and a menace to themselves.\textsuperscript{85} However, even so-called permanent awards have been subject to modification under

\textsuperscript{85}
enough to permit the formerly dependent spouse to become self-sufficient. ⁸⁶

Not only does the no-fault approach reduce hostility, ⁸⁷ thereby minimizing the harm to all parties involved, ⁸⁸ but it also reduces the time ⁸⁹ and cost ⁹⁰ of litigation. Moreover, by removing considerations of misconduct and substituting more clearly defined economic factors, the system reduces the discretion of individual judges and thus provides for awards that are better designed to deal with the economic realities facing the parties. ⁹¹

The Maryland legislature and courts have not been totally unresponsive to the alimony reform movement. As the Wallace decision indicates, much of the harshness of the old fault-related doctrines has been alleviated. ⁹² However, instead of completely replacing the laws with a purely no-fault approach, the legislature has chosen simply to add no-fault divorce grounds to the existing system, thereby creating a "hybrid" statute. ⁹³

Hybrid statutes are problematic. The frequent failure of legislatures to explain the relationship between the fault and no-fault provisions has generated a great deal of confusion. ⁹⁴ For example, in those states that provide only no-fault divorce grounds and do not specify whether fault should remain a consideration in alimony determinations, the courts have split. Some have held that fault has no place in the new law, while others have decided that fault is still relevant. ⁹⁵ When interpreted in the latter fashion, these statutes frustrate the purposes of the no-fault provisions by allowing fault considerations to re-


⁸⁷. Comment, supra note 65, at 815.

⁸⁸. Zuckman & Fox, supra note 64, at 564-65.

⁸⁹. Comment, supra note 65, at 794.

⁹⁰. Comment, supra note 34, at 532.

⁹¹. See id., at 795, 815. Furthermore, removing evidence of fault from the record helps to assure a more neutral disposition of the case on appeal. See Note, supra note 67, at 499.

⁹². See 290 Md. at 272-73, 429 A.2d at 237.

⁹³. "Hybrid" statutes retain some or all of the fault grounds, but in addition include one or more no-fault grounds. Wadlington, supra note 68, at 251-52. See, e.g., GA. CODE ANN. § 30-102 (1980).

⁹⁴. See, e.g., Comment, supra note 65, at 809.

⁹⁵. Compare In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972) (Iowa Supreme Court, by a 4-to-3 vote, held that fault had no place under the new statute) with Kretzschmar v. Kretzschmar, 48 Mich. App. 279, 210 N.W.2d 352 (1973) (interpreting Michigan statute, similar to Iowa's, to retain fault considerations).
surface in the alimony award. Thus the hostilities and the costs associated with the fault approach to divorce are perpetuated by a fault approach to alimony.\textsuperscript{96}

Although the \textit{Wallace} decision and the new alimony statute are positive steps in the reform of Maryland domestic relations law, further steps are needed. Truly effective reform must emanate from the legislature in the form of a comprehensive pure no-fault scheme.\textsuperscript{97} While such an approach is by no means a miracle cure,\textsuperscript{98} it offers clear advantages over Maryland's current system.\textsuperscript{99} The fault approach is outmoded.\textsuperscript{100} Our laws must be changed to reflect the changes in society,\textsuperscript{101} for only then will alimony meet the needs of the people it is designed to serve.

\textsuperscript{96} Comment, \textit{supra} note 34, at 534; Note, \textit{supra} note 67, at 497.

\textsuperscript{97} The original version of the Unif. Marriage and Divorce Act (1970), \textit{reprinted in} 5 Fam. L.Q. 205 (1971), provides an excellent model from which to draft such a statute. For a discussion of the elements of a pure no-fault system, see Zuckman \& Fox, \textit{supra} note 64, at 558-86.

The Maryland Governor's Commission on Domestic Relations Law has discussed the possible adoption of a pure no-fault system, but its membership is split on the issue. \textit{See Governor's Comm'n on Domestic Relations Laws, Minutes of Meeting} (Nov. 19, 1980); \textit{Governor’s Comm’n on Domestic Relations Laws, Minutes of Meeting} (Feb. 8, 1977).

\textsuperscript{98} Current research, although not conclusive, indicates that even under a pure no-fault system alimony awards often remain woefully inadequate. For example, one study found that “when the total post-divorce resources are divided between the two new households of the former spouses, the husband's post-divorce household retains two-thirds to three-quarters of the total, while the wife is left with no more than one-third.” Weitzman \& Dixon, \textit{supra} note 63, at 178. Also, some commentators argue that the “transitional” awards given thus far, \textit{see supra} note 86 and accompanying text, in fact have not been sufficient to permit retraining of the dependent spouse. Weitzman \& Dixon, \textit{supra} note 63, at 163. Moreover, quite often adequate resources do not exist to support the family members after they have been split into two households. Weitzman \& Dixon, \textit{supra} note 63, at 181; R. Eisler, \textit{Dissolution} 54 (1977).

\textsuperscript{99} Suggestions other than no-fault grounds for divorce have included mandatory reconciliation counseling, \textit{see} Note, \textit{The No Fault Concept, supra} note 62, at 969, and alimony insurance, \textit{see} Clark, \textit{supra} note 65, at 412.

\textsuperscript{100} Zuckman and Fox, for instance, write that “the social scientists have known for some time that the old ecclesiastical concepts of divorce are both outmoded and harmful.” Zuckman \& Fox, \textit{supra} note 64, at 538.

\textsuperscript{101} \textit{See Wadlington, supra} note 68, at 277.
### THE WORK OF THE COURT OF APPEALS: A STATISTICAL MISCELLANY*

**TABLE I:** Source Of Cases  
A. Procedural Source  
B. County Of Origin  

**TABLE II:** Action Of Judges  

**TABLE III:** The Court Of Special Appeals In The Court Of Appeals  
A. Reported Opinions Of The Court Of Special Appeals  
B. Unreported Opinions Of The Court Of Special Appeals  

**TABLE IV:** Frequency Of Separate Opinions  
**TABLE V:** Judicial Persuasiveness  
**TABLE VI:** Voting Alignment  
A. All Cases  
B. Cases with Concurrence Or Dissent  
C. Most Aligned—Least Aligned  

**TABLE VII:** Primary Subject Matter Of Opinions  

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* Tables prepared by Steven G. Tyler, Assistant Editor of the *Maryland Law Review*. These Tables follow the format used by Prof. William L. Reynolds in his article, *The Court of Appeals of Maryland: Roles, Work and Performance—Part I*, 37 MD. L. REV. 1, 40-60 (1977), which considered opinions decided during the September 1975 Term, and in *The Work of The Court of Appeals: A Statistical Miscellany*, 39 MD. L. REV. 646 (1980), which considered opinions decided during the September 1978 Term. Unless otherwise noted, figures from these Tables may be compared with figures on the earlier Tables.
### TABLE I

**SOURCE OF CASES**

#### A. PROCEDURAL SOURCE

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a. Throughout these Tables, unless otherwise noted, the data include all published opinions of the Court of Appeals decided during the September 1980 Term, between September 1, 1980 and August 31, 1981, inclusive. These Tables, unlike previous Tables, include per curiam opinions and orders. Separately-captioned cases consolidated and disposed of by the court in a single decision are treated as separate cases in Tables I and III. All other Tables treat such a decision as a single case.

Bogley v. Middleton Tavern, 288 Md. 645, 421 A.2d 571 (1980), was decided on June 5, 1980, before the period covered by these Tables, but the court issued a per curiam opinion on the Motion for Reconsideration and Clarification on October 22, 1980. The per curiam opinion, but not the opinion on the merits, is included in the Tables. Health Serv. Cost Review Comm'n v. Holy Cross Hosp., 290 Md. 508, 431 A.2d 641 (1981) is counted twice, as a decision on the merits and as a decision on a Motion for Leave to File a Motion for Reconsideration as Amicus Curiae, *id.* at 548, 431 A.2d at 661. Separate authored opinions, each with a different voting alignment, accompanied the decisions.

b. The only direct appeal from a circuit court was a mandatory review of a death sentence in Tichnell v. State, 290 Md. 43, 427 A.2d 991 (1981), a review required by Md. R.P. 898.
## B. COUNTY OF ORIGIN<sup>c</sup>

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<sup>c</sup> Each separately-captioned case below is counted only once. See note a in Table I. If a case below had multiple parties, such as co-defendants in a criminal trial or parties joined on appeal before the Court of Special Appeals, the case is assigned to the county in which the trial of the first-named party was held.


<sup>e</sup> Not included in the total are nine professional supervision cases and one question certified to the Court of Appeals by the United States District Court for the District of Maryland.

<sup>f</sup> Slight discrepancies in total percentages in this and subsequent Tables are caused by rounding errors.
### TABLE II

**ACTION OF JUDGES**

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<td>97</td>
<td>2</td>
<td>2</td>
</tr>
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<td>14 (12.3)</td>
<td>1</td>
<td>3</td>
<td>102</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Smith</td>
<td>26 (22.8)</td>
<td>0</td>
<td>4</td>
<td>98</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Specially Assigned</td>
<td>0 (0.0)</td>
<td>0</td>
<td>0</td>
<td>10</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

| Total<sup>e</sup> | 132  |

<sup>a</sup> Judges participating in a per curiam decision are listed as joining the opinion of the court. A concurrence or dissent by a judge who does not publish an opinion is treated as "joining" a concurrence or dissent.

<sup>b</sup> The parenthetical figures in this column are the percentages of signed opinions of the court authored by each judge.

<sup>c</sup> Opinions designated by their author as "Concurring in Part and Dissenting in Part" are treated in this Table as dissenting opinions. Similarly, judges joining such opinions are treated as joining dissenting opinions. Otherwise, the designation of the opinion used by the author has been adopted.

<sup>d</sup> "Per curiam" includes per curiam opinions and orders published without a signed opinion, such as a dismissal of a writ of certiorari as improvidently granted.

<sup>e</sup> The discrepancy between the total number of cases listed in this Table and in Table I is explained in note a of Table I.
TABLE III
THE COURT OF SPECIAL APPEALS IN
THE COURT OF APPEALS

A. REPORTED OPINIONS OF THE COURT
OF SPECIAL APPEALS

<table>
<thead>
<tr>
<th>Author</th>
<th>Majority</th>
<th>Joined</th>
<th>Concurrence</th>
<th>Dissent</th>
</tr>
</thead>
<tbody>
<tr>
<td>COUCH</td>
<td>3</td>
<td>5</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>GILBERT</td>
<td>1</td>
<td>5</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>LISS</td>
<td>6</td>
<td>1</td>
<td>3</td>
<td>2</td>
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<tr>
<td>LOWE</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>MacDaniel</td>
<td>3</td>
<td>6</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>MASON</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>MELVIN</td>
<td>1</td>
<td>3</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>MOORE</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>MORTON</td>
<td>1</td>
<td>1</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>MOYLAN</td>
<td>4</td>
<td>5</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>THOMPSON</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>WILNER</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>WEAINT</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Specially Assigned</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total 24 19

B. UNREPORTED OPINIONS OF THE COURT OF SPECIAL
APPEALS

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirmed</td>
<td>10</td>
<td>32.3</td>
</tr>
<tr>
<td>Reversed</td>
<td>21</td>
<td>67.7</td>
</tr>
<tr>
<td>Totalc</td>
<td>31</td>
<td>100.0</td>
</tr>
</tbody>
</table>

a. In these Tables, a decision has been designated as "affirmed" or "reversed" if that is the label placed upon it by the Court of Appeals. The "reversed" column includes decisions which were "modified," "vacated" or "remanded," either wholly or in part.

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

b. For dissenting opinions, "affirmed" and "reversed" refer to the Court of Appeals' treatment of the majority decision. Thus, a dissenting opinion noted as "reversed" signifies that the Court of Appeals may have reached the same result urged by the dissenter. But see supra note a.

c. Total of reported and unreported opinions do not include three cases in which the Court of Appeals dismissed the writ of certiorari as improvidently granted.
TABLE IV
FREQUENCY OF SEPARATE OPINIONS

<table>
<thead>
<tr>
<th>The Court</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>UNANIMOUS OPINIONS</strong></td>
<td>94</td>
<td>71.2</td>
</tr>
<tr>
<td><strong>DECISIONS WITH CONCURRING OPINIONS</strong></td>
<td>7</td>
<td>5.3</td>
</tr>
<tr>
<td><strong>DECISIONS WITH DISSenting OPINIONS</strong></td>
<td>31</td>
<td>23.5</td>
</tr>
<tr>
<td><strong>DECISIONS WITH BOTH CONCURRING OPINIONS AND DISSenting OPINIONS</strong></td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>132</td>
<td>100.0</td>
</tr>
</tbody>
</table>

* Cases consolidated on appeal, in which the court issued a single opinion disposing of more than one case, are treated as a single opinion in this and all subsequent Tables. The word "opinions" includes concurrences and dissents without opinions. Per curiam opinions and orders are included in this Table.

TABLE V
JUDICIAL PERSUASIVENESS

<table>
<thead>
<tr>
<th>Author of the Opinion of the Court</th>
<th>Unanimous</th>
<th>Opinions with Concurrences</th>
<th>Opinions with Dissents</th>
<th>Opinions with Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>COLE</td>
<td>50.0</td>
<td>10.0</td>
<td>40.0</td>
<td>0.0</td>
</tr>
<tr>
<td>DAVIDSON</td>
<td>78.6</td>
<td>0.0</td>
<td>21.4</td>
<td>0.0</td>
</tr>
<tr>
<td>DIGGES</td>
<td>52.4</td>
<td>14.3</td>
<td>33.3</td>
<td>0.0</td>
</tr>
<tr>
<td>ELDRIDGE</td>
<td>83.3</td>
<td>0.0</td>
<td>16.7</td>
<td>0.0</td>
</tr>
<tr>
<td>MURPHY</td>
<td>64.7</td>
<td>11.8</td>
<td>23.5</td>
<td>0.0</td>
</tr>
<tr>
<td>RODOWSKY</td>
<td>85.7</td>
<td>0.0</td>
<td>14.3</td>
<td>0.0</td>
</tr>
<tr>
<td>SMITH</td>
<td>65.4</td>
<td>0.0</td>
<td>34.6</td>
<td>0.0</td>
</tr>
</tbody>
</table>

* Figures are percentages of the total of each author's opinions. Per curiam opinions are not included in this Table.
# TABLE VI

## VOTING ALIGNMENT

( Figures are Percentages)

### A. ALL CASES

<table>
<thead>
<tr>
<th></th>
<th>Cole</th>
<th>Davidson</th>
<th>Digges</th>
<th>Eldridge</th>
<th>Murphy</th>
<th>Rodowsky</th>
<th>Smith</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>J 91.5</td>
<td>92.1</td>
<td>93.8</td>
<td>83.3</td>
<td>86.3</td>
<td>88.6</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C 1.5</td>
<td>7.9</td>
<td>16.9</td>
<td>10.1</td>
<td>1.6</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>D 6.9</td>
<td>0.0</td>
<td>15.1</td>
<td>12.9</td>
<td>14.5</td>
<td>11.4</td>
<td></td>
</tr>
<tr>
<td></td>
<td>J 91.5</td>
<td>84.8</td>
<td>90.0</td>
<td>77.8</td>
<td>83.1</td>
<td>81.7</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C 1.5</td>
<td>1.6</td>
<td>3.8</td>
<td>3.2</td>
<td>2.4</td>
<td>1.5</td>
<td></td>
</tr>
<tr>
<td></td>
<td>D 6.9</td>
<td>13.6</td>
<td>6.2</td>
<td>19.0</td>
<td>14.5</td>
<td>16.8</td>
<td></td>
</tr>
<tr>
<td></td>
<td>J 92.1</td>
<td>84.8</td>
<td>90.0</td>
<td>77.8</td>
<td>83.1</td>
<td>81.7</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C 0.0</td>
<td>1.6</td>
<td>2.4</td>
<td>1.7</td>
<td>0.8</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>D 7.9</td>
<td>13.6</td>
<td>8.9</td>
<td>10.8</td>
<td>8.5</td>
<td>4.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>J 93.8</td>
<td>90.0</td>
<td>88.6</td>
<td>81.5</td>
<td>90.7</td>
<td>96.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C 2.3</td>
<td>3.8</td>
<td>2.4</td>
<td>4.0</td>
<td>3.3</td>
<td>2.3</td>
<td></td>
</tr>
<tr>
<td></td>
<td>D 3.9</td>
<td>6.2</td>
<td>8.9</td>
<td>14.5</td>
<td>11.4</td>
<td>13.2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>J 83.3</td>
<td>77.8</td>
<td>87.5</td>
<td>81.5</td>
<td>95.0</td>
<td>88.9</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C 1.6</td>
<td>3.2</td>
<td>1.7</td>
<td>4.0</td>
<td>0.8</td>
<td>1.6</td>
<td></td>
</tr>
<tr>
<td></td>
<td>D 15.1</td>
<td>19.0</td>
<td>10.8</td>
<td>14.5</td>
<td>4.2</td>
<td>9.5</td>
<td></td>
</tr>
<tr>
<td></td>
<td>J 86.3</td>
<td>83.1</td>
<td>90.7</td>
<td>85.4</td>
<td>95.0</td>
<td>92.7</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C 0.8</td>
<td>2.4</td>
<td>0.8</td>
<td>3.3</td>
<td>0.8</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>D 12.9</td>
<td>14.5</td>
<td>8.5</td>
<td>11.4</td>
<td>4.2</td>
<td>7.3</td>
<td></td>
</tr>
<tr>
<td></td>
<td>J 88.6</td>
<td>81.7</td>
<td>96.0</td>
<td>84.5</td>
<td>88.9</td>
<td>92.7</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C 0.0</td>
<td>1.5</td>
<td>0.0</td>
<td>2.3</td>
<td>1.6</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>D 11.4</td>
<td>16.8</td>
<td>4.0</td>
<td>13.2</td>
<td>9.5</td>
<td>7.3</td>
<td></td>
</tr>
<tr>
<td></td>
<td>J 100.0</td>
<td>60.0</td>
<td>100.0</td>
<td>75.0</td>
<td>100.0</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>C 0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Assigned</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>D 0.0</td>
<td>40.0</td>
<td>0.0</td>
<td>25.0</td>
<td>0.0</td>
<td>0.0</td>
<td></td>
</tr>
</tbody>
</table>

### Key:

- **J** — The two judges joined in the same opinion. One may have authored it.
- **C** — The two judges agreed in the result, but in different opinions.
- **D** — The two judges disagreed in the result.

Due to rounding errors, the scans may not total 100 percent. For ease of use, the format for Tables VI.A and VI.B have been modified slightly from the format used in the earlier Tables; otherwise the Tables are comparable.

- **b.** This Table includes all cases, both those with signed opinions of the court and per curiam opinions and orders.
### B. CASES WITH CONCURRENCE OR DISSENT

<table>
<thead>
<tr>
<th>Cole</th>
<th>Davidson</th>
<th>Digges</th>
<th>Eldridge</th>
<th>Murphy</th>
<th>Rodowsky</th>
<th>Smith</th>
</tr>
</thead>
<tbody>
<tr>
<td>J</td>
<td>71.1</td>
<td>73.7</td>
<td>78.9</td>
<td>44.7</td>
<td>51.4</td>
<td>60.5</td>
</tr>
<tr>
<td>C</td>
<td>5.3</td>
<td>0.0</td>
<td>7.9</td>
<td>5.3</td>
<td>2.9</td>
<td>0.0</td>
</tr>
<tr>
<td>D</td>
<td>23.7</td>
<td>26.3</td>
<td>13.2</td>
<td>50.0</td>
<td>45.7</td>
<td>39.5</td>
</tr>
</tbody>
</table>

- **Davidson**
  - J 71.1
  - C 5.3
  - D 23.7

- **Digges**
  - J 73.7
  - C 0.0
  - D 26.3

- **Eldridge**
  - J 78.9
  - C 7.9
  - D 13.2

- **Murphy**
  - J 44.7
  - C 5.3
  - D 50.0

- **Rodowsky**
  - J 51.4
  - C 2.9
  - D 45.7

- **Smith**
  - J 60.5
  - C 0.0
  - D 39.5

- **Specially Assigned**
  - J 100.0
  - C 0.0
  - D 0.0

- **Assigned**
  - J 100.0
  - C 100.0
  - D 50.0

---
**c.** This Table considers only those cases in which at least one judge concurred or dissented. This serves to highlight judicial alignment by eliminating the masking effect of the large number of unanimous decisions. See Table IV.

### C. MOST ALIGNED — LEAST ALIGNED

#### MOST ALIGNED

<table>
<thead>
<tr>
<th>Pair</th>
<th>J</th>
<th>C</th>
<th>D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Digges/Smith</td>
<td>86.8</td>
<td>0.0</td>
<td>13.2</td>
</tr>
<tr>
<td>Murphy/Rodowsky</td>
<td>83.3</td>
<td>3.3</td>
<td>13.3</td>
</tr>
<tr>
<td>Cole/Eldridge</td>
<td>78.9</td>
<td>7.9</td>
<td>13.2</td>
</tr>
<tr>
<td>Rodowsky/Smith</td>
<td>74.3</td>
<td>2.9</td>
<td>22.9</td>
</tr>
<tr>
<td>Cole/Digges</td>
<td>73.7</td>
<td>0.0</td>
<td>26.3</td>
</tr>
</tbody>
</table>

#### LEAST ALIGNED

<table>
<thead>
<tr>
<th>Pair</th>
<th>J</th>
<th>C</th>
<th>D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Davidson/Murphy</td>
<td>26.3</td>
<td>10.5</td>
<td>63.2</td>
</tr>
<tr>
<td>Davidson/Smith</td>
<td>36.8</td>
<td>5.3</td>
<td>57.9</td>
</tr>
<tr>
<td>Eldridge/Murphy</td>
<td>39.5</td>
<td>13.2</td>
<td>47.4</td>
</tr>
<tr>
<td>Davidson/Rodowsky</td>
<td>44.4</td>
<td>8.3</td>
<td>47.2</td>
</tr>
<tr>
<td>Cole/Murphy</td>
<td>44.7</td>
<td>5.3</td>
<td>50.0</td>
</tr>
</tbody>
</table>

---
**d.** Figures used on these charts are from Table VI.B. The “Most Aligned” chart presents the five most aligned pairs of judges; the pairs are arranged in descending rank.
order according to the "J" figure. See note a in Table VI. Conversely, the "Least Aligned" chart presents the five least aligned pairs arranged in ascending rank order.

### TABLE VII

**PRIMARY SUBJECT MATTER OF OPINIONS**

<table>
<thead>
<tr>
<th>Number of Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary Subject Matter of Opinions</td>
</tr>
</tbody>
</table>

#### A. Public Law

<table>
<thead>
<tr>
<th></th>
<th>Number of Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criminal</strong></td>
<td></td>
</tr>
<tr>
<td>Constitutional Issues (federal and/or state)</td>
<td>9</td>
</tr>
<tr>
<td>Evidentiary</td>
<td>3</td>
</tr>
<tr>
<td>Procedural (non-constitutional)</td>
<td>24</td>
</tr>
<tr>
<td>Substantive</td>
<td>12</td>
</tr>
<tr>
<td><strong>Quasi-Criminal</strong></td>
<td></td>
</tr>
<tr>
<td>Juvenile</td>
<td>2</td>
</tr>
<tr>
<td><strong>Civil</strong></td>
<td></td>
</tr>
<tr>
<td>Administrative</td>
<td>14</td>
</tr>
<tr>
<td>Constitutional—Maryland</td>
<td>5</td>
</tr>
<tr>
<td>Municipal Law</td>
<td>3</td>
</tr>
<tr>
<td>Real Property</td>
<td></td>
</tr>
<tr>
<td>Eminent Domain</td>
<td>1</td>
</tr>
<tr>
<td>Zoning</td>
<td>4</td>
</tr>
<tr>
<td>Sovereign Immunity</td>
<td>2</td>
</tr>
<tr>
<td>Taxation</td>
<td>4</td>
</tr>
</tbody>
</table>

#### B. Private Law

<table>
<thead>
<tr>
<th></th>
<th>Number of Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Procedural</strong></td>
<td></td>
</tr>
<tr>
<td>Appellate</td>
<td>5</td>
</tr>
<tr>
<td>Pre-Trial and Trial</td>
<td>5</td>
</tr>
<tr>
<td><strong>Substantive</strong></td>
<td></td>
</tr>
<tr>
<td>Contracts</td>
<td>4</td>
</tr>
<tr>
<td>Custody/Domestic Relations</td>
<td>3</td>
</tr>
<tr>
<td>Insurance</td>
<td>4</td>
</tr>
<tr>
<td>Labor</td>
<td>3</td>
</tr>
<tr>
<td>Property (not including eminent domain and zoning)</td>
<td>2</td>
</tr>
<tr>
<td><strong>Tort</strong></td>
<td></td>
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<td>Automobile</td>
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<tr>
<td>Other</td>
<td>2</td>
</tr>
<tr>
<td>Uniform Commercial Code</td>
<td>1</td>
</tr>
<tr>
<td>Wills/Estates/Trusts</td>
<td>3</td>
</tr>
</tbody>
</table>

#### C. Professional Questions

<table>
<thead>
<tr>
<th></th>
<th>Number of Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reinstatement</td>
<td>1</td>
</tr>
<tr>
<td>Discipline</td>
<td>8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>126</td>
</tr>
</tbody>
</table>

*a. Not listed in this Table are six cases in which the writ of certiorari was dismissed.*