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BEALL V. BEALL — THE EFFECT OF ONE SPOUSE'S DEATH ON AN OFFER TO SELL PROPERTY HELD AS TENANTS BY THE ENTIRETIES

Addressing an issue of first impression in Beall v. Beall, the Maryland Court of Appeals, with two judges dissenting, concluded that an offer to sell property held in tenancy by the entireties lapses on the death of one of the tenants. In the majority’s view, continuance of an offer requires the continuing assent of the offeror. Death destroys the offer by destroying the offeror’s capacity to assent. The court reasoned that a valid offer of tenants by the entireties requires the continuing assent of both tenants and that the death of one causes their offer to lapse.

The absolute rule which the court enunciated may be unnecessarily rigid, and it is not clearly mandated either by the doctrine of lapse at the death of an offeror or by the nature of the tenancy by the entireties. A more useful analysis would ask whether the parties to a joint offer intended their contract formation to depend on the survival of both offerors.

I. THE OPINION OF THE COURT OF APPEALS

In 1975, Calvin Beall and his wife Cecelia offered to sell their property, which they held as tenants by the entireties, to Calvin’s second cousin, Carlton Beall. In May of 1978, nine months after Calvin’s death, Carlton notified Cecelia that he was accepting the offer. When she refused to convey the property for the agreed price, Carlton sued

1. 291 Md. 224, 226, 434 A.2d 1015, 1017 (1981). The court found no case in point in either the United States or Great Britain. Id. at 226 n.1, 434 A.2d at 1017 n.1.
2. Judge Smith was joined in dissent by Judge Digges. Id. at 236, 240, 434 A.2d at 1022, 1024 (Smith, J., dissenting).
3. Id. at 235, 434 A.2d at 1022.
4. Id. at 235, 434 A.2d at 1021.
5. Id.
6. Id.
7. Id. at 232, 434 A.2d at 1020. The offer purported to be a second extension of an option contract the parties had first executed in 1968. Id. at 226-27, 434 A.2d at 1017. The 1975 offer was an addendum to the 1971 extension of the option contract which stated in full: “As of October 6, 1975, we, Calvin F. Beall and Cecelia M. Beall, agree to continue this option agreement three more years — February 1, 1976 to February 1, 1979.” Both Calvin and Cecelia signed the addendum. Id. at 227, 434 A.2d at 1017.
9. 291 Md. at 227, 434 A.2d at 1017. Although she considered the agreed price of

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for specific performance.10

The parties disagreed over what effect ownership by the entireties should have on the owners' joint offer. Cecelia argued that a single unit — the tenants by the entireties — made an offer, both of which ceased to exist upon Calvin's death.11 Because Calvin's death terminated the marriage and hence the tenancy, Cecelia argued that the general rule that the offeror's death caused the offer to lapse should apply.12 Carlton, on the other hand, contended that Calvin and Cecelia had made the offer as individuals, each of whom owned an entire interest in the property and possessed an unrestricted power to revoke.13 Although Calvin's death may have revoked his offer, it neither revoked Cecelia's offer nor inhibited her capacity to convey the property.14

The court agreed with Cecelia that the offer had lapsed, but advanced a formulation of the tenancy's legal effect on the offer which differed from both Cecelia's and Carlton's views. The court first reasoned that because the continuance of an offer depends on the offeror's continued assent,15 death revokes the offer by destroying the offeror's ability to assent.16 Because tenants by the entireties must act together

$28,000 to be too low, Cecelia indicated her willingness to consider a higher one. Joint Record Extract at E-15, E-16.

10. 291 Md. at 227, 434 A.2d at 1017. The trial court dismissed Carlton's suit, finding that the extension of the option was unenforceable as a contract for lack of consideration. Id. On appeal the Maryland Court of Special Appeals reversed and remanded for determination of whether a valid, unrevoked offer existed and whether Carlton made a proper acceptance. Beall v. Beall, 45 Md. App. 489, 494, 413 A.2d 1365, 1368 (1980). Before factual findings could be made on those questions, the Maryland Court of Appeals granted certiorari to consider whether an enforceable contract existed and, if not, whether Calvin and Cecelia's offer survived Calvin's death. 291 Md. at 227, 434 A.2d at 1017.

The Court of Appeals concluded that, because the 1975 extension lacked any recitation of consideration, it did not fulfill the requirements of the statute of frauds. See 291 Md. at 229, 434 A.2d at 1018. The court further found that Carlton's forbearance of exercise of his legal rights during the remainder of the enforceable 1971 option would not support specific performance, because it was not unequivocally related to the 1975 agreement. Id. at 232, 434 A.2d at 1020.

11. Brief of Appellant at 22-23, Beall.
12. Id. at 23.
13. Brief of Appellee at 24, Beall.
14. Id. at 25.
15. 291 Md. at 235, 434 A.2d at 1021.

The offeror's death terminates the power [of acceptance] of the offeree without notice to him. This rule seems to be a relic of the obsolete view that a contract requires a "meeting of minds," and it is out of harmony with the modern doctrine that a manifestation of assent is effective without regard to actual mental assent . . . . In the absence of legislation, the rule remains in effect.
to alienate the entireties property, the court found that they necessarily act as a "team" in making "but a single offer to convey." Continuance of the offer requires the continued assent of both members of the "team." The death of one tenant revokes the offer by destroying the continued assent of the "team." The court asserted that the practical consideration underlying the "team" concept made it preferable to Cecelia's "unity" concept, which was based on a metaphysical notion of the tenancy as the offeror.

The court buttressed its reasoning and result with equitable considerations. The death of one spouse often works major changes in the financial and legal circumstances of the survivor. A couple may make an offer appropriate to their needs that would be completely unsuited to the surviving spouse's circumstances.

In a dissenting opinion, Judge Smith, joined by Judge Digges, noted the scholarly criticism of the logic and utility of the general rule that an offeror's death terminates an offer. Judge Smith further noted that critics have attacked the entire concept of tenancy by the entireties as anachronistic. Where the surviving spouse was a party to the offer, and entire title vested in her by operation of law, he would have bound the survivor to her own unrevoked offer.

II. Analysis

The outcome in Beall produces an unfortunate rule that promotes efficiency and certainty, but may unnecessarily disappoint the legitimate expectations of contracting parties by its arbitrariness and inflexibility. A better approach would apply existing contract doctrine regardless of the nature of the underlying estate. Discussion of this proposed approach is more profitably undertaken after analysis of the rationales supporting the court's rule: (1) the contract doctrine of lapse upon the offeror's death, (2) the property concept of tenancy by the entireties, and (3) equitable relief for changed circumstances.

17. 291 Md. at 234, 434 A.2d at 1021.
18. Id. at 235, 434 A.2d at 1021.
19. Id.
20. Id. at 234-35 n.2, 434 A.2d at 1021 n.2. The court felt that Cecelia's concept of "oneness" would produce anomalous results in situations where divorce destroyed the marital unity, this implying that divorce will not trigger automatic revocation of the offer. See id.
21. Id. at 236, 434 A.2d at 1022.
22. Id.
23. Id. at 237-38, 434 A.2d at 1022-23 (Smith, J., dissenting) (quoting 1 A. CORBIN, CORBIN ON CONTRACTS § 54 (1963)).
24. Id. at 239-40, 434 A.2d at 1022-24 (Smith, J., dissenting) (quoting 2 AMERICAN LAW OF PROPERTY § 6.6 (A. Casner ed. 1952)).
25. Id. at 238, 434 A.2d at 1023 (Smith, J., dissenting).
A. Lapse of Offer on Death of Offeror

The lapse-on-death rule has its origins in cases where the offeree seeks to enforce the offer against a sole offeror's estate. The rule has been criticized for its arbitrariness in that context, and it is especially inappropriate in Beall where two persons participated in the offer, and the offeree sought enforcement not against the deceased offeror's estate, but against the surviving offeror. The court should have analyzed the offer as analogous to a joint offer and concluded that the offer survived Calvin's death.

1. Sole offeror — The rule originated with the notion that contract formation requires mutual agreement between the parties at a single moment. The court in Beall reasoned that an offer continues by its constant repetition by the offeror, which ceases at death. After the death of a sole offeror, no mutual agreement at the moment of acceptance is possible.

Most courts no longer adhere to this metaphysical "meeting of the minds" requirement. Rather, contract formation depends on the parties' objective manifestations of mutual assent, not on their subjective states of mind. An offeree's acceptance thus creates a contract if she

26. See infra note 44 and accompanying text.
29. 291 Md. at 235, 434 A.2d at 1021 (quoting Pratt v. Trustees of Baptist Soc'y, 93 I1. 475, 478-79 (1879)).
30. Id. at 233, 434 A.2d at 1020.
31. To support its requirement of continuous assent in Beall, the Court of Appeals cited a nineteenth-century decision of the Supreme Court of Illinois. 291 Md. at 235, 434 A.2d at 1021 (citing Pratt v. Trustees of Baptist Soc'y, 93 Ill. 475 (1879)). The court ignored its own recent precedents that discuss objective manifestation and assent. See, e.g., Klein v. Weiss, 284 Md. 36, 395 A.2d 126, 141 (1978): "One of the essential elements for formation of a contract is a manifestation of agreement or mutual assent . . . ; in other words, to establish a contract the minds of the parties must be in agreement as to its terms."

See also RESTAMENT (SECOND) OF CONTRACTS § 17 comment c (1979). One judge has noted the effect that the law gives to objective acts by saying:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used
properly dispatches it before receiving the offeror’s attempted revocation, even though the offeror earlier had decided to revoke.\textsuperscript{32} In such cases, the offeree has acted reasonably in reliance on the offeror’s objective manifestation of assent without knowledge of the change in the offeror’s state of mind. The law presumes continuing assent from the initial objective expression unless the offeror properly manifests revocation.\textsuperscript{33}

2. \textit{Joint offerors} — One might try to bridge the gap between the old “meeting of the minds” theory and today’s objective focus by arguing that death is itself an objective manifestation of revocation. Such a rule would protect successors of a sole offeror who were without knowledge of the original offer. In a joint offer, however, the surviving offeror has knowledge of the offer and remains free to revoke the offer or to perform if it is accepted.

In \textit{Beall}, death terminated not only Calvin’s ability to assent as a co-offeror, but all his interest in the property and the offer. Carlton predicated his acceptance on Cecelia’s continued objective manifestation of assent.\textsuperscript{34} Although Cecelia may have had mental reservations concerning the written agreement that constituted the offer,\textsuperscript{35} she unquestionably signed it.\textsuperscript{36} Carlton tendered acceptance to Cecelia,\textsuperscript{37} who had not altered her objective manifestation of assent during the months between Calvin’s death and Carlton’s acceptance.\textsuperscript{38}

the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.

\begin{itemize}
\item Oliver v. Wyatt, 418 S.W.2d 403, 405 (Ky. 1967); \textit{see Restatement (Second) of Contracts § 42} (1981).
\item Carlton’s notice of acceptance focused on Cecelia’s assent to the offer, rather than Calvin’s. \textit{See} Joint Record Extract at E-8, E-9. In his complaint, he named Cecelia as defendant solely in her individual capacity. \textit{Id.} at E-3.
\item \textit{See} Joint Record Extract at E-63.
\item 291 Md. at 226-27, 434 A.2d at 1017. She signed it on three separate occasions. \textit{See supra} note 7.
\item \textit{Id.} at 227, 434 A.2d at 1017.
\item Cecelia contended, however, that she had withdrawn the offer before Carlton effectively accepted it. She argued that the wording of Carlton’s attempted acceptance referred only to the 1971 agreement and that Carlton thus failed effectively to express acceptance of the 1975 agreement by failing to refer to it explicitly. Her refusal to sell for the agreed price,
Lapse of an offer on the offeror's death has been defended on the ground that the offeree's expectation was qualified by an implied condition that the offer would lapse on death. In this view, each party intended to contract with the other — not with the other's estate. That argument, however, is inapplicable where, as in Beall, the surviving offeree seeks enforcement against the surviving offeror. Where the offeree is willing to receive performance from the remaining offeror, and performance in accord with the offer's terms is possible, the offer should not invariably lapse.

Further, Beall did not present a question of forcing any party to contract with an unintended party. As Judge Smith correctly noted in his dissent, Cecelia was a party to the offer. Being vested with entire title, she was able to convey the property according to the terms of the offer. Each party would have received the performance for which she or he had bargained from a party with whom she or he had dealt. Even if a condition were implied that Carlton expected performance from both Cecelia and Calvin, he plainly was willing to settle for purchasing the property from Cecelia alone. An implied condition that the offeror will be able to oversee the performance of the contract similarly would not require the lapse of the offer in Beall. As the surviving offeror, Cecelia was capable of supervising Carlton's performance.

Although the Court of Appeals' majority correctly noted that other courts have held that an offer lapses immediately upon the death of the offeror, the decisions cited by the court all concern a single offeror.

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41. 291 Md. at 238, 434 A.2d at 1023 (Smith, J., dissenting).


43. 291 Md. at 233, 434 A.2d at 1020.

44. Chain v. Wilhelm, 84 F.2d 138, 142 (4th Cir. 1936) (individual surety on bank's depository bond of funds deposited by bankruptcy trustees did not enter into contract binding on his estate where first deposit of such funds was made after his death) rev'd on other grounds, 300 U.S. 31 (1937); Shaw v. King, 63 Cal. App. 18, 24, 218 P. 50, 52 (1923) (unilateral offer by brother to maintain sister revoked by brother's death before sister's acceptance, despite sister's lack of notice of brother's death); Pratt v. Trustees of Baptist Soc'y, 93 Ill. 475, 478 (1879) (promissory notes, given to enable church to buy a bell, revoked by promisor's death before trustees undertook to procure bell or to collect notes); New Headley Tobacco Warehouse Co. v. Gentry's Ex'r, 307 Ky. 857, 862, 212 S.W.2d 325, 327 (1948)
Beall, however, presented a joint offer, and neither case law nor commentary has addressed the general question whether a joint offer survives the death of one offeror. Because an offer is an inchoate obligation, the law of joint obligations provides a useful analogy.

Except in promises to render personal services, if one of two joint obligors dies, the survivor continues to be bound by the contract. If Cecelia and Calvin had contracted, rather than offered, to sell the property, Cecelia would have been obligated to carry out the promised conveyance despite Calvin's subsequent death. Each joint offeror undertakes the full obligation and the full risk of nonperformance upon the offeree's acceptance. Of course, an offer is not an obligation; it merely empowers the offeree to create an obligation by acceptance. An offeror generally may revoke an offer at will. In the analogy to joint obligations law, however, survival of the offer leaves the surviving offeror in exactly the same position as before her co-offeror's death —
capable of revoking her offer. Hence, preserving the offer does not transform it into an obligation.

*Columbian Carbon Co. v. Kight* offers a useful analogy to the situation in *Beall*. In *Columbian Carbon* a husband, acting alone, executed a lease of property he and his wife owned as tenants by the entireties. After a divorce, the wife leased the property to another party. Observing that in Maryland neither tenant by the entireties alone can make a valid lease of entireties property because each is entitled to the whole estate by reason of their legal unity, the Court of Appeals held that the husband's lease was invalid during the marriage. The court went on to observe, however, that the husband's lease could have taken effect by operation of law when the divorce converted the tenancy by the entireties into a tenancy in common. In *Columbian Carbon* the tenancy by the entireties made the husband's lease invalid at its inception, but the tenancy did not prevent the lease from becoming valid under a theory of estoppel upon termination of the tenancy. Cecelia Beall's offer was valid when made; a fortiori, termination of the tenancy by the entireties should not have invalidated it.

**B. Tenancy by the Entireties**

As the second rationale for its holding in *Beall*, the Court of Appeals reasoned that the nature of the tenancy by the entireties required application of the doctrine of lapse. Examination of the tenancy's development, however, shows that the purposes that supported its feudal development no longer exist and the purposes that it serves in modern society do not require lapse of an offer where both tenants knowingly participated in making the offer.

The tenancy by the entireties served distinct functions in feudal society. First, feudal society strongly preferred joint tenancies over other forms of concurrent ownership. Survivorship under joint tenancies avoided division of tenures, which weakened the feudal structure.

Second, the tenancy by the entireties developed as an adjunct to the general devolution of property under male control. The control of land carried with it the concomitant duty of service to the king.

50. 207 Md. 203, 114 A.2d 28 (1955).
51. Id. at 204-05, 114 A.2d at 29.
52. Id. at 205, 114 A.2d at 29.
53. Id. at 209, 114 A.2d at 31.
54. Id. at 210, 114 A.2d at 31-32.
and men rendered those services. Under the common law, a married woman's identity merged into that of her husband.\textsuperscript{58} During marriage the wife could not make a valid conveyance, execute an enforceable contract, nor could she sue or be sued without the joinder of her husband.\textsuperscript{59} The tenancy by the entireties converted the sole ownership of property owned by a married woman before her marriage or acquired during marriage into concurrent ownership with her husband. Because the husband dominated the marital unit, he controlled the property and thus incurred the concomitant feudal duties.\textsuperscript{60}

The tenancy by the entireties, while preserving the male-dominated feudal society, also gave the wife the protection of a survivorship interest in the entireties property. Although the husband could convey the entireties property to a third party during his life, he could not alienate the wife's right of survivorship without her assent. A conveyance of entireties property in which she did not join was defeasible in her favor if she survived her husband.\textsuperscript{61}

Changes in society and societal attitudes have altered the original purposes for the tenancy by the entireties. Reflecting those changes, statutes and case law have altered the legal significance of the tenancy. Virtually universal enactment of Married Women's Acts in the United States during the nineteenth century\textsuperscript{62} gave married women the right to acquire, hold, use, and convey property as though they were unmarried.\textsuperscript{63}

In Maryland, the tenancy by the entireties continues to exist, but the Married Women's Acts have equalized the tenants' rights and powers regarding the property. In Marburg v. Cole,\textsuperscript{64} the Maryland Court of Appeals held that the Married Women's Property Act allows a married woman to acquire and to hold property, but does not affect the

\begin{footnotes}
\item[58] Johnston, \textit{Sex and Property: The Common Law Tradition, the Law School Curricu-
\item[59] D. STEWART, \textit{HUSBAND AND WIFE} §§ 357, 394, 431 (1885).
\item[61] Duffy, \textit{supra} note 57, at 206-07; Phipps, \textit{supra} note 56, at 26-27; Starling, \textit{The Ten-
\item[62] Phipps, \textit{supra} note 56, at 27.
\item[63] Any property that a woman had owned before marriage or that she acquired sepa-
rately during marriage she thereafter owned in her own right, rather than concurrently with her husband. She could effectively convey it without her husband's joinder in the convey-
ance. Having no interest in that property, the husband could not convey it. See Johnston, \textit{supra} note 58, at 1070-79 (general discussion of Married Women's Act). In Maryland, the provisions of the Married Women's Property Act are now codified at Md. ANN. CODE art. 45, §§ 1-5 (1982). The Married Women's Acts also gave married women the right to con-
tract, to sue, and to be sued separately from their husbands. See, \textit{e.g.}, \textit{id.} § 5.
\item[64] 49 Md. 402 (1878).
\end{footnotes}
nature of an estate conveyed to her and her husband jointly. As at common law, any conveyance to a husband and wife that does not expressly designate some other tenancy creates a tenancy by the entireties. The Married Women's statute abrogates the husband's sole control of the property, so that neither spouse can dispose of any part of the property without the assent of the other.

The tenancy by the entireties in Maryland thus prevents alienation of any interest in the property without the consent of both tenants and vests each tenant with an indefeasible right of survivorship in the property. During the tenants' joint lives, an attempted conveyance by either of them alone is ineffective. On the death of one, the entire title immediately vests in the survivor by operation of law. In sum, the tenancy today serves to protect an unknowing spouse against possible alienation of the entireties property by the other spouse during their joint lives.

The Beall decision gives the tenancy by the entireties more effect

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65. Id. at 412-13. For a discussion of the Maryland Married Women's Property Act, see supra note 63.


68. Tizer v. Tizer, 162 Md. 489, 496, 160 A. 163, 165 (1932) (Digges, J.); id. at 498-99, 161 A. 510, 511 (Parke, J., dissenting) (there can be no valid lease of property held by husband and wife as tenants by the entireties except by their joint act). Cf. King v. Green, 30 N.J. 395, 153 A.2d 49, 60 (1959) (life interest and survivorship interest of each tenant by the entireties are alienable).


71. Marburg, 49 Md. at 412.

72. See Watterson v. Edgerly, 40 Md. App. 230, 236, 388 A.2d 934, 938 (1978) (entireties property is subject to attachment only for debts incurred by tenants jointly); In re Ford, 3 Bankr. 559, 576 (Bankr. D. Md. 1980) (under Maryland law, where only one spouse filed petition in bankruptcy, debtor may exempt his or her interest in entireties property from bankruptcy estate).

The Court of Appeals has highlighted the limited protection offered by the tenancy in Grauel v. Rohe, 185 Md. 121, 43 A.2d 201 (1945). In that case a purchaser sought specific performance of a contract for sale of entireties property in the husband's name alone. Id. at 123, 43 A.2d at 202. The Court of Appeals rejected the defendants' argument that the contract was unenforceable because of the tenancy by the entireties. Id. at 126, 43 A.2d at 204. Finding that the wife had knowledge of the contract, the court held that her failure to repudiate the agreement ratified the transaction under agency principles. Although the husband's action had been unauthorized, the wife's subsequent ratification through knowledge was the equivalent to original authority. Id. at 126-27, 43 A.2d at 204 (quoting Kvedera v. Mondravitsky, 145 Md. 260, 264, 125 A. 591, 593 (1924)). The wife was bound by the contract even though she had not participated directly in its making. Id. at 127, 43 A.2d at 204.
at the moment of its disappearance than it has during the joint lives of the tenants. During the joint lives of Calvin and Cecelia, Cecelia could be bound to an offer only by her own consent. She could have withdrawn her consent at any time before acceptance of the offer and thereby have revoked the offer. Actions showing her consent would have been sufficient to bind her to any contract that Calvin signed. At all times, Cecelia was entitled to possess the entire property, and she participated in and signed the offer of sale. After Calvin's death, Cecelia's control of the property immediately became absolute. Under such circumstances, the tenancy by the entireties alone does not justify automatic withdrawal of the surviving tenant's consent and lapse of the offer.

C. Change of Circumstances

The court in Beall noted the change in circumstances that often results from the death of one's spouse. The surviving spouse takes on legal and financial responsibility for joint obligations incurred during the marriage. Family responsibilities devolve on the surviving spouse alone. Moreover, entireties property, which is not subject to the individual debts of either spouse, is immediately available to creditors of the survivor. As a result of those changes, enforcement of an offer made during the lives of both spouses may be a significant hardship to the surviving spouse.

Courts have exercised some discretion in relieving parties from specific performance of a "harsh or oppressive" contract due to events subsequent to the contract, but they do not necessarily relieve parties of all responsibility under the contract. In granting such relief courts do not allow parties to escape bad bargains or circumstances that were foreseeable when the contract was formed. In alluding to this equitable doctrine as an alternate ground for the decision in Beall, the court

73. See Grauel v. Rohe, 185 Md. 121, 126, 43 A.2d 201, 204 (1945); supra note 72.
75. 291 Md. at 236, 434 A.2d at 1022. Co-ownership by two people who are not married is less likely to entail family or similar responsibilities. The death of one such co-owner is less likely to change the survivor's circumstances significantly with respect to the property.
77. Arnold, Tenancy by the Entireties and Creditors [sic] Rights in Maryland, 9 Md. L. Rev. 291, 297-98 (1948) (if judgment creditor of one spouse only has judgment outstanding when other spouse dies, creditor can get execution on entireties property immediately).
79. CORBIN, supra note 78, § 1164.
80. Id.
was sensitive to the plight of surviving spouses, but it did not discuss how the circumstances of the case demonstrated a significant hardship to Cecelia. Because circumstances may change on the death of one spouse, parties should be held to contemplate such foreseeable occurrences as death. Although some contracts may implicitly contemplate survival of the parties as essential to performance, *Beall* does not present such a case. Calvin's survival was not essential to performance. The changed circumstances doctrine thus appears inappropriate in *Beall*.

### III. A Better Approach

The rigidity of the *Beall* rule and the harsh surprise that it presents for unwary offerees might have been avoided if the court had applied well-established contract principles concerning implied conditions. Although these concepts would not have allowed Cecelia to escape her offer, they would have provided a fairer approach in future cases.

Contract law recognizes several types of conditions that may impose duties on parties beyond the literal or express language of their contract. In the view now generally adopted, implied conditions are products of the interpretation of the parties' agreement, derived from the actual expressions of the parties and the actions surrounding the literal agreement. In this sense, the parties impliedly assented to such conditions.

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81. 291 Md. at 236, 434 A.2d at 1022.
82. At trial, the parties focused largely on the issue of consideration. The record does suggest, however, that the parties may have been aware of problems with Calvin's health. See Joint Record Extract at E-100.
83. See supra notes 41-42 and accompanying text.

By contrast, courts create "constructive conditions" (sometimes called conditions "implied-in-law") from the requirements of justice, although the parties may have had no intentions concerning them. See supra note 84; 3 A. Corbin, *Corbin on Contracts* § 632 (1960); 5 S. Williston, *The Law of Contracts* § 669 (3d ed. 1961); Corbin, *Conditions in the Law of Contract*, 28 Yale L.J. 739, 743-44 (1919); Holmes, *The Path of the Law*, 10 Harv. L. Rev. 455, 466 (1897).

In this manner, the constructive condition of simultaneous exchange has been added to simple land contracts. Where A promises to pay B for Blackacre, and B promises to convey Blackacre to A, but the contract says nothing of the time of exchange, courts now
The participation of both joint offerors may be so central to the contract as to constitute an implied condition of the contemplated contract.\textsuperscript{88} In defending against an action for specific performance, a surviving joint offeror should be allowed to show that all parties, including the offeree, understood the existence of such an implied condition.\textsuperscript{89}

The burden of coming forward with evidence to show the implied condition should be on the defending offeror, because the offeror could have revoked the offer before acceptance. In this way, a "team" concept would not impose an undue burden on the offeree and could be dealt with by trial courts as a question of fact like that of the existence of any other defense to an action for specific performance.

Implied conditions come from interpretation of the contract and must follow logic and the limits of factual inference.\textsuperscript{90} On the existing record in \textit{Beall},\textsuperscript{91} the offer itself\textsuperscript{92} does not raise an inference that survival of both offerors was essential to the contract. The attendant facts that the offerors were spouses and tenants by the entireties raise conflicting inferences. The marital relationship and joint ownership indicate the involvement of a "team" in the offer, but the survivorship characteristics of the tenancy by the entireties make the "team" unnecessary for performance. Beyond these objective facts, the record hold such exchange must be simultaneous. \textit{See} 3A A. \textit{Corbin, Corbin on Contracts}, § 663 (1960).

In \textit{Beall}, the operation of constructive conditions might mean that Cecelia did not have to convey the land until Carlton tendered the purchase price. Calvin's death, however, did not require the creation of a new term to fulfill the inchoate obligation. Cf. Lishner \textit{v. Bleich}, 319 Mass. 350, 65 N.E.2d 693 (1946). (The court dismissed a suit for recovery of a deposit from the defendant who had contracted to sell land titled in his wife's name. The plaintiff contended that simultaneous exchange would not be possible because the defendant lacked the power to convey title. The court held such exchange possible because the defendant could acquire title by time of settlement.).

Although it might seem that a constructive condition of lapse on death of a co-offeror could be applied in \textit{Beall}, the doctrine of constructive conditions does not support such an application. Although judicially established for justice, constructive conditions are not broad equitable remedies, but rather outgrowths of the contract itself. In the view of the \textit{Restatement}, constructive conditions arise when the parties have neglected a term "essential to a determination of their rights and duties . . . ." \textit{Restatement (Second) of Contracts} § 226 comment c (1981). \textit{But} see 5 S. \textit{Williston, The Law of Contracts} § 669 (3d ed. 1961) (implying a more flexible approach).

88. \textit{See} Internatio-Rotterdam, Inc. \textit{v. River Brand Rice Mills, Inc.}, 259 F.2d 137, 139-40 (2d Cir. 1958) (condition precedent is act or event which must exist or occur before duty of performance arises), \textit{cert. denied}, 358 U.S. 946 (1959).


90. \textit{See} 3 A. \textit{Corbin, Corbin on Contracts} § 562 (1960).

91. The record focuses largely on whether Carlton had given consideration for the agreement, rather than interpretation of the agreement's terms. \textit{See supra} note 10.

92. \textit{See supra} note 7.
reveals largely conflicting arguments about the parties intentions and little support for finding a mutual understanding that death would revoke the offer. 93

The inability to find an implied condition in Beall should not frustrate the application of such a condition in an appropriate case. For example, where tenants in common offer to convey the entire property, the inference would be clear that all of the offerors are necessary to the contemplated contract. 94 An approach which finds lapse only on determination of an implied condition would deal more fairly with the justifiable expectations of both the joint offerors and the offeree.

IV. CONCLUSION

The narrow rule enunciated in Beall is unnecessarily rigid and raises questions for practitioners in the future. For spouses offering to sell their tenancy by entireties property, the Beall decision now affords the protection of revocation without any express language in the offer. Offerees and offerors who wish the offer to survive the death of one co-offeror must consider specific language to achieve this result. The opinion in Beall indicates that a binding option contract would provide the most certain method of achieving this result. 95 Unclear from the opinion, however, is whether the parties can overcome the automatic lapse of an offer by express language in the offer. Parties desiring survival of the offer after the death of a co-offeror may wish to consider not only express language about survival, but also an unequivocal expression of separate, continuing assent to the offer by both offerors.

93. For example, at trial Cecelia testified that she had signed the agreements to sell the property only because Calvin wanted to sell. Joint Record Extract at E-63. One must bear in mind, however, that the 1975 offer was the third time Cecelia had signed such an agreement, because the 1971 option contract to which the offer was appended was itself a re-execution of an original three-year option contract executed in 1968. 291 Md. at 226, 434 A.2d at 1017.

94. Each tenant in common has a distinct estate in the property. Neither, therefore, has any power over the other's share. See In re Estate of Horn, 102 Cal. App. 2d 635, 228 P.2d 99 (1951).

95. 291 Md. at 227-28, 434 A.2d at 1017-18.
**JOHNSON v. STATE**—DIMINISHED CAPACITY REJECTED AS A CRIMINAL DEFENSE

In *Johnson v. State*, a divided Maryland Court of Appeals declined to accept as a criminal defense a defendant's "diminished capacity" — evidence tending to show that the defendant did not possess the mens rea element for a specific intent crime. By holding that recognition of the diminished capacity defense is an "essentially legislative prerogative," the court underestimated its own authority to fashion common-law defenses to criminal charges. In addition, the court failed to distinguish between the diminished capacity defense, which simply negates one element of the crime, and the diminished responsibility defense, which reduces a guilty defendant's responsibility for the act. An evaluation of the diminished capacity defense on its merits indicates that it should have been adopted by the Court of Appeals.

I. THE JOHNSON DECISION

In *Johnson*, the defendant joined two other men who had stolen a car and abducted its owner. While driving around in the stolen car, the men smoked parsley flakes treated with PCP. Johnson and one of the other men raped the abducted woman, and then Johnson fatally shot her. Johnson was convicted of first degree murder and sentenced to death.

The case went directly to the Court of Appeals under the automatic review provision of the Maryland death penalty statute. The court affirmed the murder conviction, but vacated the death sentence and remanded for further consideration of the punishment to be given.

Johnson contended on appeal that his murder conviction should

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2. The term "criminal capacity" refers to the ability to form the mental intent required to commit the crime. A person who lacks criminal capacity cannot be held criminally responsible because he is not guilty of the criminal offense. The term "criminal responsibility," on the other hand, refers to a guilty offender's liability for committing the crime. Lack of criminal responsibility can be established by a showing of insanity. R. Perkins, Perkins on Criminal Law 857-58 (2d ed. 1969).
3. 292 Md. at 427-28, 439 A.2d at 555.
4. For a discussion of the diminished responsibility defense, see infra text accompanying notes 44-47.
5. 292 Md. at 409, 439 A.2d at 545-46.
6. Id. at 408, 439 A.2d at 545. Johnson also was convicted of first degree rape, kidnapping, and use of a handgun.
8. 292 Md. at 440-41, 439 A.2d at 561-62. The court's holding on this point rested on the jury's failure to consider as a mitigating factor Johnson's lack of a prior record of violent
be reversed because the trial court erred in not admitting psychological evidence to show that he lacked sufficient mental capacity to form the requisite intent to commit murder in the first degree. The defense had called as a witness a clinical psychologist who had examined Johnson and had compiled a psychological report. The trial court allowed the psychologist to read to the jury only those parts of his report that related to Johnson’s performance on intelligence tests — indicating an I.Q. of 72 — and his conclusion that Johnson is a severely deprived individual with a negative orientation and a severe authority problem. The court excluded the portion of the report which stated that the defendant showed signs of bizarre thinking, had a tenuous hold on reality, and perceived the world as a cold, inhospitable place in which he
crime as required by the death penalty statute. The court also affirmed the sentences Johnson received for the other offenses. *Id.* at 408, 439 A.2d at 545.

9. *Id.* at 417, 439 A.2d at 549.

Johnson raised several other matters on appeal, including the contention that he was not afforded adequate assistance of counsel at trial. *Id.* at 434, 439 A.2d at 558. Johnson’s argument on this point convinced all three dissenting judges. *Id.* at 444, 439 A.2d at 564 (Eldridge, J., dissenting); *id.* at 456, 439 A.2d at 570 (Cole, J., dissenting). At trial, defense counsel tried to offer evidence of Johnson’s diminished capacity based on his drug usage and submissive personality. Because of procedural blunders, however, these possible grounds were never fully explored.

The possibility existed that Johnson’s mental capacity was impaired as a result of drug use. The state psychiatrists’ report concluded that he had a history of drug abuse. *Id.* at 410, 439 A.2d at 546. Johnson himself testified at trial that he had used a variety of drugs, *id.* at 468, 439 A.2d at 576 (Cole, J., dissenting), and that he had smoked parsley flakes treated with PCP while riding in the victim’s car. *Id.* at 409, 439 A.2d at 545, 557. The extent of the defendant’s drug problem is difficult to gauge because the defense failed to secure any expert testimony regarding the effects of PCP. *Id.* at 471, 439 A.2d at 578 (Cole, J., dissenting).

Defense counsel also attempted to show that Johnson was particularly susceptible to the overbearing influence of Mayers, one of Johnson’s two companions on the night of the murder. *Id.* at 466, 471, 439 A.2d at 575, 578 (Cole, J., dissenting). Certainly Johnson’s circumstances — he was only 19, he was Mayers’ cousin, and he was living in Mayers’ house — could increase the likelihood that he could be controlled by Mayers. *Id.* at 417, 409, 468, 439 A.2d at 550, 545, 576. Johnson’s testimony indicated that Mayers was the ringleader of the trio. Johnson testified that it was Mayers who drove the stolen car, suggested raping the woman, took the woman’s coat and purse, decided the woman must be killed, provided the gun, and ordered one of the other men to do the shooting. *Id.* at 409, 469, 439 A.2d at 545, 577. Nevertheless, evidence of Johnson’s pliable nature was poorly presented at trial. The only references to Johnson’s submissiveness came from counsel’s statements and appellant’s own testimony, with no independent evidence to support the theory. Brief for Appellant at 59, Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982).

10. The psychologist had examined Johnson as part of a psychiatric evaluation ordered by the trial court when Johnson entered an insanity plea. 292 Md. at 417, 439 A.2d at 549-50. Johnson withdrew his insanity plea when psychiatrists from the state Department of Health and Mental Hygiene concluded that he was not insane and the trial court refused to appoint a private psychiatrist at state expense to assist with his defense. *Id.* at 410-14, 439 A.2d at 546-48.
had no opportunity.\textsuperscript{11} Johnson argued that the entire report should have been presented to the jury because it was relevant to his defense of diminished capacity.\textsuperscript{12}

On appeal, the Court of Appeals characterized the diminished capacity defense as the admission of any evidence relevant to the existence of the defendant's specific intent in order to negate that intent when the defendant is charged with a specific intent crime. The court observed that the purpose of the defense is to show that a lesser degree of the offense, not requiring specific intent, was committed, and that the diminished capacity defense is to be applied only after the defendant

\begin{itemize}
\item \textbf{Tests Administered:}
  \begin{itemize}
  \item WAIS
  \item Bender-Gestalt
  \item Holtsman Inkblot Technique
  \item Color Pyramid Test
  \end{itemize}
\item \textbf{Test Behavior:}
  The patient is a 19-year old youth of medium height and build who presented a neat and clean appearance. He was extremely sullen and hostile, and his cooperation for interview and test was poor. In view of this test results have to be considered tentative.
\item \textbf{Test Results:}
  On the \textit{WAIS} he earned a Verbal \textit{I.Q.} of 78, a Performance \textit{I.Q.} of 68, and a Full Scale \textit{I.Q.} of 72 which places him within the borderline range of intelligence. His potential, as gauged by his abstract reasoning, is at least within the low average range. Intellectual efficiency is decreased by a combination of educational deprivation and negativism. There are some signs which point in the direction of bizarre thinking and a tenuous hold on reality. \textsc{E.g.} [sic] on Card 22 of the Holtzman he saw "the devil," and on Card 27 he saw "God over water." But these should be interpreted with caution, as they may also be attempts to embarrass and express contempt for the examiner by giving nonsensical answers.

  The personality picture is that of an extremely deprived individual who does not expect any affection and emotional support from either parental figure. He perceives the mother figure as domineering, but distant and devoid of warmth and understanding and the father figure as hostile and threatening. Yet he has conjured up the image of an idealized, all wise and all loving father surrogate with whom he will compare any male elder. Since such a person is bound to fall short of his ideal he is apt to equate this person with the real father figure whom he sees in negative terms and reject him. As a result he not only has trouble with authority figures, but perceives the world about him as a cold inhospitable place where he does not have a chance.

  \textbf{Conclusion:}
  The patient functions at the borderline intellectual level (\textit{I.Q.} 72), but his potential is at least within the low average range. He can be described as a severely deprived individual with a hostile and negative orientation and an [sic] severe authority problem. Contact with reality is difficult to evaluate on account of his poor productivity resulting from extreme negativism.
\end{itemize}

\textit{Id.} at 417-18 n.6, 439 A.2d at 550 n.6.

\textsuperscript{12} \textit{Id.} at 417-18, 439 A.2d at 550.
has been found to be sane and therefore accountable for his actions.\textsuperscript{13}

The court then reviewed prior Maryland cases, citing \textit{Spencer v. State},\textsuperscript{14} \textit{Armstead v. State},\textsuperscript{15} and \textit{Allen v. State},\textsuperscript{16} to show that the defense previously had been rejected in Maryland.\textsuperscript{17} The court stated that these decisions demonstrate that "the criminal law as an instrument of social control cannot allow a legally sane defendant's lesser disabilities to be part of the guilt determining calculus."\textsuperscript{18}

Despite its evaluation of the diminished capacity defense and its review of judicial precedents, the court based its holding on legislative pre-emption. The court found that "because the legislature, reflecting community morals has, by its definition of criminal insanity, already determined which states of mental disorder ought to relieve one from criminal responsibility, this court is without authority to impose our views in this regard even if they differed."\textsuperscript{19}

Describing the diminished

\begin{footnotes}
\textsuperscript{13} \textit{Id.} at 419, 439 A.2d at 551.
\textsuperscript{14} 69 Md. 28, 13 A. 809 (1888). In \textit{Spencer}, Maryland adopted the McNaughten test for insanity, which holds that a defendant is accountable for his actions if "at the time of the commission of the alleged offense, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature and consequences of his act . . . ." 292 Md. at 421, 439 A.2d at 552 (quoting \textit{Spencer}, 69 Md. at 37, 13 A. at 813).
\textsuperscript{15} 227 Md. 73, 175 A.2d 24 (1961).
\textsuperscript{16} 230 Md. 533, 188 A.2d 159 (1963). The \textit{Johnson} court failed to point out that \textit{Armstead} and \textit{Allen} did not analyze the diminished capacity defense and therefore do not furnish a strong rationale for rejecting diminished capacity in \textit{Johnson}. Even if \textit{Armstead} and \textit{Allen} were more strongly reasoned, the Court of Appeals could well have decided to reevaluate them. They date from 1961 and 1963, respectively, before numerous jurisdictions accepted the diminished capacity defense. \textit{E.g.}, United States v. Brawner, 471 F.2d 969, 1002 (D.C. Cir. 1972); State v. Gramenz, 256 Iowa 134, 140, 126 N.W.2d 285, 289 (1964); State v. Nichols, 3 Ohio App. 2d 182, 209 N.E.2d 750 (1965); People v. Lynch, 47 Mich. App. 8, 208 N.W.2d 656 (1973); Commonwealth v. Walzack, 468 Pa. 210, 212-13, 360 A.2d 914, 915 (1976).
\textsuperscript{17} The defense has been addressed, although only in the most perfunctory manner, in a few other Maryland cases. In Simmons v. State, 292 Md. 478, 439 A.2d 581 (1982), decided on the same day as \textit{Johnson}, the Maryland Court of Appeals rejected the defendant's diminished capacity defense, stating only that it had "fully expressed" its views with respect to diminished capacity in \textit{Johnson}. 292 Md. at 479, 439 A.2d at 582.
\textsuperscript{18} The Maryland Court of Special Appeals seemed somewhat receptive to the diminished capacity defense in Pfeiffer v. State, 44 Md. App. 49, 407 A.2d 354 (1979). The Court of Special Appeals suggested that the Court of Appeals might be willing to reconsider the defense because "a majority of jurisdictions [now] admit psychiatric opinions as evidence that the defendant did not have the required specific intent . . . ." 44 Md. App. at 57 n.4, 407 A.2d 358 n.4. As \textit{Johnson} attests, the Court of Special Appeals' prediction was wrong.
\textsuperscript{19} \textit{Id.} at 425-26, 439 A.2d at 554.
\end{footnotes}
capacity defense as "a fundamental change in the common law theory of [criminal] responsibility,'"\(^{20}\) the court stated that the General Assembly has the "prerogative to make the delicate judgments upon which changes in the limits of criminal responsibility are based."\(^{21}\)

In a dissent joined by Judges Cole and Davidson,\(^{22}\) Judge Eldridge argued that diminished capacity is not really an independent defense at all, but simply an opportunity for the defendant "to present evidence in his own behalf."\(^{23}\) He stated that before Johnson, whenever a particular mental state was an element of the crime with which the defendant was charged, "the Court has consistently held that evidence of the defendant's mental capability is admissible to show the absence of that element, and thus the absence of criminal conduct."\(^{24}\) Judge Eldridge concluded that the majority's refusal to admit evidence going to the defendant's ability to form the requisite intent "represents an abrupt departure from prior Maryland law."\(^{25}\) He cited decisions\(^{26}\) that stated that a first degree murder conviction must be supported by a finding that the defendant had a "'[s]pecific purpose and design to kill.'"\(^{27}\) Reasoning that such a specific purpose and design "certainly involve a defendant's mental state,"\(^{28}\) Judge Eldridge argued that evidence of the defendant's capacity to form the requisite mental state should be admitted because a defendant's capacity to commit the crime should be established before his criminal responsibility is considered.\(^{29}\)

\(^{20}\) Id. at 420, 439 A.2d at 551 (quoting Fisher v. United States, 328 U.S. 463, 476 (1946)).

\(^{21}\) Id. at 426, 439 A.2d at 555.

\(^{22}\) Id. at 456, 439 A.2d at 570.

\(^{23}\) Id. at 455, 439 A.2d at 569 (Eldridge, J., dissenting).

\(^{24}\) Id. at 449, 439 A.2d at 566 (Eldridge, J., dissenting) (emphasis in original).

\(^{25}\) Id. at 446, 439 A.2d at 565 (Eldridge, J., dissenting).


\(^{27}\) 292 Md. at 447, 439 A.2d at 565 (Eldridge, J., dissenting) (quoting Faulcon).

\(^{28}\) Id.

\(^{29}\) Id. at 448, 439 A.2d at 566. Judge Eldridge interpreted the prior Maryland cases as rejecting not a diminished capacity defense but a diminished responsibility defense, largely because they used the term "diminished responsibility" rather than the term "diminished capacity." Allen actually does seem to involve a diminished responsibility rather than a diminished capacity defense. The court there noted that the defendant's "epilepsy played no primary role in the affair" and thus presumably did not affect his capacity. 230 Md. at 534, 188 A.2d at 160. Because the Allen court did not make its reasoning explicit, however, it is risky to assume, as Judge Eldridge did, that the court was consciously distinguishing diminished capacity from diminished responsibility.

Armstead, however, used the terms interchangeably. The Armstead court paraphrased the defendant's "diminished responsibility" argument as meaning that "when a statute . . . requires deliberate premeditation in order to constitute murder in the first degree . . . the question of whether the accused is in such condition of mind as to be incapable of deliberate premeditation necessarily becomes a material subject of consideration." 227 Md.
II. The Legislative Deference Rationale

The court's holding that the legislature had pre-empted the area of criminal responsibility rested primarily on inferences drawn from legislative inaction. The court noted that in 1967 the General Assembly replaced the Spencer-McNaughten insanity test with a broader formula patterned after the Model Penal Code, and made further changes in the insanity test in 1970. The court concluded that "[b]y thus defining and redefining the limits of criminal culpability as expressed in the definition of legal insanity, the General Assembly has exercised its unique prerogative to balance the interests of the community and the individual accused." The court also observed that the legislature had deleted mental retardation from the definition of mental disorder, but later redefined mental disorder to again include mental retardation. The court interpreted these adjustments as an indication of the General Assembly's intent to excuse from criminal accountability only those mentally deficient persons whose deficiencies meet the insanity test.

The court regarded the legislature's silence concerning persons whose mental deficiencies do not meet the insanity test as an indication of the legislature's policy preference to ignore any form of mental defi-
ciency short of insanity when determining criminal responsibility, reasoning that if the legislature had wished to adopt a diminished capacity defense, it would have provided for one when it modified the insanity defense. The court also concluded that adoption of the broad Model Penal Code test rendered a diminished capacity defense unnecessary. The court stated: "the arguable need for a doctrine such as diminished capacity to ameliorate . . . the McNaughten rule has been eliminated to the extent that the legislature has deemed it advisable to do so." 36

In addition to the doubtful validity of the court's reliance on legislative silence as an indication of legislative intent, 37 several other difficulties in the court's reasoning weaken its conclusion. First, the court's legislative deference rationale is predicated on the faulty notion that the insanity and diminished capacity defenses are equivalent. The insanity defense focuses on the defendant's responsibility for his criminal act and involves a policy decision not to punish him for that act. The diminished capacity defense, on the other hand, does not measure the defendant's criminal responsibility, but his criminal capacity to commit a specific intent crime. 38 The diminished capacity defense does not excuse the defendant from punishment, but punishes him only for the

36. *Id.* at 426, 439 A.2d at 554-55.

California cases have stated explicitly that the diminished capacity defense is an attempt to mitigate the extreme all-or-nothing position of the McNaughten test. *E.g.*, People v. Drew, 22 Cal.3d 333, 343-44, 583 P.2d 1318, 1323, 149 Cal. Rptr. 275, 280-81 (1978); People v. Henderson, 60 Cal.2d 482, 490, 386 P.2d 677, 682, 35 Cal. Rptr. 77, 82 (1963). *See also* Held, *Diminished Capacity in California: A Diminished Future or Capacity for Change?*, 8 SAN FERN. V. L. REV. 203, 210-11 (1980).

One of the major criticisms levied against the McNaughten test is its failure to take into account the defendant's ability to control himself. Instead, the McNaughten test considers only whether the defendant knew that what he was doing was wrong. Many authorities have expressed concern that an offender who kills someone under the influence of an insane delusion could be convicted of murder under the McNaughten test for insanity. *See, e.g.*, United States v. Currens, 290 F.2d 751, 774 (3d Cir. 1961); Bethea v. United States, 365 A.2d 64, 80 (D. App. D.C. 1976), *cert. denied*, 433 U.S. 911 (1977); United States v. Freeman, 357 F.2d 606, 618 (2d Cir. 1966); Held, *supra*, at 207.

The Model Penal Code test, however, takes account both of volitional factors (the defendant's ability to control himself) as well as of cognitive factors (the defendant's ability to know that what he was doing was wrong). *Model Penal Code* § 4.01 comment 3 (Proposed Official Draft 1962).

37. Legislative inaction can be traced to numerous reasons other than legislative disapproval. For example, the legislators may be completely disinterested in the issue, they may consider it politically expedient not to take any present action on the matter, or they may be undecided. The legislators may even be leaving the matter for judicial resolution. Because the legislature has discretion in selecting the topics on which it legislates, little weight should be given to its failure to legislate. *H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law* 1395-96 (Tent. ed. 1958). *See also* Abraham, *Adopting Comparative Negligence: Some Thoughts For the Late Reformer*, 41 MD. L. REV. 300, 303-06 (1982).

38. *See supra* note 2.
general intent crime that he was capable of committing. Because insanity and diminished capacity are separate defenses, the court should not have assumed that legislative attention to the insanity defense signalled consideration and rejection of the diminished capacity defense.

Second, the court’s decision to defer to the legislature was based on the mistaken assumption that adoption of the diminished capacity defense requires a “delicate” legislative judgment in the area of criminal “responsibility.” But, as the next section demonstrates, the diminished capacity defense does not involve criminal responsibility at all; rather, it is an offer of proof designed to show that the defendant did not commit the crime with which he was charged. Thus, the Court of Appeals’ power to adopt the diminished capacity defense is as broad as its power to adopt any other common-law defense to a criminal charge. Because Maryland is a common-law crime state, its willingness to rely on the common law not only to fill the gaps left by statutes but also to define criminal acts shows that judge-made law actually has a large impact on the criminal law. If the Maryland Court of Appeals can define the very crimes for which defendants can be prosecuted, surely it has the power to adopt defenses to criminal charges.

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39. Held, supra note 36, at 208-10. In Maryland, if an individual is found not guilty of a crime by reason of insanity, the individual is committed to the state Department of Health and Mental Hygiene for an examination to determine whether the individual is mentally retarded or has a mental disorder, and whether, if he were released, the individual would be a danger to himself or to another person or another person’s property. Md. Health-General Code Ann. § 12-110 (1982). In jurisdictions that recognize the diminished capacity defense, however, a successful assertion of the defense usually results in a conviction for a lower grade offense with no provision for psychiatric treatment. Lewin, Psychiatric Evidence In Criminal Cases For Purposes Other Than The Defense Of Insanity, 26 Syracuse L. Rev. 1051, 1055 (1975).


The Johnson court made no attempt to explain the willingness of these other courts to adopt the diminished capacity defense, merely noting that some jurisdictions have recognized diminished capacity “by judicial fiat.” 292 Md. at 419 n.7, 439 A.2d at 551 n.7.
The court's narrow view of its authority precluded it from basing its decision to adopt or to reject the diminished capacity defense on its merits. Nevertheless, the court's comments on the defense's merits indicate that the court would have rejected it in any event. The court's disapproval resulted from its mischaracterization of the diminished capacity defense as an issue of criminal responsibility.

III. THE DIMINISHED CAPACITY DEFENSE

A. The Distinction Between the Diminished Capacity Defense and the Diminished Responsibility Defense

The diminished capacity defense is based on a definitional rationale: if a crime by definition requires a specific state of mind, then any evidence, including psychiatric evidence, that is relevant to the defendant's mental state is admissible to refute the existence of the specific intent. Thus, the diminished capacity defense is not an affirmative defense, enabling the defendant to escape all liability, but a negation of one element of the state's case against the defendant. Indeed, the diminished capacity defense is actually more an evidentiary rule than a criminal defense. The issue before the court in Johnson was not whether to establish a new affirmative defense. Rather, the question was the much narrower one of what evidence is admissible to negate the mental element of a specific intent crime.

The diminished capacity defense sometimes is misapplied to admit evidence that explains why the defendant entertained the specific intent instead of demonstrating that the defendant did not have the requisite intent. This broad application of the defense exceeds the definitional rationale because evidence of the defendant's disability is used to reduce the defendant's culpability for his offense and thereby reduce his punishment. This ameliorative approach is actually a diminished responsibility defense because it involves a determination of the defendant's mental state.

42. Held, supra note 36, at 203-04.
44. Id. at 830-31. Arenella refers to this version of the defense as the "broad diminished capacity model" and the narrower version, discussed supra text accompanying notes 42-43, as the "strict mens rea model." Arenella concedes, however, that his broad diminished capacity model is in essence the same as the diminished responsibility model.
45. Lewin, supra note 39, at 1056-57. Lewin categorizes the various defenses which address the defendant's mental state as either "causative" or "ameliorative." An ameliorative defense uses evidence of the defendant's psychological abnormality to reduce the penalty; a causative defense connects the abnormality to an essential element of the crime.
46. See supra note 45.
47. The diminished responsibility defense, as used in the United Kingdom, reduces the
fendant's criminal responsibility when the issue of his criminal capacity — whether he possessed the mental element of the crime with which he was charged — is not present.

These distinctions are narrow and therefore the diminished capacity and diminished responsibility defenses are frequently confused. The Johnson court failed to distinguish them, as demonstrated by its statement that "the concept of diminished capacity as a separate defense involves 'a fundamental change in the common law theory of [criminal] responsibility.'"48 Thus, most of the court's reasons for rejecting the diminished capacity defense were misplaced because those reasons were directed at a diminished responsibility defense.

The diminished capacity defense is frequently faulted for its tendency to evolve into the diminished responsibility defense. Critics often cite California as an example,49 noting that its diminished capacity defense was transformed into a diminished responsibility defense in People v. Wolff,50 where the court shifted the question from whether the defendant had the requisite intent to why he had it. Instead of finding the defendant guilty of first degree murder, the court redefined premeditation so that it focused on the manner in which the defendant thought about the act, finding the defendant guilty of only second degree murder because he had not premeditated as a normal person would have done.51 In Wolff, then, California began to establish a separate standard of culpability for aberrant but sane defendants.52

The tendency of the diminished capacity defense to expand into the diminished responsibility defense does not counsel rejection of the diminished capacity defense, but rather a careful application of it. Courts can prevent this expansion by admitting only evidence that establishes that the defendant did not entertain the mental state required

defendant's punishment by moving the offense into a separate category for mentally disabled defendants. Because the removal of the defendant's offense into a separate category depends on a determination by the jury that the defendant was less culpable than a normal person who would commit the identical act, the diminished responsibility defense addresses the issue of criminal responsibility. Arenella, supra note 43, at 829, 849-53. The diminished responsibility defense as such has not been adopted in the United States. Id. at 830.

This article uses the term "diminished responsibility defense" to signify the ameliorative approach under which evidence is used to explain the defendant's mental state rather than to negate it.

48. 292 Md. at 420, 439 A.2d at 551 (quoting Fisher v. United States, 328 U.S. 463, 476 (1946)).
50. 61 Cal.2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).
52. The California courts' enthusiasm for the defense may have led to the defense's undoing. The California legislature recently abolished the diminished capacity defense by statute. CAL. PENAL CODE § 28 (West 1981 Cum. Supp.).
for conviction of the crime charged.\textsuperscript{53} Strict monitoring of the diminished capacity defense will keep it faithful to the definitional rationale on which it is founded.

**B. Due Process Requirements**

Because the diminished capacity defense involves nothing more than allowing the defendant to introduce evidence that negates one element of the crime with which he was charged, it may be required by the United States Constitution. In *In re Winship*,\textsuperscript{54} the Supreme Court of the United States held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."\textsuperscript{55} Similarly, in *State v. Grady*,\textsuperscript{56} the Maryland Court of Appeals recognized that "under the Federal Constitution, as well as the law of Maryland, the burden is on the state to prove all elements of the alleged crime and to do so beyond a reasonable doubt."\textsuperscript{57} If the crime with which the defendant is charged is defined as requiring a specific intent or state of mind, then the defendant's state of mind is an element of the crime. Because the prosecution has the burden of proving beyond a reasonable doubt that the defendant had the requisite state of mind, the defendant should be allowed to introduce evidence that refutes his capacity to have formed such an intent at the time of the alleged offense.\textsuperscript{58} Thus, constitutional principles of due process seem to require that the defendant be permitted to introduce evidence, by means of the diminished capacity defense, which negates the state-of-mind element of the state's case against him.

**C. Analogy to the Intoxication Defense**

Adoption of the diminished capacity defense can be supported by analogy to the intoxication defense.\textsuperscript{59} As the Court of Appeals stated in *State v. Gover*,\textsuperscript{60} the intoxication defense holds that "when a defendant, charged with a crime requiring a specific intent, is so drunk that he is unable to formulate that *mens rea*, [h]is intoxication will then excuse

\begin{itemize}
  \item \textsuperscript{53} Arenella, *supra* note 43, at 835.
  \item \textsuperscript{54} 397 U.S. 358 (1970).
  \item \textsuperscript{55} *Id.* at 364.
  \item \textsuperscript{56} 276 Md. 178, 345 A.2d 436 (1975).
  \item \textsuperscript{57} *Id.* at 182, 345 A.2d at 438.
  \item \textsuperscript{58} 292 Md. at 455, 439 A.2d at 569 (Eldridge, J., dissenting); State v. DiPaolo, 34 N.J. 279, 294, 168 A.2d 401, 409, *cert. denied*, 368 U.S. 880 (1961).
  \item \textsuperscript{59} E.g., *Spencer v. State*, 69 Md. at 46-49, 13 A. at 816-18 (Bryan, J., dissenting); *Lewin*, *supra* note 39, at 1092-93, 1104.
  \item \textsuperscript{60} 267 Md. 602, 298 A.2d 378 (1973).
\end{itemize}
his actions and serve as a defense.”

The intoxication defense’s focus on the defendant’s capacity to form the requisite mens rea rests on the same definitional rationale as the diminished capacity defense.

Yet in Johnson, the court in a footnote disposed of intoxication as an analogy for adopting the diminished capacity defense, asserting:

facile comparison of the doctrine of diminished capacity with the rule allowing certain evidence of a defendant’s intoxication on the issue of mens rea does not withstand scrutiny. The degree of intoxication necessary to negate mens rea is great and is comparable with that degree of mental incapacity that will render a defendant legally insane.

This criticism is misplaced: the intoxication defense, unlike the insanity defense, does not address the defendant’s criminal responsibility. Instead, like the diminished capacity defense, the intoxication defense simply negates the mental element of the offense. Therefore, the analogy between the diminished capacity and intoxication defenses does indeed withstand scrutiny, and the existence of the intoxication defense supports the adoption of the diminished capacity defense.

Furthermore, adoption of the diminished capacity defense through analogy to the intoxication defense can be supported on policy grounds. Although intoxication generally is considered a socially unacceptable condition, many conditions that give rise to assertions of diminished capacity, such as subnormal intelligence or delusions, are not caused by the defendant’s own actions. If evidence based on a socially repugnant condition is admitted to negate the mental element of an offense, it similarly should be admitted if based upon a condition.

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61. Id. at 606, 298 A.2d at 381.

While this article was going to print, the General Assembly amended the death penalty statute to remove intoxication as a separately enumerated mitigating circumstance. 1983 Md. Laws, ch. 296. The amendment does not preclude consideration of the defendant’s intoxication, however, which still may be considered under Art. 27, § 413(g)(8) (“any other facts”). Furthermore, ch. 296 concerns only sentencing in capital cases; it has no effect on the general common-law defense of intoxication.

62. 292 Md. at 425 n.10, 439 A.2d at 554 n.10.

63. Gover misstated the rationale for the intoxication defense when it stated that the defendant’s intoxication excuses his actions. Instead, the evidence of intoxication negates the defendant’s capacity to formulate the required mens rea.


65. People v. Wetmore, 22 Cal.3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978) (Defendant entered an apartment under a delusion that he owned it, and lived there until the rightful owner returned, cooking the food in the kitchen and wearing the clothes from the closet. The court held that psychiatric evidence of the defendant’s delusions should have been admitted at trial to show his diminished capacity.).
over which the defendant has no control.66

D. Relevance of Psychiatric Evidence

One distinction between the intoxication defense and the diminished capacity defense is that under the latter, a defendant usually will seek to prove that he lacked criminal capacity by offering psychiatric evidence. Because the issue of whether to adopt the diminished capacity defense ultimately reduces to the question of what evidence is admissible to negate the mens rea element of a specific intent crime, the materiality and probative value of psychiatric evidence becomes a central concern.

The law and psychiatry approach human behavior from two very different perspectives. The law analyzes the defendant's actions in terms of causation; psychiatry examines his behavior in terms of his overall character. By assuming that any given act can be ascribed to a particular intent, the law singles out from the continuity of a human life one act and so forestalls inquiry into the defendant's total personality development which culminated in the particular act.67 In this way, the law concentrates on whether the defendant had the ability to form the requisite specific intent to commit the crime, while psychiatry asks why he committed the crime. Thus, the diminished capacity defense is sometimes criticized for its assumption that psychiatric evidence is relevant to the legal question of criminal capacity.

Those who favor the diminished capacity defense frame the issue in terms of psychiatry's reliability rather than its relevance. Somewhat typical is a comment made in Commonwealth v. Walzack,68 the decision in which Pennsylvania recognized the diminished capacity defense. In Walzack, the court stated that "psychiatry has a legitimate scientific basis. While recognizing that psychiatry might well be less exact than some other medical disciplines we are nevertheless cognizant of the 'tremendous advancements made in the field.'"69 The court then observed that psychiatric evidence is accepted on other criminal law issues, including the defendant's competency to stand trial and insanity.70

Despite the differences between law and psychiatry, the law should not ignore the guidance that psychiatry can offer. The discrepancies

66. Lewin, supra note 39, at 1092.
69. Id. at 218-19, 360 A.2d at 918.
70. Id. at 219-20, 360 A.2d at 918-19.
between the two disciplines can be handled through instructions to the jury on the weight to be given to the expert's testimony; total exclusion of the psychiatrist's testimony is an unnecessarily broad measure.\(^7\) If judges are careful to limit use of technical psychiatric evidence to answering the legal question of whether the defendant possessed criminal capacity, the diminished capacity defense will enhance the jury's ability properly to evaluate the defendant's level of accountability.\(^7\)

IV. CONCLUSION

The Maryland Court of Appeals' rejection of the diminished capacity defense is unfortunate. The diminished capacity defense is simply an offer of proof by the defendant to negate the mental element of a specific intent crime. As Judge Eldridge observed in his dissent: "Evidence designed to show that a particular defendant was incapable of having the requisite mental state is nothing more or less than evidence designed to show that he did not commit the crime with which he was charged."\(^7\) This offer of proof is virtually identical to the intoxication defense, which is well established in Maryland. Moreover, preventing a defendant from negating one element of the state's case against him may offend principles of due process.

Existing procedures would not change greatly if the court were to adopt the diminished capacity defense, provided that the defense were properly applied and not permitted to burgeon into the diminished responsibility defense. Courts often admit evidence of the defendant's mental capacity short of insanity without acknowledging the practice as a form of the diminished capacity defense.\(^7\) For example, some evidence probative of the defendant's diminished capacity actually had been admitted by the trial court in Johnson. The defendant testified that he had used a variety of drugs in the past\(^7\) and that on the night of the murder he had smoked parsley flakes treated with PCP.\(^7\) In addition, a psychologist was allowed to testify as to the defendant's low intelligence level.\(^7\) The willingness of the trial judge to admit this evi-

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71. Lewin, supra note 39, at 1097.
72. In his dissent to Fisher v. United States, 328 U.S. 463, 493 (1946), Justice Murphy observed: "Precluding the consideration of mental deficiency only makes the jury's decision on deliberation and premeditation less intelligent and trustworthy." See also Bethea v. United States, 365 A.2d 64, 81 (Ct. App. D.C. 1976), cert. denied, 433 U.S. 911 (1977); Arenella, supra note 43, at 850 n.115.
73. 292 Md. at 447, 439 A.2d at 565-66 (Eldridge, J., dissenting).
74. See supra text accompanying notes 22-25. See also Arenella, supra note 43, at 833.
75. 292 Md. at 468, 439 A.2d at 576 (Cole, J., dissenting).
76. Id. at 468, 439 A.2d at 576.
77. Id. at 417 n.6, 439 A.2d at 550 n.6.
evidence bolsters Judge Eldridge's contention that such evidence is, and should be, regularly admitted.\textsuperscript{78}

If the diminished capacity defense were recognized, the evidence of the defendant's drug usage and low intelligence level would be admitted if it were linked to the defendant's incapacity to form the requisite mental state. In addition, the psychologist would be permitted to testify as to the defendant's "bizarre thinking and tenuous hold on reality"\textsuperscript{79} — testimony which was excluded by the \textit{Johnson} trial court.\textsuperscript{80} Evidence that merely offered possible explanations for the defendant's actions, such as his relationships with his parents,\textsuperscript{81} would be excluded because admission of this evidence would convert the diminished capacity defense into a diminished responsibility defense. A successful diminished capacity defense in the context of \textit{Johnson} would reduce the degree of the offense of which the defendant is convicted.

\textsuperscript{78} Why the trial judge admitted the evidence of the defendant's low I.Q. is not clear. The defense attorney proffered the evidence "to go to the mitigation of First Degree Murder and any specific crimes." The judge asked, "You're talking about intelligence?" The defense attorney replied, "[i]ntelligence and the rest of it" and the trial judge ruled, "[w]ithin that limits [sic] we will permit it." 292 Md. at 445 n.1, 439 A.2d at 564 n.1 (Eldridge, J., dissenting).

\textsuperscript{79} \textit{Id.} at 417-18 n.6, 439 A.2d at 550 n.6.

\textsuperscript{80} \textit{Id.} at 417-18, 439 A.2d at 549-50.

\textsuperscript{81} \textit{Id.} at 417-18 n.6, 439 A.2d at 550 n.6.
In *Williams v. State*, the Maryland Court of Appeals ruled that a criminal defendant will waive his right to be present at the voir dire of prospective jurors unless he or his attorney objects or asks that the defendant be present. Although other constitutional rights may restrict its application to other stages of the trial, *Williams* explicitly overrules more than sixty years of Maryland case law which held that only the defendant could waive his right to be present, and then only if he did so expressly. The new standard removes Maryland from the majority of jurisdictions that require a defendant to expressly waive his right to be present at voir dire, and needlessly jeopardizes the free exercise of a constitutional right.

2. *Id.* at 219-20, 438 A.2d at 1309-10.
3. *Id.* at 214, 438 A.2d at 1307.
4. The *Williams* court stated that "many other courts" are in accord with Maryland's new waiver rule, but the cases cited do not deal with the *Williams* situation in which an attorney's inaction is viewed as validating the defendant's absence while the voir dire is in progress. For instance, in *Tatum v. United States*, 330 A.2d 552 (D.C. 1974), although the defendant was not present at the bench while his attorney exercised three peremptory challenges, he was present during the entire voir dire of his jury. See *Robinson v. United States*, 448 A.2d 853, 855 (D.C. 1982) (distinguishing *Tatum*). Similarly, *People v. Carrell*, 396 Mich. 408, 240 N.W.2d 722 (1976), and *State v. Nevels*, 192 Neb. 668, 223 N.W.2d 688 (1974) both involve a defendant's absence at an in-chambers hearing on the jury's impartiality, not an absence at voir dire.

The other cases cited by the court also involve stages other than voir dire. The *Williams* court cites State v. Blier, 113 Ariz. 501, 503, 557 P.2d 1058, 1060 (1976) (defendant's right to be present at competency hearing can be waived by counsel); *People v. Harris*, 28 Cal.3d 935, 955, 623 P.2d 240, 250-51, 171 Cal. Rptr. 679, 690 (1981) (defendant's presence not necessary at hearing as to the admissibility of exhibits); and *People v. Hudson*, 46 Ill.2d 177, 194, 263 N.E.2d 473, 482-83 (1970) (right to be present cannot be waived by counsel but defendant's presence not required at hearing to show cause why counsel should not be held in contempt of court). Because of the unique nature of voir dire and the purposes that it serves, cases involving waivers at other stages do not support waivers at voir dire. See infra text accompanying notes 26-31.

Most courts require at least a personal and express waiver of a defendant's right to be present at all stages of the trial. See, e.g., *People v. Harvey*, 95 Ill. App.3d 992, 998, 420 N.E.2d 645, 650 (1981); *Childers v. State*, 408 N.E.2d 1284, 1285 (Ind.App. 1980); *State v. McClure*, 94 N.M. 440, 612 P.2d 232, 234 (1980). Cf. *State v. Hanagan*, 559 P.2d 1059, 1063-65 (Alaska 1977) (Counsel can waive defendant's right to be present in a noncapital case only if defendant: (1) gave counsel express authority in a knowing and intelligent manner; or (2) was present at the time of the waiver, was clearly informed of his rights, and remained silent; or (3) subsequently acquiesced in the proceedings in a knowing and intelligent manner.).

Many courts require that the waiver, in addition to being express and personal, be some combination of knowing, intelligent, and voluntary. See, e.g., *State v. Tugday*, 128
criminal defendant's right to be present at every stage of his trial.

**The Opinion**

Williams claimed that his right to be present was violated when, during voir dire, the trial judge questioned several prospective jurors at bench conferences while Williams remained seated at the trial table. Neither Williams's attorney, who was present at the bench, nor Williams himself, who was unaware of his right to be present, objected or asked that he be present. Williams was convicted and received consecutive thirty- and ten-year sentences for second degree murder and assault with intent to commit murder.

After the post-conviction court and the Court of Special Appeals reviewed Williams's case, the Court of Appeals granted him a new trial, finding that under Maryland's "personal and express" waiver standard Williams's absence from the voir dire bench conferences violated his right to be present. The Williams opinion went on to an-

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Some courts maintain that the right cannot be waived at all in capital trials, but attach less strict standards as the seriousness of the criminal charge decreases. See, e.g., State v. Montgomery, 33 N.C.App. 693, 696, 236 S.E.2d 390, 391 (1977) (right cannot be waived in capital cases, can be waived only by defendant in other felony cases, and can be waived by counsel in misdemeanor cases).

5. 292 Md. at 215, 438 A.2d at 1307-08.


7. 292 Md. at 220, 438 A.2d at 1310. In granting Williams's petition for certiorari the court rejected the state's argument that §12-202 of the Courts and Judicial Proceedings Article prevented the Court of Appeals from reviewing any case arising under the Post Conviction Procedure Act. MD. ANN. CODE CTS. & JUD. PROC. § 12-202 (1980). Section 12-202 states in pertinent part: "A review by way of certiorari may not be granted by the Court of Appeals in a case or proceeding in which the Court of Special Appeals has denied or granted: (1) Leave to prosecute an appeal in a post conviction proceeding . . . ." The court held that this limitation only denied it jurisdiction to review the specific exercise of discretion by the Court of Special Appeals in denying or granting leave to appeal and did
nounce prospectively, however, that in subsequent cases the "inaction" of counsel and defendant will be sufficient to waive the defendant's right to be present at voir dire. In reaching this conclusion the Williams court, following prior Maryland law, did not regard the right to be present as constitutionally protected except, perhaps, to the extent that due process requires the defendant's presence at all stages of the trial where his absence might frustrate the fairness of the proceedings.

Although a minority position, the court's view of the nature of
the right and its waiver-by-inaction rule have support in constitutional law. The Supreme Court opinions dealing with the right to be present are susceptible of Maryland's interpretation. Moreover, even if the Court were specifically to hold that the Constitution fully protects the right, waiver standards for constitutional rights vary, depending in part upon the nature of the right. The Supreme Court has not regarded the right to be present at every stage of the trial as one of those rights that require a "knowing and intelligent" waiver. Consequently, the Williams court's waiver-by-inaction rule probably would withstand a

including the empanelling of his jury). See also 3A C. Wright, Federal Practice and Procedure: Criminal § 721, at 5 (2d ed. 1982).

11. See cases cited in United States v. Alessandrello, 637 F.2d 131, 137 n.8 (3rd Cir. 1980), cert. denied 451 U.S. 949 (1981) (Because no witnesses are involved in jury empanelling, the sixth amendment confrontation clause is inapplicable.).

12. "Fundamental" constitutional rights, such as the right to counsel, require a "knowing and intelligent" or "knowing and voluntary" standard for waiver. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Waiver of "lesser" constitutional rights, however, such as those granted by the fourth amendment, need not meet the "knowing and intelligent" test, as they are not an "adjunct to the ascertainment of truth." Schneckloth v. Bustamonte, 412 U.S. 218, 241-42 (1973) (quoting Tehan v. United States ex. rel. Shott, 382 U.S. 406, 416 (1966)). These rights may be constitutionally protected only in the sense that, if the waiver standard is so arbitrary as to deny the defendant a fair opportunity to raise his claim, application of that standard may itself violate due process. See Reece v. Georgia, 350 U.S. 85, 88-90 (1955). To ascertain whether a defendant's "inaction" can waive his rights, then, one must determine first whether the right is a constitutional right and, if so, whether it is one of those few constitutional rights that require a "knowing and intelligent" waiver. If the right does not require at least a "knowing and intelligent" waiver standard, the states may fashion any waiver standard they choose, so long as the rule satisfies due process requirements. See infra notes 36-37 and accompanying text.

The Williams court stated that where the "knowing and intelligent" waiver standard is inapplicable, case law or any pertinent statutes or rules govern the waiver standard. 292 Md. at 216, 438 A.2d at 1308. One possibly pertinent statute is section 645A(c) of the Post Conviction Procedure Act, which defines "waiver" as that which occurs when a petitioner could have made, but intelligently and knowingly failed to make, an allegation of error. MD. ANN. CODE art. 27 § 645A (c) (1982). The Williams court reasoned, however, that subsection (c), with its "intelligent and knowing" standard, is applicable only where the waiver concept of Johnson v. Zerbst, 304 U.S. 458, 464 (1938), governs (i.e., where the right involved is "fundamental"). A rule that might determine the applicable waiver standard is MD. R.P. 724. It reads in pertinent part: "The defendant shall be present at every stage of the trial, including the impaneling of the jury . . . ." Subsection (c) sets forth two instances in which the defendant may waive his right to be present at all stages of his trial. First, when he voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his right to remain during trial, or second, when he engages in conduct to justify his being excluded from the courtroom. MD. R.P. 724(c). The Williams court, however, did not view the rule as limiting the situations in which the right to be present can be waived. The court simply found that the two instances set forth in Rule 724 (c) are not the only ones under which the right to be present can be waived. 292 Md. at 212, 438 A.2d at 1306.

13. The rights that require a "knowing and intelligent" waiver standard are the right to counsel, right to trial by jury, rights lost through a guilty plea, right to fifth amendment self-incrimination privilege, rights under the double jeopardy clause, right to appeal, and the
Although the prospective Williams rule arguably satisfies minimum constitutional requirements, the court’s justification for greatly diluting a defendant’s common-law protections does not withstand analysis. By abandoning Maryland’s “personal and express” standard in favor of a “waiver-by-inaction” rule, the court has moved as far as possible from the “knowing and intelligent” standard applied in many jurisdictions. Although the court intends to use the new standard to identify “waivers,” the rule will operate as a rule of procedural default, which is most precisely defined as “the loss of a right through a failure by the accused or his representative to assert a claim in a prescribed manner or at a required time.” Procedural defaults traditionally are applied to relatively less important rights and justified on grounds unrelated to the right, such as the efficiency of the judicial system. In determining the validity of a procedural default, courts balance the importance of the constitutional adequacy of trial counsel’s representation. See Curtis v. State, 284 Md. 132, 143-44, 150-51, 395 A.2d 464, 471, 474-75 (1977).

14. Several Supreme Court opinions suggest that the Court will not interfere, on due process grounds, with a state’s application of its waiver standard for the right to be present unless the defendant can show that his absence may have frustrated the fairness of his trial. The Court found, in Faretta v. California, 422 U.S. 806 (1974), by analogizing to other trial rights that the Constitution implicitly protects, that the sixth amendment implies a right to self representation without the aid of counsel. The Court then noted that where the accused’s absence might frustrate the fairness of the proceedings, the constitutional stature of his right to be present at all stages of his trial is now recognized. That right, though not literally expressed in the Constitution, is “essential to due process of law in a fair adversary process.” Id. at 819 n.15. The Court applied the same concept to waivers in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Schneckloth suggests a test for determining when a waiver must be an intelligent relinquishment of a known right. Only where the particular right is an adjunct to the ascertainment of truth, the Supreme Court implied, should every reasonable presumption be indulged against voluntary relinquishment. 412 U.S. at 242-43. The Court, in finding that the “knowing and intelligent” waiver standard is inapplicable to waivers of fourth amendment rights, reasoned that “the Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial.” Id. at 242. The fourth amendment, however, “is not an adjunct to the ascertainment of truth.” Id. Therefore the Court reasoned, the Constitution does not require waivers of fourth amendment rights to be knowing and intelligent. Id. at 246. Most defendants, like Williams, will be unable to show that their absence frustrated the Court’s search for truth: Williams did not allege that he would have done anything differently were he at the bench during voir dire, nor did he contend that his jury was not impartial. Brief for Appellee at 16, Williams v. State, 292 Md. 201, 438 A.2d 1301 (1981). It therefore follows that a defendant’s waiver of his right to be present at that stage need not be “knowing and intelligent” to pass the Schneckloth test.


16. See id. at 513-14.
right against the extrinsic interest served.\textsuperscript{17} Although the \textit{Williams} court appears to have engaged in just such a balancing process, its reasons for giving so much weight to the extrinsic considerations are problematic and its diminution of the right's importance is also questionable.

The \textit{Williams} court reasoned that changed conditions — the advent of the absolute right to counsel and the increased complexity of criminal trials — require the less rigorous waiver standard.\textsuperscript{18} When the court first adopted the "personal and express" standard, indigents had no right to state-compensated counsel; now, of course, this right is well established.\textsuperscript{19} According to the court, this development undercuts the original policy reasons for the "personal and express" standard and makes its imposition on the courts institutionally impractical. Because all defendants can be represented by counsel if there is a danger of incarceration, and because criminal trials have become too complex for most defendants to understand, our system must proceed upon the assumption that it is primarily counsel's function to assert or waive most rights of the defendant. Unless a defendant speaks out, normally he must be bound by his attorney's trial decisions, actions, or inactions; otherwise, according to the court, "the system simply would not work."\textsuperscript{20}

Although the court does not explain why the system would grind to a halt under the burden of the "personal and express" standard, its reasoning can be deduced from dicta in an earlier decision and from the state's brief to the Court of Appeals. In \textit{Curtis v. State}\textsuperscript{21} the court said that if a "knowing and intelligent" waiver standard were applied to those rights that could be lost through procedural default, the results would be chaotic: Defense attorneys would have to interrupt a trial repeatedly and go through countless litanies with their clients.\textsuperscript{22} Similarly, the state in its brief argued that, given the sheer number of proce-
dural rights afforded criminal defendants and the adversary nature of the system, it is not the function of the trial courts to advise defendants on each occasion that a procedural right may be exercised. In addition, the court may have considered the familiar argument that when defendants must object at trial to assert a right or to preserve a point for appeal, trial courts are accorded a greater opportunity to correct their own errors, thus reducing the burden on the appellate courts and furthering the state's interest in the finality of judgment. Unless the accused makes an issue of his right to be present, in other words, the courts at both the trial and appellate levels have enough to do without worrying about enforcement of this right.

The court's conclusion is sound if one accepts its central premises: (1) that the advent of the absolute right to counsel has largely vitiated the importance of the right to be present at voir dire so that the latter right is no longer any more important than other rights that can be lost through procedural default; (2) that the continued application of the "personal and express" waiver standard would put an intolerable burden on the judicial system; and (3) that a less strict waiver standard will not affect the scope of the right waived.

It is unclear, however, why the advent of the right to state-compensated counsel has rendered the defendant's right to be present at voir dire significantly less important than it was previously. Certainly counsel now plays a key role at voir dire, assuming much of the responsibility for juror selection that the indigent defendant alone once exercised. But, when viewed in light of the purposes served by both voir dire and the defendant's presence at voir dire, the court's conclusion that counsel alone can serve these purposes and protect the defendant's interests is doubtful.

Blackstone, defending the concept of peremptory challenges and thus of voir dire, identified one interest when he said that a defendant "should have a good opinion of his jury, the want of which might totally disconcert him." Accordingly, the law seeks to ensure that a

25. 292 Md. at 217-20, 438 A.2d at 1309-10.
26. The Maryland court may not recognize a distinction between these purposes. See infra text accompanying notes 27-31 (describing the purposes). In another case the court stated that the purpose of the right to be present during juror selection relates solely to jury impartiality and the disqualification of prospective jurors. Porter v. State, 289 Md. 349, 355, 424 A.2d 371, 376 (1981) (defendant's presence not required during court's communications with jurors or prospective jurors if unrelated to juror impartiality or disqualification).
27. 4 W. Blackstone, Commentaries *353-54.
defendant will not have his fate determined by any juror against whom the defendant has conceived a prejudice, even if the defendant cannot explain why he dislikes the particular juror.\textsuperscript{28} Even the best defense attorney cannot adequately protect his client's interest in having a good opinion of the jury unless the client is present to advise counsel of his personal prejudices and to participate in the selection of the persons who will determine his guilt or innocence.

The Supreme Court identified a second interest in \textit{Hopt v. Utah},\textsuperscript{29} in which it rejected the suggestion that the presence of counsel had reduced the importance of a defendant's right to be present at voir dire. Justice Harlan focused on the impartial jury requirement, writing that a defendant's life or liberty may depend upon the aid that his personal presence may give to counsel and to the court in the selection of jurors. The presence of counsel alone may not always meet the necessities of his defense, Harlan emphasized.\textsuperscript{30} Although the instances where the defendant alone will have knowledge relevant to the selection of an impartial jury may be few, the \textit{Williams} court has not suggested why this potential aid is less important now than it was when Mr. Hopt selected his jurors.

The extent to which the defendant's right to be present contributes to the appearance of judicial fairness — a quality reasonably viewed as being nearly as important as the court's paramount goal of actual fairness\textsuperscript{31} — underlies both interests and is probably the most important purpose served by the defendant's presence at voir dire. All but the most apathetic of defendants must be presumed to have an intense interest in the process of selecting the jurors who will determine their fate. Failing to ensure that a defendant knows of his right to be present during each stage of this process may well diminish the moral authority that the defendant and the public are willing to accord the jury.

Moreover, in an era of budget cuts and burgeoning case loads assigned to public defenders,\textsuperscript{32} the familiar complaints concerning the quality of representation accorded indigent defendants\textsuperscript{33} have taken on a renewed sense of urgency. This, therefore, would seem to be a particularly inopportune time to cite the right to counsel as a major reason

\begin{footnotes}
\footnotetext{28. Id.}
\footnotetext{29. 110 U.S. 574 (1884).}
\footnotetext{30. Id. at 578.}
\footnotetext{33. See, e.g., Bazelon, The Defective Assistance of Counsel, 42 U. Cinn. L. Rev. 1 (1973).}
\end{footnotes}
for relaxing the waiver standard for the right to be present. The failure of Williams’s counsel to inform his client that he had the right to attend the voir dire bench conferences, for example, was inadvertent, and not part of any “tactical decision.” Yet the new rule will operate to punish the defendant, not counsel, for such a failure to inform.

It is not clear why an affirmation of Maryland’s traditional waiver standard would have had the disastrous effect on the orderly procedure of trials that the court seems to envision. Although it might be burdensome to have to extract a “knowing and intelligent” waiver, surely it is a relatively simple matter merely to inform a defendant of his right to be present at voir dire. One such warning should suffice; there is no reason why a trial would be significantly interrupted.

But perhaps the most curious aspect of the court’s reasoning is its emphatic assertion that the change in the waiver standard will not in any way affect the scope of the right to presence. If by this assertion the court means that the right will continue to exist in the abstract even for defendants who are prevented by their own ignorance from exercising it, the reassurance seems hollow indeed, for the court clearly feels that the judiciary has no obligation to inform defendants of the right. If, on the other hand, the court is suggesting that the right as a practical matter remains available to all criminal defendants, it simply is wrong. For although the court views its decision as merely modifying the waiver standard for the right, it actually is denying the right to all but those defendants who either have learned of the right through their own efforts (giving recidivists an advantage over first-time offenders) or who are represented by counsel who will inform them of the right. A convicted defendant surely will be excused if he fails to appreciate the distinction between not having had a right to be present at all, and of having “waived” that right, without his knowledge or consent, before he even knew that he had it.

THE SCOPE OF WILLIAMS

The scope of the Williams rule is uncertain. Although the court attempted to limit its reach, the opinion’s diminution of a defendant’s right to be present at stages of the trial beyond voir dire is substantial if the court’s holding is read in light of its reasoning. The court mentions that, in addition to stages of the trial at which the defendant’s right to

34. At the hearing held upon Williams’s petition for post-conviction relief, the attorney who had represented him at trial testified that, although it was his policy to have defendants present, he could not recall whether Williams was present at the voir dire bench conferences. Brief for Appellant at 9, Williams v. State, 292 Md. 201, 438 A.2d 1301 (1981).
35. 292 Md. at 219, 438 A.2d at 1310.
confront witnesses is involved, the Williams waiver standard may not apply when the absence of the defendant implicates "other constitutional rights." But this additional limitation may be ineffective. Besides the right to confront witnesses, the only explicit constitutional right that requires the defendant's presence for its satisfaction is the right to due process of law. Yet under the court's decision, any due process rights of the defendant at voir dire would be adequately protected because his attorney could effectively represent the defendant's interests without the defendant's presence. If an attorney by himself can adequately represent the defendant's interests at voir dire, which traditionally has been viewed as one of the primary stages at which the defendant must be present to represent his interests, due process would not seem to limit the extension of Williams to other stages where counsel's help is viewed as more important and the defendant's participation less necessary. For example, the Court of Appeals has recognized that a defendant has the constitutional right to be present during any exchange between the judge and jury as to facts, law, or form of verdict. Yet the Williams opinion specifically notes that these stages are now subject to the new waiver rule.

Other limitations, however, can be read into the Williams standard. First, other stages of the trial where the defendant's absence would prevent him from exercising fundamental trial rights might also be stages where the defendant's inaction would be insufficient to waive his right to be present, even if his attorney failed to object. The Supreme Court, for example, has stated that the right to be heard in one's own defense, although not explicitly conferred by the Constitution, is so obviously fundamental as to be constitutionally protected. Even though the Supreme Court has never said that a "knowing and intelligent" waiver standard attaches to the right to be heard, a defendant's inaction probably would be insufficient to waive his right to be present at the only stages where he might exercise that fundamental trial right.

A second limitation may be the constitutional guarantee of effective assistance of counsel. Although the Court of Special Appeals has ruled that it will not find an attorney incompetent just because he over-

36. Id.
37. Id. at 218, 438 A.2d at 1309.
39. 292 Md. at 220, 438 A.2d at 1310.
41. The Supreme Court first construed the sixth amendment to guarantee effective assistance of counsel in Powell v. Alabama, 287 U.S. 45, 66-68 (1932).
looked, in the heat of trial, the right of his client to be present at a short bench conference,42 the Williams court implicitly presupposed competent counsel when it granted attorneys more power to waive their clients' rights by inaction.43 Maryland appellate courts look to all of the circumstances in a particular case to determine whether an attorney genuinely and adequately represented his client.44 Consequently, counsel's inattentive waiver of his client's right to be present, if combined with other trial blunders, could help fuel an inadequate-representation claim. Moreover, due process may require a higher degree of competence when the attorney is given more power to bind his client by waiving important rights.

Finally, two other possible limitations exist on both the extension of Williams to other stages of the trial and to factual situations at voir dire beyond those in Williams. First, although a waiver-by-inaction of a defendant's right to be present at a given stage might be constitutional most of the time, it sometimes might result in the impermissible loss of another constitutional right. For instance, if Williams had contested the impartiality of his jury, and if he alone could have discovered the potential bias by being present at the bench conference where the juror's qualifications were being discussed, Williams would have been entitled to a new trial. Although the right to an impartial jury, not the right to be present, would have been violated, Williams's absence would have served as the springboard for the impartial jury claim. Consequently, any time a constitutional right is at issue and the defendant's presence is necessary to ensure the satisfaction of the right under the circumstances, a defendant's presence may be constitutionally mandated.

Second, the right to be present itself may limit the expansion of the Williams waiver standard to other stages of the trial or other fact situations. During the bench conferences, Williams was seated only a few feet away and at least had the opportunity to observe what was happening.45 A far different case may have presented itself if Williams had been improperly excluded from the court room during voir dire, or an-

43. See, e.g., Conley v. Warden, 190 Md. 750, 752, 59 A.2d 684, 684 (1947) (per curiam) (citing United States ex. rel. Jackson v. Brody, 47 F.Supp. 362, 367 (1942), aff'd 133 F.2d 476 (4th Cir.), cert. denied 319 U.S. 746 (1943)), for the rule that "where in a State criminal trial the defendant is represented by competent and experienced counsel, even constitutional rights known or presumed to be known to counsel to exist must be held to have been waived if not made at all or . . . inadequately presented."
45. Williams was seated at the trial table in the courtroom. 292 Md. at 204, 438 A.2d at 1302.
other stage. In that case, despite the Williams court's reasoning that counsel properly represents the defendant's interests, traditional notions of due process could be so offended as to require a reversal. The same can be said for other stages of the trial; depending upon the defendant's proximity and length of absence, an attorney may not be able to waive the defendant's right to be present by action or inaction.

The Williams opinion contemplates that a defendant will be given at least some minimal opportunity to object or to ask to be present. The court stated that if the defendant himself does not affirmatively ask to be present at such occurrences or does not express an objection at the time, and if his attorney consents to his absence or says nothing regarding the matter, the right to be present will be deemed to have been waived. Consequently, the waiver of a defendant's right to be present may itself be a stage of the trial where the defendant who has not voluntarily absented himself or engaged in obstreperous conduct must be present in the courtroom. Perhaps only the defendant's presence can protect his and society's interest in the apparent fairness of the proceedings when his rights are being waived.

CONCLUSION

The Maryland court's apparent eagerness to abandon an easily enforced waiver standard which served to protect an important right is troubling, for the new standard is not as conducive to providing equal protection to all criminal defendants. Surely it will be the exceedingly rare defendant who, if he is not informed of his right to be present, will nonetheless possess both the legal sophistication and the temerity to object contemporaneously to a stage of the voir dire being conducted out of his hearing. Those defendants fortunate enough to be represented by an attorney who will inform them of their right to be present have nothing to fear from Williams. But others, unless they can show that their absence reflected ineffective assistance of counsel or caused the violation of some other important right, are likely to find the new waiver standard an effective bar to their acknowledged right to be present at every stage of their trials.

47. Cf. Reece v. Georgia, 350 U.S. 85, 89-90 (1955) (right to object to composition of grand jury presupposes an opportunity to exercise that right).
48. 292 Md. at 220, 438 A.2d at 1310.
49. See Md. R.P. 724(c).
WENTZEL V. MONTGOMERY GENERAL HOSPITAL — MARYLAND'S EQUITABLE JURISDICTION OVER STERILIZATION PETITIONS: A CONSTITUTIONAL ANALYSIS

In Wentzel v. Montgomery General Hospital, the Court of Appeals of Maryland held that a circuit court has inherent equitable jurisdiction to hear a guardian's petition requesting authority to consent to the sterilization of an incompetent minor. Joining a growing minority of state courts, the Maryland court based its finding of subject matter jurisdiction on the parens patriae doctrine. To guide circuit courts in the exercise of jurisdiction, the Court of Appeals established minimal substantive and procedural standards controlling the issuance of sterilization authorizations. Finally, refusing to remand the case for reconsideration in accordance with those new standards, the court upheld the

1. 293 Md. 685, 447 A.2d 1244 (1982).
2. Id. at 701–02, 447 A.2d at 1252–53.

The vast majority of courts have refused to consider sterilization petitions. See Case Comment, Inherent Parens Patriae Authority Empowers Court of General Jurisdiction to Order Sterilization of Incompetents, 60 WASH. U. L. Q. 1177, 1181 n.21 (1982) for a list of those courts denying jurisdiction. See also Case Comment, Equitable Jurisdiction to Order Sterilizations, 57 WASH. L. REV. 373 (1982) suggesting that the development of the majority position was the result of judicial fear of civil liability for ordering sterilization. When the Supreme Court held that a judicial sterilization order could not result in civil liability unless the order was made in "clear absence of jurisdiction," it allowed state courts to consider freely the jurisdictional issue. Id. at 381.


5. 293 Md. at 702–03, 447 A.2d at 1253–54. See infra note 39 and accompanying text.
circuit court's denial of the guardians' sterilization petition.  

Although the Court of Appeals did not address the constitutional issues involved in the Wentzel decision, this Note, after summarizing the court's opinion, concludes that the court was constitutionally compelled to accept jurisdiction over sterilization petitions. Moreover, constitutional analysis of the Wentzel standards suggests that they do not adequately protect an incompetent's privacy rights. Thus, the court should reconsider the Wentzel decision in light of its constitutional implications and should adopt a standard that fully protects an incompetent's constitutional rights.

Sonya Star Flanary was born a normal child. But at five months of age she was severely injured in an automobile accident resulting in blindness, pronounced neurological problems, and severe permanent retardation. Those disabilities limited Sonya’s intellectual development to that of a one- to two-year-old. After caring for Sonya for thirteen years, Sonya’s aunt and grandmother petitioned the Circuit Court of Montgomery County requesting that they be appointed Sonya’s co-guardians. They also requested that the court authorize them, as guardians, to consent to a subtotal hysterectomy which would terminate Sonya’s menstrual cycle and result in her sterilization.

The circuit court, after appointing a guardian ad litem, held a hearing on the petition. A child psychiatrist testified that a subtotal hysterectomy would be in Sonya’s best interests, but he would not conclude that a hysterectomy was necessary for Sonya’s physical or mental health. Although the circuit court appointed the petitioners co-guardians, it refused to grant them authority to consent to the hysterectomy which would terminate Sonya’s menstrual cycle and result in her sterilization.

[6. 293 Md. at 704–05, 447 A.2d at 1254.  
7. Courts generally avoid the constitutional issue if the record presents another basis on which to decide the case. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 83–85 (1978).  
8. 293 Md. at 687, 447 A.2d at 1245–46.  
9. Id. at 687–88, 447 A.2d at 1246.  
10. See Md. R. P. R76 permitting a circuit court to appoint an attorney (the guardian ad litem) in a guardianship hearing to investigate the facts and report to the court.  
11. The evidence disclosed that Sonya had recently reached puberty and that her menstruation was painful. She was irritable and disoriented during her menstrual period and could not care for her basic hygienic needs. The evidence also showed that, although Sonya was capable of bearing a normal child, she was incapable of understanding sexual reproduction or caring for a child. 293 Md. at 688, 447 A.2d at 1246.  
12. Id. See also 293 Md. at 707 n.1, 708–12, 447 A.2d at 1256 n.1, 1256–58 (Smith, J., concurring and dissenting, quoting testimony of Dr. Rogers Burlton).  
13. 293 Md. at 690, 447 A.2d at 1247. See also Brief for Appellant at E–8, Wentzel v. Montgomery Gen. Hosp., 293 Md. 685, 447 A.2d 1244 (reproducing Opinion and Order, Circuit Court for Montgomery County, Bell, J.).]
the Court of Appeals granted certiorari before decision by the interme-
diate court.14

I. THE WENTZEL OPINION

The Wentzel opinion answers two important questions: (1) Upon
what jurisdictional basis may a Maryland court rest its authority to
consider sterilization petitions? (2) What standards should a Maryland
court use to determine whether to grant the guardian of an incompetent
minor the authority to consent to the minor's sterilization?

A. Jurisdictional Authority

Courts in at least eighteen states have explicit statutory grants of
authority to order the sterilization of the mentally incompetent.15
Maryland, however, does not have a sterilization statute. Because an
incompetent may be unable to give effective legal consent,16 physicians
generally refuse to perform sterilizations without a court order.17 If a
court lacks subject matter jurisdiction to hear a sterilization petition,

14. 293 Md. at 690, 447 A.2d at 1247.
(1980).
16. The doctrine of informed consent requires that legal consent be made voluntarily,
with the information necessary to decide and with sufficient mental capacity to understand
the decision. The courts generally hold that mental incompetency prevents an individual
from giving informed consent to sterilization procedures. See, e.g., Relf v. Weinberger, 372
F. Supp. 1196, 1202 (D.D.C. 1974) (nearly universal common-law rule that mental incompet-
ents cannot consent to medical operations), final disposition 403 F. Supp. 1235 (D.D.C.
1975), vacated as moot per curiam, 565 F.2d 722 (D.C. Cir. 1977). Commentators have at-
tacked this rule. Because capacity to consent depends on the individual's capabilities, the
rule is arguably too broad. See Neuwirth, Heisler & Goldrich, Capacity, Competence, Con-
447, 447-52 (1975) [hereinafter cited as Neuwirth]; Murdock, Sterilization of the Retarded: A
sterilize because of fear of future civil liability); In re Penny N., 120 N.H. 269, 270, 414 A.2d
541, 542 (1980) (doctor refused to operate without court approval); Note, Addressing the
Consent Issue Involved in the Sterilization of Mentally Incompetent Females, 43 Alb. L. Rev.
322, 322-23 (1979).
any court order authorizing sterilization could be considered invalid by a higher court and might not protect the physician performing the sterilization from future liability.18

The court identified two bases from which to derive subject matter jurisdiction: statutory jurisdiction and inherent equity jurisdiction.19 Because the Court of Appeals found that no Maryland statute authorized circuit courts to consider sterilization petitions,20 only the circuit court's inherent equitable jurisdiction could form the basis for jurisdiction.21 To sanction the inherent equitable jurisdiction of the circuit courts, the court had to make two findings. First, because circuit courts, as the highest courts of general jurisdiction, can exercise full common-law equity jurisdiction only if that jurisdiction is not limited by statute,22 the court had to determine that no statute restricted circuit courts from hearing sterilization petitions. Finding no limiting statute,23 the court then looked for a source of jurisdictional authority. Because the source of inherent equitable jurisdiction emanates from

18. See Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977) rev'd on other grounds sub nom. Stump v. Sparkman, 435 U.S. 349 (1978). The Supreme Court held that a judge ordering sterilization cannot be held liable unless he acts in the clear absence of all jurisdiction. 435 U.S. at 357. This holding should not affect the viability of any state claims for assault or battery.

19. 293 Md. at 692, 447 A.2d at 1248.

20. Id. at 699, 447 A.2d at 1252. Md. Est. & Trusts Code Ann. §§ 13-704 to -710 (Supp. 1982) govern the guardianship of disabled persons, and the petitioners argued that § 13-708(a) authorized the court to grant their petition. That statute allows "[t]he court [to] grant to a guardian of a person only those powers necessary to provide for the demonstrated need of the disabled person." Md. Est. & Trusts Code Ann. § 13-708(a) (Supp. 1982). The Court of Appeals reasoned that, because the Md. Est. & Trusts Code Ann. § 13-101(d) defines a "disabled person" as a person other than a minor, § 13-708(a) did not give circuit courts jurisdiction over a petition requesting the authority to sterilize a minor. In addition, the court found that, although the Maryland Estates & Trusts Code gives circuit courts the power to appoint guardians for minors, the Code does not explicitly define the powers a court may grant to a minor's guardians. See Md. Est. & Trusts Code Ann. §§ 13-701 to -703 (1974). Absent such definition, the court concluded that no Maryland statute granted jurisdiction to circuit courts to hear petitions to sterilize minors. 293 Md. at 699-701, 447 A.2d at 1252.

21. 293 Md. at 701, 447 A.2d at 1252.

22. Md. Cts. & Jud. Proc. Code Ann. § 1-501 (1980) states that circuit courts: are the highest common-law and equity courts of record exercising original jurisdiction within the State . . . [with] full common-law and equity powers and jurisdiction in all civil and criminal cases within [their] counties, and all the additional powers and jurisdiction conferred by the Constitution and by law, except where by law jurisdiction has been limited or conferred exclusively upon another tribunal.

23. The Court of Appeals reasoned that by enacting Md. Est. & Trusts Code Ann. § 13-702 without explicitly defining a guardian's powers and duties, "the legislature intended that circuit courts would exercise their inherent equitable jurisdiction over guardianship matters pertaining to minors." 293 Md. at 701, 447 A.2d at 1252. Therefore, § 13-702, allowing circuit courts to appoint a guardian on petition by any person interested in a minor's welfare, does not limit a circuit court's jurisdiction.
certain equitable doctrines, the court looked to the origins of equity to
ascertain the appropriate doctrine upon which to base jurisdiction.24

Two equitable doctrines — "substituted judgment"25 and parens patriae26 — have been relied on by other state courts to confer equita-
ble jurisdiction over sterilization petitions.27 Without discussing the
substituted judgment doctrine,28 the Court of Appeals relied on the cir-

24. "It is not so easy to ascertain the origin of equitable . . . jurisdiction of the Court of
Chancery," 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN
ENGLAND AND AMERICA 41 (1836 & photo. reprint 1972), but there are certain principles
which both limit and define the boundaries of inherent equitable jurisdiction. Id. at 21-25,
70-71. Story asserts that inherent equity jurisdiction is governed by "such civil maxims, [sic]
as are adopted by any particular state or community." Id. at 4. Although disputed, an
equity court's jurisdiction over minors and incompetents seems to have evolved from the
King's duty to protect his subjects. 2 Id. at 557-58, 591-92. That duty is embodied in the
parens patriae doctrine and the doctrine of substituted judgment, see supra note 4 & infra
note 25.

25. The doctrine of substituted judgment allows a court, or other appropriate entity, to
do whatever the incompetent would have done if she were capable of making a reasoned
decision. See, e.g., In re Moe, 432 N.E.2d at 720; In re Boyd, 403 A.2d 744, 750-52 (D.C.
1979). See also Robertson, Organ Donations by Incompetents and the Substituted Judgment
Doctrine, 76 COLUM. L. REV. 48, 57-68 (1976). The court may allow the parents to make
the final decision as to whether a particular surgical procedure is to be performed, or the
court itself may decide. Compare In re Grady, 85 N.J. 235, 264, 426 A.2d 467, 482 (1981)
(court's judgment, not parents' good faith judgment is controlling) with In re Quinlan, 70
922 (1976) (parents may decide whether to terminate life support; court will endorse their
decision). The Grady court distinguished Quinlan on the grounds that the alternatives were
more clearcut in the Quinlan case and the medical procedure in question was not subject to
extensive abuse. In re Grady, 85 N.J. at 251-52, 426 A.2d at 475. Because the parents'
interest in sterilization may conflict with the child's interest, allowing the court to substitute
its judgment is the better alternative. See Neuwirth, supra note 16, at 455; infra text accompa-
nying notes 103-07.

To exercise substituted judgment, the court generally gathers evidence of previous
expressions by the incompetent concerning her choice if she were to become incompetent.
In the absence of such evidence, the court will base its decision on what a reasonable person
in the incompetent's position would do. Robertson, supra, at 61.

26. See supra note 4. The parens patriae doctrine, unlike the substituted judgment doc-
trine, restricts the court to a decision based on the "best interests" of the incompetent. Id.
Best interests are usually determined by weighing objective factors such as age, health, and
mental capacity. See, e.g., the Wentzel standards, infra note 39. See also In re Terwilliger,
450 A.2d 1376, 1383-84 (Pa. Super. 1982); In re Guardianship of Hayes, 93 Wash. 2d.

27. See, e.g., In re Moe, 432 N.E.2d 712, 710 (Mass. App. 1982) (relying on substituted
judgment doctrine); In re Grady, 85 N.J. 235, 261-62, 426 A.2d 467, 479 (1981) (relying on
parens patriae doctrine).

28. But see 293 Md. at 714-18, 447 A.2d at 1259-61 (Smith, J., concurring and dissent-
ing). Judge Smith urged that the court not only accept jurisdiction, but grant the guardians
the authority to consent to sterilization. He argued that because Sonya would have chosen
to be sterilized if she "were in a position to make a sound judgment," the court, as a court of
conscience, should authorize sterilization. Id. at 717, 447 A.2d at 1260. Thus, Judge Smith
advocated the use of the doctrine of substituted judgment.
In Maryland, an individual's mental incompetence does not automatically vest a court with parens patriae jurisdiction over the individual. The legislature must delegate to the courts the power to conduct incompetency proceedings and to regulate the custody and control of incompetent adults. But, even in the absence of statutory authority, equity courts have inherent jurisdiction to appoint guardians for minors and to supervise those guardians' activities. The parens patriae power of a Maryland equity court over minors is plenary, and allows the court, in the absence of statutory authority, to act in the minor's best interests. Thus, the *Wentzel* court's jurisdictional finding was based on a Maryland circuit court's authority over individuals who are incompetent by virtue of their age, not the court's authority over persons who are incompetent by virtue of their mental abilities.

*Wentzel* does not directly address whether circuit courts have sub-

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29. 293 Md. at 701-02, 447 A.2d at 1252-53.
30. "[L]unacy, or incompetence alone does not originate equitable jurisdiction over the person or estate of a lunatic, except to a limited degree; consequently, if the equity courts of this State possess such jurisdiction, its source is other than the general jurisdiction of those courts." *In re* Easton, 214 Md. 176, 180, 133 A.2d 441, 443-44 (1956).
31. *Id.* at 183, 133 A.2d at 444-45. "It is well settled that equity has no inherent power to deal with insane persons or their property." Schneider v. Davis, 194 Md. 316, 321, 71 A.2d 32, 33 (1950). Maryland equity jurisdiction is derived from the jurisdiction of the English Chancery Court. Chancery jurisdiction over incompetents did not arise until a person had been declared incompetent by a jury. Once declared incompetent, the Chancery Court had jurisdiction to supervise the guardian committee. Because authority to declare a person incompetent was personal to the King, the King had to delegate this power. The power to declare individuals incompetent was not delegated to the Court but to the Chancellor, as the personal representative of the King. Accordingly, it was exercised by the Chancellor, not the Court. See Hamilton v. Traber, 78 Md. 26, 29-32, 27 A 229, 230-31 (1893); 4 J. Pomeroy, *Equity Jurisprudence*, § 1311 (S. Symons 5th ed. 1941).
32. E. Miller, *Equity Procedure as Established in the Courts of Maryland*, § 717 (1897).
33. Ross v. Hoffman, 280 Md. 172, 175, 372 A.2d 582, 585 (1977). "In other words, a court of chancery stands as a guardian of all children and may interfere at any time and in any way to protect and advance their welfare and interests." *Id.* at 176, 372 A.2d at 586 (quoting Dietrich v. Anderson, 185 Md. 103, 118, 43 A.2d 186, 192 (1945)).
34. The Maryland court is the only court to base jurisdiction exclusively on its inherent equitable power over minors. Of those cases which have recently held that state courts have equitable jurisdiction to consider sterilization petitions, see *supra* note 3, only two have involved the sterilization of a mentally incompetent minor. *See In re* A.W., 637 P.2d 366 (Colo. 1981); *In re Guardianship of Hayes*, 93 Wash.2d 228, 608 P.2d 635 (1980). Only one of those, *In re A.W.*, distinguished the jurisdictional authority to hear petitions for the sterilization of mentally incompetent adults from the jurisdictional authority to hear petitions for the sterilization of mentally incompetent minors. *In re A.W.*, 637 P.2d at 371-75. Colorado courts, unlike Maryland courts, have expansive jurisdictional authority over all claims unless a statute provides otherwise. Patterson v. Parr, 23 Colo. App. 479, 489, 130 P. 618, 621-22 (1913). Thus, the *In re A.W.* court was able to base its jurisdictional authority on its inherent power over all incompetents, both minor and adult.
ject matter jurisdiction to consider a petition for the sterilization of an incompetent adult. Nevertheless, under current Maryland law, guardians of incompetent adults may consent to any medical procedure for which a "demonstrated need" is proven. The court in Wentzel stated that section 13-708 of the Maryland Estates and Trusts Code, containing the "demonstrated need" test, essentially paralleled and was "declaratory of the common law parens patriae powers of circuit courts over incompetent minors." Therefore, it apparently follows from the Wentzel decision that the circuit courts of Maryland have jurisdictional authority to decide whether any person, minor or adult, declared to be incompetent, will be sterilized.

Unfortunately, the parallel drawn between the statutory "demonstrated need" test and the court's inherent equitable jurisdiction over minors under the parens patriae doctrine erroneously implied that the Wentzel best interests standard should apply in cases concerning petitions to sterilize adults. The legislature, by enacting section 13-708, has indicated that the standard to use in deciding adult petitions is a "demonstrated need" standard. The parallel implies that the best interests standard, as established by the Wentzel court, will be used to define the "demonstrated need" standard. Because the Wentzel court defined the best interests standard very strictly, use of the Wentzel standards in deciding adult cases will not adequately protect the incompetent's constitutional right to reproductive autonomy. Therefore, the Wentzel decision should not constrain Maryland courts when considering a guardian's petition to sterilize an adult.

B. Standards for Authorizing Guardian Consent

In a sweeping opinion, the Wentzel court established minimal standards to govern circuit courts when ruling on a guardian's petition for authorization to consent to the sterilization of a minor. The court must first comply with certain procedural safeguards designed to ensure that the incompetent is fully represented and that the court has a full understanding of the circumstances surrounding the request for

36. 293 Md. at 701, 447 A.2d at 1252.
37. See supra text accompanying notes 112-14.
38. The Court of Appeals explicitly recognized that it was overstepping the traditional function of the judiciary and, in effect, legislating. "We recognize, of course, that declaration of the public policy of this state is normally a function of the legislative branch of government." 293 Md. at 705, 447 A.2d at 1255. The "public-policy emphasis" of the judiciary has been criticized as inappropriate. See, e.g., Berger, Paul Brest's Brief For an Imperial Judiciary, 40 Md. L. Rev. 1, 7-18 (1981); Fernandez, Custom and the Common Law: Judicial Restraint and Lawmaking by Courts, 11 Sw. U. L. Rev. 1237, passim (1979).
sterilization. Then the court must make three evidentiary findings: (1) The incompetent must be incapable of making the sterilization decision, (2) sterilization must be in the minor's best interests, and (3) sterilization must be medically necessary. All of these factors must be proven by clear and convincing evidence.

Because the court identified the parens patriae doctrine as the source of jurisdiction, the Wentzel standards were designed to promote the minor's best interests. Historically, the best interests standard has been loosely construed but the recent cases that influenced the Went-

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39. The court established the following standards:
1. The court must appoint an independent guardian ad litem to act on the ward's behalf. This guardian ad litem must be given a full opportunity to meet with the ward, and, to present evidence and cross-examine witnesses at a full judicial hearing.
2. Medical, psychological, and sociological experts must present independent evaluation to the circuit court. In addition, the court may appoint its own experts to evaluate the ward's best interests.
3. The court should personally meet with the ward to obtain its own impression of the ward's competency.
4. The circuit court must find by clear and convincing evidence that the ward is incompetent to make a decision about sterilization and that this incompetency is unlikely to change in the foreseeable future.
5. The court must find by clear and convincing evidence that sterilization is in the best interests of the ward. The best interests of the ward are determined by several factors including:
   a. Whether the incompetent is capable of reproduction;
   b. The incompetent's age and circumstances at the time of the petition;
   c. Extent of exposure to sexual contact that could result in pregnancy;
   d. Feasibility of other effective contraceptive procedures;
   e. Availability of less intrusive sterilization procedures; and
   f. Possibility of scientific advances that could result in improvement of the incompetent's mental condition.
6. In addition, the court, before authorizing sterilization as being in the best interests of the incompetent, must find by clear and convincing evidence that the requested operative procedure is medically necessary to preserve the life or physical or mental health of the incompetent minor. 293 Md. at 703, 447 A.2d at 1253-54.

40. One of the earliest cases finding inherent jurisdictional authority to order the sterilization of an incompetent was, Ex parte Eaton, Daily Record, Nov. 11, 1954, at 4, col. 1 (D.C. Balt. City, Nov. 10, 1954). That court stated, in dicta, that "the facts and law in this case are so clear and pointed that [the court] has not only the authority but a definite obligation to this Incompetent to authorize the operation." Id. at col. 2. The opinion did not enunciate specific standards for determining when sterilization would be ordered, but merely recited that sterilization was necessary for the incompetent's health and well being, and would promote the incompetent's mental recovery. Id. at col. 1. Thus, the court appeared to articulate a best interests standard.

Later cases relying on Ex parte Eaton show, however, that although the courts have denominated a best interests standard, that standard can be abused. For example, in In re Simpson, 180 N.E.2d 206 (Ohio 1962), an Ohio probate judge ordered the sterilization of an eighteen-year old woman with an IQ of 36 because she was sexually promiscuous, her illegitimate child needed welfare aid, state institutions were overcrowded, and any additional children would be burdensome to the county and state welfare departments. 180 N.E.2d at 207-08. Judge Gray continued authorizing sterilizations for ten years until a woman who
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del decision have established a tighter structure within which to evaluate an individual's best interests. The Washington Supreme Court in In re Guardianship of Hayes, the first state court of last resort significantly to elaborate the best interests standard, established guidelines for decisionmaking in sterilization cases. The Hayes standards are very similar to those enunciated in other recent sterilization decisions influencing the Maryland court.

The Wentzel standards differ from the Hayes standards in two significant ways. The Washington court required that the factors weighing in favor of, or against, sterilization be individually established by clear and convincing evidence. The Maryland court, however, merely listed a number of factors that are determinative of the best interests of the incompetent. Although sterilization generally must be proven to be in the best interests of the incompetent by clear and convincing evidence, Maryland circuit courts have comparatively wide dis-


42. 93 Wash. 2d 228, 608 P.2d 635 (1980).

43. In re Grady, 170 N.J. Super. 98, 405 A.2d 851 (1979), was decided eight months prior to In re Hayes, but the New Jersey Superior Court's decision that the parents of an incompetent may substitute their judgment for her's was vacated later by the New Jersey Supreme Court. That court held that sterilization could be ordered only when shown to be in the best interests of the incompetent. In re Grady, 85 N.J. 235, 244, 264–67, 426 A.2d 467, 471, 482 (1981).

44. 93 Wash. 2d at 238–39, 608 P.2d at 641–42.


46. In addition to the differences discussed in the text, the Hayes standards require the court to find that the incompetent is permanently incapable of caring for a child. 93 Wash. 2d at 238, 608 P.2d at 641. Although the Maryland court indicated that its list was not exhaustive, it did not list child-care ability as one of the factors to be considered when authorizing sterilizations. 293 Md. at 703, 447 A.2d at 1253–54. When applying the Wentzel standards, circuit courts should consider an incompetent's ability to care for a child before ordering sterilization. Empirical studies show that many persons who are legally incompetent are capable of being or becoming good parents. Comment, Nonconsensual Sterilization of the Mentally Retarded—Analysis of Standards for Judicial Determinations, 3 W. NEW ENG. L. REV. 689, 698 (1981) citing Note, Retarded Parents in Neglect Proceedings: The Erroneous Assumption of Parental Inadequacy, 31 STAN. L. REV. 785, 797–803 (1979) (reviewing empirical data on child-rearing capacities of retarded parents). See also Developments in the Law — The Constitution and the Family, 93 HARV. L. REV. 1156, 1302–03 (1980).

47. 93 Wash. 2d at 238, 608 P.2d at 641.

48. See supra note 39.
cretion to weigh the relevant factors and arrive at a final decision concerning the incompetent's best interests.

Most important, the *Hayes* and *Wentzel* standards differ in that *Wentzel* makes medical necessity a factor controlling the sterilization decision. In establishing the medical necessity requirement, the Maryland court cited the only other case holding that medical necessity controls whether an incompetent can be sterilized. In *In re A. W.*, the Colorado Supreme Court defined medical necessity as "necessary, in the opinion of experts, to preserve the life or physical or mental health of the mentally retarded person." The Colorado court reasoned that the requirement was necessary to emphasize that the incompetent minor's interests were paramount and to protect against the historical abuse of sterilization. The Court of Appeals did not analyze the reasoning of *In re A. W.* but appears to have accepted it without question.

The Colorado court's reasoning is not persuasive. Because the medical necessity requirement may, on occasion, be inconsistent with the incompetent's best interests, the medical necessity test cannot in every case emphasize the priority of the incompetent's best interests. Individuals can choose to be nontherapeutically sterilized. In fact, psychologists often advocate the nontherapeutic sterilization of the mentally incompetent to enhance their ability to live in a less restrictive environment. Preventing the nontherapeutic sterilization of all incompetents does not emphasize the incompetents' interests but prohibits them from exercising the same rights as competent persons. As argued in the third section of this Note, that restriction may be unconstitutional.

The historical abuse of the reproductive rights of the mentally retarded does not justify such a restrictive standard. That abuse occurred as a result of misguided eugenic theories, involuntary sterilization

50. 293 Md. at 703, 447 A.2d at 1254 (citing *In re A. W.*, 637 P.2d 366 (Colo. 1981)).
52. *Id.* at 375-76.
53. *Id.* at 376.
54. *See* Bass, *Voluntary Eugenic Sterilization*, in *EUGENIC STERILIZATION*, 94, 104-06 (J. Robitscher ed. 1973); *but see* Giannella, *Eugenic Sterilizations and the Law*, *id.* at 76, noting that the "increased freedom" argument could be used by the state to coerce incompetents to undergo sterilization as a condition of release from an institution.

Despite that debate, it is obvious that one reason competent persons choose to be sterilized is to be able to engage in sex without fear of pregnancy. Incompetence should not deprive a person of that freedom, but the court must be alert to any coercive motive behind the petition for sterilization.

55. *See* Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L.
laws, and irresponsible use of the best interests standards. When equity courts are guided by specific rules for granting sterilization petitions, a broad rule, preventing all sterilizations not necessary to preserve or protect an incompetent's health, is unnecessary.

II. APPLICATION OF THE WENTZEL STANDARDS

After establishing stringent standards for Maryland circuit courts to follow when considering a guardian's petition for authority to consent to sterilization, the Wentzel court reviewed, in a cursory fashion, the Chancellor's decision on the merits. Although the newly established criteria could not have been applied at the trial, the court affirmed the Chancellor's denial of the guardian's petition.

Because the lower court record was inadequate, the Court of Appeals should have remanded the case for further consideration. The

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56. Comment, Sterilization of the Developmentally Disabled: Shedding Some Myth-Concepts, 9 FLA. ST. U. L. REV. 599, 602–29 (1981). Maryland has not been immune from outrageous sterilization legislation. In 1960, Senate Bill No. 91, introduced by Senator John Sanford, Jr., was designed to punish any woman who gave birth to more than two illegitimate children. The bill provided for a fine and/or imprisonment for three years. The state would assume custody of the children, and the mother would be sterilized. This bill passed the Senate by a vote of 23 to 3 but was defeated in the House. Paul, The Return of Punitive Sterilization Proposals: Current Attacks on Illegitimacy and the AFDC Program, 3 LAW & SOC'Y REV. 77, 84–87 (1968).

57. See supra note 40.

58. The Court of Appeals' decision to dismiss rested on the court's interpretation of the Chancellor's opinion. The court stated that the Chancellor had not dismissed the petition for lack of jurisdiction, but for the petitioner's failure to establish that sterilization was justified. 293 Md. at 704, 447 A.2d at 1254. But the Chancellor's opinion did not clearly hold that she found jurisdiction to consider the sterilization petition.

The Chancellor stated:

The Court has considered the various bases suggested as a possible avenue for the Court to order a hysterectomy for Sonya and might well wish that it had the authority to act. . . . In the absence of such statutory authority and guidelines, this Court cannot find that it has the authority to grant the relief sought.


Thus, the Court of Appeals apparently misinterpreted the Chancellor's opinion. She did not consider whether there was any "demonstrated need" for sterilization but disposed of the petition on jurisdictional grounds.

59. The court stated: "Considering Sonya's age and circumstances, the absence of any evidence, much less clear and convincing evidence of any medical necessity for the sterilization procedure at this time, no useful purpose would be served by remanding the case to the trial court for further proceedings in light of today's opinion." 293 Md. at 705, 447 A.2d at 1254 (footnote omitted).

60. See 293 Md. at 718, 447 A.2d at 1261 (Digges, J., concurring and dissenting). Judge Digges agreed with the court's analysis but would have remanded the case for further consideration. Judge Davidson disagreed with the majority's standards but would have re-
court established extensive procedural and substantive safeguards with one hand, but refused to allow the trial court to apply them with the other. The court’s failure to remand the case not only deprived Sonya of the full panoply of procedural rights established by the court, but also effectively deprived her of her constitutional freedom of choice.

III. THE WENTZEL DECISION: A CONSTITUTIONAL PERSPECTIVE

Wentzel v. Montgomery General Hospital was not decided on constitutional grounds. Nevertheless, because the case involved the constitutional right to privacy, constitutional considerations should support the decision. *Skinner v. Oklahoma*, a case predating the development of the right to privacy which struck down, on narrow equal protection grounds, a compulsory sterilization statute, is remembered for its broad dicta that the right to procreate is “one of the basic civil rights of man.” The Court, anticipating the later recognition of “fundamental interests,” stated that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”

Although the parameters of the right to privacy are unclear, the Supreme Court has consistently applied the privacy doctrine to protect certain procreative rights. In *Griswold v. Connecticut*, the Supreme Court mandated for further consideration in accordance with her own. 293 Md. at 718-25, 447 A.2d at 1261-64 (Davidson, J., dissenting). Judge Smith would have granted the guardian’s petition based on the majority’s standards. 293 Md. at 705-18, 447 A.2d at 1255-61 (Smith, J., concurring and dissenting). The facts developed at trial are noted supra at notes 8-12 and accompanying text. The failure to remand illustrates the court’s refusal to recognize a right to sterilization.

61. See supra note 7.
64. 316 U.S. 535 (1942).
65. Id. at 542-43. The court found that there was no eugenic basis for sterilizing those thrice convicted of larceny but not those thrice convicted of embezzlement. Thus, the statutory distinction was “conspicuously artificial” and violated the equal protection clause. Id.
66. 316 U.S. at 541.
67. See G. GUNTER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 572 (10th ed. 1980).
68. 316 U.S. at 541.
71. 381 U.S. 479 (1965).
Court held that the right to privacy encompassed procreative decisions within the marriage relationship.\(^{72}\) That constitutional protection has been extended to unmarried individuals\(^{73}\) and minors.\(^{74}\) Extending the protection to unmarried individuals, the Supreme Court stated that "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\(^{75}\) Similarly, in *Whalen v. Roe,*\(^{76}\) the Supreme Court characterized the right to privacy as "independence in making certain kinds of important decisions,"\(^{77}\) specifically those decisions "dealing with 'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education . . .'"\(^{78}\) Thus, the constitutional right involved in any sterilization case\(^{79}\) is the fundamental right to freedom of choice — freedom from governmental intrusion in making, implementing, and avoiding the consequences of failing to make that choice.\(^{80}\)

Just as any legislation that deprives an individual of a fundamental constitutional right must satisfy the procedural requirements of the fourteenth amendment's due process clause,\(^{81}\) so too the *Wentzel* standards should ensure procedural due process. Additionally, any statutory classification that results in the deprivation of a class's constitutional right must be sufficiently related to the purposes of the legislation to satisfy the varying levels of scrutiny under the equal pro-

\(^{72}\) *Id.* at 484.


\(^{74}\) Planned Parenthood v. Danforth, 428 U.S. 52 (1976). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* at 74.

\(^{75}\) 405 U.S. at 453 (emphasis in original).

\(^{76}\) 429 U.S. 589 (1977).

\(^{77}\) *Id.* at 600.

\(^{78}\) *Id.* at 600 n.26 (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)).

\(^{79}\) Carey v. Population Servs. Int'l, 431 U.S. at 688 n.5, addressed all forms of contraception including sterilization.

\(^{80}\) The discourse leading to this conclusion parallels that found at *Note, Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 HARV. L. REV. 1850, 1866-67 (1981). But see Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421 (1980), asserting that the claim for privacy "is a claim for state interference in the form of legal protection against other individuals, and this is obscured when privacy is discussed in terms of non-interference with personal decisions." *Id.* at 438 (citation omitted, emphasis in original).

\(^{81}\) To determine the adequate process, the court balances the private interest involved, the effectiveness of the present procedure and additional effectiveness of any additional procedures, and the government's interest in limiting its administrative and fiscal burden. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).
tection clause. If the right deprived is fundamental, then the equal protection clause demands strict scrutiny of both the classification and the legislative purpose to determine whether the classification is necessary to promote a governmental interest compelling enough to override the interests of the affected class. If the classification is not necessary to achieve the legislative purpose, or if the governmental interest is not compelling, the statute is unconstitutional.

Finally, substantive review of state action under the due process clause requires that any legislation that limits a fundamental right, regardless of any classifying scheme, must be necessary to promote a compelling or overriding governmental interest. Thus, when a fundamental right is involved, both the equal protection clause and the due process clause require that any legislation must be narrowly drawn to promote a compelling governmental interest. Obviously, the standards established by the Wentzel court are not legislation. Nevertheless, this approach is a useful analytic tool for evaluating a decision.


84. L. Tribe, American Constitutional Law § 16-7 (1978).

85. See Roe v. Wade, 410 U.S. 113, 152-56 (1973). The Supreme Court apparently transferred the compelling state interest test used in equal protection analysis to the substantive due process analysis in Roe. Id. at 173 (Rehnquist, J., dissenting).

86. Although equal protection and substantive due process analysis are generally two distinct strands of constitutional scrutiny of legislation, when fundamental rights are involved, equal protection analysis collapses into the substantive due process analysis. See, Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537, 564 and authorities cited at 562 n.84 (1982); Perry, supra note 82, at 1074-83. But see, Comment, Equal Protection and Due Process: Comparing Methods of Review Under Fourteenth Amendment Doctrine, 14 HARV. C.R.—C.L. L. REV. 527 (1979), arguing that although the Supreme Court has confused equal protection and due process review, id. at 531-33, when fundamental rights are at issue, the two methods of review are conceptually distinct and should be so applied. Id. at 537-41.

which in many ways resembles legislation.

In sterilization cases, several state interests may be considered sufficiently compelling to permit state interference with an incompetent's right to privacy: (1) the state's interest in protecting the welfare of the incompetent's unborn child; (2) the state's interest in protecting the financial welfare of all citizens; and (3) the state's interest, as sovereign, in protecting the rights of children and incompetents. The Court of Appeals, by designing standards that emphasize the best interests of the child, implicitly decided that only the state's interest in protecting incompetents and their rights was sufficiently compelling to warrant state interference with an incompetent's right to privacy. If the court had used any other rationale to justify its intervention, the incompetent's rights arguably would have been infringed.

A. A Constitutional Analysis of the Jurisdictional Issue

When competent individuals attempt to exercise their fundamental privacy rights, their right to choose and their right to freedom from governmental intrusion with their choice coalesce. Theoretically, a competent individual's privacy rights are protected when the governmental refrains from interfering with both the individual's decisionmaking process and the way in which the individual implements that choice. This approach is admittedly unusual. Although Supreme Court review of a decision such as Wentzel would probably not follow the textual argument, this approach is enlightening. Cf. Comment, An Analytical Model to Assure Consideration of Parental and Familial Interests when Defining the Constitutional Rights of Minors — An Examination of In re Scott K., 1980 B.Y.U.L. Rev. 598 urging the judiciary to treat any prospective opinion affecting fundamental rights as "legislation". Because the public policy set by judicial precedent often has the same political and practical impact upon society as legislation, the author recommends that the court apply an equal protection analysis to the opinion. Id. at 608. See, e.g., Cook v. State, 9 Or. App. 224, 230, 495 P.2d 768, 771-72 (1972) (classification based on whether prospective mother would be able to care for child not denial of equal protection).

90. See, e.g., In re Moore, 289 N.C. 95, 103, 221 S.E.2d 307, 312 (1976) ("The people . . . have a right to prevent the procreation of children who will become a burden on the State."); In re Cavitt, 182 Neb. 712, 720-21, 157 N.W.2d 171, 177 (1968) ("Mental deficiency . . . presents a social and economic problem of grave importance . . . .").


92. An in-depth analysis of the asserted interests is beyond the scope of this article. Commentators have concluded that legislation based on any interest other than protecting the incompetent could not be drawn narrowly enough to allow the state to interfere with an incompetent's privacy right. See Comment, supra note 46, at 695-702, 708 (concluding that only best interests standard may protect constitutional rights of incompetents). Cf. Comment, Constitutional Law — Legislative Naivete in Involuntary Sterilization Laws, 12 Wake Forest L. Rev. 1064, 1080-81 (1976); Comment, Eugenic Sterilization Statutes: A Constitutional Re-Evaluation, 14 J. Fam. Law 280, 298-303 (1975) (both articles conclude no state interest compelling; neither article discusses best interests of the incompetent).
choice. For example, if a woman chose to be sterilized and the government prevented her doctor from performing the appropriate sterilization procedure, the government would be interfering with her freedom of choice. Similarly, any governmental interference with the actual decisionmaking process, regardless of limitations on the achievement of sterilization, would interfere with an individual's freedom of choice. Such intervention would have to be constitutionally justified.

An incompetent's exercise of constitutional freedoms is more problematic than that of a competent person. Because the constitutional right involved in the Wentzel case is a constitutional freedom — the freedom of choice — and because an incompetent, by definition, is incapable of exercising choice, ascription of freedom of choice to an incompetent is "paradoxical." Nevertheless, those rights which the constitution protects should not categorically be denied an individual because of a physical or mental disability. Incompetency should not


94. See generally Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756 (1981) (defining the problem and developing four theories allowing constitutional freedom to be attributed to persons of diminished capacity).

95. In re Grady, 85 N.J. at 235, 426 A.2d at 469; see also Garvey, supra note 94, at 1762, noting "the difficulty of explaining why we should ascribe, to those unable to choose, liberties that are valued because of the protection they offer for choice."

96. Because the Wentzel decision applies specifically to incompetent minors, one could argue that the restrictive standards are constitutionally permissible. The Supreme Court has recognized that the state may regulate children more closely than adults. See, e.g., Bellotti v. Baird, 443 U.S. 622, 633-39 (1979) (plurality opinion). In H.L. v. Matheson, 450 U.S. 398 (1981), the Supreme Court upheld a Utah statute which required physicians to notify the parents of immature girls prior to performing an abortion. The Court held that, as applied to immature and dependent minors, parental notification did not violate the minor's constitutional right to privacy. The Court reasoned that the statute did not give parents a veto over the minor's decision but served "important considerations of family integrity and protect[ed] adolescents." 450 U.S. at 411.

The reasons justifying different protection for the constitutional rights of children do not apply when the child is also mentally incompetent. Justice Powell, in his plurality opinion in Bellotti v. Baird articulated the three reasons why the constitutional rights of children have not been protected to the same extent as the rights of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed mature manner; and the importance of the parental role in child rearing." 443 U.S. at 634. Although incompetents apparently possess all of these characteristics, careful examination of Justice Powell's reasoning reveals otherwise. Justice Powell first suggested that the peculiar vulnerability of children may allow the state to provide fewer procedural safeguards for children. Id. at 634-35. Procedural due process, however, is designed to protect individuals from biased decisionmaking processes; the vulnerability of the individual should not be relevant to the adequacy of the process afforded him. Developments in the Law — The Constitution and the Family, supra note 46, at 1368 (1980).

With regard to the second reason, Justice Powell noted that the state's power to limit the decisions of immature children is premised on the notion that these children may be adversely affected by an unthoughtful decision when they mature. Bellotti v. Baird, 443
result in the loss of constitutional rights.\textsuperscript{97}

Although a competent individual's freedom to choose is protected when the government does not interfere with both the choice and the right to implement and avoid the consequences of not making that choice, for incompetents, governmental noninterference cannot simultaneously protect all aspects of the privacy right. Because an incompetent is generally unable to consent to sterilization effectively, physicians usually refuse to sterilize the mentally incompetent without a court order.\textsuperscript{98} Thus, in the absence of a court order, an incompetent will be unable to obtain a sterilization, and, consequently, could be denied her freedom to choose. To protect an incompetent's freedom to choose to have a sterilization, the state must step in and either grant or deny the sterilization of the incompetent or allow someone else to consent to the incompetent's sterilization.\textsuperscript{99} Paradoxically, the state must seem to interfere with an incompetent's privacy right to protect that privacy right.

Because the state must become involved in the decision to protect the incompetent's privacy right, state courts must interject themselves

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U.S. at 635-36. Justice Powell noted that in an earlier case the Supreme Court upheld a statute which prevented minors from selling religious literature on the ground that "the interests of society to protect the welfare of children' and to give them 'opportunities for growth into free and independent well-developed men and citizens', permitted the state to enforce its statute, which '[c]oncededly . . . would be invalid' if made applicable to adults." 443 U.S. at 636 n.14 (quoting Prince v. Massachusetts, 321 U.S. 158, 162, 165, 167 (1944) (citations omitted)). Because permanently mentally incompetent minors will never develop into competent adults, protection of these minors to preserve their autonomous development is illogical.

The third basis for limiting the constitutional rights of children articulated by Justice Powell is similarly inapplicable to mentally incompetent individuals. Parental infringement on the constitutional rights of their children is based on "[t]he duty to prepare the child for 'additional obligations'." 443 U.S. at 637 (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)). "Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." 443 U.S. at 638-39 (citation omitted). Permanently mentally incompetent minors will not grow to participate fully in society. Thus, the rights of incompetent minors and incompetent adults should be equally protected. The age of the incompetent is irrelevant.

\textsuperscript{97} In re Moe, 432 N.E.2d 712 (Mass. App. 1982). "To protect the incompetent person within its power, the State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons." \textit{Id.} at 720 (quoting Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 746, 370 N.E.2d 417, 428 (1977)).

\textsuperscript{98} See \textit{supra} notes 16 and 17.

\textsuperscript{99} See Tribe, \textit{Foreword: Toward a Model of Roles in the Due Process of Life and Law}, 87 \textit{Harv. L. Rev.} 1 (1973). Tribe argues that the \textit{Roe v. Wade} decision should be analyzed as a case in which the court was "choosing among alternative allocations of decisionmaking authority." \textit{Id.} at 11 (emphasis omitted). One of his theses is that "the due process clause is violated whenever the state either assumes a role the Constitution entrusts to another, or fails to assume a role the Constitution imposes upon it." \textit{Id.} at 15.
into the sterilization decision by accepting jurisdiction over sterilization petitions. If a court refuses to accept jurisdiction over sterilization petitions, incompetents will never be able to procure sterilizations; and as a matter of fact, the court’s refusal to act would lead to the deprivation of an incompetent’s fundamental privacy rights. By this analysis, the Court of Appeals may have been constitutionally compelled to accept jurisdiction over sterilization petitions.

B. Constitutional Analysis of the Wentzel Standards

Assuming that judicial intervention into the sterilization decision is necessary to protect the rights of the incompetent, what form should that intervention take? The court must first identify the appropriate decisionmaker, and then develop constitutionally adequate standards to guide that decisionmaker. Addressing the first of these issues, a court, by granting all petitions requesting the authority to consent, in effect, could allow the guardians of an incompetent to decide whether that incompetent will be sterilized. Or the court itself could decide whether an incompetent should be sterilized, and, finding sterilization warranted, authorize the guardians to consent.

Indiscriminate authorization of all guardians’ petitions would be unwise as a matter of policy, and might impermissibly infringe on the incompetent’s rights. Although parents or guardians are presumptively motivated by the best interests of their children, their interest in their

100. See text accompanying notes 16-17.
101. It is axiomatic that the Constitution protects individuals only against “state” deprivation of constitutional rights. U.S. Const. amend. XIV, § 1. Because it is the unwillingness of the medical profession to sterilize incompetents without a court order that actually prevents incompetents from exercising their constitutional freedom, the state seems not to be implicated. In Boddie v. Connecticut, 401 U.S. 371 (1971), the plaintiffs challenged the state’s mandatory statutory requirement that anyone seeking a divorce pay a minimum court fee. The Supreme Court held that when a state monopolizes the means of exercising a constitutional right, the state may limit access to that means only on the basis of a “counter-vailing . . . interest of overriding significance.” Id. at 377. Connecticut’s interest in preventing frivolous litigation and in allocating scarce resources was not sufficient to over-ride an indigent’s right to obtain a divorce. By analogy, the state must provide a forum within which incompetents will be allowed to exercise their constitutional right to privacy. The argument for requiring the state to provide such a forum is more persuasive in Wentzel than in Boddie. For those judicially declared incompetent, the state has erected a barrier to the exercise of all legal rights. Furthermore, the state affirmatively designates those individuals whom this barrier will obstruct by declaring them legally incompetent. Therefore, the state must afford those judicially declared to be incompetent a forum within which to vindicate their constitutional rights.
102. This Article will use the term “guardians” to refer to any person standing in loco parentis.
103. See Parham v. J.R., 442 U.S. 584 (1978). Parents have a common-law duty to care for and protect their child, including the limited ability to make medical decisions for the
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incompetent child's welfare may conflict with the child's right to privacy.\textsuperscript{104} A guardian's view of what is best for the child may be colored by concern for the mental competency of the incompetent's children or the incompetent's ability to care for children,\textsuperscript{105} or a wish to avoid the costs associated with the birth and raising of a child.\textsuperscript{106} The parents or guardians of a severely mentally retarded child may be motivated by a desire to protect her from the normal hygienic and emotional problems associated with menstruation.\textsuperscript{107} Because judicial intrusion into an incompetent's privacy is premised on protecting that incompetent's rights, a disinterested decisionmaker is generally in a better position to decide whether a particular incompetent should be sterilized than is that incompetent's parent or guardian. Thus, rubberstamped parental or guardian control over the sterilization decision would be improper.

To guide the circuit court, as the disinterested decisionmaker, the \textit{Wentzel} court recognized the importance of substantive standards evaluating the appropriateness of sterilization. Because judicial authorization is the only mechanism through which an incompetent may exercise her constitutional rights, the \textit{Wentzel} standards must satisfy the same constitutional requirements that the jurisdictional decision must satisfy. Specifically, the standards must provide procedural due process\textsuperscript{108} and must be narrowly drawn to promote a compelling governmental interest.\textsuperscript{109}

Because the only governmental interest sufficiently compelling to allow the state to intervene in the sterilization decision is an interest in protecting the incompetent,\textsuperscript{110} any standards governing sterilization decisions must protect the privacy rights of the incompetent. The \textit{Wentzel} standards require circuit courts to find, first, that the incompetent is


\textsuperscript{105} See, e.g., Comment, The Sterilization Rights of Mental Retardates, 39 WASH. & LEE L. REV. 207, 215-16 (1982); Neuwirth, supra note 16, at 455 (parent's interest may be diametrically opposed to child's).


\textsuperscript{107} 293 Md. at 706, 447 A.2d at 1255 (Smith, J., concurring and dissenting) ("the difficulties connected with menstruation apparently . . . [have] motivated [the] request for the operation").

\textsuperscript{108} See supra note 81. By requiring that the court appoint an independent guardian ad litem to act on the ward's behalf and that the guardian ad litem be given full opportunity to meet with the minor, present evidence and cross-examine witnesses at a full judicial hearing, the court granted full procedural due process rights to the incompetent child. 293 Md. at 703, 447 A.2d at 1253. For a discussion of the appointment of a guardian ad litem see supra note 10.

\textsuperscript{109} See supra text accompanying notes 82 to 86.

\textsuperscript{110} See supra notes 89 to 92 and accompanying text.
incapable of making the sterilization decision. Because circuit court intervention is justified only if the individual is unable to exercise her constitutional rights, that finding is a threshold finding. It merely identifies the group of persons for whom the court will be the surrogate decisionmaker. If a legally incompetent individual is capable of making the sterilization decision, the court should follow that choice. Second, the court must find that sterilization is in the best interests of the incompetent. But, even if the court decides that sterilization would be in the incompetent's best interests, it must make a third finding—that sterilization is medically necessary to protect the incompetent's health.

The medical necessity standard is so restrictive that circuit courts, in all but extraordinary circumstances, will be unable to grant sterilization petitions. Thus the court, the surrogate decisionmaker for the incompetent, has been denied the opportunity to choose that which may be in the best interests of the incompetent. To restrict the freedom of the court to choose is to restrict the privacy rights of the incompetent. Such a restriction is unconstitutional.

C. Suggestions for the Court

The Wentzel court could have developed a substituted judgment standard that would protect the incompetent's privacy rights. Although the source of jurisdiction under the court's analysis, the parens patriae doctrine, requires the court to act in the "best interests" of the incompetent—an objective requirement—the definition of "best interests" is open to judicial interpretation. Despite Maryland precedent restricting the use of the substituted judgment doctrine, the

112. 293 Md. at 703, 447 A.2d at 1253–54.
113. Id.
114. Because the issue of which standards should govern the court in making the sterilization decision was not briefed by any of the three parties before the court, the court did not have the benefit of opposing views.
115. See supra note 4.
116. For example, the best interests in child custody cases vary from case to case depending on the factors involved in each situation. See Ester, Maryland Custody Law — Fully Committed to the Child's Best Interests?, 41 Md. L. Rev. 225, 262–73 (1982).
117. An early Maryland case implied that an equity court's power to substitute its judgment for that of an incompetent arose from a court's inherent equity jurisdiction. Corrie's Case, 2 Bland 488, 492–93 (1830). But in Kelly v. Scott, 215 Md. 530, 137 A.2d 704 (1958), the Court of Appeals held that, unless a statute conferred the power, Maryland equity courts could not exercise substituted judgment. Id. at 533–35, 137 A.2d at 705–06. Whether a court has inherent or statutory power to exercise substituted judgment has been the subject
court could have relied on the principles of substituted judgment in developing a best interests standard. Judicial application of the substituted judgment doctrine usually entails the use of subjective standards, but when it is impracticable to determine the past subjective desires of an incompetent, the court will supplement any past evidence of the incompetent’s desire with a judgment as to what a reasonable person in the incompetent’s position would choose. Because a substituted judgment standard is less well defined than the Wentzel court’s best interests standards, any particular sterilization decision will be more difficult to resolve. Nevertheless, the constitutional rights of the incompetent demand a substituted judgment standard.

Assuming that the court has found that an incompetent is unable to make a decision about sterilization, the court should then consider medical evidence about whether that incompetence is permanent. When determining the permanency of incompetence, the court should consider the individual’s age and disability, but the incompetent’s age should not be dispositive. A fifteen year-old with the mental ability of a two year-old will become, if her incompetence is permanent, a thirty year-old with the same mental ability. If an individual’s incompetence is permanent, her youth should not preclude the exercise of her constitutional rights. If the incompetency is temporary, the court should not consider the sterilization petition.

When an incompetent is both presently and permanently incapable of making the sterilization decision, the circuit court should substitute its judgment for that of the incompetent. First, the court must consider any expression by the incompetent when she was capable of making the decision as to her choice. Although such evidence may frequently be unavailable, in a small number of cases the evidence will be invaluable.

Second, the court should consider evidence concerning both the

of comment. Compare Carrington, The Application of Lunatics' Estates for the Benefit of Dependent Relatives, 2 Va. L. Rev. 204, 204–07 (1914–15) (doctrine was part of inherent equitable power) with Thompson & Hale, The Surplus Income of a Lunatic, 8 Harv. L. Rev. 472, 472 n.1 (1894–95) (recognizing division of authority but stating that the power “appears to have been first definitely” statutory). Nevertheless, the absence in Maryland of statutory authority to use the substituted judgment doctrine should not hamstring the court. The Constitution, in place of a statute, provides sufficient authority to overcome the restriction of the Kelly v. Scott precedent.

118. See supra note 25.

119. But if a legally incompetent individual is capable of making a sterilization decision, the court should follow that choice.

120. The Wentzel standards require this finding. 293 Md. at 703, 447 A.2d at 1253–54.

121. Paradoxically, the severe incompetence of the person eliminates to a great extent the adult/minor distinction that is often made in privacy rights cases. See supra note 96.
physical and psychological health of the incompetent and the physical and psychological effect of sterilization on the incompetent. For example, evidence of poor physical health may weigh against choosing sterilization. Evidence of the psychological effect of sterilization on the incompetent may weigh for or against sterilization. The lack of medical necessity, however, should not prevent the court from granting the sterilization petition.

Those factors are not all inclusive. To determine what other circumstances are relevant in each particular case, the circuit court must consider the purpose for the sterilization. For example, if sterilization is posited as a method of birth control, the court should determine if other less intrusive means of contraception are feasible, their effectiveness, and their effect on the incompetent. Considering all factors that are relevant to the choice of sterilization, the court should substitute its judgment for that of the incompetent. Thus, the incompetent's right to choose will be protected.

IV. Conclusion

The Court of Appeals of Maryland correctly accepted jurisdiction over petitions requesting the authority to consent to the sterilization of incompetent minors. When adopting standards to govern the consideration of those petitions, however, the Court of Appeals failed in two respects. First, the court established a restrictive medical necessity requirement which prohibits circuit courts from both acting in the incompetent's best interests and protecting the incompetent's right to choose to be sterilized. Second, the court did not provide genuine guidance to circuit courts for determining when an individual should be sterilized. When the Court of Appeals again considers the issue of sterilization, it should reevaluate the constitutional implications of the Wentzel decision. Specifically, when the Court of Appeals decides whether the Wentzel standards apply to the sterilization of adults, it should redefine the Wentzel standards to protect the incompetent's constitutional freedom of choice.

123. The Wentzel standards include this type of inquiry. 293 Md. at 703, 447 A.2d 1253-54.
124. For a similar conclusion, see 11 U. BAL T. L. REV. 467, 474 (1982).
**Turner v. State**—Should an Accomplice's Excited Utterance Corroborate His In-Court Testimony?

The testimony of an accomplice is viewed with great suspicion under Maryland law. Presumed untrustworthy, such testimony will not support a conviction unless corroborated by independent evidence capable of identifying the accused with the crime.¹ In *Turner v. State*,² the Court of Appeals of Maryland addressed the question of whether an accomplice's excited utterance³ could sufficiently corroborate his in-court testimony.⁴ Holding this evidence insufficient, the court determined that Maryland's accomplice corroboration rule requires that corroboration be derived from a source independent of the accomplice himself.⁵ In so holding, the court failed to consider this judicially created rule in light of its underlying purpose and consequently rejected probative, reliable evidence.⁶

**Statement of the Case**

In February, 1980, Howard A. Turner was convicted of first degree murder in the Criminal Court of Baltimore City.⁷ The decisive evidence against Turner was the testimony of an accomplice⁸ who stated

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¹. *See, e.g.*, Brown v. State, 281 Md. 241, 246, 378 A.2d 1104, 1108 (1977); *see infra* notes 26-30 and accompanying text.
². 294 Md. 640, 452 A.2d 416 (1982).
³. FED. R. EVID. 803(2) defines an excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." For a discussion of the rationale behind the excited utterance exception, see C. Mccormick, *Handbook of the Law of Evidence* § 297 (2d ed. 1972).
⁴. McCormick suggests that a declarant's excited utterance is more reliable than his testimony in court "given at a time when his powers of reflection and fabrication are operative." *Id.* at 704. Prior to *Turner*, however, the court never addressed the question of whether an accomplice's excited utterance was sufficient corroboration of his in-court testimony.
⁵. 294 Md. at 647, 452 A.2d at 420.
⁶. A dissenting opinion, filed by Judge Smith and joined by Chief Judge Murphy, 294 Md. at 647, 452 A.2d at 420 (Smith, J., dissenting), noted that the accomplice corroboration rule was of judicial origin, and, as such, no reason for excluding the excited utterance exists if the jury can find truth in it. The decision in Brown v. State, 281 Md. 241, 378 A.2d 1104 (1977), reaffirmed and set forth the reasons for retaining the accomplice corroboration rule. *See infra* text accompanying note 26.
⁷. In addition, Turner was found guilty of unlawful use of a handgun and robbery with a deadly weapon. Appellant's Brief at 2, Turner v. State, 294 Md. 640, 452 A.2d 416 (1982).
⁸. The accomplice, John Morris, had previously pled guilty to charges of second degree murder and robbery with a deadly weapon, but was not yet sentenced at the time of the *Turner* trial. Appellant's Brief at 6-7, Turner v. State, 294 Md. 640, 452 A.2d 416 (1982).
that both he and the victim had been shot by Turner during the course of a hold-up. The accomplice further testified that, immediately after being shot, he fled to a nearby apartment where he excitedly told the occupants what had transpired. The occupants of this apartment appeared at the trial as third-party witnesses and related the accomplice's excited utterance to the court. Over the objections of the defense, the trial court held the excited utterance to be sufficient corroboration of the accomplice's in-court testimony.

Agreeing that the accomplice's excited utterance sufficiently corroborated his in-court testimony, the Court of Special Appeals affirmed Turner's conviction. The Court of Appeals reversed, however, holding that the accomplice corroboration rule required that evidence be derived from a source independent of the accomplice himself. Although acknowledging that the accomplice's excited utterance was admissible, the court nonetheless concluded that the third-party testimony offered by the state was insufficient corroboration. To hold otherwise, the court concluded, essentially would allow an accomplice to corroborate himself.

Although at first glance this holding seems consistent with the rule, closer examination reveals that the court's reasoning was misguided. This Recent Decision will illustrate how the excited utterance and the accomplice corroboration rule can work together in assuring the reliability of accomplice testimony.

10. A police officer testified that he had seen the accomplice running from the scene of the crime, and that he had encountered the accomplice, soon thereafter, in the apartment. 294 Md. at 649, 452 A.2d at 421 (Smith, J., dissenting).
11. Both of the third-party witnesses attributed the following declaration to the accomplice: "We robbed someone... if the m-----f-----g Howard [Turner] had shot right he wouldn't have shot me." Appellant's Brief at 4-5, Turner v. State, 294 Md. 640, 452 A.2d 416 (1982).
14. See supra text accompanying note 1; infra text accompanying note 28.
15. 294 Md. at 644, 452 A.2d at 418 (1982); see infra notes 32-33 and accompanying text.
16. The state argued that because an excited utterance is a trustworthy statement, it satisfies the purposes of the accomplice corroboration rule. Brief of Appellee at 10, Turner v. State, 294 Md. 640, 452 A.2d 416 (1982). The court, however, rejected the state's argument, stating that it confused "the admissibility of evidence with its sufficiency to serve as corroboration." 294 Md. at 646, 452 A.2d at 419.
17. 294 Md. at 647, 452 A.2d at 420; see infra text accompanying notes 52-62.
THE ACCOMPlice CORROBORATION RULE

In the early 1900's,\textsuperscript{18} Maryland joined a minority\textsuperscript{19} of states in adopting an accomplice corroboration rule.\textsuperscript{20} Since then, the Court of Appeals has set forth two justifications for the rule: First, because the accomplice is admittedly guilty of the crime in question, his testimony is presumed untrustworthy.\textsuperscript{21} Second, and perhaps of greater concern, is the possibility that an accomplice's desire for prosecutorial favor might motivate fabrication of his testimony.\textsuperscript{22}

Although these are important concerns,\textsuperscript{23} the accomplice corroboration rule's purpose is confined to ensuring the reliability\textsuperscript{24} of accomplice testimony. Hence, courts have taken care to avoid making the rule so rigorous that it operates to exclude otherwise reliable evidence. Indeed, the Court of Appeals in \textit{Brown v. State}\textsuperscript{25} specifically questioned whether the rule should be abandoned in its entirety. In deciding to retain the rule as an added safeguard, the court recognized its "limited utility"\textsuperscript{26} and cautioned that only minimal evidence should be

\textsuperscript{18} The case usually cited as having formulated the accomplice corroboration rule is \textit{Luery v. State}, 116 Md. 284, 81 A. 681 (1911), but the requirement was first applied in \textit{Lanasa v. State}, 109 Md. 602, 71 A. 1058 (1909).

\textsuperscript{19} The accomplice corroboration rule is not used in the federal courts or those of some thirty-four states. While the rule in Maryland and Tennessee is judicially created, in other minority states the rule is mandated by statute: \textit{ALA. CODE} § 12-21-222 (1975); \textit{ALASKA STAT.} § 12.45.020 (1972); \textit{ARK. STAT. ANN.} § 43-2116 (1977); \textit{CAL. PENAL CODE} § 1111 (West 1970); \textit{IDAHO CODE} § 19-2117 (1979); \textit{MINN. STAT. ANN.} § 634.04 (West 1947); \textit{MONT. CODE ANN.} § 46-16-213 (1981); \textit{NEV. REV. STAT.} § 175.291 (1979); \textit{N.Y. CRIM. PROC. LAW} § 60.22 (McKinney 1981); \textit{N.D. CENT. CODE} § 29-21-14 (1974); \textit{OKLA. STAT. ANN. tit. 22, § 742 (West 1969)}; \textit{OR. REV. STAT.} § 136.440 (1981); \textit{S.D. CODIFIED LAWS ANN.} § 23A-22-8 (1979); \textit{TEX. CRIM. PROC. CODE ANN.} § 38.14 (Vernon 1979).

\textsuperscript{20} At common law, the court merely instructed the jury to review the uncorroborated testimony of an accomplice with caution. This is the practice followed in the federal courts and those state courts that do not have the accomplice corroboration rule. Wigmore preferred this approach, stating that the need for corroboration was best addressed on a case-by-case basis. \textit{J. WIGMORE, EVIDENCE} § 2060, at 451 (Chadwick rev. ed. 1978). For a comparative view tracing the origin of the rule to Roman law, see \textit{Peiris, Corroboration In Judicial Proceedings: English, South African And Sri Lankan Law on The Testimony of Accomplices}, 30 INT'L. & COMP. L. Q. 682 (1981).


\textsuperscript{22} \textit{Luery v. State}, 116 Md. 284, 293, 81 A. 681, 684 (1911), cited with approval in \textit{Brown}, 281 Md. at 243, 378 A.2d at 1105-06.

\textsuperscript{23} The \textit{Brown} court recognized that the growing use of accomplices as state witnesses increased these concerns. 281 Md. at 246, 378 A.2d at 1108.

\textsuperscript{24} The \textit{Turner} court noted that "as a safeguard against depriving the factfinder of evidence from a source intimately connected with the crime," only slight corroboration is needed. 294 Md. at 642, 452 A.2d at 417.


\textsuperscript{26} Id. at 246, 378 A.2d at 1108.
required as corroboration.\textsuperscript{27} Thus, in order to satisfy the rule, the state need only present evidence that independently identifies the accused with either the perpetrators of the crime or the commission of the crime itself.\textsuperscript{28} As long as this standard is satisfied, the accomplice's entire testimony will be deemed sufficiently trustworthy to go to the jury.\textsuperscript{29}

**THE TURNER DECISION**

In applying this standard to the facts in *Turner*, the Court of Appeals held that the evidence did not satisfy the accomplice corroboration rule even though the evidence offered as corroboration clearly identified Turner as a participant in the crime.\textsuperscript{30} Rather, the court focused its inquiry upon the requirement that corroborative evidence be "independent."\textsuperscript{31} Although previous decisions required that such evidence be independent—in the sense that it could sufficiently identify the accused with the crime without having to rely upon the accomplice's in-court testimony—\textsuperscript{32} the *Turner* decision added a new dimension to this requirement: Corroborative evidence must be derived from a source not only independent of the accomplice's testimony, but independent of the accomplice himself.\textsuperscript{33}

\begin{itemize}
  \item \textsuperscript{27} *Id.* See also 294 Md. at 644, 452 A.2d at 418 (only "minimal evidence [is] required" to corroborate).
  \item \textsuperscript{28} 281 Md. at 244, 378 A.2d at 1107.
  \item \textsuperscript{29} Corroborative evidence is not required to cover every detail. As long as the accused is identified with the crime or its perpetrators, the jury is allowed to "credit the accomplice's testimony even with respect to matters as to which no corroboration was adduced." *Id.*
  \item \textsuperscript{30} *See supra* note 11 and accompanying text. This testimony, although not actually naming Turner as the killer, tends to show that he was involved in the robbery and that he unlawfully used a handgun. Thus, the testimony was sufficient corroboration.
  \item \textsuperscript{31} 294 Md. at 646-47, 452 A.2d at 419-20.
  \item \textsuperscript{32} The *Turner* court cited no Maryland cases in support of its conclusion that an accomplice's testimony must be corroborated by evidence "from some source other than the accomplice himself." *Id.* at 644, 452 A.2d at 418. None of the out-of-state cases cited by the court in support of this conclusion involved excited utterances. Moreover, neither *Brown* nor any of Maryland's other accomplice corroboration rule decisions placed emphasis upon an independent source requirement. Although the *Brown* decision mentioned that material facts must be corroborated by evidence "independent of the accomplice's testimony," this language only requires that the corroborative evidence be able to identify the accused with the crime without the aid of the accomplice's in-court testimony. 281 Md. at 246, 378 A.2d at 1108. *See infra* note 39. This is also the rule in Tennessee, the only other state to have a judicially created accomplice corroboration rule, as well as in New York. *See State v. Fowler*, 213 Tenn. 239, 373 S.W. 2d 460 (1963) (requiring corroborative evidence which "taken by itself" identifies the accused); People v. Hudson, 51 N.Y.2d 233, 239, 414 N.E.2d 385, 387-88, 433 N.Y.S.2d 1004, 1007 (1980) (Reliance may not be "placed on testimony of the accomplice. . . . [T]he so-called corroborative evidence must stand on its own.").
  \item \textsuperscript{33} "We believe the conclusion . . . logical that commensurate with the requirement that an accomplice's testimony . . . be corroborated is the requirement that the evidence offered as corroboration . . . be independent of the accomplice's testimony." Clearly, re-
Although it noted the trustworthiness of an excited utterance, the court stated that the issue turned not upon the statement's reliability, but upon its sufficiency as corroboration. Yet, by focusing upon the evidentiary source rather than the manifest reliability of the excited utterance, the Turner court disregarded the Brown court's reason for choosing to retain the accomplice corroboration rule: To safeguard against unreliable accomplice testimony. Hence, in conceding the utterance's reliability yet rejecting its sufficiency, the court applied the rule in a manner that ignored the very reason for its existence.

At least two theoretical routes lay open to the court for avoiding this anomalous result. First, the court could have considered the excited utterance, as defined by traditional res gestae theory, as independent of the declarant. A second and perhaps more satisfactory alternative would have been to recognize that an accomplice's excited utterance provides a justifiable exception to the court's independent source requirement.

Although the first route is artificial, it is no less so than the court's distinction between reliability and sufficiency. At the very least, it

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34. 294 Md. at 646-47, 452 A.2d at 419 (emphasis added).
35. 281 Md. at 246, 378 A.2d at 1108.
36. One of the principle weaknesses of the Turner opinion was the court's rigid adherence to the technical form of the accomplice corroboration rule without paying regard to the rule's substantive purpose, as demonstrated by the following passage:

We agree with the State that when the utterance is closely connected in time and causally connected with the event itself that the likelihood for reflection and fabrication by the utterer is most unlikely if not improbable. However, despite the usual credibility given to an excited utterance and despite the minimal evidence required to be corroborative, we think it at least implicit in the requirement that corroboration come from a source other than the accomplice himself.

294 Md. at 644, 452 A.2d at 418 (emphasis added).
37. The phrase res gestae refers to both the principal litigated act and the acts and declarations which accompany it. C. McCormick, supra note 3, § 288; Thayer, Bedingfield's Case—Declarations As A Part Of The Res Gestae (pts. I-III), 14 Am. L. Rev. 817 (1880), 15 Am. L. Rev. 1, 71 (1881), [hereinafter cited as Thayer]; see generally 6 J. Wigmore, Evidence §§ 1745-57 (J. Chadbourn ed. 1976) (stating the general form of the res gestae exception to the hearsay rule). Because the res gestae declaration is so connected to the principal act, it becomes a natural part of it and is thus admissible as a hearsay exception. See Thayer, supra, 14 Am. L. Rev. at 829; Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397 (1869).
38. The traditional theory was best stated by Thayer: The declarations are admissible as a part of the event itself—"it being always understood that they are not to be taken upon the credit of the declarant." Thayer, supra note 37, 15 Am. L. Rev. at 83 (emphasis added).
39. The court's reasoning may be broken down into the following steps:

(1) Excited utterances are admissible because "the likelihood for reflection and
leads to a sensible result. Like all res gestae declarations, the excited utterance derives its trustworthiness from its theoretical identity with the act itself. To qualify as an excited utterance, a declaration must be both spontaneous and causally connected to a startling event. Considered a product of the event rather than of the declarant, ex-

fabrication by the utterer is most unlikely if not improbable." 294 Md. at 644, 452 A.2d at 418.

(2) The accomplice, however, is presumed to be untrustworthy and may have dishonest motives; therefore, his testimony must be corroborated. 294 Md. at 642, 452 A.2d at 417.

(3) Corroboration must be sufficient.

(4) Because the excited utterance is the product of the accomplice, it will not suffice as corroboration. This is presumably because accomplices are unreliable and may fabricate their testimony in order to gain prosecutorial favor.

Plainly, steps (1) and (4) are irreconcilable. Moreover, sufficiency has never been dependent upon the source of testimony. Sufficiency hinges upon whether the evidence is able to link the accused to the crime. In Wright v. State, 219 Md. 643, 150 A.2d 733 (1959), the Court of Appeals quoted the following passage with approval: "It seems that corroboration which with some degree of cogency tends to establish facts material and relevant which would authorize the jury to credit the accomplice's testimony should be sufficient." Id. at 649, 150 A.2d at 737 (quoting 1 H. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 185, at 412 (5th ed. 1956)). Viewed in this light, the accomplice's excited utterance was sufficient in this respect.

40. McCormick gives four examples of res gestae declarations: "(1) declarations of present bodily condition, (2) declarations of present mental states and emotions, (3) excited utterances, and (4) declarations of present sense impressions." C. MCCORMICK, supra note 3, § 288, at 686. For an early discussion of these separate classifications, see Morgan, A Suggested Classification of Utterances Admissible As Res Gestae, 31 YALE L.J. 229 (1922); Stone, Res Gestae Reagiatia, 55 LAW Q. REV. 66 (1939).

41. Wharton stated that "the statement born of surprise is an act, just as much as shooting a gun is an act, and may therefore be described by testimony in court." 2 F. WHARTON, WHARTON'S CRIMINAL EVIDENCE § 297, at 62 (13th ed. 1972).

42. Spontaneity lasts as long as the shock prevents the declarant from reflecting upon the event. Thus, depending upon the circumstances, an excited utterance may be made within seconds or hours of the startling event. See C. MCCORMICK, supra note 3, § 297, at 706.

43. See, e.g., Wilson v. State, 181 Md. 1, 3, 26 A.2d 770, 772 (1942) ("tested, not by closeness in time, but by [causal] connection").

44. FED. R. EVID. 803(2); see C. MCCORMICK, supra note 3, § 297, at 704; Morgan, supra note 40, at 238. For a comparison of the reliability of excited utterances and present sense impressions, see Note, The Present Sense Impression, 56 TEX. L. REV. 1053 (1978).

45. Thayer described res gestae declarations with a "pebble-in-the-pond" metaphor. The causal event is similar to a stone cast upon the water; the declarations which arise from this event are likened to the ripples which "extend outward after the stone has sunken from sight." Waltz, The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes, 66 IOWA L. REV. 869, 898 (1981). The metaphor applies well to the Turner case: The stone thrown upon the water (i.e., the causal event) is the robbery-murder in which the accomplice was wounded; the extending ripples (i.e., the res gestae) are the accomplice's excited utterance and his plainly visible wound.

46. The Maryland courts seem to have accepted this traditional view. See, e.g., Reckard v. State, 2 Md. App. 312, 316, 234 A.2d 630, 632 (1967), cert. denied, 248 Md. 734 (1968) (calling an excited utterance the "facts talking through the party" rather than the declarant's
cited utterances are believed to be free from fabrication,\textsuperscript{47} and are therefore reliable.\textsuperscript{48} Hence, the testimony offered by the state with respect to the accomplice’s utterance in \textit{Turner} could have been accepted, under the traditional view, as independent corroborative evidence.

But the vitality of the traditional res gestae concept is steadily fading,\textsuperscript{49} and this analysis is unlikely to carry much force today.\textsuperscript{50} The current relaxation of the traditional res gestae theory does not, however, discredit the excited utterance as a reliable hearsay exception. Indeed, the excited utterance, regardless of its source, is widely recognized as a proven guarantor of testimonial veracity.\textsuperscript{51} As such, a second route lay open to the court: The excited utterance could have served as a justified exception to the accomplice corroboration rule’s independent source requirement.

Other rulings by Maryland courts with respect to excited utterances and other extrajudicial declarations tend to support this second alternative. The courts have relied upon the excited utterances of incompetent\textsuperscript{52} and biased\textsuperscript{53} witnesses in the corroboration of their in-

\textsuperscript{47} See C. \textsc{McCormick}, \textit{supra} note 3, at 704.

\textsuperscript{48} \textit{Contra}, Hutchins and Slesinger, \textit{Some Observations on the Law of Evidence: Spontaneous Exclamations}, 28 \textsc{Colum. L. Rev.} 432, 433 (1928). These writers attack the reliability of this exception on the ground that an excited utterance may be inaccurate because the declarant’s powers to observe may be lessened while in an excited state. For a view to the contrary stating that this concern is “outweighed by the advantages of freedom from motivation,” see Strahorn, \textit{Extra-Legal Materials And Evidence}, 29 \textsc{Ill. L. Rev.} 300, 316 n.24 (1934), reprinted in 15 \textsc{Md. L. Rev.} 330, 344 n.24 (1955).

\textsuperscript{49} See C. \textsc{McCormick}, \textit{supra} note 3, § 288, at 687 (“The ancient phrase can well be jettisoned [sic] . . . it has served well its era in the evolution of evidence law.”). For a humorous portrayal of the traditional res gestae theory being used in a modern courtroom, see Moylan, \textit{Res Gestae, Or Why Is That Event Speaking And What Is It Doing In This Courtroom?}, 63 \textsc{A.B.A.J.} 968 (1977).

\textsuperscript{50} The phrase res gestae has generated confusion because “of its exasperating indefiniteness.” Morgan, \textit{supra} note 40, at 229.

\textsuperscript{51} See C. \textsc{McCormick}, \textit{supra} note 3, at 704 (“all courts today recognize an exception to the hearsay rule” for excited utterances).

\textsuperscript{52} See, \textit{e.g.}, Moore v. \textit{State}, 26 \textsc{Md. App.} 556, 561, 338 \textsc{A.2d} 344, 347 (1975) (testimonial competence in cases involving excited utterances is irrelevant); 6 J. \textsc{Wigmore, supra} note 37, § 1751.

\textsuperscript{53} Although rape victims are arguably biased witnesses, the rule in Maryland and other states is that a rape victim’s complaint, made without delay, is sufficient corroboration of the in-court testimony. This rule stems from the excited utterance exception, but it is less demanding with respect to the time element. See C. \textsc{McCormick}, \textit{supra} note 3, § 297, at 709; Green v. \textit{State}, 161 \textsc{Md.} 75, 82, 155 \textsc{A. 164}, 167 (1931); Guardino v. \textit{State}, 50 \textsc{Md. App.} 695, 706, 440 \textsc{A.2d} 1101, 1107 (1982) (victim’s complaint made while “emotionally engulfed by the situation” was res gestae and can support her testimony).
court testimony. Moreover, the Court of Appeals has long held that an impeached witness’s prior consistent statements, made shortly after the event and "before the motive to fabricate existed," are admissible to corroborate his in-court testimony. Although such language is broad enough to include extrajudicial statements in general, it plainly indicates that an excited utterance can be used to corroborate an impeached witness. Indeed, the time constraints applied to excited utterances may make them more reliable than other extrajudicial statements. Moreover, biased and impeached witnesses, who have been proved unreliable, are not necessarily more reliable than accomplices, who are only presumed to be untrustworthy. Thus, if the testimony of biased or impeached witnesses may be corroborated by their own excited utterances, the same should hold true for the corroboration of accomplice testimony.

This reasoning is supported by dictum in an early Court of Appeals decision, Lanasa v. State. In reviewing a criminal conviction, the Lanasa court was asked to determine whether an out-of-court declaration of an impeached accomplice could be used to corroborate his in-court testimony. Although the particular facts of the case mandated a negative reply, the court quoted with approval the accepted standard for corroborating an impeached witness. The court thus indicated that if the accomplice’s declaration had been made shortly after the event, it would have sufficed as corroboration.

54. See Cross v. State, 118 Md. 660, 86 A. 223 (1912); City Passenger Ry. Co. v. Knee, 83 Md. 77, 79, 34 A. 252, 253 (1896). Indeed, the City Passenger line of cases would seem to allow an impeached witness to corroborate himself. This approach is inconsistent with the court's holding in Turner. See supra text accompanying note 17.

55. See Strahorn, supra note 48, 15 MD. L. REV. at 344 (“The brevity of the interval . . . indicates absence of motive for falsehood.”).

56. Corroboration is required to prevent fabricated testimony, so whether the witness is an accomplice, a biased witness, or an impeached witness is irrelevant.


58. The defendants were accused of conspiracy and destruction of property. 109 Md. at 602, 71 A. at 1508.

59. Certainly an impeached accomplice is much less reliable than an ordinary accomplice.

60. The accomplice's statement was made 39 days after the commission of the crime, and thus it did not qualify. 109 Md. at 620, 71 A. at 1065.

61. See supra notes 52-56 and accompanying text.

62. 109 Md. at 621, 71 A. at 1065 (“To bring the case within this exception it must appear that the [declaration] occured soon after the transaction.”) (emphasis in original). Somewhat analogous to this finding is the holding in Judy v. State, 218 Md. 168, 146 A.2d 29 (1958). In Judy, the Court of Appeals allowed an accomplice's extrajudicial identification of the accused's photograph to be “admitted for the purpose of corroborating the [accomplice] and bolstering his credibility.” Undoubtedly, this prior identification was made by the accomplice; thus, the court in Judy is, in fact, allowing an accomplice to corroborate himself.
Hence, even assuming that the *Turner* court correctly found that the excited utterance was not from a source independent of the accomplice, it still had ample support for allowing its use as corroboration. The rationale underlying the accomplice corroboration rule is that an accomplice's testimony is inherently untrustworthy. The same rationale supports the rejection of other witnesses' testimony. An impeached witness may be a notorious liar; a biased witness may be so interested in the outcome of the trial that he is willing to fabricate his testimony; an incompetent witness, although perhaps sincere, may not understand the difference between truth and falsehood. Nonetheless, these witnesses' excited utterances are considered reliable even if their in-court testimony is not.  

The same rule should apply to the excited utterance of a potentially unreliable accomplice. An accomplice's motive to fabricate may be greater than, say, that of a biased witness. This difference, however, seems one of degree only, and is far from inevitable in every case. One can easily imagine a situation in which a biased witness stands to gain much more by lying than an accomplice stands to lose by telling the truth. Moreover, the accomplice corroboration rule has never required much in the way of corroboration. Therefore, an accomplice's excited utterance, if it can sufficiently identify the accused with either the perpetrators of the crime or the commission of the crime itself, should be admissible as corroboration of his in-court testimony.

To argue that an accomplice's excited utterance is less reliable because of his motive to minimize his role in the crime would be to argue against the validity of the excited utterance as a hearsay exception. Such an argument can find no support in Maryland case law. Once having accepted the proposition that an excited utterance is reliable, the court should not disallow it as corroboration. Because both the accomplice corroboration rule and the excited utterance exception insure reliability, the court should have recognized the excited utterance as an exception to the independent source requirement. To say that

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63. See *supra* note 4; *Strahorn, supra* note 48, 15 MD. L. REV. at 330, 344 n.24 (reasoning that excited utterances are intrinsically superior guarantors of trustworthiness); see also *Jackson v. State*, 31 Md. App. 332, 356 A.2d 299 (1976) (mother's testimony of incompetent four-year-old's excited utterance is sufficient evidence to convict accused).

64. Chief Judge Murphy, writing for the court in *Brown*, stated that "[n]ot much in the way of evidence corroborative of the accomplice's testimony has been required by our cases." 281 Md. at 244, 378 A.2d at 1104.

65. See *supra* note 39.

66. See, e.g., *Murphy Auto Parts Co. v. Ball*, 249 F.2d 508, 510 (D.C. Cir. 1957), in which Chief Justice Burger, while sitting as a judge on the District of Columbia Circuit, favorably compared an excited utterance to corroboration as a reliable means of insuring trustworthy evidence.
excited utterances cannot suffice as corroboration, even if they link the accused to the crime, is to defeat the purpose of the accomplice corroboration rule.\textsuperscript{67}

**CONCLUSION**

The *Turner* court's failure to accept the accomplice's excited utterance, either as a source independent of the accomplice or as a justified exception to the court's independent source requirement, gives rise to several ambiguities. First, whether the independent source requirement will apply solely to accomplice corroboration or, henceforth, to corroboration in general is uncertain.\textsuperscript{68} The failure of the court to address this issue could be read as a challenge to the decisions allowing excited utterances and other extrajudicial declarations to corroborate the testimony of impeached, biased, and incompetent witnesses. Second, given that an excited utterance, under *Turner*, is no longer viewed as being independent of the declarant,\textsuperscript{69} the case may be read as a sub silentio rejection of the traditional res gestae concept.\textsuperscript{70} Third, although the excited utterance is a widely recognized hearsay exception,\textsuperscript{71} the *Turner* holding could undermine the exception's validity.\textsuperscript{72}

\textsuperscript{67} Another route was available to the court. The facts of the case indicate that the accomplice's declaration may have been admissible as a declaration against penal interest. This point was raised by the Court of Special Appeals, 48 Md. App. at 373, 428 A.2d at 90, but it was not discussed and did not figure into that court's holding. Although there may be legitimate doubt as to whether a declaration that implicates an accused is actually made against his or her interest, the declaration in *Turner* was made to acquaintances prior to the arrest, which should alleviate this concern. See FED. R. EVID. 804(b)(3) advisory committee note, 56 F.R.D. 183, 327-28 (1972). But because the declarant was available at the trial, the admissibility of his declaration against penal interest would be questionable in most courts. See FED. R. EVID. 804(b)(3) (requiring declarant to be unavailable). Still, an argument can be made that because an accomplice is unable to corroborate his own in-court testimony, he is, in a sense, unavailable. Thus, the *Turner* court could have theoretically allowed the testimony offered by the third-party witnesses to corroborate the accomplice's testimony by creating a penal interest exception to the accomplice corroboration rule's independent source requirement.

\textsuperscript{68} Maryland courts do not confine the need for corroboration to accomplice testimony. Other cases require corroboration of the testimony of impeached, biased, and incompetent witnesses. See *supra* notes 52-58 and accompanying text.

\textsuperscript{69} 294 Md. at 647, 452 A.2d at 420.

\textsuperscript{70} Because relatively recent decisions have embraced the traditional res gestae theory, see *supra* note 46, it should not be rejected without an explicit holding and an explanation. Such a holding would be consistent with the growing trend rejecting the traditional res gestae concept in favor of the specific hearsay exceptions. See *supra* note 49.

\textsuperscript{71} See *supra* note 51.

\textsuperscript{72} Admittedly, it has been argued by a few commentators that excited utterances are not reliable guarantors of testimonial veracity. See Hutchins & Slesinger, *supra* note 48. But this is the view of a distinct minority of commentators and is not reflected in the case law of any state. See FED. R. EVID. 803(2) advisory committee note and cases cited therein.
Fourth, the court’s holding that an otherwise *reliable* declaration is not necessarily *sufficient* corroboration leaves the very premise behind the accomplice corroboration rule open to question.73

The Court of Appeals should reconsider the premise behind the accomplice corroboration rule. To begin with, the rule is of questionable merit.74 This rule is not applied in the federal courts or those of some thirty-four states.75 Maryland has employed the rule, nonetheless, as a safeguard against untrustworthy testimony, and in so doing the courts have applied the rule in a flexible manner by not requiring much in the way of corroboration.76 In *Turner*, however, the court’s unnecessarily rigid use of this rule defeated its purpose.

The court should therefore redefine the accomplice corroboration rule. In so doing, it should abandon the circular reasoning applied in *Turner* in favor of allowing the use of *any* reliable evidence that can identify the accused with the crime.77 In addition, the court should clarify its independent source requirement by delineating the extent of its applicability. Moreover, the court should re-evaluate its position on res gestae. If, in holding that an excited utterance is not independent of the declarant, the court means to reject the traditional res gestae theory, an explicit statement to this effect is in order.

Finally, the court should allow an excited utterance exception to the accomplice corroboration rule’s independent source requirement. Such an exception would serve the purpose of the accomplice corroboration rule by providing the jury with reliable accomplice testimony.

73. *See supra* text accompanying note 24.

74. Wigmore said that the accomplice corroboration rule was but a “technical nicet[y]” and preferred the common-law approach to accomplice corroboration, stating that the issue of corroboration was best addressed on a case-by-case basis. 7 J. Wigmore, *supra* note 20, § 2060, at 451. Wigmore traces the origin of the rule in the United States to a “misguided moment [when] . . . [t]he judge was forbidden to contribute to the jury’s aid any expression of opinion upon the weight of evidence in a given case.” *Id.* § 2056, at 416; cf. Brown v. State, 281 Md. at 246, 378 A.2d at 1108 (“[W]e recognize that a jury instruction serves . . . much the same purpose as the Maryland rule requiring corroboration.”).


76. 281 Md. at 244, 378 A.2d at 1107.

77. *Accord,* 7 J. Wigmore, *supra* note 74, § 2059, at 424: “The important thing is not how our trust is restored, but whether it is restored at all.” (emphasis added).
Over the past seven years, students have attempted to sue the public schools for their failure to provide an adequate education, and almost every jurisdiction has flatly rejected these claims. Legal commentators, however, have urged that this new tort, commonly referred to as "educational malpractice," be recognized. The courts have been reluctant to allow the cause of action even for a limited class of claims because they fear disenchanted students and parents will use the courts as a forum for challenging the administration of the public school system. Two recent cases—Hunter v. Board of Education and Doe v. Board of Education—have brought this debate to Maryland. In Hunter, the Maryland Court of Appeals followed the majority of jurisdictions in refusing to recognize educational malpractice claims. One year later, the court labelled the claim in Doe as a typical educational malpractice action and therefore found Hunter to be controlling. The two claims, however, can be distinguished, and the court's reasoning in Hunter did not justify its rejection of the action in Doe. Although there are cogent reasons for restricting the scope of this new tort, the courts nevertheless should recognize at least a limited class of claims. A re-


3. See, e.g., Hoffman v. Board of Educ., 49 N.Y.2d at 127, 400 N.E.2d at 320, 424 N.Y.S.2d at 379 (a court is not the proper forum to test the validity of decisions concerning a student's education).


6. 292 Md. at 484-85, 439 A.2d at 583-84.

7. 295 Md. at 68, 453 A.2d at 814.
view of the leading cases in this area indicates that all educational malpractice claims are not simply allegations concerning a school’s general failure to educate a student.

I. BACKGROUND

The principal educational malpractice cases fall into two categories. Originally, the term educational malpractice described a student's general claim that a school provided inadequate instruction in basic skills. The first two reported educational malpractice cases—Peter W. v. San Francisco Unified School District and Donohue v. Copiague Union Free School District—presented broad claims concerning a school’s failure to teach a student. In Peter W., for example, the student claimed that the school system negligently failed to provide adequate instruction in basic academic skills. In Donohue, the student alleged that the school system allowed him to graduate from high school without a rudimentary ability to comprehend written English. These students, who had no learning handicaps, had the opportunity to receive the same public school education as other similarly situated students.

In the second category of cases, claimants have alleged that a school negligently evaluated them and this incorrect evaluation re-

8. See Note, supra note 2, at 824.
11. 60 Cal. App.3d at 818, 131 Cal. Rptr. at 856; 47 N.Y.2d at 442, 391 N.E.2d at 1353, 418 N.Y.S.2d at 376-77. Although students in both Peter W. and Donohue alleged that the schools failed to evaluate them, both courts summarized the allegations as presenting general claims that the school system had failed to instruct the students in academic skills. See 60 Cal. App.3d at 818, 131 Cal. Rptr. at 856; 47 N.Y.2d at 442, 391 N.E.2d at 1353, 418 N.Y.S.2d at 376. These courts adopted two different analytical approaches for determining whether a cause of action for educational malpractice should be recognized. The Peter W. court framed the issue in terms of whether there is a duty to educate. The Donohue court said that even if the requirements of a traditional negligence claim were met, the policy considerations precluded liability. But those courts that have addressed the issue in terms of whether there is a duty have realized that the question of when the law will impose a duty is largely a matter of policy. See, e.g., 60 Cal. App.3d at 821, 131 Cal. Rptr. at 859. The judicial recognition of a duty of care, according to Peter W., depended upon the following considerations of public policy: the degree of foreseeability of harm to the plaintiff, the causal connection between the defendant's conduct and the injury, the moral blame attached to the defendant’s action, the need for preventing future harm, the economic consequences to the community, the availability of insurance coverage, the likelihood of feigned claims, and the possibility of limitless liability. See 60 Cal. App.3d at 823, 131 Cal. Rptr. at 859-60 (quoting Rowland v. Christian, 69 Cal.2d 108, 112-13, 70 Cal.Rptr. 97, 100 (1968)).
12. 60 Cal. App.3d at 818, 131 Cal. Rptr. at 856.
13. 47 N.Y.2d at 442, 391 N.E.2d at 1353, 418 N.Y.S.2d at 376.
14. See, e.g., D.S.W. v. Fairbanks N. Star Borough School Dist., 628 P.2d at 554; Hoffman v. Board of Educ., 49 N.Y. 2d at 125, 400 N.E.2d at 319, 424 N.Y.S.2d at 378. See also
sulted in their being placed in an inappropriate class. In one kind of negligent evaluation claim, a student alleges that a school incorrectly evaluated him as being handicapped. For example, in *Hoffman v. Board of Education*, the student alleged that he was classified as being mentally retarded when he was in fact of normal intelligence. Conversely, a student may allege that he was classified as being of normal intelligence when he actually had some special learning handicap. For example, in *Pierce v. Board of Education*, the student alleged that he was suffering from a specific learning disability and the school refused to transfer him to a special education class. The other kind of negligent evaluation claim involves a student who alleges that a school never evaluated him to determine if he had a handicap. In *D.S.W. v. Fairbanks N. Star Borough School District*, one of the student plaintiffs claimed that the school failed to ascertain his dyslexia until he was in the sixth grade. Such a student is not claiming that his handicap

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Smith v. Alameda County Soc. Serv. Agency, 90 Cal. App.3d at 941-42, 153 Cal. Rptr. at 718-19 (plaintiff claimed that clinical psychologist employed by state adoption agency misdiagnosed him as mentally retarded); *Pierce v. Board of Educ.*, 69 Ill.2d at 92, 370 N.E.2d at 536 (student claimed school refused to place him in special education class).


16. *Id.* at 124-25, 400 N.E.2d at 319, 424 N.Y.S.2d at 378. In *Hoffman*, the student claimed that the school had negligently assessed his intellectual capacity, resulting in his misplacement for 11 years in a class for the mentally retarded. The school psychologist had given Hoffman a Stanford-Binet Intelligence Test. He scored 74, which was one point short of the cut-off score for normal intelligence. The psychologist recommended that Hoffman be reevaluated in two years because he had a severe speech defect that limited his ability to respond to the verbal I.Q. test. Hoffman was never retested and attended classes for the mentally retarded until he was 18 years old. He was later transferred to an occupational training center where another I.Q. test was administered, and it showed that he was of normal intelligence. The New York Appellate Division upheld Hoffman's claim on the ground that the school had committed an affirmative act of negligence in failing to reevaluate Hoffman within two years. *See 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978), rev'd, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).* Recently, however, the Montana Supreme Court concluded that a student who is mislabelled as mentally retarded may sue the state for damages. *B.M. v. State*, 649 P.2d 425, 426 (Mont. 1982) (4-3 decision). The student in *B.M. v. State* was tested by a school psychologist and classified as educable mentally retarded (EMR). She was placed in a regular first-grade class where she and other EMR students received additional tutoring. The school discontinued this program and moved the student to a segregated classroom for the mentally retarded without informing her parents. *Id.* at 426. The appellate court remanded the case to give the student an opportunity to prove that the school had negligently misclassified her as mentally retarded. *Id.* at 427-28.

17. 69 Ill.2d 89, 370 N.E.2d 535 (1977).

18. *Id.* at 92, 370 N.E.2d at 536. In *Pierce*, the student claimed that the school officials were advised by his physicians that he was suffering from a specific learning disability, but they nevertheless refused to test or to evaluate him and thus he remained in normal classes where he competed with non-handicapped students.


20. *Id.* at 555. The other plaintiff claimed that the school identified him as being dyslexic in the first grade but did not provide special education until he was in the fifth grade.
was misdiagnosed, rather he is alleging that the school was negligent in failing to refer him to a specialist for an evaluation.\textsuperscript{21}

Thus, the first category of educational malpractice cases—referred to in this Note as inadequate education claims—including students who allege that a school failed to provide them with an adequate education.\textsuperscript{22} The second category of cases—referred to as negligent evaluation claims—takes one of two forms: First, a student with an identifiable learning handicap alleges that school professionals made specific errors in evaluating his handicap, or conversely, a normal child alleges that he was misdiagnosed as being handicapped and this inaccurate evaluation caused him to be placed in the wrong class.\textsuperscript{23} Second, a student may allege that the school failed to evaluate his learning abilities at all, even though he exhibited behaviors indicating that he was handicapped. At first glance, these claims in which a student alleges that a school failed to evaluate him at all could be classified as inadequate education claims, because any student may allege that in retrospect his failure to learn was caused by a school’s failure to evaluate him. If such a student is able to prove that he actually had an identifiable handicap that was overlooked, however, then a court should classify the allegation as a negligent evaluation claim. Two recent Maryland cases—\textit{Hunter} and \textit{Doe}—illustrate how courts have ignored the differences between the two categories of claims.

\section*{II. Summary of \textit{Hunter} and \textit{Doe}}

The parents of Ross Hunter brought a negligence action on behalf of their son, alleging that the Montgomery County School Board and several individual educators (hereinafter collectively referred to as the

\begin{verbatim}
Both plaintiffs claimed that the school negligently terminated classes for dyslexic children. \textit{Id.} at 554-55.

\textsuperscript{21} See generally Comment, \textit{Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children}, 14 \textit{Colum. J.L. \\ & Soc. Probs.} 389, 397 (1979) (failure to identify a handicapped child at all may be the most compelling case because professionals can usually agree that a child suffers from some handicap).

\textsuperscript{22} See \textit{Note}, supra note 2, at 825-26. The Note compared the \textit{Peter W.} and \textit{Donohue} cases to \textit{Hoffman} and was the first to point out that the holdings in \textit{Peter W.} and \textit{Donohue} were limited to the question of whether a student may sue his school for inadequate instruction in basic skills and that the New York court had mislabelled Hoffman’s professional malpractice claim against the school psychologist as an educational malpractice claim. \textit{Id.} at 833. For a discussion of the arguments in favor of recognizing educational malpractice claims in which a student makes a general allegation concerning a school’s failure to educate him, see Elson, supra note 2, at 642-49.

\textsuperscript{23} The failure to identify a handicapped student is different from the failure to place a child correctly. The issue in a wrongful placement case is which educational setting would be most appropriate and not what is the nature of the child’s handicap. See Comment, supra note 21, at 395-96.
\end{verbatim}
Board) had failed to provide Hunter with an adequate education.\textsuperscript{24} Although the Hunters had alleged that the school negligently evaluated their son,\textsuperscript{25} the court characterized the issue as whether a public school student may sue a school for its failure to educate him properly.\textsuperscript{26} The Hunters alleged that their son developed learning deficiencies and suffered psychological injury.\textsuperscript{27} The Court of Appeals upheld the lower court's dismissal of the negligence claim,\textsuperscript{28} but reversed in part to give the plaintiffs an opportunity to prove that individual educators had intentionally injured Hunter.\textsuperscript{29} A separate opinion agreed with the majority in its holding that educators may be liable for their intentional torts,\textsuperscript{30} but urged that educational malpractice claims be allowed.\textsuperscript{31}

\textsuperscript{24} See Brief for Appellants at 6, Hunter v. Board of Educ., 292 Md. 481, 439 A.2d 582 (1982). The Hunters filed a six-count declaration which included allegations that the school board maliciously intended to deprive Hunter of an adequate education, failed to evaluate its programs and personnel, breached a statutory duty of care in not providing him with a quality education, and breached an implied contract to educate him. \textit{Id.} at 4. On certiorari, the Court of Appeals held that an educational malpractice claim based on the violation of a statute or the breach of an implied contract was also precluded. 292 Md. at 489 n.5, 439 A.2d at 586 n.5. Most other state courts also have rejected the implication that state education statutes impose a duty upon instructors to educate students. \textit{See}, e.g., Peter W. v. San Francisco Unified School Dist., 60 Cal. App.3d at 826-27, 131 Cal. Rptr. at 862 (state statute requiring a school board to allow only students proficient in basic skills to graduate could not be used to imply a statutory duty of care). The Hunters relied upon § 4-107 of the Maryland Education Article, which states that each school board shall “[m]aintain throughout its county a reasonably uniform system of public schools that is designed to provide quality education and equal educational opportunity for all children.” \textit{Md. Educ. Code Ann.} § 4-107(1) (1978), \textit{cited in} Brief for Appellants at 6, Hunter v. Board of Educ., 292 Md. 481, 437 A.2d 582 (1982). The \textit{Hunter} court held that the plaintiffs could not recover damages for a breach of this type of statute. 292 Md. at 489 n.5, 439 A.2d at 586 n.5. For a discussion of the possible theories of recovery for educational injuries, see generally Funston, \textit{supra} note 2, at 759-99.

\textsuperscript{25} The plaintiffs alleged that the school required Hunter to repeat first-grade materials in the second grade even though he had successfully mastered the primary materials, tested him incorrectly, failed to evaluate his learning problems, and prepared inaccurate records. \textit{See} Brief for Appellants at 5, Hunter v. Board of Educ., 292 Md. 481, 439 A.2d 582 (1982).

\textsuperscript{26} 292 Md. at 483, 439 A.2d at 583. Later in \textit{Doe} the court maintained that the decision in \textit{Hunter} covered claims in which a plaintiff alleged that a school had negligently evaluated him. 295 Md. at 78, 453 A.2d at 819. Although the Hunters did allege that the school negligently misplaced their son, the court summarized the claim as an allegation that the school failed “to properly educate young Hunter” and did not directly address the negligent evaluation claim as a separate issue. 292 Md. at 484, 439 A.2d at 583.

\textsuperscript{27} 292 Md. at 484, 439 A.2d at 583.

\textsuperscript{28} \textit{Id.} at 489, 439 A.2d at 586.

\textsuperscript{29} \textit{Id.} at 490-91, 439 A.2d at 587. The court remanded the case in part to allow the plaintiffs to prove that the individual educators willfully and maliciously injured Hunter. \textit{Id.} But the court in \textit{Hunter} unequivocally stated that a school board would not be liable for the acts of individual educators who willfully injure a student, because such intentional torts will always constitute an abandonment of employment. 292 Md. at 441 n.8., 439 A.2d at 587 n.8.

\textsuperscript{30} 292 Md. at 492, 439 A.2d at 587 (Davidson, J., dissenting).

\textsuperscript{31} \textit{Id.} at 492-93, 439 A.2d at 588.
In *Doe*, a former public school student and his parents alleged that two psychologists, employed by the school district, were negligent in failing to evaluate and to test their son properly. Dr. Stickel, a psychologist working for the school board, evaluated Doe in 1967 and found that he “suffered cerebral damage during his infant years and was retarded or of borderline intellectual functioning.” Stickel recommended that Doe be placed in a class for brain-injured children or in a class for the mentally retarded. In October 1968, the parents notified the school that a private physician had evaluated Doe and found that he had a severe case of dyslexia rather than cerebral brain damage. Although Stickel himself had recommended that Doe be reevaluated in ten months, the school failed to do so until over seven years later. In January 1975, Dr. Johns, another school psychologist, evaluated the student and recommended that he be retained in the same program. The plaintiffs alleged that the negligent evaluations by the school psychologists caused Doe to be retained in classes for the mentally retarded for approximately seven years. The majority found that the negligent evaluation of Doe presented a general educational malpractice claim and therefore was barred under *Hunter*. Three judges dissented, arguing that the plaintiffs had presented a traditional professional malpractice claim against the two psychologists.

The Maryland court, like most courts, assumed that negligent evaluation claims are the same as inadequate education claims because they both are “concerned with the proper administration of the public school system.” *Hunter*, however, involved a child of normal intelligence in a mainstream classroom whose parents waited until his sixteenth birthday to complain that his second-grade teacher forced him

32. 295 Md. at 72, 453 A.2d at 816.
33. *Id.* at 71, 453 A.2d at 816, quoting Brief for Appellants at E-21, *Doe*.
34. *Id.*
35. *Id.* at 71-72, 453 A.2d at 816.
36. *Id.* at 72, 453 A.2d at 816. The plaintiffs alleged that Dr. Johns also knew of Doe's specific learning disabilities and ignored recommendations from private psychologists who suggested Doe was not mentally retarded.
37. *Id.* at 73, 453 A.2d at 816.
38. *Id.* at 78, 453 A.2d at 819.
39. *Id.* at 81-82, 453 A.2d at 821 (Eldridge, J., dissenting). The dissent argued that the plaintiffs had stated a professional malpractice claim against the two psychologists and the majority was incorrect in labelling the claim as involving educational malpractice. The dissent also pointed out that the court in *Hunter* had expressly declined to decide the issue of whether actions against professionals who are normally subject to suit would be barred merely because those professionals were employed by the school system. *Id.* at 87, 453 A.2d at 824.
40. *Id.* at 79, 453 A.2d at 819.
to study materials he already had learned. *Doe* involved a dyslexic student misplaced in a class for the mentally retarded who could point to specific acts of two psychologists alleged to have conducted negligent evaluations. Doe's parents had informed the school that their son was incorrectly diagnosed as having minimal brain dysfunction. The Does did not present an amorphous claim about teachers failing to educate their son. They could identify a particular act—the negligent psychological assessment—which caused Doe to lose the opportunity to learn to compensate for his actual handicap.

III. Recognizing a Limited Cause of Action

In *Hunter* and *Doe*, the court followed other state courts in holding that public policy considerations justify a broad rule precluding all educational malpractice claims. The policy reasons relied upon by the court include: (1) no workable standard of care exists, (2) the cause of the injury is too uncertain, (3) the damages are difficult to ascertain, and (4) the financial burden on the school system would be unacceptable. The court's conclusion in *Hunter* rested upon the interrelationship between those problems associated with defining this new cause of action and the difficulties of devising a fair remedy that would not expose financially strapped public schools to unlimited liability. Analysis of the major policy considerations indicates that taken as a whole they do provide a sound basis for protecting schools from having to defend against claims that they failed to teach a student basic skills. But when analyzed separately in light of the distinction between inadequate education claims and negligent evaluation claims, it becomes apparent that these policy considerations do not apply in cases like *Doe*. Defining the scope of liability for a new common-law action and fashioning an appropriate remedy is the kind of problem that a court is capable of resolving without renouncing its traditional function of providing a forum for individuals to seek redress for negligently inflicted harms.

41. 292 Md. at 487-88, 439 A.2d at 585; 295 Md. at 79, 453 A.2d at 819.
42. See 292 Md. at 484-88, 439 A.2d at 584-85. The court also mentioned that such suits would be a judicial intrusion into the day-to-day operations of a school. *Id.* The majority, however, did not maintain that the legislature's delegation of certain powers to the school boards preempted the courts from deciding questions concerning the tort liability of school employees. Additionally, the Maryland legislature's policy of waiving the defense of governmental immunity for schools indicates the legislature sanctioned tort actions against public schools. *See* MD. EDUC. CODE ANN. § 4-105(d)(2) (1982). A county board of education may not raise the defense of sovereign immunity to any claim of $100,000 or less. *Id.*
A. Defining the Cause of Action

1. Standard of Care—The Hunter court, like other courts, concluded that because educators themselves disagree about appropriate professional standards for teachers, a court is incapable of fashioning a uniform and nonarbitrary standard of care. This lack of agreement among educators concerning professional standards is the result of three pedagogical problems. First, the conflicts about how children learn are unresolved. Second, academicians and practitioners in the educational field still disagree about which teaching practices are an essential part of competent academic instruction. Third, even if teachers agree about which methods are effective in developing academic skills, most public schools have not devised standard criteria for evaluating how well teachers implement accepted methods.

Despite these problems, many advocates of a cause of action for educational malpractice have maintained that a court could devise a fair standard of care for teachers using the traditional rules governing the liability of professionals. A professional is expected to exercise

43. See 292 Md. at 484-85, 439 A.2d at 584. ("[C]lassroom methodology affords no readily acceptable standards of care . . . ") (quoting Peter W. v. San Francisco Unified School Dist., 60 Cal. App.3d 814, 824, 131 Cal. Rptr. 854, 860 (1976)). The available methods for devising a standard of care for teachers are analyzed in Elson, supra note 2, at 697-745.

44. Most educators agree that the psychological principles governing human learning have yet to be adequately identified. See generally IMPACT OF RESEARCH ON EDUCATION: SOME CASE STUDIES (P. Suppers ed. 1978) (analysis of the effect of psychological theories of Thorndike, Skinner, Piaget, Freud, and Dewey on American educational practice); LEARNING AND INSTRUCTION (M. Wittrock ed. 1977) (analysis of theories on learning and human memory that have influenced classroom instruction).

45. Generally, educators agree that there is no empirical evidence demonstrating that certain teaching practices are more effective than others. See SECOND HANDBOOK OF RESEARCH ON TEACHING passim (R. Travers ed. 1973). One legal researcher, who conducted an informal survey, has concluded that there is no agreement among educators on the fundamental teaching practices that must be used in a classroom. See Elson, supra note 2, at 710-13. But certain research studies on teacher practices nonetheless have found that some teaching methods are more effective than others. See, e.g., Armento, Teacher Behaviors Related to Student Achievement on a Social Science Concept Test, 28 J. TCHR. EDUC. 46, 51-52 (April 1977) (describing teacher behaviors that were associated with greater gains in student learning); Berliner & Tikunoff, The California Beginning Teacher Evaluation Study: Overview of the Ethnographic Study, 27 J. TCHR. EDUC. 24, 29-30 (Spring 1976) (identifying certain teaching practices that were consistently more effective than others). See also D. Schalock, Research on Teacher Selection, in REVIEW OF RESEARCH IN EDUCATION (D. Berliner ed. vol. 7 (1979)) (summary of research on teacher effectiveness).

46. See J. BECKHAM, LEGAL ASPECTS OF TEACHER EVALUATION 1-2 (1981); Fenstermacher, Philosophical Consideration of Recent Research on Teacher Effectiveness, in REVIEW OF RESEARCH IN EDUCATION (L. Shulman ed. vol. 6 1978).

47. See Elson, supra note 2, at 737-45; Tracy, supra note 2, at 576-79.
the care and knowledge commonly possessed by members of good standing in his profession. If conflicting standards of care govern in a particular discipline, a professional is judged only according to the standards of the school of thought to which he adheres.

The difficulty with using a professional standard of care in this area is that few teachers explicitly adhere to a particular educational school of thought. This lack of consensus concerning the procedures that are essential to competent teaching is especially problematic when a student alleges that his educators failed to teach him basic skills. If, however, a student alleges that a teacher or some other specialist responsible for identifying a student's learning handicap has negligently evaluated him, then a court can fashion a workable standard of care because most specialists agree about the correct procedures for evaluating students with learning problems. The American Psychological Association, for example, promulgates detailed guidelines explaining how to administer psychological tests. A psychologist or other diagnostician who is not employed by a public school is expected to use reasonable care in conforming to these professional standards. A professional psychologist need not be treated differently merely because he is employed by a public school system.

Standards for evaluating students are available in Maryland for other school professionals, including teachers, who may be required to identify students with learning problems. Maryland has a comprehensive statutory scheme for identifying and evaluating children with

50. See Elson, supra note 2, at 709-10 (few routine practices and mechanical procedures are accepted as the norm by a particular group of teachers).
51. See, e.g., C. Comptom, A Guide to 65 Tests for Special Education 3-5 (1980) (diagnosticians should use a battery of tests to evaluate a student's academic skills as well as his ability to process auditory, visual, and tactile stimuli); G. Wallace & S. Larsen, Educational Assessment of Learning Problems: Testing for Teaching 11-12 (1978) (diagnosticians usually supplement results of standardized tests with informal assessment procedures).
52. American Psychological Association (APA), Standards for Educational and Psychological Tests 57-73 (1974). The APA standards, for example, require test users to have a general knowledge of measurement principles and the limitations of test interpretations. In addition, a test user is expected to consider more than one variable in an assessment and any given variable should be assessed by more than one method. Id. at 61.
learning handicaps. A court could use these statutory and administrative guidelines to devise a standard of care for determining if a particular educator's failure to identify or to evaluate properly a child's learning disability was negligent.

The court in both Hunter and Doe seemed to conclude that a court could never fashion a standard of care for educators. In Hunter, the student challenged the routine classroom practices of public school teachers. He claimed he was forced to repeat materials he already had learned. A teacher's decision about which academic materials to use with a student involves individual pedagogical judgment, and a court would have a difficult time devising a comparative standard of care that would protect a teacher from having his substantive teaching


The federal statute itself has a provision that allows parents to seek judicial review of a state agency's decision about where to place a handicapped student. 20 U.S.C. § 1415 (e)(2) (1982). If a state fails to comply with the federal statute, a court may grant the parents "such relief as the court determines is appropriate." Id. Some federal courts have held that this statutory language authorizes a court to grant monetary damages in addition to injunctive or declarative relief, but they have limited the damages to the costs incurred by parents who made alternative arrangements for their child during the administrative review process. See Anderson v. Thompson, 658 F.2d 1205, 1213-14 (7th Cir. 1981); Department of Educ. v. Katherine D., 531 F. Supp. 517, 530 (D. Hawaii 1982); Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460, 468-69 (S.D. Tex. 1982) (dictum); Gregg B. v. Board of Educ., 535 F. Supp. 1333, 1337-39 (E.D.N.Y. 1982); Tatro v. Texas, 516 F. Supp. 968, 977-81 (N.D. Tex. 1981); Monahan v. Nebraska, 491 F. Supp. 1074, 1094 (D. Neb. 1980). But see Meiner v. Missouri, 673 F.2d 969, 979-80 (8th Cir. 1982) (no general right to damages under EAHCA), cert. denied, 103 S. Ct. 215 (1982); Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770, 776 (1st Cir. 1981). The EAHCA does not preempt state courts from creating a new common-law action for educational malpractice, because the damages awarded under the act are for the costs parents actually incurred in placing their child in another educational setting when state facilities were non-existent or inadequate. See Tatro v. Texas, 516 F. Supp. at 978.

55. 292 Md. at 483-84, 439 A.2d at 593.
methods second-guessed. In Doe, on the other hand, the student alleged that a psychologist had diagnosed him as suffering from cerebral brain damage and ignored indications on the Wechsler Intelligence Scale for Children that were inconsistent with a diagnosis of simple retardation. The defendant did not administer additional diagnostic tests, such as the Wide Range Achievement Test or Slingerland's Screening Test For Identifying Children with Specific Language Disability. Thus, the Does were challenging the failure of an individual psychologist to conduct a comprehensive evaluation. As pointed out in the Doe dissent, the plaintiffs were not asking the court to create a nebulous standard of care because the court could refer to existing professional standards for psychologists.

2. Causation—The difficulty of establishing the causal relationship between a teacher's negligence and a student's failure to learn is the second policy consideration mentioned in Hunter for denying claims of educational malpractice. The multiplicity of factors that influence the learning process make it difficult for a student to prove that a teacher's negligence was the cause-in-fact of the student's illiteracy. A child's failure to learn is influenced by his home life and cultural background, intellectual capacity, and overall psychological make-up. Additionally, many institutional factors, such as class size, student mix, and availability of special resources influence a

57. Id.
58. 295 Md. at 82, 453 A.2d at 821 (Eldridge, J., dissenting). See supra note 52 for discussion of APA professional standards for psychologists. Claims against psychologists are infrequent, but other professionals in the mental health field have been held liable for malpractice. Cf. Roy v. Hartogs, 85 Misc. 2d 891, 893, 381 N.Y.S.2d 587, 588 (1976) (psychiatrist liable for failure to use professionally acceptable procedures).
59. 292 Md. at 485, 439 A.2d at 584.
60. In a traditional negligence action, a plaintiff must necessarily prove that the defendant's conduct was the legal cause of the injury. See PROSSER, supra note 48, § 41 at 236.
65. See G. GLASS & M. SMITH, META-ANALYSIS ON THE RELATIONSHIP OF CLASS SIZE AND ACHIEVEMENT iv-v (1978) (academic achievement improves measurably when class size is reduced to 20 students).
child's ability to acquire fundamental skills. The denial of educational malpractice claims on the ground that it is difficult to prove causation is persuasive, however, only if one assumes that educational malpractice claims are general allegations concerning the failure of teachers to instruct in basic skills.

Proving that a particular negligent evaluation, such as administering an intelligence test incorrectly or failing to conduct an evaluation at all, caused a student to be placed in an inappropriate class is less problematic than proving causation in an inadequate education case because the student is able to point to a specific act that was a cause of his failure to learn. For example, if Doe had been properly evaluated, he would have had an opportunity to receive an appropriate education. He should have the same opportunity that is available to other tort plaintiffs to prove that the identifiable act was the proximate cause of his injury.68

3. Injury—The lack of certainty concerning the nature of the injury is the third policy consideration addressed by the Hunter court.69 The injury itself, however, can be easily described: The primary injury is the loss of the opportunity to acquire those skills a student could have acquired if exposed to appropriate classroom instruction.70 Although the loss of the opportunity to acquire academic skills is not a traditional tort injury, modern courts have been willing to allow compensation for a variety of novel injuries as long as they are a foreseeable result of a defendant's negligence.71 The loss of the opportunity to

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66. See, e.g., R. Rosenthal & L. Jacobson, Pygmalion in the Classroom 47-55 (1968) (teachers' expectations of pupils' intellectual competence influence how well students perform in class).

67. See, e.g., N. Bennett, Teaching Styles and Student Progress 152-55 (1976) (analysis of teaching styles that have a significant effect on pupil progress in reading and mathematics); Gillingham, Detailed Description of Remedial Work for Reading, Spelling, and Penmanship, in Education and Specific Language Disability 112, 131-33 (S. Childs ed. 1968) (description of kinaesthetic-phonetic technique used to teach students with learning disabilities); Spady, The Impact of School Resources on Students, in Review of Research in Education (F. Kerlinger ed. vol. 1 1973).

68. See Restatement (Second) of Torts § 431 (1965).

69. 292 Md. at 484, 439 A.2d at 584.

70. See Tracy, supra note 2, at 581 (plaintiff's best claim for injury is simply his "non-learning").

71. See, e.g., Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (recovery allowed for psychological damage despite the absence of physical injury); Lucas v. Hamm, 56 Cal.2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (recovery allowed despite lack of privity for benefits plaintiff would have received under decedent's will if no attorney malpractice). See generally Keeton, Creative Continuity in the Law of Torts, 75 Harv. L. Rev. 463, 488 n.62 (1962) ("Why assume that there are no causes of action except those recognized by precedent rather than assuming that there is a cause of action unless denied
learn to compensate for one's handicap is a foreseeable result of a negligent evaluation of one's learning abilities. In addition, an educational deficiency may be easier to identify and to prove than other intangible tort injuries, because a simple paper and pencil test often will show if a student has learned to read and to write at a certain grade level.

Additional harm may accompany the plaintiff's lost educational opportunity. A student, for example, may allege that he suffered psychological damage\(^\text{72}\) or lost future employment opportunities.\(^\text{73}\) Whether to recognize these additional damages and to what extent the lost educational opportunity should be compensated are issues a court may resolve by devising an appropriate remedy.

### B. The Appropriate Remedy

If a court accepts the loss of the opportunity to acquire academic skills as a legally compensable injury, then it could limit the remedy to the cost of remedial tutoring. Providing a remedial education compensates the student for his main injury because the tutoring restores, albeit imperfectly, the lost educational opportunity. Although this limited remedy would only partially compensate plaintiffs—because other injuries, such as emotional distress, would not be covered\(^\text{74}\)—it certainly is better than no damage recovery. Moreover, this compromise solution resolves the speculative damage issue, because a court need only calculate the cost of educational services for the time period in which the student was deprived of an appropriate education and then estimate the current cost of providing remedial education services rather than determine the damages for all the plaintiff's future harms.

Limiting the remedy in educational malpractice claims is further justified by the unique financial position of public school defendants. The public school system is not in the position of a typical private defendant who can increase the price of goods or services to cover the cost of liability insurance. Monetary resources in many school districts are restricted because local property taxes rather than general revenues pri-

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\(^{72}\) Pierce v. Board of Educ., 69 Ill.2d at 92, 370 N.E.2d at 536; Hoffman v. Board of Educ., 49 N.Y.2d at 125, 400 N.E.2d at 319, 424 N.Y.S.2d at 378.

\(^{73}\) D.S.W. v. Fairbanks N. Star Borough School Dist., 628 P.2d at 554-55.

\(^{74}\) In Hoffman, for example, the psychiatrist said that even with special education and psychotherapy, it would not be possible to correct the educational deprivation and psychological damage Hoffman suffered as a result of being mislabelled as mentally retarded. 64 A.D.2d at 378, 410 N.Y.S.2d at 105, rev'd, 49 N.Y.2d 121, 400 N.E. 317, 424 N.Y.S.2d 376 (1979).
marily are used to fund the school systems. Liability insurance for educational malpractice claims could be expensive, and requiring teacher unions or school districts to carry insurance to cover educational malpractice claims would decrease the amount of money available for other school expenditures. In schools in low-income areas, where financial resources are already strained, money would go toward redressing individual harms rather than toward improving the overall school system. By restricting the damages to the cost of acquiring a remedial education and by limiting the potential class of plaintiffs to those students who have been negligently evaluated, the court could control the problem of exposing public schools to limitless liability.

IV. Conclusion

The policy considerations articulated in Hunter and Doe do not justify a complete bar against all educational malpractice claims. By recognizing the distinction between inadequate education claims and negligent evaluation claims and by limiting the recovery to remedial tutoring, the court could resolve the policy and practical problems associated with allowing this new tort. In addition to examining the practical difficulties in recognizing such claims, the court also should consider that its traditional role is to provide a forum for aggrieved litigants and not to protect the state school system completely from liability for negligent conduct.


76. A Maryland local school board must carry comprehensive liability insurance, which includes a minimum liability coverage of not less than $100,000 for each occurrence, to protect itself and its agents and employees. Md. Educ. Code Ann. §§ 4-105(a),(c) (1978). The Maryland State Teachers’ Association (MSTA) provides additional liability coverage up to $1 million to its members for claims not covered by the local school board. Telephone interview with Robert L. Haugen, Coordinator of Legal Services for MSTA (Sept. 31, 1982).

77. For a discussion of the possible effects of allowing students to bring educational malpractice claims on the quality of education in poor school districts, see Funston, supra note 2, at 803.
The Court of Appeals granted certiorari in *Martens Chevrolet v. Seney* "primarily to clarify seeming confusion in the law of this state" concerning the tort of negligent misrepresentation. In *Martens Chevrolet*, the Court of Appeals permitted the buyer of an automobile dealership to bring an action for negligent misrepresentation against the seller. Although the court clarified Maryland law by holding that an action for negligent misrepresentation is a viable tort, the court departed from the general rule confining the tort to the sale of information itself, or to relationships which impose a duty to use care in supplying information. Because *Martens Chevrolet* presumably provides the buyer of a business with a cause of action for negligent misrepresentation against a seller, it is inconsistent with the law on this subject and should be modified in the future.

Before *Martens Chevrolet*, if a seller in an arm's-length commercial transaction provided false or incomplete information, or concealed material or qualifying facts, the buyer had a cause of action only in deceit. Although the tort of negligent misrepresentation existed, a

2. *Id.* at 331, 439 A.2d at 536.
3. *Id.* at 338, 439 A.2d at 539.
4. *Id.* at 331, 439 A.2d at 536. Because they addressed the case on direct review, the Court of Appeals also considered two evidentiary issues the appellant had raised. *Id.* at 331 n.3, 439 A.2d at 536 n.3. See *infra* note 24.
5. 292 Md. at 328, 439 A.2d at 537. The plaintiff, Martens Chevrolet, Inc., alleged deceit and breach of contract, as well as negligent misrepresentation. *Id.* at 330, 439 A.2d at 536. One of the requirements of an action in deceit is actual fraud. Donnelly v. Baltimore Trust & Guarantee Co., 102 Md. 1, 13, 61 A. 301, 306 (1905). Maryland law follows the view established in the landmark English case, Derry v. Peek, 14 App. Cas. 337 (P.C. 1889). See 292 Md. at 333-34, 439 A.2d at 539. The Derry court held that to prove fraud, a plaintiff must show that "a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." 14 App. Cas. at 374 (opinion of Lord Herschell).

In Gittings v. Von Dorn, 136 Md. 10, 15-16, 109 A. 553, 554 (1920), the Court of Appeals stated the requirements for a deceit action. Because Maryland has adopted the requirement of scienter, or actual fraud, a plaintiff generally must prove that a defendant made a deliberate misstatement. *See* Cahill v. Applegarth, 98 Md. 493, 498, 56 A. 794, 797 (1904). A defendant's silence or nondisclosure will not constitute actionable fraud. Walsh v. Edwards, 233 Md. 552, 557, 197 A.2d 424, 427 (1964); Fowler v. Benton, 229 Md. 571, 581-82, 185 A.2d 344, 351 (1962). But if a defendant makes an active misstatement of fact, or only a partial or fragmentary disclosure that misleads the purchaser, he is liable for fraudulent misrepresentation. Walsh v. Edwards, 233 Md. 552, 557, 197 A.2d 424, 427 (1964). Concealment of the truth becomes fraud when it is accompanied by misleading, deceptive
buyer could not sue a seller on this theory because the seller had no duty to exercise due care to ensure that the information supplied was accurate. The rationale for this rule was that in the context of a commercial relationship, a buyer may expect the seller to speak and to act honestly, but not that the seller would use care to make certain that everything he said was accurate. If a buyer wanted to make sure that a fact was true, he could demand a warranty from the seller, or investigate the fact himself. *Martens Chevrolet* changes the law because it places on the seller a duty to use care to make sure that what he says is accurate. Even though the buyer already had a remedy in deceit if the seller was dishonest, *Martens Chevrolet* gives the buyer an additional remedy for negligent misrepresentation if the seller’s statements are incorrect.

This Recent Decision discusses the effects of *Martens Chevrolet* and argues that a cause of action in negligent misrepresentation for financial loss should arise only when the parties’ relationship justifies the expectation of accuracy. When one is in the business of providing information, he must be careful to provide it correctly, but in an arm’s-length transaction that does not involve the sale of information a buyer should not be able to hold a seller liable for providing false information on a negligence theory.

**FACTS**

In February, 1976, Imperial Investment Company, through its officers, Harry J. Marten, Jr., and his son, Harry J. Marten, III, negotiated to purchase a Chevrolet dealership owned by Franklin Loving and Howard F. Seney. The Martens informed the sellers that they intended to continue operating the Chevrolet franchise after the sale, and that they therefore wanted accurate information about the dealership’s past profitability. At the parties’ first meeting, Mr. Seney responded to the Martens’ inquiries about the financial status by presenting a handwritten financial “trend” sheet, stating, “this pretty well depicts

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words and conduct that affirmatively suppress or cover up the truth, or distract a person’s attention from the actual facts. *See* Schnader v. Brooks, 150 Md. 52, 57-58, 132 A. 381, 383 (1926). The jury decides whether or not a defendant intentionally concealed material information with the object of creating or continuing a false impression. *See* Levin v. Singer, 227 Md. 47, 64, 175 A.2d 423, 432 (1961); Fowler v. Benton, 229 Md. 571, 579-80, 185 A.2d 344, 350 (1962).


7. *See infra* notes 34-44 and accompanying text.

8. *See* 292 Md. at 333, 337-38, 439 A.2d at 537, 539.

9. *Id.* at 331, 439 A.2d at 536.

10. *Id.*
the trends of how we have been doing.” The trend sheet contained a list of the net profit figures for each year the dealership had been in operation, including a $2,211 profit for the previous year.  

Twice during negotiations, the Martens’ accountant asked to inspect the dealership’s audited financial statements. Each time, Seney denied that such documents existed. Additionally, Seney reassured the buyers throughout negotiations that they could rely on the trend sheet as an accurate reflection of the enterprise’s financial status. On May 6, 1976, the Martens contracted to purchase the Loving dealership.  

After operating as Martens Chevrolet, Inc. for six months, the franchise showed a $187,000 loss. This financial plunge baffled the new owners. The comptroller, who had formerly worked for Seney and Loving, then showed the Martens a 1975 year-end financial statement which he had prepared for Loving, and an audited financial statement prepared by an accountant. Both of these statements disclosed large deficits, instead of the modest profit reflected on the trend sheet. Although both documents had been prepared well before the sale date, the sellers did not inform the buyers that they existed. Martens Chevrolet brought an action against Loving Chevrolet, Inc., and its sole stockholders, Loving and Seney, alleging breach of contract, deceit, and negligent misrepresentation. At the close of the plaintiff’s case, the trial judge granted the defendant’s motion for a directed verdict on the negligent misrepresentation and breach of contract claims. The jury returned a verdict for the defendants on the

11. Id. The trend sheet was an unaudited financial statement marked with the letters “BBT,” meaning “before bonuses and taxes,” but the buyers stated that they did not know the meaning of this acronym. Brief for Appellants at 5, Martens Chevrolet v. Seney, 292 Md. 328, 439 A.2d 534 (1982).
12. 292 Md. at 331, 439 A.2d at 536.
13. Id. at 331-32, 439 A.2d at 536.
14. Id. at 332, 439 A.2d at 536.
15. Id.
16. Id. at 332, 439 A.2d at 536-37.
17. Id. at 332, 439 A.2d at 537.
18. Id. In the comptroller’s statement, the deficit equalled $39,153, compared to the $2,211 profit shown on the trend sheet. The financial statement prepared by the certified public accountant showed an even greater loss of $69,000 for 1975.
19. Id.
20. Id.
22. Id. at 330, 439 A.2d at 536.
23. Id.
remaining count in deceit.\(^{24}\) Before the Court of Special Appeals could consider this case, the Court of Appeals granted certiorari on its own motion to resolve any confusion concerning the existence of the tort of negligent misrepresentation.\(^{25}\) The Court of Appeals reversed the jury verdict on the deceit count and granted a new trial on the deceit and negligent misrepresentation counts.\(^{26}\) Although the Court of Appeals

\(^{24}\) *Id.* at 331, 439 A.2d at 536. The Court of Appeals reversed the jury verdict on the deceit count because of two evidentiary errors at trial. *Id.* at 339-40, 439 A.2d at 540-41. The first matter concerned the cross-examination of one of appellant’s nonparty witnesses, Harry J. Marten, Jr. *Id.* at 338, 439 A.2d at 540. Defense counsel tried to impeach the witness’s credibility concerning appellee’s alleged deceit in the sale of the dealership by revealing to the jury that the witness had himself been formally charged with fraud in an unrelated civil suit. *Id.* at 339, 439 A.2d at 540.


The court also noted that the appellees disregarded a court order that all discovery be completed by a certain date, and deposed a witness two weeks after the discovery deadline had passed. Quoting Maryland Rule 400(a), the court stated that because appellees did not request modification of the discovery terminating order, they had violated the Maryland Rule. 292 Md. at 341, 439 A.2d at 541. The Court of Appeals appeared to rely more heavily on the impeachment issue in reversing the jury verdict. *Id.* Consequently, the court ordered a new trial on both the deceit and negligent misrepresentation counts. *Id.*

25. 292 Md. at 331, 439 A.2d at 539. Since the Maryland Court of Appeals’ decision in *Delmarva Drilling Co. v. Tuckahoe Shopping Center*, 268 Md. 417, 302 A.2d 37 (1973), courts were confused about the existence and scope of the tort of negligent misrepresentation in Maryland. See, e.g., *George Byers, Inc. v. East Europe Import Export*, 488 F.Sup. 574, 586 (D. Md. 1980); Note, *Deceit and Negligent Misrepresentation in Maryland*, 35 Md. L. Rev. 651, 670 (1976). In *Delmarva Drilling*, the Court of Appeals stated that “there can be no recovery in an action for deceit on the ground of negligent misrepresentation.” 268 Md. at 427, 302 A.2d at 41. In other words, in a deceit action, the misrepresentation must be willful and not merely negligent. See *Holt v. Kolker*, 189 Md. 636, 639, 57 A.2d 287, 288 (1948). But litigants have interpreted the *Delmarva Drilling* language variously to mean (1) that there is no cause of action for negligent misrepresentation, (2) that if there is such a tort, it cannot arise between parties to an arm’s-length contract, or (3) that a valid disclaimer provision in a contract would bar any claims for negligent oral misrepresentations. See Brief for Appellees at 19-20, *Martens Chevrolet v. Seney*, 292 Md. 328, 439 A.2d 534 (1982); *Martens Chevrolet v. Seney*, 292 Md. at 338 n.7, 439 A.2d at 539 n.7. See also *George Byers, Inc. v. East Europe Import Export*, 488 F. Supp. at 586.

In *Delmarva Drilling*, the court correctly held that the evidence did not support a cause of action for fraudulent misrepresentation because Delmarva’s statement that it could produce useable water for Tuckahoe Shopping Center was, at most, a promise. 268 Md. at 427, 302 A.2d at 41. As the court accurately observed, because one of the elements of fraud is the representation of a past or existing fact, fraud cannot be predicated on a promise to do something in the future. *Id.* See *Appel v. Hupfield*, 198 Md. 374, 379, 84 A.2d 94, 96 (1951); *Boulden v. Stillwell*, 100 Md. 543, 552, 60 A. 609, 610 (1905).

The court in *Delmarva Drilling* concentrated on why the claim could not lie in deceit, and failed to discuss any of the previous Maryland cases that had recognized and upheld actions for negligent misrepresentation. See infra note 45.

26. *See* 292 Md. at 341, 439 A.2d at 541.
correctly reaffirmed the existence of negligent misrepresentation as a valid tort, distinct from a cause of action in deceit, the court should not have chosen to recognize this tort under the Martens Chevrolet facts.

**BACKGROUND**

In negligent misrepresentation, as in negligence law generally, courts have more willingly compensated physical injury than economic injury. One reason is historical. Courts traditionally used negligence law to analyze misstatements that caused physical harm. They applied the same rules whether a defendant's negligent words or negligent acts resulted in the plaintiff's personal injury. Misstatements that caused only economic injury were associated with the intentional tort of deceit. Second, courts have not readily expanded recovery for negligent misrepresentation to include purely pecuniary loss because they did not want to expose defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class." A defendant's negligent misstatement could be repeated and passed along indefinitely. A limitless number of people could rely on his words, and the magnitude of the defendant's liability might far exceed his fault.

Although the courts have extended negligent misrepresentation to compensate purely economic loss, they have done so only in limited

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27. *Id.* at 337-38, 439 A.2d at 539. The court held that if the trial judge directed a verdict on the plaintiff's negligent misrepresentation count, either because he believed the cause of action did not exist, or that there was insufficient believable evidence to support the claim, he was incorrect. The court added: "a review of the evidence . . . demonstrates, in our view, its sufficiency to at least create a jury issue concerning whether recovery may be had under the negligent misrepresentation count." *Id.* at 338, 439 A.2d at 539.


30. W. PROSSER, supra note 28, § 107, at 704.

31. *See id.* § 105, at 684.

32. Ultramesares Corp. v. Touche, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931) (accountants not liable to an indefinite number of creditors whom accountants did not know would rely on inaccurate balance sheet).

33. W. PROSSER, supra note 28, § 107, at 706-07. *See, e.g.,* Jaillet v. Cashman, 235 N.Y. 511, 139 N.E. 714 (1923) (per curiam) (defendant not liable to member of the investing public for publishing unintentionally false stock market information on its tickers).
situations in which the parties' relationship justified the plaintiff's expectation of the defendant's accuracy, and reliance on the truth of his words.\(^{34}\) The reason for this limitation is to avoid disproportionate liability when a defendant had spoken negligently, but in good faith, unless he had expressly undertaken to observe a certain standard of care.\(^{35}\) The special relationships required to hold a defendant liable for negligent statements resulting in the plaintiff's economic loss can be grouped into three categories: (1) when the defendant is in the business of supplying information,\(^{36}\) (2) when the defendant has a duty to use care arising from his profession,\(^{37}\) and (3) when the parties have a fiduciary relationship.\(^{38}\)

In a negligent misrepresentation action for purely pecuniary injury, the parties' relationship itself imposes an obligation on the defendant to use care to provide correct information. A person engaged in the commercial sale of information, who encourages purchasers' reliance on its accuracy, is under a duty to supply correct information.\(^{39}\) Similarly, when one person seeks professional or business advice from a professional or a person operating a business, he expects that the advice will be given carefully and accurately.\(^{40}\) In fiduciary relationships, one party owes to the other a duty to speak and to act with care because, by definition, he must act for the other's benefit.\(^{41}\) Only in these relationships can a person receiving information reasonably expect the exercise of care to assure accuracy. In other kinds of relationships the recipient of information has no reason to expect or to rely on more than

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\(^{35}\) See Restatement (Second) of Torts § 552 comment a (1965).

\(^{36}\) E.g., Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).

\(^{37}\) See infra text at notes 40, 43, 44.

\(^{38}\) See infra text at note 41.


\(^{40}\) See, e.g., W. Prosser, supra note 28, § 107, at 706; Hill, Damages for Innocent Misrepresentation, 73 Colum. L. Rev. 679, 683-88 (1973); James & Gray, Part I, supra note 28, at 309. Restatement (Second) of Torts § 552(1) states:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

\(^{41}\) See, e.g., Brink v. DaLesio, 496 F. Supp. 1350, 1374 (D. Md. 1980) (insurance broker and participants' funds); Gerson v. Gerson, 179 Md. 171, 177-78, 20 A.2d 567, 570 (1941) (widow and stepsons). Other relationships which invite particular confidence may also fall into this category. James & Gray, Misrepresentation—Part II, 37 Md. L. Rev. 488, 491-92 (1978) [hereinafter James & Gray, Part II]; James & Gray, Part I, supra note 28, at 308.
the speaker's honesty and good faith.\textsuperscript{42}

The recipient's justifiable reliance on the data's correctness, and hence the duty to use care to supply it, exist only because the parties have a certain relationship. For example, courts have found liability based on professional relationships such as that between an accountant and his client.\textsuperscript{43} The accountant represents that he is qualified to perform certain services for the public. The client expects that his accountant will either give him careful service and accurate data, or be liable for damages in negligence if he is careless. Because the recipient expects care and accuracy, and the provider undertakes to perform services knowing of that expectation, courts have allowed recovery for negligent misrepresentation that caused economic loss when the parties have such a relationship.\textsuperscript{44}

\textbf{MARYLAND LAW}

Maryland courts initially recognized the tort of negligent misrepresentation only in the context of physical injury.\textsuperscript{45} The Court of Appeals first extended negligent misrepresentation to compensate economic loss where the parties had a special relationship that justified reliance.\textsuperscript{46} For example, in \textit{Brack v. Evans}, the court allowed a client to bring an action in negligent misrepresentation for financial loss.

\textsuperscript{42} Dean Prosser argues that a duty of care must exist by analogy to a gratuitous statement made by one who derives no benefit from it, such as a doctor's curbside medical opinion. W. PROSSER, supra note 28, § 107, at 706. When the gratuitous opinion is intentionally false, the doctor is liable in deceit. If a statement is merely negligent, however, it can be compared to a gift or loan of chattels, where the recipient is not justified in relying upon any care on the donor's part. \textit{Id.}

\textsuperscript{43} \textit{See, e.g., RESTATEMENT (SECOND) OF TORTS § 552 (1965). See also James & Gray, Part I, supra note 28, at 309 n.15.}

\textsuperscript{44} \textit{But cf. Home Mutual Ins. Co. v. Broadway Bank & Trust Co., 53 N.Y.2d 568, 428 N.E.2d 842, 444 N.Y.S.2d 436 (1981). (When a defendant is not required to speak, but speaks for its own protection, an existing business relationship does not create a duty to speak with care and no cause of action for negligent misrepresentation arises.). But see Survey of New York Practice, 56 ST. JOHN'S L. REV. 371 (1982). The Survey approves the Court of Appeals' support of the legislative policy to promote premium finance agencies by limiting their liability to the amount of the premiums, \textit{id.} at 414, but finds a statutory duty to speak with care under the New York Banking Law. \textit{Id.} at 416 n.205.}

\textsuperscript{45} \textit{E.g., Virginia Dare Stores, Inc. v. Schuman, 175 Md. 287, 1 A.2d 897 (1938) (plaintiff injured when he relied on his employer's statement that glass case would support him); Holt v. Kolker, 189 Md. 636, 57 A.2d 287 (1948) (plaintiff fell through porch relying on plumber's statement that it would support her; recovery denied because plumber not under any duty to plaintiff, who had no right to rely on a casual expression of opinion); Piper v. Jenkins, 207 Md. 308, 313, 113 A.2d 919, 921 (1955) (no recovery for misrepresentations concerning sale of land; dicta inferred that the cause of action for negligent misrepresentation was limited to cases where personal injury results).}

\textsuperscript{46} \textit{See Note, supra note 25, at 668-70.}

\textsuperscript{47} 230 Md. 548, 187 A.2d 880 (1963).
when his stockbroker negligently and incorrectly advised him concerning a stock purchase. In *Brack*, the plaintiff consulted the stockbroker in his professional capacity and had a reason to anticipate his careful, competent advice. Another case authorizing recovery for pecuniary loss, *St. Paul at Chase v. Manufacturers’ Life Insurance*, allowed a client to recover for losses he sustained by relying on a mortgage broker. The trial court held the mortgage broker to “the degree of care one would expect of the particular person involved, whether he is a doctor, or a lawyer, or a real estate broker or specialist.” Most recently, in *Local 75, United Furniture Workers of America v. Regiec*, the Court of Special Appeals concluded that because a labor union had “chosen to establish procedures whereby inquiry was invited and answers given with the clear knowledge that such advice would be acted upon to sway the conduct of the inquirer,” the plaintiff could recover in negligence by proving that he depended on his union for that information.

In all of these cases, the special relationship between the parties justified the plaintiffs’ reliance on the truth of the defendants’ statements. In *Brack* and *St. Paul*, the plaintiffs sought the services of the defendants as professionals. These defendants typically performed such services for compensation, and because of their occupations, represented that they were qualified to perform them accurately. *Regiec* also fits into this category because Regiec relied on the union to provide correct facts about his insurance coverage. The union routinely gave information regarding its members’ insurance benefits to hospitals that would telephone it when union members were admitted.

*Martens Chevrolet* differs from the previous Maryland cases allowing recovery for financial loss in negligent misrepresentation. No special relationship exists between the parties in *Martens Chevrolet* to justify the buyer’s reliance on the seller’s representations. The seller is not selling information; any information he provides the buyer is merely incidental to the underlying sale of something else. Because they are buyer and seller in a commercial situation, the parties in *Martens Chevrolet* are in an adversarial relationship. In an adversarial business deal, the buyer cannot expect that the seller has taken care to state each fact correctly for the buyer’s benefit. But the buyer does ex-

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48. Id. at 554, 187 A.2d at 883.
49. 262 Md. 192, 278 A.2d 12 (1971).
50. Id. at 219, 278 A.2d at 26.
52. Id. at 413, 311 A.2d at 460.
53. Id. at 408-09, 311 A.2d at 457-58.
pect, and the law requires, that the seller act and speak honestly. Parties in commercial deals have always owed each other a "duty" of honesty and good faith, and the law provides the buyer with other means to insure the seller's honesty. If the seller knowingly or recklessly supplies false information, the buyer's remedy is in deceit. If the buyer wants to insure accuracy in addition to honesty, he can demand that the seller warrant or promise that his statement is true. Unlike the special relationship cases, the buyer has not engaged the seller to provide him with careful and accurate facts. Therefore, he cannot expect the seller to make sure that every fact he states is correct, and he has no basis for holding the seller liable on a negligence theory for an honest, unintentionally false statement.

CONSEQUENCES OF Martens CHEVROLET

At first glance, the consequences of extending the tort of negligent misrepresentation to arm's-length commercial parties who are not selling information might appear to be beneficial. The possibility of a negligence action for inaccurate statements probably would encourage sellers to be careful that what they said was actually true. During negotiations, the buyer would be entitled to rely on the truth of the seller's statements, or to recover damages. Additionally, a buyer's ability to sue in negligence would alleviate two difficulties in proving deceit: first, proving that the seller knew or should have known his statement was false, and second, satisfying the stricter clear and convincing evidence standard of proof.

Despite these policy considerations, an action in negligent misrepresentation for financial loss should be limited to those special relationships in which the plaintiff asks the defendant to provide accurate information, or the relationship requires him to do so. First, an additional buyer's remedy in negligent misrepresentation serves only to complicate commercial transactions and to superimpose negligence concepts upon an area where they do not belong. When information provided by the seller relates only incidentally to the subject matter of the parties' deal, placing the responsibility of using care to give correct information on the seller fundamentally alters the relationship's arm's-length, adversarial character. If the buyer intends to rely on the truth of the seller's statement, the buyer should investigate the facts himself. This encourages both parties to be diligent in investigating the sub-

54. See RESTATEMENT (SECOND) OF TORTS § 552 comment a.
stance of the transaction. When the underlying sale is of information, however, the buyer cannot investigate the truth of the seller's statements and must rely upon the seller's accuracy.

Before Martens Chevrolet, if the buyer of a business wanted to make certain that facts orally represented by the seller were true, he demanded a warranty or verified the facts himself. Whether the seller would give certain warranties and which ones he would give are bargaining points in negotiations. Under Martens Chevrolet, the commercial seller must use care to provide accurate facts even when he has not agreed to give a warranty.

Imposing this duty of accuracy in oral statements does not necessarily improve the flow of commercial information during negotiations. Sellers will not be as free to bargain during negotiations because they must use caution to make sure everything they say is correct, even when they do not know upon which representations the buyer will rely. Before Martens Chevrolet, on the other hand, a buyer's demand for a warranty would put the seller on notice that certain facts were important to the buyer. The seller then could exercise care to make sure those facts were true. Thus, the seller's duties and responsibilities were more clearly defined.

Second, the Martens Chevrolet opinion leaves unanswered many of the practical problems courts and parties will face in applying and proving negligent misrepresentation in the context of commercial deals that do not involve the sale of information. Courts must determine the standard of care for a reasonable seller. In personal injury cases, the jury decides whether or not the defendant behaved as a reasonable man under the circumstances. Expert testimony establishes the standard of care for professionals. In both instances, the expected standard of care is the measure for negligence. No community standard exists to assess the conduct of a reasonable commercial seller because buyers have never expected more than honesty and good faith, absent a seller's express agreement to warrant more.

Several elements of the tort itself complicate proof of negligent misrepresentation in a commercial context like the one in Martens Chevrolet. First, the buyer must prove that the seller owed him "a duty

56. W. Prosser, supra note 28, § 37, at 207.
57. Id. § 32, at 161-66.
of care." Unlike a situation where one person is paying another to give him information, the buyer-seller relationship does not impose a legal obligation upon the seller to use care to be accurate for the buyer's benefit. Because they are adversaries, the buyer and seller act to benefit themselves, not each other. Occasionally, courts will find a duty of care in a complex transaction requiring one party to rely upon the superior knowledge of the other, but *Martens Chevrolet* did not present this kind of situation.

Second, the buyer must justifiably take action in reliance on the seller's statement. A buyer may have difficulty proving why he felt justified in relying on the truth of his opponent's statement, yet neglected to obtain any written promise from him. Although an accountant or any other seller of information has no motive to give his client false information, and every reason to perform as competently as he can, the same is not always true of a seller who wants to make a profitable deal. Third, because negligent misrepresentation is a negligence action, the buyer must be prepared to meet the seller's defense of contributory negligence. Although the buyer has no reason to expect that his adversary would use care to speak accurately, the seller may have a good argument that the buyer was contributorily negligent for failing to use care to ascertain the truth. After all, the buyer is making the investment, and the seller could reasonably expect the buyer to carefully investigate representations related to the sale.

Finally, expanding negligent misrepresentation to commercial deals like the one in *Martens Chevrolet* may affect certain contract rules

---

59. 292 Md. at 337, 439 A.2d at 539. In *Martens Chevrolet*, the court outlined the principal elements of the tort of negligent misrepresentation:

1. the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
2. the defendant intends that his statement will be acted upon by the plaintiff;
3. the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
4. the plaintiff, justifiably, takes action in reliance on the statement; and
5. the plaintiff suffers damage proximately caused by the defendant's negligence.

*Id.*


61. *See*, e.g., Littau v. Midwest Commodities, 316 N.W.2d 639, 644 (S.D. 1982) (citing cases).


63. 292 Md. at 337, 439 A.2d at 539.

that govern the admission of evidence outside the parties’ written agreement. When the parties have reduced their agreement to a contract, evidence of prior understandings or negotiations will not be admitted to vary or to contradict the terms of their agreement.\textsuperscript{65} No parol evidence problem exists to bar proof of negligent misrepresentation when, as in \textit{Martens Chevrolet}, the representation does not conflict with express contract terms.\textsuperscript{66} The Court of Appeals, however, has since reserved the question of whether a plaintiff could recover in negligent misrepresentation when the alleged representation directly conflicts with an express term of the contract.\textsuperscript{67}

In \textit{Martens Chevrolet}, the court did rule on the effect of an integration or merger clause, which provided that the contract superseded or integrated all prior oral or written agreements and understandings. The court found that the clause would not shield the defendants from liability for any breach of duty in a negligent misrepresentation action.\textsuperscript{68} To support its conclusion, however, the court relied on cases involving actual fraud, not negligence.\textsuperscript{69} Integration or merger clauses do not bar proof of fraud in inducing a contract.\textsuperscript{70} Because the court failed to reconcile, for the purpose of disregarding an integration clause, the distinction between fraud and negligence, the law on this point remains unclear. Prior cases suggest that the court will examine the facts of each case in negligent misrepresentation actions before admitting oral evidence to prove the parties’ intent despite the presence of


\textsuperscript{66} 294 Md. at 119, 448 A.2d at 338.

\textsuperscript{67} \textit{Id.} at 119 n.13, 448 A.2d at 338 n.13.

\textsuperscript{68} 292 Md. at 338 n.7, 439 A.2d at 540 n.7.

\textsuperscript{69} \textit{Id.} The Court of Appeals in \textit{Martens Chevrolet} stated that its position was in accord with that taken by the New York Court of Appeals in Jackson v. State, 241 N.Y. 563, 150 N.E. 556 (1925), adopting the opinion of Hubbs, J., in Jackson v. State, 210 App. Div. 115, 119, 205 N.Y.S. 658, 661 (1924). In \textit{Jackson}, the court stated:

A party to a contract cannot, by misrepresentation of a material fact, induce the other party to the contract to enter into it to his damage and then protect himself from the legal effect of such misrepresentation by inserting in the contract a clause to the effect that he is not to be held liable for the misrepresentation which induced the other party to enter into the contract.

\textit{Id.} The problem with the Maryland Court of Appeals’ adoption of the position in \textit{Jackson v. State} is that \textit{Jackson} involved fraudulent, not negligent, misrepresentation. In \textit{Jackson}, state plans, which were the basis of a contract, failed to disclose all the facts to the excavators and indicated that the soil was soft when the state knew it was not.

\textsuperscript{70} Young v. Frost, 5 Gill 287, 313-14 (Md. 1847); Schmidts v. Miller, 212 Md. 585, 593-94, 130 A.2d 572, 576 (1957); Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 320, 157 N.E.2d 597, 598 (1959).
an integration clause.\textsuperscript{71}

\section*{Conclusion}

\textit{Martens Chevrolet v. Seney} is a product of the existing confusion in Maryland concerning the tort of negligent misrepresentation. The Court of Appeals took a step toward eliminating that confusion by definitively stating that a cause of action for negligent misrepresentation exists apart from an action in deceit. But, in \textit{Martens Chevrolet}, the Court of Appeals expanded the action for negligent misrepresentation to provide the buyer with a new remedy against the seller.

This decision leaves many questions unanswered. Primarily, because the result represents such a departure from prior law, it is unclear whether the Court of Appeals intended to expand the tort of negligent misrepresentation to include this kind of commercial transaction. If the court did mean to extend the tort to a buyer-seller situation in which the sale is not of information, some guidelines for trial courts and potential parties are needed.

The law of negligent misrepresentation could take several possible future directions. If the court wanted to limit the tort to situations in which the defendant was selling information, or the parties' relationship otherwise required the defendant to speak with care, the court should retreat from its holding in \textit{Martens Chevrolet} to the traditional plaintiff's remedies of deceit and breach of warranty. Alternatively, the court could follow other jurisdictions that hold a seller liable on the theory that he is presumed to know the truth of his statements, even if he made them in good faith.\textsuperscript{72}

\textit{Martens Chevrolet} provides commercial buyers and sellers with a negligence remedy that lies somewhere between fraud, with its scienter requirement, and strict liability.\textsuperscript{73} Meanwhile, until the court acts fur-


\textsuperscript{72} These jurisdictions hold a person liable for fraud by dispensing with the traditional scienter requirement. The defendant is presumed to know the truth of his words. If his statement is indeed false, the defendant is liable and it is no defense that he believed it to be true. See, e.g., Bostic v. Amoco Oil Co., 553 F.2d 329, 336-37 (4th Cir. 1977); Aldrich v. Scribner, 154 Mich. 23, 117 N.W. 581, 583 (1908); Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 405, 18 N.E. 168, 169 (1888); Becker v. McKinnie, 106 Kan. 426, 427, 186 P. 496, 496 (1920); Jacquot v. Farmers' Straw Gas Producer Co., 140 Wash. 482, 487-88, 249 P. 984, 986-87 (1926). See also Williston, Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415, 427-40 (1911).

\textsuperscript{73} Liability on a warranty theory has nearly the same effect as abandoning or manipulating the scienter requirement; the defendant is held to warrant the truth of his statements. E.g., Iler v. Jennings, 87 S.C. 87, 91, 68 S.E. 1041, 1042-43 (1910).
ther, under *Martens Chevrolet*, parties to commercial transactions must take care to speak not only honestly, but accurately as well.

such as that relating to the sale of goods in the Uniform Commercial Code. *See* U.C.C. § 2-313 comment 8 (1981).
THE WORK OF THE COURT OF APPEALS: A STATISTICAL MISCELLANY*

September 1981 Term

<table>
<thead>
<tr>
<th>TABLE I:</th>
<th>Source of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>Procedural Source</td>
</tr>
<tr>
<td>B.</td>
<td>County of Origin</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>TABLE II:</th>
<th>Action of Judges</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>TABLE III:</th>
<th>The Court of Special Appeals in The Court of Appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>Opinions of The Court of Special Appeals</td>
</tr>
<tr>
<td>B.</td>
<td>Reported Opinions of The Court of Special Appeals</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>TABLE IV:</th>
<th>Frequency of Separate Opinions</th>
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<table>
<thead>
<tr>
<th>TABLE V:</th>
<th>Judicial Persuasiveness</th>
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</table>

<table>
<thead>
<tr>
<th>TABLE VI:</th>
<th>Voting Alignment</th>
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<tbody>
<tr>
<td>A.</td>
<td>All Cases</td>
</tr>
<tr>
<td>B.</td>
<td>Most Aligned—Least Aligned</td>
</tr>
<tr>
<td>C.</td>
<td>Swing Votes</td>
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</table>

<table>
<thead>
<tr>
<th>TABLE VII:</th>
<th>Primary Subject Matter of Opinions</th>
</tr>
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</table>


1. Throughout these tables, the data include all published opinions of the Court of Appeals of Maryland decided between September 1, 1981 and August 31, 1982, inclusive. These tables, unlike some previous tables, include per curiam opinions and orders (excluding voluntary dismissals and writs of certiorari dismissed as improvidently granted). Separately captioned cases consolidated and disposed of by the court in a single decision are treated as separate cases in tables IA, IB, and III. All other tables treat such a decision as a single case.
### TABLE I
**SOURCE OF CASES**

#### A. PROCEDURAL SOURCE

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<thead>
<tr>
<th></th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
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<td><strong>WRIT OF CERTIORARI</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>To the Court of Special Appeals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Decided in the Court of Special Appeals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reported</td>
<td>37</td>
<td></td>
</tr>
<tr>
<td>Unreported</td>
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</tr>
<tr>
<td>Total</td>
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<tr>
<td>Expedited to the Court of Appeals</td>
<td>69</td>
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</tr>
<tr>
<td>To Circuit Courts</td>
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<td>3.4</td>
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<td><strong>DIRECT APPEALS FROM CIRCUIT COURT</strong></td>
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<td>0.6</td>
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<tr>
<td><strong>CERTIFIED QUESTIONS FROM FEDERAL COURT</strong></td>
<td>2</td>
<td>1.1</td>
</tr>
<tr>
<td><strong>PROFESSIONAL SUPERVISION</strong></td>
<td>21</td>
<td>11.9</td>
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<tr>
<td></td>
<td>177</td>
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#### B. COUNTY OF ORIGIN

<table>
<thead>
<tr>
<th>COUNTY</th>
<th>NO. OF CASES</th>
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<th>PCT. OF CASES</th>
<th>PCT. OF POPULATION</th>
</tr>
</thead>
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<td>1.3</td>
<td>1.9</td>
</tr>
<tr>
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<td>15</td>
<td>370,775</td>
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<tr>
<td>Baltimore</td>
<td>13</td>
<td>655,615</td>
<td>8.4</td>
<td>15.5</td>
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<td>Calvert</td>
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<td>34,638</td>
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</tr>
<tr>
<td>Caroline</td>
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<td>Carroll</td>
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<td>60,430</td>
<td>1.3</td>
<td>1.4</td>
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3. The only direct appeal from a circuit court was the mandatory review of the death sentence in Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982).

4. Slight discrepancies in total percentages in this and subsequent tables are caused by rounding.

5. Each separately captioned case below is counted twice. See supra note 1.

<table>
<thead>
<tr>
<th>COUNTY</th>
<th>NO. OF CASES</th>
<th>POPULATION</th>
<th>PCT. OF CASES</th>
<th>PCT. OF POPULATION</th>
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<tr>
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<td><strong>4,216,446</strong></td>
<td><strong>99.5</strong></td>
<td><strong>99.8</strong></td>
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**TABLE II**

THE COURT OF SPECIAL APPEALS IN THE COURT OF APPEALS

A. OPINIONS OF THE COURT OF SPECIAL APPEALS

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<thead>
<tr>
<th></th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
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<tr>
<td>Unreported</td>
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<tr>
<td>Affirmed</td>
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<tr>
<td>Reversed</td>
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<td>Total</td>
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</table>

|               |        |            |
| Reported      |        |            |
| Affirmed      | 13     | 37.1       |
| Reversed      | 22     | 62.9       |
| Total         | 35     | 100.0      |

|               |        |            |
| Total         |        |            |
| Affirmed      | 24     | 31.6       |
| Reversed      | 52     | 68.4       |
| Total         | 76     | 100.0      |

7. Not included in the total are twenty-one professional supervision cases and two questions certified to the Court of Appeals by the United States District Court for the District of Maryland.

8. 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 also includes decisions that were "modified," "vacated," or "remanded" either wholly or in part.
B. REPORTED OPINIONS OF THE COURT OF SPECIAL APPEALS

<table>
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<th></th>
<th>Majority</th>
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<th>Concurrence</th>
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<th>Dissent</th>
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<td>Authored</td>
<td>Joined</td>
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<tr>
<td></td>
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<td>Rev'd</td>
<td>Aff'd</td>
<td>Rev'd</td>
<td>Aff'd</td>
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<tr>
<td>GILBERT</td>
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<td>4</td>
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<td>4</td>
<td></td>
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<tr>
<td>LISS</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>3</td>
<td></td>
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<tr>
<td>LOWE</td>
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<td>4</td>
<td>2</td>
<td>3</td>
<td></td>
</tr>
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<td>MACDANIEL</td>
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<td>1</td>
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<td></td>
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<tr>
<td>MASON</td>
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<td></td>
<td></td>
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<tr>
<td>MELVIN</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>MOORE</td>
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<td>3</td>
<td></td>
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<td>MORTON</td>
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<td>1</td>
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<td>THOMPSON</td>
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<tr>
<td>WILNER</td>
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<td>WEANT</td>
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<td>5</td>
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<tr>
<td>Specially</td>
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<tr>
<td>Assigned</td>
<td></td>
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<tr>
<td><strong>Total</strong></td>
<td>13</td>
<td>22</td>
<td>28</td>
<td>44</td>
<td></td>
</tr>
</tbody>
</table>

"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 serve as rough indicators of possible trends or problems.

9. 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.

10. Total of reported and unreported opinions in Table II do not include cases in which the Court of Appeals dismissed the writ of certiorari as improvidently granted.
### TABLE III

**ACTION OF JUDGES**

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<th>Opinion Authored</th>
<th>Joined</th>
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<th>Concurrence</th>
<th>Dissent $^{13}$</th>
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<td></td>
</tr>
<tr>
<td>Couch $^{14}$</td>
<td>6 (4.1)</td>
<td>1</td>
<td>21</td>
<td>0</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Davidson</td>
<td>20 (13.5)</td>
<td>11</td>
<td>127</td>
<td>2</td>
<td>7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Digges $^{15}$</td>
<td>12 (8.1)</td>
<td>3</td>
<td>111</td>
<td>0</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eldridge</td>
<td>23 (15.5)</td>
<td>6</td>
<td>128</td>
<td>1</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murphy</td>
<td>16 (10.8)</td>
<td>5</td>
<td>124</td>
<td>0</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rodowsky</td>
<td>24 (16.2)</td>
<td>1</td>
<td>141</td>
<td>0</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Smith</td>
<td>30 (20.3)</td>
<td>9</td>
<td>126</td>
<td>0</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Specialy Assigned $^{15}$</td>
<td>0 (0.0)</td>
<td>0</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Per Curiam $^{16}$</td>
<td>22</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total $^{17}$</td>
<td>170 (100.0)</td>
<td>5</td>
<td>45</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

11. 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 nonetheless as a concurrence or dissent.

12. The parenthetical figures in this column are the percentages of signed opinions of the court authored by each judge.

13. 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.

14. Associate Judge James F. Couch, Jr., was sworn in on March 1, 1982.

15. Associate Judge J. Dudley Digges retired on January 7, 1982, but participated in the decision and adoption of the opinions in which he participated in the hearing and conference (pursuant to Article IV, Section 3A, of Maryland’s Constitution), and was specially assigned to participate in the decision of twelve cases. These cases are included under “Digges,” not “Specially Assigned.”

See Tributes to Judge J. Dudley Digges, 41 Md. L. Rev. 384 (1982).

16. “Per Curiam” includes opinions and orders published without a signed opinion. Dismissals of writs of certiorari as improvidently granted, and voluntary dismissals are not included.

17. See supra note 1.


**TABLE IV**

**FREQUENCY OF SEPARATE OPINIONS**

<table>
<thead>
<tr>
<th>The Court Number</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>UNANIMOUS OPINIONS</strong></td>
<td>120</td>
<td>70.6</td>
</tr>
<tr>
<td><strong>DECISIONS WITH CONCURRING OPINIONS</strong></td>
<td>5</td>
<td>2.9</td>
</tr>
<tr>
<td><strong>DECISIONS WITH DISSENTING OPINIONS</strong></td>
<td>44</td>
<td>25.9</td>
</tr>
<tr>
<td><strong>DECISIONS WITH BOTH CONCURRING OPINIONS AND DISSENTING OPINIONS</strong></td>
<td>1</td>
<td>0.6</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>170</td>
<td>100.0</td>
</tr>
</tbody>
</table>

---

**TABLE V**

**JUDICIAL PERSUASIVENESS**

<table>
<thead>
<tr>
<th>Author of the Opinion of the Court</th>
<th>Unanimous Opinion</th>
<th>Opinions with Concurrences</th>
<th>Opinions with Dissents</th>
<th>Opinions with Both</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>COLE</strong></td>
<td>10 (58.8)</td>
<td>1 (5.9)</td>
<td>6 (35.3)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td><strong>COUCH</strong></td>
<td>4 (66.7)</td>
<td>0 (0.0)</td>
<td>2 (33.3)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td><strong>DAVIDSON</strong></td>
<td>15 (75.0)</td>
<td>0 (0.0)</td>
<td>4 (20.0)</td>
<td>1 (5.0)</td>
</tr>
<tr>
<td><strong>DIGGES</strong></td>
<td>7 (58.3)</td>
<td>1 (8.3)</td>
<td>4 (33.3)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td><strong>ELDRIDGE</strong></td>
<td>16 (69.6)</td>
<td>2 (8.7)</td>
<td>5 (21.7)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td><strong>MURPHY</strong></td>
<td>11 (68.8)</td>
<td>0 (0.0)</td>
<td>5 (31.3)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td><strong>RODOWSKY</strong></td>
<td>17 (70.8)</td>
<td>1 (4.2)</td>
<td>6 (25.0)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td><strong>SMITH</strong></td>
<td>23 (76.7)</td>
<td>0 (0.0)</td>
<td>7 (23.3)</td>
<td>0 (0.0)</td>
</tr>
</tbody>
</table>

18. Cases consolidated on appeal, in which the court issued a single opinion disposing of more than one case, are treated as a single opinions 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.

19. Per curiam opinions are not included in this table.
TABLE VI
VOTING ALIGNMENT
(Figures are Percentage)

A. ALL CASES

<table>
<thead>
<tr>
<th></th>
<th>COUCH</th>
<th>DAVIDSON</th>
<th>DIGGES</th>
<th>ELDRIDGE</th>
<th>MURPHY</th>
<th>RODOWSKY</th>
<th>SMITH</th>
<th>SPECIALLY</th>
<th>ASSIGNED</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>M</td>
<td>92.6</td>
<td>79.6</td>
<td>83.2</td>
<td>83.0</td>
<td>82.8</td>
<td>88.2</td>
<td>83.3</td>
<td>100.0</td>
</tr>
<tr>
<td></td>
<td>S</td>
<td>4.8</td>
<td>0.0</td>
<td>3.6</td>
<td>0.7</td>
<td>0.0</td>
<td>0.0</td>
<td>0.6</td>
<td>0.0</td>
</tr>
<tr>
<td></td>
<td>R</td>
<td>0.0</td>
<td>1.2</td>
<td>0.0</td>
<td>2.4</td>
<td>1.3</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td></td>
<td>D</td>
<td>7.4</td>
<td>13.2</td>
<td>16.8</td>
<td>10.9</td>
<td>15.2</td>
<td>11.8</td>
<td>16.1</td>
<td>0.0</td>
</tr>
</tbody>
</table>

|    | COUCH | M     | 83.3   | 96.0     | 96.0   | 100.0   | 100.0 | 100.0     | 0.0      |
|    | S     | 0.0   | -      | 0.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | R     | 0.0   | -      | 0.0      | 4.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | D     | 16.7  | -      | 4.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |

|    | DAVIDSON | M     | 80.8   | 83.2     | 78.1   | 82.6    | 80.6  | 0.0       | 0.0      |
|    | S     | 1.5   | 7.8    | 0.7      | 0.0    | 0.6     | 0.0   | 0.0       | 0.0      |
|    | R     | 3.1   | 0.6    | 2.6      | 1.2    | 1.2     | 0.0   | 0.0       | 0.0      |
|    | D     | 14.6  | 8.4    | 18.5     | 16.2   | 17.6    | 0.0   | 0.0       | 0.0      |

|    | DIGGES | M     | 82.7   | 86.2     | 91.5   | 89.2    | 0.0   | 0.0       | 0.0      |
|    | S     | 0.8   | 0.9    | 0.8      | 0.4    | 4.6     | 0.0   | 0.0       | 0.0      |
|    | R     | 2.4   | 1.8    | 0.0      | 0.8    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | D     | 14.2  | 11.0   | 7.7      | 5.4    | 0.0     | 0.0   | 0.0       | 0.0      |

|    | ELDRIDGE | M     | 83.8   | 89.0     | 83.4   | 0.0     | 0.0   | 0.0       | 0.0      |
|    | S     | 0.7   | 0.0    | 0.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | R     | 3.4   | 1.8    | 1.8      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | D     | 12.2  | 9.2    | 14.7     | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |

|    | MURPHY | M     | 92.7   | 86.6     | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | S     | 2.0   | 2.0    | 0.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | R     | 1.3   | 2.0    | 0.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | D     | 4.0   | 9.4    | 0.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |

|    | RODOWSKY | M     | 100.0  | 0.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | S     | 0.0   | 0.0    | 0.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | R     | 0.0   | 0.0    | 0.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |
|    | D     | 0.0   | 0.0    | 0.0      | 0.0    | 0.0     | 0.0   | 0.0       | 0.0      |

20. Key: M — The two judges joined in the majority opinion. One may have authored it.
          S — The two judges joined in a separate opinion, either a concurrence or a dissent. One may have authored it.
          R — The two judges joined in the result, but in different opinions.
          D — The two judges disagreed in the result.

"M" and "S" replace "J" — two judges joining in the same opinion — a symbol found in earlier tables.

This table includes all cases, both those with signed opinions of the court and per curiam opinions and orders (except voluntary dismissals and writs of certiorari dismissed as improvidently granted). Percentages vary not only because of agreement and disagreement between the judges, but also because of the number of cases each judge heard. For example, Chief Judge Murphy was not involved in the argument and decision of nineteen cases, while Associate Judge Rodowsky missed only one case.
### TABLE VI (continued)

#### B. MOST ALIGNED — LEAST ALIGNED\(^{21}\)

<table>
<thead>
<tr>
<th>MOST ALIGNED</th>
<th>M/S/R</th>
<th>D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rodowsky/Murphy</td>
<td>96.0</td>
<td>4.0</td>
</tr>
<tr>
<td>Digges/Smith</td>
<td>94.6</td>
<td>5.4</td>
</tr>
<tr>
<td>Rodowsky/Digges</td>
<td>92.3</td>
<td>7.7</td>
</tr>
<tr>
<td>Eldridge/Davidson</td>
<td>91.6</td>
<td>8.4</td>
</tr>
<tr>
<td>Eldridge/Rodowsky</td>
<td>90.8</td>
<td>9.2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>LEAST ALIGNED</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Davidson/Murphy</td>
<td>81.4</td>
<td>18.5</td>
</tr>
<tr>
<td>Davidson/Smith</td>
<td>82.4</td>
<td>17.6</td>
</tr>
<tr>
<td>Cole/Digges</td>
<td>83.2</td>
<td>16.8</td>
</tr>
<tr>
<td>Davidson/Rodowsky</td>
<td>83.8</td>
<td>16.2</td>
</tr>
<tr>
<td>Cole/Smith</td>
<td>83.9</td>
<td>16.1</td>
</tr>
</tbody>
</table>

#### C. SWING VOTES

<table>
<thead>
<tr>
<th>NUMBER OF SWING VOTES(^{22})</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Rodowsky</td>
<td>10</td>
</tr>
<tr>
<td>Murphy</td>
<td>9</td>
</tr>
<tr>
<td>Digges</td>
<td>9</td>
</tr>
<tr>
<td>Cole</td>
<td>9</td>
</tr>
<tr>
<td>Smith</td>
<td>7</td>
</tr>
<tr>
<td>Eldridge</td>
<td>7</td>
</tr>
<tr>
<td>Davidson</td>
<td>5</td>
</tr>
<tr>
<td>Couch</td>
<td>0</td>
</tr>
<tr>
<td>Specially Assigned</td>
<td>0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VOTING COMBINATIONS IN SWING VOTE OPINIONS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Murphy, Smith, Digges, Rodowsky</td>
<td>5</td>
</tr>
<tr>
<td>Digges, Eldridge, Cole, Davidson</td>
<td>3</td>
</tr>
<tr>
<td>Murphy, Eldridge, Cole, Rodowsky</td>
<td>2</td>
</tr>
<tr>
<td>Murphy, Smith, Cole, Rodowsky</td>
<td>1</td>
</tr>
<tr>
<td>Eldridge, Cole, Davidson, Rodowsky</td>
<td>1</td>
</tr>
<tr>
<td>Murphy, Eldridge, Cole, Davidson</td>
<td>1</td>
</tr>
<tr>
<td>Smith, Digges, Cole, Rodowsky</td>
<td>1</td>
</tr>
</tbody>
</table>

---

21. Figures used in this table are from Table VI.A. The "Most Aligned" table presents the five most aligned pairs of judges; the pairs are arranged in descending order according to the combined "M," "S," and "R" percentages. Conversely, the "Least Aligned" table presents the five least aligned pairs.

Judge Couch is not included in this table because of the small number of cases in which he was involved.

22. A "swing vote" is cast by each judge in the majority in a 4-3 case.
## TABLE VII
### PRIMARY SUBJECT MATTER OF OPINIONS

<table>
<thead>
<tr>
<th>Category</th>
<th>Subject</th>
<th>Number of Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Public Law</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Criminal</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Constitutional Issues</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>(federal and/or state)</td>
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<tr>
<td></td>
<td>Evidentiary</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>Procedural (non-constitutional)</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Substantive</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Quasi-Criminal</td>
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</tr>
<tr>
<td></td>
<td>Juvenile</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>Probation</td>
<td>3</td>
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</tr>
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<td></td>
<td>Administrative</td>
<td>6</td>
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<td></td>
<td>Constitutional—Maryland</td>
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<td></td>
<td>Municipal Law</td>
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<td>Real Property</td>
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<td>Eminent Domain</td>
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<td></td>
<td>Taxation</td>
<td>4</td>
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<tr>
<td></td>
<td>Zoning</td>
<td>3</td>
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<td></td>
<td>Sunshine Law</td>
<td>2</td>
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<tr>
<td></td>
<td>Taxation</td>
<td>1</td>
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<td></td>
<td>Other</td>
<td>4</td>
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</table>

<table>
<thead>
<tr>
<th>Category</th>
<th>Subject</th>
<th>Number of Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>B. Private Law</strong></td>
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<td></td>
<td>Procedural</td>
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</tr>
<tr>
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<td>Appellate</td>
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<tr>
<td></td>
<td>Pre-Trial and Trial</td>
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</tr>
<tr>
<td></td>
<td>Substantive</td>
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</tr>
<tr>
<td></td>
<td>Antitrust</td>
<td>1</td>
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<tr>
<td></td>
<td>Constitutional Law</td>
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<td></td>
<td>Contracts</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Corporations</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Custody/Domestic Relations</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Insurance</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Labor (including unemployment and workmen's compensation)</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Property (not including eminent domain and zoning)</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Tort</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Automobile</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Defamation/Privacy</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Wills/Estates/Trusts</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category</th>
<th>Subject</th>
<th>Number of Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>C. Professional Questions</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Reinstatement</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Discipline</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>Admission to Bar</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>166</strong></td>
</tr>
</tbody>
</table>

23. Not listed in this table are four per curiam opinions that did not divulge the primary subject matter of the case.