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## TABLE OF CONTENTS

### I. Civil Procedure

- **A. Scope of Claim for Purposes of Claim Preclusion** ........................................... 742
- **B. Appealability of Nonfinal Judgments** ............................................................. 748
- **C. Statute of Limitations for Architects and Contractors** ...................................... 752

### II. Constitutional Law

- **A. Maryland Constitution** ....................................................................................... 758
  - 1. Requirements for Holding Elected Office .......................................................... 758
  - 2. Legal Mutual Liability Insurance Society of Maryland ......................................... 763
- **B. United States Constitution** .................................................................................. 769
  - 1. First Amendment ..................................................................................................... 769
    - a. Obscenity Standard ............................................................................................ 769
    - b. Zoning Ordinances Restricting Free Speech ................................................... 773
  - 2. State Action ........................................................................................................... 779
    - a. Issuance of Public Rally Permits ........................................................................ 779
    - b. Bail Bondsmen ..................................................................................................... 784
  - 3. Jury Selection ......................................................................................................... 787

### III. Criminal Law

- **A. Constitutional Issues** .......................................................................................... 793
  - 1. Exclusionary Rule .................................................................................................... 793
    - a. Illegal Arrests ....................................................................................................... 793
    - b. Probation Revocation Hearing ............................................................................. 798
  - 2. Exculpatory Evidence ............................................................................................ 802
  - 3. Immunity from Prosecution .................................................................................... 808
  - 4. Right to Counsel .................................................................................................... 813
    - a. Hybrid Representation ....................................................................................... 813
    - b. Effective Assistance of Counsel ......................................................................... 818
    - c. Breathalyzer Tests ............................................................................................... 821
- **B. Sentencing** .......................................................................................................... 825
  - 1. Increased Sentence on Retrial ............................................................................... 825
  - 2. Habitual Offender Statute ....................................................................................... 830
- **C. Procedure** ........................................................................................................... 834
  - 1. Subject Matter Jurisdiction .................................................................................... 834
  - 2. Courtroom Misconduct .......................................................................................... 837
- **D. Elements of Crimes** ............................................................................................ 840

739
IV. Evidence ........................................ 861
   A. Witnesses .................................... 861
      1. Expert Testimony on Psychological Disorders .... 861
      2. Testimony Following Hypnosis ................ 866
   B. Hearsay ...................................... 869
      1. Probation Revocation Hearing ................ 869
      2. Party Opponent Exception .................. 872
   C. Plea Agreements ................................ 876
V. Family Law .................................... 882
   A. Separation Agreements ....................... 882
   B. Alimony ...................................... 886
   C. Child Support .................................. 890
   D. Paternity ..................................... 894
VI. Property ...................................... 899
   A. Zoning ....................................... 899
      1. Interaction of State and Local Regulations ... 899
      2. Defense of Equitable Estoppel ............... 904
   B. Landlord-Tenant ................................ 908
      1. Regulation of Lead-Based Paint Removal ...... 908
      2. Violation of Maryland's Consumer Protection Act .......... 913
      3. Covenant of Quiet Enjoyment .............. 917
   C. Other Developments ............................ 923
      1. Service of Notice of Building Code Violation ... 923
      2. Affirmative Covenants Running at Law ....... 928
VII. State Government and Administration .......... 934
   A. Administrative Agencies ...................... 934
      1. Judicial Review ................................ 934
         a. Exhaustion of Remedies ................... 934
         b. Findings of Fact ......................... 941
      2. Savings and Loan Associations ............. 944
         a. Right to Refund ......................... 944
         b. Pro Rata Distribution .................. 951
      3. Unemployment and Workers' Compensation ...... 957
         a. Employer's Right to Set-Off ............ 957
**TABLE OF CONTENTS**

b. Statutory Employers .......................................................... 961
c. Striking Workers ................................................................. 966

**B. Governmental Functions** .............................................. 971
1. Governmental Immunity ...................................................... 971
   a. Retrospective Application of Immunity Statute ....................... 971
   b. Tort Immunity of Police Officers ...................................... 975
2. Election Law Violations .................................................... 980

**VIII. TAXATION** ................................................................. 986

**A. Condominium Conversion** .............................................. 986
1. Mid-Cycle Reassessment of Property ..................................... 986
2. Transfer Tax ................................................................. 989

**B. Foreign Corporations** .................................................. 993
1. Exemptions for Foreign Sales Corporations .......................... 993
2. Solicitation of Business in Maryland .................................. 998

**IX. TORTS** .................................................................. 1003

**A. Negligence** ................................................................. 1003
1. Duty .............................................................................. 1003
   a. Banks ........................................................................ 1003
   b. Builders, Developers, and Architects .................................. 1007
   c. Property Owners ....................................................... 1012
2. Tortfeasor Releases .......................................................... 1016

**B. Intentional Torts** .......................................................... 1021
1. Tortious Interference with Contract ...................................... 1021
2. Intentional Infliction of Emotional Distress .......................... 1024

**C. Insurance** ................................................................ 1028
1. Household Exclusion Clause .............................................. 1028
2. Uninsured Motorist Coverage ............................................. 1031

**TABLE OF CASES** ............................................................... 1046
I. CIVIL PROCEDURE

A. Scope of Claim for Purposes of Claim Preclusion

In Kent County Board of Education v. Bilbrough the Court of Appeals adopted the "transactional" approach advocated by the Restatement (Second) of Judgments to define a claim within the preclusion context. By doing so, the court expanded existing law under which the courts had determined the scope of a claim by the narrower "same evidence" test. The court's stated purpose in adopting the Restatement view was to assure that the scope of a claim not receive an "improperly narrow" definition.

At issue was the effect of a judgment entered against Bilbrough, a public employee, in a civil rights action in the United States District Court for the District of Maryland. Bilbrough alleged that the newly elected Superintendent of Schools for the Kent County Board of Education had terminated his employment because he had been politically active on behalf of certain Board of Education candi-

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2. Id. at 499, 525 A.2d at 238. See Restatement (Second) of Judgments § 24 (1980). Section 24 addresses the dimensions of a "claim" for the purposes of merger or bar:

   (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

   (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Id. (emphasis added).

3. The "same evidence" test, as its name implies, looked to whether a party would need to use the identical evidence to establish the claims presented in the two suits. See infra notes 19-26 and accompanying text.

4. 309 Md. at 494, 525 A.2d at 236.

5. Id. at 490, 525 A.2d at 234. Bilbrough brought suit jointly with one other plaintiff. There were seven defendants in the case, including the Kent County Board of Education and the Superintendent of Schools. Id.

6. Id. Bilbrough had been employed as manager of maintenance services at the Kent County Board of Education from 1978 to 1981. In the summer of 1981 the Superintendent abolished the position by consolidating its duties with those of another job classification. Id.
The trial court found that the Superintendent based Bilbrough's termination on legitimate business considerations rather than his political activities. On appeal the Fourth Circuit affirmed.

While the Fourth Circuit appeal was pending, Bilbrough filed the instant suit in state court alleging, inter alia, invasion of privacy claims against six of the seven defendants in the federal action. The state circuit court judge granted two of the defendants summary judgment on all counts on the basis of claim preclusion. Bilbrough then obtained a rule 2-602 certification of a final judgment and appealed to the Court of Special Appeals. Bilbrough restricted his argument on appeal to the invasion of privacy claims and the damage claims arising from lost earnings associated with his allegedly wrongful discharge. Although the Court of Special Appeals

7. Id. These candidates had supported the Superintendent's unsuccessful predecessor in the campaign.
8. Id. See infra note 14.
9. 309 Md. at 490, 525 A.2d at 234. The Fourth Circuit opinion is unpublished.
10. Id. at 491, 525 A.2d at 234. Three of the seven counts in the state suit were invasion of privacy claims, two of which alleged improper disclosure of information regarding Bilbrough's criminal history. Id. at 491-92, 525 A.2d at 234-35. Specifically, the first count alleged that two of the defendants obtained Bilbrough's criminal history record from the local police department, made photocopies of it, and provided it to the incoming Superintendent, who in turn passed it on to other Board of Education members. Id. at 491, 525 A.2d at 234. For a discussion of this form of privacy claim, see W. Prosser, D. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS § 17, at 856-59 (5th ed. 1984) [hereinafter PROSSER & KEETON]. See also RESTATEMENT (SECOND) OF TORTS § 652D (1976). The third count contained "false light" privacy allegations related to the characterization of Bilbrough's orders for pens and business cards, the legitimacy of his mileage expense vouchers and use of county gas pumps, and the characterization of his behavior on school grounds. 309 Md. at 492, 525 A.2d at 235. For a discussion of the "false light" form of privacy action, see PROSSER & KEETON, supra, § 117, at 863-65. The Court of Appeals noted that whether any of these privacy counts stated claims upon which relief could be granted was not a question before the court. 309 Md. at 492 nn.1-3, 525 A.2d at 234 n.1, 235 nn.2-3.
11. 309 Md. at 490, 525 A.2d at 234.
12. Md. R. 2-602 provides:
   (a) Generally.—Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action . . . , or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
      (1) is not a final judgment; and
      (2) does not terminate the action as to any of the claims or any of the parties . . . .
   (b) When Allowed.—If the court expressly determines in a written order that there is not just reason for delay, it may direct in the order the entry of a final judgment:
      (1) as to one or more but fewer than all of the claims or parties . . . .
13. 309 Md. at 490-91, 525 A.2d at 234. The opinion of the Court of Special Appeals is unpublished.
held that the damage claims were precluded because the federal court had found no liability for wrongful discharge, it reversed on the privacy claims, finding that they were not precluded.

The Court of Appeals granted certiorari to review the intermediate appellate court's reversal on the privacy claims. The court was particularly interested in the method of analysis that the Court of Special Appeals used in determining that the claims were not precluded by the previous litigation. As the court noted, "[W]e are concerned that sole reliance on the same evidence or required evidence analysis to determine if the same claim is involved in two actions may improperly narrow the scope of a 'claim' in the preclusion context."

Maryland courts previously used the "same evidence" or "required evidence" test to determine whether a second suit duplicated a first for claim preclusion purposes. The line of cases employing this test began in 1940 with *Williams v. Messick*, a minority shareholder's derivative suit. The Court of Appeals held that because the individual shareholder had sued the company on the same grounds in an earlier action, the second action was barred, even though it was a derivative suit that included additional parties.

More than twenty years later the Court of Appeals reiterated

14. *Id.* at 491, 525 A.2d at 234. The federal trial judge expressly found that the Superintendent based Bilbrough's discharge on the business considerations of "greater efficiency and cost savings," a proper basis for a defense verdict in a wrongful discharge case. *Id.* at 490, 525 A.2d at 234.

15. *Id.*

16. *Id.*

17. *Id.* at 493-94, 525 A.2d at 235-36.

18. *Id.* at 494, 525 A.2d at 236.

19. Two other largely outdated methods of determining the scope of a claim or a "cause of action," expressed in terms of definitional theories, are the "same remedial right" theory and the same "substantive" or "primary" right theory. F. James & G. Hazard, *Civil Procedure* § 11.8 (3d ed. 1985). The "same remedial right" theory views a cause of action as one right which might have a number of possible remedies, all of which may be pursued in separate actions, although double recovery would be precluded. See McCaskill, *The Elusive Cause of Action*, 4 U. Chi. L. Rev. 281 (1937); McCaskill, *Actions and Causes of Action*, 34 Yale L.J. 614 (1925). See also C. Clark, *Code Pleading* 132-34 (2d ed. 1947). The same "substantive" or "primary" right theory views a cause of action as a single wrong, or single breach of a primary duty, which would give rise to only one cause of action, although there might be multiple remedies. See J. Pomeroy, *Code Remedies* §§ 346-356, 417 (5th ed. 1929); Schopflocher, *What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?*, 21 Or. L. Rev. 319 (1942).

20. 177 Md. 605, 11 A.2d 472 (1940).

21. *Id.* at 609, 11 A.2d at 474. The shareholder attempted to distinguish the two cases on the basis of his difference in position, the legal theories involved, the addition of other parties, and differences in the nature of the rights and duties asserted. *Id.* at
this approach in *Alvey v. Alvey*. The court noted that the relitigating plaintiff was attempting to use all of the same facts upon which he had relied in an unsuccessful first suit, but was seeking different legal conclusions from those facts. The court held that the second action was barred because "all questions of fact arising in connection with the present transaction . . . [had] been litigated and determined in the first suit, not only as to the matters and claims which were presented in that suit, but also as to all matters that could have been presented but were not." In other words, the same evidence would be required in the second action, and that evidence already had been before the court. The court reaffirmed the "same evidence" test during the course of the next two decades. Thus stood the state of the law until the instant case.

In *Bilbrough* the court first examined the law of claim preclusion in Maryland and found it "to be settled here that a mere change in the legal theory, applied to the same set of facts previously litigated, will not in and of itself avoid claim preclusion." The court further

609-10, 11 A.2d at 474. In addressing the question of claim preclusion, the court noted that the shareholder conceded that exactly the same evidentiary facts would have to be presented and considered if this second contest were carried through. And one of the tests commonly applied to determine whether the issues have been the same in the two suits is whether in both they could be supported by the same evidence.

Id. at 613, 11 A.2d at 475.


23. Id. at 390, 171 A.2d at 94.

24. Id.

25. See MPC, Inc. v. Kenny, 279 Md. 29, 367 A.2d 486 (1977); Mettee v. Boone, 251 Md. 332, 247 A.2d 390 (1968). *Mettee* concerned a summary judgment that had been granted in favor of a building contractor in an action for breach of contract for damages caused by leaking pipes. The court held the judgment barred a second action for negligence, breach of warranty, and fraud that was based on the same facts. 251 Md. at 340-41, 247 A.2d at 395. The court colorfully noted:

> Just as the embittered French Legionnaire who described a camel as a horse designed by a committee knew perfectly well that it was a camel, Mettee should have known that the same facts, having once been used, without success, in pursuit of one conclusion, cannot, under another label, still be used to obtain a different conclusion.

Id. at 341, 247 A.2d at 395. In *MPC* the court cited what was by then the long-standing rule of *Mettee, Alvey*, and *Williams* and engaged once more in "same evidence" analysis. 279 Md. at 33-34, 367 A.2d at 489-90.


27. 309 Md. at 495, 525 A.2d at 236 (citing *Mettee*, 251 Md. 332, 247 A.2d 390, and *Alvey*, 225 Md. 386, 171 A.2d 92).
noted that to construe the scope of a cause of action for claim preclusion purposes as broadly as the scope of permissive joinder of claims effectively would require "mandatory joinder for pleading purposes of all claims which the original plaintiff has against any original defendant."  

As an analytic tool the court set up a continuum of claim preclusion issues. At one end of the continuum lie plaintiffs who, by virtue of modern, liberalized pleading practice, assert no preclusion for a second claim based on the same facts. At the other end of the continuum lie defendants asserting preclusion because the second claim, although based on different facts, could have been joined in the earlier action under modern pleading practice. Between these two extremes exists a substantial grey area representing "the same claim-separate claim conundrum."  

The court examined the approach that the Restatement (Second) of Judgments has taken to this "conundrum": "The present trend is to see a claim in factual terms and to make it coterminous with the transaction . . . . The transaction is the basis of the litigative unit or entity which may not be split."  

The court looked to section 24 of the Restatement for practical guidance as to the application of the transactional approach, finding this method well tailored to modern pleading practice.  

The court then applied transactional analysis to the facts of Bilbrough's two actions. Examining factors such as time, motive, and the "trial unit," the court determined that there were two separate transactions, one involving Bilbrough's discharge and one involving privacy claims grounded in the alleged invasion of police files, ensuing cover-up, and spreading of information in a "false light."  

More noteworthy, however, was the discussion following this portion of the opinion. The court clearly was concerned not with the enforcement of a rule, but rather with the exposition of a method of analysis to be used in future cases presenting the same "conundrum" of claim definition. The court cited specific illustrations from section 24 of the Restatement, as well as a recent federal

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28. Id. at 497, 525 A.2d at 237.
29. Id.
30. RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment a (1980).
31. 309 Md. at 498, 525 A.2d at 237-38. For the text of § 24, see supra note 2.
32. 309 Md. at 499, 525 A.2d at 238.
33. Id. at 500, 525 A.2d at 239.
34. Id. at 502, 525 A.2d at 240. The court examined one particularly relevant example:

A, under a contract of employment with B, is discharged from the job on the
case,\textsuperscript{35} to demonstrate that there must be a sufficient "nexus"\textsuperscript{36} between the different actions under consideration in order for them "to be so interrelated as to constitute one transaction or a connected series [of transactions]."\textsuperscript{37}

The court's adoption of the transactional method for determining the scope of a claim significantly affects existing Maryland law.\textsuperscript{38} The potential scope of a claim is now wider than under the "same evidence" test. It seems likely, however, that Maryland attorneys still must engage in some "same evidence" analysis, because neither the Bilbrough court\textsuperscript{39} nor the Restatement\textsuperscript{40} totally rejects the "same evidence" test. As the Bilbrough court phrased it, the second action will be barred if there is enough "of a nexus between the two actions involved"\textsuperscript{41} to warrant preclusion.

The adoption of the transactional approach is a sensible and predictable step for the court to take. The 1984 reform of the Maryland Rules modernized the State's procedural system along the lines of the federal system, whose courts have applied this analysis for some time.\textsuperscript{42} Thus, the occasion was ripe for Maryland to adopt the transactional approach.

\begin{quote}
\begin{itemize}
\item\textsuperscript{35} United States v. Athlone Indus. Inc., 746 F.2d 977 (3d Cir. 1984) (finding that claims for distributing a hazardous product in commerce and failing to report a defect arise from separate transactions).
\item\textsuperscript{36} 309 Md. at 504, 525 A.2d at 241.
\item\textsuperscript{37} Id. at 503, 525 A.2d at 240.
\item\textsuperscript{38} In one recent case, the Court of Special Appeals determined that using the transactional approach would have produced a different outcome than using the "same evidence" test. See Jack v. Foster Branch Homeowner's Ass'n, 53 Md. App. 325, 334, 452 A.2d 1306, 1311 (1982) (finding that zoning applications for a variance and a modification, waiver, or reduction were essentially the same "transaction," because both sought permission to operate a doctor's office with limited off-street parking).
\item\textsuperscript{39} The court expressed concern regarding the effect of "sole reliance on the same evidence or required evidence analysis" in determining the scope of a claim. 309 Md. at 494, 525 A.2d at 236 (emphasis added).
\item\textsuperscript{40} Restatement (Second) of Judgments § 24 comment b (1980) explains:
\begin{itemize}
\item If there is a substantial overlap [between witnesses or proofs in the second action and those relevant to the first], the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.
\end{itemize}
\item\textsuperscript{41} Id.
\item\textsuperscript{42} In the District of Maryland the first reported case applying the transactional approach was J. Aron & Co. v. Service Transp. Co., 515 F. Supp. 428, 445-46 (D. Md.}
\end{itemize}
\end{quote}
B. Appealability of Nonfinal Judgments

The Court of Appeals held in State Highway Administration v. Kee that a plaintiff’s failure to make proof of service or return of nonservice on one defendant does not necessarily render summary judgment for the other defendant a final judgment that is appealable without a rule 2-602(b) certification. The court based its decision in this case on three findings: (1) the record was facially ambiguous; (2) statements made at oral argument indicated that the trial court had acquired in personam jurisdiction over the defendant foreign corporation; and (3) rule 2-602 reflects a policy against piecemeal appeals.

The case arose as the result of a 1982 motor vehicle accident involving two brothers. The car in which they were traveling failed to negotiate a curve, broke through a guard rail, and plunged down an embankment. One brother died at the scene; the other survived. Kee, the personal representative of the deceased brother’s estate, filed claims for wrongful death, survival, and personal injury against the State Highway Administration (SHA) and Green Acres, Inc. (Green Acres), a foreign corporation with whom the SHA had contracted to repair the guard rail.

The docket entries in the case indicated that the clerk of the court issued a summons for the corporation and returned it to Kee’s counsel for service by mail. The attorney never filed any return indicating whether the summons in fact had been served. Nearly two months after the date on which the validity of service of process would have expired, the clerk received a letter from Kee’s counsel requesting that the summons be reissued. The docket entries

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1981 (carrier’s claim for loss for failure to provide appropriate insurance coverage part of same transaction as action for declaratory judgment of noncoverage of loss).
44. See Md. R. 2-602(a). The text of the rule is set forth at supra note 12.
45. Md. R. 2-602(b).
46. 309 Md. at 530, 525 A.2d at 640.
47. Id. at 529, 525 A.2d at 640.
48. Id. at 531, 525 A.2d at 641. This policy seeks to avoid the additional expense, delays, frustrations, and unnecessary demands on judicial resources that these appeals entail. Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980); Parish v. Maryland & Virginia Milk Producers Ass’n, 250 Md. 24, 242 A.2d 512 (1968), cert. denied, 404 U.S. 940 (1971).
49. 309 Md. at 525, 525 A.2d at 638.
50. Id. According to the complaint, Green Acres was “a Pennsylvania corporation doing business in Maryland.” Id.
51. Md. R. 2-113 specifies that “[a] summons is effective for service only if served within 60 days after the date it is issued. A summons not served within that time shall be dormant, renewable only on written request of the plaintiff.”
showed that this was done and that the reissued summons was sent to the attorney for service. Again, however, the counsel never filed proof of service, nor did any company named Green Acres enter an appearance in the case.\(^{52}\)

The suit proceeded against the SHA, which moved for summary judgment on grounds of sovereign immunity.\(^ {53}\) When the circuit court entered summary judgment in favor of the SHA, Kee appealed the judgment without securing a rule 2-602(b) certification.\(^ {54}\) The Court of Special Appeals, without questioning the appealability of the judgment, reversed and remanded on the merits.\(^ {55}\)

The Court of Appeals, however, after granting certiorari to consider the immunity issues,\(^ {56}\) recognized the threshold jurisdictional question and proceeded to address it sua sponte. The court realized that although the parties had not argued the issue of appealability, the court was obliged to question its own jurisdiction.\(^ {57}\) In reviewing the law of judgments, the court noted that a summary judgment is final and appealable without certification only when it disposes of all claims against all parties over whom the court has acquired in personam jurisdiction.\(^ {58}\) Thus, the question turned on whether the trial court had acquired jurisdiction over Green Acres even though the record did not indicate whether service of process had been perfected.\(^ {59}\)

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52. Neither the majority opinion nor the dissent states this point expressly. This, however, is the only logical inference that supports the thrust of each discussion, particularly as the majority opinion includes excerpts from the oral argument in which Kee's counsel at one point claimed serving "somebody up [in Pennsylvania] named Green Acres." See 309 Md. at 528, 525 A.2d at 639. If any party named Green Acres had entered even a limited appearance in the case, the issue under consideration would not exist. As the court pointed out: "[O]ur holding deals solely with appealability." Id. at 531, 525 A.2d at 641.

53. Id. at 527, 525 A.2d at 639. The State Highway Administration (SHA) based its motion on a portion of the Maryland Tort Claims Act which waives sovereign immunity in certain actions to the extent that the State is covered by liability insurance. See Md. Cts. & Jud. Proc. Code Ann. § 5-403 (Supp. 1987). The SHA argued that the State was immune because it had no liability insurance at the time of the occurrence. Kee's counsel argued, inter alia, that the State had chosen to "self-insure" and thereby had waived its immunity. The Court of Special Appeals addressed these issues in its opinion. Kee v. State Highway Admin., 68 Md. App. 473, 486-90, 513 A.2d 930, 936-38 (1986).

54. 309 Md. at 527, 525 A.2d at 639.

55. 68 Md. App. at 491, 513 A.2d at 939. In fact, nowhere in the intermediate appellate court's opinion is there any reference to another party.

56. 309 Md. at 525, 525 A.2d at 638. For a brief discussion of these issues, see supra note 53.

57. 309 Md. at 528 n.2, 525 A.2d at 639 n.2.

58. Id. at 529, 525 A.2d at 640.

59. Id.
Rule 2-126(g) provides: "Failure to make proof of service does not affect the validity of the service." The court, however, chose not to accept the SHA's argument that the record should be determinative and provide "facial appealability" when no return has been filed. Instead, the court viewed the lack of any return as producing a facial ambiguity "because the Maryland Rules require either proof of service or a return of nonservice." The court then looked to the statements by Kee's counsel at oral argument, interpreting them as indicating that Green Acres indeed had been served. Thus, the court found Kee's appeal premature because the case involved multiple defendants. The summary judgment in favor of the SHA therefore was not a final judgment under rule 2-602.

Judge McAuliffe dissented. He argued that the majority had inferred too much from the attorney's oral statement, which lacked the requisite specificity to satisfy the "substantive and procedural requirements for valid mail service on an out-of-state corporation." More importantly, Judge McAuliffe believed that the docket entries in a case should be controlling for purposes of determining

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60. Md. R. 2-126(g).
61. 309 Md. at 530, 525 A.2d at 640.
62. Id. The court reasoned that the SHA had learned from the record that a summons for Green Acres was issued, and knew from the explicit language of rule 2-126(g) that failure to file proof of service would not affect the validity of service. Id. at 530-31, 525 A.2d at 640.
63. See id. at 528-29, 525 A.2d at 639-40 (excerpts of the exchange between the trial judge and Kee's counsel on this point). The dialogue may appear confusing because the judge's questions went to the issue of appealability, while the attorney's answers were largely directed to issues of misjoinder and misnomer.

THE COURT: Is it clear that you did serve Green Acres?
PLAINTIFF'S ATTORNEY: No, your Honor. That's a problem. We served a corporation in Pennsylvania called Green Acres, but they're a golf course. They're not a contractor.

PLAINTIFF'S ATTORNEY: They've never been—we have not served the Green Acres that we're alleging the argument against.
THE COURT: But you did serve a Green Acres?
PLAINTIFF'S ATTORNEY: We did serve a Green Acres.

Id. (emphasis added).
64. The court pointed out that at oral argument Kee's counsel admitted serving "the corporation identified by name and address in the complaint." Id. at 530, 525 A.2d at 640. The court did not consider relevant the substantive question of whether the Green Acres that was served was the Green Acres that allegedly had contracted with the State. As the court noted: "Whether service on Green Acres of Sharon, Pennsylvania resulted from a misnomer or a misjoinder is not before us and does not affect appealability." Id. at 531, 525 A.2d at 641.
65. Id. at 530, 525 A.2d at 640.
66. Id. at 532, 525 A.2d at 641 (McAuliffe, J., dissenting).
67. Id. at 532-33, 525 A.2d at 641.
which parties are before the court within the meaning of rule 2-602. Failure to accord "dignity to the record" has the undesirable effect of adding more uncertainty to the law of final judgments. 68

The holding in this case is in step with previous decisions interpreting the object of Maryland Rule 2-602 to be the prevention of piecemeal appeals, 69 as with the federal rule after which it was patterned. 70 The new ground that the case breaks is a narrow one, addressing for the first time the role that a return of process plays in determining what is a final and appealable judgment in a multiparty case. In holding that failure to file proof of service will not necessarily defeat the trial court's jurisdiction for purposes of determining the appealability of a judgment, the majority adopted an approach that follows the thrust of prior decisions, which have strenuously protected the policy against piecemeal appeals by mandating strict compliance with the rule 2-602(b) certification requirement. 71

It is noteworthy that the court did not insist upon strict compliance with the rule relating to return of service. 72 The dissent would have found that the court lacked personal jurisdiction over a party until a return of service was filed or the party actually entered an appearance in the case. 73 Under this view, the docket entries would

68. Id. at 533, 525 A.2d at 641-42.

In the instant case the court noted that the potential for a piecemeal appeal existed if the status of Green Acres remained nebulous and the State prevailed on its immunity defense. In that event,

unless [Kee's counsel] completely abandon[s] the action, [the attorney] would have to address the status of Green Acres. [The attorney] might attempt to press the claim against the corporation served, or . . . attempt service on another person, contending that the service previously effected was the result of a mere misnomer . . . . These kinds of issues could give rise to future appeals.


71. See supra notes 48, 69 & 70. For examples of the court's strict compliance requirement, see Lewis, 290 Md. 175, 428 A.2d 454 (ruuling that parties may not circumvent the rule and acquire appellate jurisdiction by consent); Robert v. Robert, 56 Md. App. 317, 467 A.2d 798 (1983) (holding that a determination that there is no just reason for delay will not be acceptable unless explicitly stated).

72. The rule states: "An individual making service of process by delivery or mailing shall file proof of the service with the court promptly and in any event within the time during which the person served must respond to the process." Md. R. 2-126(a) (emphasis added).

73. 309 Md. at 535, 525 A.2d at 643 (McAuliffe, J., dissenting).
be controlling on the jurisdictional question.\textsuperscript{74}

The Court of Appeals has not effected a dramatic change in the law of final judgments. Rather, the court has engaged in some "fine tuning" of the law. The potential effect of the decision, however, must not be underestimated. Given the liberal modern rules of pleading and joinder,\textsuperscript{75} multiple-party litigation is on the rise.\textsuperscript{76} In every case the plaintiff's failure to file proof of service or a return of nonservice on even one of the defendants will render the judgment against all of the others nonfinal and thus nonappealable absent a rule 2-602(b) certification.

The majority noted that this case highlights a problem in the present rules, referring the matter to the Rules Committee for possible changes.\textsuperscript{77} Although the court did not elaborate upon what changes would be desirable, the case may point the way toward requiring a rule 2-602 certification whenever the record does not facially reflect the jurisdictional status of all defendants.

C. Statute of Limitations for Architects and Contractors

In \textit{Hilliard \& Bartko Joint Venture v. Fedco Systems, Inc.}\textsuperscript{78} the Court of Appeals examined the applicability of the "continuation of events" theory to the statute of limitations for contract actions against architects and contractors. Under this theory, when one party performs continuous service for another, the statute of limitations does not commence running until the service is completed.\textsuperscript{79} The court rejected the theory in this instance, holding that the discovery rule determines when a cause of action accrues in such cases. Although this decision concerns the special limitations statute for actions against architects and contractors,\textsuperscript{80} it is consistent with

\textsuperscript{74} Id.

\textsuperscript{75} See, \textit{e.g.}, Md. R. 2-212 (permissive joinder); Md. R. 2-214 (intervention); Md. R. 2-221 (interpleader); Md. R. 2-331 (joinder of additional party for counterclaim and cross-claim); Md. R. 2-332 (third-party practice); Md. R. 2-341 (liberal amendment of pleadings).

\textsuperscript{76} The Maryland circuit courts, for example, presently are laboring under an avalanche of toxic tort litigation in which the defendants in each case often number in the dozens.

\textsuperscript{77} 309 Md. at 532, 525 A.2d at 641. The Process' Parties and Pleadings Subcommittee of the Maryland Rules Committee has since determined that no rules changes are necessary, believing that the factual situation in \textit{Kee} is a rare one. Letter from Alan M. Wilner to the Judges of the Maryland Court of Appeals (Oct. 30, 1987).

\textsuperscript{78} 309 Md. 147, 522 A.2d 961 (1987).

\textsuperscript{79} See \textit{Booth Glass Co. v. Huntingfield Corp.}, 304 Md. 615, 622, 500 A.2d 641, 644 (1985) (finding theory inapplicable to suit for negligent glass installation).

\textsuperscript{80} Md. CTS. \& JUD. PROC. CODE ANN. § 5-108 (1984).
Maryland's adherence to the discovery rule in cases controlled by the general limitations statute.\textsuperscript{81}

The court also considered when the statute of limitations begins to run on a claim for breach of warranty to repair. Consistent with its decision in the recent case of \textit{Antigua Condominium Association v. Melba Investors Atlantic, Inc.},\textsuperscript{82} the court held that the statute does not begin to run until the warrantor learns of the defect and fails to repair within a reasonable time.\textsuperscript{83}

Don Hilliard and John Bartko (H \& B), as joint venturers, employed contractor Gardiner \& Gardiner, Inc. (Gardiner), and architect Fedco Systems, Inc. (Fedco) to build a warehouse and office building. H \& B executed separate contracts with Fedco and Gardiner, each containing an arbitration clause.\textsuperscript{84} Before construction was complete, H \& B discovered numerous leaks in the project. H \& B eventually sued Fedco and Gardiner in the Circuit Court for Prince George's County, and the court ordered that the dispute be submitted to arbitration. Four months later H \& B filed demands for arbitration. Fedco and Gardiner in turn sought to permanently enjoin the arbitration hearings as barred by the statute of limitations. The trial court ruled for Fedco and Gardiner, and the Court of Special Appeals affirmed.\textsuperscript{85} The Court of Appeals granted certiorari to decide whether any H \& B claim could survive the bar of the statute of limitations.

H \& B argued that although H \& B knew of the leaks more than three years before filing for arbitration, the statute of limitations did not begin to run until after Fedco and Gardiner had completed the promised services. Because the contract required Fedco to conduct a final inspection of the project, and because this inspection oc-

\textsuperscript{81} Id. § 5-101.
\textsuperscript{82} 307 Md. 700, 517 A.2d 75 (1986).
\textsuperscript{83} 309 Md. at 164, 522 A.2d at 970.
\textsuperscript{84} Id. at 150-51, 522 A.2d at 963. The contracts provided that all claims between the parties relating to the contracts or the breach thereof would be submitted to arbitration. \textit{Id.} at 155, 522 A.2d at 965. The contracts further provided that any demand for arbitration shall be made within a reasonable time after the claim, dispute, or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations. \textit{Id.} at 151 n.2, 522 A.2d at 966 n.2 (quoting the contract between H \& B and Fedco).
\textsuperscript{85} Id. at 152, 522 A.2d at 964. The opinion of the Court of Special Appeals is unreported. The Court of Appeals provided a chart setting forth the chronology of the facts. \textit{Id.} at 152-54, 522 A.2d at 964-66.
curred within three years of the filing of demands for arbitration, H & B contended that section 5-101 of the Courts and Judicial Proceedings Article did not bar the action.86

In determining that the "continuation of events" theory was inapplicable87 the court ruled that section 5-108,88 rather than section 5-101, provided the appropriate limitation period for actions against architects and contractors.89 Subsection (e) of section 5-108 reads: "A cause of action for an injury described in this section accrues when the injury or damage occurs."90 A strict reading of the statute seems to indicate that the period of limitations runs from the occurrence of an injury, regardless of when the injury is discovered. After an examination of the legislative history, however, the court held that subsection (e) "was not intended to abrogate the discovery rule."91 Moreover, the subsection did not "accommodate further postponing of the time for accrual of an H & B cause of action beyond the time of discovery."92 Thus, any claims against Fedco or Gardiner based on leaks which H & B discovered more than three years before the requests for arbitration were barred.93

Although the Hilliard court rested its decision on section 5-108(e), its refusal to expand the "continuation of events" theory is consistent with previous Court of Appeals' decisions applying section 5-101, the general statute of limitations.94 Maryland has steadfastly permitted use of the theory only in medical malpractice cases,95 despite applications by other states to suits such as architect

87. Before addressing this argument, the court considered a procedural issue raised by Fedco. Fedco claimed that because H & B's original complaint in the circuit court did not set forth any contract claims, and this complaint was incorporated by reference in the demand for arbitration, no contract claims were involved. The court held, however, that this issue was "within the very broad submission of the arbitration clause and is for the arbitrator to decide." 309 Md. at 156, 522 A.2d at 965.
89. 309 Md. at 159, 522 A.2d at 967.
91. 309 Md. at 161, 522 A.2d at 968.
93. 309 Md. at 159, 522 A.2d at 967.
malpractice cases.\textsuperscript{96}

In \textit{Booth Glass Co. v. Huntingfield Corp.}\textsuperscript{97} the Court of Appeals suggested that the "continuation of events" theory may apply to cases other than medical malpractice.\textsuperscript{98} A contractor allegedly was negligent in installing glasswork in a new building. The contractor repeatedly attempted to correct latent window leaks which developed after construction was complete. The \textit{Booth} court held that the statute of limitations ran from the time the defect was originally discovered\textsuperscript{99} and was not tolled by the contractor's efforts.\textsuperscript{100} The court reasoned that because the building owner was suing for negligent installation rather than negligent repair, there was no tort of a continuous nature. The "continuation of events" theory therefore was inapplicable.\textsuperscript{101}

The \textit{Booth} court observed that the theory had been allowed in two previous cases.\textsuperscript{102} An examination of these cases, however, demonstrates that they do not support this proposition.

\textit{Vincent v. Palmer}\textsuperscript{103} involved an employment contract in which the date for the employee's payment was not specified. The Court of Appeals held that limitations did not begin to run "until an accounting was made or the employee's services are ended."\textsuperscript{104} Similarly, \textit{Washington, Baltimore & Annapolis Electric R.R. v. Moss}\textsuperscript{105} concerned a contract between a principal and agent which also failed to specify a payment date. The court remanded the action to resolve evidentiary conflicts as to when payment was due.\textsuperscript{106}

Neither of these cases suggests that the outcome in \textit{Hilliard} would have been different if section 5-101 rather than section 5-108 had controlled the limitations period. As the \textit{Hilliard} court noted, "[B]ecause the contracts for the rendering of services in . . . [\textit{Vincent} and \textit{Moss}] were not specific as to when payment for services was due to be made, the opinions can be read to stand for no more than that

\begin{footnotesize}
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\item \textsuperscript{96} See, e.g., \textit{County of Broome v. Vincent J. Smith, Inc.}, 78 Misc. 2d 889, 358 N.Y.S.2d 998 (1974) (applying "continuous treatment" doctrine to architect malpractice).
\item \textsuperscript{97} 304 Md. 615, 500 A.2d 641 (1985).
\item \textsuperscript{98} \textit{Id.} at 621, 500 A.2d at 644.
\item \textsuperscript{99} \textit{Id.} at 622, 500 A.2d at 644.
\item \textsuperscript{100} \textit{Id.} at 624, 500 A.2d at 645.
\item \textsuperscript{101} \textit{Id.} at 622, 500 A.2d at 644.
\item \textsuperscript{102} \textit{Id.} at 621, 500 A.2d at 644.
\item \textsuperscript{103} 179 Md. 365, 19 A.2d 183 (1941).
\item \textsuperscript{104} \textit{Id.} at 375, 19 A.2d at 189.
\item \textsuperscript{105} 130 Md. 198, 100 A. 86 (1917).
\item \textsuperscript{106} \textit{Id.} at 211, 100 A. at 91.
\end{itemize}
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limitations did not begin to run until payment was due." 107 Neither Vincent nor Moss considered postponing the running of limitations beyond the time when a cause of action accrued; they simply involved factual disputes as to when the cause of action arose. Conversely, in Hilliard H & B did not contend that no valid cause of action existed when the leaks were discovered, but rather argued that the running of limitations was postponed until some future date. Thus, had section 5-101 been controlling in Hilliard, the discovery rule still would have applied.

Given the Hilliard court's skepticism as to the significance of Vincent and Moss, the Booth dicta indicating that the "continuation of events" theory may be applicable outside the context of medical malpractice cases cannot be given much force. The discovery rule is firmly entrenched in Maryland law. As the Booth court recognized, Maryland courts are slow to permit exceptions to the rule: "[W]here the legislature has not expressly provided for an exception in a statute of limitations, the court will not allow any implied or equitable exception to be engrafted upon it." 108

In the second part of its opinion the Hilliard court held that the statute of limitations did not bar H & B's claim for breach of the warranty to repair. 109 This decision is consistent with the recent case of Antigua Condominium Association v. Melba Investors Atlantic, Inc. 110

In Antigua condominium owners sued the developer of their condominium complex for failure to correct defects in their homes. Each contract of sale contained a provision in which the developer promised to make necessary repairs provided it received notice within one year of closing. Because the owners brought suit more than three years after many of them had purchased their units, the developer asserted the statute of limitations as a defense. The court, however, held that the repair clause was not simply a warranty of the condition of the units at closing, but rather a separate covenant to correct any defects discovered within one year. 111 Consequently, this provision was not breached and the statute of limitations did not begin to run until the developer received notice

107. 309 Md. at 158, 522 A.2d at 966-67.
108. Booth, 304 Md. at 623, 500 A.2d at 645.
109. 309 Md. at 163, 522 A.2d at 969.
111. Id. at 715, 517 A.2d at 83.
of defects and failed to repair within a reasonable time.112 Because the owners filed suit within three years and two months after giving the developer notice of the defects, the court remanded for a determination of whether the owners should have discovered the developer's breach within two months after notice was given.113

In Hilliard Gardiner promised to repair defects discovered within one year of the substantial completion date.114 H & B gave notice of leaks in the project within one year of this date. Because the notice was less than three years before H & B's demand for arbitration,115 the statute of limitations did not bar H & B's claim for breach of the repair provision.116 This decision logically follows from Antigua's holding that a repair clause is not breached until notice of the defect is given and the guarantor fails to repair within a reasonable time.

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112. Section 5-101, the general three-year statute of limitations, applied to the breach of contract claims in Antigua. Id. at 711, 517 A.2d at 80.
113. Id. at 718, 517 A.2d at 84.
114. The warranty to repair by Gardiner read in relevant part:
    If, within one year after the Date of Substantial Completion of the Work... any of the work is found to be defective... , the Contractor shall correct it promptly after receipt of a written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. This obligation shall survive termination of the Contract. The Owner shall give such notice promptly after discovery of the condition.
309 Md. at 164, 522 A.2d at 969.
115. Fedco certified the date of substantial completion as December 1, 1980, and H & B gave notice of the defects on February 23, 1981. Id., 522 A.2d at 970. H & B filed for arbitration on December 28, 1983. Id. at 154, 522 A.2d at 965.
116. Id. at 164, 522 A.2d at 970.
II. CONSTITUTIONAL LAW

A. Maryland Constitution

1. Requirements for Holding Elected Office.—In Broadwater v. State the Court of Appeals upheld article I, section 12 of the Maryland Constitution which provides that only registered voters may hold statewide elective office. In so doing, the court quashed the attempt of a prominent Prince George’s County political figure to regain a seat in the State Senate while on probation following a felony conviction.

The appellate challenge was limited to arguments based on the equal protection clause of the fourteenth amendment of the United States Constitution. While the court looked to the equal protection analysis of City of Cleburne, Texas v. Cleburne Living Center for guidance, the court rested its conclusion on the plurality reasoning in Clements v. Fashing and the relative ease of voter registration in Maryland.

Tommie Broadwater, Jr. served in the Maryland Senate for eight years prior to his 1983 conviction for felonies related to the unauthorized acquisition of food stamps. He was sentenced to three years’ imprisonment and a fine of $20,000. All but six months of the prison sentence were suspended, and Broadwater was placed on probation for the four years following his release. The terms of his probation required him to make restitution in the amount of

2. Md. Const. art. I, § 12, states:
   Except as otherwise specifically provided herein, a person is ineligible to enter upon the duties of, or to continue to serve in, an elective office created by or pursuant to the provisions of this Constitution if the person was not a registered voter in this State on the date of the person’s election or appointment to that term or if, at any time thereafter and prior to completion of the term, the person ceases to be a registered voter.
3. 306 Md. at 602, 510 A.2d at 585.
6. 306 Md. at 605-06, 510 A.2d at 586-87. The “ease” of registration is emphasized throughout the court’s opinion, which describes in detail the provisions of Md. Const. art. I, § 1, and Md. Ann. Code art. 33, §§ 3-1 to -25 (1986 & Supp. 1987), governing voter registration, and discusses how these provisions have been liberalized over the years.
$18,420 to the United States Department of Agriculture and to complete 1000 hours of community service.

Upon his conviction, Broadwater's name was stricken from the registry of qualified voters in Prince George's County; on sentencing, he was stripped of his Senate seat. Almost immediately, speculation began as to whether Broadwater, the first black senator outside Baltimore and a force in Democratic Party politics, might re-enter elective politics in 1986. Discussion focused specifically on the absence of any requirement in Maryland law that an independent candidate for the General Assembly be a registered voter. It

8. Md. Ann. Code art. 33, § 3-4(c) (1986), states:
   No person shall be registered as a qualified voter if he has been convicted of theft or other infamous crime, unless he has been pardoned, or, in connection with his first such conviction only, he has completed any sentence imposed pursuant to that conviction, including any period of probation imposed by virtue of parole or otherwise in lieu of a sentence or part of a sentence.

9. Md. Const. art. XV, § 2, states:
   Any elected official of the State, or of a county or of a municipal corporation who during his term of office is convicted of or enters a plea of nolo contendere to any crime which is a felony, or which is a misdemeanor related to his public duties and responsibilities and involves moral turpitude for which the penalty may be incarceration in any penal institution, shall be suspended by operation of law without pay or benefits from the elective office. During and for the period of suspension of the elected official, the appropriate governing body and/or official authorized by law to fill any vacancy in the elective office shall appoint a person to temporarily fill the elective office, provided that if the elective office is one for which automatic succession is provided by law, then in such event the person entitled to succeed to the office shall temporarily fill the elective office. If the conviction becomes final, after judicial review or otherwise, such elected official shall be removed from elective office by operation of Law and the office shall be deemed vacant. If the conviction of the elected official is reversed or overturned, the elected official shall be reinstated by operation of Law to the elective office for the remainder, if any, of the elective term of office during which he was so suspended or removed, and all pay and benefits shall be restored.


11. Id. Smith wrote:
   Broadwater himself may not be through in elective politics. Though he will not be eligible to vote then, state law would allow him to run for his old seat in 1986 as an independent, according to Jack Schwartz, an assistant state attorney general.

   With his sentencing yesterday in a scheme to defraud the federal food stamp program, Broadwater will be barred from the voting booth until after his six-month prison term and his four years on probation.

   A candidate for governor must be a registered voter, but a candidate for the state Senate or House of Delegates need not be.

   If Broadwater wanted to run in 1986, he would have to prove only that he was over 25 and a resident of the area he hoped to represent. Since he could
was precisely that "loop-hole" which the 1984 General Assembly proposed to eliminate by a constitutional amendment that would be ratified by the voters in November 1984.12

In September 1984 Broadwater filed a complaint for declaratory judgment in the Circuit Court for Anne Arundel County seeking a prohibition against placing the proposed amendment on the November ballot, or, alternatively, a ruling that the amendment violated provisions of both the state and federal constitutions.13 The trial court granted the State's motion to dismiss for failure to state a cause of action.14

Broadwater appealed to the Court of Special Appeals, but the Court of Appeals issued a writ of certiorari on its own motion before argument in the intermediate appellate court. Finding that the trial court erred in dismissing the suit without declaring the rights of the parties, the court vacated the judgment below and remanded the case for further proceedings.15 On remand, the trial court upheld the amendment and its application to Broadwater against all of Broadwater's challenges,16 concluding that he was not entitled to run for office in 1986.17 Again Broadwater appealed, and again the Court of Appeals granted certiorari.18

For purposes of its decision, the court assumed that Broadwater had standing to represent the class of all unregistered voters in the meet those qualifications, he could enter the 1986 race—though he could not vote for himself.

And he would be obliged to run as an independent. Since he would not be a registered voter, he could not be a registered Democrat—and therefore could not run in a Democratic primary, according to Mr. Schwartz of the attorney general's staff.

Id.

12. In fact, Broadwater alleged that the amendment "was drafted for the sole purpose of preventing this Plaintiff from presenting himself as a candidate to the electorate in his district." 306 Md. at 600, 510 A.2d at 584. The trial court rejected that contention as "without merit," pointing out that "the amendment applies equally to all citizens of this State, not just Tommie Broadwater." Id. at 601, 510 A.2d at 585. The Court of Appeals did not address the issue in either opinion.

13. 303 Md. at 463, 494 A.2d at 935.
14. Id. at 464-65, 494 A.2d at 936.
15. Id. at 469, 494 A.2d at 938.
16. 306 Md. at 600, 510 A.2d at 584. Broadwater claimed the amendment violated the first, fifth, and fourteenth amendments of the United States Constitution, as well as article 24 of the Maryland Declaration of Rights. Alternatively, he urged that the amendment should not apply to his eligibility to seek office in 1986 because prior to its adoption, he already had complied with all the rules and regulations necessary to place his name on the ballot. Id. at 600-01, 510 A.2d at 584.
17. Id. at 601, 510 A.2d at 585.
18. Id.
State, 19 which Broadwater claimed constituted nearly one-third of the otherwise eligible population. 20 By precluding members of this class from seeking elective office, Broadwater contended, the amendment deprived them of equal protection of the laws. 21

The court's equal protection analysis began with a lengthy quotation from Justice White's opinion in Cleburne indicating that only legislation which impermissibly classifies by race, alienation, or national origin, or which impinges on personal rights guaranteed by the Constitution, will be subject to the "strict scrutiny" of a reviewing court; the court will sustain the legislation if it is "suitably tailored to serve a compelling state interest." 22 The court noted that Broadwater sought to equate the right of an unregistered voter to seek elective office with the personal right to vote protected by the Constitution. 23

In rejecting this argument, the court relied on Justice Rehnquist's plurality opinion in Clements v. Fashing 24 that "the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" 25 Given the evidence that apathy accounts for most failures to register 26 and the ease with which one may register in Maryland, 27 the court determined that the amendment challenged by Broadwater did not require strict scrutiny. 28

Returning to Cleburne for guidance, the court next considered whether some lesser, but still "heightened," standard of review might be required. 29 Following an analysis of that standard, 30 and

19. Id., 510 A.2d at 584. The trial court so held.
20. Id. at 602, 510 A.2d at 585.
21. Id.
25. Id. at 963 (quoting Bullock v. Carter, 405 U.S. 134, 143 (1982)). Justice Rehnquist went on to say that the degree of scrutiny required will depend upon the nature of the interests affected and the burdens imposed. Id.
26. 306 Md. at 604, 510 A.2d at 586. The court quoted an affidavit of the Deputy Administrator of Election Laws filed in the trial court which indicated that more than half of the 243,000 voters removed from state rolls during the 18-month period ending June 1985 were removed for failure to vote or for some other manifestation of apathy. Id.
27. See supra note 6.
28. 306 Md. at 606, 510 A.2d at 587.
29. Id.
30. In Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 929 (1981), the Court of Appeals summarized the "heightened" standard of review as follows:
again noting the ease of registration, the court declined to apply any more exacting standard than the traditional "rational basis" test for equal protection. Finding a rational basis for the State's interest in limiting office holders to registered voters, the court affirmed the judgment of the trial court.

Although the Court of Appeals noted that the challenged amendment simply made uniform a requirement that those holding elective office be registered voters, it stopped well short of suggesting that some impersonal desire for uniformity in the State's election laws triggered the amendment's proposal or ratification. Indeed, it would be naive to deny, as the trial court appeared to do, that Tommie Broadwater's personal electoral ambition was the single motivating factor behind the amendment.

That analysis, however, leads to a legal dead end. It is useless to speculate whether the amendment would have been proposed and adopted had Broadwater been a powerful white politician instead of a popular black one. A reviewing court has little access to the unexpressed motives of legislators, and it has virtually no access to the inner minds of the voters. Nor would such access nec-

"Heightened scrutiny" of a legislative classification is a less exacting standard of review and is applied when a statute impacts upon "sensitive," although not necessarily suspect criteria of classification (i.e., gender discrimination), or where a statute affects "important" personal rights or works a "significant" interference with liberty or a denial of a benefit vital to the individual.

Id. at 641, 458 A.2d at 944-45.
31. 306 Md. at 607, 510 A.2d at 588.
32. Id. More precisely, the court endorsed the trial court's findings: "Registration manifests the fact of residency; it is indicative of the candidate's seriousness . . . . Registration also protects against fraudulent voters and candidates, ensuring that the underage and convicted felons are disqualified from seeking office." Id.
33. Id. at 608, 510 A.2d at 588.
34. Id.
35. See supra note 12.
36. In his dissent in Edwards v. Aguillard, 107 S.Ct. 2573, 2605 (1987), Justice Scalia pointed out:

For while it is possible to discern the objective "purpose" of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth . . . .discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite.

37. The court noted that the law challenged here is—

not a legislative enactment but a provision of the Constitution of Maryland adopted by the voters of this State. We agree with the State when it says, "It is not unreasonable for the voters of this State to decide that those who seek to govern should be both eligible to register to vote, and, in fact, registered." 306 Md. at 608, 510 A.2d at 588.
essarily reveal the kind of invidious discrimination required to find an equal protection violation. For each "improper" General Assembly vote against Broadwater the black politician, there would be a vote against Broadwater the convicted felon. And for each ratifying voter who gave Broadwater a thought, there may be thousands who never heard of him.

In fact, the amendment was perfectly consistent with then-existing Maryland election law, and, by the reasoning of the *Clements* plurality, imposed only a de minimis burden on Broadwater's own rights. For the majority of nonregistered Maryland residents, the brief stop at the registrar's office presents no substantial obstacle to candidacy for statewide office.

Nevertheless, the opinion is somewhat disquieting. Perhaps that is because the court answered, without ever candidly asking, the real question presented by *Broadwater*—Can a facially neutral restriction on an important political right survive an equal protection challenge by the one person whose deeds provoked its enactment and whose exercise of that right is, as a practical matter, the only one likely to be affected? The answer, according to the court, is yes, but the question is more important.

2. *Legal Mutual Liability Insurance Society of Maryland.*—In *Ogrinz v. James* the Court of Appeals affirmed the constitutionality of legislation creating the Legal Mutual Liability Insurance Society of Maryland (Legal Mutual) and the lawfulness of Legal Mutual's activation under the terms of that statute. While the opinion broke no new ground, the result is significant to many Maryland attorneys and their clients.

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38. The United States Supreme Court has held that disenfranchisement of convicted felons who have completed their sentences and paroles does not deny equal protection. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

39. *Clements v. Fashing*, 457 U.S. 957, 967 (1982). According to Justice Rehnquist: "A 'waiting period' is hardly a significant barrier to candidacy . . . . We conclude that this sort of insignificant interference with access to the ballot need only rest on a rational predicate in order to survive a challenge under the Equal Protection Clause." *Id.* at 967-68.

40. Broadwater has not disappeared from Maryland politics. In July 1988 he accompanied the Maryland delegation to the Democratic National Convention to act as a whip for the supporters of Jesse Jackson. See *Broadwater Named Jackson Whip*, *The Daily Record*, July 9, 1988, at 1, col. 1.


42. *Id.* at 399, 524 A.2d at 86.

43. According to a form letter which Legal Mutual's plan administrator, Insurance Planning, Inc., Baltimore, provides with its application forms, the organization now can offer professional liability coverage to the majority of Maryland attorneys.
The relevant legislative history of the statute challenged in Ogrinz dates to 1977, when the General Assembly added a subtitle to the State's Insurance Code entitled "Legal Mutual Liability Insurance Society of Maryland."\(^4\) The new provision's purpose was to provide a mechanism through which attorneys in the State could be assured of obtaining legal malpractice insurance and through which clients could be assured of compensation when injured by an attorney's malpractice.\(^4\) The Act was to become effective upon a finding by the Insurance Commissioner (the Commissioner) that a substantial number of Maryland attorneys might be or soon become unable to obtain malpractice insurance.\(^4\) The legislation provided no means for capitalizing this non-stock corporation,\(^4\) however, and the provisions of the Act never were implemented.\(^4\)

In 1984 the General Assembly enacted certain insurance reforms technically unrelated to the Legal Mutual subtitle.\(^4\) Aimed in large part at keeping rates down through price competition,\(^5\) the new law included a significant change in the way legal malpractice and other insurance rates were established.\(^5\) Before this enactment, proposed rates filed with the Commissioner became effective in thirty days unless the Commissioner specifically disapproved them.\(^5\) Under the new law, the Commissioner could require prior approval of all proposed rates\(^5\) if insurers failed to demonstrate at a formal hearing that a reasonable degree of competition existed for the type of insurance in question.\(^5\)

Because of growing concern about the cost and availability of legal malpractice insurance,\(^5\) the Commissioner held a hearing in November 1984.\(^5\) Finding the competition inadequate, the Com-

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46. Id. at (b).
47. Id. § 568(a).
48. 309 Md. at 386, 524 A.2d at 80.
51. Id. § 244K.
52. Id. § 242(d).
53. Id. § 244K.
54. Id. § 2441(c)(1).
55. 309 Md. at 387, 524 A.2d at 80.
missioner invoked the prior approval authority. Because the law provided that a finding would remain valid for up to one year, other hearings were held in January 1986 and in March 1987. Each resulted in a finding of inadequate competition.

Against this backdrop, the General Assembly resurrected Legal Mutual in 1986, amending the dormant subtitle to facilitate the Society's creation and operation. The new statute provided that the Legal Mutual subtitle would become effective thirty days after the Commissioner (1) received a petition from the Maryland State Bar Association requesting the establishment of Legal Mutual, and (2) determined through the hearing process that inadequate competition existed in the legal malpractice market.

On May 14, 1986, the Bar Association petitioned the Commissioner to establish Legal Mutual; within the week the Commissioner ruled that the then-current finding satisfied the second part of the statute's triggering mechanism. In accordance with other provisions, the Commissioner then authorized Legal Mutual's creation, the Governor appointed a board of directors, and the Commissioner approved incorporation on July 1, 1986.

A group of attorneys then filed a declaratory judgment action broadly challenging the constitutionality of the 1986 Act and the legality of Legal Mutual's activation. The Circuit Court for Baltimore City found the Act constitutional and held that Legal Mutual had been created lawfully. The Court of Appeals, which granted certiorari "to consider the significant issue of public importance involved in the case," affirmed the lower court on all issues.

Organizing the attorneys' arguments into eight broad categories, the court first rejected any notion that a new determination of inadequate competition was required before Legal Mutual could be activated. Both the language of the Act and its legislative history unambiguously indicated that the General Assembly intended the

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62. 309 Md. at 389-90, 524 A.2d at 81.
63. Id. at 390, 524 A.2d at 81.
64. Id., 524 A.2d at 81-82.
65. Id., 524 A.2d at 82.
66. Id.
67. Id. at 399, 524 A.2d at 86.
68. Id. at 390, 524 A.2d at 82.
then-valid finding to suffice. Moreover, the court found the General Assembly's failure to require a new finding "tantamount to a legislative determination" of inadequate competition. Thus, the attorneys were not entitled to the procedural due process they claimed was denied them by lack of notice and opportunity to be heard prior to the Commissioner's determination.

The attorneys' next four arguments were based on the taxing mechanism chosen by the General Assembly to support Legal Mutual in the absence of general fund appropriations. The law levied on all attorneys admitted to the Maryland State Bar a one-time, $150 tax "for the privilege of practicing law in the State." An attorney could credit this tax against the "membership fee" required when applying to Legal Mutual for a malpractice policy or any other property, casualty, or surety policy authorized by the statute.

The court rejected the attorneys' contention that the statute violated article 15 of the Maryland Declaration of Rights by raising tax revenue solely to support a private entity. Conceding that article 15 requires a public purpose for all tax revenues, the court reminded the attorneys that the use of public funds to benefit private institutions does not preclude finding a public purpose. Reaffirming that the legislature has the primary responsibility for determining whether a particular revenue measure serves a public purpose,

69. Id. at 391, 524 A.2d at 82.
70. Id. at 392, 524 A.2d at 83.
71. Id.
72. Id. at 388, 392-93, 524 A.2d at 81, 83.
74. Id. at (e).
75. 309 Md. at 392-93, 524 A.2d at 83. Md. Const. Decl. of RTS. art. 15 provides in pertinent part:

[A]ll taxes thereafter provided to be levied by the State for the support of the general State Government, and by the Counties and by the City of Baltimore for their respective purposes, shall be uniform within each class or sub-class of land, improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy; yet fines, duties or taxes may properly and justly be imposed, or laid with a political view for the good government and benefit of the community.

76. 309 Md. at 393, 524 A.2d at 83. See Allied Am. Co. v. Commissioner, 219 Md. 607, 616, 150 A.2d 421, 427 (1959) ("It is clearly established that the State may raise funds by taxation to expend for general welfare, and it is for the Legislature and not the taxpayers or the courts to choose the methods and subjects of taxation.").
77. 309 Md. at 393, 524 A.2d at 83. See Johns Hopkins Univ. v. Williams, 199 Md. 382, 401, 86 A.2d 892, 901 (1952) ("There is no prohibition in the Constitution against making appropriations to private institutions, provided the purpose is public, or semi-public . . . .").
78. 309 Md. at 393, 524 A.2d at 83.
the court found the availability of malpractice insurance "important to the public as well as to lawyers and their clients." 79

The challenged revenue-raising mechanisms by which the General Assembly sought to achieve that important purpose "merely represent permissible legislative choices," 80 the court said. As such, the mechanisms survive a substantive due process test that gives deference to the legislature, absent a showing that the statute in question is "clearly arbitrary, oppressive, or unreasonable." 81 Furthermore, the incentive to join Legal Mutual resulting from the de facto tax rebate provides the rational basis that all parties conceded would suffice to withstand an equal protection attack. 82

The attorneys next argued that the Act unconstitutionally delegated taxing power to Legal Mutual in contravention of article 14 of the Maryland Declaration of Rights. 83 In particular, they noted that application of the mandatory tax to Society membership fees, coupled with a provision authorizing Legal Mutual to refuse to underwrite certain risks, gave Legal Mutual effective discretion to determine which attorneys would receive tax rebates. 84 The court found this argument meritless, noting that Legal Mutual could exercise discretion only within the bounds of statutorily acceptable underwriting practices. 85

The court also rejected the attorneys' contention that the tax was a property tax subject to article 15's uniformity requirement, 86 because nonpayment could result in a lien against real or personal property. 87 Pointing out that failure to pay other types of taxes also

79. Id. at 394, 524 A.2d at 83.
80. Id. at 395, 524 A.2d at 84.
81. Id. at 394, 524 A.2d at 84. The court noted that appellants did not state whether their due process and equal protection challenges were based on the Maryland Declaration of Rights or the United States Constitution. The standards would be the same in either case, the court noted, pointing out that it has "consistently considered guarantees in the Declaration of Rights to be in pari materia with similar provisions of the federal constitution." Id. at 394 n.3, 524 A.2d at 84 n.3.
82. Id. at 395-96, 524 A.2d at 84. See Nordheimer v. Montgomery County, 307 Md. 85, 102, 512 A.2d 379, 387 (1986) ("[A]s long as the classifications made in imposing the tax are not utterly arbitrary, the tax statute meets the rational basis test for equal protection purposes.").
83. 309 Md. at 396, 524 A.2d at 85. Md. Const. Decl. of Rts. art. 14 requires that no tax be levied without the consent of the General Assembly.
84. 309 Md. at 396, 524 A.2d at 85.
85. Id. at 396-97, 524 A.2d at 85. See Md. Ann. Code art. 48A, § 572(c) (1986).
86. 309 Md. at 397, 524 A.2d at 85. For the relevant text of Md. Const. Decl. of Rts. art. 15, see supra note 75.
could result in a lien, the court reaffirmed the legislature’s classification of the tax as an excise or privilege tax.

Two additional arguments met with equally decisive rejection. The court dismissed as without merit the attorneys’ argument that the Act’s title was insufficiently descriptive to comply with article III, section 29 of the Maryland Constitution. Furthermore, the court upheld the trial court’s entry of summary judgment against the attorneys and refused to grant declaratory relief. While the attorneys claimed that there was a “genuine dispute of material fact” as to the actual degree of competition in the legal malpractice insurance market, the trial judge correctly determined that neither the Commissioner’s original finding nor the legislature’s implicit endorsement of it could be challenged in the declaratory judgment action, since both issues “were solely matters of law.”

At first glance, many of the arguments in Ogrinz appear to border on the frivolous, prompting the question of why the Court of Appeals so quickly jumped into the fray to painstakingly analyze each argument, when the principles governing its findings are so well established. Without speculating as to the motives of the attorneys who brought the suit, it is not difficult to see why the court well might prefer to handle every conceivable challenge to Legal Mutual at once, before the Society became fully institutionalized and before too many Maryland attorneys came to rely on it for their malpractice coverage. To do otherwise might have left Legal Mutual vulnerable to future piecemeal attacks, jeopardizing its very purpose. Thus, while Ogrinz contributes little to the substantive body of Maryland law, it adds an important measure of certainty to Maryland practice.

89. 309 Md. at 398, 524 A.2d at 85.
90. Id., 524 A.2d at 86. Md. Const. art. III, § 29, requires that “every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title.”
91. 309 Md. at 398-99, 524 A.2d at 86.
92. Id. at 399, 524 A.2d at 86.
93. Id.
B. United States Constitution

I. First Amendment.—a. Obscenity Standard.—In a graphic opinion in United States v. Guglielmi the United States Court of Appeals for the Fourth Circuit rejected a pornography supplier’s creative defense and upheld his conviction and sentence on federal obscenity charges. The supplier asserted that the films depicting various acts of bestiality could be obscene only if they “appealed to the prurient interest of the average person in the sense that the average person viewing the material would experience sexual arousal.” He argued that the materials at issue in the case were so “disgusting and repellent that they could not be found to appeal to the prurient interest of the average person, nor to the average zoophilic.”

Speaking through Judge Haynsworth, the Fourth Circuit rejected the notion that extremely offensive sexually oriented material is protected by the first amendment while less offensive pornography is not. While agreeing with the defense’s contention that the materials in question were disgusting, and noting that the defense was “not without ingenuity,” the appellate court found that the materials indeed were obscene within the prevailing legal meaning of the term.

Louis Guglielmi operated a warehouse in Baltimore which supplied adult bookstores with films, literature, and other sexual paraphernalia. As part of an ongoing FBI investigation, an undercover agent purchased several movies, which Guglielmi then shipped to the agent in North Carolina. The films in question, although primarily depictions of bestiality, also portrayed “a variety of sex acts among humans.”

97. 819 F.2d at 454.
98. Id. at 452.
99. Id. at 455.
100. The court stated, “Surely Guglielmi is right that the reaction of most people to these films would be one of rejection and disgust . . . .” Id.
102. 819 F.2d at 454-55.
103. Id. at 452.
104. Id. at 452-53.
105. Id. at 453. The portrayal of sexual acts between humans was significant to the court’s opinion as it lent support to the testimony of the government’s expert witness
The legal standard for obscenity is prescribed by *Miller v. California*. The United States Supreme Court there set forth criteria for judging whether or not material is obscene:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The primary argument in *Guglielmi* concerned the meaning of the first branch of this test. After describing three of the films in explicit detail, the *Guglielmi* opinion turned to the major contention of the defendant's appeal—that the material was so revolting as to be beyond the pale of the prurient interest branch of *Miller*. The District Court for the Western District of North Carolina had put the question to the jury in terms of "whether the material was an appeal to prurient interest." Guglielmi contended that this instruction constituted "reversible error since it permitted the jury to find the films obscene without finding that the average person would experience sexual arousal upon seeing them." The government had argued that it

"that each of the films would have an appeal to the prurient interest of an otherwise sexually normal person." *Id.* at 454.

107. *Id.* at 24 (citations omitted).
108. 819 F.2d at 454.
109. *Id.* at 453-54. The films described by the court were entitled "Snake Fuckers," "Horny Boar," and "Horsepower." *Id.* at 453.
110. *Id.* at 454-55.
111. *Id.* at 454.
112. *Id.* This contention is not novel. In *Mishkin v. New York*, 383 U.S. 502, 508 (1966), the Supreme Court declared:

"[A]ppellant's sole contention regarding the nature of the material is that some of the books... do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that "instead of stimulating the erotic, they disgust and sicken." We reject this argument as being based on an unrealistic interpretation of the prurient-appeal requirement.

Although *Mishkin* was decided under the standard of *Roth v. United States*, 354 U.S. 476 (1957), the first part of the *Miller* test is derived from *Roth*, 354 U.S. at 489. *See Miller*, 413 U.S. at 24. *See also Hamling v. United States*, 418 U.S. 87, 128 (1974) ("Petitioners appear to argue that if some of the material appeals to the prurient interest of sexual deviants while other parts appeal to the prurient interest of the average person, a gen-
was "enough that the material was directed to sexual arousal." Reduced to its essentials, Guglielmi's argument on appeal was that the materials were beyond obscenity, as no finding of obscenity could be predicated on prurient appeal to a minuscule class of deviants.

One of Guglielmi's expert witnesses had testified that "zoophiliacs are not fungible." In other words, one who fantasizes about sex with one species of animal would not be aroused by material depicting sexual activity with a different species. This testimony was intended to support the defense's contention that not only would the movies fail to arouse the average person, but they would not excite the average zoophiliac. Unless the film depicted sexual activity with the zoophiliac's particular type of animal, the zoophiliac would not experience sexual arousal; only a small subclass of zoophiliacs, therefore, actually could enjoy any particular film. Thus, Guglielmi contended, no finding of obscenity could be based on prurient appeal to the interests of such a small group. Guglielmi argued that if the material is so disgusting that the average person could not experience sexual arousal upon viewing it, then the material is protected by the first amendment even though other, less "hard-core" material is not. While it accepted Guglielmi's premise that the films were disgusting, the Fourth Circuit refused to be led to such a paradoxical conclusion.

The Fourth Circuit viewed this argument as based on an erroneous interpretation of the phrase "average person" as used in Miller. The reference to the average person in Miller is derived from an earlier attempt to formulate a workable test for identifying

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113. 819 F.2d at 454.
114. Id. ("Guglielmi contends that there is no such thing as an average zoophiliac, and that the sub-groups are so small that no finding of obscenity can be based upon a finding of prurient appeal to zoophiliacs.").
115. Id.
116. Id.
117. Id.
118. Id. at 455.
119. Id.
120. Id. The court stated: "The average person would view such materials with an intellectual curiosity ... but not experience a whetting of sexual appetite. So much may be conceded, but if it appeals to those 'individuals eager for a forbidden look,' it meets the prurient interest requirements of the Miller test." Id. See MODEL PENAL CODE § 207.10(2) comment, at 10 (Tent. Draft No. 6, 1957) (defining appeal to the prurient interest as "the capacity to attract individuals eager for a forbidden look").
obscenity in *Roth v. United States*. The finder of fact first must determine the appropriate community standard and then apply it to the material in question. According to the *Guglielmi* court’s interpretation:

The average person comes into the test not as the object of the appeal but as its judge. It is he, not the most prudish, who, applying contemporary community standards, determines whether or not the work appeals to the prurient interest. There is no explicit requirement that the average person determine that the material appeals to the prurient interest of the average person. If that were the case, the average juror would answer the question by assessing his own reaction.

Under this reading the test for obscenity is not whether the material appeals to the average juror, but whether it has “the capacity to attract individuals eager for a forbidden look,” regardless of whether the result of that look is repulsion or stimulation. In fact, sexual arousal really is incidental in determining obscenity; material provoking “only normal, healthy sexual desires” is not obscene.

It is material that arouses a “shameful or morbid interest in nudity, sex or excretion,” which satisfies the first branch of the *Miller* test.

This case clarifies the legal standard in an area of confusion. Defining obscenity always has strained jurists’ abilities to articulate, especially when a trial judge must instruct the jury. Nevertheless,

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121. 354 U.S. 476 (1957). See supra note 112. *Roth* used the phrase “average person” as part of its rejection of the British standard for obscenity, first articulated in *Regina v. Hicklin*, 3 L.R.-Q.B. 360, 371 (1868), which judged obscenity by the effect of an isolated excerpt or passage upon particularly susceptible persons.
122. 819 F.2d at 454.
123. *Model Penal Code* § 207.10(2) comment, at 10 (Tent. Draft No. 6, 1957).
126. See *Pope v. Illinois*, 107 S.Ct. 1918, 1929-30 (1987) (Stevens, J., dissenting) (“The Constitution cannot tolerate schemes that criminalize categories of speech that the Court has conceded to be so vague and uncertain that they cannot ‘be defined legislatively.’” (citation omitted)). See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting) (“[T]he concept of ‘obscenity’ cannot be defined with sufficient specificity . . . to prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech.”). Typical of the confusion in this area is *United States v. Treatman*, 524 F.2d 320 (8th Cir. 1975), upon which Guglielmi sought to rely. The hopelessly muddled instructions to the jury in the *Treatman* trial did not yield a beneficial precedent. *Id.* at 322-23.
127. In *Pinkus v. United States*, 436 U.S. 293 (1978), the Supreme Court noted: “The difficulty of framing charges in this area is well recognized. But the term ‘average per-
at a time when defendants face increasingly severe penalties on federal obscenity charges, the need for clarification is greater than ever. Guglielmi, who never before had been convicted of any offense, received a sentence of twenty-five years and fines of $35,000. Although the jury instructions were correct under Miller, the draconian punishment does not comport with the generally unsatisfactory state of obscenity law.

b. Zoning Ordinances Restricting Free Speech.—The Court of Special Appeals' decision in 5297 Pulaski Highway, Inc. v. Town of Perryville represented the first time a Maryland appellate court considered first and fourteenth amendment challenges to a zoning ordinance. The court upheld a Perryville, Maryland ordinance which restricted the sale of adult books and magazines, finding that it did not impermissibly abridge the first amendment freedom of expression.

Perryville initiated the litigation by seeking an injunction against the sale of anything "other than woman's [sic] lingerie and associated woman's [sic] clothing" at the Treasure Lingerie and Gift

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130. See Pope v. Illinois, 107 S.Ct. 1918, 1927-28 n.7 (1987) (Stevens, J., dissenting) ("It has been recognized recently that 'the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues' involved in obscenity laws 'is incorrect,' in that it fails to adequately protect First Amendment values." (quoting ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 261 (1986)); id. at 1923 (Scalia, J., concurring) ("All of today's opinions, I suggest, display the need for reexamination of Miller.").

131. See Pope v. Illinois, 107 S.Ct. 1918, 1927-28 n.7 (1987) (Stevens, J., dissenting) ("It has been recognized recently that 'the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues' involved in obscenity laws 'is incorrect,' in that it fails to adequately protect First Amendment values." (quoting ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 261 (1986)); id. at 1923 (Scalia, J., concurring) ("All of today's opinions, I suggest, display the need for reexamination of Miller.").


133. Id. at 592, 519 A.2d at 207. The court stated that it was unaware of "any Maryland appellate decision addressing a challenge to a zoning ordinance on the ground that it violated the First and Fourteenth Amendments to the Constitution of the United States." Id. at 594, 519 A.2d at 208. Cf. Donnelly Advertising Corp. v. Mayor of Baltimore, 279 Md. 660, 370 A.2d 1127 (1977) (urban renewal ordinance challenged on first amendment and equal protection grounds).

134. 69 Md. App. at 606, 519 A.2d at 214.
Shop, operated by 5297 Pulaski Highway, Inc. (5297). The shop had been selling adult literature as well as lingerie. The town based its action on an amendment to its zoning ordinance which prohibited adult bookstores or entertainment centers from operating "within 1800 feet of the boundary of the property upon which sets any church, school, hospital, or other similar institution for human care." The trial court granted the injunction and went on to determine that the literature was obscene. 5297 appealed both rulings, contending that the amendment to the zoning ordinance violated the first amendment.

The Court of Special Appeals first considered 5297's argument that the ordinance was facially violative of the first amendment. Because of the absence of Maryland decisions on the issue, the court turned to a "plethora of authority" from the federal courts, particularly City of Renton v. Playtime Theatres, Inc. and its predecessor Young v. American Mini Theatres, Inc.

Both of these Supreme Court cases focused on the premise that the first amendment gives at least partial protection to adult movies as a form of expression. Whether the expression is protected depends on whether the regulation of the expression is "content-based," and hence presumptively violative of the first amendment, or "content-neutral." "Content-neutral" regulations are "properly analyzed as a form of time, place and manner regula-
tion” and are acceptable if “they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.”

With this framework in mind, the Court of Special Appeals considered Perryville’s ordinance. The preamble to the ordinance, which states that its object is to “promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity or general welfare,” as well as minutes from community meetings, convinced the court that Perryville had acted not to suppress speech but to protect “a fundamental interest in protecting the general welfare of the community.” As in Renton and American Mini Theatres it was significant that Perryville had not attempted an outright ban on the establishments, but allowed for their operation as conditional uses in certain areas.

The court next examined the guidelines for determining whether zoning officials should grant a conditional use. The ordinance providing for the granting of conditional uses places the burden of proof on the applicant, but sets forth thirteen guidelines which the Board of Zoning Appeals must follow. The ordinance also contains a time limit within which an appeal must be decided, and provisions for notice to the applicant and a right to be heard at a public hearing. Finally, the law defines “Adult Bookstore/Adult Entertainment Center,” “Specified Sexual Activities,” and “Specified Anatomical Areas.”

The Court of Special Appeals was satisfied that the definitions and criteria employed by Perryville insulated the ordinances as a whole from attack on the grounds of vagueness or overbreadth. The court relied primarily on 15192 Thirteen Mile Road v. City of War-

146. Id. at 46.
147. Id. at 47.
148. 69 Md. App. at 595-97, 519 A.2d at 209-10.
149. Id. at 595, 519 A.2d at 209 (quoting the ordinance).
150. Id.
151. Id. at 597, 519 A.2d at 210.
152. Id. at 596-97, 519 A.2d at 210. See American Mini Theatres, 427 U.S. at 82 n.4 (Powell, J., concurring) (“If [the town] had been concerned with restricting the message purveyed by adult theatres, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.”).
153. 69 Md. App. at 597-602, 519 A.2d at 210-12.
155. Id.
156. Id.
157. Id. § 10(2).
158. Id. § 19B.
ren, in which the United States District Court for the Eastern District of Michigan determined that language remarkably similar to that which Perryville employed in defining "Adult Bookstore/Adult Entertainment Center," "Specified Sexual Activities," and "Specified Anatomical Areas" was sufficiently precise to withstand a due process challenge. The court in 15192, however, added the caveat that "each term is 'readily subject to narrowing construction by the state courts.'" The Court of Special Appeals did not use such qualifying language.

15192 also summarized the first amendment overbreadth doctrine. "A challenge on the basis of overbreadth raises two questions: whether the language of the statute reaches too broadly and proscribes protected conduct, and whether too much discretion is vested in the officials who administer the statute." Although neither the 15192 court nor the Court of Special Appeals in the instant case elaborated on their findings regarding the first prong of the overbreadth analysis, presumably the ordinances in question did not "proscribe" protected conduct but simply regulated it. As noted above, the justifications for the ordinance were sufficient to

160. Id. at 150, 155 (noting the similarities between the Warren ordinance and that upheld in American Mini Theatres); 69 Md. App. at 598 n.3, 519 A.2d at 210 n.3 (noting the similarities between the Warren ordinance and that of Perryville).
161. 593 F. Supp. at 155 (quoting American Mini Theatres, 427 U.S. at 61).
162. The Court of Special Appeals did state that had 5297 sought and been denied a conditional use permit, the Board of Zoning Appeals would have had to justify its decision. 69 Md. App. at 600 n.5, 519 A.2d at 211 n.5. In Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981), the Court of Appeals established that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.
Id. at 22-23, 432 A.2d at 1331. Presumably, Maryland courts reviewing a denial of a conditional use permit then could apply the "narrowing construction" thought ameliorative in 15192.
164. 15192, 593 F. Supp. at 155.
165. "[W]henever an overbroad law covering first amendment activities and formless standards of first amendment privilege are conjoined, the result is an operative, injurious legal reality suffering due process vagueness." Note, supra note 163, at 871 (footnote omitted). The overbreadth and void-for-vagueness doctrines thus overlap. "It is a logical possibility for a statute to be precise in language, yet overbroad." 15192, 593 F. Supp. at 155. In 5297 it becomes increasingly difficult to distinguish the overbreadth and vagueness arguments.
166. See supra text accompanying notes 148-151.
convince the 5297 court of its validity as a "content-neutral" time, place, and manner regulation.\textsuperscript{167}

The 15192 and 5297 courts took different paths in addressing the discretion vested in officials charged with administering the ordinances in question.\textsuperscript{168} 15192 held that "[t]he application procedure for a special land use permit and site plan approval leaves an improper degree of discretion in the local officials."\textsuperscript{169} In contrast, the Court of Special Appeals, examining the procedures at issue in 15192 and relying on Maryland case law for additional safeguards,\textsuperscript{170} held that the Perryville criteria and procedures survived a facial examination for the "unbridled discretion" which would violate the first amendment protections.\textsuperscript{171}

Turning to the question of the obscenity vel non of the material purveyed by 5297, the Court of Special Appeals applied the three-part test of \textit{Miller v. California}.\textsuperscript{172} The crux of the application was the determination of "contemporary community standards."\textsuperscript{173} Because a "community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates,"\textsuperscript{174} the Court of Special Appeals relied on evidence which 5297 adduced at trial that the same sort of magazines which the trial court found obscene were sold, not only within the immediate environs of Perryville, but within the proscribed boundaries of the ordinance.\textsuperscript{175} The court concluded that, judged by the community standards of Perryville, the material could not be obscene.\textsuperscript{176} Nevertheless, because the trial judge did not include the finding of obscenity within the injunction forbidding the sale of the magazines, the injunction stood.\textsuperscript{177}

\begin{itemize}
    \item 167. 69 Md. App. at 594-95, 519 A.2d at 209.
    \item 168. Id. at 598-600, 519 A.2d at 210-11.
    \item 169. 15192, 593 F. Supp. at 156 (citation omitted).
    \item 170. 69 Md. App. at 601-02, 519 A.2d at 212; Schultz v. Pritts, 291 Md. 1, 22-23, 432 A.2d 1319, 1331 (1981).
    \item 171. 69 Md. App. at 599-600 & n.5, 519 A.2d at 211 & n.5.
    \item 172. 413 U.S. 15 (1973). The \textit{Miller} test requires the trier of fact to consider:
        \begin{itemize}
            \item a) Whether the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest;
            \item b) Whether the work depicts, in a patently offensive way, sexual conduct as specifically defined by state law; and
            \item c) Whether the work taken as a whole lacks serious literary, artistic, political, or scientific value.
        \end{itemize}
        \textit{Id.} at 24 (citations omitted).
    \item 173. 69 Md. App. at 603-06, 519 A.2d at 213-14.
    \item 175. 69 Md. App. at 603, 519 A.2d at 213.
    \item 176. Id. at 606, 519 A.2d at 214.
    \item 177. Id.
\end{itemize}
This opinion is rather cryptic and unsatisfactory. The reasons for the ordinance related in the opinion are vague and conclusory. Perhaps Perryville was motivated by the requisite concern for the secondary effects of unregulated adult bookstores rather than by an impermissible desire to censor the first amendment materials themselves; nevertheless, this "substantial governmental interest" should be articulated more clearly. Although the opinion mentions minutes of community meetings at which townpeople voiced their concerns, it is silent as to what those concerns were. These minutes, along with a vague and all-encompassing statement of purpose, serve as Perryville's only justification for regulating material that, if not obscene, is presumptively protected by the first amendment. This same justification can be the only reason for the court's otherwise unexplained finding that the ordinance in question does not proscribe protected conduct. The opinion lacks a substantial discussion of the overbreadth doctrine.

If the Renton doctrine regarding "content-neutral" regulations is not to become a vehicle for censorship, its application by local officials must be subject to a stricter scrutiny. Because 5297 did not attempt to obtain a conditional use, perhaps this case was devoid of the more specific record which would have rendered it appropriate for consideration by the Court of Appeals. Nevertheless, it is questionable whether, in view of similar attempts by Maryland localities to restrict the distribution of adult literature and entertainment, the public interest was well served by a denial of certiorari. Consid-

178. See supra text accompanying notes 148-149.
179. Young v. American Mini Theatres, Inc., 427 U.S. 50, 76 (1976) (Powell, J., concurring) (noting that "a substantial burden rests upon the State when it would limit in any way First Amendment rights").
180. 69 Md. App. at 595, 519 A.2d at 209.
181. Id.
183. See supra note 163.
184. Renton, 475 U.S. at 54; American Mini Theatres, 427 U.S. at 84 (Powell, J., concurring) ("[C]ourts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression . . . .").
185. On April 15, 1988, Judge Kaufman of the United States District Court for Maryland held that Prince George's County's zoning restrictions on adult bookstores violate the first amendment. 11126 Baltimore Blvd., Inc. v. Prince George's County, 684 F. Supp. 884 (D.Md. 1988), appeal docketed, No. K-86-1411 (4th Cir. May 12, 1988). Judge Kaufman found that the county had enacted the ordinance without sufficiently establishing its "substantial interest" in regulating the bookstores; moreover, the ordinances granted "overbroad discretion" to zoning officials. Id. at 899.
eration by the Court of Appeals could have provided an opportunity to place such restrictions on a firmer footing.

2. State Action.—a. Issuance of Public Rally Permits.—The United States District Court for the District of Maryland held in NAACP, Frederick County Chapter v. Thompson 186 that a county zoning administrator may be enjoined from issuing a permit for a public rally on private property which would exclude members of the public based on race or ethnic background.187 The court concluded that the county’s issuance of a permit and the presence of state and county law enforcement officers at the rally indicated governmental involvement significant enough to constitute state action, thus violating the equal protection clause of the fourteenth amendment to the United States Constitution.188

Frederick County requires an individual to obtain a temporary use permit from the county zoning administrator before holding a public rally on private property.189 Pursuant to the county ordinance, Roger Kelly obtained a temporary use permit to hold a public Ku Klux Klan (Klan)190 rally on private property belonging to his father.191 The zoning administrator previously had issued five similar permits to the Klan for rallies which admitted “white gentile persons only,” and thus was aware of the Klan’s plans to exclude all non-white members of the public from the rally.192

The promotion of the Klan’s discriminatory racial and religious views is the primary purpose of its public rallies.193 To enforce these policies, armed Klansmen escort from the premises all non-whites who attempt to attend the rallies.194 As a general practice, state and

187. Id. at 225.
188. Id. at 224-25.
190. As stipulated in the facts of the case, “the Ku Klux Klan is an organization comprised of individuals who promote and practice racial discrimination. The Klan’s policy of excluding all non-whites from public and private rallies is codified in its constitution, bylaws and operating procedures.” 648 F. Supp. at 224-25.
191. Id.
192. Id. The previously issued permits had been issued under an earlier ordinance which differed from the one applicable to the permit in question. Pursuant to the ordinance, each of the five earlier permits declared, “The issuance of this permit shall in no way be construed as the approval of any Frederick County Governmental Agency or official of the purpose of the meeting or of the organization holding the activity.” Id. The parties stipulated that the permit in question also contained this disclaimer, but the court noted that the record indicated otherwise. Id. at 197 n.5.
193. Id. at 198.
194. Id.
county law enforcement officers would monitor the rallies to assist with traffic control, ensure compliance with the conditions of the permit, and maintain the peace.\textsuperscript{195} While present at the rallies, the law enforcement officers witnessed the Klan's exclusionary practices, but absent any breach of the peace, the officers would refrain from interfering with the actions of the armed Klansmen.\textsuperscript{196}

Members of the Frederick County Chapter of the National Association for the Advancement of Colored People (the NAACP) brought suit against the County Zoning Administrator seeking a permanent injunction\textsuperscript{197} barring the administrator from issuing permits for future Klan rallies which would exclude non-white and non-gentile members of the public.\textsuperscript{198} The primary issue before the court was whether the state and county involvement in the Klan rallies amounted to state action.\textsuperscript{199} Private conduct which denies an individual's rights does not violate the equal protection clause of the fourteenth amendment unless the state has been significantly involved in the discrimination.\textsuperscript{200} The NAACP did not challenge the constitutionality of the zoning ordinance, as the group agreed that the law was facially neutral as to race.\textsuperscript{201} Nor did the NAACP question the Klan's right to hold private, segregated meetings on private property.\textsuperscript{202} The NAACP did contend, however, that the county's granting of the required rally permit coupled with the state and county law enforcement officers' acquiescence in the forced exclusion of non-whites and non-gentiles from Klan rallies constituted state action.\textsuperscript{203}

\begin{itemize}
\item 195. Id.
\item 196. Id.
\item 197. Id. at 196. Several individual plaintiffs joined the NAACP in bringing the action. The NAACP originally sought a temporary restraining order declaring the permit void. Following a hearing, the NAACP withdrew its request for a restraining order and amended the complaint to seek the permanent injunction. Id. at 197.
\item 198. Id. at 200.
\item 199. Id. at 203. As a threshold issue the court found that both the NAACP and the individual plaintiffs had standing to sue. Id. at 201-02.
\item 200. Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-22 (1961) (finding that the relationship between a state-owned parking building and the building's privately-owned restaurant which discriminated against blacks was mutually beneficial, or symbiotic; hence, the discrimination constituted state action).
\item 201. 648 F. Supp. at 202.
\item 202. Id.
\item 203. Id. at 202-03. State action includes action by a subdivision of a state, such as Frederick County. Id. at 202. "[A]ll problems relating to the existence of government action—local, state or federal—which would subject an individual to constitutional restrictions comes under the heading of 'state action.'" J. Nowak, R. Rotunda & J. Young, Constitutional Law § 12.1, at 422 (3d ed. 1986).
\end{itemize}
Before delving into the question of state action, the court addressed the zoning administrator's contention that it would violate the Constitution to condition the issuance of a permit to hold a public rally on private property on the permit holder's admission of all members of the public to the rally. The court responded by comparing Kelly's private property with the shopping center property in three well-known Supreme Court cases.

In *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.* the Supreme Court held that a privately owned shopping center was the functional equivalent of a business district and should be treated as public property for first amendment purposes. It was unconstitutional, therefore, for the shopping center's owner to invoke state trespass laws in an effort to bar peaceful union picketing of one of the center's stores.

Four years later in *Lloyd Corp. v. Tanner* the Court held that anti-war activists could be prohibited from distributing handbills in a shopping center. According to the Court, there was no first amendment right to protest in a shopping center if the speech did not relate to the shopping center's operations.

Finally, in *Hudgens v. NLRB* the Supreme Court concluded that *Lloyd* overruled *Logan Valley* and that the first amendment did not guarantee a right of access to privately owned shopping centers. The *Hudgens* Court determined that although federal constitutional principles did not require a shopping center to permit protesting on its premises, federal statutes could so mandate.

The NAACP court compared the Kelly property to the shopping centers, conceding that the Kelly property had even fewer of the attributes of public property than the shopping centers. Ex-

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204. 648 F. Supp. at 203. The zoning administrator also argued that Frederick County lacked power to place conditions on the issuance of a rally permit by virtue of the limited authority granted to the county by the State. The court, assuming *arguendo* that that contention had merit, stated that Maryland could empower the county to condition the issuance of a permit upon lack of racial discrimination at the rally. *Id.*

205. *Id.* at 203-05.


207. *Id.* at 325.

208. *Id.* at 318.


210. *Id.* at 570.

211. *Id.* at 561-67.


213. *Id.* at 518.

214. *Id.* at 518-20.

tending Hudgens to the NAACP case, the court stated that if federal statutes could require the shopping centers to permit protesting on the premises, there was no reason why Frederick County and the State of Maryland could not condition the grant of a permit for a rally on private land upon opening the rally to all members of the public.\textsuperscript{216}

In analyzing the question of state action, the court focused on two landmark Supreme Court cases, Adickes v. S.H. Kress & Co.\textsuperscript{217} and Burton v. Wilmington Parking Authority.\textsuperscript{218} The issue in Adickes was whether a state-enforced custom compelling segregation in restaurants constituted state action for fourteenth amendment purposes.\textsuperscript{219} The Adickes Court recognized that the fourteenth amendment does not forbid a private party who acts without state involvement from discriminating on the basis of race.\textsuperscript{220} As the Court had pointed out in Shelley v. Kraemer,\textsuperscript{221} the fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful."\textsuperscript{222} The Adickes Court determined, however, that if the racially discriminatory act by the private party is either compelled by statute or by "custom having the force of law," the state has commanded the result by its law.\textsuperscript{223}

Neither a Frederick County statute nor a state-enforced custom compelled discrimination at the Klan rally. The NAACP court therefore had to resolve whether, in the absence of a discriminatory statute or custom, the issuance of the rally permit and the participation by county and state law enforcement officers amounted to "significantly sufficient state action to trigger the bar of the fourteenth amendment against governmental involvement in the Klan’s discriminatory actions."\textsuperscript{224}

The county ordinance requiring a permit for a rally such as that held by the Klan was a response to a perceived need to establish controls in connection with public rallies on private property.\textsuperscript{225} The permit ordinance was facially neutral regarding race; moreover, the language of the permit declared that its issuance was not to be

\textsuperscript{216} Id.
\textsuperscript{217} 398 U.S. 144 (1970).
\textsuperscript{218} 365 U.S. 715 (1961).
\textsuperscript{219} Adickes, 398 U.S. at 169.
\textsuperscript{220} Id.
\textsuperscript{221} 334 U.S. 1 (1948).
\textsuperscript{222} Id. at 13.
\textsuperscript{223} Adickes, 398 U.S. at 171.
\textsuperscript{224} 648 F. Supp. at 214.
\textsuperscript{225} Id. at 199.
construed as the county's approval of the purpose of the rally or of the sponsoring organization.\textsuperscript{226}

The state and county law enforcement officials who were on hand at the rally to monitor traffic and security did not affirmatively act to enforce the Klan's discriminatory policies.\textsuperscript{227} Nevertheless, they did tolerate the forcible exclusion of non-whites from the rally and passively supervise the activities of the armed Klansmen.\textsuperscript{228} As stated by the court, police protection to prevent members of an excluded group from entering private property being used for private purposes would not violate the equal protection clause.\textsuperscript{229} The conduct more closely approaches significant state involvement when police assist at a public function held on private property pursuant to a governmental permit when conditions strongly indicate a need for police involvement.\textsuperscript{230}

Neither the issuance of the permit nor the police involvement endorsed the Klan's policy to bar potential attendees from the rally on racial or religious grounds.\textsuperscript{231} Nonetheless, the permit coupled with police services enabled the Klan to hold its discriminatory rally and were symbols of the county's tolerance of the Klan's exclusionary practices.\textsuperscript{232}

In \textit{Burton v. Wilmington Parking Authority}\textsuperscript{233} a restaurant's refusal to serve blacks constituted state action because the restaurant leased space in a government parking facility.\textsuperscript{234} The \textit{Burton} Court stated that private conduct abridging individual rights does not violate the equal protection clause of the fourteenth amendment unless "to some significant extent the state in any of its manifestations has been found to have become involved in it."\textsuperscript{235} A parallel may be drawn between the public parking facility in \textit{Burton} and the zoning administrator in \textit{NAACP}. By their inaction the state agencies in both cases made themselves parties to the discriminatory activity and placed their "power, property and prestige behind the admitted discrimination."\textsuperscript{236}

\begin{itemize}
\item[226.] Id. at 197. While the parties had stipulated that the permit contained this language, the record seemed to indicate that the permit lacked such a disclaimer. \textit{Id.} at n.5.
\item[227.] Id. at 214.
\item[228.] Id.
\item[229.] Id. at 215.
\item[230.] Id. at 215-16.
\item[231.] Id. at 217.
\item[232.] Id.
\item[233.] 365 U.S. 715 (1961).
\item[234.] Id. at 717.
\item[235.] Id. at 722.
\item[236.] Id. at 725.
\end{itemize}
The NAACP court therefore found that a significant degree of state involvement existed by virtue of the county's establishment of a permit system which allowed discriminatory rallies, the zoning administrator's issuance of the permit for the rally, and the law enforcement officials' passive supervision of the Klan's discriminatory practices at the rally. While significant affirmative encouragement of discrimination by the State was absent, the involvement of the State and its tolerance of the discrimination was enough to constitute state action. The court pointed out that state and local governments have other choices with regard to public rallies which would avoid the constitutional issue at hand. The Frederick County government, however, chose to maintain a permit system which allowed private actors to engage in racially discriminatory practices of which the government was aware. Therefore, the county placed itself in the position of tacitly approving discriminatory actions that violated the equal protection clause. Because of this constitutional violation, the court found that the zoning administrator may be enjoined from issuing future permits if the administrator knows, or has cause to know, that the permit applicant proposes to exclude members of the public from public rallies on the basis of race.

b. Bail Bondsmen.—In Jackson v. Pantazes the United States Court of Appeals for the Fourth Circuit held that a bail bondsman was a state actor. Therefore, the bondsman could be subject to suit under title 42, section 1983 of the United States Code.

Betty Jackson claimed that bondsman Nicholas Pantazes and

237. 648 F. Supp. at 224.
238. Id. at 224-25.
239. Id. at 225. For example, the government could allow public rallies to be held on private property without governmental regulation, could ban the rallies for safety reasons, or could authorize the rallies to take place under a permit entitling all members of the public to attend. Id.
240. Id.
241. Id.
242. 810 F.2d 426 (4th Cir. 1987).
243. A state actor may be a state official, one who has acted together with or has obtained significant aid from state officials, or one whose conduct otherwise is chargeable to the State. Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).
244. 42 U.S.C. § 1983 (1982) provides in pertinent part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
police officer Allan Goldberg inflicted personal injuries and property damage when they forcibly entered her home to apprehend her son.\(^{245}\) Ms. Jackson's son, Frank Jackson, had employed Pantazes as surety on a bond for his appearance in court to answer criminal charges.\(^{246}\) When Jackson failed to appear in court, Pantazes and two police officers appeared at the Jackson home and sought permission to enter to search for him.\(^{247}\) Ms. Jackson repeatedly denied that her son was at home, but Pantazes and Goldberg forcibly entered the home, causing Ms. Jackson to sustain personal injuries.\(^{248}\) When Ms. Jackson attempted to stop Pantazes and Goldberg from searching her home, Pantazes kicked her; Goldberg did not intervene.\(^{249}\) Pantazes then searched the home, breaking down unlocked doors in the process, while Goldberg physically restrained Ms. Jackson.\(^{250}\) Pantazes and Goldberg left the premises after failing to find Johnson, but Pantazes then followed Ms. Jackson and her husband to the police station and repeatedly threatened them with physical violence.\(^{251}\)

Ms. Jackson filed suit against Pantazes and Goldberg in the United States District Court for the District of Maryland under title 42, section 1983 of the United States Code.\(^{252}\) The federal court granted summary judgment for Pantazes and Goldberg on the ground that Pantazes was not a state actor and therefore could not be liable under section 1983.\(^{253}\) The court further found that Goldberg was not at fault with regard to the use of excessive force alleged by Ms. Jackson.\(^{254}\)

The Fourth Circuit reversed the district court's judgment, declaring that Pantazes was a state actor who could be sued under section 1983 and that Goldberg might be liable under section 1983 for participating in Pantazes' alleged deprivations of Ms. Jackson's con-

\(^{245}\) 810 F.2d at 428.  
\(^{246}\) Id. at 427.  
\(^{247}\) Id. at 428.  
\(^{248}\) Id. Pantazes shoved the door into Ms. Jackson, causing her to cut her arm and fall backwards. Id.  
\(^{249}\) Id.  
\(^{250}\) Id.  
\(^{251}\) Id. Ms. Jackson went to the police station to swear out an arrest warrant for Pantazes. Pantazes filed criminal charges against Ms. Jackson for assault and battery and for harboring a fugitive. Ms. Jackson was acquitted of all charges at trial. Id.  
\(^{252}\) Id. at 427.  
\(^{253}\) Id.  
\(^{254}\) Id.
In reversing the lower court's decision, the Fourth Circuit found that the bondsman met the requirements used to determine when the conduct of an actor is so fairly attributable to the state as to render the wrongful conduct actionable under section 1983. The court relied on two Supreme Court decisions, *Lugar v. Edmonson Oil Co.* and *Adickes v. S.H. Kress & Co.*, which established the test for determining whether a party is a state actor subject to suit under section 1983. The test consists of two parts:

[F]irst, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible .... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Both prongs of this test are satisfied when a private party and public official act together to produce a constitutional violation, even in the absence of a state statute, custom, or policy authorizing the private party's conduct. It is clear from the facts in *Jackson* that Goldberg's aid to Pantazes in the search of the Jackson home qualifies as this type of joint participation. Goldberg assisted Pantazes in gaining entrance to Ms. Jackson’s home, dragging her from her doorway, and restraining her while Pantazes conducted his search.

The court noted that both parts of the *Lugar* test also are satisfied when an independent or symbiotic relationship exists between

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255. *Id.* The court recognized that Goldberg, as a state officer exercising official powers, was indeed a state actor. *Id.* at 428.
256. *Id.* at 429.
259. The Supreme Court delineated the two-part test in *Lugar*. 457 U.S. at 937, deriving it from *Adickes*, 398 U.S. at 169-74. *Adickes* was a § 1983 action brought against a private party, based on a claim of racial discrimination in violation of the equal protection clause of the fourteenth amendment. The Court held that the private party's participation with a state official in a conspiracy to discriminate constituted both the state action essential to a constitutional violation and action under color of law for purposes of § 1983.
261. *Id.* at 931.
262. *Id.*
263. 810 F.2d at 429.
the state and a private actor, as in Burton v. Wilmington Parking Authority. According to the Jackson court, the symbiotic relationship between bail bondsmen and the criminal court system sufficed to satisfy both parts of the test and constitute state action on Pantazes' part. Therefore, Pantazes could be classified as a state actor.

The effect of Jackson is to limit the broad power of bail bondsmen to capture and arrest a fugitive, especially if receiving assistance from state officials. Acting alone, professional bondsmen have enjoyed extraordinary powers to capture and use force to compel peremptory return of a bail jumper. Courts traditionally have viewed recapture as a private remedy which arises from a private action. Nevertheless, when bondsmen licensed by the State obtain significant aid from police officers exercising state authority, the bondsmen become state actors, and therefore are constrained both by the Constitution and by federal statutes such as section 1983.

3. Jury Selection.—The United States Court of Appeals for the Fourth Circuit held in United States v. Ricks that in a criminal trial, selection of a jury by the "struck jury" method requires certain

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264. 365 U.S. 715 (1961). In Burton a restaurant's refusal to serve blacks constituted state action for fourteenth amendment purposes when the restaurant leased space in a public parking facility under an arrangement with the State that conferred on each a variety of mutual benefits. The Court found that if there are extensive contacts between a state and a private discriminator in such a way that each benefits from the other's conduct, the requisite state involvement may be found. Id. at 726.

265. 810 F.2d at 430. Bondsmen are licensed by the State and depend on the judicial use of a bail bond system for their livelihood. In turn, bondsmen facilitate pretrial release of accused persons, monitor their whereabouts, and retrieve them for trial. Id. See Md. R. 4-217; 1285 (bail bond system and licensing of bondsmen, respectively).

266. 810 F.2d at 429. Upon ruling that Pantazes was a state actor, the court concluded that Ms. Jackson had established sufficient evidence of violations of her constitutional rights to withstand Pantazes' motion for summary judgment. The powers conferred on a bondsman by state law include the right to arrest a fugitive without legal process and the right to break and enter on private property to effect the arrest. Nevertheless, the Jackson court believed that based on Ms. Jackson's evidence a trier of fact might find that Pantazes used excessive force and unnecessarily destroyed property in violation of Ms. Jackson's constitutional rights. The court also ruled that evidence of Goldberg's participation in Pantazes' search and his failure to protect Ms. Jackson from the alleged illegal excesses perpetrated by Pantazes might lead to a finding that Goldberg helped to deny Ms. Jackson's constitutional rights. Id. at 429-30.

267. See Kear v. Hilton, 699 F.2d 181, 182 (4th Cir. 1983) (recognizing that professional bondsmen enjoy extraordinary powers to capture and use force to compel return of a bail jumper, but permitting extradition of a bondsman to Canada for kidnapping a bail jumper).

268. Id.


270. In jurisdictions using the "struck jury" method, the trial court gives each party a
safeguards to prevent the "dilution" of a defendant's peremptory challenges. The venire list given to counsel for purposes of exercising peremptory challenges must "contain only the approximate number of necessary potential jurors." Alternatively, if a larger list is provided, the court must give "clear, unambiguous instructions" identifying an appropriately limited portion of the list from which the jury will be selected.

Affirming the majority decision of a three-judge panel one year earlier, over a vigorous dissent in both instances, the Fourth Circuit sitting en banc held that the trial court's failure to limit the venire list in a complex Baltimore drug trafficking prosecution was reversible error warranting a new trial for the defendants. The court found that failure to limit the list, while not rising to the level of a constitutional violation, "hinders the full, unrestricted exercise of peremptory challenges and violates an essential part of the right to trial by jury."

Thomas Calvin Ricks and seven other defendants were convicted in the United States District Court for the District of Maryland of conspiring to possess and distribute heroin and cocaine, as well as other federal narcotics offenses. The jury which convicted

list of prospective jurors who have not been challenged and excused for cause. Each side exercises its peremptory strikes against the names on the list. If afterwards more than twelve jurors remain on the list, the trial judge selects the actual jury. The other common method of exercising peremptory challenges is called the "jury-box" method, in which the parties challenge jurors already seated in the box. As each prospective juror is challenged and excused, another is seated. When both sides have exhausted all peremptory challenges, the twelve persons seated in the box serve as jurors. For a discussion of jury selection methods, see United States v. Blouin, 666 F.2d 796, 797-98 (2d Cir. 1981).

271. 802 F.2d at 734. "It is self-evident that the right to a given number of peremptory challenges becomes less and less effective as the list of potential jurors against which the challenges must be exercised grows larger than the approximate number of veniremen needed to comprise a jury." Id. at 733.

272. Id.

273. Id.

274. United States v. Ricks, 776 F.2d 455 (4th Cir. 1985). The court also held that a conviction for conspiracy to possess and distribute narcotics under 21 U.S.C. § 846 (1982) could serve as one of the three requisite narcotics violations upon which there could be a conviction for conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848 (1982 & Supp. IV 1987). This note will not address that aspect of Ricks.

275. 776 F.2d at 466 (Wilkinson, J., dissenting from panel decision); 802 F.2d at 737 (Wilkinson, J., dissenting from en banc decision). Chief Judge Winter wrote the majority opinions for both the panel and the full court; Judge Wilkinson wrote both dissents.

276. 802 F.2d at 732.

277. Id. at 733.

278. Id. at 734.

279. 776 F.2d at 458. Only the panel decision fully set forth the facts of the case.
the defendants was selected from a list of fifty-seven names given to counsel for the purpose of marking peremptory strikes.

Before voir dire began, a government attorney asked which portion of the list the trial court planned to use in drawing a jury. The court's response was ambiguous, and was apparently construed differently by opposing counsel. The defense exercised all of its twelve challenges within the first twenty-seven persons on the list; the government's six challenges were dispersed throughout.

Without further explanation, the court passed over the first fourteen persons remaining eligible on the list and selected the fifteenth to be jury foreman. The judge drew the balance of the panel from among persons listed still further down on the list. Defense counsel promptly and strenuously objected that they had been misled into wasting their peremptory challenges, but the judge overruled their objections and swore in the jurors as selected.

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280. In fact, 75 persons reported for jury duty on the day that the trial began. The record suggested that other juries were to be selected later in the day. The 75 were divided into a group of 66 from which active jurors would be chosen, and a group of 9 from which alternates were to be selected. In the course of voir dire, 9 of the active group and 1 of the alternates were excused for cause. That left 57 on the list of active jurors submitted to counsel for peremptory strikes. The alternate list played no part in this controversy. Id. at 458-59.

281. Because the offenses charged were punishable by imprisonment for more than one year, the government was entitled to six peremptory challenges and the defendants jointly to no fewer than 10. FED. R. CRIM. P. 24(b). The trial court granted the defendants jointly 12 peremptory challenges under the authority of FED. R. CRIM. P. 24(c).

282. 776 F.2d at 459. The inquiry and the court's response were as follows:

MR. ULWICK [the government attorney]: Your Honor, may I assume that we'll be—or the Court will be picking from the top of the list?

THE COURT: Well, of course I can't tell at this point, as far as strikes and so forth, but ordinarily I start from the top, not any rigid number, counting from the top, so I think it would be reasonably fair to say, if you want to exercise your strikes mostly at the top, and if you're satisfied with the top, don't strike there.

Id.

283. Id.

284. "We relied on the Court's statement that it was going to start from the top of the list. We feel as though we've been led astray." Id.

285. Id. at 460. In a brief oral opinion overruling the objections, the judge declared:

It seems to me that the Government followed my instructions. If counsel misunderstood them, I think that is unfortunate. I don't think that you can say the strikes were not effective because it could have been that I would have picked one of these people that you struck as the foreman. I don't know anything about any of these people. I don't think counsel does either, but at this point, to say, "We don't like the composition of the jury and therefore we ought to pick another jury because we think those people are going to be one way or the other," I don't think is the proper way to do it and I think that the Government properly followed my instructions. Defense counsel didn't. So your exceptions will be noted and we're going to swear the jury.
jury convicted the defendants after a five-week trial.\textsuperscript{286}

On appeal two Fourth Circuit judges found that defense counsel’s belief that the court would select the jury from the beginning of the list was not unreasonable in view of the court’s advice before the voir dire.\textsuperscript{287} Nor was it unreasonable for defense counsel to have enough faith in their interpretation to relieve them of any duty to seek further clarification. The practical effect of this “not unreasonable belief” was to “frustrate the exercise of their peremptory strikes.”\textsuperscript{288} Interpreting United States Supreme Court decisions on point to say that “denial or impairment of the right to peremptory strikes is reversible error per se,”\textsuperscript{289} the panel majority reversed the district court and remanded the case for a new trial.

Judge Wilkinson focused his arguments in dissent both on the unreasonableness of defense counsel’s reading of the trial court’s advice, “given the ambiguities in the court’s statement,” and on the unreasonableness of relying on such an ambiguous statement.\textsuperscript{290} Turning the majority's own reasoning against the holding, the dissent urged that the very importance of the peremptory challenge should give “special force” to an attorney’s “usual duty of circumspection.”\textsuperscript{291}

On rehearing, the full court not only reaffirmed the panel’s conclusion,\textsuperscript{292} but also determined that a limitation on the effective size of the venire was “essential to the validity of a jury chosen by the ‘struck jury’ system.”\textsuperscript{293} Conceding that no appellate decision “actually holds that it is error for a district court to submit a jury list to counsel with more names than required,”\textsuperscript{294} the court noted that every appellate decision upholding the “struck jury” system involved a venire no larger than necessary to seat a jury after all chal-

\textsuperscript{286} Id. at 460 n.8.
\textsuperscript{287} Id. at 458.
\textsuperscript{288} Id. at 460.
\textsuperscript{289} Id. at 461.
\textsuperscript{289} Id. In particular, the court looked for authority to Swain v. Alabama, 380 U.S. 202, 218 (1965) (finding that racially discriminatory jury selection procedures, including discrimination in the use of the peremptory strike system, violated the right to equal protection of the laws), and Pointer v. United States, 151 U.S. 396, 408 (1894) (noting that the peremptory challenge is one of the most important of the sixth amendment rights). Swain’s holding that a black defendant could not make out a prima facie case of impermissible discrimination solely on the facts of the defendant’s particular case was overturned in Batson v. Kentucky, 476 U.S. 79, 93-94 (1986).
\textsuperscript{290} 776 F.2d at 466 (Wilkinson, J., dissenting).
\textsuperscript{291} Id. at 469.
\textsuperscript{292} 802 F.2d at 732.
\textsuperscript{293} Id. at 733.
\textsuperscript{294} Id. at 736.
lenges were exhausted. The court found the jury selection process in Ricks to be "without precedent" and asserted, without more clearly developing the logical rationale for this historical circumstance, that it also was impermissible.

Judge Wilkinson, again dissenting, examined the cases the majority used to support its decision and reached an entirely different conclusion: a defendant "cannot succeed in his claim simply by showing that he could, under some procedure, have made more effective use of his peremptories." The dissent also emphasized the discretion given to trial courts in the jury selection procedure, and suggested that a larger venire could have the salutary effect of increasing minority representation on juries.

The Fourth Circuit's holding does not purport to elevate any aspect of the peremptory challenge to a constitutional right, despite its obvious link to the sixth amendment. Nor does it require that trial courts maximize the effectiveness of a defendant's peremptory challenges by eliminating any possibility of a "wasted" strike. Rather, the holding invests the conceptually exclusionary device of peremptory challenge with greater utility as a tool for determining which jurors will be included on a particular jury.

Unasked and unanswered in Ricks is when the inescapable "wasting" of peremptory challenges might constitute a violation of procedural due process. It is not enough to aver that the peremp-

295. Id.
296. Id. at 796-37.
297. Judge Wilkinson relied most heavily on Pointer v. United States, 151 U.S. 396 (1894), which, in Judge Wilkinson's words, "directly refutes the majority's premise that the right to a specific number of peremptory challenges implies a right to the greatest possible power of exclusion." 802 F.2d at 738.
298. 802 F.2d at 739 (Wilkinson, J., dissenting).
299. Id.
300. Id. at 740.
301. Id. at 733.
302. 802 F.2d at 738 (Wilkinson, J., dissenting). The dissent demonstrated that both the "struck jury" system and the "jury box" system could result in "wasted" peremptory challenges. For example, the "struck jury" system upheld in United States v. Pointer, 151 U.S. 396, 412 (1894), required the defendant to exercise peremptory strikes without knowing whom the government would challenge. "The defendant would have enjoyed an 'undiluted' influence if the prosecution had first used its challenges," potentially saving the defense one or more strikes against mutually unacceptable candidates. 802 F.2d at 738. Similarly, the "jury box" system upheld in United States v. Blouin, 666 F.2d 796 (2d Cir. 1981), required the defendant to exercise the last peremptory challenge before learning who would be the last replacement juror. Id. at 798.
303. "It has long been settled that '[t]he right of peremptory challenge is not, of itself, a right to select, but a right to reject jurors."' 802 F.2d at 738 (Wilkinson, J., dissenting) (quoting United States v. Marchant & Colson, 25 U.S. 480, 482 (1827)).
tory challenge is not a constitutionally protected right. Established by statute to help ensure the guaranteed right to a fair trial by jury, the peremptory challenge becomes part of the process to which a defendant is constitutionally entitled under the fifth amendment. At some point, the "dilution" of peremptory challenges must rise to the level of a constitutional violation. It is hard to imagine a better set of circumstances for bringing the constitutional question under scrutiny.

ERIC B. EASTON
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304. In Spencer v. State, 20 Md. App. 201, 314 A.2d 727 (1974), a Maryland court found just such a violation. The parties exercised their peremptory challenges under a "jury box" system, with replacements called in order from the top of the list to the bottom. When the defense had exhausted its final challenge, however, the clerk "suddenly departed from the standard operating procedure and jumped over the next three names on the list, calling the name of the fourth person down the line" to fill the remaining seat. Id. at 208, 314 A.2d at 732. The Court of Special Appeals reversed the subsequent conviction, declaring:

Under the peculiar circumstances of the case at bar, we see a violation of the due process of law to which the appellant was entitled by the arbitrary and capricious action of the court clerk. We do not establish any ironclad ritual to govern the calling of prospective jurors. We simply hold . . . that where the rules have been agreed upon . . . a defendant is entitled to rely upon those rules, unless good cause necessitates some departure therefrom.

Id.
III. CRIMINAL LAW

A. Constitutional Issues

1. Exclusionary Rule.—a. Illegal Arrests.—The Court of Appeals examined the role of the exclusionary rule in guaranteeing a defendant's fourth amendment rights in *Trwty v. State*. The court reaffirmed its position that the erroneous admission of evidence at a criminal trial requires a reversal of all related convictions unless the prosecution proves beyond a reasonable doubt that the error did not influence each verdict.

Tyrone Trusty was charged with various drug possession offenses, resisting arrest, and assaulting the arresting officer. Trusty claimed that the exclusionary rule applied to the drugs and paraphernalia recovered from him, arguing that the police lacked probable cause to effectuate the warrantless arrest which uncovered the evidence, and thereby violated his fourth amendment right to be free of unreasonable searches and seizures. In the pretrial hearing the circuit court denied Trusty's motion to suppress the evidence, finding probable cause to support the arrest. A jury subsequently

1. The fourth amendment provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated..." U.S. CONST. amend. IV.
4. 308 Md. at 660, 521 A.2d at 750.
5. Id. at 661, 521 A.2d at 750. A search conducted after the arrest revealed heroin, cocaine, marijuana, and a spoon, all of which were admitted into evidence. Id. at 665, 521 A.2d at 752.

Although it is unclear whether Trusty relied on the federal or state constitution, the Court of Appeals noted that the fourth amendment and article 26 of the Maryland Declaration of Rights consistently have been held *in pari materia*. 308 Md. at 660 n.1, 521 A.2d at 750 n.1. See Potts v. State, 300 Md. 567, 576, 479 A.2d 1335, 1340 (1984) ("[W]e have said on numerous occasions that Article 26 is *in pari materia* with its federal counterpart and decisions of the Supreme Court interpreting the Fourth Amendment are entitled to great respect.").
The Court of Special Appeals found that at the pretrial hearing the State failed to meet its burden of establishing probable cause to arrest. Because the narcotic convictions clearly were based on the evidence that was seized after an illegal arrest, the court held that these convictions must necessarily be reversed. The intermediate appellate court, however, refused to reverse the assault and resisting arrest convictions, holding that Trusty failed to object to the evidence with the particularity required by Maryland Rule 4-324(a). It thus affirmed these convictions without considering the possible effects that the excluded evidence may have had on the verdicts.

On review the Court of Appeals examined the extent to which the erroneously admitted evidence influenced the rendition of the verdicts at issue. In Dorsey v. State the court had established the test for determining whether reversible error had occurred:

[When] an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is

8. 308 Md. at 661, 521 A.2d at 751. Trusty did not renew his motion to suppress at trial and the pretrial ruling therefore was binding. See Md. R. 4-252(g)(2).
9. 67 Md. App. at 629, 508 A.2d at 1022.
10. Id. at 630, 508 A.2d at 1022.
11. Id.
12. Id. At the end of the State’s case, Trusty moved for judgments of acquittal on the assault and resisting arrest counts based on the contention that the arrest was illegal. Id. at 622-23, 508 A.2d at 1019-20. Md. R. 4-324(a) provides: [A] defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State’s case.
13. 308 Md. at 669, 521 A.2d at 754.
14. 276 Md. 638, 350 A.2d 665 (1976). The Court of Appeals established this test following the Supreme Court’s decision in Chapman v. California, 386 U.S. 18 (1967). In Chapman the prosecutor had commented impermissibly on the defendant’s failure to testify at trial, yet the Supreme Court dismissed the constitutional violation as harmless error. In two previous situations, however, the Court had found that the constitutional violation is per se reversible error. See Haynes v. Washington, 373 U.S. 503 (1963) (reversible error to use an involuntary confession); Glasser v. United States, 315 U.S. 60 (1942) (deprivation of the right to counsel at trial never can be construed as harmless error).
mandated. Such reviewing court must thus be satisfied that there is no reasonable probability that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.\(^{15}\)

Applying this test, the *Trusty* court reviewed the trial record\(^{16}\) and determined that the erroneously admitted evidence was the “life-blood” of the State’s case which “permeated the entire proceedings.”\(^{17}\) Thus, the court was unable to declare that the error did not influence the rendition of the guilty verdicts. The error, therefore, was not harmless; it followed that these convictions must be reversed.\(^{18}\)

The court indicated that the Court of Special Appeals had failed to address the correct issue. Determinative of the validity of the assault and resisting arrest convictions was the legality of the arrest, not the sufficiency of any collateral evidence to support these convictions.\(^{19}\) Absent a finding of harmless error, the convictions must be reversed, regardless of the defendant’s failure to correctly phrase the motion for acquittal. Although the exclusionary rule “does not confer a constitutional right . . . to have evidence excluded, it has the salutary effect of assuring that certain constitutional guarantees and prohibitions may not be violated to the detriment of a criminal defendant.”\(^{20}\)

15. *Dorsey*, 276 Md. at 659, 350 A.2d at 678. The prosecution bears the burden of proving the “innocuous nature” of the erroneous proceeding. Hilliard v. State, 286 Md. 146, 155, 406 A.2d 415, 421 (1979). The *Trusty* court declared that it would not distinguish between constitutional, evidentiary, and procedural errors when applying the harmless error test. 308 Md. at 668 n.6, 521 A.2d at 754 n.6. For a comprehensive discussion of *Chapman* and related Maryland cases, see *Dorsey*, 276 Md. at 642-46, 350 A.2d at 668-70.

16. 308 Md. at 664-68, 521 A.2d at 752-54.
17. *Id.* at 669, 521 A.2d at 754.
18. *Id.* at 670, 521 A.2d at 755.
19. *Id.* at 670 n.7, 521 A.2d at 755 n.7.
20. *Id.* at 673, 521 A.2d at 756. In United States v. Calandra, 414 U.S. 338 (1974), the Supreme Court stated for the first time that the exclusionary rule is not a constitutional right of the aggrieved party but rather a deterrent to future police misconduct. *Id.* at 347-48. Maryland has adopted this construction of the rule. See Whitaker v. Prince George's County, 307 Md. 368, 381, 514 A.2d 4, 11 (1986) (exclusionary rule is an evidentiary rule, not a constitutional right); Potts v. State, 300 Md. 567, 582, 479 A.2d 1335, 1343 (1984) (rule is a prophylactic device and does not confer right upon individual to have evidence excluded as a matter of constitutional law); Randall Book Corp. v. State, 64 Md. App. 589, 603, 497 A.2d 1174, 1180 (1985), cert. denied, 305 Md. 175, 452 A.2d 187 (1986) (rule is a judicially created remedy rather than constitutional right). See also Comment, *Blessed Are the Faithful: An Analysis of the Scope and Applicability of the Good Faith Exception to the Exclusionary Rule*, 15 U. BALTIMORE L. REV. 496, 525 (1986) (authored by
The court flatly rejected the State's argument that a deficiency of evidence at the pretrial hearing to support probable cause could be cured by evidence introduced at the trial on the merits, noting the obvious unfairness this proposition would work on the defendant. Likewise, the court rejected the argument that, assuming that the existence of probable cause had been proven at trial, the reversal of the convictions was unwarranted because it would not serve to deter future police misconduct.

In Trusty the Court of Appeals found that the exclusionary rule serves as an effective tool in guaranteeing a defendant's constitutional rights, and is not, as the State argued, solely a "prophylactic device." Thus the court has signalled its intent to use the rule to regulate the means by which the State administers criminal justice. Notwithstanding its declaration that the rule itself is not a constitutional right under either the federal or state constitution, the court concluded that the rule promotes the end of allowing a defendant to have "guilt proved through a fair trial in accord with the due processes of the law of the land." The Supreme Court, however, recently reaffirmed its conviction that the exclusionary rule is, indeed, solely a deterrent to police misconduct. By rejecting this

Thomas Page Lloyd) (Maryland courts consistently have followed Supreme Court interpretations of the fourth amendment).

21. 308 Md. at 670-72, 521 A.2d at 755-56.
22. Id. at 671-72, 521 A.2d at 755-56. The court quoted extensively from 4 W. LAFAVE, SEARCH AND SEIZURE § 11.7(c) (2d ed. 1987). Professor LaFave puts forth the proposition endorsed by Maryland courts that in reviewing a denial of a pretrial motion to suppress, the appellate court should not consider evidence produced at the trial on the merits. Id.
23. 308 Md. at 672-74, 521 A.2d at 756-57.
24. Id. at 672, 521 A.2d at 756. The State relied on Potts v. State, 300 Md. 567, 582, 479 A.2d 1335, 1343 (1984), which maintained that "the exclusionary rule is a prophylactic device designed to deter police misconduct." See supra note 20.
25. 308 Md. at 673, 521 A.2d at 756.
26. Id. at 674, 521 A.2d at 757.
27. Maryland v. Garrison, 107 S. Ct. 1013 (1987) (extending the good faith exception to the exclusionary rule to a factual mistake by police concerning nature of premises). The constitutional stature of the exclusionary rule has been debated ever since its creation in Weeks v. United States, 232 U.S. 383 (1914). Miller, The Exclusionary Rule: Where Are We Now?, PROSECUTOR 15 (Spring 1987). The Supreme Court has offered three theories to justify the use of the rule: (1) it is essential to protect the fourth amendment right to privacy, see Mapp v. Ohio, 367 U.S. 643, 655, 657 (1961); (2) it is necessary to maintain judicial integrity, see McNabb v. United States, 318 U.S. 332, 345 (1943); and (3) it acts to deter future police violations of the fourth amendment, see United States v. Calandra, 414 U.S. 338, 347-48 (1974). The characterization of the rule in Mapp as an essential element of an individual's fourth amendment right has been displaced by subsequent Supreme Court decisions during the Burger and Rehnquist eras which have declared that the exclusionary rule is simply a police deterrent. See, e.g.,
narrow construction of the rule, the Court of Appeals has construed the function of the exclusionary rule differently than the Supreme Court. By reading due process implications into the exclusionary rule, the Court of Appeals effectively enlarged the arsenal of arguments available to criminal defendants, and also suggested a means to isolate judgments protective of the defendant's rights from review by the relatively conservative Supreme Court. In this

Illinois v. Krull, 107 S. Ct. 1160, 1167 (1987) (holding that exclusionary rule does not apply when police conduct a warrantless administrative search in reliance on unconstitutional statute); Garrison, 107 S. Ct. at 1018 ("The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and disclose, to the issuing magistrate."); United States v. Leon, 468 U.S. 897, 922 (1984) (holding that the exclusionary rule does not apply when a police officer, acting in good faith, relies on defective warrant issued by a magistrate); Stone v. Powell, 428 U.S. 465, 492 (1976) (holding that exclusionary rule issues may not be litigated in federal habeas corpus review of state conviction); United States v. Janis, 428 U.S. 433, 446 (1976) (holding that the exclusionary rule is inapplicable in a civil proceeding). See generally Comment, supra note 20. The exceptions to the exclusionary rule are so numerous that they now define the rule. Miller, supra note 27, at 20.

Trusty was decided less than one month after the Supreme Court issued its opinion in Garrison. State appellate courts increasingly have refused to follow the constructions of the fourth amendment set forth by the Burger and Rehnquist Courts, relying on their state constitutions as bases for a more liberal interpretation of the search and seizure provision. See Blodgett, Liberal Trend?, 72 A.B.A. J. 20, 20-21 (Jan. 1, 1986).

For example, in Stringer v. State, 491 So. 2d 837 (Miss. 1985), the Mississippi Supreme Court refused to accept the Supreme Court's good-faith exception to the exclusionary rule formulated in Leon and stated that "[h]owever passe the idea may be in other circles, some of us still regard it as important that our citizens be free from unreasonable searches and seizures. . . . We perceive no vehicle for protecting these rights of our citizens . . . other than continued enforcement of this state's exclusionary rule." Id. at 849 (emphasis in original). The court stated that, although the rule was not a constitutional right per se, it was a "logical and necessary corollary" to the search and seizure provision of the state constitution. Id. at 847. Other states have rejected the Supreme Court's characterization of the exclusionary rule. See, e.g., People v. Bigelow, 66 N.Y.2d 417, 427, 488 N.E.2d 451, 458, 497 N.Y.S.2d 630, 637 (1985) (declining to apply on state constitutional grounds the good-faith exception to the rule); State v. Grawein, 123 Wis. 2d 428, 432, 367 N.W.2d 816, 818 (1985) (same).

The Court of Appeals invoked the fifth, sixth, and eighth amendments to the federal constitution, and articles 16 through 25 of the Maryland Declaration of Rights. 308 Md. at 673, 521 A.2d at 756. Primary reliance, however, appears to be placed on Maryland's due process clauses, articles 19 and 24, and the fourteenth amendment to the federal constitution. Id. The court concluded that "[n]o matter how culpable an accused may appear to be, he is entitled to have his guilt proved through a fair trial in accord with the due processes of the law of the land. As long as the exclusionary rule is in effect, it tends to this end." Id. at 674, 521 A.2d at 757. The opinion omits citation to Maryland's article 26, the warrants clause, which has been consistently held in pari materia with the fourth amendment. See supra note 7.

If the court concludes that it is the state constitution that it is construing, the decision is " 'impervious to review by the U.S. Supreme Court.' " Blodgett, supra note 28, at 21 (quoting Joseph Cook of the University of Tennessee Law School). This rests on the principle that as long as the state constitution gives greater protection to the
way, defense attorneys may look to the state constitution for a more expansive view of the protection provided by the exclusionary rule when seeking its shelter.31

b. Probation Revocation Hearing.—In Chase v. State32 the Court of Appeals considered whether illegally seized evidence may be used in a probation revocation hearing.33 The court concluded that as a general rule the exclusionary rule does not apply to bar illegally seized evidence from probation revocation hearings.34 The court, however, qualified this principle by mandating application of the exclusionary rule upon an unrebutted showing of bad faith on the part of law enforcement officers.35

Jerome Chase pleaded guilty to robbery and was sentenced to ten years in prison.36 After fifty-five days of incarceration, he was placed on conditional probation for five years.37 One year later, Chase violated the conditions of probation and his prior ten-year sentence was reimposed. The court again suspended the sentence and placed him on five years probation.38 Two years later, law enforcement officials arrested Chase for drug trafficking. During the search incident to the arrest, the police seized marijuana, drug paraphernalia, and money.39 At the criminal trial on the charges, the judge sustained Chase's motion to suppress the evidence and the charges were dismissed.40


31. Sidney Bernstein, former chair of the Criminal Law Section of the Association of Trial Lawyers of America, contends that the differences between state and federal constitutions are "'window[s] of opportunity' " for the criminal defense bar and that failure to seek out these distinctions would constitute legal malpractice. Blodgett, supra note 28, at 20.

33. For a discussion of other evidentiary issues involving probation revocation proceedings, see the analysis of State v. Fuller, 308 Md. 547, 520 A.2d 1315 (1987), infra at 869-72.
34. 309 Md. at 251, 522 A.2d at 1362.
35. Id. at 253-54, 522 A.2d at 1362-63. The court feared that per se admissibility of evidence in a probation revocation hearing would "derogate due process of law to presume conclusively that in such cases the police officer acted in good faith." Id. at 253, 522 A.2d at 1363.
36. Id. at 228, 522 A.2d at 1350.
37. Id.
38. Id.
39. Id. at 229, 522 A.2d at 1350.
40. Id. The circuit court found that the officers lacked probable cause to arrest Chase. Id.
At his probation revocation hearing,41 Chase again moved to suppress the seized evidence.42 Both the circuit court and the Court of Special Appeals held that the exclusionary rule does not bar admission of illegally seized evidence in a probation revocation hearing.43 The Court of Appeals affirmed the judgment, but modified the harshness of the rule by allowing a court to bar evidence upon a showing that law enforcement officers acted in bad faith in effecting the search and seizure.44

The Supreme Court has yet to determine whether the exclusionary rule applies in probation revocation hearings.45 The Maryland Court of Appeals, in addressing the issue, balanced two

41. *Id.* The probation revocation hearing was biphasal: a preliminary hearing to rule on the admissibility of evidence seized and a hearing on the merits. *Id.* at 230, 522 A.2d at 1351.

42. *Id.* The court ruled that, under the circumstances, the exclusionary rule did not apply to Chase's probation revocation hearing. At this point Chase admitted possessing the controlled substance. Chase v. State, 68 Md. App. 413, 416, 511 A.2d 1128, 1130 (1986).

43. 68 Md. App. at 425, 511 A.2d at 1134; 309 Md. at 229-30, 522 A.2d at 1350-51.

44. 309 Md. at 254, 522 A.2d at 1363. The Court of Appeals also considered whether the record's failure to show that Chase was physically present at his revocation hearing was enough to establish a knowing waiver of his right to be present and the right to contest the charges against him. *Id.* at 233-37, 522 A.2d at 1352-54. In refusing to reverse the judgment, the court determined that Chase effectively waived his right of presence; moreover, because his absence did not influence the verdict, any error was harmless. *Id.* at 236-37, 522 A.2d at 1354.

45. *Id.* at 248-49, 522 A.2d at 1360. This issue, however, has been the subject of continuing controversy in other jurisdictions. The majority of courts have held that the exclusionary rule is inapplicable to probation revocation hearings. See, e.g., United States v. Frederickson, 581 F.2d 711, 713 (8th Cir. 1978) ("All reported cases which have considered the question have held the fourth amendment exclusionary rule inapplicable to probation revocation proceedings."); United States v. Vandemark, 522 F.2d 1019, 1020 (9th Cir. 1975) (collecting cases); United States v. Winsett, 518 F.2d 51, 53-55 (9th Cir. 1975) ("[T]o apply the exclusionary rule to probation revocation hearings would tend to frustrate the remedial purposes of the probation system."). The minority view allows the application of the exclusionary rule to probation revocation hearings. See, e.g., United States v. Rea, 678 F.2d 382, 388-90 (2d Cir. 1982) ("[E]vidence seized by a probation officer in an illegal warrantless search of a probationer's home is inadmissible at a subsequent probation revocation hearing."); United States v. Workman, 585 F.2d 1205, 1211 (4th Cir. 1978) ("[T]he Supreme Court has never exempted from the operation of the exclusionary rule any adjudicative proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim of a search to imprisonment."); Adams v. State, 153 Ga. App. 41, 42, 264 S.E.2d 532, 533 (1980) ("[I]legally seized evidence may not be used to revoke probation."); State *ex rel* Piccarillo v. New York State Bd. of Parole, 48 N.Y.2d 76, 81, 397 N.E.2d 354, 356-57, 421 N.Y.S.2d 842, 845 (1979) (holding exclusionary rule applicable to administrative proceedings including probation revocation hearings). For a discussion of the policy considerations inherent in this question, see Note, *The Exclusionary Rule In Probation and Parole Revocation: A Policy Appraisal*, 54 Tex. L. Rev. 1115, 1126-28 (1976).
concepts: the nature of a probation revocation hearing\textsuperscript{46} and the goal of deterrence.\textsuperscript{47} In so doing, the court significantly limited an individual's protection against governmental use of illegally seized evidence in probation revocation hearings.

The Chase court began its analysis by comparing probation revocation hearings and criminal trials. In Maryland a probation revocation hearing is a civil proceeding,\textsuperscript{48} not a criminal prosecution.\textsuperscript{49} Moreover, the nature of a civil action does not necessitate the protection of "the full panoply of constitutional rights and procedural safeguards enjoyed by a defendant in a criminal cause. . ."\textsuperscript{50} For example, a probationer has no right to a jury trial,\textsuperscript{51} cannot assert all rules of evidence,\textsuperscript{52} has no absolute right to confront witnesses,\textsuperscript{53} and has no absolute federal constitutional right to court-appointed

\begin{itemize}
\item \textsuperscript{46} 309 Md. at 238-42, 522 A.2d at 1355-57. See infra notes 48-54 and accompanying text.
\item \textsuperscript{47} 309 Md. at 249-51, 522 A.2d at 1360-61. See infra text accompanying note 57.
\item \textsuperscript{48} 309 Md. at 238, 522 A.2d at 1355. A court may suspend a sentence, grant probation, or revoke probation under Md. Ann. Code art. 27, § 641A (1987). Probation is a rehabilitative measure. The court, however, may revoke this grant of liberty if the conditions of probation are not met. Id.
\item \textsuperscript{49} Howlett v. State, 295 Md. 419, 424, 456 A.2d 375, 378 (1983) (probation revocation proceeding not a new criminal prosecution, since no new charges are filed and the probation violation "is not punishable beyond the reimposition of the original sentence imposed").
\item \textsuperscript{50} 309 Md. at 239, 522 A.2d at 1355. See also Howlett, 295 Md. at 424, 456 A.2d at 378. The Supreme Court has examined the constitutional rights of a probationer in a revocation of probation proceeding. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), a felony probationer had his probation revoked without a hearing after he admitted committing a subsequent crime. Id. at 780. The Court held that although revocation of probation is not part of the criminal prosecution, the probationer must be afforded due process by means of a preliminary hearing to determine probable cause and a final revocation hearing on the merits. Id. at 781-82. A right to be represented by counsel, however, remains in the discretion of the body conducting the hearings. Id. at 790. But see infra note 54 and accompanying text.
\item \textsuperscript{51} Minnesota v. Murphy, 465 U.S. 420, 435 (1984).
\item \textsuperscript{52} Gagnon, 411 U.S. at 789. See State v. Fuller, 308 Md. 547, 553, 520 A.2d 1315, 1317 (1987) ("reasonably reliable hearsay may be received").
\item \textsuperscript{53} 309 Md. at 240, 522 A.2d at 1356. See Gagnon, 411 U.S. at 786.
\end{itemize}
The court also weighed the individual's and the State's interests in the probation revocation system. A probationer has a vital interest in maintaining his or her liberty as well as in having the opportunity to enjoy due process before losing that liberty. The State, on the other hand, has an interest in quickly and expeditiously incarcerating delinquent probationers without the burdensome procedure of a new criminal trial. Moreover, the State has a fundamental interest in its need to revoke probation when the community's safety is threatened.

After assessing the nature of a probation revocation hearing, the court invoked the Supreme Court's fourth amendment methodology. The court noted that "the application of the exclusionary rule has been confined to criminal trials, and within those trials, to the prosecution's case in chief on the merits of guilt or innocence." Utilizing the balancing test enunciated by the Supreme Court in *United States v. Calandra*, the Chase court weighed the costs and benefits of allowing evidence to be excluded from the trial against the potential deterrence of unconstitutional police conduct. The court found that the community's interest in safety outweighed the rehabilitative goals of the probation system, and thus refused to apply the exclusionary rule. Moreover, the court reasoned that applying the rule to probation revocation hearings would not further the rule's primary purpose of deterring unconstitutional law enforcement misconduct.

Recognizing that the balance did not tip completely toward law enforcement goals, the court refined the blanket rule to permit application of the exclusionary rule under certain circumstances. If the probationer can establish, by a preponderance of the evidence, that there was lack of good faith on the part of the law enforcement

55. 309 Md. at 241-42, 522 A.2d at 1356-57.
56. Id.
57. Id. at 241, 522 A.2d at 1356-57.
58. Id. at 245-46, 522 A.2d at 1359.
59. 414 U.S. 338 (1974) (exclusionary rule inapplicable in grand jury proceedings). The Supreme Court determined that the exclusionary rule should be utilized whenever a court finds that the potential deterrence of police misconduct outweighs the harm caused by the exclusion of the evidence. Id. at 350-52.
60. 309 Md. at 249-50, 522 A.2d at 1360-61.
61. Id. at 250, 522 A.2d at 1361.
62. Id. *See supra* note 27 and accompanying text.
officer, a probationer may invoke the exclusionary rule. The Chase court set forth the procedure for demonstrating that a law enforcement officer acted in bad faith. The probationer must produce credible evidence making a prima facie showing that the officer's conduct was not consistent with reasonable law enforcement activities. The State then must refute the challenge with evidence that the law enforcement officer acted in good faith. Good faith must be evaluated on an objective rather than subjective basis.

In setting forth its guidelines, the court properly weighed the competing interests of the probationer and the State. While recognizing the importance of a probationer's liberty interests, the court correctly refused to apply the exclusionary rule in probation revocation hearings based on the rule's deterrent purpose, the State's substantial interest in insuring the community's safety, and the need to determine quickly and efficiently whether the probationer should be incarcerated. Moreover, the court strove to extend a limited amount of protection to a probationer who is a victim of police misconduct by not absolutely barring use of the exclusionary rule under these circumstances.

2. Exculpatory Evidence.—In Bloodsworth v. State the Court of Appeals examined a criminal defendant's due process right in having the State divulge exculpatory materials in light of the Supreme Court's decision in United States v. Bagley. The court also addressed the applicable standard for determining the admissibility of expert testimony regarding the reliability of eyewitness identification.

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63. 309 Md. at 253-54, 522 A.2d at 1363. The court held that the officer's conduct in the instant case did not amount to bad faith. Id. at 256, 522 A.2d at 1364.
64. Id. at 254, 522 A.2d at 1363.
65. Id.
66. Id. at 255, 522 A.2d at 1363. See also United States v. Leon, 468 U.S. 897, 919 (1984) (objective assessment of good faith required in evaluating application of the exclusionary rule).
67. In addition, Chase's rehabilitative process was unsuccessful, further justifying reimposition of his criminal sentence. See 309 Md. at 228-30, 522 A.2d at 1350-51.
68. 307 Md. 164, 512 A.2d 1056 (1986).
70. 307 Md. at 177-86, 512 A.2d at 1062-67. In the interest of "judicial economy," the court considered several other issues which, because the case was to be retried, it was under no obligation to decide. The most important issue not addressed here concerns the admissibility of a victim impact statement (VIS) at sentencing proceedings pursuant to Md. Ann. Code art. 41, § 4-609(c) (1986). Required in all felony cases, a VIS reports the effect of the crime on the victim and the victim's family. The Bloodworth
Bloodsworth was convicted of first degree murder, first degree rape, and a first degree sexual offense; he was sentenced to death.\footnote{307 Md. at 166, 512 A.2d at 1057. The Court of Appeals must review the sentence whenever the death penalty is imposed. See Md. Ann. Code art. 27, § 414 (1987).} During discovery, Bloodsworth filed a motion requesting information concerning all persons arrested or taken into custody as possible suspects, as well as for "any and all information of which [the State] is aware . . . identifying or suggesting that someone other than the Defendant . . . was the perpetrator of [the] crime."\footnote{307 Md. at 171, 512 A.2d at 1059.} The State failed, however, to disclose the contents of a confidential report written by a detective\footnote{307 Md. at 172, 512 A.2d at 1059.} which indicated that an individual named Richard Gray had been found at the scene of the crime under suspicious circumstances.\footnote{Id. at 173, 512 A.2d at 1060.} The report concluded that Gray should be considered a possible suspect.\footnote{Id., 512 A.2d at 1060.} In the hearing on a motion for a new trial, Bloodsworth relied on \textit{Brady v. Maryland}\footnote{Gray was found in the vicinity of the victim's body and was very dirty except for his "meticulously clean" hands. There appeared to be a blood stain on his shirt. Upon questioning, Gray seemed nervous and vomited as the officer searched his car. The search uncovered a pair of girl's underwear which Gray said he had found in the woods. Although the police had not yet found the girl's body, Gray correctly indicated that the victim wore a purse over her left shoulder. A background check revealed that Gray had been convicted previously of indecent exposure and further investigation revealed that he had failed a polygraph test in connection with the present case. \textit{Id.} at 173, 512 A.2d at 1060. Detective Bacon reported that Gray had "a great deal more information than he [was] releasing." \textit{Id.} at 172, 512 A.2d at 1059.} to support his argument that the State's sup-

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pression of this exculpatory evidence denied him due process under the fourteenth amendment. In Brady the Supreme Court held that "the suppression . . . of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment." In United States v. Bagley the Supreme Court clarified the meaning of materiality. Evidence is material, in retrospect, if there was a "reasonable probability" that the outcome of a proceeding would have been different had the evidence been disclosed to the defendant. The Supreme Court defined "reasonable probability" as "probability sufficient to undermine confidence in the outcome" of the proceeding.

The Court of Appeals rejected the State's contention that it had fulfilled its duty under Brady and Bagley by listing Gray on the indictment as a State's witness. The court remanded for a new trial finding that the suppression of the report led to a denial of due process because it sufficiently undermined its confidence in the verdict.

Bloodsworth also contested the trial court's refusal to allow the expert testimony of Dr. Robert Buckhout concerning the reliability of eyewitness identification. Bloodsworth argued that the court...
had erred in applying the traditional Frye-Reed test, which demands that the basis of a scientific opinion be generally accepted in the expert’s particular field, rather than the more liberal standard of admissibility for expert testimony set forth in rule 702 of the Federal Rules of Evidence: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” The Court of Appeals held that the Frye-Reed test was inapplicable, albeit on uncertain grounds, yet upheld the trial court’s decision to exclude

ness Identification, 73 CALIF. L. REV. 1402, 1407 (1985). The psychologists usually focus on the unreliability of cross-racial identifications and identifications made under a great deal of stress. See id. See generally Comment, Do the Eyes Have It? Psychological Testimony Regarding Eyewitness Accuracy, 38 BAYLOR L. REV. 169 (1986) (review of the history of exclusion of expert psychological testimony, concluding that exclusion should be based on evidentiary standards, not on the historical fear of a battle of the experts); E. Loftus, EYEWITNESS TESTIMONY (1979) (extensive discussion of psychological studies); EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (G. Wells & E. Loftus eds. 1984) (collection of psychological data on reliability of eyewitness identification). 86. 307 Md. at 179, 512 A.2d at 1063. This traditional test for the admissibility of scientific testimony was set forth in the case of Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), which involved the forerunner of the modern polygraph test. Maryland adopted the Frye standard for admissibility in Reed v. State, 283 Md. 374, 389, 391 A.2d 364, 372 (1978). The merits of the Frye test have been debated since its inception. See Reed, 283 Md. at 384-85, 391 A.2d at 369 (Smith, J., dissenting). See generally Gianelli, The Admissibility of Novel Scientific Evidence: Frye v. United States a Half-Century Later, 80 COLUM. L. REV. 1197 (1980). McCormick argues that the Frye standard is too conservative and that the correct test should be whether or not the particular evidence will, in fact, help the jury decide the issue. E. Cleary, MCCORMICK’S HANDBOOK ON THE LAW OF EVIDENCE § 206, at 624-25 (3d ed. 1984) [hereinafter MCCORMICK’s]. See generally McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 IOWA L. REV. 879 (1982) (tracing erosion of adherence to the Frye standard and return to the traditional evidentiary analysis). 87. FED. R. EVID. 702 (emphasis added). See 307 Md. at 179-80, 512 A.2d at 1063-64. See also United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985) (rejecting Frye and construing rule 702 as the correct “balancing test”). Since the adoption of the Federal Rules of Evidence in 1975, many legal scholars have sought to amend rule 702 to include some type of standard for “novel” scientific evidence. For examples of proposed amendments, see Annual Meeting Program Preview of the Legal Reception of Scientific Evidence Committee of the ABA Section of Science and Technology, 26 JURIMETRICS J. 235 passim (1986) [hereinafter Annual Meeting]. 88. 307 Md. at 184, 512 A.2d at 1066. The court cited People v. McDonald, 37 Cal. 3d 351, 373, 690 P.2d 709, 724, 208 Cal. Rptr. 236, 251 (1984), which listed the type of techniques that would lend themselves to the Frye test (e.g., lie detectors, truth serum, Nalline testing, voiceprints), and noted that use of the Frye-Reed test in Maryland has been “confined” to voiceprints in Reed v. State, 283 Md. 374, 389-400, 391 A.2d 364, 372-77 (1978), and hypnosis in State v. Collins, 296 Md. 670, 681, 464 A.2d 1028, 1034 (1983). It then abruptly concluded that the Frye test was inapplicable to the expert testimony at issue. 307 Md. at 184, 512 A.2d at 1066. It is possible that the majority consid-
the expert testimony based on the trial court's wide discretion over such matters.\textsuperscript{89}

Notwithstanding the evidence's failure to pass the \textit{Frye-Reed} test, the trial judge was concerned that the proffered testimony would tend to confuse, rather than aid, the jury.\textsuperscript{90} Moreover, the trial court believed that this particular type of expert opinion would invade an area that traditionally has been considered the exclusive province of the jury.\textsuperscript{91} In \textit{Shivers v. Carnaggio}\textsuperscript{92} the Court of Appeals adopted McCormick's view that an expert's opinion should be admissible if it will assist the trier of fact, as well as McCormick's position that the exclusion of expert testimony on the grounds that it somehow invades the province of the jury lacks merit.\textsuperscript{93} Citing \textit{Shivers}, the Court of Appeals held that the trial court was well within the bounds of its discretion in deciding to exclude the testimony on the ground that the evidence would not help the jury in deciding the issues at hand.\textsuperscript{94}

The court noted that the majority of jurisdictions which have ruled on the admissibility of this type of expert testimony have excluded it,\textsuperscript{95} quoting extensively from decisions which articulated
the lower court's rationale that the jury was sufficiently equipped to decide the reliability of an eyewitness identification with the aid of effective cross-examination.96 Following the lead of other jurisdictions, the Court of Appeals upheld the lower court's decision.97

By following the Brady-Bagley test, the Court of Appeals reaffirmed its conviction that the State's business is "not to achieve victory but to establish justice."98 The court's conclusion that the prosecution violated Bloodsworth's due process rights was sound considering the materiality of the Gray report coupled with the resulting prejudice caused by its suppression.

The court's treatment of the trial court's decision to exclude Dr. Buckhout's testimony, however, was less than satisfactory. The Court of Appeals agreed that the Frye test was inapplicable, yet failed to articulate its reasons.99 More importantly, the court failed to recognize that the trial court refused to admit the expert testimony because to do so would "invade the province of the jury," a basis which under Shivers is unacceptable.100

Testimony that could prevent wrongful convictions is of obvious value to our criminal justice system.101 While it is clear that, upon review, a trial court's evidentiary rulings must be accorded great deference, the Court of Appeals' automatic acceptance of the trial judge's rote response that proffered testimony would "tend to confuse or mislead the jury"102 amounts to no review at all. If the Court of Appeals is truly concerned with establishing justice, it should rely on reason as well as precedent and formulate a specific

96. See 307 Md. at 182-83, 512 A.2d at 1065-66. See also cases cited supra note 91.
97. 307 Md. at 186, 512 A.2d at 1067. The court outlined the well-settled rule for appellate review of the exclusion of expert testimony, concluding that, unless the trial court erred on a question of law or "'clearly abused its discretion,'" the lower court decision must be upheld. Id. at 185-86, 512 A.2d at 1066-67 (quoting Raithal v. State, 280 Md. 291, 301, 372 A.2d 1069, 1074-75 (1977) (excluding or admitting expert testimony seldom constitutes grounds for reversal)). For a compilation of recent cases upholding the trial court's decision to exclude this type of expert testimony, see Commonwealth v. Francis, 360 Mass. 89, 92, 453 N.E.2d 1204, 1207 (1983).
99. 307 Md. at 184, 512 A.2d at 1066. Perhaps the court agreed with the reasoning in McDonald that Frye was to be applied to scientific, not psychological, testimony. See People v. McDonald, 37 Cal. 3d 351, 377, 690 P.2d 709, 723, 208 Cal. Rptr. 236, 254 (1984).
100. See supra note 94.
101. In United States v. Wade, 388 U.S. 218, 228 (1967), the Supreme Court acknowledged that "the annals of criminal law are rife with instances of mistaken identification" and that "[t]he identification of strangers is proverbially untrustworthy."
102. 307 Md. at 178, 512 A.2d at 1063.
rule for the admission of expert testimony regarding eyewitness identifications. 103:

3. Immunity from Prosecution.—In re Criminal Investigation No. 1-162 104 presented the Court of Appeals with the issue of whether a witness compelled to testify before a grand jury during the course of a gambling investigation may assert the fifth amendment right against self-incrimination 105 and refuse to testify, notwithstanding the immunity provided by article 27, section 262. 106 By determining that section 262 confers transactional immunity, 107 the court found that the protection provided is sufficient to overcome a witness' fifth amendment right to remain silent. 108

103. For examples of possible standards, see McDonald, 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254; United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973); Annual Meeting, supra note 87, passim.

104. 307 Md. 674, 516 A.2d 976 (1986).

105. Although it is unclear whether the witnesses invoked their state or federal right against self-incrimination, the Court of Appeals has "consistently construed Article 22 [of the Maryland Declaration of Rights] to be in pari materia with the fifth amendment." 307 Md. at 683 n.3, 516 A.2d at 981 n.3. See also Richardson v. State, 285 Md. 261, 265, 401 A.2d 1021, 1023-24 (1979) (noting that "the privilege against self-incrimination contained in Article 22 of the Maryland Declaration of Rights . . . has long been recognized as being in pari materia with its federal counterpart").

106. MD. ANN. CODE art. 27, § 262 (1987). The statute provides:

No person shall refuse to testify concerning any gaming or betting because his testimony would implicate himself and he shall be a competent witness and compellable to testify against any person or persons who may have committed any of the offenses set forth under this subtitle, provided that any person so compelled to testify in behalf of the State in any such case shall be exempt from prosecution, trial and punishment for any and all such crimes and offenses of which such person so testifying may have been guilty or a participant and about which he was so compelled to testify.

107. There are three types of statutory immunity:

Use immunity protects against the future use of the witness' compelled testimony in a criminal prosecution of the witness; use and derivative use immunity prohibit the use of the witness' testimony to uncover other evidence for use against the witness; and transactional immunity bars any future prosecution of the witness for offenses based on the compelled testimony. 307 Md. at 684, 516 A.2d at 981.

108. The Supreme Court first considered the issue of immunity as it relates to a person's fifth amendment privilege against self-incrimination in Counselman v. Hitchcock, 142 U.S. 547 (1892), in which it struck down a federal use immunity statute which prohibited the actual use of compelled testimony, yet allowed the prosecution to use evidence derived from the testimony in a subsequent prosecution of the witness. The Court stated that "no statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States." 1d. at 585. Although the Court did not explicitly state that transactional immunity was required to replace the fifth amendment privilege, succeeding Supreme Court cases reflected this position. See, e.g., Brown v. United States, 359 U.S. 41, 45-46 (1959) (immunity under
Eleven witnesses summoned before a grand jury impaneled to investigate gambling and related tax violations invoked the fifth amendment privilege on the ground that section 262 did not protect them from prosecution for crimes other than gambling offenses.\footnote{109} The State sought to compel testimony, but the circuit court denied the motion.\footnote{110} The Court of Special Appeals affirmed the lower court's judgment,\footnote{111} concluding that section 262 conferred immunity only for gambling violations and that a broader construction would "convert specific witness immunization statutes into fishing expeditions in matters extraneous to the express purpose of the particular statute."\footnote{112} The Court of Appeals granted certiorari in order

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the Motor Carrier Act); United States v. Monia, 317 U.S. 424, 428 (1943) (immunity under the Sherman Act).

In 1972, however, the Supreme Court upheld a federal use and derivative use immunity statute in Kastigar v. United States, 406 U.S. 441, 453 (1972), finding that this type of immunity was coextensive with the privilege against self-incrimination. The Court also noted that transactional immunity affords greater protection than that provided by the fifth amendment. \textit{Id.} The dissent reacted with shock at the majority's rejection of over 75 years of fifth amendment jurisprudence. \textit{See id.} at 462-71 (Douglas and Marshall, JJ., dissenting). \textit{See generally Mykkelvedt, Ratio Decidendi or Obiter Dicta?: The Supreme Court and Modes of Precedent Transformation, 15 Ga. L. Rev. 311 (1981) (discussing how the Supreme Court manipulated precedent to attenuate the fifth amendment privilege). Subsequent state decisions have rejected the result of \textit{Kastigar} while striking down state use and derivative use immunity statutes by relying on their state constitutions. \textit{See, e.g.}, State v. Miyasaki, 62 Haw. 269, 282, 614 P.2d 915, 923 (1980) (finding transactional immunity to be part of the "fabric" of the state constitution); Attorney General v. Colleton, 387 Mass. 790, 800, 444 N.E.2d 915, 921 (1982) (stressing difference in language of state and federal constitutions); State v. Soriano, 68 Or. App. 642, 684 P.2d 1220, 1234, \textit{aff'd}, 298 Or. 392, 693 P.2d 26 (1984) ("Only transactional immunity is constitutional in Oregon."). \textit{See also infra} note 136.

Section 262 was adopted in 1957, prior to \textit{Kastigar}. The General Assembly has not revised the statute since that time.

\footnote{109} 307 Md. at 679, 516 A.2d at 979. The witnesses were concerned that the modifier "such" in the wording of the statute limited the crimes for which they had been "exempted from prosecution, trial and punishment" to gambling offenses. \textit{Id.} at 686, 516 A.2d at 983. For the exact wording of the statute, see \textit{supra} note 106. The witnesses feared that the investigation also would reveal their involvement in tax fraud. 307 Md. at 691, 516 A.2d at 985.

\footnote{110} 307 Md. at 679-80, 516 A.2d at 979.

\footnote{111} \textit{In re Criminal Investigation No. 1-162}, 66 Md. App. 315, 503 A.2d 1363 (1986). The Court of Special Appeals did not discuss the specific type of immunity conferred by section 262; rather, it simply decided that the immunity only applied to gambling offenses. \textit{Id.} at 319, 503 A.2d at 1364.

\footnote{112} \textit{Id.} at 320, 503 A.2d at 1365. A specific witness or crime immunization statute applies to the investigation and prosecution of particular crimes. The legislature has refused to enact a general use and derivative use immunity statute which a prosecutor could employ in any type of investigation. \textit{See} S.B. 1285 (1978); H.B. 981 (1979); H.B. 197 (1980); H.B. 519 (1981); S.B. 482 (1981). Each of these bills either died in committee or received an unfavorable report. \textit{See supra} note 107 for a definition of use and derivative use immunity.
to decide the precise scope of immunity provided by section 262 and thus determine whether the statute preempts the need to invoke the fifth amendment privilege against self-incrimination.  

Citing *Kastigar v. United States*, the court established that the government may compel a witness to disclose potentially self-incriminating information if the witness obtains protection coextensive with the fifth amendment; transactional immunity provides such protection. Following well-established rules of statutory construction, the court found that the legislature intended section 262 to confer transactional immunity. The next question, then, was whether the statute conferred immunity for crimes other than gambling offenses. Acknowledging that the language of the statute was ambiguous, the court looked beyond the words and "examine[d] the purpose of the statute and the consequences of different constructions." The court concluded that the narrow interpretation urged by the witnesses would render the statute virtually useless and "significantly hamper the State's ability to pursue gaming investigations." A broader construction of the scope of the immunity al-

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113. 307 Md. at 680, 516 A.2d at 979. Before addressing the substantive issue, the court reaffirmed its constitutional authority to decide moot cases since the instant investigation had been concluded. *Id.*, 516 A.2d at 980. Although there is no textual support in the state constitution for this proposition, the court has found "no constitutional bar to the rendering of an advisory opinion." *Reyes v. Prince George's County*, 281 Md. 279, 297, 380 A.2d 12, 23 (1977).

The court found that the rule it had established in *Lloyd v. Supervisors of Elections*, 206 Md. 36, 111 A.2d 379 (1954), afforded a justification for hearing this case: "[I]f the public interest clearly will be hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot, particularly if all these factors concur with sufficient weight."

*Id.* at 43, 111 A.2d at 382. Noting that "the public has an interest in the effective investigation of this State's criminal laws," and recognizing that the issue of the scope of immunity could recur with respect to numerous other statutes, the Court of Appeals opted to decide the case, even though the term of the grand jury in question had expired. 307 Md. at 681-82, 516 A.2d at 980.


115. 307 Md. at 683, 516 A.2d at 981 (citing *Kastigar*, 406 U.S. at 449 (1972)). In fact, the Supreme Court found that "[t]ransactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege." *Kastigar*, 406 U.S. at 453.

116. See 307 Md. at 685-86, 516 A.2d at 982-83.

117. *Id.* at 686, 516 A.2d at 983.

118. *Id.* at 687, 516 A.2d at 983.
allows the State to "use section 262 to facilitate gaming investigations and prosecutions, as the legislature intended, and the witness would not lose the protection of the fifth amendment privilege against compelled self-incrimination." 119

Refuting the contention that a broad construction would turn a crime-specific immunity statute into a prosecutorial "fishing expedition," the court maintained that the witnesses and the lower courts had failed to differentiate between the application of section 262 and the scope of immunity it provides. 120 Whereas the immunity described under section 262 applied only in the event of a "bona fide" gambling investigation, the scope of the immunity would provide protection from prosecution for any and all offenses revealed by the witness' testimony, 121 including crimes other than gambling offenses. In order to comply with the legislative intent, therefore, the prosecution must limit itself to questions relating solely to the gambling investigation at hand. 122

The court also rejected the witnesses' argument that in 1937 the legislature had demonstrated its intent to constrict the broad scope of immunity granted by the precursor of section 262 by substantially altering the statute's language. 123 While "[g]enerally, a substantive amendment to an existing statute indicates an intent to change the meaning of the statute," 124 the court found that the circumstances surrounding the 1937 amendments warranted the conclusion that the changes were simply a part of a comprehensive statutory revision. 125 Thus, the court concluded that the meaning of the statute was unaffected by the alteration. 126

119. Id.
120. See id. at 686-89, 516 A.2d at 983-84.
121. Id.
122. See supra note 112. In this way, the legislature limits the prosecution's use of immunity to investigations involving specific kinds of crimes. See infra note 128.
123. Section 262 amended Md. Ann. Code art. 27, § 258 (1924)
   by changing the last phrase of the statute from "he shall not be prosecuted for any offense to which his testimony relates" to "any person so compelled to testify . . . shall be exempt from prosecution . . . for any and all such crimes and offenses of which such person so testifying may have been guilty or a participant and about which he was compelled to testify."
124. 307 Md. at 689, 516 A.2d at 984.
125. Id. at 689-90, 516 A.2d at 984. The court bolstered its conclusion by noting that the amendment was not enacted in response to a judicial interpretation with which the legislature disagreed. It also noted that the legislature reworded the entire provision, not merely the final phrase. Id.
126. See id., 516 A.2d at 984-85.
Finally, the court cited its decision in Brown v. State, in which it determined that article 27, section 23, conferred transactional immunity to a witness in a bribery investigation. Because section 262 contains language similar to section 23, and because both statutes provide crime-specific immunity, the court reasoned that its decision in Brown controlled. It followed, then, that section 262 provides protection that is at least coextensive with the scope of the fifth amendment privilege against self-incrimination and is sufficient, therefore, to compel testimony over a claim of that privilege.

By construing the immunity granted by section 262 broadly, the Court of Appeals sought to preclude further challenges to the constitutionality of compelling disclosure of information in the course of gambling investigations. Although the holding necessarily was narrowed to apply to section 262, the court's reference to the similar language of other crime-specific immunity statutes, as well as its reliance on Brown, indicates that it will interpret the language of similar statutes to confer transactional immunity.

It is unlikely, however, that the court has heard the last of the fifth amendment claim under the immunity statutes. The litigable issue now will be whether the questions posed by the prosecutor during an investigation relate to the specific probe for which the grand jury was impaneled. If they do not, the State can neither compel testimony nor grant immunity. Moreover, considering the Supreme Court's determination that a use and derivative use immunity...
nity statute sufficiently protects a witness' fifth amendment privilege and the Court of Appeals' decisions which hold Maryland's privilege against self-incrimination in pari materia with that of the federal constitution, it is likely that Maryland courts will be forced to confront the issue of whether the state constitution in fact provides greater protection than its federal counterpart.

4. Right to Counsel.—a. Hybrid Representation.—The Court of Appeals held in Parren v. State that although a criminal defendant has a constitutional right to self-representation as well as a right to counsel, a defendant has no corresponding constitutional right to "hybrid" representation. Nevertheless, the trial court's failure to comply with the exact terms of Maryland Rule 4-215 rendered the defendants' waiver of counsel ineffective.

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134. See supra note 108.
135. See supra note 105.
136. Curiously, the court made no reference to this discrepancy. See 307 Md. at 684, 516 A.2d at 981-82. It is not clear, however, whether the Court of Appeals realized that Kastigar determined that transactional immunity provides protection beyond that mandated by the fifth amendment. See id. For example, the court referred to transactional immunity and cites Kastigar for the proposition that "in any subsequent prosecution of the witness" the government has the burden of proving that its evidence is derived from an independent source. Id. at 684 n.4, 516 A.2d at 982 n.4. The Supreme Court in Kastigar, however, was referring to the congressional use and derivative use statute at issue. When a transactional immunity statute is in force the witness can never be prosecuted for crimes to which the testimony refers. See Kastigar, 406 U.S. at 453.

The highest courts in Hawaii, Massachusetts, and Oregon have struck down state statutes which have offered only use and derivative use immunity to potential witnesses as violating the state constitution's privilege against self-incrimination. See supra note 108. For a comprehensive review of the history of immunity and the fifth amendment along with a detailed account of the development of this issue in Alaska, see Feldman & Ollanik, supra note 131.

138. Id. at 264-65, 523 A.2d at 599. In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court held that the sixth amendment affords an independent right to self-representation. Thus, a state cannot force a defendant to have a state-appointed public defender. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Id. at 819.

The Court, however, did not address the question of hybrid representation. Justice Blackmun, in dissent, wondered whether the Court's ruling permitted an accused to switch modes of representation mid-trial, or whether a right to standby counsel exists—questions the Court clearly left unanswered. Id. at 846-53.

The Parren court concluded that hybrid representation is too ambiguous a concept to apply. As the Court of Appeals observed, it would be impossible in many cases to determine whether a defendant had exercised the right to counsel, self-representation, or a hybrid of the two until after trial. 309 Md. at 269, 523 A.2d at 601.

139. 309 Md. at 282, 523 A.2d at 608. The court noted that the trial judge failed to comply with Md. R. 4-215(a)(3), which requires the court to "[a]dvise the defendant of
David Bright and Marvin Parren were convicted in the Circuit Court for Baltimore City of various offenses stemming from an attack on guards at the Maryland Penitentiary. At trial, the defendants were provided public defenders. Nevertheless, Bright and Parren asserted their right to self-representation and discharged their counsel, even though counsel, family members, and the trial judge warned them against doing so.

Bright and Parren subsequently appealed their convictions. The Court of Special Appeals affirmed, characterizing what had occurred at trial as "hybrid representation." The intermediate appellate court stressed that the defendants had requested to conduct their own defense "with the assistance of counsel," and that the trial judge had permitted the defendants to consult with counsel throughout the trial.

The Court of Appeals, on the other hand, found "hybrid representation" a highly misleading term because it has been used to characterize both the participation of defendants in their trials when they have not waived counsel, and the assistance of counsel during trials when defendants represent themselves. The court recognized that borderline situations arise, but nonetheless held that there is no constitutional right to hybrid representation.

Thus, only one question remained: Had the defendants effectively waived their right to counsel before they represented themselves? In response, the court declared that the procedures enumerated in rule 4-215 regarding the waiver of counsel are mandatory. The court stressed that the stringent nature of the rule

the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any." Id. See Md. R. 4-215(a)(3).

140. 309 Md. at 266, 523 A.2d at 600. Parren and Bright were charged with a variety of misdemeanors and felonies that included assault with intent to murder, attempted murder, and common-law assault. Parren was already serving a 15-year sentence, to which 20 years were added for his convictions for an assault on one guard with intent to murder, assault on another guard, and carrying a deadly weapon with intent to injure. Bright was already serving a life sentence plus five years, to which six years were added for assaults on both guards. Id. at 292, 523 A.2d at 612-13 (Rodowsky, J., dissenting).

141. Id. at 267-68, 523 A.2d at 600-01.


143. Id.

144. 309 Md. at 264, 523 A.2d at 599.

145. Id. The court stated:

"The right to counsel and the right to defend pro se cannot be asserted simultaneously. The two rights are disjunctive. There can be but one captain of the ship, and it is he alone who must assume responsibility for its passage, whether it safely reaches the destination charted or founders on a reef." Id. See supra note 138.
was necessary "to protect that most important fundamental right to the effective assistance of counsel."146 Allowing an ad hoc application of the rule's procedures would open the door to administrative unfairness and procedural inefficiency.147 Moreover, the Supreme Court has noted:

To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.148

Thus, the trial judge's failure to comply with the requirement that defendants be told the exact penalties they faced for the charges against them constituted reversible error.149

The Court of Appeals' holding in Parren helped to clarify its recent rulings in Colvin v. State150 and Leonard v. State.151 In Colvin the defendant sought to dismiss the public defender assigned to him and requested the appointment of counsel of his choice at the State's expense. After determining that Colvin's reasons for the request were insufficient, the trial court denied his motion. Colvin then asked that he be permitted to defend himself "to a degree." The Court of Appeals determined, however, that at most Colvin was seeking hybrid representation; thus the request failed to trigger the rule concerning waiver of counsel.152 The defendant in Leonard indicated a desire to represent himself, but the trial court then failed to conduct the necessary inquiry concerning the waiver. Finding that this failure was reversible error, the Court of Appeals ruled that a defendant is "not required to utter a talismanic phrase so as to

146. 309 Md. at 281, 523 A.2d at 607.
147. Id., 523 A.2d at 608.
149. 309 Md. at 282, 523 A.2d at 608. For the text of Md. R. 4-215(a)(3), see supra note 139. Subsection (a)(4) requires the trial court to conduct a waiver inquiry if the defendant indicates a desire to waive counsel. The purpose of the inquiry, which is covered by subsection (b), is to ensure that there has been an intelligent and voluntary waiver. In addition, subsection (a)(2) requires that the defendant be informed of the right to counsel and of the importance of counsel's assistance. 309 Md. at 282, 523 A.2d at 608.
152. Colvin, 299 Md. at 100-01, 472 A.2d at 959.
place the court on notice that he desires self-representation."  

The court stressed that the defendant's statements "dispel[led] any contention that Leonard was seeking hybrid representation."  

As a result of Parren, there is no longer any middle ground in Maryland between the constitutional right to effective assistance of counsel and the right of individuals to represent themselves. The court refused to recognize "hybrid representation" as a third classification of the right to counsel, explaining that "there are only two types of representation constitutionally, guaranteed—representation by counsel and representation pro se—and they are mutually exclusive."  

Maryland trial courts therefore must ensure that defendants either have effective assistance of counsel or have knowingly and intelligently waived this right pursuant to rule 4-215. In Leonard the court merely held that the trial court must be alert to a defendant's expressed desire for self-representation; such an expression should trigger an inquiry that meets the requirements of the waiver rule. In Parren the court took a further step by holding that the rule's procedures for conducting that inquiry are to be followed stringently. The majority applied this holding so strictly to the facts of Parren that the case was reversed because the trial judge did not inform the defendants word for word what the penalties would be for the charges against them.  

Judge Rodowsky's dissent decried the majority's "formalist" approach, declaring: "What is important under the majority analysis is rites and not rights." The dissent argued that if the majority were correct that the Maryland trial courts therefore must ensure that defendants either have effective assistance of counsel or have knowingly and intelligently waived this right pursuant to rule 4-215. In Leonard the court merely held that the trial court must be alert to a defendant's expressed desire for self-representation; such an expression should trigger an inquiry that meets the requirements of the waiver rule.  

The dissent argued that if the majority were correct that the

153. Leonard, 302 Md. at 124, 486 A.2d at 169.  
154. Id. at 126, 486 A.2d at 170.  
155. 309 Md. at 265, 523 A.2d at 599.  
156. Id.  
157. Leonard, 302 Md. at 124, 486 A.2d at 172.  
158. 309 Md. at 280, 523 A.2d at 607.  
159. The trial judge's failure to comply with the letter of Md. R. 4-215(a)(3) rendered the defendants' waiver ineffective, denying them assistance of counsel as a matter of law. 309 Md. at 282-83, 523 A.2d at 608.  
160. 309 Md. at 298, 523 A.2d at 616 (Rodowsky, J., dissenting).  
161. Id. at 283, 523 A.2d at 608; Md. R. 1-201(a). As Judge Rodowsky noted, rule 1-201 also expresses an overall purpose for the Maryland Rules: to "secure simplicity in
purpose of rule 4-215 is to protect the fundamental, constitutional right to effective assistance of counsel, then the trial court had not thwarted that purpose. The transcript of the hearing on the defendants' new trial motion, from which Judge Rodowsky quoted at length, strongly suggested that the defendants knew they were waiving counsel and understood the implications of their choice. The dissent also reasoned that the technical violation itself was not serious enough to require reversal because the trial judge had in fact pointed out that one of the offenses could lead to life imprisonment. Judge Rodowsky concluded, "It is immaterial that the trial judge did not specify which offense potentially carried a life sentence." It was enough that "they certainly knew how serious the charges were when the court told them they potentially faced life sentences." Parren simplifies the right to counsel in Maryland by making it clear that a defendant is entitled to either effective assistance of counsel or to self-representation, but not a hybrid of the two. To soften the impact of this all-or-nothing choice, the Court of Appeals has mandated strict compliance with Maryland Rule 4-215 in the belief that justice will best be served by strict application of procedures which were designed to ensure that defendants understand the dan-

procedure, fairness in administration, and elimination of unjustifiable expense and delay." 309 Md. at 283, 523 A.2d at 608.

The Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), recognized that "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

162. 309 Md. at 281-82, 523 A.2d at 607.

163. Id. at 296, 523 A.2d at 615. At one point, Parren admitted to the trial judge, "You did everything, you practically begged me to get a lawyer." Id. at 298, 523 A.2d at 616 (Rodowsky, J., dissenting). Nevertheless, the defendants took advantage of a technical failure to state the possible penalties. As Bright said to the judge: "[Y]ou, Your Honor, didn't go through the procedures." Id. This led Judge Rodowsky to conclude, "All of these facts, in my view, demonstrate a knowing and voluntary election of self-representation and waiver of counsel." Id. at 298, 523 A.2d at 616. Judge Rodowsky criticized the majority for not deciding whether rights in fact had been violated. "All that matters [to the majority] is that there has been a departure from the ordained ritual." Id.

164. Id. at 298, 523 A.2d at 613.

165. Id. The dissent also cited cases from other jurisdictions "upholding waivers without any recital in the operative facts that the trial court had explained to the accused on the record the range of possible punishments." Id. at 287, 523 A.2d at 610. See, e.g., King v. State, 55 Ala. App. 306, 314 So. 2d 908, 909 (1975) ("The question is not whether the trial judge adhered to a specific procedure but whether accused was competent to exercise an intelligent, informed judgment."); Burton v. State, 260 Ark. 688, 690, 543 S.W.2d 760, 761 (1976) (noting that "the record indicates that the court thoroughly acquainted appellant with his rights and the nature of the charges against him," but makes no mention of possible penalties).
gers and consequences of waiving right to counsel. As the dissent pointed out, however, an application of the majority’s interpretation might defeat the rule’s underlying purposes of simplifying procedure and protecting fundamental rights. Through these stringent technical requirements, the holding could lead to a nightmare of loopholes of which Parren was merely the first example.

b. Effective Assistance of Counsel.—In Clark v. State the Court of Appeals held that the right to effective assistance of counsel constitutionally entitles attorneys for criminal codefendants to communicate with one another concerning matters of strategy in the jury selection process. Therefore, the trial judge’s prohibition against conferring with cocounsel during the exercise of peremptory challenges constituted reversible error.

A Baltimore City grand jury indicted Steven Clark and Jonathan Hemphill for various drug offenses. During the voir dire examination of prospective jurors, the trial judge asked the defense attorneys whether they wanted to combine their peremptory challenges or exercise them individually. The attorneys decided to exercise them individually, prompting the judge to inform them that they could not confer during the selection process. When Hemphill’s attorney challenged the judge’s decision, the court responded, “I am instructing you, you get 20 challenges, and you get 20 challenges. Let’s not play this game of saying you will exercise it independently, but yet you want to confer on it.”

Following Clark’s conviction, the Court of Appeals granted a

167. Id. at 489, 510 A.2d at 246.
168. Id. at 491-92, 510 A.2d at 247.
169. Id. at 484, 510 A.2d at 243.
170. Id. Former Md. R. 753(a)(1) provided that when a defendant was potentially subject to a sentence of death, life imprisonment, or 20 years or more of imprisonment, the defendant was permitted 20 peremptory challenges. Because both Clark and Hemphill were subject to more than 20 years’ imprisonment, each qualified for the 20 challenges. Currently, if the defendant is subject to life imprisonment or death, the defendant has 20 peremptory challenges while the State is permitted only 10. A defendant subject to 20 years or more of imprisonment is permitted 10 challenges, while the State is allowed five. In all other cases, each party is permitted four peremptory challenges. Md. Cts. & Jud. Proc. Code Ann. § 8-301 (Supp. 1987); Md. R. 4-313.
171. 306 Md. at 485, 510 A.2d at 244.
172. Id. The defense attorneys noted their objections and eventually requested a mistrial. The trial judge denied the request, the jury was selected, and Clark was convicted of possessing heroin. Clark appealed to the Court of Special Appeals, asserting that the trial court erred in refusing to allow the attorneys to communicate. The intermediate appellate court affirmed the trial judge’s decision in an unreported per curiam opinion. Id. at 486, 510 A.2d at 244-45. The case does not reveal what happened to Hemphill.
writ of certiorari to consider whether "fundamental fairness and due process dictate that co-defendants who have been forced to accept the disadvantage of a joint trial may not be deprived of one of its few benefits—consultation between counsel for co-defendants on matters of trial strategy." The court held that the action of the trial court violated the defendant's right to effective assistance of counsel, reasoning that "effective representation means representation in which the attorney is unhindered in the lawful pursuit for knowledge which may benefit the client." Even though it was possible that one attorney "might have been aware of sound reasons to strike a particular juror, those reasons might have become much less sound when viewed in light of co-counsel's trial strategy." Thus, when the trial judge forbade the two attorneys to communicate, he deprived Clark's counsel of valuable information and advice concerning the exercise of the peremptory challenges.

The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The Supreme Court has recognized that the government violates this right when it interferes with an attorney's ability to decide independently how best to defend a client. Therefore, "there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process." State action that interferes with counsel's making full use of traditional trial procedures thus may deny a defendant the effective assistance of counsel.

173. Id., 510 A.2d at 245. Clark reasoned that the manner in which peremptory challenges are exercised is strategically important. The State rejoined that the court acted within its sound discretion since no statute or court rule prohibited the trial judge's conduct. The State further maintained that Clark's right to exercise his peremptory challenges was not impaired so as to deny him a fair trial. Id. at 486-87, 510 A.2d at 245.


175. 306 Md. at 489, 510 A.2d at 246.

176. Id. at 490, 510 A.2d at 246.

177. Id. at 489, 510 A.2d at 246.

178. U.S. CONST. amend. VI.


If the interference had such an effect, then prejudice to the defendant's case may be presumed.

In *Cronic v. United States*¹⁸¹ the Supreme Court illustrated instances in which this presumption is justified: (1) a situation in which "counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding";¹⁸² and (2) occasions when, although counsel was available to assist the accused during trial, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."¹⁸³ Absent circumstances of such magnitude, there is generally no basis for finding a sixth amendment violation unless the defendant can show how a specific error undermined the reliability of the finding of guilt.¹⁸⁴

The Court of Appeals recognized that the trial judge's action constituted a form of state interference with Clark's right to counsel; therefore, it declared that there was no need for Clark to establish that he was prejudiced by the interference.¹⁸⁵ The court did state, however, that the prosecution could have attempted to show beyond a reasonable doubt that the prejudice was harmless error.¹⁸⁶ Had the State met this burden, Clark's conviction would have stood.¹⁸⁷

While the Court of Appeals acknowledged the scope of the

¹⁸². *Id.* at 659 n.25.
¹⁸³. *Id.* at 659-60.
¹⁸⁴. *Id.* at 658.
¹⁸⁵. 306 Md. at 491, 510 A.2d at 247. A number of Supreme Court decisions illustrate various kinds of state-imposed restrictions which violate the sixth amendment. See *Geders v. United States*, 425 U.S. 80, 82 (1975) (defendant prohibited from consulting with counsel during an overnight recess); *Herring v. New York*, 422 U.S. 853, 863 (1975) (counsel prohibited from delivering a closing argument before the jury); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (statute requiring the defendant to testify as the first defense witness or not at all); *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (statute prohibiting defense counsel from questioning the defendant on direct examination).
¹⁸⁶. 306 Md. at 491, 510 A.2d at 247. The harmless error doctrine came to fruition in *Chapman v. California*, 386 U.S. 18, 21-26 (1967), in which the Supreme Court noted that although it was true that constitutional errors previously had warranted automatic reversal, this did not mean that constitutional errors could never be harmless. Under *Chapman*, an appellate court must be convinced beyond a reasonable doubt that the alleged error did not contribute to the verdict. *Id.* at 24.
¹⁸⁷. 306 Md. at 491, 510 A.2d at 247. The State failed to file a cross petition for certiorari asserting harmless error as an issue. In accordance with Maryland Rule 813, the court therefore refused to consider the effect of the error. *Id.* at 492, 510 A.2d at 247 (declaring that the Court of Appeals "will ordinarily consider only the issues which have been raised in the petition and any cross petition for certiorari"); see *Md. R. 813(a).*
right to effective assistance of counsel, it incorrectly concluded that the trial court's actions deprived Clark of these rights. While Clark could have benefitted considerably had his counsel been allowed to confer with Hemphill's attorney, the court did not demonstrate how this presumptively impaired Clark's counsel from effectively assisting Clark. A consideration of the examples of presumed prejudice in Cronic reveals that there was no need to apply the presumption to Clark's situation. First, the trial court impaired neither the opportunity nor the ability of Clark's counsel to exercise the permitted peremptory challenges during voir dire. Clark's attorney was present at every juncture; only Hemphill's counsel was prevented from assisting Clark. Moreover, it is unlikely that a restriction such as that which the trial court imposed upon Clark's counsel would prevent a competent attorney from effectively assisting a client. The inability of Clark's attorney to consult with a codefendant's counsel should not have prevented the attorney from conducting voir dire proceedings so as to protect Clark's interests.

c. Breathalyzer Tests.—In Brosan v. Cochran the Court of Appeals was asked to refine its holding in Sites v. State that a drunk driving suspect be afforded a reasonable opportunity to communicate with an attorney before deciding whether to submit to a chemical sobriety test. The court found that face-to-face consul-

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188. 306 Md. at 487, 510 A.2d at 245.
190. The record disclosed that each defendant exhausted his allotted 20 peremptory strikes. 306 Md. at 486 n.2, 510 A.2d at 244 n.2.
191. In Vaccaro v. Caple, 33 Md. App. 413, 418, 365 A.2d 47, 50 (1976), the Court of Special Appeals determined that a waiver of the right to peremptory challenge may occur when a party fails to exercise due diligence. Clark's counsel, therefore, had to use due diligence to discover relevant facts concerning the jury selection; otherwise, he would waive the right to peremptory challenges. When a juror who might otherwise be disqualified for cause is permitted to serve on a jury because of the aggrieved party's failure to use due diligence in discovering the irregularity, the court will not disturb the judgment. Id.
192. 307 Md. 662, 516 A.2d 970 (1986).
194. Sites, 300 Md. at 717, 481 A.2d at 200. In Maryland all drivers impliedly consent to submit to a state-administered chemical sobriety test if apprehended on suspicion of drunk driving. See Md. Transp. Code Ann. § 16-205.1(a) (1987). Subsection (b)(i) provides that refusal to take the test will result in suspension of the suspect's driver's license for not less than 60 days nor more than six months for the first offense. For a comprehensive analysis of Sites, along with a brief history of case law concerning the right to counsel under other "implied consent" laws, see Note, The Ever Evasive Right to Counsel Under Implied Consent: Sites v. State, 1985 Det. C.L. Rev. 903.
Attorney Gill Cochran and one of his former clients challenged the constitutionality of guidelines promulgated by the Superintendent of the Maryland State Police Department establishing the procedures governing the right of a drunk-driving suspect to consult with counsel before deciding whether or not to take a breathalyzer test. Specifically, the defendants challenged the provisions which limited attorney-client contact to a single telephone call and which prohibited the administration of a separate sobriety test by the attorney prior to the one given by the State. The Superintendent argued that a single telephone call would satisfy the requirements of Sites; moreover, even if in-person communication were required, the private administration of a breathalyzer test was a scientific test and therefore not within the ambit of communication permitted by Sites.

In Sites a suspected drunk driver sought to consult an attorney before consenting to the State's sobriety test. The Court of Appeals determined that due process may entitle the driver to contact an attorney prior to submitting to the test. The Brosan court examined Sites and reaffirmed that although there was no sixth amendment right to consult with counsel prior to submitting to a breathalyzer, there did exist a due process guarantee allowing a brief opportunity to make telephone contact with his attorney. Even though Cochran arrived at the police barracks four minutes after his client called him, he was not allowed a face-to-face consultation.

195. 307 Md. at 669-70, 516 A.2d at 974-75.
196. Id. at 672-73, 516 A.2d at 976-77.
197. Id. at 670-71, 516 A.2d at 974.
198. Id. at 665, 516 A.2d at 972. On March 12, 1984, the Superintendent issued General Order No. 01-84-73, establishing these guidelines. Id.
199. 307 Md. at 666, 516 A.2d at 972. The order provided that a suspect would be given "a brief opportunity to make telephone contact with his attorney." Id. at 665, 516 A.2d at 972. Even though Cochran arrived at the police barracks four minutes after his client called him, he was not allowed a face-to-face consultation. Id. at 665-66, 516 A.2d at 972.
200. Id. at 671, 516 A.2d at 975.
202. Id. at 718, 481 A.2d at 200.
203. 307 Md. at 668, 516 A.2d at 973-74. In Kirby v. Illinois, 406 U.S. 682, 689-90 (1972), the Supreme Court held that the sixth amendment right to counsel does not attach until the initiation of formal judicial proceedings by way of, inter alia, an indictment, information, or other formal charge. See also Sites, 300 Md. at 712, 481 A.2d at 197. These proceedings are "critical stages" in the evidence gathering process to which
suspect to communicate with counsel upon request.\textsuperscript{204} This due process right was limited only to the extent it "substantially" or "unreasonably" interfered with the State's interest in obtaining an accurate sobriety test.\textsuperscript{205} The court agreed with the trial judge that "the operative question is whether the requested communication would unreasonably impede police processing."\textsuperscript{206} Thus, the court reiterated its finding in Sites that the unreasonableness of the requested communication must be determined on a case-by-case basis, but that under no circumstances could the consultation delay the

the absolute right to counsel necessarily extends. \textit{Id.} In Maryland, however, a statutory right to counsel by virtue of the Public Defender Law, Md. Ann. Code art. 27A, §§ 1-14 (1986 & Supp. 1987), attaches at the moment when the suspect is taken into custody. See \textit{id.} § 4(d). See also Webster v. State, 299 Md. 581, 603-04, 474 A.2d 1305, 1316-17 (1984). In Sites the suspect was not formally charged until 20 minutes after he had taken the test. This part of the arrest procedure, therefore, is not a critical stage within the context of the sixth amendment. Sites, 300 Md. at 712, 481 A.2d at 197. The majority of other jurisdictions likewise have refused to label this stage as "critical." See, e.g., State v. Vietor, 261 N.W.2d 828, 832 (Iowa 1978) (right to prior consultation with an attorney is limited to circumstances when doing so will not materially interfere with administering a blood test within the specified time limits); State v. Petkus, 110 N.H. 394, 269 A.2d 123, 125 (1970), cert. denied, 402 U.S. 932 (1971) (taking defendant's blood under an implied consent law is not a critical stage). This line of cases is criticized in Williams, \textit{DWI Breath Testing and the Right to Counsel}, 30 Ariz. B.J. (Feb.-Mar. 1986). Maryland allows a police officer to request that a suspect submit to a breathalyzer test before making an arrest or issuing a citation. See Md. Transp. Code Ann. § 16-205.2(a) (1987). In the instant case, because the suspect refused to take the test, his license was suspended. See \textit{supra} note 194.

\textsuperscript{204} 307 Md. at 668, 516 A.2d at 974. The Sites court based its holding on several Supreme Court decisions which recognize the due process clause of the fourteenth amendment as a broader source of a right to counsel than the sixth amendment. Sites, 300 Md. at 716, 481 A.2d at 200. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (holding that welfare recipient is entitled to presence of privately retained counsel at hearing to terminate benefits); In re Gault, 387 U.S. 1, 36 (1967) (holding that juvenile is entitled to assistance of counsel in delinquency proceedings). While this due process right is not precisely definable, it is one that assures "that convictions cannot be brought about by methods that offend 'a sense of justice.' " Rochin v. California, 342 U.S. 165, 173 (1952) (quoting Brown v. Mississippi, 297 U.S. 278, 285-86 (1936)).

In Dixon v. Love, 431 U.S. 105, 112-13 (1977), the Supreme Court held that a person's driver's license may not be revoked without the processes due under the fourteenth amendment. See also Sites, 300 Md. at 717, 481 A.2d at 200. At least three other states have recognized a due process right to counsel before submission to a state sobriety test. See, e.g., People v. Gursey, 22 N.Y.2d 224, 227-28, 239 N.E.2d 351, 352-53, 292 N.Y.S.2d 416, 418-19 (1968) (right of access to counsel violated when defendant was denied the right to telephone attorney before taking test); Troy v. Curry, 36 Ohio Misc. 144, 147, 303 N.E.2d 925, 927 (1973) (refusal to allow accused to consult with counsel violates sixth and fourteenth amendments); State v. Newton, 291 Or. 788, 807, 636 P.2d 393, 406 (1981) (threatening defendant with adverse consequences if defendant called a lawyer before breathalyzer test restricted accused's freedom).

\textsuperscript{205} 307 Md. at 668-70, 516 A.2d at 974.

\textsuperscript{206} \textit{Id.} at 670, 516 A.2d at 974 (quoting the trial judge).
administration of the test beyond the statutory two-hour time limit.\textsuperscript{207}

The private administration of the breathalyzer was considered in light of the "operative question" of interference with police procedures. \textsuperscript{208} Considering the importance of a driver's license in today's society, the court determined that a suspect had a "significant interest at stake in deciding whether to submit to the state-administered chemical sobriety test."\textsuperscript{209} Recognizing that assistance of counsel impliedly entails \textit{effective} assistance, the court noted that the result of a privately administered sobriety test, although non-verbal, was a type of attorney-client communication, and that this information would aid in making an informed decision whether or not to submit to the State's test.\textsuperscript{210} To establish the requirements of fairness imposed by the due process clause a court must balance the competing interests of the individual and the State.\textsuperscript{211} Therefore, the Court of Appeals weighed the individual's interest in communicating with an attorney against the competing state interest in efficient administration of its test, which also includes the avoidance of unnecessary increases in administrative and fiscal burdens.\textsuperscript{212} Rather than alleging that the private test would in any way impair these legitimate interests, however, the Superintendent's argument revolved around the belief that the private test would result in fewer drunk driving convictions.\textsuperscript{213} The court concluded that the generalized interest in convicting drunk drivers could not override the constitutional right to communicate with counsel concerning the decision whether to submit to the state test.\textsuperscript{214} Finally, the court noted that its conclusion was limited to situations in which the decision to take the state test was of "critical importance."\textsuperscript{215}

The Court of Appeals set forth a common-sense construction of due process as it relates to effective attorney-client communication in drunk driving representation. The court refused, however, to give a fuller explanation of what constitutes unreasonable interfer-

\textsuperscript{208} 307 Md. at 672, 516 A.2d at 975.
\textsuperscript{209} \textit{Id.}
\textsuperscript{210} \textit{Id.} at 672-73, 516 A.2d at 976.
\textsuperscript{211} \textit{Id.} at 671, 516 A.2d at 975.
\textsuperscript{212} \textit{Id.} at 671-72, 516 A.2d at 975-76.
\textsuperscript{213} \textit{Id.} at 671, 516 A.2d at 975. It is unclear whether the court would have reached the same decision had the Superintendent argued this point.
\textsuperscript{214} \textit{Id.} at 673, 516 A.2d at 976.
\textsuperscript{215} \textit{Id.} at 673-74, 516 A.2d at 976. The court neglected, however, to explain the kind of situation in which the decision would be "critically important."
ence with police procedures than it had in Sites. By maintaining that unreasonableness must be determined on a case-by-case basis and continuing to give great deference to the police interpretation of what actually is unreasonable,216 the court in effect is letting the fox guard the chicken coop. Considering the Superintendent's obvious attempt to circumvent the spirit of Sites, it is not unlikely that the majority of police reports will characterize the attempted attorney-client consultation as unreasonable.217 Although the State has an important interest in keeping drunk drivers off the road, the exercise of its police powers should not rise above the requirements of the Constitution. It may well be that the only way to guarantee that a suspect be afforded the right to counsel is to attach the sixth amendment right at this arguably "critical" stage.218

B. Sentencing

1. Increased Sentence on Retrial.—The Court of Appeals held in Jones v. State219 that section 12-702 of the Courts and Judicial Proceedings Article prohibits a court from increasing a defendant's sentence on retrial for crimes committed before the first trial but for which convictions occurred later.220 In so holding, the court concluded that the meaning of the statutory language, adopted nearly verbatim from the Supreme Court's holding in North Carolina v. Pearce,221 was not affected by subsequent Supreme Court decisions modifying Pearce.222

In 1982 a Montgomery County jury convicted Darryl Jones of

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217. In Sites the suspect alleged that he requested counsel three separate times, yet the arresting officer said he had "no recollection" of these requests. Sites, 300 Md. at 708, 481 A.2d at 195.
218. Some courts in fact have labeled this stage "critical." See, e.g., State v. Welch, 135 Vt. 316, 321, 376 A.2d 351, 355 (1977) ("[I]n seems clear that when a serious criminal case is involved, the request to submit to a chemical test can rise to the level of a 'critical stage' in the proceedings."); State v. Fitzsimmons, 93 Wash. 2d 436, 445, 610 P.2d 893, 898 (1980) ("[T]he period immediately after arrest and charging in a driving while under the influence of intoxicating liquor case is a 'critical stage' because of the unique character of the evidence to be obtained and the trial strategy decisions which must be made then, if at all.").
220. Id. at 456, 514 A.2d at 1222.
222. See Texas v. McCullough, 475 U.S. 134 (1986) (holding that Pearce did not prevent a judge from imposing a 50-year sentence at resentencing, even though the original sentence was only 20 years); Wasman v. United States, 468 U.S. 559 (1984) (holding that Pearce did not prevent a resentencing judge from considering an intervening conviction).
robbery with a deadly weapon. The Court of Special Appeals reversed the conviction a year later. In 1985 another Montgomery County jury reconvicted Jones of the same crime. The trial judge increased Jones' sentence, aware that the defendant had committed crimes before his first trial for which he was not convicted until after that trial. The Court of Special Appeals affirmed the sentence, and the Court of Appeals granted certiorari.

In 1973 the General Assembly enacted section 12-702(b) of the Courts and Judicial Proceedings Article, which provided that on remand a trial court cannot impose a sentence greater than that originally handed down unless certain criteria are met. The General Assembly lifted the wording containing the limitations on increased sentences from the language of the Supreme Court's 1969 opinion in Pearce. As the Court of Appeals recognized, the trial court's imposition of an increased sentence in this case clearly violated the "literal language" of section 12-702; thus, it also violated the Supreme Court's initial ruling in Pearce. The Supreme Court has since modified its ruling in Pearce, however, determining that due process does not preclude increased sentencing if on review the original sentence is overturned and the defendant appears again for resentencing. Because the General Assembly relied on Pearce in enacting section 12-702(b), the Court of Appeals faced the question of whether or not it was obliged to engraft the Supreme Court's modification of Pearce onto the Maryland statute. The court prop-

223. 307 Md. at 451, 514 A.2d at 1220. The court sentenced Jones to nine years' imprisonment. Id.
224. Id. The Court of Special Appeals' opinion was unreported.
225. Id.
226. Id. at 451-52, 514 A.2d at 1220.
227. Id. at 452, 514 A.2d at 1220.
228. MD. CTS. & JUD. PROC. CODE ANN. § 12-702(b) (1984). The statute provides:
If an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper judgment or sentence, or conduct a new trial, and if there is a conviction following this new trial, the lower court may impose any sentence authorized by law to be imposed as punishment for the offense. However, it may not impose a sentence more severe than the sentence previously imposed for the offense unless:
(1) The reasons for the increased sentence affirmatively appear;
(2) The reasons are based upon objective information concerning identifiable conduct on the part of the defendant occurring after the original sentence was imposed; and
(3) The factual data upon which the increased sentence is based appears as a part of the record.
229. 307 Md. at 452, 514 A.2d at 1220-21.
231. 307 Md. at 451, 514 A.2d at 1220.
erly refused to do so.\textsuperscript{232}

In \textit{North Carolina v. Pearce}\textsuperscript{233} the Supreme Court reviewed the resentencing of two defendants.\textsuperscript{234} Two district courts had convicted the defendants and sentenced them to prison.\textsuperscript{235} After the original convictions were set aside on grounds of constitutional error, the two were reconvicted.\textsuperscript{236} One defendant received a sentence greater than that originally imposed.\textsuperscript{237} The other defendant not only received a longer sentence, but was denied credit for time already served.\textsuperscript{238}

The Supreme Court held that the imposition of a harsher sentence on retrial violates neither the equal protection clause of the fourteenth amendment nor the constitutional provision against double jeopardy.\textsuperscript{239} Nevertheless, the Court ruled that the trial court must set forth in the record its reasons for imposing a heavier sentence so that the decision can be reviewed on appeal.\textsuperscript{240} The Court emphasized that the reasons for an increased sentence must be based on objective information concerning the defendant's identifiable conduct after the original sentencing proceeding.\textsuperscript{241}

Left unresolved in \textit{Pearce} was whether fourteenth amendment due process limitations applied to a defendant who, following conviction by a lesser court, seeks a horizontal appeal of right to a superior trial court by a trial de novo. In \textit{Cherry v. State}\textsuperscript{242} the Court of Special Appeals squarely addressed this issue, holding that the principles pronounced in \textit{Pearce} applied equally to a trial de novo.\textsuperscript{243}

While the legislature considered whether to expand section 12-
702(b) to incorporate Cherry's holding, the Supreme Court addressed the same issue in *Colten v. Kentucky.* Contrary to the Maryland court's holding in *Cherry,* the Supreme Court in *Colten* decided that *Pearce* did not apply when a superior court resentenced a defendant on a de novo appeal from an inferior court. The Court reasoned that there was little danger that a defendant seeking a trial de novo would face judicial vindictiveness merely for exercising the right of appeal. After the *Colten* decision, the General Assembly adopted the Court of Special Appeals' holding in *Cherry* and applied the *Pearce* rule to de novo appeals, even though the Supreme Court's ruling meant that it was not constitutionally required to do so. Thus, the Maryland rule at that time afforded more protection to the defendant convicted after a trial de novo than the rule of the Supreme Court.

In subsequent decisions both the Court of Appeals and the Supreme Court have emphasized the importance of identifiable conduct by the defendant occurring after the imposition of the original sentence in justifying an increased sentence. In *Briggs v. State* the Court of Appeals stressed that in enacting section 12-702 the legislature intended to prohibit a harsher sentence upon resentencing, unless the sentencing judge possesses objective information concerning conduct by the defendant which occurred after the trial court imposed the original sentence. Yet in *Wasman v. United

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244. 407 U.S. 104 (1972).
245. *Id.* at 118.
246. *Id.* at 116.
247. A reviser's note appended to the text of § 12-702 stated:

> [W]e have a constitutional limitation on increase of sentence if there is an ordinary appeal and either a remand for sentencing or a re-conviction after a new trial. And we have a statutory limitation on increase of sentence if there is a conviction after a de novo appeal. What § 12-702 proposes is the codification of the case law, and the retention of the existing statutory law, thus providing a uniform approach to the problem, and one readily accessible to and understandable by those involved in criminal sentencing.


248. 289 Md. 23, 421 A.2d 1369 (1980).
249. *Id.* at 32-33, 421 A.2d at 1374-75. The district court convicted Briggs of assaulting a correctional officer. When he committed the assault, Briggs was serving time for armed robbery. The court sentenced him to 30 days to run consecutively following his term for armed robbery. Briggs then appealed to the circuit court. Between the time of the district court and circuit court trials, Briggs was convicted of three other assaults. At
States the Supreme Court held that after a defendant is retried and convicted, a court may justify an increased sentence by affirmatively identifying relevant conduct or events, including convictions, that occurred after the original sentencing proceedings. The Court asserted that "any language in Pearce suggesting that an intervening conviction for an offense committed prior to the original sentencing may not be considered upon sentencing after retrial, is inconsistent with the Pearce opinion as a whole."

The Jones court held that although in enacting section 12-702 the General Assembly had adopted almost verbatim the language of Pearce, Maryland courts were not obligated to follow subsequent Supreme Court decisions modifying the Pearce doctrine. The Court of Appeals construed the statute as the legislature's refusal to follow Supreme Court decisions which provided minimal constitutional rights by enacting a law that provides extra protection. The court stressed that in section 12-702(b)(2), the phrase "conduct on the part of the defendant occurring after the original sentence was imposed" does not include a conviction occurring after the original sentence based on actions which occurred earlier.

A state is perfectly free to adopt measures that provide protections beyond those mandated by the Constitution. As the Court of Appeals recognized, the legislature was well aware of the Supreme Court's decisions in Colten and Wasman yet it did not move to modify the statute to correspond with the Supreme Court holdings. This inaction is a clear indication of the legislative will to leave matters unchanged. The Court of Appeals, recognizing its proper function, did not attempt to thwart this intent.

the trial de novo, the circuit court judge convicted Briggs and sentenced him to 10 years' imprisonment. Id. at 24-25, 421 A.2d at 1370-71.

251. Id. at 572.
252. Id.
253. 307 Md. at 454-55, 514 A.2d at 1221-22.
254. Id. at 455, 514 A.2d at 1222. In deciding Jones, the Court of Appeals concluded that the Maryland legislature enacted a "clear and specific law" independent of Supreme Court rulings. Id. at 454, 514 A.2d at 1222.
256. See Mills v. Rogers, 457 U.S. 291, 300 (1982) ("[A] State may confer procedural protection of liberty interests that extend beyond those minimally required by the Constitution of the United States. If a State does so, the minimal requirements of the Federal Constitution would not be controlling. . . ." (emphasis in original)).
257. 307 Md. at 455, 514 A.2d at 1222. The Jones court neglected to take into account the 1983 amendment of the de novo section of the statute which conforms to Colten. See supra note 247.
2. Habitual Offender Statute.—In Montone v. State the Court of Appeals clarified the meaning of the statutory mandate that in order to be sentenced as an habitual offender pursuant to Maryland’s Habitual Criminal Statute, a criminal must have received three previous, separate convictions for crimes of violence. The court further emphasized that the criminal must have served three unconnected rather than concurrent or consecutive terms of confinement in a correctional institution. In reaching its conclusion, the court declared that the statute’s purpose is not only to punish, but also “to identify individuals incapable of rehabilitation and lock them up forever.”

In 1977 Santo Louis Montone was convicted of daytime housebreaking and was incarcerated. Montone conceded that this qualified as the first period of confinement under the repeat offender statute. In 1979 he was convicted of nighttime housebreaking and the use of a handgun in the commission of a crime of violence. He was sentenced to two to seven years on the former count and five years on the latter, sentences to be consecutively served. After reconsideration, the trial court suspended the execution of the balance of both sentences and placed Montone on concurrent five-year terms of probation. Montone already had served nineteen months, making this the second term of confinement. Probation was revoked; the sentences for the nighttime housebreaking and handgun offenses were reduced to eighteen months each, to be concurrently served. The State contended that this constituted Montone’s third period of confinement.

In 1983 Santo Louis Montone pleaded guilty to felony theft and daytime housebreaking. Acting pursuant to article 27, section

260. 308 Md. at 606, 521 A.2d at 723.
261. Id. at 613-14, 521 A.2d at 727.
262. Id. at 612-13, 521 A.2d at 726-27.
263. 308 Md. at 603, 521 A.2d at 722. In fact, Montone had been convicted of nighttime housebreaking exactly one year earlier. In 1983 the State, however, did not list the 1976 conviction and any resulting incarceration in its notice that it would seek to invoke the habitual offender statute. Therefore, the trial court considered the 1977 events as the first conviction and confinement. Id.
264. Id. at 604, 521 A.2d at 722.
265. Id.
266. Id.
267. Id.
268. Id. at 604-05, 521 A.2d at 722.
269. Id., 521 A.2d at 722-23.
270. Id. at 605, 521 A.2d at 723.
CRIMINAL LAW

643B, the judge sentenced Montone to life imprisonment without the possibility of parole.\(^{271}\) One month later, Montone was convicted of robbery and the use of a handgun in the commission of a crime of violence; again, the sentence was life without parole.\(^{272}\) Following a reduction of the sentence to one life term without possibility of parole, Montone appealed.\(^{273}\) The Court of Appeals granted certiorari to determine if Montone's life sentence violated section 643B(b).\(^{274}\)

The statute declares, "Any person who has served three separate terms of confinement in a correctional institution as a result of three separate convictions of any crime of violence shall be sentenced, on being convicted a fourth time of a crime of violence, to life imprisonment without the possibility of parole."\(^{275}\) The Court of Appeals in Montone defined what constitutes three "separate" terms of confinement and three "separate" convictions.

Montone presented three arguments to the Court of Appeals to persuade it that the trial court erred in sentencing him as an habitual offender.\(^{276}\) First, Montone contended that he did not receive "three separate convictions" as required by the statute because he was convicted simultaneously of both the second and third crimes.\(^{277}\) Thus, the criminal justice system did not have an opportunity to reform him between the commission of the second and third offenses. Second, Montone asserted that he did not serve "three separate terms of confinement" because the period of imprisonment resulting from his third conviction was concurrent with the term of confinement resulting from his second conviction.\(^{278}\) Finally, Montone maintained that he did not serve three separate terms of confinement "as a result of three separate convictions" because his last term of imprisonment resulted from a probation violation.\(^{279}\)

\(^{271}\) Id. at 602-03, 521 A.2d at 721. See Md. Ann. Code art. 27, § 643B(b) (1987).

\(^{272}\) 308 Md. at 603, 521 A.2d at 721-22.

\(^{273}\) In an unreported per curiam opinion, the Court of Special Appeals affirmed Montone's conviction but vacated the sentence. Accordingly, the intermediate appellate court remanded the cases for appropriate sentencing. On remand the trial judge reduced the sentence for felony theft and housebreaking but left in place the sentence of life imprisonment without possibility of parole for the robbery conviction. Id., 521 A.2d at 722.

\(^{274}\) Id.


\(^{276}\) 308 Md. at 605, 521 A.2d at 723.

\(^{277}\) Id.

\(^{278}\) Id.

\(^{279}\) Id.
While the Court of Appeals acknowledged that many states have habitual offender statutes, it determined that Maryland's is unique:

The Maryland statute requires more than merely "previous" convictions; it requires separate convictions. Moreover, the statute's scope is narrowed by the fact that it requires not only that an individual shall have received separate convictions, but that he shall have been sentenced to, and shall have actually served, three separate terms of confinement under the jurisdiction of the correctional system. 280

Nevertheless, the court found it instructive to consult the law of other states in construing the meaning of "separate." 281

If the primary purpose of a state's statute is deemed to be rehabilitative, a court generally requires sequential terms of confinement. 282 Thus, two convictions handed down on the same day may not serve as predicate convictions for each other. Courts reason that the criminal has not had an opportunity to be rehabilitated between the first conviction and the commission of the crime upon which the second conviction is based. 283

280. Id. at 606, 521 A.2d at 723 (emphasis in original).
281. Id. at 608, 521 A.2d at 724.
282. Id.
283. Id. at 609, 521 A.2d at 724-25. For example, in State v. Carlson, 560 P.2d 26 (Alaska 1977), Alaska's Supreme Court construed the habitual offender statute as requiring that predicate convictions pursuant to the statute occur in sequence. The court reasoned that it was the "accumulation of prior offenses, indicating the defendant has not reformed his behavior, rather than merely the gross number of offenses, which should be determinative of habitual criminal status." Id. at 30. The court added that "[w]here, as in the case of [the defendant], two convictions occur on the same day, the opportunity for reformation is afforded to him only once, not twice." Id.

Likewise, in State v. Ellis, 214 Neb. 172, 333 N.W.2d 391 (1983), the Nebraska Supreme Court held that not only are recidivist statutes enacted to deter and punish repeat offenders, but that they also are intended to apply to persistent offenders who do not respond to the influence of conviction and imprisonment. Id. at 175, 333 N.W.2d at 394. The court stated that "'[i]t is the commission of the second felony after conviction for the first, and the commission of the third felony after conviction of the second that is deemed to make the defendant an incorrigible.'" Id. at 176, 333 N.W.2d at 394 (quoting Coleman v. Commonwealth, 276 Ky. 807, 125 S.W.2d 798 (1939)). The court held that in order to warrant the imposition of Nebraska's habitual offender statute, each conviction, except for the first conviction, must be for crimes committed after a preceding conviction. Moreover, all prior convictions must precede the commission of the principal crime. Id.

Finally, in Combs v. Commonwealth, 652 S.W.2d 859 (Ky. 1983), the Supreme Court of Kentucky considered whether concurrent sentences for two crimes could serve as separate convictions under the habitual offender statute. The court focused on the statute's purpose to rehabilitate criminals, and stressed that if a court convicts an of-
If, on the other hand, the statute is intended to be a deterrent by mandating punishment for the repeat offender, then the court will hold that confinement may be concurrent and convictions may occur on the same day. These courts, therefore, declare the sequence of the predicate crimes to be irrelevant.

The Montone court concluded that two convictions must be separated by an intervening term of imprisonment before each can be counted as a predicate conviction under section 643B(b). The court stressed that the statute's purpose is to identify criminals incapable of rehabilitation. It would circumvent this purpose to allow two convictions without an intervening term of confinement to count separately because the criminal would be "deprived of an intervening exposure to the correctional system." As the Court of Appeals declared in Hawkins v. State, the purpose of section 643B(b) "is to protect the public from assaults upon people and injury to property and to deter repeat offenders from perpetrating other criminal acts of violence under the threat of an extended period of confinement." Moreover, the Montone court stressed that if a court imposes either a concurrent or a consecutive sentence for two convictions, the resulting terms of confinement cannot be considered separate. To do so would frustrate the legislative intent "that the conviction and confinement for one predicate crime be separate from the other."

In a brief concurrence, Chief Judge Murphy stressed that in Hawkins the Court of Appeals defined the aims of section 643B(b) as deterrence of crime and protection of the public. Judge Murphy

fender twice before any prison time is served, the convictions must be considered a single conviction for purposes of the statute. Id. at 862. The court nevertheless affirmed the defendant's conviction as a habitual offender; while the two sentences overlapped, the defendant already had served part of the first sentence before being convicted of the second felony. Id.

284. 308 Md. at 611, 521 A.2d at 726. See, e.g., Watson v. State, 392 So. 2d 1274, 1279 (Ala. 1980) (purpose of statute was to prevent crime by imposing greater penalties upon repeat offenders); Washington v. State, 273 Ark. 482, 485, 621 S.W.2d 216, 218 (1981) (statute had only a punitive purpose); State v. Montague, 671 P.2d 187, 190 (Utah 1983) (statute designed to subject repeat offenders to increased sentences).

285. 308 Md. at 611, 521 A.2d at 726.

286. Id. at 613, 521 A.2d at 727.

287. Id.


289. Id. at 148, 486 A.2d at 182.

290. 308 Md. at 613, 521 A.2d at 727.

291. Id. at 614, 521 A.2d at 727.

292. Id. at 617, 521 A.2d at 728 (Murphy, C.J., concurring). See Hawkins, 302 Md. at 148, 486 A.2d at 182.
stated:

I do not believe that the legislature intended—irrespective of the number of separate crimes of violence perpetrated by an offender—that one continuous term of imprisonment under consecutive sentences for separate qualifying offenses would count as but one separate term of imprisonment under the statute. As I see it, the legislative purpose permits the imposing of a life sentence without parole upon a fourth conviction of a crime of violence where the qualifying convictions were coupled with a period of actual confinement separately imposed.293

Judge Murphy further asserted that consecutive sentences are "separate within the contemplation of the statute, even though the total period of imprisonment under separate and consecutive sentences is continuous."294

Judge Murphy's rationale appears to conform more to the statute's language than does the majority's opinion. Nowhere in the statute is it suggested that one of the statute's objectives is to afford the offender an opportunity to reform. Although the statute speaks of three separate convictions resulting in three separate terms of imprisonment, the court has distorted the statute's meaning by dabbling in semantics. "Separate" for the purposes of section 643B(b) should include consecutive sentences for crimes of violence. To insure that Maryland has the type of habitual offender statute that it needs, the legislature should amend the statute to leave no room for misinterpretation.

C. Procedure

1. Subject Matter Jurisdiction.—The Court of Appeals in Pennington v. State295 addressed the issue of subject matter jurisdiction over the offense of obstruction of justice.296 Because obstruction of justice is a crime against the State itself,297 the court determined that a Maryland court could exercise jurisdiction over the crime, even though the criminal act took place outside the State.298

Jean Pennington was convicted in the Circuit Court for Balti-

293. 308 Md. at 617, 521 A.2d at 729.
294. Id.
296. Id. at 728, 521 A.2d at 1216.
297. Id. at 739, 521 A.2d at 1222.
298. Id. at 746, 521 A.2d at 1225.
more City for obstruction of justice. The charge originated when she stabbed another woman in the District of Columbia in order to discourage her from testifying in a pending Maryland assault case. Ms. Pennington asserted that the Maryland courts had no subject matter jurisdiction over the offense because the actions attributed to her occurred in the District of Columbia. The Court of Special Appeals rejected this argument and affirmed her conviction. The Court of Appeals granted certiorari and likewise affirmed.

In Maryland the principal basis for subject matter jurisdiction over crimes is the common-law theory of territorial jurisdiction: "a state has power to make conduct or the result of conduct a crime if the conduct takes place or the result happens within its territorial limits." Many states have created statutory extensions of territorial jurisdiction modeled after the Model Penal Code. Maryland, however, has not statutorily expanded the scope of the State's crimi-

299. Id. at 728, 521 A.2d at 1216. The defendant violated Md. Ann. Code art. 27, § 27 (1982), which states: "If any person by corrupt means or by threats or force endeavors to influence, intimidate, or impede any juror, witness, or court officer of any court of this State in the discharge of his duty . . . he is liable to be prosecuted."

300. 308 Md. at 728, 521 A.2d at 1216.

301. Id.


303. 308 Md. at 728, 521 A.2d at 1216. The Court of Appeals recognized that the issue presented was one of first impression not only in Maryland, but in other states as well. Id.


305. 1 W. LaFave & A. Scott, Substantive Criminal Law § 2.9, at 180 (1986) (footnote omitted). See also R. Perkins & R. Boyce, Criminal Law at 38-45 (3d ed. 1982). The situs, or locus, of a crime is the place of the act (or omission) constituting the crime. The place of the result of a crime only matters if the definition of the crime expressly includes such a result as an element. W. LaFave & A. Scott § 2.9, at 180-81. For example, criminal jurisdiction exists over the crime of murder in the state in which the fatal force was inflicted on the victim, rather than that in which the force is discharged or the victim dies. Stout v. State, 76 Md. 317, 323, 25 A. 299, 301 (1892). In the case of larceny, however, prosecution is permitted in any state into which the goods may be brought subsequently. W. LaFave & A. Scott § 2.9, at 182. See also Worthington v. State, 58 Md. 403, 409 (1882) (every asportation deemed to be a new taking).

306. Several states' statutes predate the Model Penal Code while 29 others have expressly adopted it. 308 Md. at 729 n.2, 521 A.2d at 1216-17 n.2. The Model Penal Code expands jurisdiction over crimes by providing "that a state has jurisdiction when 1) conduct or a result that is an element of the offense occurs within the state; 2) conduct outside the state constitutes an attempt or conspiracy within the state or is prohibited by a statute of the state specifically directed at such out-of-state conduct." Model Penal Code § 1.03 explanatory note (1985).
nal jurisdiction, instead retaining the common-law concepts.

Initially the court reasoned that causing or attempting to cause the obstruction of justice constituted an essential element of the crime. Therefore, the locus of the act's result is the more important element of the crime. Essentially, the defendant committed two crimes: assault against the individual and obstruction of justice against the State. The injury to the State constituted a justification for Maryland to assume jurisdiction over the crime.

For persuasive support, the court considered cases arising under the federal obstruction of justice statute concerning venue and cases involving the concept of constructive contempt. The federal circuits are divided on the venue issue, with some courts holding that venue lies in obstruction cases only in the district in which the threatening actions occur. Other courts of appeal have rejected this theory, declaring that in obstruction of justice cases, venue is proper in the district in which justice is impeded. The Court of Special Appeals had determined that the better reasoned cases were those holding that venue lies in the district influenced by the obstructive acts.

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307. A provision similar to the Model Penal Code was considered but rejected in Maryland. 308 Md. at 729 n.2, 521 A.2d at 1216-17 n.2.


310. 308 Md. at 739, 521 A.2d at 1222.

311. Id.

312. "It thus would appear to make sense to view the gravamen of those crimes [obstruction of justice] as being the injury to the State and to conclude that jurisdiction exists where the offended agency of the State is located." Id.


314. United States v. Nadolny, 601 F.2d 940 (7th Cir. 1979) (venue proper although actual act of obstruction of justice did not take place where criminal investigation was proceeding); United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971) (venue in District of Columbia improper when defendant committed criminal obstruction of justice acts in Maryland).


316. 308 Md. at 735 n.8, 521 A.2d at 1220 n.8.
Moreover, constructive contempt cases are analogous in their analysis of the territorial jurisdiction of a court. "'The fact that the offense was committed at a point remote from the court, in an adjoining State, is of no importance.'" The court cited cases which have noted that an indirect contempt insults the court's dignity; prohibiting a court from punishing an indirect contempt because the acts occurred outside the jurisdiction would undermine the court's power.

Pennington significantly extends the territorial boundaries of subject matter jurisdiction to include not only the situs of the criminal act but also the forum affected by the act's results in criminal obstruction of justice cases. Predictably, the Court of Appeals conferred jurisdiction over the person whose acts prevented the administration of justice in a Maryland court. The court correctly concluded that the result element was by far the most important element of the crime.

The court, while recognizing the General Assembly's refusal to enact an overall extension of territorial jurisdiction, believed that the crime of obstruction of justice warranted the extension. In the future the court may be persuaded to extend criminal jurisdiction for other crimes which affront the judicial administration of a forum.

In obstruction of justice cases, the ultimate victim is the court, even if the act was committed outside the forum state's borders. Essential to the foundation of a judicial administration is the assurance that acts committed against a court are within the purview of its jurisdictional reach.

2. Courtroom Misconduct.—In Collins v. State the Court of Special Appeals discussed the measures that a trial court may take to prevent a criminal defendant from disrupting courtroom proceed-

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317. A constructive contempt is a willful disregard or disobedience of a public authority committed outside the presence of the court. W. LaFave & A. Scott, supra note 305, § 1.7, at 62. A number of courts have determined that a court has jurisdiction over constructive contempt acts committed outside the state's borders. See, e.g., Snow v. Hawkes, 183 N.C. 365, 368, 111 S.E. 621, 623 (1922) (holding defendant in contempt for coercing plaintiff in another state to dismiss the suit); Farmers' State Bank of Texhoma v. State, 13 Okla. Crim. 283, 284-85, 164 P. 132, 132 (1917) ("[C]ontempt is an offense against the dignity and authority of the particular court to which the affront is offered.").

318. 308 Md. at 742, 521 A.2d at 1223 (quoting Hunter v. United States, 48 App. D.C. 19, 24-25 (1918)).

319. Id. at 743-45, 521 A.2d at 1224-25.

320. See supra notes 306-07 and accompanying text.

ings. After considering the options available to a judge, the intermediate appellate court determined that the trial judge had acted properly in delaying removal of the defendant from the courtroom.\textsuperscript{222}

Daniel Collins was convicted in the Circuit Court for Howard County of kidnapping, rape, robbery, and assault with intent to murder.\textsuperscript{223} Collins' speech and conduct throughout his trial and sentencing hearing was so disruptive that it was virtually impossible to conduct the proceedings in his presence.\textsuperscript{224} The trial court judge took several measures to attempt to alleviate Collins' interruptions, but eventually had to remove him from the courtroom.\textsuperscript{225} On appeal Collins argued that he was deprived of a fair trial because he was not removed from the courtroom soon enough.\textsuperscript{226} He contended that the effect of this prejudice was to deny him his constitutional right to a fair trial.\textsuperscript{227}

The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."\textsuperscript{228} The Supreme Court has interpreted this confrontation clause as granting a defendant in a criminal proceeding the right to be present in the courtroom at every stage of the trial.\textsuperscript{229} The Court, however, also has held that this right can be waived by a defendant's inappropriate conduct. In \textit{Illinois v. Allen}\textsuperscript{230} the Court provided trial judges three options for dealing with an unruly defendant: (1) bind and gag the defendant; (2) cite the defendant for contempt; and (3) remove the defendant from the courtroom until he or she promises to behave.\textsuperscript{231}

\begin{itemize}
\item \textsuperscript{222} \textit{Id.} at 189, 516 A.2d at 1023.
\item \textsuperscript{223} \textit{Id.} at 178-79, 516 A.2d at 1018.
\item \textsuperscript{224} \textit{Id.} at 179, 516 A.2d at 1018.
\item \textsuperscript{225} \textit{Id.} The measures included taking a recess, warning Collins verbally out of the jury's presence, and eventually binding and gagging him. Once Collins had been removed, he refused repeated invitations to return to the courtroom. During most of this voluntary absence, however, Collins viewed his trial on a closed-circuit television in a courthouse cell. \textit{Id.} at 181-82, 186, 516 A.2d at 1019, 1021.
\item \textsuperscript{226} \textit{Id.} at 186-87, 516 A.2d at 1022.
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} U.S. CONST. amend. VI. The Supreme Court held this clause applicable to the states via the fourteenth amendment in \textit{Pointer v. Texas}, 380 U.S. 400, 406 (1965).
\item \textsuperscript{229} \textit{See} Lewis v. United States, 146 U.S. 370, 372 (1892).
\item \textsuperscript{230} 397 U.S. 337 (1970).
\item \textsuperscript{231} \textit{Id.} at 343-44. In \textit{Allen} the defendant was repeatedly warned by the trial judge that he would be removed if he persisted in his unruly conduct and was constantly informed that he could return to the trial when he agreed to conduct himself in an orderly manner. \textit{Id.} at 340-41.
\end{itemize}
The Court of Special Appeals has held that the choice of action taken in dealing with a disruptive defendant is solely within the discretion of the trial judge, since the judge is best able to assess the situation.\(^{332}\) The court has suggested, however, that before sanctions are employed against the defendant, the trial judge first should excuse the jury from the courtroom and then warn the defendant that further disruption will lead to sanctions.\(^{333}\)

As the Court of Special Appeals recognized, the *Collins* case represented a new twist to the appeals normally raised by a disruptive defendant who has been excluded from courtroom proceedings.\(^{334}\) Usually a misbehaving defendant will claim that the removal was a deprivation of the constitutional right to a fair trial; Collins, however, claimed that he was deprived of a fair trial because he was *not* removed.\(^{335}\) Collins argued that the trial judge "abused his discretion in refusing requests to remove him from the courtroom before he disrupted the trial and antagonized and prejudiced the jury."\(^{336}\)

When Collins initially interrupted the trial, the judge ordered that a recess be taken.\(^{337}\) Soon thereafter, the trial judge excused the jury and warned Collins that he might be removed from the courtroom, subsequently receiving an assurance from Collins that the disruptions would cease.\(^{338}\) "It was only after Collins reneged on this assurance that the court employed *Allen*-like sanctions, first handcuffing, then gagging, then excluding Collins."\(^{339}\) Therefore, the trial judge properly admonished Collins before expelling him.\(^{340}\)

Nor did the trial judge abuse his discretion in refusing to exclude the defendant from the proceedings sooner than he did. Collins' defense relied upon the premise that the victims had


\(^{334}\) 69 Md. App. at 186, 516 A.2d at 1022.

\(^{335}\) *Id.*

\(^{336}\) *Id.* at 186-87, 516 A.2d at 1022.

\(^{337}\) *Id.* at 180, 516 A.2d at 1019.

\(^{338}\) *Id.* at 181, 516 A.2d at 1019.

\(^{339}\) *Id.* at 188, 516 A.2d at 1023.

\(^{340}\) This preference also has been expressed in the A.B.A. *STANDARDS FOR CRIMINAL JUSTICE*, Standard 6-3.8 commentary, at 6.44 (2d ed. 1986):

> Public confidence in the trial process requires that removal of defendants be limited to cases urgently demanding that action be taken, that it be done only after explicit warning, that there be a standing opportunity for the defendant to return to the courtroom, and that the burden that absence creates for the defense be kept to the unavoidable minimum.
misidentified him. Thus, in-court identification was the crux of the State's case. Once the identification was completed, the trial judge granted Collins' request to leave the courtroom. The Court of Special Appeals reasoned that if the trial judge had excluded Collins earlier and then brought him back for the identification, Collins' reappearance might have affected the credibility of the in-court identification.

The Collins court reaffirmed that the trial judge's discretion over courtroom proceedings extends to determining how to control an obstreperous defendant. Moreover, the court made it clear that a misbehaving defendant's right to a fair trial is not violated by the defendant's own inappropriate actions in the courtroom.

D. Elements of Crimes

1. Mens Rea.—In Glenn v. State the Court of Special Appeals thoroughly analyzed the mental element of the crime of assault with intent to murder. With the goal of "housecleaning" in mind, the court sought not only to provide a better definition of the crime but also to elaborate on the dangers inherent in using the ambiguous term "malice." In an opinion written by Judge Moylan, the Court of Special Appeals held that (1) "[a]ssault with intent to murder is an assault with intent to kill under circumstances such that if the victim should die, the crime would be murder," (2) it is the absence of mitigation, not malice, that separates murder from manslaughter; and (3) it is the intent to kill, rather than malice, that may be inferred from the directing of a dangerous weapon at a vital part of the human anatomy.

Britt Glenn was convicted in a nonjury trial of assault with intent to murder and possession of marijuana. On appeal he claimed he lacked the mens rea necessary for assault with intent to murder. The Court of Special Appeals agreed, finding that there

341. 69 Md. App. at 189, 516 A.2d at 1023.
342. Id.
343. Id.
345. Id. at 381, 511 A.2d at 1112.
346. Id. at 398, 511 A.2d at 1120.
347. Id. at 405, 511 A.2d at 1124.
348. Id. at 411, 511 A.2d at 1127.
349. Id. at 380, 511 A.2d at 1111.
350. Id. at 381, 511 A.2d at 1111. The facts were undisputed. An altercation occurred in which the assault victim, Rizo, and his friends attacked Glenn outside of a nightclub. After nightclub bouncers separated the men, Glenn followed Rizo in his car, went over to the car in which Rizo sat, and stabbed him four times. Id. at 406-07, 511 A.2d at
were facts establishing provocation legally sufficient to provide a mitigating factor that would have prevented Glenn from being convicted of murder had the victim died. The court concluded that in convicting Glenn of assault with intent to murder the trial judge had “erred by following time-honored but misleading appellate road signs.”

The court characterized pre-1975 law on criminal homicide as a “Kafkaesque hall of mirrors.” The Supreme Court's 1975 opinion in Mullaney v. Wilbur “set out to clean the Augean Stables of the accumulated semantic debris and outworn linguistic usages of three centuries.” The Court struck down a jury instruction to the effect that the defendant bore the burden of establishing that justifying or mitigating circumstances reduced an intentional and unlawful homicide from manslaughter to murder. Also in 1975, the Court of Special Appeals reversed the conviction of the defendant in Evans v. State. In that opinion, also written by Judge Moylan, the court struck down a jury instruction which declared that malice was to be presumed from the pointing of a deadly weapon at a vital part of the human body. The court characterized the instruction as unconstitutional because the State bears the burden of proving lack of mitigation beyond a reasonable doubt.

Despite Evans, certain “elusive” and “tenacious” misconceptions have persisted since 1976 concerning the distinctions between the various forms of homicide, the role of “malice” in deciding which offenses have been committed, and the nature of assault with

1125. Glenn did not challenge his conviction for possession of marijuana, nor did he deny committing simple assault. Id. at 380-81, 511 A.2d at 1111. As Judge Moylan stated, “Criminal agency was clear. The only issue is whether [Glenn] stabbed his victim with that aggravating mens rea that raises the common law misdemeanor of simple assault to the statutory felony of assault with intent to murder.” Id. at 382, 511 A.2d at 1112.

351. Id. at 406-07, 511 A.2d at 1125.

352. Id. at 381, 511 A.2d at 1111.

353. Id. Judge Moylan subsequently traced much of the confusion to the “chronic failure to distinguish between the evidentiary significance of the intent to commit grievous bodily harm and the legal significance thereof.” Id. at 390-91, 511 A.2d at 1116. While proof of an intent to inflict grievous harm may support an inference of an intent to kill, in theory the two intents are quite different. Id. at 391, 394, 511 A.2d at 1116, 1118.

In a long footnote, the court pointed to a “glaring misstatement” in case law that first appeared in Webb v. State, 201 Md. 158, 93 A.2d 80 (1952). In Webb the court held that a specific intent to kill is not necessary to support a charge of assault with intent to murder. Id. at 161-62, 93 A.2d at 82. See 68 Md. App. at 391 n.7, 511 A.2d at 1116 n.7.


355. 68 Md. App. at 381, 511 A.2d at 1111.


357. Id. at 730-31, 349 A.2d at 354.
It is to these misconceptions, which the court characterized as "half-truths," that the court's opinion was addressed.

The first "half-truth" which the court attacked declared: "Assault with intent to murder is an assault under circumstances such that if the victim should die, the crime would be murder." The court considered this statement incomplete because it failed to take into account the existence of four types of murder: (1) intent to kill murder, (2) intent to commit grievous harm murder, (3) felony murder, and (4) deprived heart murder. Each type of murder has its own distinct mens rea, each exists in both the first and second degree. The old definition of assault with intent to murder, which turned on the end result being termed "murder" if the victim died, thus failed to distinguish between eight homicidal intents.

To clarify this maze, the court focused on the mens rea necessary for assault with intent to murder, identifying it as the specific intent to cause the victim's death. Moreover, the court stated, this specific intent to kill is a required element only for the intent to kill murders.

Intent to kill is not an element of an assault with intent to commit grievous bodily harm, because the victim's death is not the end goal of such an act. While the perpetrator would be charged with murder should the victim die, a specific intent to cause death is not necessary. Likewise, when victims of deprived heart acts or felo-
nies die, perpetrators are held accountable for murder without a prerequisite specific intent to kill. The court concluded that assault with intent to murder is the inchoate form only of the intent to kill murders. The court opined that the Maryland legislature must have intended that assault with the intent to murder be restricted to the intent to kill murders. Otherwise, every assault with intent to commit any felony automatically would constitute an assault with intent to murder.

Therefore, the proper definition requires the words "with intent to kill" to eliminate the three other types of murder. Moreover, the words "under circumstances such that if the victim should die, the crime would be murder" must be retained to weed out justifiable or excused homicides. The court’s first complete definition is then: “Assault with intent to murder is an assault with intent to kill under circumstances such that if the victim should die, the crime would be murder.”

The court next addressed the common misconception that “[m]alice is that which separates murder from manslaughter.” Courts have had difficulty distinguishing these crimes because of the word “malice” itself. Originally courts created the crime of manslaughter to separate deliberate killings from those mitigated by on-the-scene provocation, as the phrase “malice aforethought” gradually lost its significance. When the term “malice” remained and expanded in application, the result was “a semanticist’s nightmare.” While malice often is used to denote intent, intent

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365. With felony murder, there is no specific intent that harm should come to anyone, but merely a general intent to commit a felony. Depraved heart murder is also a general intent crime: there is required an intent to do a reckless life-endangering act without regard for the consequences. 68 Md. App. at 388-89, 511 A.2d at 1115.

366. Id. at 396, 511 A.2d at 1119.
367. Id. at 397, 511 A.2d at 1120.
368. Id. at 395, 511 A.2d at 1119.
369. Intended murder is “more than a simple intent to kill. It is the unjustified, unexcused and unmitigated intent to kill.” Id. at 388 n.6, 511 A.2d at 1115 n.6.
370. Id. at 398, 511 A.2d at 1120.
371. Id., 511 A.2d at 1121.
372. Id. at 401-04, 511 A.2d at 1122-24.
373. Id. at 398, 511 A.2d at 1121.
does not separate murder from manslaughter. In the heat of sudden provocation, a person might intend to kill, yet the killing would not be murder. The court concluded, therefore, that it is "absence of mitigation," rather than "malice," which separates murder from manslaughter.374

The word "malice" also caused the flaw in the third misconception that the court dismantled: "One may infer malice from the directing of a deadly weapon at a vital part of the human anatomy."375 In examining this "half-truth," the court considered what may be inferred from the directing of a dangerous weapon at a person.

According to the court's analysis, only one component of malice—intent to kill—may be inferred from such action. "Malice, like Gaul, is divided into three parts":376 intent to kill, absence of mitigation, and absence of justification or excuse.377 Attacking someone with a knife several times, as Glenn did, would indeed demonstrate an intent to kill,378 but would say absolutely nothing about the absence of mitigation, which separates murder from manslaughter, or the absence of justification or excuse.379 Nevertheless, because one component of malice could be inferred from a knife attack, a court might erroneously convict a defendant like Glenn of assault with intent to murder380 despite the presence of legally suffi-

374. Id. at 405, 511 A.2d at 1124.
375. Id. at 408, 511 A.2d at 1126.
376. Id. at 398, 511 A.2d at 1121.
377. Id. at 404, 511 A.2d at 1123-24.
378. In Cox v. State, 69 Md. App. 396, 518 A.2d 132 (1986), aff'd, 311 Md. 326, 534 A.2d 1333 (1988), the Court of Special Appeals used its Glenn holding regarding the difference between murder and manslaughter to support its affirmation of a conviction for "attempted voluntary manslaughter." Id. at 401-04, 518 A.2d at 135-37. The defendant had argued that a specific intent is necessary for attempt, which is precluded from the sudden provocation element of voluntary manslaughter. Id. at 399, 518 A.2d at 134. Applying Glenn, the Court of Special Appeals reiterated the holding that it is not malice, nor even specific intent to kill, that separates murder from manslaughter, as there can be intent to kill with manslaughter. Id. at 404, 518 A.2d at 136-37.
379. 68 Md. App. at 410, 511 A.2d at 1126-27. "Although the intent may be inferred from the act itself, it may not be inferred that the intent was unexcused or unjustified or that the intent was unmitigated." Id.
380. The court observed:

[E]rror was almost inevitable. The court was looking for malice. The case law told the court that malice may be inferred from the directing of a deadly weapon at a vital part of the human anatomy. Therefore, malice was found to be present. Therefore, the verdict was guilty of assault with intent to murder. Id. See also Hall v. State, 69 Md. App. 37, 516 A.2d 204, 208 (1986), cert. denied, 308 Md. 382, 519 A.2d 1283 (1987) (applying Glenn to reverse the defendant's conviction for assault with intent to murder on the ground that use of a deadly weapon by itself does not establish intent to murder).
To correct the faulty inference, the court substituted "intent to kill" for "malice." Therefore, the court explained that "[t]he intent to kill may be inferred from the directing of a dangerous weapon at a vital part of the human anatomy." 382

In Glenn the Court of Special Appeals made an admirable attempt to remedy the confusion created by the amorphous legal concept of malice. With its holding, it was the court's hope that trial courts no longer would be tempted to slip "on the linguistic banana peel of 'malice.'" 383

2. Merger.—The Court of Appeals clarified concepts of criminal intent in State v. Jenkins. 384 The court determined that even though the *mentes reae* of assault with intent to murder and assault with intent to maim differ, the offenses themselves are not inconsistent because one act of criminal assault may lead to either the death or disablement of the victim. 385 Therefore, it is possible to harbor both types of intent as "conditional alternatives" simultaneously. 386 The court held, however, that because the legislature did not intend to compound an offender's punishment when the two offenses arise out of the same criminal act, assault with intent to maim merges into assault with intent to murder. 387

A jury in the Circuit Court for Calvert County convicted Tony Jenkins of assault with intent to murder and assault with intent to maim, disfigure, or disable as a result of an incident in which one shot was fired. 388 Jenkins received separate but concurrent sentences for each offense. 389

381. The court overturned Glenn's conviction for assault with intent to murder and remanded the case for sentencing for simple assault and battery. 68 Md. App. at 412, 511 A.2d at 1127.
382. Id. at 411, 511 A.2d at 1127.
383. Id. at 408, 511 A.2d at 1126.
385. Id. at 516, 515 A.2d at 472. Assault with intent to murder requires a specific intent to kill. Assault with intent to maim involves an intent to inflict grievous bodily harm, but does not require a purpose that the victim die. Id. at 515, 515 A.2d at 472.
386. Id. at 516, 515 A.2d at 472.
387. Id. at 517, 515 A.2d at 473.
388. Id. at 503-04, 515 A.2d at 466. An altercation outside of a store in Sunderland, Maryland, began when the victim, Claggett, told Jenkins not to lean on his car. When the two squared to fight, Jenkins drew a gun and shot Claggett, wounding him in the leg and hip. Jenkins also was charged with simple assault and carrying a handgun. Id.
389. Id. at 504, 515 A.2d at 466. Jenkins was sentenced to 25 years for assault with intent to murder, 10 years for assault with intent to maim, five years for simple assault, and five years for carrying a handgun. Id.
The Court of Special Appeals reversed, holding that assault with intent to murder and assault with intent to maim are inconsistent offenses because their intent elements differ. Jenkins, therefore, could not be held accountable for both. The intermediate appellate court thus resolved the perceived inconsistency in favor of the defendant, vacating the conviction for assault with intent to murder. 390

The Court of Appeals agreed that the intent elements for each offense were inconsistent, because assault with intent to murder requires a specific intent to kill while assault with intent to maim does not. 391 The Court of Appeals diverged from the intermediate appellate court, however, in its holding that despite different intent elements, the crimes themselves are consistent. The court stated that a criminal may "harbor both intents at the time of the assault," with the intent to maim "conditioned upon the first intent [i.e., the intent to kill] not being achieved." 392

Nevertheless, the court found a legislative intent to preclude separate punishment for the two crimes when they arise from the same criminal attack. 393 When the legislature intends to punish one crime instead of two, the lesser offense merges into the greater. 394 The court thus declined to apply the required evidence test, which it

391. 307 Md. at 515, 515 A.2d at 472.
392. Id. at 516, 515 A.2d at 472. In its petition for certiorari, the State claimed that the Court of Special Appeals' characterization of assault with intent to murder was incorrect, in that a specific intent to kill is not an element of the offense which the prosecution must prove. Rather, the State claimed, intent to kill may be inferred by evidence showing an intent to inflict grievous bodily harm. The State therefore reasoned that since an intent to inflict grievous bodily harm and an intent to maim are not mutually exclusive, neither are the mentes reae of assault with intent to murder and assault with intent to maim. The State further claimed that as a result, an offender may be found guilty of both crimes. Id. at 507-08, 515 A.2d at 468.

The Court of Appeals, however, upheld the intermediate appellate court's characterization of assault with intent to murder, stating that the prosecution must establish the specific intent to kill. The Court of Appeals saw the State's definition as an attempt to equate that crime with an assault with intent to inflict grievous bodily harm. The court pointed out that while the facts showing an intent to inflict grievous bodily harm might support an inference that an intent to murder existed, the mentes reae for the two crimes need not be equivalent. Nonetheless, while the Court of Appeals rejected the State's attempt to reconcile the two intents, it did accept the State's conclusion that an offender may harbor both intents at the time of one criminal attack. Id. at 515-16, 515 A.2d at 472.
393. Id. at 517, 515 A.2d at 473.
394. Id. The Court of Appeals found the Court of Special Appeals in error for vacating Jenkins' conviction and sentence for assault with intent to murder, ruling that his conviction and sentence for assault with intent to maim, disfigure, or disable should have been remanded for entry of a new judgment. Id. at 523-24, 515 A.2d at 475-76.
conceded is the general test for determining whether offenses merge.\footnote{395}

The Supreme Court enunciated the required evidence test in \textit{Blockburger v. United States}.\footnote{396} Applying this test, assault with intent to murder and assault with intent to maim do not merge because assault with intent to murder requires proof of a specific intent to kill while assault with intent to maim does not.\footnote{397} The Court of Appeals, however, declined to apply \textit{Blockburger}, asserting instead the doctrine of merger by legislative intent.\footnote{398}

The court indicated that whenever a single criminal act results in several charges, there are several considerations: (1) whether the offenses are inconsistent, thereby precluding conviction for both; (2) if not, whether the offenses merge for the purposes of conviction and sentencing; and (3) if they merge, whether \textit{Blockburger} or the doctrine of merger by legislative intent applies.\footnote{399}

In considering the consistency of the two crimes, the Court of Appeals agreed with the Court of Special Appeals' characterization of the \textit{mens rea} of assault with intent to murder as a specific intent to kill.\footnote{400} Unlike the intermediate appellate court, however, the Court of Appeals did not have difficulty envisioning a case in which a criminal could simultaneously harbor both an intent to kill and an intent to maim.\footnote{401} Such an offender, according to the court, would desire the victim's death. In the event that death did not occur, the offender would have an alternative intent that the injuries be at least

\footnotesize{\begin{itemize}
  \item\footnote{395} \textit{Id.} at 518, 515 A.2d at 473. \textit{See Blockburger v. United States, 284 U.S. 299 (1932)}, discussed \textit{infra} at note 396.
  \item\footnote{396} 284 U.S. 299 (1932). The test is as follows:
    \begin{itemize}
      \item Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.
    \end{itemize}
  \item\footnote{397} \textit{Id.} at 304. \textit{See also Newton v. State, 280 Md. 260, 268, 373 A.2d 262, 266 (1977) (applying \textit{Blockburger} to merge attempted robbery into felony murder). Because the \textit{Blockburger} Court decided the case on federal statutory, rather than constitutional grounds, a state court is not obliged to use the test.}
  \item\footnote{398} \textit{Id.} at 517-18, 515 A.2d at 473.
  \item\footnote{399} \textit{Id.} at 516-21, 515 A.2d at 472-75.
  \item\footnote{400} \textit{Id.} at 515, 515 A.2d at 472. In \textit{Glenn v. State}, 68 Md. App. 379, 511 A.2d 1110, \textit{cert. denied}, 307 Md. 506, 516 A.2d 569 (1986), the Court of Special Appeals held that assault with intent to murder is an assault with intent to kill under circumstances such that if the victim should die, the crime would be murder. \textit{Id.} at 382-98, 511 A.2d at 1112-20. The \textit{Jenkins} court left the \textit{Glenn} definition undisturbed. 307 Md. at 515, 515 A.2d at 472. For an analysis of \textit{Glenn}, see \textit{supra} notes 344-383 and accompanying text.
  \item\footnote{401} 307 Md. at 516, 515 A.2d at 472.
\end{itemize}
disabling. The court stated that although these ultimate goals are inconsistent as well as mutually exclusive in that both results cannot be achieved against a single victim in one assault, the existence of both purposes in the offender’s mind at the time of the act is not impossible. Therefore, the crimes themselves are not inconsistent.

The court contrasted this situation with the crimes of larceny and receiving. The mens rea of larceny, the intent to steal, is inconsistent with that of receiving, in which the intent is to obtain an item from someone who has stolen it. Although these intents likewise may exist as conditional alternatives, the crimes of larceny and receiving cannot share a common actus reus. According to the Court of Appeals, the impossibility of executing both intents by means of the same act makes the crimes of larceny and receiving inconsistent.

Even though the Court of Appeals reasserted Blockburger as the general standard to be applied in Maryland, it nevertheless declined to follow the required evidence rule in Jenkins, noting that the Blockburger test has not been the exclusively applied standard. Two Maryland statutes define assault with intent to murder and assault with intent to maim, disfigure, or disable. Despite the existence of separate statutes and different elements for these crimes, the Court of Appeals determined that the General Assembly intended to prohibit the imposition of separate convictions and

402. Id.
403. Id.
404. Id. at 516-17, 515 A.2d at 472-73.
405. Id.
406. Id.
408. 307 Md. at 518, 515 A.2d. at 473. The court cited Whack, 288 Md. at 149, 416 A.2d at 268, in which the Court of Appeals upheld the imposition of dual punishments for robbery and illegal use of a handgun. The Whack court declared that “even though two offenses may be deemed the same under the required evidence test, separate sentences may be permissible, at least where one offense involves a particularly aggravating factor, if the Legislature expresses such an intent.” Id. (footnote omitted). The Whack court found it significant that the General Assembly, in enacting the handgun control bill now codified at Md. Ann. Code art. 27, § 36B (1987), did not amend the robbery statute to “delete handguns from the coverage.” Whack, 288 Md. at 146, 416 A.2d at 270.
sentences "where there is but a single act of assault."\textsuperscript{410} The court reasoned that if the Blockburger standard were applied, all assault with intent crimes would be considered separate from each other even when occurring during one criminal attack, rather than as various ways of aggravating the underlying criminal act.\textsuperscript{411} Instead, the Court of Appeals concluded that "one aggravated assault should be viewed as merging into the other aggravated assault."\textsuperscript{412}

Once a court determines that the crimes for which a defendant has been convicted merge, the court must decide which offense merges into the other. In the required evidence test, the elements of each offense, rather than the relative sentences for the crimes, determine which offense merges into the other.\textsuperscript{413} By contrast, if various aggravated assault offenses merge as a result of the court's construction of legislative intent, "the offense carrying the lesser maximum penalty merges into the offense carrying the greater penalty."\textsuperscript{414} Because Jenkins' crimes merged by legislative intent, the court concluded that his conviction and sentence for assault with intent to murder should not have been reversed; rather, his conviction and sentence for assault with intent to maim should have been vacated due to its merger into the greater offense.\textsuperscript{415}

Since Jenkins the Court of Appeals has had the opportunity to consider similar questions and to refine its holding. The court has indicated that it still relies primarily on the Blockburger required evidence test. For instance, one month after Jenkins, the court in Robinson v. State\textsuperscript{416} ruled that the intent element of assault with intent to disable is not inconsistent with that of depraved heart murder.\textsuperscript{417}

\textsuperscript{410} 307 Md. at 517, 515 A.2d at 479.
\textsuperscript{411} Id. at 520-21, 515 A.2d at 475. The court quoted Manigault v. State, 61 Md. App. 271, 486 A.2d 240 (1985), in which Judge Moylan wrote:

A defendant who has assaulted his victim with the concomitant specific intents to rape her, to rob her, and to kill her, has committed not three crimes but one. That one has simply been aggravated upward to the felony plateau in three different ways. An uncritical application of the Blockburger test, simply comparing elements, might make it appear that assault with intent to rob, assault with intent to murder, and assault with intent to rape are all separate crimes because each possesses a distinct element. It is not a proper occasion to apply the Blockburger test, however, because these are but various forms of aggravating a common undergirding offense.

\textsuperscript{412} Id. at 285 n.2, 486 A.2d at 247 n.2.
\textsuperscript{413} Id.
\textsuperscript{414} Id.
\textsuperscript{415} Id.
\textsuperscript{416} 307 Md. 738, 517 A.2d 94 (1986).
\textsuperscript{417} Id. at 744, 517 A.2d at 97.
Because the court did not face the problem of alternative inconsistent intents, it found that the Jenkins analysis was inapplicable.

In Dillsworth v. State the defendant was convicted of both assault with intent to maim and a third degree sexual offense. On appeal he claimed that the offenses should have merged. The Court of Appeals reaffirmed the Blockburger test as the generally applicable standard, and concluded that because each offense at issue required proof of an element that the other did not require, the two crimes would not merge under Blockburger.

The Dillsworth court next considered whether the doctrine of merger by legislative intent would supersede the Blockburger test. Examining the two statutes at issue, the court explained, "The doctrine of merger by legislative intent operates as a rule of statutory construction and is not constitutionally mandated." That the statute for assault with intent to maim had been enacted more than a century before the sexual offense legislation aided the court in concluding that the legislature had not considered the question of multiple punishment when "a consummated sexual offense embodies an assault with intent to maim, disfigure or disable." An examination of legislative history gave the court no reason to conclude that the legislature intended to prohibit multiple punishment, nor did the court find any statutory ambiguity that would preclude the imposition of multiple sentences. Unlike Jenkins, therefore, which also involved two separate statutes, the doctrine of merger by legislative intent was not triggered.

Finally, in State v. Holmes the Court of Appeals again indicated that Blockburger generally applies in Maryland, holding that the crimes of assault with intent to murder and attempted murder in the first degree are not the same. Citing Jenkins, the court concluded that the elements of each offense differ in that assault with intent to murder requires an assault and an intent to murder, whereas attempted murder in the first degree requires a wilful, deliberate, and

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418. Id.
420. Id. at 361, 519 A.2d at 1272.
421. Id. at 360, 519 A.2d at 1272.
422. Id. at 361-67, 519 A.2d at 1272-76.
424. Dillsworth, 308 Md. at 364, 519 A.2d at 1274.
425. Id. at 367, 519 A.2d at 1276.
426. Id.
428. Id. at 267-72, 528 A.2d at 1282-85.
premeditated intent to kill. The crimes, therefore, did not merge under the required evidence test.\textsuperscript{429}

The *Jenkins* holding leaves room for advocating the use of the doctrine of merger by legislative intent. Although Maryland courts generally follow *Blockburger*, whenever multiple charges arise from one criminal act, the Court of Appeals will consider construing the statutes in question to find a legislative intent that separate penalties not be imposed.

**E. Defenses**

1. *Necessity.*—The Court of Appeals held in *State v. Crawford*\textsuperscript{430} that necessity may be a valid defense to the unlawful possession of a handgun. The court articulated a five-part test that a defendant must satisfy in order to justify the unlawful possession of a handgun.\textsuperscript{431} If the defendant faces a threat of mere property damage or future, rather than imminent, personal injury, or if the defendant's conduct creates the emergency, the defense is unavailable.\textsuperscript{432}

The sequence of events on the night that defendant Leonard Crawford was arrested was "nothing less than bizarre."\textsuperscript{433} Two assailants attacked and shot Crawford in his own apartment.\textsuperscript{434} He struggled for possession of one assailant's handgun.\textsuperscript{435} In the process of grabbing the gun, Crawford fell through his second story apartment window.\textsuperscript{436} When he realized that the gun was on the ground next to him, he picked it up.\textsuperscript{437} His assailants followed, shooting him in the leg repeatedly and trying to hit him with their car.\textsuperscript{438} Crawford staggered wounded and dazed, seeking assistance and safety. Finally, the police arrived, shot Crawford in the arm and chest, and then arrested him.\textsuperscript{439}

\begin{itemize}
  \item \textsuperscript{429} *Id.* at 272, 528 A.2d at 1285.
  \item \textsuperscript{430} 308 Md. 683, 521 A.2d 1193 (1987).
  \item \textsuperscript{431} *Id.* at 698-99, 521 A.2d at 1200-01.
  \item \textsuperscript{432} *Id.* at 699, 521 A.2d at 1201.
  \item \textsuperscript{433} *Id.* at 686, 521 A.2d at 1194.
  \item \textsuperscript{434} *Id.* at 686-87, 521 A.2d at 1194-95. The court quoted extensively from Crawford's testimony. *Id.* at 686-90, 521 A.2d at 1194-96.
  \item \textsuperscript{435} *Id.* at 687, 521 A.2d at 1195. When Crawford first realized that intruders were in his apartment, he attempted to call the police, but found that his telephone had been disconnected because he had failed to pay his bill. *Id.* at 686, 521 A.2d at 1194.
  \item \textsuperscript{436} *Id.* at 687, 521 A.2d at 1195.
  \item \textsuperscript{437} *Id.* The defendant stated, "I picked up the gun to defend myself." *Id.*
  \item \textsuperscript{438} *Id.* at 688, 521 A.2d at 1195.
  \item \textsuperscript{439} *Id.* at 690, 521 A.2d at 1195-96. Crawford was charged in Prince George's County with two counts of assault on a police officer and one count of unlawful possession of a handgun pursuant to Md. Ann. Code art. 27, § 36B(b) (1987).
\end{itemize}
The jury found Crawford not guilty of assault but convicted him of unlawful possession of a handgun. The trial judge, however, refused to instruct the jury regarding the defense of necessity. The Court of Special Appeals reversed and remanded the case, finding that the defense of necessity is valid for the offense of unlawful possession of a handgun and that the defendant was entitled to a jury instruction to that effect. The Court of Appeals affirmed, formulating strict guidelines to which a defendant must adhere in order to successfully invoke the defense of necessity.

The defense of necessity may arise when an individual in a perilous situation confronts environmental forces which require a choice between two evils. The person must choose between violating the criminal law or abiding by the law and producing an even greater harm. Public policy recognizes the difficulty of this dilemma; an individual therefore is justified in violating the literal language of the law when to do so promotes a greater good for society.

440. 308 Md. at 691, 521 A.2d at 1196. The statute provides in pertinent part:

Any person who shall wear, carry, or transport any handgun, whether concealed or open, upon or about his person, and any person who shall wear, carry or knowingly transport any handgun, whether concealed or open, in any vehicle traveling upon the public roads, highways, waterways, or airways or upon roads or parking lots generally used by the public in this State shall be guilty of a misdemeanor; and it shall be a rebuttable presumption that the person is knowingly transporting the handgun.


441. 308 Md. at 691, 521 A.2d at 1196. The judge declared that the handgun statute provided no necessity exception. Id.


443. 308 Md. at 698-99, 521 A.2d at 1200-01.


The court recognized that "[w]hen the pressure causing a defendant to commit a criminal act is caused by human beings, his defense will usually be 'duress' rather than 'necessity.'" 308 Md. at 691 n.1, 521 A.2d at 1197 n.1. Nevertheless, as commentators have pointed out:

The typical duress case, however, has involved a situation in which A has ordered B to engage in certain conduct prohibited by the criminal law or else suffer certain consequences. It might well be argued that when an individual acts to avoid a greater harm from a person who has not given such an order . . . the situation ought to be dealt with as a form of necessity rather than duress.

W. LaFAVE & A. SCOTT, supra note 305, §5.4, at 628 n.3 (citations omitted). Thus, the Crawford court declared, "We will refer to the defense in this case as necessity." 308 Md. at 691 n.1, 521 A.2d at 1197 n.1.

445. See W. LaFAVE & A. SCOTT, supra note 305, §5.4, at 627. The Supreme Court
The Court of Appeals first recognized the possibility of the defense of necessity in *Sigma Reproductive Health Center v. State*.

The defense applies when: "1) the act charged was done to avoid significant evil; 2) there was no other alternative means of escape; and 3) the remedy was not disproportionate to the evil to be avoided."

After examining the necessity defense under Maryland law, the court considered the legislative history of the reformed handgun control legislation. In prohibiting the carrying of any handgun, this stringent legislation aimed "to discourage and punish the possession of handguns on the streets and public ways." The statute, however, did not refer expressly to situations that may warrant the use of a handgun in the event of impending danger to life or limb.

The Court of Appeals reasoned that it was within the mandate of the handgun legislation to allow temporary possession of a handgun when an individual is in imminent danger of death or serious bodily harm. The court noted that it would have been unreasonable for the General Assembly to intend that an individual facing life-threatening danger surrender to an attacker rather than act in self-defense.

Consistent with the *Crawford* decision are a number of cases considered the general rules regarding the defense of necessity in United States v. Bailey, 444 U.S. 394 (1980).

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447. Arnolds & Garland, supra note 444, at 294.


449. Persons exempt from the prohibition against handgun possession include law enforcement personnel, members of the armed forces, correctional facility personnel, persons with permits, persons transporting handguns for legitimate purposes, and persons on their own property. MD. ANN. CODE art. 27, § 36B(c) (1987).

450. 308 Md. at 695, 521 A.2d at 1199. The General Assembly recognized that there had been a significant increase in the number of crimes committed by persons carrying handguns in public. Id. at 693, 521 A.2d at 1198.

451. Id. at 696, 521 A.2d at 1199. The statute, however, does allow the issuance of permits for handgun possession when it is "necessary as a reasonable precaution against apprehended danger." MD. ANN. CODE art. 27, § 36E(a)(6) (1987).

452. 308 Md. at 696, 521 A.2d at 1199.

453. Id. The court pointed out that it would be "utter folly to talk of requiring a man
from other jurisdictions which allow the necessity defense to the charge of unlawful possession of a handgun. Persuaded by this case law, the Court of Appeals articulated a five-part test which permits the defense of necessity in a prosecution for the illegal possession of a handgun:

(1) [T]he defendant must be in present, imminent, and impending peril of death or serious bodily injury, or reasonably believe himself or others to be in such danger; (2) the defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) the defendant must not have any reasonable, legal alternative to possessing the handgun; (4) the handgun must be made available to the defendant without preconceived design, and (5) the defendant must give up possession of the handgun as soon as the necessity or apparent necessity ends.

Applying this test to the facts of the case, the court determined that Crawford was entitled to invoke the defense of necessity.

The court articulated a stringent test presumably to prevent an onslaught of necessity defenses in the trial courts. Elaborating a five-part standard should dissuade frivolous attempts to shield defendants from criminal liability. Moreover, the test does not undermine the policies articulated by the General Assembly in its attempt to control crimes perpetrated by means of handguns. Thus, there now exists a defense for situations like that faced by Crawford in which self-preservation and unusual circumstances warrant temporary possession of a handgun.

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454. See, e.g., People v. King, 22 Cal. 3d 12, 24, 582 P.2d 1000, 1006, 148 Cal. Rptr. 409, 415 (1978) ("Use of a concealable firearm in self-defense is neither a crime nor an unlawful purpose."); State v. Blache, 480 So. 2d 304, 308 (La. 1985) ("[W]hen a felon is in imminent peril of great bodily harm, or reasonably believes himself or others to be in such danger, he may take possession of a weapon for a period no longer than is necessary to use it in self-defense, or in defense of others.").

455. 308 Md. at 698-99, 521 A.2d at 1200-01.

456. Id. at 699, 521 A.2d at 1200-01. In devising its five-part test, the Court of Appeals relied on two other cases each of which sets forth a four-pronged analysis. The test set forth in United States v. Gant, 691 F.2d 1159, 1162-63 (5th Cir. 1982), contains all but the fifth element of the Crawford test. The test described in King, 22 Cal. 3d at 24, 582 P.2d at 1007, 148 Cal. Rptr. at 416, omits Crawford's second prong. See 308 Md. at 697-98, 521 A.2d at 1200.

457. 308 Md. at 699, 521 A.2d at 1200-01.

458. See Md. ANN. CODE art. 27, § 36B(a) (1987) (declaring policy to prevent violent crimes resulting from the use of handguns in public).
2. Voluntary Intoxication.—In Shell v. State the Court of Appeals analyzed the distinction between specific and general intent crimes and examined the relevance of voluntary drug intoxication as a defense to various charges. The court held that the willful and malicious destruction of another’s property is a specific intent crime, and therefore is subject to a defense of voluntary intoxication if the intoxicated state negates the offender’s intent. The court found, however, that the General Assembly intended the unlawful transportation of handguns to be a general intent crime, making its mens rea incapable of negation by voluntary intoxication. In addition, the court determined that a defendant cannot be convicted of using a handgun to commit a felony or crime of violence if the defense of voluntary intoxication as to the felony or crime of violence is successful.

A trial judge in the Circuit Court for Montgomery County convicted James Shell of using a handgun in the commission of a felony or crime of violence, knowingly transporting a handgun, and maliciously destroying property. The criminal activity occurred one evening after Shell had ingested PCP and other drugs. After the Court of Special Appeals affirmed the conviction, Shell petitioned the Court of Appeals for a writ of certiorari, claiming that his convictions for destroying property and transporting a handgun

460. Id. at 62-63, 512 A.2d at 366.
461. Id. at 63-65, 512 A.2d at 367.
462. Id. at 68, 512 A.2d at 369.
463. Id. at 68-70, 512 A.2d at 369-70. See infra note 487 for the relevant text of the statute.
464. 307 Md. at 58, 512 A.2d at 364. The court found that the trial judge had rendered inconsistent verdicts in finding Shell guilty of use of a handgun in the commission of a felony or crime of violence, when Shell had been acquitted of the underlying felonies of attempted murder and assault with intent to maim. The court declared that even if inconsistent jury verdicts are sometimes accepted, inconsistent verdicts from a trial judge are unjustifiable. Id. at 55-57, 512 A.2d at 362-63.
465. Id. at 48-50, 512 A.2d at 359-60. Shell had been in his van, stuck in the snow near his house, when a man approached and offered to help him. Shell told him to go away and then fired two shots at him, wounding the man with both bullets. Half an hour later, Shell forced his way into a nearby house demanding to use a telephone, which he then broke. After the occupants of the house succeeded in transporting Shell to a hospital, he broke some telephones there. Hospital security guards found PCP in his pocket.

Shell also was convicted of breaking and entering and possessing controlled dangerous substances. The trial judge did not convict him of charges of attempted murder or shooting with intent to maim because of a finding that Shell had been so intoxicated from the drugs that he lacked the intent necessary for these crimes. Id.
466. The Court of Special Appeals opinion was unreported. Id. at 51, 512 A.2d at 360.
were improper because his drug-induced intoxication prevented him from forming the necessary intent for these crimes. The Court of Appeals granted certiorari to clarify a "confusion in the law as to the relevance of voluntary intoxication to various criminal charges." After examining prior Maryland cases, the court concluded that voluntary intoxication is a defense only to specific intent crimes. The court cited Brown v. State and Rosenberg v. State to support its position that when a statute contains both the words "wilful" and "malicious," as does the destruction of property statute, the legislature intended to require as a mens rea nothing less than a specific purpose to accomplish that particular crime. The court therefore reversed Shell's conviction for malicious destruction of property, stating that even though his intoxicated state was voluntarily induced, it nevertheless made him incapable of forming the requisite mens rea.

467. Id. at 51-52, 512 A.2d at 360-61.
468. Id. at 47, 512 A.2d at 358.
469. Id. at 63, 512 A.2d at 366-67. In Smith v. State, 41 Md. App. 277, 398 A.2d 426, cert. denied, 284 Md. 748 (1979), the Court of Special Appeals defined and enumerated specific intent crimes:

The larger class "specific intent" includes such other members as 1) assault with intent to murder, 2) assault with intent to rape, 3) assault with intent to rob, 4) assault with intent to maim, 5) burglary, 6) larceny, 7) robbery and 8) the specific-intent-to-inflict-grievous-bodily-harm variety of murder. Each of these requires not simply the general intent to do the immediate act with no particular, clear or undifferentiated end in mind, but the additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result.

Id. at 306, 398 A.2d at 443.

The Shell court relied particularly on Avey v. State, 249 Md. 385, 386, 240 A.2d 107 (1968), and State v. Gover, 267 Md. 602, 298 A.2d 378 (1973). In Avey the defendant, who had been convicted of assault with intent to murder, obtained a remand for a new trial because the trial court failed to instruct the jury on voluntary intoxication. The Avey court ruled that intoxication—to the extent that it renders it impossible for a defendant to form a specific intent—is a defense to a crime requiring a specific intent. Avey, 249 Md. at 389, 398 A.2d at 108.

In Gover the Court of Appeals delineated the degree of intoxication required before it becomes a defense to a crime. After determining that robbery required a specific larcenous intent, Gover, 267 Md. at 606, 298 A.2d at 381, the court remanded the case for a new trial to determine whether the defendant was "so drunk as to paralyze his mental faculties and render him incapable of entertaining the design to take and permanently convert the property of another to his own use." Id. at 608, 298 A.2d at 382.

470. 285 Md. 469, 475, 403 A.2d 788, 792 (1979) (distinguishing between malice and wilfulness in determining that arson is a specific intent crime).
473. 307 Md. at 68, 512 A.2d at 369.
intent.\textsuperscript{474}

On the other hand, because the statute prohibiting the transportation of handguns\textsuperscript{475} aims to "curb the transportation of handguns in vehicles by persons drunk or sober,"\textsuperscript{476} the court concluded that the legislature must not have intended to create a specific intent crime. The court noted that the statute defines a defendant as guilty of transporting a handgun if the individual knows that he or she is doing so; thus, the offense is a general intent crime for which intoxication is no defense. The court therefore upheld Shell's conviction for transporting a handgun.\textsuperscript{477}

While the \textit{Shell} decision clearly aligns Maryland with the majority of jurisdictions concerning the availability of voluntary intoxication as a defense to specific intent crimes,\textsuperscript{478} the process of deciding which statutes create specific intent rather than general intent offenses is much less clearly understood. The Maryland destruction of property statute reads: "Any person who shall wilfully and maliciously destroy, injure, deface or molest any real or personal property of another shall be deemed guilty of a misdemeanor."\textsuperscript{479} The majority believed that the words "wilfully" and "maliciously" in the statute mean that a specific intent to destroy property is an essential element of the offense. The court cited \textit{Brown} and \textit{Rosenberg} for the proposition that when both words occur in a statute, "effect must be given to both the element of wilfulness and the element of malice."\textsuperscript{480}

In \textit{Brown} the court concluded that a wilful act is one done "intentionally," whereas a "malicious" act "is one intended to bring harm to another person."\textsuperscript{481} The defendant in \textit{Brown} deliberately set fire to a building in order to save demolition costs. The court ruled that while the element of wilfulness was present, malice was

\begin{itemize}
\item \textsuperscript{474} \textit{Id}.
\item \textsuperscript{475} Md. Ann. Code art. 27, § 36B (1987).
\item \textsuperscript{476} 307 Md. at 69, 512 A.2d at 370.
\item \textsuperscript{477} \textit{Id}. at 69-70, 512 A.2d at 369-70.
\item \textsuperscript{478} \textit{Id}. at 63, 512 A.2d at 367. For example, in People v. Watts, 133 Mich. App. 80, 348 N.W.2d 39 (1984), the Court of Appeals of Michigan asserted the unavailability of a defense of voluntary intoxication to general intent crimes and held that receiving and concealing stolen property is a general intent crime. The statute in question in that case contained the word "knowingly." Like the \textit{Shell} court, the \textit{Watts} court recognized that while sometimes that word can describe a specific intent crime, it is to legislative intent that attention must be paid in determining whether a specific criminal intent is required. \textit{Id}. at 82-83, 348 N.W.2d at 41.
\item \textsuperscript{479} Md. Ann. Code art. 27, § 111 (1987).
\item \textsuperscript{480} 307 Md. at 65, 512 A.2d at 368.
\item \textsuperscript{481} \textit{Brown} v. State, 285 Md. 469, 474, 403 A.2d 788, 791 (1979).
\end{itemize}
not.\textsuperscript{482} In \textit{Rosenberg} a malicious act was described as a wrongful act done "deliberately and without legal justification."\textsuperscript{483} The defendants claimed to have destroyed a post on a third party's land only to protect a bona fide right to an easement. At trial, the judge prohibited the defendants from introducing evidence to support this claim. The Court of Appeals reversed the convictions, stating that such evidence was relevant to the element of malice and therefore was admissible.\textsuperscript{484}

In \textit{Shell} the Court of Appeals concluded that the destruction of property statute requires "both a deliberate intention to injure the property of another and malice."\textsuperscript{485} Therefore, according to the court, a statute such as article 27, section 111 creates a specific intent offense.\textsuperscript{486}

On the other hand, the statute proscribing transportation of handguns contains only the word "knowingly" with regard to \textit{mens rea}.\textsuperscript{487} Recognizing that this word sometimes denotes a specific intent crime, the Court of Appeals stated that "the particular language and purpose of each statute must be considered."\textsuperscript{488} The court discussed the legislative history of the statute and concluded that because the "knowledge element of the offense was included largely to prevent unwitting violations, and the purpose of the criminal provision as a whole is to curb the transportation of handguns in vehicles by persons drunk or sober, the General Assembly did not intend to

\textsuperscript{482} \textit{Id.} at 476, 403 A.2d at 792. The arson statute in \textit{Brown}, now Md. Ann. Code art. 27, § 7 (1987), contained the words "willfully and maliciously."

\textsuperscript{483} Rosenberg v. State, 164 Md. 473, 476, 165 A. 306, 307 (1933). In \textit{Rosenberg} the defendant had removed a post from the property of another landowner. The post had prevented the defendant from using a legitimate right of way over the other property. \textit{Id.} at 475, 165 A. at 306.

\textsuperscript{484} \textit{Id.} at 477, 165 A. at 307.

\textsuperscript{485} 307 Md. at 68, 512 A.2d at 369.

\textsuperscript{486} \textit{Id.} See also Paschall v. State, 71 Md. App. 234, 244, 524 A.2d 1239, 1244 (1987) (citing \textit{Shell} and declaring that "[m]ere reckless or wanton disregard of property by the offender will not support a conviction for malicious mischief"); Smith v. State, 69 Md. App. 115, 119, 516 A.2d 985, 987 (1986) (holding that defendant was entitled to a jury instruction on the defense of voluntary intoxication to specific intent crimes).

\textsuperscript{487} Md. Ann. Code art. 27, § 36B (1987). The statute provides:

\begin{quote}
Any person who shall wear, carry, or transport any handgun, whether concealed or open, upon or about his person, and any person who shall wear, carry or knowingly transport any handgun, whether concealed or open, in any vehicle traveling upon the public roads, highways, waterways, or airways or upon roads or parking lots generally used by the public in this State shall be guilty of a misdemeanor; and it shall be a rebuttable presumption that the person is knowingly transporting the handgun.
\end{quote}

\textit{Id.} at (b).

\textsuperscript{488} 307 Md. at 69, 512 A.2d at 370.
create a specific intent crime."\textsuperscript{489} The court therefore deemed the required \textit{mens rea} to be only a general awareness that the action is illegal; voluntary intoxication cannot negate this awareness.\textsuperscript{490}

In contrast, the dissent did not believe that the words "wilful" and "malicious" in the destruction of property statute created a specific intent crime. Judge McAuliffe pointed out that while the history of the offense shows that the intent may be specific, it also may be implied.\textsuperscript{491} He believed that the word "wilful" implies at most an "evil intent" or an intent to do something illegal. Judge McAuliffe equated this evil intent with general criminal intent.\textsuperscript{492} As for the word "malicious," Judge McAuliffe discussed situations, such as felony murder and depraved heart murder, in which malice is implied.\textsuperscript{493} He concluded that the words "wilful" and "malice" require no more than a general intent to do something illegal without the existence of justifying or mitigating circumstances.\textsuperscript{494} Judge McAuliffe therefore would have found destruction of property a general intent offense to which voluntary intoxication would provide no excuse.

As the dissenting opinion reveals, recognizing the availability of voluntary intoxication as a defense to specific intent crimes does not aid in determining how to characterize various offenses as either general or specific intent crimes. Other jurisdictions have experienced difficulty in applying the specific/general intent distinction, yet have not considered the presence of the words "wilful" and "malicious" in the statutes to be determinative.\textsuperscript{495} In \textit{Shell} the Court

\textsuperscript{489} Id.
\textsuperscript{490} Id. at 69-70, 512 A.2d at 370. Earlier, the court also had observed, regarding the specific intent/general intent classification, "While the distinction may be illogical and somewhat arbitrary, it does serve to reconcile fairness to the accused with the need to protect the public from intoxicated offenders and to deter such persons." \textit{Id.} at 65, 512 A.2d at 367.
\textsuperscript{491} Id. at 70, 512 A.2d at 370 (McAuliffe, J., dissenting).
\textsuperscript{492} Id. at 71, 512 A.2d at 371.
\textsuperscript{493} Id. at 71-72, 512 A.2d at 371.
\textsuperscript{494} Id. at 72, 512 A.2d at 371.
\textsuperscript{495} For example, in \textit{Linehan v. State}, 476 So. 2d 1262, 1265 (Fla. 1985), the combination of "wilful" and "malicious" in an arson statute did not connote specific intent to the Superior Court of Florida. The court found that the statute in question required only a general intent, as was true of the common-law crime of arson; as a result, voluntary intoxication would not be a defense. The Florida court also recognized that courts "are having difficulty determining whether a particular offense is a specific or general intent crime." \textit{Id.} Considering that the \textit{Linehan} court analyzed the same statutory words yet reached a conclusion opposite to that of the Maryland court in \textit{Shell}, it is ironic that the Maryland court cited \textit{Linehan} for the proposition that distinguishing between specific and general intent might be difficult. 307 Md. at 64-65, 512 A.2d at 367.
of Appeals seemed to sanction the use of the voluntary intoxication defense whenever the words malicious and wilful occur together in a criminal statute, thereby increasing its availability. The majority, however, also believed that in labelling a particular crime a specific or general intent offense, a court should consider the legislature’s purpose in enacting the statute. It is questionable whether the legislature would desire that all intoxicated persons be acquitted of any offense defined using these words, for the terms frequently occur together in statutes. In the future, the Court of Appeals might find Judge McAuliffe’s limitation on the distinction more workable.

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IV. Evidence

A. Witnesses

1. Expert Testimony on Psychological Disorders.—In State v. Allewalt\(^1\), the Court of Appeals held that expert testimony regarding post-traumatic stress disorder (PTSD)\(^2\) was admissible to establish that a rape victim had not consented to sexual intercourse. Through this decision the court expanded the range of expert testimony permissible in a rape case by admitting evidence of a disorder originally defined for therapeutic use.\(^3\)

William Allewalt was charged with raping Mary Lemon, his girlfriend’s mother. Allewalt, who lived with his girlfriend and her mother, returned home from a bar intoxicated and engaged in sexual intercourse with Ms. Lemon. Ms. Lemon reported the incident to the police as rape, but Allewalt claimed Ms. Lemon had consented.\(^4\)

In its rebuttal case the State called a psychiatrist as an expert witness who testified that Ms. Lemon suffered from PTSD and that in his opinion the cause of the disorder was the alleged rape.\(^5\) The

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\(^{1}\) 308 Md. 89, 517 A.2d 741 (1986).

\(^{2}\) The American Psychiatric Association has classified post-traumatic stress disorder (PTSD) as an anxiety disorder whose "essential feature ... is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience." American Psychiatric Ass’n, Diagnostic & Statistical Manual of Mental Disorders, category 309.89, at 247 (rev. 3d ed. 1987). "[S]uch common experiences as simple bereavement, chronic illness, business losses, and marital conflict" will not trigger PTSD; classic examples of events which will induce the syndrome include natural disasters, military combat, torture, and rape. Id. at 247-48. Some authorities recognize rape trauma syndrome as a subset of PTSD. 308 Md. at 104, 517 A.2d at 748.

The expert in Allewalt defined PTSD as “a condition recognized in psychiatry as the emotional reaction to a traumatic event.” Id. at 94, 517 A.2d at 743. The syndrome’s symptoms include insomnia, exaggerated startle response, feelings of guilt, loss of appetite and of weight, avoidance of reminders of the traumatic event, fearfulness, and nightmares and flashbacks. Identified as early as the turn of this century, PTSD may be caused by a physical or an emotional trauma. Id. at 94-95, 517 A.2d at 743-44.

\(^{3}\) 308 Md. at 116, 517 A.2d at 751 (Eldridge, J., dissenting). While states have reached various conclusions regarding the syndrome’s admissibility in criminal trials, see generally Annotation, Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome, 42 A.L.R.4th 879 (1985), Allewalt was Maryland’s first consideration of the issue. The case also presented two sentencing issues which are not addressed here.

\(^{4}\) 308 Md. at 92-93, 517 A.2d at 742-43.

\(^{5}\) Id. at 95, 517 A.2d at 744. The expert noted that a diagnosis of PTSD is predicated on the assumption that some traumatic incident had occurred previously. Although Ms. Lemon recently had experienced the breakup of her 16-year marriage, the
trial court admitted the testimony, reasoning that it would assist the jury in determining Ms. Lemon's state of mind at the time of the event. On appeal the Court of Special Appeals held the testimony inadmissible, finding the evidence's limited probative value outweighed by its prejudicial effect. The intermediate appellate court explained that when the expert stated a rape could cause the syndrome, he implicitly verified the victim's claim that rape was in fact the cause of the disorder. Consequently, his view "unduly corroborates the victim's rendition of the incident." Because the presence of PTSD did not "conclusively establish" the type of trauma which caused it, the court prohibited admission of the testimony.

The Court of Appeals reinstated the conviction, holding that a trial court may admit expert medical testimony regarding the presence and cause of PTSD in a victim. The court held that the expert's testimony of PTSD in Allewalt satisfied the general test of admissibility in that it had a natural tendency to establish the fact at issue—whether a rape had occurred—and thereby would aid the trier of fact. Consequently, the trial court had not abused its discretion in admitting evidence of the existence of PTSD.

The court first determined that the admissibility of the expert's testimony was controlled by Beahm v. Shortall. The Court of Appeals held in Beahm that a physician may present both medical conclusions and information, including the history and subjective

doctor opined that only the alleged rape was sufficiently traumatic to cause PTSD, noting that a marital separation "doesn't cause nightmares and flashbacks and [avoidance] behavior and being uncomfortable around young males and so on." "Id. 6. Id. at 94, 517 A.2d at 743.
8. Id. at 516, 487 A.2d at 670.
9. Id.
10. Id.
11. 308 Md. at 91, 517 A.2d at 742.
12. Id. at 98-99, 517 A.2d at 745-46.
13. Id. at 102, 517 A.2d at 747. The Court of Appeals reasoned that adopting the Court of Special Appeals' standard that the expert testimony must "conclusively establish" the rape effectively would eliminate most evidence at trials of all kinds. "Id. at 101, 517 A.2d at 747.
14. Id. at 109, 517 A.2d at 751. A concurring opinion proposed that the expert be allowed to offer no conclusions, but only information on PTSD and responses to hypothetical situations. "Id. at 127-28, 517 A.2d at 760 (McAuliffe, J., concurring).
15. Id. at 98, 517 A.2d at 745. In Beahm v. Shortall, 279 Md. 321, 327, 368 A.2d 1005, 1009 (1977), the Court of Appeals overruled Parker v. State, 189 Md. 244, 249, 55 A.2d 784, 786 (1947), which had limited the admissibility of medical opinions based upon the patient's narrative of subjective complaints to those rendered by an attending physician, thus excluding opinions of physicians engaged to testify, such as the expert in Allewalt. 308 Md. at 98, 517 A.2d at 745.
symptoms described by the patient, which forms the basis for those conclusions.\textsuperscript{16} The expert in \textit{Beahm} was a neurosurgeon testifying concerning injuries the plaintiff suffered in an automobile accident.\textsuperscript{17} The expert drew conclusions as to the nature and extent of the injuries from the plaintiff’s subjective symptoms.\textsuperscript{18}

\textit{Allewalt} moved beyond these limits by permitting expert testimony in reference to a syndrome designed for therapeutic purposes to establish the factual basis of a prior event. The court noted that PTSD is a well-recognized anxiety disorder,\textsuperscript{19} but the dissent stressed that the syndrome never had been shown to indicate reliably that a rape in fact had occurred.\textsuperscript{20} Although the expert identified rape as the trauma involved, the diagnosis rested on the presumption that the act of sexual intercourse actually had been rape.\textsuperscript{21} The decision in \textit{Allewalt} thus allows an expert’s testimony to establish what the expert presumes to be true—that a particular trauma occurred.

The Court of Appeals found the prejudice feared by the intermediate appellate court insufficient to outweigh the evidence’s probative value.\textsuperscript{22} Because the psychiatrist did not purport to have a scientific test for determining consent, his opinion neither proved a fact not properly at issue nor unfairly excited the emotions of the jury against the defendant.\textsuperscript{23} The court stressed that the trial judge properly instructed the jury that it must evaluate the credibility of both the victim and the doctor in determining what weight to give the expert opinion.\textsuperscript{24}

In admitting the expert’s testimony on PTSD, the court indicated that certain “baggage” necessarily accompanied the evidence.\textsuperscript{25} A defendant not only could cross-examine the expert generally about PTSD, but also could question both the expert and the victim concerning possible causes of the victim’s disorder other

\textsuperscript{16} \textit{Beahm}, 279 Md. at 327, 368 A.2d at 1009.
\textsuperscript{17} \textit{Id.} at 328, 368 A.2d at 1009.
\textsuperscript{18} \textit{Id.}, 368 A.2d at 1009-10.
\textsuperscript{19} 308 Md. at 99, 517 A.2d at 746. There are four diagnostic criteria: 1) the existence of a recognizable stressor; 2) re-experiencing the trauma; 3) numbing of responsiveness to the external world; and 4) at least two additional symptoms that did not exist prior to the trauma (e.g., sleep disturbance, memory impairment, or guilt). \textit{Id.} at 100 & n.6, 517 A.2d at 746 & n.6.
\textsuperscript{20} \textit{Id.} at 115, 517 A.2d at 754 (Eldridge, J., dissenting).
\textsuperscript{21} \textit{Id.} at 96, 517 A.2d at 744-45. 
\textsuperscript{22} \textit{Id.} at 102, 517 A.2d at 747-48.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 103, 517 A.2d at 748.
\textsuperscript{25} \textit{Id.} at 109, 517 A.2d at 751.
than the alleged assault.\textsuperscript{26} Additionally, because the defendant might wish to counter the State's PTSD evidence, the court foresaw that the defendant might seek to compel the victim to undergo a psychiatric examination by the defense's expert.\textsuperscript{27} Finally, the court acknowledged that "[l]urking in the background is the nice question of whether the absence of PTSD is provable by the accused in defense of a rape charge, as tending to prove that there was consent."\textsuperscript{28} Thus, when the admissibility of PTSD evidence arises, the trial judge must balance "the benefit of the evidence not only against potential unfair prejudice, but also against the complexity of possibly accompanying issues and against the time required properly to try the expanded case."\textsuperscript{29}

The court expressly limited its holding to the facts of Allewalt, stressing that admissibility is a matter for trial court discretion on a case-by-case basis.\textsuperscript{30} It further limited the breadth of its decision by identifying several factors that contributed to the admissibility of the testimony under the facts of Allewalt.\textsuperscript{31} First, the expert did not use the term "rape trauma syndrome," thereby avoiding any unnecessary prejudice associated with that phrase.\textsuperscript{32} Second, the doctor carefully pointed out that other traumas can produce the disorder.\textsuperscript{33} Third, the expert expressed no personal opinion as to Ms. Lemon's credibility, but did indicate that the validity of his opinion depended on the truth of her representations.\textsuperscript{34} Finally, the expert testified only after Allewalt acknowledged having had intercourse with Ms. Lemon.\textsuperscript{35}

In a strong dissent, Judge Eldridge declared that the "relevant question" is whether the presence of PTSD in the alleged victim is reliable evidence that a rape in the legal sense occurred.\textsuperscript{36} Implicitly rejecting application of the Beahm standard to the admissibility of expert testimony regarding PTSD, Judge Eldridge advocated a stan-
standard requiring “that the scientific process be shown to be ‘generally accepted as reliable within the expert’s particular scientific field’” before the expert’s opinion based on the process or method can be admitted.37 In concluding that PTSD did not satisfy this test, the dissent emphasized that the disorder is not a legal factfinding tool, but rather a therapeutic device.38 Moreover, even scientific literature does not claim that PTSD is a reliable method of establishing that a rape occurred.39

The dissent further reasoned that the expert’s testimony implicitly and improperly expressed an opinion regarding the credibility of Ms. Lemon’s testimony, and thus invaded the province of the jury.40 The psychiatrist’s training in evaluating a patient’s verbal and nonverbal responses lent an aura of reliability to the expert’s testimony.41 Moreover, the psychiatrist’s testimony regarding the presence and cause of PTSD essentially expressed an opinion that the victim was telling the truth about the rape.42 The combined force of the psychiatrist’s status as an expert and the testimony itself thus could have caused the jury to give the doctor’s testimony undue weight.43

The vehement dissent and the majority’s cautionary limitations on Allewalt’s holding make clear that unless circumstances are nearly identical to Allewalt, courts should be reluctant to allow testimony on PTSD. Based on the court’s reasoning, a psychological profile of an alleged rape victim’s reaction is admissible only regarding a subjective issue such as consent, and other evidence first must establish that an act of intercourse in fact occurred.44 Even with these limitations, the Allewalt holding provides the potential for another type of therapeutic device to be admissible evidence in establishing the occurrence of a prior event.

37. Id. at 112, 517 A.2d at 752-53 (Eldridge, J., dissenting) (quoting State v. Washington, 229 Kan. 47, 53, 622 P.2d 986, 991 (1981) (method of blood analysis)). This standard was set forth in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), and was adopted by Maryland in Reed v. State, 283 Md. 374, 389, 391 A.2d 364, 372 (1978). The State argued that the dissent’s test was inapplicable because it “applied to tests or techniques used primarily to measure or identify something,” and PTSD was a mental disorder, not a scientific test. 308 Md. at 112, 517 A.2d at 752 (Eldridge, J., dissenting).
38. 308 Md. at 116, 517 A.2d at 755 (Eldridge, J., dissenting).
39. Id.
40. Id. at 120, 517 A.2d at 757.
41. Id. at 120-21, 517 A.2d at 757.
42. Id. at 121, 517 A.2d at 757.
43. Id.
44. Id. at 108-09, 517 A.2d at 751.
2. Testimony Following Hypnosis.—The United States Court of Appeals for the Fourth Circuit held in Harker v. Maryland that the admission of testimony by a witness who previously had been hypnotized was not a per se violation of either the defendant's sixth amendment right to confrontation or fourteenth amendment right to due process. The testimony is admissible if it has a reliable basis independent of hypnosis. In so holding, the court affirmed the denial of the defendant's petition for habeas corpus in the United States District Court for the District of Maryland.

The victim in Harker, Mervyn Thompson, was interviewed by a deputy sheriff three days after being shot. Thompson described the assailant's physical features, clothing, and automobile. With Thompson's cooperation, the police prepared a composite sketch of the assailant. An individual driving the described vehicle and resembling the composite sketch was observed by police and identified as David Harker, the defendant.

Prior to Harker's arrest the police had Thompson undergo hypnosis.

45. 800 F.2d 437 (4th Cir. 1986).
46. Id. at 438. Harker also contended that testimony of a fellow inmate was improper because the inmate was mentally incompetent and was a government agent who extracted an un counselled confession from Harker. Id. at 444. The Fourth Circuit found that the admission of the inmate's testimony did not violate Harker's sixth amendment right to counsel because the inmate, although an informant, was not a government agent. Id. at 444-45.
47. Id. at 438, 441. Under current Maryland law, only testimony which originated prior to the hypnosis or which concerns topics not addressed in the hypnotic session is admissible. See State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); Note, State v. Collins—Limiting the Admission of Hypnotically Enhanced Testimony, 43 Md. L. Rev. 595 (1984). Although the present case was tried before the decision in Collins and thus applied criteria set forth in Polk v. State, 48 Md. App. 382, 427 A.2d 1041 (1981), the Court of Special Appeals found that the testimony of the hypnotized witness was admissible under Collins. The appellate court therefore affirmed Harker's state conviction for assault with intent to murder. Harker v. State, 55 Md. App. 460, 475, 463 A.2d 288, 297, cert. denied, 297 Md. 312 (1983). See infra notes 63-67 and accompanying text.
49. 55 Md. App. at 463, 463 A.2d at 290.
50. 800 F.2d at 439; 55 Md. App. at 463, 463 A.2d at 290.
51. 800 F.2d at 439; 55 Md. App. at 463, 463 A.2d at 290-91.
52. 800 F.2d at 439; 55 Md. App. at 463, 463 A.2d at 291. The license tag number was registered to David Harker. Harker's father, in fact, indicated that the composite sketch was similar to his son's appearance. 800 F.2d at 439, 443; 55 Md. App. at 463, 463 A.2d at 291.
53. 800 F.2d at 439; 55 Md. App. at 464, 463 A.2d at 291. The hypnosis was conducted by a police officer from another county and was audiotaped. 800 F.2d at 439. The police hoped to clarify a discrepancy in the victim's statement as to his physical
description of his assailant. Four days later, Thompson identified Harker in a photo array. Subsequently Thompson was taken to the county courthouse where he positively identified Harker after seeing him face-to-face. Harker was arrested; during the trial, Thompson once again identified him as the assailant.

Harker attempted to suppress Thompson’s identifications made after the hypnosis, claiming that they were tainted. Harker contended that his sixth amendment right to confront witnesses was violated because hypnosis so influences a witness’ perceptions that effective cross-examination becomes impossible. In addition, he claimed that his fourteenth amendment right to due process was violated because the hypnosis session was impermissibly suggestive and thus tainted the subsequent photo array and courtroom identifications. The trial court, however, admitted the post-hypnotic testimony after finding that it met the reliability standards of Polk v. State, the then-existing Maryland rule concerning hypnotically enhanced testimony.

After the trial but before the appeal, the Maryland Court of Appeals established a new rule concerning hypnotically enhanced testimony in State v. Collins. Under the new rule, because hypnotically enhanced testimony generally is not accepted in the scientific community, it is not admissible unless the testimony could be attributed to pre-hypnotic statements. The Court of Special Appeals in location at the time of the shooting and to obtain the license plate number of the assailant’s vehicle. The hypnosis was unsuccessful in eliciting this information. 55 Md. App. at 464, 463 A.2d at 291.

55. 800 F.2d at 439; 55 Md. App. at 466, 463 A.2d at 292. Prior to the hypnosis, Thompson had been shown a different photo array which did not contain Harker’s picture. Thompson did not select any of those photographs as that of his assailant. 800 F.2d at 439.
56. 800 F.2d at 439; 55 Md. App. at 466, 463 A.2d at 292.
57. 800 F.2d at 439, 441; 55 Md. App. at 466, 463 A.2d at 292.
58. 800 F.2d at 442.
59. 800 F.2d at 442.
60. Id. at 443.
61. 48 Md. App. 382, 427 A.2d 1041 (1981) (holding that to admit hypnotically induced testimony, hypnosis must be generally accepted in the relevant scientific community, pursuant to the rule set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).
62. 800 F.2d at 441 & n.1; 55 Md. App. at 470, 463 A.2d at 294.
64. Id. at 702, 464 A.2d at 1044. In Rock v. Arkansas, 107 S. Ct. 2704 (1987), the Supreme Court held that a state rule which per se excluded all post-hypnotic testimony infringed impermissibly on a defendant’s right to testify on his or her own behalf, particularly when there was evidence corroborating the post-hypnotic testimony and when re-
Harker considered the Collins rule and concluded that the post-hypnotic identifications were attributable to Thompson's pre-hypnotic statement and therefore were admissible. The state court found no violation of Harker's sixth amendment right of confrontation. The court noted that the defense counsel's ability to cross-examine Thompson had not been impaired "because the manner in which Thompson made the photographic and confrontational identification (not positive as to the photograph; hesitant at the confrontation) indicated that he retained critical judgment, unimpaired by the hypnosis." Likewise, there was no abridgement of Harker's fourteenth amendment right to due process because Thompson had a good opportunity to see his assailant on the night of the crime and his description of the assailant was accurate.

In Harker the Fourth Circuit focused on the constitutional issues in determining whether the defendant was entitled to habeas corpus relief. The federal court first determined that Harker's sixth amendment right to confrontation was not violated. Experts from each side informed the jury of the uses and dangers of hypnosis, the questioning of witnesses fully explored the circumstances of the hypnotic session, and defense counsel cross-examined Thompson concerning his opportunity for pre-hypnotic observation of the assailant. The court also held that the post-hypnotic identifications did not violate Harker's fourteenth amendment right to due process

cordings of the hypnotic session demonstrated that responses were not suggested by leading questions. Id. at 2714-15. This case has enormous implications for the Maryland rule, in that Collins' narrow exception for post-hypnotic testimony may have to be expanded when a defendant has been hypnotized or when the independent corroborating testimony arises from a source other than the hypnotized witness.

65. 55 Md. App. at 470, 463 A.2d at 294.
66. Id.
67. Id. at 473, 463 A.2d at 296.
68. 800 F.2d at 441 n.1.
69. The Court of Appeals discussed in detail the weaknesses of refreshing a witness' recollection through hypnosis. Id. at 441. The drawbacks of hypnosis are threefold: (1) suggestibility, whereby a hypnotist may lead the hypnotized subject by suggestion; (2) confabulation, whereby the subject fabricates missing details; and (3) memory hardening, whereby the subject remembers being hypnotized, but cannot distinguish between events recalled before hypnosis and those recalled during hypnosis, and thus may be more convinced than ever of the accuracy of post-hypnotic testimony. Id. at 439-41. The danger of misidentification is enhanced when the witness reconstructs the memory of the crime through suggestibility or confabulation and then becomes absolutely convinced of the accuracy of the memory through memory hardening. Id. at 440-41.
70. Id. at 442-43. In noting these requirements for complying with the sixth amendment right to confrontation, the court stressed that memory hardening, a danger in all eyewitness identifications, does not pose a per se violation of the sixth amendment. Id. at 442.
because the in-court identification had a basis which was independent from the hypnotic session. This independent basis compensated for any deficiencies in the hypnotic session.

Although the Maryland rule set forth in Collins is generally one of exclusion, it does allow admission of post-hypnotic testimony when there is an independent basis for the evidence, such as a pre-hypnotic statement. The Harker decision serves as an example of how the exception to the rule can be applied; thus, the case will serve as a benchmark for other cases in which post-hypnotic testimony is offered into evidence.

B. Hearsay

1. Probation Revocation Hearing.—In State v. Fuller the Court of Appeals held that a respondent in a probation revocation hearing has the same right to confront witnesses as that guaranteed to defendants in criminal proceedings, unless the State demonstrates good cause for dispensing with confrontation and the trial judge sets forth a specific finding of good cause in the record of the revocation proceeding. Fuller also establishes the procedure to be followed when a party to a probation revocation hearing objects to the admission of hearsay evidence.

Respondent Solomon Fuller faced probation revocation pro-

71. Id. at 443. Thompson had a good opportunity to see his assailant at the time of the assault due to lighting and the passage of time. Thompson also prepared a pre-hypnosis composite which Harker's father said resembled his son. Thompson's descriptions of the assailant were consistent before, during, and after hypnosis. Id.

72. Id. No video tape was available because the lens cap was not removed from the video camera. Id. An audio tape was made, however, and the trained hypnotist was a disinterested law enforcement officer from another county who did not excessively guide or direct the victim during the hypnosis. Id. at 444. The concurring opinion, while recognizing the value of hypnosis as an investigatory tool, expressed grave misgivings about the procedures used by the police in administering the hypnosis and noted that the record was so flawed as to make it impossible to determine whether the circumstances of the session were in fact suggestive. Id. at 445 (Murnaghan, J., concurring). Judge Murnaghan suggested that the State should bear the burden of proving that the hypnosis was conducted and the statements were elicited under tightly controlled and neutral conditions. Id. at 446-47.


74. 308 Md. 547, 520 A.2d 1315 (1987).

75. Id. at 549, 520 A.2d at 1316. This holding "drastically weakened" the Court of Appeals' holding in Scott v. State, 238 Md. 265, 208 A.2d 575 (1965). 308 Md. at 551-52, 520 A.2d at 1317. For a discussion of other evidentiary issues involving probation revocation hearings, see the analysis of Chase v. State, 309 Md. 224, 552 A.2d 1348 (1987), supra at 798.

76. 308 Md. at 552-53, 520 A.2d at 1317-18.
ceedings when the question of the admissibility of hearsay testimony arose. At the probation revocation hearing, a police officer testified concerning out-of-court statements made to him during his investigation of a charge against Fuller for uttering a bad check. Fuller objected to the testimony on grounds that it was hearsay and that it violated his fourteenth amendment due process right to confront and cross-examine witnesses, basing his argument upon the Supreme Court's decisions in *Morrissey v. Brewer* and *Gagnon v. Scarpelli*.

The petitioners in *Morrissey* claimed that their due process rights were violated when their paroles were revoked without a hearing. In considering this claim, the Supreme Court held that at a minimum, due process in a parole revocation hearing includes "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." In *Gagnon* the Supreme Court extended *Morrissey*’s due process requirements for parole revocation hearings to probation revocation hearings.

The State relied upon the Maryland case of *Scott v. State*, which involved Scott's probation being revoked despite an acquittal on charges of assault with intent to rape and common assault. Prior to trial, the prosecution learned that the accused's mother had recanted her story and, if called as a witness, would deny ever having seen the hat. Despite this, the prosecution called the mother to testify, claiming surprise and trying to impeach her testimony when she denied recognizing the hat. The trial judge ruled that the attempted impeachment was improper because the prosecution knew before trial of the mother's probable testimony. As an alternative, the prosecution offered the testimony of the police officer to whom the mother had originally identified the hat as that of her son. The judge excluded this testimony as hearsay and the jury acquitted the accused.

Despite the acquittal, the judge believed the accused in fact had committed the crime, and therefore revoked the accused's probation. The judge based his decision on
tending that the admission of hearsay testimony did not offend pro-
cedural due process and that *Morrissey* and *Gagnon* did not
"undermine the continued viability of *Scott*." The Court of Ap-
peals held in *Scott* that a judge in a probation revocation hearing
may use extrajudicial information, including hearsay and informa-
tion not subject to cross-examination, as long as certain safeguards
exist. These safeguards include notice of the charges against the
accused and the opportunity to answer or explain the facts known to
the judge. The court found these safeguards present and there-
fore upheld the trial judge's revocation of the accused's probation.

The Fuller court rejected the State's argument and found that
*Morrissey* and *Gagnon* "drastically weakened" the previous procedure
set forth in *Scott*. The Court of Appeals noted that in determining
the admissibility of hearsay evidence at a probation revocation hear-
ing, the judge must first decide whether the evidence is admissible
under the Maryland law. At the same time, the judge must re-
member that probation revocation proceedings do not mandate ad-
herence to formal rules of evidence; consequently, the judge may
admit reasonably reliable hearsay evidence. If a confrontation
clause issue is present, however, the trial judge should first deter-
mine whether the evidence falls within a recognized exception to the
hearsay rule; next the judge should examine both the evidence and
the exception to see whether the criteria necessary to satisfy the
confrontation clause are met. If the confrontation clause's re-
quirements are satisfied, the judge need not make a specific finding
of good cause before admitting the evidence. On the other hand,
if the evidence fails to satisfy the rules of evidence or the require-
ments of the confrontation clause, then the evidence is inadmissible
unless it "satisfies the standard of reasonable reliability and the trial

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86. 308 Md. at 551, 520 A.2d at 1317.
88. *Id.* at 275, 208 A.2d at 580.
89. *Id.* at 277-78, 208 A.2d at 582.
90. 308 Md. at 551-52, 520 A.2d at 1317.
91. *Id.* at 552-53, 520 A.2d at 1317.
92. *Id.* at 553, 520 A.2d at 1317 (citing *Gagnon* v. *Scarpelli*, 411 U.S. 778, 789
(1973)).
93. *Id.*, 520 A.2d at 1317-18. For a discussion of the constitutional requirements
mandated by the confrontation clause, see United States v. *Inadi*, 106 S. Ct. 1121 (1986)
(no requirement of unavailability prior to admitting out-of-court statement of nontesti-
ifying co-conspirator), and Ohio v. *Roberts*, 448 U.S. 56 (1980) (requirements of unavail-
ability of witness, need for testimony, and adequate "indicia of reliability").
94. 308 Md. at 553, 520 A.2d at 1318.
judge makes, and states in the record, a specific finding of good cause."

The record in the instant case contained no finding of good cause for denying Fuller the opportunity to confront and cross-examine the employees interviewed by the investigating officer. Furthermore, the evidence did not fall within any exception to the hearsay rule. Therefore, the Court of Appeals held that the trial court erred in admitting the police officer's hearsay testimony at the probation revocation hearing.

The court next considered whether the error was harmless under the circumstances of the case. Fuller faced revocation of probation arising from two separate convictions for theft. In a consolidated hearing, the judge presiding over the first case expressly stated that he relied on the hearsay evidence in concluding that Fuller had violated the terms of his probation. The second judge relied on other evidence. The Court of Appeals therefore concluded that the judge should make a new determination of whether probation had been violated in the first case, but that the admission of the hearsay was harmless error in the second case.

Fuller ensures that due process protections are afforded Maryland probationers before they are deprived of their liberty. The decision preserves the informal nature of probation revocation hearings while at the same time providing a procedural structure for making the important decision to revoke probation.

2. Party Opponent Exception.—The Court of Appeals held in Holcomb v. State that a contemporaneous memorandum of a defendant's confession, prepared by a police officer, could be produced as evidence at trial. The defendant's failure to attest to the accuracy of the memorandum did not affect the admissibility of the

95. Id. See Wilson v. State, 70 Md. App. 527, 533-34, 521 A.2d 1257, 1260-61 (1987) (finding that the prohibitive cost of calling a witness from Virginia was good cause).

96. 308 Md. at 554, 520 A.2d at 1318.

97. Id.

98. Id. at 550, 520 A.2d at 1316.

99. Id. at 554-55, 520 A.2d at 1318.

100. Id.

101. Id. at 554, 520 A.2d at 1318.

102. Id. at 555, 520 A.2d at 1318.

103. For more detailed information on the revocation hearing process, see Little, Rights of the Maryland Probationer: A Primer for the Practitioner, 11 U. BALT. L. REV. 272, 296-308 (1982).

writing.\textsuperscript{105}

On October 22, 1982, police interviewed the defendant, Kenneth Holcomb, in connection with the murder of Tanea Rothschild the day before. At that time Holcomb offered an exculpatory statement. Four days later Holcomb agreed to undergo a polygraph test. During the test, a Baltimore County detective asked Holcomb a series of questions and then accused him of lying about the murder. Holcomb confessed to the murder, answered the questions, and agreed to repeat his confession to another detective. After receiving a \textit{Miranda}\textsuperscript{106} warning, however, Holcomb refused to comment any further.\textsuperscript{107}

The detective transcribed the discussion with Holcomb into longhand within fifteen minutes after the examination ended.\textsuperscript{108} Although the report later was typed, there was no evidence that Holcomb ever saw the document or acknowledged its accuracy.\textsuperscript{109} Holcomb was charged with first degree murder.\textsuperscript{110}

At the trial, the detective related Holcomb's oral confession by reading the document prepared on the day of the polygraph test. The State then entered an edited transcript of the contemporaneous memorandum of the oral confession into evidence.\textsuperscript{111} The court admitted the exhibit as a business record over the defense's objection.\textsuperscript{112} Testifying in his own defense, Holcomb denied the validity of the detective's testimony.\textsuperscript{113} Holcomb was convicted and sentenced to life imprisonment.\textsuperscript{114}

The Court of Special Appeals affirmed Holcomb's conviction, finding that two levels of hearsay were involved.\textsuperscript{115} The detective's narration of what the original declarant, Holcomb, had said was the first level of hearsay. The recounting of Holcomb's statement from

\begin{footnotes}
\item[105] \textit{Id.} at 459, 515 A.2d at 214.
\item[107] The description of the facts of the case derives from the Court of Appeals' reading of testimony given at the hearing on Holcomb's motion to suppress the oral confession. 307 Md. at 459 n.1, 515 A.2d at 214 n.1.
\item[108] \textit{Id.} at 460, 515 A.2d at 214.
\item[109] \textit{Id.}
\item[110] \textit{Id.}
\item[111] \textit{Id.} The edited version contained no references to the polygraph examination. \textit{Id.}
\item[112] \textit{Id.}
\item[113] \textit{Id.} Holcomb claimed that he had not confessed to the detective, and that the detective "had screamed accusations at him until Holcomb threatened to punch [him] in the face." \textit{Id.}
\item[114] \textit{Id.} at 461, 515 A.2d at 214-15.
\item[115] \textit{Id.}, 515 A.2d at 215.
\end{footnotes}
Yet the Court of Special Appeals held the evidence admissible, finding both that the detective's memorandum was a business record and that the contents of the document fell under the party opponent exception to hearsay. 

Holcomb made two arguments before the Court of Appeals. First, he asserted that the memorandum was not admissible as a business record because as the original declarant he had no duty to be truthful. Holcomb based his argument on the rule handed down in *Aetna Casualty & Surety v. Kuhl*, in which the court held that for a memorandum to be admissible as a business record, the original declarant must have had an affirmative duty to report events faithfully. For example, descriptions by firefighters of what took place at a fire, as later related to a fire marshall and then recorded in an official report, would be admissible even though the descriptions involve two levels of hearsay. Both "links" in the hearsay "chain"—the firefighters and the fire marshall—are bound by a business duty to report events observed in a truthful manner.

Holcomb claimed that because he had no duty to be truthful, the memorandum did not properly fall under the business record exception to the hearsay rule. Although Holcomb had no duty of truthfulness, the court found that because the memorandum was a record of a party speaking about his own actions, the party opponent exception applied.

Holcomb also argued that the trial judge should not have admitted his alleged confession into evidence because Holcomb never

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116. *Id.* at 460, 515 A.2d at 214.
117. *Id.* at 461, 515 A.2d at 215.
119. 307 Md. at 461, 515 A.2d at 215.
120. 296 Md. 446, 463 A.2d 822 (1983). Aetna, as an auto insurer, sought a declaratory judgment against the person claiming against its insured. Aetna argued that there was no coverage because the insured struck the claimant on purpose. The claimant tried to introduce a police statement in which the insured stated the collision was accidental. Although the statement was clearly a business record, the *Kuhl* court found the hearsay exception did not apply because the insured did not have a duty to tell the truth. *Id.* at 454-55, 463 A.2d at 827.
121. *Id.*
122. This example was taken from an actual Maryland case, *Aravanis v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965).
123. *Id.* at 261-62, 206 A.2d at 159.
124. 307 Md. at 461, 515 A.2d at 215.
125. *Id.* at 464, 515 A.2d at 216. For a discussion of the party opponent rule, see McCormick on Evidence ch. 26, at 774-818 (E. Cleary 3d ed. 1984).
confirmed the memorandum's veracity. He urged the court to:

adopt the rule fashioned by a substantial number of other jurisdictions that if an oral statement purporting to be the accused's confession is reduced to writing by a third person, until the statement is signed or its correctness is acknowledged in some fashion by the accused, the written instrument is not admissible in evidence as the written confession of the accused and the oral testimony of the witness is only admissible evidence of the purported confession.

The Court of Appeals refused to adopt this view, instead applying the longstanding Maryland rule that "a memorandum recording past recollection may be admitted into evidence as a document." The court relied on the ruling in Hall v. State, in which a defendant convicted of murder challenged the admissibility of statements made by a police officer and a stenographer as to what the defendant had said during questioning. The police officer and the stenographer were allowed to read contemporaneous notes during the trial. The Court of Appeals found the reading of the memoranda proper, stating that the trial court could have admitted the actual memoranda into evidence. The Holcomb court saw no reason to make the standard for admissibility of a memorandum of an oral confession any more stringent than that for the admissibility of any recording of past recollections.

In this decision the Court of Appeals applied longstanding Maryland rules and cases to a fact pattern of first impression. Holcomb tried to use the basic rules of the business exception to the hearsay rule to carve out more protection for persons whose confessions become part of a business record. The court, however, aptly

126. 307 Md. at 461, 515 A.2d at 215.
127. Id. at 464, 515 A.2d at 216. Holcomb's submission parrots the Court of Special Appeals' synthesis of the cases used by Holcomb in his first appeal. The Court of Appeals noted that it did not find the synthesis an accurate interpretation of the case law. Id.
128. Id. at 468, 515 A.2d at 218.
129. Id. at 464, 515 A.2d at 216.
130. 223 Md. 158, 162 A.2d 751 (1960).
131. Id. at 161-62, 162 A.2d at 753.
132. Id. at 162, 162 A.2d at 753.
133. Id. at 177, 162 A.2d at 761.
134. 307 Md. at 468, 515 A.2d at 218. The court followed the precedent of Hall. The procedure in federal court is not to admit the memorandum into evidence, but to have the declarant read from the memorandum in open court. See Fed. R. Evid. 803(5).
refused to accept Holcomb's argument because a party's own statements fall under a separate exception to the hearsay rule, the party opponent exception.\(^{136}\) Thus, *Holcomb* reaffirms both the business record and the party opponent exceptions to the hearsay rule.

As to Holcomb's second argument, the court simply refused to overrule the longstanding rule of *Hall*\(^{137}\) that a contemporaneous memorandum may be used to refresh the memory of a witness. The Court of Appeals noted that many jurisdictions allow the witness to read from a contemporaneous memorandum but not to admit the document into evidence.\(^{138}\) Yet several other jurisdictions look at "the writing as part of the testimony of the witness."\(^{139}\) The court found no policy reason to distinguish between the reading of a memorandum and the entry of the actual document into evidence.\(^{140}\) Considering that under either approach the information reaches the jury,\(^{141}\) it would appear that a more expansive rule in Maryland would have little practical effect.

C. Plea Agreements

In *Wright v. State*\(^{142}\) the Court of Appeals held that statements made by a defendant pursuant to a plea agreement may be used later against the defendant if the defendant breaches the agreement. The plea agreement specifically must provide that upon the defendant's breach of the agreement, the defendant's statements are admissible as evidence.\(^{143}\)

Kenneth Coley, the defendant, was arrested on suspicion of homicide following a grocery store shooting.\(^{144}\) He waived his *Miranda*\(^{145}\) rights and on the night of his arrest gave a written statement denying all knowledge of the shooting.\(^{146}\) When police

\(^{136}\) 307 Md. at 464, 515 A.2d at 216.

\(^{137}\) 223 Md. at 176-77, 162 A.2d at 761.

\(^{138}\) 307 Md. at 464-67, 515 A.2d at 216-18.

\(^{139}\) *Id.* at 467, 515 A.2d at 218.

\(^{140}\) *Id.* at 468, 515 A.2d at 218.

\(^{141}\) *Id.* at 466-66, 515 A.2d at 217.

\(^{142}\) 307 Md. 552, 515 A.2d 1157 (1986).

\(^{143}\) *Id.* at 586-87, 515 A.2d at 1174-75. The Court of Appeals also considered whether the trial court's prior acquittal of the other defendant, Joseph Wright, on a felony charge precluded his subsequent conviction for felony-murder based on that felony. *Id.* at 554-55, 515 A.2d at 1158. The court held that to convict a defendant of felony-murder after acquittal on the felony charge would violate both the fifth amendment's double jeopardy clause and Maryland common-law double jeopardy principles. *Id.* at 577-78, 515 A.2d at 1170. This issue will not be discussed here.

\(^{144}\) *Id.* at 555, 515 A.2d at 1158.


\(^{146}\) 307 Md. at 578, 515 A.2d at 1170.
EVIDENCE

unraveled his alibi and advised him that he would be charged with homicide, Coley struck a plea agreement with the prosecution.\textsuperscript{147} The agreement provided that in exchange for the State's acceptance of Coley's plea of guilty to second degree murder, Coley would give a full statement and testify before the grand jury. Furthermore, the agreement stated that if Coley breached the agreement, all statements made pursuant to the agreement would be admissible against Coley in court.\textsuperscript{148}

Coley later reneged on the plea agreement and chose to stand trial on a plea of not guilty.\textsuperscript{149} He moved to suppress his statements as involuntary, claiming that by offering the plea agreement the State induced him to confess.\textsuperscript{150} The trial court admitted the plea agreement, confession, and grand jury testimony over Coley's objections.\textsuperscript{151} Coley was convicted of felony murder and was sentenced to life in prison.\textsuperscript{152} The Court of Special Appeals affirmed his conviction.\textsuperscript{153}

Coley appealed to the Court of Appeals on the ground that the State improperly induced him to make incriminating statements while under the plea agreement; therefore, the statements were inadmissible.\textsuperscript{154} Coley based his argument on the inducement rule laid down in Hillard v. State,\textsuperscript{155} which provides that if a defendant confesses in response to police or prosecutorial promises of special help or favors, the defendant's declaration will be considered involuntary and therefore inadmissible.\textsuperscript{156} Police arrested the suspect in

\textsuperscript{147} Id. at 578-79, 515 A.2d at 1170-71. Coley asserted that his mother and cousin could provide him with an alibi, but in interviews with police they failed to do so. Id. at 578, 515 A.2d at 1170.
\textsuperscript{148} Id. at 579, 515 A.2d at 1171.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 559-60, 515 A.2d at 1160-61. Coley's original sentence was life, 15 years of which purportedly were suspended. This sentence was vacated for uncertainty in Ball v. State, 57 Md. App. 338, 369, 470 A.2d 361, 377 (1984).
\textsuperscript{153} Ball, 57 Md. App. at 389, 470 A.2d at 388. The appeal reviewed the convictions of three codefendants: Coley, Joseph Wright, and Sheldon Ball.
\textsuperscript{154} 307 Md. at 560, 515 A.2d at 1161. Coley claimed that the prosecution's promise not to try him for first degree murder induced him to speak. Id. Coley also challenged the use of his inculpatory statements on the ground that it violated the fifth amendment of the United States Constitution. Id. at 587, 515 A.2d at 1175. The Court of Appeals did not consider the fifth amendment issue because it was not included in either Coley's petition for a writ of certiorari or the court's order granting the petition. Id.
\textsuperscript{155} 286 Md. 145, 406 A.2d 415 (1979).
\textsuperscript{156} Id. at 153, 406 A.2d at 420. There is considerable Maryland case law in accord with Hillard. See, e.g., Stokes v. State, 289 Md. 155, 162, 423 A.2d 552, 556 (1980) (holding inadmissible defendant's inculpatory statement made in reliance on a police promise
Hillard in connection with a robbery and murder.\textsuperscript{157} The accused and his lawyer submitted a typed inculpatory statement to the police in reliance upon a police officer's statement that he would "go to bat" for the accused.\textsuperscript{158} The Court of Appeals found the police officer's statement an improper inducement.\textsuperscript{159} Coley attempted to compare general police or prosecutorial inducement to the plea agreement into which he had entered.\textsuperscript{160}

The court recognized that Coley's confessions would have been inadmissible had the prosecution simply promised not to try Coley for first degree murder if he pleaded guilty to a lesser crime.\textsuperscript{161} The court, however, distinguished Coley's situation as being "quite different" from cases falling under the Hillard rule.\textsuperscript{162}

The court acknowledged that Hillard and similar Maryland cases\textsuperscript{163} have held that promises or inducements made by the State in order to get a confession were improper.\textsuperscript{164} In Wright, however, the discussions between the prosecution and Coley were conducted in accordance with Maryland Rule 4-243, which expressly authorizes and governs plea bargaining;\textsuperscript{165} thus the negotiations were permissible.\textsuperscript{166} Additionally, the court found that under rule 4-243 plea bargaining negotiations cannot be per se involuntary because subsection (d) of the rule permits judicial inquiry into the voluntariness of plea agreements.\textsuperscript{167} The court further stressed that the agreement specified that the inculpatory statements could be used against Coley if he reneged, noting that no other case relying on the inducements to arrest the defendant's wife); Streams v. State, 238 Md. 278, 281, 208 A.2d 614, 615 (1965) (finding inadmissible confession elicited by police promises to attempt to get defendant probation); Edwards v. State, 194 Md. 387, 398-99, 71 A.2d 487, 492 (1950) (finding confession involuntary when police showed a defendant a letter from a prison convict expressing regret about not having confessed); Lubinski v. State, 180 Md. 1, 5, 22 A.2d 455, 458 (1941) (dictum that statement by police that if defendant confessed, it would help him a lot, was enough to make defendant's confession involuntary); Dobbs v. State, 148 Md. 34, 61, 129 A. 275, 286 (1925) (finding improper inducement when prosecutor said to defendant: "Tell the truth about it. You've got nothing to fear if you tell the truth and you weren't in it.").

\textsuperscript{157} Hillard, 286 Md. at 147, 406 A.2d at 417.
\textsuperscript{158} Id. at 147-48, 406 A.2d at 417.
\textsuperscript{159} Id. at 153, 406 A.2d at 420.
\textsuperscript{160} 307 Md. at 579, 515 A.2d at 1171.
\textsuperscript{161} Id. at 583, 515 A.2d at 1173.
\textsuperscript{162} Id.
\textsuperscript{163} See supra note 156.
\textsuperscript{164} 307 Md. at 580, 515 A.2d at 1171.
\textsuperscript{165} Md. R. 4-243.
\textsuperscript{166} 307 Md. at 585, 515 A.2d at 1174.
\textsuperscript{167} Id.; Md. R. 4-243(d) ("[I]nquiry into the voluntariness of the plea or a plea agreement shall be on the record.").
ment rule involved a similar agreement.\textsuperscript{168}

The court next addressed Coley's policy argument that his situation should fall within the Hillard rule in order to encourage plea bargaining.\textsuperscript{169} Coley asserted that as a matter of policy other jurisdictions protect all discussions related to a plea bargain from use at trial.\textsuperscript{170} The court agreed that under many circumstances, admitting into evidence offers and discussions made in the process of plea bargaining negotiations would be detrimental.\textsuperscript{171} Furthermore, the court made it clear that discussions leading to plea agreements and plea agreements themselves would be admissible only upon a defendant's breach of a valid, consummated agreement.\textsuperscript{172} If there were no breach at all, or if the State breached or rescinded the agreement, statements made pursuant to a plea agreement could not be used.\textsuperscript{173} In the instant case, however, strict adherence to the agreement would not be detrimental to plea bargaining in general.\textsuperscript{174} Coley entered into an agreement which expressly stated that a breach by Coley would result in the State being able to use Coley's own statements against him.\textsuperscript{175} The court found this to be a valid, binding, and enforceable part of the agreement.\textsuperscript{176} In fact, the court speculated that its decision would foster the plea bargaining process since a contrary decision would encourage defendants to rescind agreements "without justification."\textsuperscript{177}

\textsuperscript{168} 307 Md. at 585, 515 A.2d at 1174.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 585-86, 515 A.2d at 1174. \textit{See}, e.g., Kercheval v. United States, 274 U.S. 220 (1927) (finding that statements made in connection with withdrawn guilty pleas should not be admitted); United States v. Grant, 622 F.2d 308, 311-12 (8th Cir. 1980) (noting that under \textit{Fed. R. Crim. P.} 11(e)(6) statements made during plea bargaining negotiations are inadmissible); Ashby v. State, 265 Ind. 316, 354 N.E.2d 192 (1976) (holding that inculpatory statements should not be admitted without showing defendant breached or rescinded agreement).
\textsuperscript{171} 307 Md. at 586, 515 A.2d at 1174-75.
\textsuperscript{172} Id.
\textsuperscript{173} Id. In Allgood v. State, 309 Md. 58, 522 A.2d 917 (1987), the Court of Appeals refused to extend the \textit{Wright} holding to a case in which the State rescinded a plea agreement and then sought to use the defendant's statements at trial. \textit{Id.} at 82, 522 A.2d at 928. The State entered into a plea agreement with Allgood, a murder suspect. The agreement provided that Allgood would testify to a grand jury; in return the State would press only manslaughter charges against Allgood. When Allgood subsequently failed a lie detector test regarding the murder, the State withdrew from the agreement. \textit{Id.} at 74, 522 A.2d at 924. The State used Allgood's own statements against him at trial, invoking \textit{Wright} as legal authority. The Court of Appeals overturned Allgood's conviction, refusing to extend the \textit{Wright} exception to the \textit{Allgood} fact pattern. \textit{Id.} at 82, 522 A.2d at 928.
\textsuperscript{174} 307 Md. at 587, 515 A.2d at 1175.
\textsuperscript{175} Id. at 586, 515 A.2d at 1174-75.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 587, 515 A.2d at 1175.
Judge Cole vigorously dissented from the majority’s holding. Arguing that plea agreements involve a *quid pro quo*, Judge Cole explained that a defendant gives up incriminating information in return for leniency from the State. This trade-off is “allowed primarily because it necessarily engages the supervision of the trial court, which must determine if the defendant entered the agreement voluntarily and appreciates the nature of the charge and the consequences of his admission of guilt.” According to Judge Cole, rather than addressing Coley’s right to back out of the agreement, the majority used Maryland Rule 4-243 to determine that the agreement’s terms were valid. Judge Cole, however, found this reasoning untenable; in his view, rule 4-243 only applies to agreements that have been presented to the court for approval. Because Coley rejected the terms of the plea agreement before the court could approve the agreement, Coley was “reclad... with all the constitutional safeguards—including presumption of innocence—he temporarily had sacrificed under his guilty plea agreement. Thus, because there is no plea agreement to moot the issue of inducement, Coley’s statements are required to pass the same test of admissibility as any other inculpatory statement.”

As to the terms of the agreement which provided that Coley’s statements would be admissible if he reneged, Judge Cole declared that a mere contract cannot outweigh an individual’s constitutional rights. Coley had rights to be free of improper inducements to confess, to enjoy confidentiality in the plea bargaining process, and to reassert his right to plead innocent without having his statements made pursuant to prosecutorial promises used against him.

The court has made it possible for the State to fashion plea agreements that effectively make a recision by the defendant a guarantee of conviction. To secure a plea bargain, a defendant normally must admit complicity in a crime. Under *Wright*, once this admission is made and the plea bargain is struck, a defendant who rescinds or

178. *Id.* at 588, 515 A.2d at 1175 (Cole, J., dissenting).
179. *Id.*, 515 A.2d at 1176.
180. *Id.* at 588-89, 515 A.2d at 1176.
181. *Id.* at 589, 515 A.2d at 1176.
182. *Id.*
183. *Id.*
184. *Id.* at 594, 515 A.2d at 1178-79.
185. *Id.* at 591-92, 515 A.2d at 1177.
186. *Id.* at 592, 515 A.2d at 1177.
187. *Id.* at 595, 515 A.2d at 1179.
breaches the agreement may face his or her own testimony in court. All that the prosecution must do to ensure this result is to include a provision in the plea bargain similar to that which appeared in Coley's agreement.

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V. FAMILY LAW

A. Separation Agreements

In Bruce v. Dyer, the Court of Appeals held that absent specific language of intent, a separation agreement does not sever a tenancy by the entireties. Furthermore, heirs of a party to a property settlement agreement may enforce the agreement.

In 1984 a husband and wife executed a voluntary separation and property settlement agreement. Shortly after the execution of the agreement and before the sale of the marital home, the husband died. His estate claimed a fifty-five percent interest in the home. The widow sought a declaratory judgment that she was the sole owner of the entire parcel of real estate. The estate, on the other hand, claimed that the separation agreement converted the tenancy by the entireties into a tenancy in common, thereby entitling the heirs to their proportionate interest in the property. In addition, the estate argued that the separation agreement itself was enforceable by the heirs of a party to the agreement.

The trial court ruled that the contractual agreement between the parties terminated the tenancy by the entireties. Reversing the lower court, the Court of Special Appeals determined that the execution of the separation and property settlement agreement did not convert the tenancy by the entireties into a tenancy in common. The court found, however, that the wife's contractual obligation with respect to the property did not terminate upon the death of her spouse. Thus, the estate could compel the sale of the home and receive a division of the proceeds in accordance with the terms of the agreement. The wife and the estate then filed cross-petitions for certiorari.

The Court of Appeals considered two questions: (1) whether the separation and property settlement agreement converted the tenancy by the entireties into a tenancy in common and (2) whether the estate could compel the sale of the home and receive a division of the proceeds in accordance with the terms of the agreement.

2. Id. at 507, 508 A.2d at 514.
3. Id. at 507, 508 A.2d at 514.
4. Id. at 507, 508 A.2d at 514.
5. Id. at 507, 508 A.2d at 514.
6. 309 Md. at 426, 524 A.2d at 780.
tenancy by the entireties into a tenancy in common; and (2) if not, whether the estate of the deceased partner could enforce the provisions of the separation and property settlement agreement against the surviving spouse.\(^7\)

The court noted that Maryland law retains the estate of tenancy by the entireties in its traditional form and that the estate can be terminated during the spouses' lifetimes only by divorce or joint action by the husband and wife.\(^8\) The separation and property settlement agreement lacked the specific language necessary to satisfy statutory requirements for severance of a tenancy by the entireties by grant.\(^9\) The court concluded that to read the property settlement agreement as severing the tenancy by the entireties would extend the agreement beyond the parties' intent, particularly in light of the court's presumption in favor of tenancies by the entireties and the court's reliance on principles of objective contract construction. Rather, the court found that at most the agreement evidenced an intent that the tenancy by the entireties not control division of the

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\(^7\) Id.
\(^8\) Id. In reality, Maryland does not retain the estate of tenancy by the entireties in its traditional form. Traditionally, a wife had only a survivorship interest in property held by the entireties; the husband's rights were paramount to those of his wife with respect to possession, control, and revenue derived from the property. For example, a wife had no legal right to income received from rental of the property during her husband's lifetime. See Columbian Carbon Co. v. Kight, 207 Md. 203, 209, 114 A.2d 28, 30 (1955). Since the enactment of the Married Women's Property Act, a wife shares equally with the husband in the income from a tenancy by the entireties. See Colburn v. Colburn, 262 Md. 333, 337, 278 A.2d 1, 3 (1971), on appeal after remand, 265 Md. 468, 290 A.2d 280 (1972).

\(^9\) 309 Md. at 428, 432, 524 A.2d at 781, 783. MD. REAL PROP. CODE ANN. § 4-108(b) (1988) provides:

Any interest in property held by a husband and wife in tenancy by the entirety may be granted, (1) by both acting jointly, to themselves, or to themselves and any other person, in joint tenancy or tenancy in common; (2) by both acting jointly, to either husband or wife and any other person in joint tenancy or tenancy in common; and (3) by either acting individually to the other in tenancy in severalty, without the use of a strawman as an intermediate grantee-grantor. These grants, regardless of when made, are ratified, confirmed and declared valid as having created the type of ownership that the grant purports to grant. This statute is in derogation of the common law, which requires the use of a straw man as an intermediary to create or terminate an estate by the entireties that did not arise or terminate by operation of law. 309 Md. at 431, 524 A.2d at 782. Because statutes in derogation of the common law are to be strictly construed, the court referred to §§ 5-103 and 1-103 of the Real Property Article for assistance in construing the separation agreement. Section 5-103 requires conveyances to be in writing; § 1-103 defines the use of the terms "grant," "conveyance," "assignment," and "transfer." The court determined that the separation agreement did not satisfy these statutory requirements. 309 Md. at 432, 524 A.2d at 783.
proceeds arising from sale of the marital home.\textsuperscript{10}

Next the court considered whether the husband’s death terminated the contract obligations of the property settlement agreement. Unless a contract is for personal services or otherwise is expressly limited, it survives the death of a party and is binding upon the deceased’s estate.\textsuperscript{11} Furthermore, Maryland statute binds heirs and estates to the contractual obligations of the decedent.\textsuperscript{12} The court concluded that the surviving spouse likewise was bound by the terms of the separation agreement.\textsuperscript{3} The court distinguished \textit{Beau v. Beall},\textsuperscript{4} which the widow had cited as controlling.”\textsuperscript{13} The promise sought to be enforced in \textit{Beau} was a “bare offer” which was unsupported by consideration and which terminated with the

\textsuperscript{10} 309 Md. at 434, 524 A.2d at 783. In Eastern Shore v. Bank of Somerset, 253 Md. 525, 532, 253 A.2d 367, 371 (1969), the court noted that during the lifetime of tenants by the entireties, an estate can be terminated by the tenants’ joint action. A conveyance by both to a third person terminates the tenancy by the entireties in the land, but not in the proceeds, which ordinarily continue to be held by the entireties. The \textit{Bruce} court did not have to decide whether the terms of the separation agreement would have controlled division of proceeds from the sale of the marital home because the husband died prior to the sale of the property.

\textsuperscript{11} 309 Md. at 439, 524 A.2d at 786. The court cited 18 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (W. Jaeger 3d ed. 1978), which states: “Unless a contractual obligation is personal in character, death of the obligor will not discharge it, although no right of action had accrued prior to the death, and although the obligation is a guaranty where the only consideration was the credit given to the principal debtor.” \textit{Id.} § 1945, at 75-76 (footnote omitted). The court also cited Burka v. Patrick, 34 Md. App. 181, 366 A.2d 1070 (1976), which held that a contract that is not for personal services or expressly intended to terminate upon the death of a party survives the death of a party and is binding upon the party’s estate. \textit{Id.} at 185, 366 A.2d at 1072.

\textsuperscript{12} Md. ANN. CODE art. 50, § 1 (1986) states:

Where two or more persons are jointly bound by bond, promissory note or by any other writing, whether sealed or unsealed, to pay money or do any other thing and one or more of such persons shall die, his or their executors and heirs shall be bound in the same manner and to the same extent as if the person so dying had been bound severally as well as jointly.

\textsuperscript{13} 309 Md. at 440, 524 A.2d at 786-87. The language of the separation agreement itself supported this conclusion. The contract concluded: “As to these covenants and promises, the parties hereto severally bind themselves, their heirs, personal representatives and assigns.” \textit{Id.} at 425, 524 A.2d at 779.


\textsuperscript{14} 291 Md. 224, 434 A.2d 1015 (1981). In \textit{Beall} the Court of Appeals held that a widow was not bound by the terms of an option agreement executed jointly with her late husband, when the option was for the purchase of property held by the couple as tenants by the entireties and the option had not been exercised prior to the husband’s death. \textit{Id.} at 235-36, 434 A.2d at 1021-22.

\textsuperscript{15} 309 Md. at 441, 524 A.2d at 787.
death of the offeror. By contrast, the separation agreement in the instant case was embodied in a fully formed contract, binding upon the widow and enforceable by her husband's estate.\textsuperscript{16}

The court's ruling in \textit{Bruce} reaffirms the basic property law presumption in favor of a tenancy by the entireties by holding that a separation agreement which does not satisfy statutory requirements for a conveyance of real property is insufficient to terminate an estate held by the entireties.\textsuperscript{17} The case provides important guidelines for practitioners endeavoring to structure property settlement agreements. When a husband and wife wish to dissolve a tenancy by the entireties, drafters must utilize language indicative of both parties' intent to terminate their estate and must comply with statutory requirements for performing a present conveyance, transfer, or assignment of interest in the real property.\textsuperscript{18}

More importantly, \textit{Bruce} declares that property settlement agreements constitute contracts which will bind the parties' heirs and assigns when such intent is expressed in the document. The court will enforce a clear statement of intent contained in a contract, even if that intent overrides the survivorship rights inherent in a tenancy by the entireties. Therefore, a practitioner must carefully select and include legal terms that best express the client's intent, and must thoroughly explain to a client the legal implications and options associated with real property ownership before finalization of the agreement. Furthermore, the attorney must anticipate the client's estate planning desires and assist the client in formulating an agreement that will best reflect these wishes. To do less may jeop-

\textsuperscript{16} The court did not address dicta in \textit{Beall} regarding the court's strong interest in protecting the widow's equitable interests following the death of her spouse. The court in \textit{Beall} stated:

[The widow's] responsibilities, both legal and personal, are vastly different today. For example, the rights of her individual creditors, if any, may now attach to the subject property, which, before [her husband's] death, could only be attached by creditors of both. In view of such changed conditions, at least some of which pertain in the case of every widowed spouse, we think that to hold a surviving widow to the terms of an unsupported offer to sell property held by the entirety, made jointly with her husband before his death, would not be in the interest of equity.

291 Md. at 236, 434 A.2d at 1022.

Thus, the \textit{Beall} court was reluctant to enforce an agreement pertaining to a property transfer when the party against whom enforcement was sought was in a more vulnerable position than when the contract was made. The \textit{Bruce} court did not apply the \textit{Beall} rationale to the facts of the case.

\textsuperscript{17} See 309 Md. at 432-33, 524 A.2d at 783.

ardize the client's property interests and fail to dispose of the prop-
erty in accordance with the client's intent.

B. Alimony

The Court of Appeals held in Turrisi v. Sanzaro that the Al-
imony Act has not abolished the inherent power of an equity court to reserve jurisdiction over alimony when it grants a divorce. Although considerations such as monetary awards, rights to the family home, or the awarding of reasonable and necessary expenses may affect the propriety of any reservation when grounds for di-
vorce definitely exist, a chancellor has discretion to reserve jurisdic-
tion if the spouse can show that circumstances will change in the reasonably foreseeable future so as to justify an award of rehabilita-
tive or indefinite alimony.

A wife sued her husband for a divorce on grounds of voluntary separation after four years of marriage. Both spouses are medical doctors. The wife was diagnosed as having multiple sclerosis shortly after the couple married. At the time of the divorce hearing, she was able to practice medicine only on a part-time basis. Nevertheless, based upon her admission that she was then self-support-
ing and not seeking immediate alimony, the chancellor determined that the wife had waived an immediate award of alimony. Furthermore, relying on Quigley v. Quigley, the chancellor held that he

21. 308 Md. at 528-30, 520 A.2d at 1086-87.
22. Id. at 517, 520 A.2d at 1081. Multiple sclerosis is a progressive neuromuscular disease that causes loss of voluntary muscle control. Once diagnosed, the course of the disease is difficult or impossible to predict. The court reported conflicting trial court testimony with respect to the wife's prognosis. There was clear evidence that the disease had forced her to convert her practice from surgery to family practice, and to reduce her employment from full-time to part-time. Her physician testified at trial that she would be unable to work as a physician within the next two to ten years, but noted that at the time she was without voluntary bowel or bladder control and was unable to walk without a cane. Id. at 518-19, 520 A.2d at 1081-82.
23. Id. at 520-21, 520 A.2d at 1082-83.
24. 54 Md. App. 45, 456 A.2d 1305 (1983). In Quigley the court dismissed the case for lack of jurisdiction. Nevertheless, in a lengthy memorandum accompanying its dis-
missal, the court rejected the wife's request that the court reserve jurisdiction to award alimony at some future time. The wife, age 61, claimed that although she was presently employed and earning an annual salary of $21,800, she would be eligible for a monthly retirement sum of only $383. At the time of the divorce, her husband, age 60, was surviving on only $96 earned income per month, but would be eligible for two retire-
ment incomes totalling $1700 per month by age 65.

In rejecting the wife's request, the court questioned its statutory authority for reser-
vation of jurisdiction to award alimony generally. It specifically rejected the concept of
lacked power to reserve jurisdiction over the question of future alimony. The Court of Special Appeals vacated and remanded the chancellor's decision with respect to the award of immediate alimony and ordered the chancellor to evaluate other factors, in addition to the wife's waiver, in reconsidering an immediate alimony award.\textsuperscript{25} The intermediate appellate court declined to address the reservation of alimony issue, although it implied an inclination to adopt \textit{Quigley}.\textsuperscript{26}

On appeal the Court of Appeals considered whether the wife waived an immediate award of alimony and whether a chancellor may reserve jurisdiction to award alimony in the future. With respect to the first issue, the court reversed the decision of the Court of Special Appeals, finding that the chancellor was not clearly erroneous in concluding that the wife had waived her claim to immediate alimony.\textsuperscript{27}

With respect to the second issue, the court noted that equity courts traditionally reserved jurisdiction to award alimony long after the grant of an absolute divorce.\textsuperscript{28} The passage of the Alimony Act\textsuperscript{29} raised the question whether the chancellor's power to reserve jurisdiction over alimony still existed. The court agreed with

\textit{reserving jurisdiction to award alimony indefinitely as a hedge against unexpected changes in a spouse's standard of living.} Relying on the facts unique to \textit{Quigley}, the court stated:

The statute does permit an indefinite award or extension to an aging or infirm spouse in need whose transition cannot reasonably be expected to progress; or one who having exhausted his or her capacity still remains desperately out of proportion with the standard of living to which he or she had been accustomed. Nothing, however, was included (despite its having been considered) that would ever permit a chancellor to use an errant spouse as a guarantor for the pecuniary well-being of a self-sufficient—albeit virtuous—one. \textit{Id.} at 55, 456 A.2d at 1311. The court, however, acknowledged that the chancellor may reserve a ruling on an alimony award for a reasonable contemplative period following the granting of a divorce. \textit{Id.} at 56, 456 A.2d at 1311-12.

25. 308 Md. at 520, 520 A.2d at 1082. The opinion of the Court of Special Appeals is unreported.

26. \textit{Id.}

27. \textit{Id.} at 520-21, 520 A.2d at 1082-83. The court based its holding on the wife's trial testimony, in which she expressly stated that she was not claiming any alimony "right now." \textit{Id.} at 519, 520 A.2d at 1082. The court rejected the continued claim of the wife's counsel for immediate alimony, stating: "[I]n a matter of this sort, it is the client, not the counsel, who decides what is or is not waived." \textit{Id.} at 520-21, 520 A.2d at 1082-83.

28. \textit{Id.} at 522, 520 A.2d at 1083.

Quigley's conclusion that the legislature did not intend to make alimony either a lifetime annuity or an insurance policy against unforeseeable future setbacks or disasters.\textsuperscript{30} The court, however, rejected dicta in Quigley that prohibited the reservation of jurisdiction to award alimony for an indefinite period of time, finding that the Quigley court misinterpreted the legislative intent.\textsuperscript{31}

Upon conducting its own analysis of the Alimony Act,\textsuperscript{32} the court concluded that circuit courts have inherent authority to award alimony.\textsuperscript{33} Further, failure of the legislature to address the reservation of jurisdiction over alimony did not support a conclusion that the legislature intended to repeal the court's power to reserve jurisdiction over alimony.\textsuperscript{34} Absent specific legislative guidelines to the contrary, a reservation of jurisdiction is not inconsistent with the purpose of the Alimony Act.\textsuperscript{35}

Having established the court's authority to reserve jurisdiction to award alimony, the court in Turrisi set forth guidelines for exercising the authority. The chancellor's power to reserve jurisdiction is discretionary; exercise of this discretion in favor of reservation depends on both statutory and nonstatutory considerations.\textsuperscript{36} First,

\textsuperscript{30} 308 Md. at 525, 520 A.2d at 1085.
\textsuperscript{31} Id. at 527, 520 A.2d at 1086.
\textsuperscript{32} Statutory standards for awarding alimony are set forth in Md. Fam. Law Code Ann. § 11-106(c) (1984):

\begin{quote}
The court may award alimony for an indefinite period if the court finds that:

(1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or

(2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.
\end{quote}


\textsuperscript{33} 308 Md. at 526, 520 A.2d at 1086. The court found statutory support for the circuit courts' authority to award alimony in Md. Fam. Law Code Ann. § 1-201(a) (1984 & Supp. 1987), which affirms that an equity court has jurisdiction over alimony. The court also found case law supporting equity jurisdiction to award alimony. See Thomas v. Thomas, 294 Md. 605, 613, 451 A.2d 1215, 1219 (1982) ("[T]he power to grant alimony was deemed to be within the inherent authority of Maryland equity courts.").

\textsuperscript{34} 308 Md. at 527, 520 A.2d at 1086.
\textsuperscript{35} Id.

\textsuperscript{36} Id. at 528, 520 A.2d at 1086. The court indicated a willingness to uphold the conclusion reached in Abell v. Abell, 12 Md. App. 99, 106-07, 277 A.2d 629, 634, cert. denied, 263 Md. 709 (1971), that a court has the same judicial discretion to reserve jurisdiction over alimony as it has to award alimony at the time of granting a divorce. Abell qualified the scope of this authority by noting that if a divorce decree is granted without
according to the Alimony Act, a spouse must demonstrate that he or she is entitled to alimony. Second, if a case involves both a monetary award and alimony, reservation of jurisdiction over alimony "demand[s] the most careful exercise of discretion." Finally, the claimant must produce evidence that circumstances will change in the reasonably foreseeable future so as then to justify an award of rehabilitative or indefinite alimony. The court remanded the case for a determination consistent with the guidelines set forth in the opinion.

The holding in Turrisi has implications for practitioners who seek or oppose the court's reservation of jurisdiction to award alimony. An attorney who anticipates that a client might require alimony at some future time can protect the client's interest by seeking reservation of jurisdiction. The practitioner should be prepared to show that while the client currently may be ineligible for alimony by virtue of present earning capacity, reservation of jurisdiction to award rehabilitative or indefinite alimony would not be an abuse of the court's discretion. The attorney also must demonstrate that other factors such as monetary, personal, and real property awards do not offset the client's foreseeable future need for alimony. Because the court will not reserve jurisdiction if the only basis for reservation is some vague expectation of changed circumstances, the practitioner should be prepared to enumerate the reasons underlying the contention that a foreseeable change in circumstances may necessitate future alimony.

Conversely, the attorney opposing reservation of jurisdiction to award alimony should demonstrate that the facts of the case under consideration do not justify reservation. The attorney should show that the request for reservation of jurisdiction is based solely on a possible change in the spouse's circumstances due to age, infirmity,

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37. 308 Md. at 528, 520 A.2d at 1086.
38. Id. at 529, 520 A.2d at 1087.
39. Id., 520 A.2d at 1088.
40. Id. at 530, 520 A.2d at 1088.
41. In McAlear v. McAlear, 298 Md. 320, 469 A.2d 1256 (1984), the court discussed the distinction between a monetary award and an award of alimony. A monetary award typically is made to achieve an equitable distribution of property acquired during the marriage and to compensate for the monetary and nonmonetary contributions made by the spouses before the dissolution of the marriage. An alimony award provides for appropriate spousal support after dissolution of the marriage. A monetary award is an adjustment of the marital property interests of the spouses and is not enforceable by contempt proceedings as are alimony awards. Id. at 348-52, 469 A.2d at 1270-73.
disability, or disparity in living standards which neither presently exists nor is foreseeable. According to Turrisi, the court will not grant a request for reservation of jurisdiction premised on these grounds alone.

C. Child Support

In Knill v. Knill the Court of Appeals refused to apply the doctrine of equitable estoppel against a husband who denied the duty to support a child who, though born to his wife during wedlock, was not his natural son. In a four-to-three decision, the court adopted the view of the majority of jurisdictions, which have refused to apply equitable estoppel in similar situations. The court’s holding rested on its finding that the child incurred no financial detriment because the husband willingly had provided support prior to the divorce.

The couple married in 1960 and had two children before the husband underwent a vasectomy in 1968. In 1970 the wife gave birth to a son whom both parties agreed was not the husband’s natural son. Nonetheless, the marriage continued for another twelve years with the couple rearing the child as a member of the family. The husband’s name appeared as father on the child’s birth certificate, and the husband’s will named the child as his son and chief beneficiary. At no time did the wife attempt to receive any support from the child’s natural father. According to the record, the husband neither encouraged nor discouraged her from seeking such support.

43. Id. at 539, 510 A.2d at 552.

California and New Jersey have applied equitable estoppel to prevent a husband from denying paternity and a support obligation. See In re Marriage of Johnson, 88 Cal. App. 3d 848, 152 Cal. Rptr. 121 (1979) (applying equitable estoppel); Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961) (establishing criteria for applying equitable estoppel, but not applying the doctrine to the facts of the case); Miller v. Miller, 97 N.J. 154, 478 A.2d 351 (1984) (finding that although equitable estoppel may apply to step-parent, not applicable to case at bar); M.H.B. v. H.T.B., 100 N.J. 567, 498 A.2d 775 (1985) (per curiam) (Handler, J., concurring) (applying equitable estoppel to step-parent).
45. 306 Md. at 537, 510 A.2d at 551.
46. Id. at 529, 510 A.2d at 547.
47. Id. at 540, 510 A.2d at 552 (Murphy, C.J., dissenting).
48. Id. at 530, 510 A.2d at 547.
The child was unaware of his illegitimacy until the age of eleven, when his mother told him the truth after a family argument. Nevertheless, the husband continued to support the child for the next two years. When the wife sued for divorce in 1984, she requested support for the child. Her husband asserted in turn that because the child was not his natural son, he had no legal duty to support him.49

At trial, a man whom the mother had identified as the child's natural father testified that while he knew the mother, because of his alcoholism, he could neither admit nor deny paternity. The evidence indicated that the alleged father was at all relevant times both available for process and financially able to support the child.50

The trial court issued a final decree of divorce and concluded that the husband was equitably estopped from denying an obligation to support the child. The husband appealed to the Court of Special Appeals. The Court of Appeals issued a writ of certiorari prior to argument in the intermediate appellate court.51

The husband denied that there existed any legal basis for imposing an obligation upon him to support a child not his own. At most he stood in loco parentis to the child during the time that he voluntarily supported him; such a relationship, being temporary in character, gave rise to no legal duty after the couple separated. Under Maryland law, because the husband was not the natural father, he bore no general obligation to support the child. The wife countered that by representing himself to her son and the community as the child's father, her husband now was equitably estopped to deny paternity.52 Furthermore, she argued that it would be "inequitable and unconscionable" to allow her husband to deny his duty to support her son after doing so since the child's birth.53

The court applied a three-pronged test to determine the applicability of equitable estoppel to this situation. First, there must be "voluntary conduct" or a representation by the party sought to be estopped. Second, the estopping party must have relied on the representation. Finally, the reliance must result in detriment to the estopping party.54

Both the majority and dissent agreed that the elements of rep-

49. Id. at 529-30, 510 A.2d at 547.
50. Id. at 520, 510 A.2d at 547.
51. Id.
52. Id. at 530-31, 541, 510 A.2d at 548, 553.
53. Id. at 532, 510 A.2d at 548.
54. Id. at 535, 510 A.2d at 550.
presentation and reliance were present in the case at bar. A representation that the husband was the child's father was implicit in the twelve years during which the husband fully supported the child as a member of the family. The child relied on that representation, using his supposed father's surname and living in the community as a member of the family. Furthermore, the child believed the husband was his father until the day his mother told him the truth.

The majority and dissent disagreed, however, over the nature of detriment necessary to trigger equitable estoppel. The majority focused on the lack of evidence demonstrating any financial detriment incurred by the child as a result of the husband's course of conduct during their relationship. There was no evidence that her husband's voluntary support caused the wife to forego the possibility of seeking support from the child's natural father. The majority further concluded that the lack of any statute of limitations in paternity cases and the availability and accuracy of genetic testing still allowed the wife the opportunity to bring suit against the natural father. Thus, the majority concluded that the wife was obliged to look to her son's natural father for support. The "humiliation of having no support from a man who for all purposes was his father for fourteen years" did not constitute the type of detriment to the child which gives rise to equitable estoppel in the absence of financial loss.

The dissent, on the other hand, initially maintained that the child did suffer "obvious financial detriment." It viewed a successful paternity action against the child's natural father after so many years would not constitute financial loss but rather a "moral obligation" of support. The dissent highlighted the importance of maintaining the natural father's role in the child's life despite the father's absence.

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55. Id. at 536, 553, 510 A.2d at 551, 559.
56. Id. at 536-37, 510 A.2d at 551.
57. Id. at 537, 510 A.2d at 551.
58. Id.
59. Id.
61. 306 Md. at 538 & n.2, 510 A.2d at 551 & n.2. In 1982 the General Assembly authorized the use of blood testing that is "sufficiently extensive to exclude 97.3% of alleged fathers who are not biological fathers and the statistical probability of the alleged father's paternity is at least 97.3%." See MD. FAM. LAW CODE ANN. § 5-1029(e) (1984).
62. 306 Md. at 538, 510 A.2d at 551.
63. Id., 510 A.2d at 551-52.
64. Id. at 541, 510 A.2d at 553 (Murphy, C.J., dissenting).
years as unlikely. Furthermore, the dissent maintained that even without financial detriment the doctrine of equitable estoppel should apply in this case. The child suffered sufficient harm in being suddenly bereft of both paternal support and community acceptance as a legitimate member of the family.

The Family Law Article provides that the parents of a minor child are "jointly and severally responsible for the child's support." The term "parents of a minor child" encompasses both natural and adoptive parents, but while the duty of child support extends to the natural parents of an illegitimate child, it does not extend to step-parents. Accordingly, the responsibility for child support rests squarely on the shoulders of the natural parents.

The court's holding affirms this responsibility. On its face, the holding indicates that equitable estoppel only will assist the natural parent of an illegitimate child in seeking child support from a former spouse when there is financial harm to the child. Furthermore, the other natural parent may have to begin supporting the child financially many years after the child's birth, even if the spouse has assumed that responsibility in the meantime.

The split of the court and the dissent's vigor, however, suggest that the court may be willing to confine this holding to its facts: cases in which the child's father is ascertainable and financially able to support his child, and in which the record gives no indication

65. Id. at 553, 510 A.2d at 559.
66. Id. at 541, 510 A.2d at 553.
67. Id. at 553, 510 A.2d at 559. The dissent also noted that "it is not reasonable to expect [the child], after the passage of sixteen years, to establish a paternal relationship with another man who, because of his alleged drunkenness, has no recollection one way or the other whether he ever engaged in sexual intercourse with [the child's] mother." Id.

69. Id. § 5-308(b).
71. See Bledsoe, 294 Md. at 193-94, 448 A.2d at 359; Brown, 287 Md. at 284, 412 A.2d at 402.
72. 306 Md. at 546, 510 A.2d at 556 (Murphy, C.J., dissenting). The dissent noted that the majority of jurisdictions also have refused to apply the doctrine of equitable estoppel in cases in which a child suffered little emotional damage from learning of his or her illegitimacy. Id. at 546-47, 510 A.2d at 556.
73. The majority noted that the natural father was "at all times available for process and financially able to support Stephen." Id. at 580, 510 A.2d at 547. The dissent pointed out that other jurisdictions have not conducted such inquiries. Id. at 546, 510 A.2d at 555-56.
that the former husband prevented the mother from obtaining support from the natural father.

Both the majority and dissent advanced public policy reasons for their respective positions. The dissent characterized the husband's silence regarding the child's illegitimacy as being "in itself, neither wrongful nor unconscionable." The effect of the husband's voluntary assumption of the parental role over such an extended period, however, would render it inequitable for him now to deny the child's legitimacy and his responsibility for support until the child's eighteenth birthday. The majority, on the other hand, concluded that when the husband knew the child was not his son, yet treated him as a member of the family, such conduct was "consistent with this state's public policy of strengthening the family, the basic unit of civilized society." The court sought to encourage spouses to undertake, when feasible, the support, guidance, and rearing of each other's children so long as their conduct does not deprive the children of the right to support from the natural parents. The majority did not wish to penalize the husband for his conduct. Thus Maryland law now provides a person who is considering whether to support a spouse's illegitimate child with an incentive to do so without fear of continued support obligations in the event of divorce.

D. Paternity

The Court of Appeals declared in Adams v. Mallory that a trial court may not enter an ex parte default judgment on the issue of paternity against an alleged father as a sanction for his failure to respond to interrogatories which include questions concerning paternity. In so holding, the court extended the protection which the Family Law Article already provides an alleged father in a paternity proceeding.

In July 1984 a single mother filed a paternity petition in which she named Kevin Adams as the father of her child born the previous month. Adams repeatedly denied paternity during pre-trial court

74. Id. at 554, 510 A.2d at 559-60.
75. Id., 510 A.2d at 560.
76. Id. at 538, 510 A.2d at 552.
77. Id. at 538-39, 510 A.2d at 552.
78. Id. at 559, 510 A.2d at 552.
80. Id. at 467, 520 A.2d at 378.
81. See infra notes 104-110 and accompanying text.
appearances.\textsuperscript{82} The State's Attorney for Baltimore City, acting as counsel for the mother,\textsuperscript{83} sent interrogatories to Adams three months before the scheduled trial date. After receiving no response despite the attorney's subsequent warning to Adams, the mother filed a motion for default judgment or sanctions.\textsuperscript{84} On the scheduled trial date, Adams appeared without counsel and requested a postponement. The trial judge denied Adam's request and later granted the mother's request for a default judgment against Adams for failure to answer the interrogatories.\textsuperscript{85}

A month later a decree determining paternity was signed, declaring Adams to be the father of the child and awarding custody to the mother. Adams was not present at this \textit{ex parte} hearing.\textsuperscript{86} When all parties appeared in circuit court three months later, Adams insisted that he was not the child's father and that he never had received a jury trial on that issue. The court indicated that it was too late for him to raise the issue, because he had failed to appeal the default judgment within thirty days.\textsuperscript{87} After hearing testimony on the remaining issues, the court issued a modified paternity decree which obligated Adams to pay child support and hospital costs.\textsuperscript{88}

Adams appealed to the Court of Special Appeals on the issue of paternity, but the court concluded that the appeal was untimely.\textsuperscript{89} The Court of Appeals, however, granted Adam's petition for a writ of certiorari and determined that the appeal in fact was timely, as it was filed within thirty days from the order that determined the last open claim.\textsuperscript{90}

\textsuperscript{82} 308 Md. at 455-56, 520 A.2d at 372-73. Adams first denied paternity before a hearing examiner at the Domestic Relations Division following the filing of the petition. In October Adams again denied paternity before a circuit court judge and requested a blood test. In January 1985, after the blood test results indicated an 83.44\% probability of paternity, Adams repeated his denial of paternity and requested a jury trial. \textit{Id.} at 455-57, 520 A.2d at 372-73.


\textsuperscript{84} 308 Md. at 457, 520 A.2d at 373.

\textsuperscript{85} \textit{Id.} The court considered arguments before entering a default judgment pursuant to \textit{Md. R. 2-433(a)}.

\textsuperscript{86} The decree ordered that "all other issues, including visitation, child support, [and] reimbursement of hospital costs" be postponed until a later hearing with Adams present. 308 Md. at 458, 520 A.2d at 373-74.

\textsuperscript{87} \textit{Id.}, 520 A.2d at 374.

\textsuperscript{88} The modified decree also stated that the mother would retain custody and guardianship of the minor child, subject to reasonable visitation rights. The decree further required Adams to reimburse the city for the costs of the blood test. \textit{Id.} at 458 n.7, 520 A.2d at 374 n.7.

\textsuperscript{89} \textit{Id.} at 458, 520 A.2d at 374. The per curiam opinion of the Court of Special Appeals was unreported. \textit{Id.}

\textsuperscript{90} \textit{Id.} at 463, 520 A.2d at 376. The mother relied on \textit{Himes v. Day}, 254 Md. 197,
Adams argued that the Family Law Article, which establishes the scheme for resolving the issues involved in paternity proceedings, prohibits propounding any interrogatories to an alleged father. The mother countered that since paternity proceedings are civil in nature, interrogatories are available.

The Maryland Rules permit a discovering party to move for sanctions without first obtaining an order compelling discovery when the opposing party fails to file a response to interrogatories after proper service. A trial court has the discretion to enter a judgment by default against a party who fails to comply with discovery requests. The Court of Appeals noted that a complete prohibition against interrogatories would forbid questions concerning the alleged father’s financial status and fitness for custody. Finding it unnecessary to reach this broad issue, the court narrowed its inquiry to the propriety of entering a default judgment for failure to answer interrogatories directed at the issue of paternity.

The court embarked upon an analysis of the Family Law Article, noting that procedural rules apply to paternity proceedings only to the extent that they are practical and consistent with the statutes. Many of the article’s provisions are designed to ensure that an alleged father is not compelled to present evidence. An alleged father is under no obligation to file a written answer to the complaint. If he does not respond in writing or admit any of the material allegations of the complaint in open court, the court then must enter a general denial of the complaint on his behalf. Thus,

254 A.2d 181 (1969), which held that under the then-existing rules of procedure a default judgment on the issue of liability alone, when entered for failure to respond to a complaint, was a final judgment. The Court of Appeals noted that under the current rules of procedure, such a default judgment is now an “order of default” and is no longer appealable as a final judgment. Therefore, the rule of Himes did not apply to an order of default entered as a discovery sanction under rule 2-433. 308 Md. at 459-61, 520 A.2d at 374-75.

92. 308 Md. at 466, 520 A.2d at 378.
93. Md. R. 2-432(a).
94. Id. 2-433.
95. 308 Md. at 466, 520 A.2d at 378.
96. Id.
98. 308 Md. at 466, 520 A.2d at 378.
99. Md. Fam. Law Code Ann. § 5-1012(a), (c) (1984). If the alleged father appears for trial without filing a written answer or files a written answer admitting the complaint, and is not represented by counsel, the court must read or explain the complaint to him to ensure that he understands the nature and substance of the allegations. Id. at (d).
100. Id. at (c).
a trial court may not enter a default order or a default judgment if the alleged father does not answer the complaint.\textsuperscript{101}

The court reasoned that because there can be no default judgment for failure to respond to the complaint, it would be inconsistent to permit a default judgment for failure to answer interrogatories on the issue of paternity.\textsuperscript{102} The court thus concluded that Adams was entitled to a trial on the issue of paternity and directed a remand.\textsuperscript{103}

As the court noted, the General Assembly has provided an alleged father with many protections in a paternity proceeding under the Family Law Article.\textsuperscript{104} A notice that the defendant has the right to a jury trial on the issue of paternity must accompany the complaint.\textsuperscript{105} If the defendant undergoes a blood test, the State’s Attorney may issue a summons requiring a third party to appear, to testify, and to produce documents connected with the examination.\textsuperscript{106} The State’s Attorney then must notify the defendant of the time and place of such a pretrial inquiry and of his right to appear and present evidence.\textsuperscript{107} The alleged father faces no compulsion to present evidence at the trial itself,\textsuperscript{108} and no inference may be drawn from his failure to testify.\textsuperscript{109} The mother bears the burden of establishing by a preponderance of the evidence that the defendant is the child’s father.\textsuperscript{110}

The court’s holding is consistent with these statutory protections and the explicit provision that a rule of procedure applies only to the extent that it is not inconsistent with statute. Because failing to answer the complaint may not trigger a default judgment, refusing to answer an interrogatory concerning paternity should not trig-

\textsuperscript{101} 308 Md. at 464, 520 A.2d at 377.
\textsuperscript{102} Id. at 467, 520 A.2d at 378.
\textsuperscript{103} Id., 520 A.2d at 378-79. The court ordered that if on remand the circuit court found that Adams was the child’s father, it should enter judgment accordingly. If, on the other hand, the mother failed to prove that Adams was the father, the court should strike all orders entered against Adams which depended upon a determination of paternity. Adams did not challenge the awarding of custody to the mother. Id., 520 A.2d at 379.
\textsuperscript{104} Id. at 463-66, 520 A.2d at 376-78.
\textsuperscript{106} Id. § 5-1019(b)(1). The State’s Attorney also has the power to administer oaths, examine witnesses, and receive evidence. Id. at (b)(2)-(4).
\textsuperscript{107} Id. § 5-1020(1), (2). At the pretrial hearing, the alleged father also has a right to testify on his own behalf, subject to his signing a waiver that permits his testimony to be used against him in the paternity proceeding. Id. at (3).
\textsuperscript{108} Id. § 5-1028(d).
\textsuperscript{109} Id. § 5-1027(c).
\textsuperscript{110} Id. § 5-1028(a).
ger one either. Unfortunately, the court’s narrow holding provides little guidance for parties in future paternity cases.

The court assumed that interrogatories, including those directed to the paternity issue, are permitted in paternity actions.\footnote{111. 308 Md. at 466, 520 A.2d at 378.} The court further assumed that the privilege against compulsory testimony does not excuse the failure to answer interrogatories.\footnote{112. \textit{Id.} at 466-67, 520 A.2d at 378.} A mother today will be unsure as to whether she can expect a response to an interrogatory directed at the issue of paternity. Furthermore, she is unsure what, if any, sanctions will deter an alleged father from evading such an interrogatory. Although the court did hint that interrogatories directed to issues of financial status and fitness for custody may be proper, it avoided determining whether any interrogatories in fact are permitted in a paternity proceeding.

Similarly, an alleged father who receives interrogatories is unsure to which, if any, he must respond. Furthermore, he is uncertain as to what, if any, penalties he might face for refusing to answer any of the interrogatories. Nevertheless, the Court of Appeals explicitly has held that an alleged father who has refused to answer interrogatories concerning paternity still is entitled to a trial on the issue of paternity.\footnote{113. \textit{Id.} at 467, 520 A.2d at 378.} A future defendant seems to have little to fear for similar behavior.

\textbf{Brian M. Reimer} \\
\textbf{Tracey G. Turner}
VI. Property

A. Zoning

1. Interaction of State and Local Regulations.—In Ad + Soil v. County Commissioners the Court of Appeals held that compliance with local zoning ordinances was an implicit condition of the Maryland statute authorizing permits for sludge storage facilities. By so holding, the court defined a two-tiered system of permit regulation, in which local authorities may enact stringent zoning ordinances tailored to their jurisdiction's needs without conflicting with state law. Because the conditional use provisions of the sludge storage ordinances were reasonable and consistent with state requirements, the court mandated compliance with the county's guidelines.

Ad + Soil, Inc. was engaged in the business of disposing of processed sewage sludge. Ordinarily, Ad + Soil would remove the sludge from the treatment plants and apply it as a fertilizer in the fields of cooperating farmers. When weather conditions did not permit the application of fertilizer, Ad + Soil stored the sludge at facilities such as the one at issue in Queen Anne's County, Maryland. Ad + Soil obtained the necessary state approval for the storage facility's site and construction plans from the Department of Health and Mental Hygiene in June 1983 and began operations immediately. It did not seek approval from the county zoning board.

In August 1983 the Zoning Administrator for Queen Anne's County ordered Ad + Soil to cease all activity at the site until Ad +

2. Id. at 335-38, 513 A.2d at 907-09.
3. Id.
4. Id.
5. Ad + Soil's contract with the District of Columbia required the disposal of "at least" 200 tons of sludge per day. Id. at 310, 513 A.2d at 894.
6. Id. Ad + Soil actually began operations earlier in Queen Anne's County. In 1982 operations commenced at another site that Ad + Soil later learned was zoned exclusively for agriculture. It moved to the location at issue in early 1983. Id. at 311, 513 A.2d at 895.
8. 307 Md. at 312, 513 A.2d at 895. Queen Anne's County derives its enabling authority in land use and zoning from Md. Ann. Code art. 66B, § 4.01(a)-(b) (1983), which empowers the county "to regulate and restrict . . . the location and use of . . . structures and land," and to "impose such additional restrictions, conditions, or limitations as may be deemed appropriate to . . . protect the general character . . . of the surrounding or adjacent lands."
Soil obtained the requisite county zoning permits.\(^9\) The county also required Ad + Soil both to obtain a release from the existing conditional use provisions imposed on the facility and to obtain a conditional use permit to operate a sludge facility.\(^10\) The county granted the zoning permit contingent on Ad + Soil's application for the conditional use permit; Ad + Soil, however, failed to apply for the conditional use permit and continued operating the facility.\(^11\) In December 1983 the State authorized a permit for Ad + Soil to operate based on the site and construction plans previously approved by

\(^9\) 307 Md. at 312, 513 A.2d at 895. Local zoning boards may impose conditional use provisions on facilities if those facilities are potentially an inconvenience or hazard to the community. One author, in discussing the reasons for granting "conditional use" or "special" permits, defines the typical standard as requiring

1. that the use must be in harmony with the intent and purpose of the locality's zoning law and comprehensive plan; 2. that it will not adversely affect the health, safety and welfare of the community; 3. that it will not seriously depreciate surrounding property values; 4. that it must be a matter of public need or convenience; 5. that the use will not contribute toward an overburdening of municipal services; and 6. that it will not cause traffic, parking, population density or environmental problems.

6 P. ROHAN, ZONING AND LAND USE CONTROLS § 44.03(1) (1986).

\(^10\) 307 Md. at 312, 513 A.2d at 896. The existing conditional use decision concerning the property authorized the operation of a sand and gravel quarry on the land, but required the land to be restored following excavation. Id. at n.5, 513 A.2d at 895 n.5. Additional conditional use provisions imposed by the county appear in the amendments of the Queen Anne's County Zoning Regulations, passed on October 25, 1983. Although Ad + Soil obtained the permits before October 1983, the court found that the amendments, which expressly made sludge storage a conditional use, nonetheless were applicable. The amendments permitted the land to be used for

Storage and Distribution of Sewage Sludge provided that: . . . b) there be an approved Sediment Control Plan; c) a minimum freeboard of two (2) feet be maintained at all times; d) the storage facility shall be located in a relatively level area; e) the storage location shall be located a minimum of one hundred (100) feet from any property line, two hundred (200) feet from any road, one hundred fifty (150) feet from any drainage, ditch, swale or gully, and a minimum of three hundred (300) feet from any stream, lake, pond or other body of water; f) facilities be provided for washing off and cleaning of vehicles before they leave the site to assure that no sludge, mud or dirt will be brought onto public roads; g) the entrance to the site shall be approved by the County or State Highway Department whichever is applicable; h) that applicant has obtained all permits from the Department of Health and Mental Hygiene. The Board shall obtain an adequate bond or other satisfactory guarantee to insure compliance with these requirements and any other requirements the Board may impose in accordance with Section 20.44. The Board shall also give specific consideration to the limitations, guides and standards as outlined in Section 20.5. The Board may increase the above required setbacks, depending on site condition, and to assure that the applicant will meet all Federal, State and Local requirements.


\(^11\) 307 Md. at 313-14, 513 A.2d at 896.
the Department of Health and Mental Hygiene.\textsuperscript{12}

Several months after commencing full operations, Ad + Soil applied for variances from the conditional use permit.\textsuperscript{13} The Board of Zoning Appeals denied the applications, noting that Ad + Soil failed to show that the variances would be neither a substantial detriment to adjacent property nor contrary to the purpose of the ordinance.\textsuperscript{14} The board stressed the storage facility's threat to the public health, the jeopardy to the local residents' peaceful enjoyment of their homes, and the potential for diminished property values surrounding the facility. On appeal the circuit court affirmed the board's orders.\textsuperscript{15} The Court of Appeals granted certiorari before the Court of Special Appeals considered the issues in the case.\textsuperscript{16}

The Court of Appeals first noted that the State had not preempted the field in sludge storage utilization\textsuperscript{17} and that the local ordinances did not irreconcilably conflict with the state statute authorizing Ad + Soil's permit.\textsuperscript{18} In so noting, the court disagreed with Ad + Soil's contention that the ordinances gave the local authorities the ability to prohibit what the State, by general public law, permitted.\textsuperscript{19} The court determined that the legislature did not intend to vest absolute authority in the State and thereby preclude the enactment and enforcement of local zoning ordinances.\textsuperscript{20} Rather, "the state permits must be viewed as authorization . . . subject to the lawful requirements of the applicable zoning regulations."\textsuperscript{21} If the

\textsuperscript{12} Id. at 314, 513 A.2d at 896.
\textsuperscript{13} Id. These variances were necessary in order to satisfy the requirements for the conditional use permit. Id. at 315, 513 A.2d at 897.
\textsuperscript{14} Id. The court noted that "[b]ecause of undisputed evidence regarding the emanation of odors from Ad + Soil's facilities, and what it viewed as unresolved questions as to the facilities' impact on the local environment, the Board . . . denied the permit." Id.
\textsuperscript{15} Id. at 317-18, 513 A.2d at 898. The appeal to the Circuit Court noted in the text was actually Ad + Soil's second appeal. The first appeal resulted in an agreement to allow the sludge removal company to file another application with the Board of Zoning Appeals. In the second appeal the circuit court found that the board's denial of Ad + Soil's second application for a conditional use permit was neither arbitrary nor capricious. Id.
\textsuperscript{16} Id. at 318, 513 A.2d at 898.
\textsuperscript{17} Id. at 334-35, 513 A.2d at 906-07.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 335, 513 A.2d at 907.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 336, 513 A.2d at 908. The court considered Ad + Soil's contention that City of Baltimore v. Sitnick, 254 Md. 303, 255 A.2d 376 (1969), mandated reversal of the circuit court decision. Sitnick held that a local jurisdiction could not prohibit what the State's general public law permitted. Id. at 317, 255 A.2d at 376. Ad + Soil contended
local requirements are not inherently unreasonable, then compliance with them is mandated.\textsuperscript{22} The state and local requirements therefore are concurrent, with the state permit procedure functioning as a general framework supplemented by local provisions. In ruling against Ad + Soil, the court stressed that the corporation could have complied with the conditional use requirements but did not.\textsuperscript{23}

Insofar as it deals with zoning regulations, Ad + Soil is a case of first impression. Maryland courts, however, have addressed analogous issues involving a choice between doctrines of “direct conflict”\textsuperscript{24} and “concurrence of powers.”\textsuperscript{25} In Heubeck \textit{v.} City of Baltimore,\textsuperscript{26} for example, the Court of Appeals struck down a city ordinance which forbade the eviction of a tenant at the expiration of a lease, when a state law permitted eviction. Though Heubeck involved a direct conflict between state and local laws, it implicitly defined the boundary between irreconcilable conflict and concurrence of power. The court noted that “[a] conflict only exists . . . when an ordinance prohibits something permitted by the Legislature, or permits something prohibited by the Legislature.”\textsuperscript{27} The court furthered this notion in \textit{American National Building \& Loan Association v. Mayor \& City Council of Baltimore}\textsuperscript{28} by determining that general state law was not intended to draw an impermissible line between state and local authority, “but rather . . . to define the inclusive limits of the State’s power.”\textsuperscript{29}

\textit{City of Baltimore v. Sitnick},\textsuperscript{30} a case upon which Ad + Soil relied,\textsuperscript{31} addressed these same principles with respect to minimum wage regulations. The \textit{Sitnick} court discussed the characterization of local regulation as supplementary to state law, thus finding an alter-

native to the choice between concurrent powers and direct conflict solutions. The court stressed that while there may be times when the legislature so forcefully expresses its intent to occupy a specific field that preemption is implied, the court must exercise caution, because applying preemption too broadly would render worthless the concept of local rule. The court found it preferable to view the local ordinance as a supplement to the state statute.

In adjudicating zoning issues the Court of Appeals has defined the reasonable limits of zoning regulations. These cases stress that local authority should have the power to impose conditional uses to promote the health, safety, morals, or general welfare of the community. Therefore, even before Ad + Soil, the court had recognized the need for local control over zoning regulation. Furthermore, the Court of Appeals has created a presumption that conditional use requirements are for the benefit of the community and that the burden to show otherwise rests with the applicant.

In Ad + Soil the Court of Appeals firmly established a two-tiered system of zoning regulation compliance—state and local law. By upholding the Queen Anne’s County ordinances, Ad + Soil fosters local control in maintaining facilities that potentially may affect the health and safety of local citizens as well as the value of adjacent property. In essence, it creates a system in which broad state law and focused local ordinances are not seen to conflict, but are concurrent in existence. Therefore, the decision facilitates zoning regulation tailored to serve the needs of each county. In addition, it places a stringent burden on those seeking special exceptions to prove the unreasonableness of conditional use regulations and

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32. 254 Md. at 324, 255 A.2d at 386.
33. Id.
34. Id. For an interesting discussion of this issue, see Moser, County Home Rule—Sharing the State’s Legislative Power with Maryland Counties, 28 Md. L. Rev. 327 (1968).
35. See Lucky Stores v. Montgomery County, 270 Md. 513, 312 A.2d 758 (1973) (a special exception to conditional use is subject to a strong showing of “need”); Rockville Fuel & Feed Co. v. City of Gaithersburg, 257 Md. 183, 262 A.2d 499 (1970) (administrative board cannot deny a special exception to conditional use absent probative evidence of harm or disturbance to neighborhood and disharmony with the general plan for the development of the district); Skipjack Cove Marina v. Cecil County, 252 Md. 440, 250 A.2d 260 (1968) (a subsequent purchaser takes property subject to prior decision of the zoning board, but may be granted a special exception upon a showing of significant change of condition); Prince George’s County v. Lightman, 251 Md. 86, 246 A.2d 261 (1967) (in determining reasonable conditional uses for filling station, testimony must show both that the proposed exception is in harmony with the general plan for the development of the district, and that it would not adversely affect the health and safety of adjacent properties or the general neighborhood).
36. See generally 6 P. Rohan, supra note 9, §§ 44.03-.04.
curbs the circumvention of local authority under the guise of state preemption or irreconcilable conflict.

2. Defense of Equitable Estoppel.—The Court of Appeals held in Permanent Financial Corp. v. Montgomery County that Montgomery County was equitably estopped from claiming that a building's upper floor exceeded the height limitation imposed by the local zoning ordinance, despite a Montgomery County Board of Appeals ruling that the height was not in compliance with the Montgomery County Code. The court found that the builder had designed and constructed the building in reasonable reliance on a building permit issued according to a long-standing interpretation of the code's requirement for calculating a building's height.

Pursuant to a Montgomery County building permit, Permanent Financial Corporation (Permanent) began construction of a four-story office building. The structure's design incorporated a penthouse used primarily to house mechanical equipment. Two million dollars and eight and one-half months later, when the structural shell of the building was complete, the county suspended the building permit and issued a stop-work order on the grounds that the building violated statutory height limitations, set-back requirements.

37. 308 Md. 239, 518 A.2d 123 (1986).
38. The height limitation under the method of construction used in this structure is established by MONTGOMERY COUNTY, MD., CODE § 59-C-6.235 (1984). Ordinarily, the maximum permissible building height in the area in question is 60 feet. When the property adjoins or is directly across the street from certain residential zones, however, as was the case here, the maximum building height is "35 [feet] plus an additional 8 feet for nonhabitable structures." 308 Md. at 243, 518 A.2d at 125 (citing MONTGOMERY COUNTY, MD., CODE § 59-C-6.235 (1984)). The measurement of the building height as shown on the plans submitted by Permanent and measurement from the actual construction was 43 feet to the top of the fourth floor and 53 feet to the highest point on the penthouse roof, therefore exceeding the height requirements. Id.
39. 308 Md. at 239, 518 A.2d at 123. The Court of Special Appeals applied equitable estoppel against a municipality in Leaf Co. v. Montgomery County, 70 Md. App. 170, 178, 520 A.2d 732, 737 (1987) (county estopped from denying the existence of a contract when the county code was "open to at least two reasonable and debatable interpretations" in construing the writing requirement for contract renewal).
40. The court considered Permanent's contention that (1) the penthouse had a mansard roof, and therefore did not violate the height restrictions because of the method of measurement for such a roof, and (2) that the penthouse housed mechanical equipment incident to the use of the building and therefore was exempt from the height limitations. The court ruled against Permanent's position in both respects. 308 Md. at 243-45, 518 A.2d at 125-26.
41. See supra note 38.
ments, and floor area ratio restrictions. Permanent filed an application for variances and appealed to the Montgomery County Board of Appeals, but the board refused to grant any variances and denied relief from the suspension and the stop-work order. Both the Circuit Court for Montgomery County and the Court of Special Appeals affirmed the board's decision. The Court of Appeals granted certiorari principally to consider Permanent's contention that equitable estoppel should be applied against the county. The court concluded that because of the penthouse, Permanent failed to meet the floor area ratio and set-back requirements; thus, the board did not err in refusing to set aside the suspension and the stop-work order or to grant the variances. The court also concluded, however, that the county was estopped from contending that the fourth floor of the building violated height restrictions of the Montgomery County Code.

Because the code's definition of nonhabitable structures "was open to at least two reasonable and debatable interpretations," and Permanent had "clearly relied upon the interpretation the County had given to the height limitation in its design of the building," the court concluded that "it would be inequitable to now permit the County to require the removal of the fourth floor."

42. The building as constructed was 53 feet high and would require setbacks from the right-of-way lines of 3 feet, 10 inches as calculated under § 59-C-6.236(b)(2) (a 1-foot setback is required from any right-of-way for every 6 feet of height by which a building exceeds 30 feet). As constructed, a portion of the cellar wall and portions of the third and fourth floors violated these setback requirements. 308 Md. at 255-56, 518 A.2d at 131.

43. The floor area ratio permitted by the code for this building was 1.0, which means that the gross floor area of the building could not exceed the area of the lot upon which it is built. The design's inclusion of a penthouse as well as an expansion to the first floor plans created an unacceptable floor area ratio of 1.26. Id. at 253, 518 A.2d at 130.

44. Id. at 242, 518 A.2d at 124.
45. Id.
46. Id. at 253-56, 518 A.2d at 130-31. The court stated in the conclusion of the opinion:

For the reasons we have outlined, the County is estopped to prevent construction of this building to a height of 43 feet. If the penthouse is modified to fit within the exemptions from height controls, Permanent will have satisfied the height restrictions of the ordinance. However, because the building currently violates height, setback and FAR [floor area ratio] restrictions, the building permit was properly suspended and the stop work order properly issued.

Id. at 257-58, 518 A.2d at 132.
47. Id. at 242, 518 A.2d at 124.
49. 308 Md. at 251, 518 A.2d at 129.
50. Id. at 252, 518 A.2d at 129.
51. Id. at 252-53, 518 A.2d at 130.
The court recognized that it must apply the doctrine of equitable estoppel against municipal corporations narrowly, and that "'when applicable, [equitable estoppel] must be bottomed on the need for the interpretation or clarification of an ambiguous statute or ordinance.' "52

The county and Permanent offered conflicting interpretations of the Montgomery County Code's height restrictions,53 focusing on the definition of "nonhabitable structures." Permanent argued that the code permits a height of thirty-five feet plus eight feet for nonhabitable structures. Because Permanent planned to use the fourth floor for offices rather than living space, Permanent contended that the space was "nonhabitable" within the meaning of the code.54 Permanent thus viewed "nonhabitable structures" as the converse of "habitable space," deriving its definition of the latter from the BOCA Basic Building Code:55 "Habitable Space: Space in a structure for living, sleeping, eating, or cooking. Bathrooms, toilet compartments, closets, halls, storage or utility spaces and similar areas are not considered habitable space."56

The court noted that the Montgomery County Code57 adopted the BOCA Basic Building Code.58 Therefore, the definitions contained in the BOCA Code should apply in the interpretation of the

52. Id. at 251, 518 A.2d at 129 (quoting City of Hagerstown v. Long Meadow, 264 Md. 481, 493, 287 A.2d 242, 248 (1972)). Accord Kent County v. Abel, 246 Md. 395, 288 A.2d 247 (1967); Berwyn Heights v. Rogers, 228 Md. 271, 179 A.2d 247 (1962); Lipsitz v. Parr, 164 Md. 222, 164 A. 743 (1938).

53. The parties differed in their views as to whether the penthouse incorporated a mansard roof which would qualify the building for a height exception under § 59-B-1.1 of the code. The court ruled that the board was not clearly erroneous in finding the penthouse lacked a mansard roof. 308 Md. at 244-45, 518 A.2d at 125-26.

54. Id.

55. The Building Officials and Code Administrators, International, Inc. (BOCA) is a non-profit service organization responsible for the promulgation of a series of model codes relating to building, housing, and zoning. Gale Research Co., Encyclopedia of Associations § 3 (20th ed. 1986). The BOCA Code is a national model regulatory construction code providing detailed minimum standards and safe practices of construction, including general provisions relating to administration and enforcement.

In 1982 BOCA and the American Insurance Association reached an agreement whereby BOCA would assume rights to the NATIONAL BUILDING CODE, a model code first published in 1905 by the American Insurance Association's predecessor, the National Board of Fire Examiners. BOCA published a transitional code in 1984, the BOCA Basic/National Building Code (9th ed. 1984). The latest version of the consolidated model codes is the BOCA National Building Code (10th ed. 1987). The citations which follow, however, will refer to the version of BOCA's code cited by the court and the county.

56. BOCA Basic Building Code § 201.0 (1981).
58. 308 Md. at 246, 518 A.2d at 126.
The county contended that the board correctly determined that “the term ‘nonhabitable structures’ is intended to include only space occupied by water towers, water tanks, air conditioning units or similar mechanical appurtenances.” The court pointed out, however, that in the past the county had consistently applied the interpretation urged by Permanent, although “the County now adopts the Board’s interpretation as the correct one, and has amended its code accordingly.”

While the court refused to disturb the board’s narrow interpretation of “nonhabitable structures,” it recognized that the code’s ambiguity was “an important consideration in assessing the validity of Permanent’s claim of equitable estoppel.” In exploring the validity of this claim, the court summarized the principles of equitable estoppel and its application against municipalities under Maryland law. Because Permanent had expended substantial funds in reliance upon a building permit issued when the county and Permanent shared a common interpretation of the height requirement, the court found it reasonable to invoke estoppel.
against the county. 67

The Court of Appeals' decision in Permanent thus has two consequences. First, the decision provides a clear indication that the Court of Appeals will enforce the board's narrow definition of the height limitation in section 59-C-6.235 of the Montgomery County Code 68 and abandon the previously well-followed interpretation allowing a more flexible application. Second, the court will not hesitate to invoke equitable estoppel against municipal corporations in situations in which a party relied upon a reasonable interpretation of an ambiguous section of the county code, even when the party later is found to be in violation of the code as the court interprets it. 69

B. Landlord-Tenant

1. Regulation of Lead-based Paint Removal.—In Ronald Fishkind Realty v. Sampson 70 the Court of Appeals held that local regulations concerning lead-based paint removal were inapplicable in light of state law. The court found that state statutory law affords a tenant an escrow remedy to compel a landlord to remove lead-based paint easily accessible to children, even though the landlord has complied with local regulations. 71 In so ruling, the court determined that section 8-211.1 of the Real Property Article 72 does not conflict with the Board, becoming convinced of the validity of a contrary interpretation only after considering the testimony of the Chairman of the Planning Commission or perhaps the decision of the Board. 73

67. Id. at 247-53, 518 A.2d at 127-30. The court also discussed Permanent's assertion that the doctrine of laches barred the county's enforcement of the code. The court concluded that there was "no separate ground for laches in this case," id. at 256, 518 A.2d at 192, since "mere delay is not sufficient to constitute laches, if the delay has not worked a disadvantage to another." Lipsitz v. Parr, 164 Md. 222, 226-27, 164 A. 743, 745 (1933).

68. The code was amended in 1984. See supra note 62.

69. Estoppel is not necessary if variances can be obtained. In this case, however, Permanent was unable to qualify for a variance in the height restriction. The court acknowledged that the county employees should have detected the errors in the plans, but stated that Permanent "was the author of its own misfortune in failing to submit properly prepared plans." 308 Md. at 257, 518 A.2d at 132. The criteria for a grant of variance are found in MONTGOMERY COUNTY, MD., CODE § 59-G-3.1(a) (1984).

70. 306 Md. 269, 508 A.2d 478 (1986).

71. Id. at 273-74, 508 A.2d at 480-81.

72. Id. MD. REAL PROP. CODE ANN. § 8-211.1 (1988). The statute reads in relevant part:

(a) Right of lessee.—Notwithstanding any provision of law or any agreement, whether written or oral, if a lessor fails to remove any and all lead-based paint from any interior, exterior, or other surface that is easily accessible to a child or a residential premise within 20 days after notice that lead-based paint is
narrower Baltimore City regulations promulgated to address lead-based paint removal. The court reconciled section 8-211.1 with the local regulations by finding that the express language of the state statute indicates a meaning and application independent of local laws.

Denise Sampson filed an action in the District Court of Baltimore City pursuant to section 8-211.1 of the Real Property Article to compel her landlord, Ronald Fishkind Realty, to remove from her home any lead-based paint easily accessible to her children. At the time the tenant's two-year-old daughter lived with her in the apartment. The parties stipulated that medical tests did not reveal an elevated level of lead in the daughter's blood; furthermore, before the tenant instituted the action in district court, the landlord had removed the loose and flaking paint from the premises to the satisfaction of the Baltimore City Housing Department inspector. The district court considered these factors in ruling against the tenant.

Present on the surfaces of the residence, the lessee may deposit his rent in an escrow account with the clerk of the District Court of the district in which the premises are located.

(b) Other rights or remedies. — The right of a lessee to deposit rent in an escrow account does not preclude him from pursuing any other right or remedy available to him at law or equity and is in addition to them.

306 Md. at 273-74, 508 A.2d at 480-81. BALTIMORE, MD., PUBLIC LOCAL LAWS § 9.9 (1980) reads in relevant part:

(b) Where property situated in the City of Baltimore is leased for the purpose of human habitation, the tenant of such property may assert that there exists upon the leased premises, or upon the property used in common of which the leased premises form a part, a condition or conditions which constitute, or if not promptly corrected, will constitute a fire hazard or serious threat to the life, health, or safety of occupants thereof, including but not limited to, . . . the existence of paint containing lead pigment on surfaces within the dwelling, provided that the landlord has notice of the painted surfaces, and if such condition would be in violation of the Baltimore City Housing Code.

BALTIMORE, MD., HOUSING CODE § 706 (1987) provides:

All exterior portions of a dwelling or dwelling unit which are painted . . . shall be cleaned and freed of flaking, loose or defective surfacing materials . . . No paint shall be used for interior painting of any dwelling, dwelling unit, rooming house or rooming unit unless the paint is free from any lead pigment.

306 Md. at 280-86, 508 A.2d at 484-87.

Fishkind Realty itself had not applied the lead-based paint and argued that landlords should not be liable for removal unless they had painted the apartment. The court rejected this position because it would not hold lessors civilly responsible unless they acted criminally in applying the paint. Because Act of May 21, 1983, ch. 615, 1973 Md. Laws 1266, later partially recodified at § 8-211.1, contained separate provisions for civil and criminal liability, the court found that it was the General Assembly's intention to hold landlords civilly liable despite their innocence in applying the paint. 306 Md. at 277-78, 280-82, 508 A.2d at 482-84.

306 Md. at 272, 508 A.2d 479-80.

Id. at 271, 508 A.2d at 479.
determining that section 9.9 of the Baltimore City Code of Public Laws,\(^78\) rather than section 8-211.1 of the state statute, governed.\(^79\) Because the landlord had complied with the city's standards, the district court reasoned, no rent escrow action could proceed.\(^80\)

The circuit court reversed, finding that the General Assembly intended section 8-211.1 to apply throughout the State without regard to existing local law.\(^81\) The landlord appealed.

In reaching its decision, the Court of Appeals first reviewed the history of lead-based paint legislation in both Maryland and Baltimore City.\(^82\) It next examined the landlord's three proposed interpretations of the statute, each arguing that only local law applied to the facts.\(^83\) After considering the language of the statute\(^84\) and the landlord's assertions, the Court of Appeals agreed with the reasoning of the circuit court and concluded that section 8-211.1 was intended to apply uniformly throughout the state.\(^85\)

Lead-based paint in residential units has concerned federal, state, and local governments for many years.\(^86\) In 1970 it was estimated that as many as 400,000 children in the United States suffered from lead poisoning and that 200 died annually from the poisoning.\(^87\) Baltimore was cited as having a particularly high incidence of lead poisoning—as high as ten percent—among its "preschool slum children."\(^88\)

Baltimore City has tried to attack the lead-based paint hazard

\(^{78}\) See supra note 73.

\(^{79}\) Thus, the district court only required the removal of the flaking and peeling paint and would not allow a rent escrow remedy for the lead-based paint still intact though easily accessible to the daughter. 306 Md. at 271, 508 A.2d at 479.

\(^{80}\) Id.

\(^{81}\) Id.

\(^{82}\) Id. at 275-79, 508 A.2d at 481-84.

\(^{83}\) Fishkind Realty's proposed interpretations of § 8-211.1 were: First, "that § 8-211.1 of the Real Property Article applies not to the facts stipulated, but to different lead paint problems, leaving the plaintiff only with the remedy afforded by § 9.9 of the local laws of Baltimore City"; second, that the statute contains undefined terms which incorporate the lead-based paint abatement standards of BALTIMORE, MD., PUBLIC LOCAL LAWS § 9.9 (1981); and last, that § 8-211.1, a public general law, and § 9.9, a local law, conflict, and that § 9.9 displaces § 8-211.1. 306 Md. at 273, 508 A.2d at 480. For the court's rejection of these arguments, see id. at 280-85, 508 A.2d at 484-87.

\(^{84}\) For the text of the law, see supra note 72.

\(^{85}\) 306 Md. at 286, 508 A.2d at 487.


\(^{88}\) Id. at 6132.
several times. In the early 1960s the city enacted ordinances prohibiting the application of lead-based paint to the interior of residential units. The Court of Appeals upheld the regulations and imposed stiff penalties for violators. In 1971 the city enacted section 9.9 of the Code of Public Laws, the regulation at issue in Fishkind Realty. The language of section 9.9 permits a rent escrow remedy when, if not promptly corrected, a condition on the premises constitutes a "serious threat to the life, health or safety of occupants thereof." It further requires that the existence of paint containing lead pigment comply with the Baltimore City Housing Code. The applicable section of the code calls for removal of all "loose or peeling . . . paint."

The State also has enacted legislation to curb the lead-based paint problem. The General Assembly enacted the first and perhaps most stringent legislation in 1971. The statute prohibited the use of lead-based paint on any interior or exterior surface to which children could be exposed. The legislation was modified in 1972 to create both a criminal and civil penalty for the use of lead-based paint, while permitting the use of the paint in certain situations. Fishkind Realty involved the civil enforcement mechanism which provides for a rent escrow remedy when, after receiving notice, the

89. BALTIMORE, MD., HOUSING CODE § 706 (1987). For the text of the law, see supra note 73.
90. Givner v. Commissioner of Health, 207 Md. 184, 113 A.2d 899 (1955). The Givner court noted that ordinances providing for the abatement of conditions like lead-based paint are for the "better protection of the health of the city" and should not be narrowly limited. Id. at 190, 113 A.2d at 902.
91. BALTIMORE, MD., PUBLIC LOCAL LAWS § 9.9 (1980). For the text of the law, see supra note 73.
92. Id.
93. Id.
94. BALTIMORE, MD., HOUSING CODE § 706 (1987). See also id. §§ 401-402 (authorizing the formation of a committee to promulgate rules and regulations regarding the public health of Baltimore City).
95. For the text of the code, see supra note 73.
97. Id. The language deleted from the original bill is similar to that contained in Md. REAL PROP. CODE ANN. § 8-211.1 (1988).
98. Act of May 21, 1973, ch. 615, 1973 Md. Laws 1266 (current version at Md. REAL PROP. CODE ANN. § 8-211.1 (1988)). The statute holds a violator guilty of a misdemeanor and subject to a fine of not more than $1000 or imprisonment not exceeding 30 days, or both. In addition, each day that the violation continues constitutes a separate offense.
99. Id. For the relevant text of the statute, see supra note 72.
100. Id. The Act makes it lawful to apply lead-based industrial paint to household appliances.
landlord has failed to remove the lead-based paint easily accessible to children. The statute requires no proof of prior lead poisoning of the children, nor does it require the paint in the dwelling to be peeling or flaking.\footnote{101}

The focus of the opinion in \textit{Fishkind Realty} is that the state statute does not conflict with the local law,\footnote{102} and that it was intended to supplement the Baltimore City regulation.\footnote{103} In order to accomplish this result, the court found ambiguity in the local ordinance, thus giving the court the opportunity to reconcile the two laws. Nevertheless, this result is appropriate and far-reaching.

The applicable laws are unambiguous in their meaning and scope. Section 8-211.1 of the Real Property Article requires removal of "any and all lead-based paint from any interior, exterior or other surface that is easily accessible to a child."\footnote{104} Section 9.9 of the Public Local Laws, on the other hand, calls for removal of paint containing lead pigment only if it violates the Baltimore City Housing Code.\footnote{105} The code merely requires removal of "flaking, loose, or defective surfacing materials."\footnote{106} The court determined that the two laws were meant to co-exist and that the Real Property Article was intended to supplement local ordinances. If this were indeed the intention of the General Assembly in enacting section 8-211.1, then the scope of the Baltimore City Housing Code would be a nullity. On the other hand, it would have been inconceivable for the court to give weight to the local provisions and thereby render section 8-211.1 a fiction in Baltimore City.\footnote{107}

Despite its flawed attempt at reconciling two laws that clearly conflict, the opinion is an important part of Maryland's newest assault on the lead-based paint problem. In 1986 the General Assembly passed two bills aimed at evaluating and abating the lead-based paint hazard.\footnote{108} Part of that legislation creates a loan program to

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102. 306 Md. at 286, 508 A.2d at 487.
103. Id.
105. For the text of the law, see supra note 73.
107. The court in \textit{Fishkind Realty} made this point in determining that § 8-211.1 was to co-exist with and supplement § 9.9: "These phrases indicate that the General Assembly intended § 8-211.1 to supplement and co-exist with Baltimore City's local law, not that § 8-211.1 is a nullity in Baltimore City." 306 Md. at 284, 508 A.2d at 486.
\end{flushright}
help finance lead-based paint abatement. This program may have afforded the court flexibility in its decision to subject landlords statewide to the requirement of section 8-211.1, without regard to local law. Through its decision, the Fishkind Realty court sends a message to landlords that it is time to eradicate the lead-based paint hazard.

2. Violation of Maryland's Consumer Protection Act.—The Court of Appeals held in Golt v. Phillips that the advertising and subsequent rental of an unlicensed dwelling violated the Maryland Consumer Protection Act. The court imposed liability upon the landlord despite the tenant's inspection of the premises before moving in, finding that rental of the unlicensed dwelling failed to disclose a material fact and thus constituted an unfair and deceptive trade practice. Furthermore, the court determined that liability for failure to disclose a material fact did not require the landlord's scienter or knowledge that the building was licensed improperly for rental purposes. In so holding, the court awarded the tenant restitutionary and consequential damages.

In August 1983 John Golt responded to an advertisement for a

110. 308 Md. 1, 517 A.2d 328 (1986).
   Unfair or deceptive trade practices include any:
   (1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;
   (2) Representation that:
      (i) Consumer goods, consumer realty, or consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;
   (3) Failure to state a material fact if the failure deceives or tends to deceive.
   Id. § 13-301.
112. 308 Md. at 10, 517 A.2d at 332-33.
113. Id. at 10-11, 517 A.2d at 332-33. The substance of the court's statutory argument has three parts. First, the lack of proper licensing is a material fact that the landlord failed to state. Second, the failure to disclose this fact deceived, or had a tendency to deceive, the tenant. Therefore, these two components violated Md. Com. Law Code Ann. § 13-301(3) (1983). Third, the applicable statute did not require scienter on the part of the landlord. In examining § 13-301(1) and (2), the court noted that "the subsections require only a false or deceptive statement that has the capacity to mislead the consumer tenant." 308 Md. at 10-11, 517 A.2d at 332-33. For the relevant text of the statute, see supra note 111.
114. 308 Md. at 13-14, 517 A.2d at 334.
furnished apartment that had been placed in the East Baltimore Guide by Phillips Brothers and Associates. Golt inspected the apartment and noted several items that needed cleaning and repairing. After receiving Phillips Brothers' assurances that the necessary work would be done, Golt signed a month-to-month lease, paid the first month's rent, and made a $200 security deposit. He took possession of the premises soon after, and made further repair requests. Despite Golt's repeated requests, Phillips Brothers failed to complete many of the repairs.115

Golt contacted the Baltimore City Department of Housing and Community Development, which inspected the premises in October 1983.116 The inspector found that the landlord was in violation of the Baltimore City Housing Code because it lacked the proper license to operate the building as a multiple dwelling.117 In addition, the inspection revealed other housing code violations.118 The Department of Housing and Community Development issued violation notices and informed the landlord that it must correct the violations and either obtain the proper license or discontinue use of the building as a multiple dwelling. Choosing the latter, Phillips Brothers reduced the number of tenants in the building by evicting Golt.119 Moreover, the landlord refused to return a portion of Golt's security deposit, allegedly for rent due in November 1983. Golt brought suit in the district court.120

115. Id. at 5, 517 A.2d at 330. When Golt moved in, he learned that he would have to share the toilet facilities with the other tenants. See infra note 118.

116. Id. Golt contacted the city department specifically to bring its attention to the uncompleted repairs.

117. Id. See BALTIMORE, MD., CITY CODE art. 13, § 1101 (1983), which reads: "No person shall conduct or operate within the corporate limits of the City of Baltimore, any rooming house, multiple family dwelling, or any combination thereof, without having first obtained a license or a temporary certificate to do so as in this Chapter hereinafter provided."

118. 308 Md. at 5-6, 517 A.2d at 330. These violations included "the lack of toilet facilities in Golt's apartment, defective door locks, and the lack of fire exits and fire doors." Id.

119. Id. at 6, 517 A.2d at 330. Golt argued that the eviction was retaliatory, in violation of BALTIMORE, MD., CODE OF PUBLIC LAWS art. 4, § 9-10(1) (1980). The court noted that the inspector told the landlord that merely evicting one tenant would not bring the building within the requirements of the multiple family dwelling law unless the cooking unit in one of the apartments also was removed. 308 Md. at 6, 517 A.2d at 330. Although no other tenant was evicted, the district court did not rule on the issue of retaliatory eviction. Id. at 6, 7 n.2, 517 A.2d at 330, 331 n.2. Because the issue is a factual one and the trial court did not rule on it, the appellate court could not make a final determination. The issue therefore was remanded to the district court. Id. at 14, 517 A.2d at 335.

120. Id. at 6, 517 A.2d at 330. Golt sought treble damages for the landlord's wrongful
The district court determined that the landlord improperly withheld the November rent.\textsuperscript{121} It did not find a violation of the Consumer Protection Act, however, since the tenant "knew what the premises looked like" before he took possession.\textsuperscript{122} The Circuit Court for Baltimore City dismissed the appeal, and the Court of Appeals granted certiorari.\textsuperscript{123}

In evaluating the tenant's claim, the Court of Appeals disagreed with the lower courts and concluded that the landlord in fact had violated the Maryland Consumer Protection Act.\textsuperscript{124} The court noted that the issue was not whether the tenant had seen the apartment before moving in, but whether the landlord had misrepresented the dwelling as licensed for multiple family use. The court found that by advertising the apartment on an open market, the landlord implicitly made such a representation. Therefore, the rental to Golt portrayed a "'sponsorship, approval . . . [or] characteristic' " which it did not have—namely, that the apartment was properly licensed.\textsuperscript{125}

The court also determined that the landlord engaged in a deceptive trade practice because the lack of proper licensing is a material fact which "under most circumstances . . . any tenant would find important."\textsuperscript{126} By so ruling, the court found without merit the landlord's argument that Golt had seen the premises. Simply viewing an apartment, after all, could not inform a prospective tenant that the premises are licensed.\textsuperscript{127} Golt was awarded restitutionary damages

\textsuperscript{121} See supra note 115 and accompanying text.
\textsuperscript{122} Id. at 7, 517 A.2d at 331. The circuit court's dismissal technically was improper; after noting this, the Court of Appeals merely treated the dismissal as an affirmation of the district court's ruling. Id. at 7 n.1, 517 A.2d at 331 n.1.
\textsuperscript{123} 308 Md. at 7, 517 A.2d at 331. The circuit court's dismissal technically was improper; after noting this, the Court of Appeals merely treated the dismissal as an affirmation of the district court's ruling. Id. at 7 n.1, 517 A.2d at 331 n.1.
\textsuperscript{124} See supra note 115 and accompanying text.
\textsuperscript{125} Id. at 9, 517 A.2d at 332. See Md. Com. Law Code Ann. § 13-301(1) to -301(3) (1983). For the relevant text of the statute, see supra note 111.
\textsuperscript{126} Id. at 9, 517 A.2d at 332. See Md. Com. Law Code Ann. § 13-301(2)(i) (1983). The court also rejected the landlord's defense that it was unaware that the building was unlicensed for multiple family use and stressed that "[i]gnorance of the law . . . is no defense." 308 Md. at 10, 517 A.2d at 332.
\textsuperscript{127} 308 Md. at 10, 517 A.2d at 332. In setting out its test for materiality the court adopted the common-law test for fraud. Id. See also RESTATEMENT (SECOND) OF TORTS § 558 (1977) (a fact is deemed material if a "reasonable [person] would attach importance to its existence in determining his [or her] choice of action").
for the three months' rent paid, as well as consequential damages representing the cost of moving to substitute housing and the difference in rent. The court reasoned that the landlord of an unlicensed dwelling is unable to recover either under the contract or under a theory of quantum meruit, since such recovery "would defeat the efficacy of the regulatory statute."

Until recently, the common-law concept of a rental agreement as a conveyance of a leasehold estate resulted in a general application of the doctrine of *caveat emptor* with respect to implied warranties that the premises were suitable for their intended use. Maryland courts enforced the doctrine not only in connection with the suitability of the premises, but also with respect to misrepresentation and false statements. In 1973 the General Assembly enacted the Consumer Protection Act in order to counteract this common-law trend. The legislature found that because public confidence in "merchants offering . . . realty" was being undermined, "preventive steps to investigate unlawful consumer practices" were necessary.

Included in the Consumer Protection Act are provisions prohibiting persons from engaging in unfair and deceptive practices in the rental, or offer for rental, of consumer realty. In addition, the act enumerates unfair and deceptive trade practices which violated the Connecticut Unfair Trade Practice Act. The *Conaway* court noted, "In the present case the defendant's actions . . . unquestionably offended the public policy, as embodied by these statutes, of insuring minimum standards of housing safety and habitability." *Id.* at 490, 464 A.2d at 852.

128. 308 Md. at 13-14, 517 A.2d at 334.

130. See Thompson v. Clemens, 96 Md. 196, 211, 53 A. 919, 923 (1903) (landlord not liable for injuries even though he broke contract to make repairs); Smith v. Walsh, 92 Md. 518, 534, 48 A. 92, 95 (1901) (landlord not liable to tenant for an injury caused by defective condition on leased premises). *Cf.* Miller v. Fisher, 111 Md. 91, 94, 73 A. 841, 842 (1909) (landlord undertaking repairs on leased premises, though not bound to do so, is liable for injuries caused by failure to complete repairs).

131. See, e.g., Fegeas v. Sherill, 218 Md. 472, 477, 147 A.2d 223, 225-26 (1958) (concealment and nondisclosure of facts must have been with an intent to deceive).

132. *SeeMd. Com. Law Code Ann.* § 13-102(a) (1983). In this section the General Assembly declared that it enacted the Consumer Protection Act because "there has been mounting concern over the increase of deceptive practices in connection with sales of merchandise, real property, and services." *Id.*

133. *Id.* at (b)(2).
134. *Id.* at (3).

135. See id. §§ 13-301(1), -301(2)(i), -301(2)(iv), -301(4), -301(5), -301(8), -301(9)(i), & -301(10)(iii).
clude, but are not limited to, making a false or misleading statement,136 representing that the consumer realty has a characteristic that it does not have,137 and failing to state a material fact if the failure deceives or tends to deceive.138 Although prior case law interpreting the Act had not addressed the landlord-tenant issues raised in Golt, it laid the foundation for the Golt court’s expanded definition of misrepresentation.139

The Consumer Protection Act was intended by the General Assembly to shield tenants from the types of deceptive practices represented in Golt. This purpose is apparent from the inclusion of “consumer realty” in the Act and from the special treatment of reality within the applicable provisions of the Act.140 While the Golt opinion is narrow in scope, the court’s reasoning is logical and correct. The advertisement and rental of an apartment does represent that the leasing of the apartment is lawful. Furthermore, if the lease is not lawful, then the landlord has misrepresented a fact material to a tenant’s decision to take possession of the premises, and the tenant should be able to seek redress. As the court pointed out, a landlord cannot enforce a leasehold contract that violates the requisite licensing statutes.141 Thus, the court properly awarded restitutionary and consequential damages for the full period of Golt’s tenancy.

3. Covenant of Quiet Enjoyment.—In Bocchini v. Gorn Management Co.142 the Court of Special Appeals held that a tenant who alleged that the landlord failed to evict a noisy tenant had stated a cause of action for breach of the implied covenant of quiet enjoyment.143

136. Id. § 13-301(1).
137. Id. at (2)(i).
138. Id. at (3).
140. See supra note 135.
141. 308 Md. at 12, 517 A.2d at 333-34. See BALTIMORE, MD., CITY CODE art. 13, § 1101 (1983). Furthermore, the court noted:

It is well settled in this State that if a statute requires a license for conducting a trade or business, and the statute is regulatory in the sense that it is for the protection of the public, an unlicensed person will not be able to enforce a contract within the provisions of that regulatory statute.

308 Md. at 12, 517 A.2d at 533.
143. Id. at 12, 515 A.2d at 1185. The court also held that the tenant sufficiently pled a cause of action for the constructive eviction that resulted from the landlord’s breach of the covenant of quiet enjoyment, but that it need not "dwell on the relationship between
The court also established that separate actions now exist in Maryland for a landlord's negligent performance or nonperformance of a covenant for quiet enjoyment, and for deceit, when a landlord fraudulently induces a tenant to remain on the premises.

Carol Bocchini rented an apartment from Gorn Management Company in 1978. In 1983 "unbearable" noise began to emanate from the apartment of Ms. Bocchini's upstairs neighbor. After several unsuccessful efforts to resolve the problem on her own, the tenant complained to the landlord, who eventually wrote two letters to the neighbor. The letters proved fruitless, as the noise continued unabated. In July 1984 the landlord told the tenant that it would do nothing further to resolve the problem. Ms. Bocchini vacated the apartment in August because of the noise and its detrimental effect upon her health.

Gorn filed an action in district court for Ms. Bocchini's breach of the lease. The tenant filed a counterclaim containing five counts: breach of a covenant of quiet enjoyment and constructive eviction, negligence, deceit, nuisance, and violation of section 8-203(c) of the Real Property Article. The court granted the land-

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these two concepts." Id. at 12 n.7, 515 A.2d at 1185 n.7. In Stevan v. Brown, 54 Md. App. 235, 240, 458 A.2d 466, 470, cert. denied sub nom. Tower Bldg. Corp. v. Stevan, 297 Md. 110 (1983), the court declared that a constructive eviction occurs whenever a landlord intends and effects a serious deprivation of the use and enjoyment of the leased property which results in the tenant vacating the property. The court further found that Ms. Bocchini had pled a sufficient cause of action for nuisance. 69 Md. App. at 22, 515 A.2d at 1190.

144. As to both, however, the court held that the tenant failed to state a claim. 69 Md. App. at 22, 515 A.2d at 1190.

145. Id. at 17, 515 A.2d 1188.

146. Id. at 21, 515 A.2d at 1190.

147. Gorn Management Company, the landlord, actually was the managing agent for the owners of the apartment, Samuel and Morton Gorn. Ms. Bocchini, the tenant, also named the Gorns individually in her counterclaim, but their liability was not an issue before the court. Id. at 3 & n.1, 515 A.2d at 1180 & n.1.

148. The noise, which occurred when the neighbor's boyfriend visited, "consisted of 'clomping on the floor from persons walking or running heavily, exercising taking place on the floor, a very loud alarm clock going off at approximately 5:00 a.m., and playing the stereo extremely loudly at late hours.'" Id. at 4, 515 A.2d at 1181 (quoting the complaint).

149. The tenant was unable to get a good night's sleep; it was upon the advice of her physician that she moved out. Id. at 5-6, 515 A.2d at 1181.

150. By praying for a jury trial, the tenant caused the action to be removed from the district court to the circuit court. Id. at 3, 515 A.2d at 1180.

151. Id. at 3-4, 515 A.2d at 1181. Md. REAL PROP. CODE ANN. § 8-205(c) (1988) concerns security deposits. The fifth count remained undecided by the trial court at the time the tenant appealed, and therefore was not considered by the Court of Special Appeals. 69 Md. App. at 4, 515 A.2d at 1181.
lord's motion to dismiss the first four counts and entered judgment in the landlord's favor. The tenant appealed. In reversing the district court's decision, the Court of Special Appeals examined the law in Maryland and elsewhere regarding covenants of quiet enjoyment, as well as actions in tort for the nonperformance of a contractual duty and for deceit.

In *Baugher v. Williams* 152 the Court of Appeals recognized that a covenant of quiet enjoyment is implied in every lease unless language in the lease declares otherwise.153 The covenant "insulates the tenant against acts or omissions on the part of the landlord, or anyone claiming under him, which interfere with the tenant's right to the use and enjoyment of the premises."154 Section 2-115 of the Real Property Article provides:

There is no implied covenant or warranty by the grantor to as to title or possession in any grant of land or of any interest or estate in land. However, in a lease, unless the lease provides otherwise, there is an implied covenant by the lessor that the lessee shall quietly enjoy the land.155

Section 2-115 applies to all leases, including residential ones.156

The *Bocchini* court examined the law regarding the landlord's defense that "a landlord cannot be held to have breached a covenant of quiet enjoyment . . . because of conditions created by another tenant."157 The court noted that "the law seems to be in a state of flux and disarray."158 Although the traditional view that a

152. 16 Md. 35 (1860).
153. Id. at 44-45. See 1 H. Tiffany, *The Law of Real Property* § 91, at 137 (3d ed. 1939). Tiffany observes that a covenant of quiet enjoyment "is implied from the mere relation of landlord and tenant, independently of the presence of any particular words in the lease." Id. at 138. See also 64 E. Walton, Inc. v. Chicago Title & Trust Co., 69 Ill. App. 3d 635, 642, 387 N.E.2d 751, 755 (1979) ("A covenant of quiet enjoyment is implied in all lease agreements."); Pollock v. Morelli, 245 Pa. Super. 388, 392, 369 A.2d 458 (1976) ("In every lease of real property there will be implied a covenant of quiet enjoyment.").
154. 3 G. Thompson, *Thompson on Real Property* § 1130 (1980) (emphasis added). *Baugher v. Wilkins*, 16 Md. 35 (1860), thus presented the seed for a tenant's relief under a covenant of quiet enjoyment when the conduct was attributable to someone other than the landlord. It remained to be firmly established, however, that a landlord was responsible for the offending conduct of a tenant. See infra notes 157-164 and accompanying text.
156. 69 Md. App. at 8, 515 A.2d at 1183. The court's observation is significant because the landlord in *Bocchini* defended on the ground that the common-law implied covenant of quiet enjoyment applies only to commercial leases. Id. at 5-6, 515 A.2d at 1182.
157. Id. at 9, 515 A.2d at 1184.
158. Id.
landlord cannot be held liable for the conduct of tenants supported Gorn's position, the court recognized that this position "has been increasingly abandoned." The Restatement (Second) of Property provides that absent some contrary agreement, "there is a breach of the landlord's obligations if, during the period the tenant is entitled to possession of the leased property, the landlord, or someone whose conduct is attributable to him, interferes with a permissible use of the leased property by the tenant."

Lacking controlling precedent, the court chose to follow the Restatement's more modern view, believing it "more appropriate" that a landlord be responsible for the conduct of a tenant, over

159. Id. The traditional view has been expressed as follows:

[A landlord] is not responsible for the activities of his tenants. The mere existence of a legal relationship between landlord and tenant is not sufficient to impose a duty on the landlord concerning tenant conduct. The test is frequently fashioned to require both the landlord's knowledge and permission or authorization of the conduct before it will be attributable to him.


The Bocchini court failed to note that Schoshinski continues: "However, when the landlord . . . fails to act on a breach of covenant by neighboring tenants which disrupts quiet enjoyment of the premises, he has been found responsible." Id. § 3:7, at 104-05 (citations omitted). Thus, in the instant case, if the court had adhered to the traditional view espoused by Schoshinski, the tenant still might have been able to enforce the covenant of quiet enjoyment against the landlord because of the alleged clauses in the neighbor's lease barring excessive noise and "barring unauthorized persons from living in the apartment." 69 Md. App. at 5, 515 A.2d at 1181.

160. Id. at 10, 515 A.2d at 1184.

161. Restatement (Second) of Property § 6.1 (1977) (emphasis added). Comment d to § 6.1 emphasizes that "[t]he conduct of a third person outside of the leased property that is performed on property in which the landlord has an interest, which conduct could be legally controlled by him, is attributable to the landlord for the purposes of applying the rule of this section." Id. comment d, at 226 (emphasis added). Illustration 11 to that comment describes a scenario similar to the case at hand and attributes the disturbances of the other tenant to the landlord.

162. 69 Md. App. at 11, 515 A.2d at 1185. The court noted that in Q.C Corp. v. Maryland Port Admin., 68 Md. App. 181, 510 A.2d 1101 (1986), aff'd in part, rev'd in part, 310 Md. 379, 529 A.2d 829 (1987), it had found a breach of an implied covenant of quiet enjoyment and constructive eviction when the landlord operated a chrome waste landfill on land to the immediate north and south of the leased property. 69 Md. App. at 11 n.6, 515 A.2d at 1184-85 n.6.

163. The court reasoned:

The insertion in a lease of a restriction against excessive noise or other offensive conduct is precisely for the purpose of enabling the landlord to control that conduct. Its principal function—at least in a multi-unit apartment lease—is to protect the right of other tenants to the quiet enjoyment of their homes by allowing the landlord to evict a tenant who transgresses upon that right.

whom the landlord has some control, which interferes with another tenant's quiet enjoyment of the premises. The court thus found that the tenant had stated a cause of action for breach of an implied covenant of quiet enjoyment leading to a constructive eviction.

The court next addressed the tenant's charge that the landlord had been negligent in not taking action under the covenant of quiet enjoyment against the offending tenant, thus causing the tenant physical and mental injury. The issue presented was "whether an action in tort [would] lie for the nonperformance of a contractual duty." The Court of Appeals has recognized that an action in tort may lie for the negligent breach of a contractual undertaking. There is a distinction, however, between the defective performance of a contractual promise and the nonperformance of a contractual promise.

Before Bocchini no court in Maryland had found tort liability for a landlord's nonperformance of the covenant of quiet enjoyment. The court thus examined Maryland cases in which a landlord incurred tort liability for the nonperformance of a promise to repair, 164. 69 Md. App. at 12, 515 A.2d at 1185. For other cases finding a breach of an implied covenant of quiet enjoyment in such situations, see Colonial Court Apartments, Inc. v. Kern, 282 Minn. 533, 533, 163 N.W.2d 770, 771 (1968) (constructive eviction found when tenants overhead "gave noisy parties twice a week, ran water early in the morning, operated a dishwasher at late hours, subjected [the complaining tenant] to insulting and abusive language, and disturbed [the complaining tenant's] sleep"); Home Life Ins. Co. v. Breslerman, 168 Misc. 117, 118, 5 N.Y.S.2d 272, 273 (1938) (constructive eviction found when landlord took no steps to abate the continuous noise emanating from the apartment above the complaining tenant's). 165. 69 Md. App. at 14-15, 515 A.2d at 1186-87. The tenant actually charged the landlord with the negligent infliction of mental distress, a cause of action which, as the court pointed out, does not exist in Maryland. Id. at 15 n.8, 515 A.2d at 1186 n.8 (citing Hamilton v. Ford Motor Credit Co., 66 Md. App. 46, 502 A.2d 1057, cert. denied, 306 Md. 118, 507 A.2d 631 (1986)). The court ignored the tenant's appellation and recharacterized the claim as one for negligent nonperformance of a covenant of quiet enjoyment. Id. at 15, 515 A.2d at 1186.

166. Id. at 16, 515 A.2d at 1187. "It has long been recognized," the court stated, "that defective performance of a contractual undertaking may give rise to an action in both tort and contract." Id. See generally W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 92, at 660-67 (5th ed. 1984) [hereinafter PROSSER & KEETON].

167. See H & R Block, Inc. v. Testerman, 275 Md. 36, 47, 338 A.2d 48, 54 (1975) (when tort arises out of contractual relation, actual malice must be shown to merit awarding punitive damages); St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 237, 278 A.2d 12, 33, cert. denied, 404 U.S. 857 (1971) (punitive damages are recoverable in an action for tortious deprivation of contractual rights only when malice is shown).

168. Prosser draws "a valid line between the complete non-performance of a promise, which in the ordinary case is a breach of contract only, and a defective performance, which may also be a matter of tort." PROSSER & KEETON, supra note 166, § 92, at 660.
noting that in these cases, "the line between misperformance . . . and nonperformance . . . has certainly been blurred, if not indeed erased."\textsuperscript{169}

The court found no valid reason for treating covenants of quiet enjoyment differently from promises to repair, since "[t]he breach of either can not only seriously interfere with the tenant's enjoyment of his property but also create a risk of pecuniary and personal injury."\textsuperscript{170} Bocchini thus established that an action for the negligent performance or nonperformance of the covenant of quiet enjoyment now exists in Maryland.\textsuperscript{171}

As with the tenant's claim for negligent nonperformance of the covenant of quiet enjoyment, her claim that the landlord had made false representations that it would take action against the offending tenant was "founded on the landlord's promise to perform [the] underlying contractual obligation, and the gravamen of the action its failure to do so."\textsuperscript{172} In Martens Chevrolet, Inc. v. Seney\textsuperscript{173} the Court of Appeals restated the elements necessary to plead a successful action for deceit: first, a promisor must intend not to fulfill the promise, but instead to defraud the promisee into relying on that promise; second, the promisee must rightfully rely upon the misrepresentation; and third, the promisee must suffer actual damage as a direct result of the misrepresentation.\textsuperscript{174}

Actions for deceit usually arise in situations in which the person claiming injury was induced to enter into a contractual relationship\textsuperscript{175} rather than those in which there exists a contractual relation-

\textsuperscript{169} 69 Md. App. at 17, 515 A.2d at 1187-88. In Thompson v. Clemens, 96 Md. 196, 53 A. 919 (1905), the Court of Appeals stated that "when a landlord has agreed to make repairs there is a duty resting on him to do so, and upon his failure the tenant may either sue on his contract or bring an action on the case founded in tort for neglect of that duty." \textit{Id.} at 208, 53 A, at 921 (emphasis in original). \textit{See also} McKenzie v. Egge, 207 Md. 1, 7, 113 A.2d 95, 97 (1955) (negligent breach of duty to make repairs incurs tort liability).

\textsuperscript{170} 69 Md. App. at 17, 515 A.2d at 1188.

\textsuperscript{171} To recover under such an action, a tenant must plead and show "'some clear act of negligence or misfeasance on the part of the landlord beyond the mere breach of contract.' Merely alleging that the landlord 'had negligently failed' to carry out his promise is not enough." \textit{Id.} at 18, 515 A.2d at 1188 (quoting Thompson, 96 Md. at 208-09, 53 A. at 922).

The court found that the tenant in the instant case had failed to state a cause of action for the negligent nonperformance of a covenant of quiet enjoyment because the tenant had not stated how and why the landlord's failure to act was negligent. \textit{Id.}

\textsuperscript{172} \textit{Id.} at 18-19, 515 A.2d at 1188.

\textsuperscript{173} 292 Md. 328, 439 A.2d 537 (1982).

\textsuperscript{174} \textit{Id.} at 333, 439 A.2d at 537.

\textsuperscript{175} 69 Md. App. at 20, 515 A.2d at 1189.
ship and the misrepresentation concerns an obligation already undertaken. Bocchini established that an action for deceit could arise out of an existing contractual relationship, such as when a landlord makes misrepresentations to induce a tenant to quit the premises. The court found such a situation “not significantly different” from that presented in the instant case, in which the landlord fraudulently induced the tenant to remain. Thus, an action for deceit may be available to tenants when a landlord breaches a covenant of quiet enjoyment.

Tenants now have better footing for actions against their landlords for breach of the covenant of quiet enjoyment. First, the Bocchini court establishes that a landlord is responsible for the conduct of a tenant that interferes substantially with another tenant’s use and enjoyment of the property. Second, a tenant’s recourse now has been expanded from the law of contracts into tort law. A tenant may charge a landlord with the negligent performance or nonperformance of the covenant of quiet enjoyment, or, if the circumstances warrant, with deceit. Thus, the Court of Special Appeals has provided tenants with the protection needed under the previously amorphous covenant of quiet enjoyment.

C. Other Developments

1. Service of Notice of Building Code Violation.—In Passnault v. Board of Administrative Appeals the Court of Appeals held that the purchaser of a dwelling house constructed in violation of the county building code is the proper party to serve with a notice of violation after title has passed from the vendor to the purchaser. In Prince

176. The court in Bocchini noted that “to extend an action for deceit to the latter situation would be tantamount to allowing punitive damages in what essentially are breach of contract actions, something the Court of Appeals has been reluctant to do absent a showing of actual malice.” Id.

177. Id. at 21, 515 A.2d at 1189-90. The court cited Crawford v. Pituch, 368 Pa. 489, 491, 84 A.2d 204, 205 (1951), in which a landlord made several representations to a tenant that the landlord desired the tenant’s apartment for its own use and occupancy. When the tenants vacated, the landlord did not move in but rented the apartment to a third person at a higher rate.

178. 69 Md. App. at 21, 515 A.2d at 1190.

179. Once again the court found that in the instant case the tenant’s averments were inadequate to sustain such an action. Id. The tenant did not aver that any specific statements made by the landlord were false. Instead, the tenant merely alleged that the landlord refused to promise or do anything more after making two unsuccessful attempts to remedy the situation. Id.


181. Id. at 467-68, 525 A.2d at 222.
George's County this decision essentially limits the responsibility of the vendor to building code violations issued at or before the time of settlement.

Gerald Passnault constructed a single family dwelling in Prince George's County. While the house was still under construction, Passnault entered into a contract for the sale of the property. Following completion of the house, the Department of Licenses and Permits conducted the standard inspections and issued a certificate of use and occupancy. The buyers took possession following Passnault's conveyance of title.182

Soon after the buyers moved in, they noticed that the roof leaked. Initially the new owners complained to Passnault who, after unsuccessfully attempting to remedy the problem, refused further assistance. The buyers then requested that a building inspector from the Department of Licenses and Permits inspect the roof. Following this inspection, the department served a series of three notices of county building code violations on Passnault.183 In substance, all three notices cited the same building deficiencies: the nails securing the roof shingles were too short and the flashing was of insufficient weight, thus causing the roof to leak.

Passnault took no corrective action following receipt of the notices, but challenged the notices on appeal to the Board of Administrative Appeals for Prince George's County. The board affirmed the

182. Id. at 468, 525 A.2d at 223.

BOCA is described at supra note 55. CABO, the Council of American Building Officials, is a non-profit service organization involved in the development and promotion of uniform building regulations. Id. at 472 n.5, 525 A.2d at 225 n.5. The CABO One & Two Family Dwelling Code is a compilation of data from several model codes, including BOCA's Code. The CABO version is "'to be used in interpreting the requirements of the [BOCA Basic Building] Code as they pertain to one- and two-family dwellings.'" PRINCE GEORGE'S COUNTY, MD., CODE § 4-108.1 (1983 & Supp. 1986). 309 Md. at 473, 525 A.2d at 225. The CABO One & Two Family Dwelling Code as well as the BOCA Basic/National Building Code are adopted and incorporated by reference in the PRINCE GEORGE'S COUNTY, MD., CODE §§ 4-101, -108.1 (1983 & Supp. 1986). 309 Md. at 472, 473 n.6, 525 A.2d at 225 & n.6. The most recent version of BOCA's code is the BOCA National Building Code (10th ed. 1987); CABO released a new edition of its code in 1986. Citations here are to the versions cited by the court and the county code.
notices of violation.\textsuperscript{184} On appeal, the Circuit Court for Prince George's County affirmed the board's decision,\textsuperscript{185} as did the Court of Special Appeals.\textsuperscript{186}

The Court of Appeals granted certiorari to determine whether the Prince George's County Department of Licenses and Permits has the authority to serve a notice of violation on the vendor or builder of a dwelling house constructed in violation of the building code and to compel the vendor or builder to abate the violation five years after the dwelling was sold to a third party.\textsuperscript{187}

After examining the appropriate sections of the BOCA Basic Building Code\textsuperscript{188} and the CABO One & Two Family Dwelling Code,\textsuperscript{189} as adopted in the Prince George's County Building Code,\textsuperscript{190} the Court of Appeals reversed, holding that the department has no such authority.\textsuperscript{191} The court looked at section 117.2 of the BOCA Basic Building Code which specifically addresses service of notice of violation:

The building official shall serve a notice of violation or order on the person responsible for the erection, construction, alteration, extension, repair, removal, demolition, use

\begin{itemize}
\item \textsuperscript{184} 309 Md. at 471, 525 A.2d at 224. The board concluded:
\begin{enumerate}
1. The roofing and flashing were improperly installed;
2. The contractor is responsible for installing the roof and flashing correctly;
3. Petitioner [Passnault] was the contractor listed on the permit;
4. Petitioner is responsible for having the roof and flashing deficiencies corrected, repaired and/or replaced."
\end{enumerate}
\textit{Id.} (quoting the board's decision).
\item \textsuperscript{185} \textit{Id.} The circuit court, "noting that limitations do not run against a municipality for an exercise of a purely governmental function, held that 'there is jurisdiction in the Prince George's County government to enforce the housing code.' " \textit{Id.}
\item \textsuperscript{186} \textit{Id.} at 472, 525 A.2d at 225. The intermediate appellate court determined:
"Nothing in [the BOCA and CABO Codes] limits the authority of the Department to issue a notice of violation of the provisions of those codes to a builder who has received a certificate of use and occupancy from the Department after its inspections of a completed building or after it is sold."
\textit{Id.} (quoting the Court of Special Appeals' unreported per curiam decision).
\item \textsuperscript{187} \textit{Id.} at 468, 471, 525 A.2d at 223, 224.
\item \textsuperscript{188} The court primarily examined BOCA BASIC/NATIONAL BUILDING CODE §§ 117.2, 119.1.1 (9th ed. 1984). Section 117.2 is reproduced at 309 Md. 480-81, 525 A.2d 229 appendix A. Section 119.1.1, as codified in PRINCE GEORGE'S COUNTY, Md., CODE § 4-113 (1983 & Supp. 1986) is reproduced at 309 Md. at 478-79, 525 A.2d at 228.
\item \textsuperscript{189} CABO ONE & TWO FAMILY DWELLING CODE §§ R-803, R-106 (1983) (Asphalt Shingles, and Violations and Penalties, respectively) are reproduced at 309 Md. at 469 n.2, 481, 525 A.2d at 223 n.2, 229 appendix B.
\item \textsuperscript{190} Because the county building code incorporates by reference the BOCA BASIC/NATIONAL BUILDING CODE and the CABO ONE & TWO FAMILY DWELLING CODE, the court cited the model codes directly for the sake of clarity.
\item \textsuperscript{191} 309 Md. at 480, 525 A.2d at 229.
or occupancy of a building or structure in violation of the provisions of this code, or in violation of a detail statement or plan approved thereunder, or in violation of a permit or certificate issued under the provisions of this code. Such order shall direct the discontinuance of the illegal action or condition and the abatement of the violation.\textsuperscript{192}

Section 117.2 contains neither temporal limits nor limits upon the court's discretion in determining which actor is the "person responsible."\textsuperscript{199} Section 119.1.9, however, makes the vendor responsible for all notices issued for violations before the time of settlement unless the contract of sale specifies otherwise.\textsuperscript{194} The court concluded that "[i]mplicit in § 119.1.1 is that the responsibility of the vendor, and those acting by, through, or under the vendor, terminates at settlement and the purchaser is responsible for notices of violation issued subsequent to the transfer of title."\textsuperscript{195} Because Passnault had transferred title to the buyer before the notices of violation were issued, the court ruled that Passnault was no longer the "person responsible" for the violation. Therefore, the county was without authority to compel Passnault to abate the violation.\textsuperscript{196}

Before \it{Passnault} an individual in a like position would have had to rely on defenses such as estoppel, laches, or the statute of limitations.\textsuperscript{197} \it{Passnault} allows a vendor in Prince George's County to

\textsuperscript{192} BOCA BASIC/NATIONAL BUILDING CODE § 117.2 (9th ed. 1984).
\textsuperscript{193} 309 Md. at 478, 525 A.2d at 228. The court noted that BOCA BASIC/NATIONAL BUILDING CODE § 201.3 (9th ed. 1984) defines the term "person" as including "a corporation or co-partnership as well as an individual," and that the term "responsible" is not defined. 309 Md. at 477, 525 A.2d at 227.
\textsuperscript{195} 309 Md. at 479, 525 A.2d at 228.
\textsuperscript{196} Id. at 480, 525 A.2d at 229.
\textsuperscript{197} Id. at 486-87 & n.3, 525 A.2d at 232 & n.3. Judge Eldridge rejected the majority's determination that BOCA BASIC/NATIONAL BUILDING CODE § 119.1.9 (9th ed. 1984) provides an "express limitation" on the plain language of § 117.2. Section 117.2 by its terms applies to the persons "responsible for the erection, construction, alteration, extension, repair, removal, demolition, use or occupancy" of a house in violation of the building code. It does not mention "buyer" or "seller," and applies regardless of whether the person responsible is a buyer or seller or neither. Section 119.1.9, however, applies only to "buy-
As a result of the decision in Passnault, homeowners will bear the burden of correcting building code violations. The court's interpretation of the Prince George's County Building Code relieves a builder of responsibility for notices of building code violations issued after conveyance of title when the builder is also the vendor and the structure is a new one-family dwelling. But the owner still has the right to any available actions against the builder or vendor based on contractual rights. For example, the purchaser may have a direct cause of action under express or implied warranty against the vendor if the house was constructed in violation of the code, and the defect could have been discovered in a reasonable inspection.

ers" and "sellers." Both sections are specific in their language; they clearly apply to distinct situations.

309 Md. at 484, 525 A.2d at 231 (Eldridge, J., dissenting). Because Passnault was both the builder and the seller, Judge Eldridge reasoned that § 119.1.9 defines Passnault's responsibility as the seller of the house, not his liability as the builder. Id. at 485, 525 A.2d at 231.

[T]he majority asserts that it is implicit in § 119.1.9 that Passnault is not responsible for violations when notices are issued after settlement and authorized by § 117.2. I disagree. This implication is totally inappropriate in light of the differences in the pertinent statutes. An ordinance that deals with the seller's responsibility for violation notices, issued prior to settlement, concerning new one-family dwellings, does not necessarily imply anything at all about the responsibility of a builder, for notices whenever issued, concerning any buildings or structures that may have been constructed, altered, repaired, removed, etc.

Id. at 485-86, 525 A.2d at 231 (emphasis in original). Because many code violations would not be apparent before occupancy by the buyer, Judge Eldridge concluded that it would not be unreasonable "to give effect to the plain meaning of § 117.2 and hold a builder responsible for his violations of the building code under notices served after settlement," since the equitable defenses of estoppel and laches would be available against a municipality. Id. at 486-87, 525 A.2d at 232.

198. 309 Md. at 487 n.3, 525 A.2d at 232 n.3.

199. Id. at 486 n.2, 525 A.2d at 232 n.2. The court's reliance upon BOCA BASiC/NATIONAL BUILDING CODE § 119.1.9 (9th ed. 1984) relates only to the responsibility of the seller of the house for notice of violation issued before the execution of a contract for sale of the property. The court’s decision does not apply to builders who are not in the business of selling. 309 Md. at 485, 525 A.2d at 237.

2. **Affirmative Covenants Running at Law.**—The Court of Special Appeals held in *Gallagher v. Bell*\(^{201}\) that a covenant to pay a pro rata share of costs to develop public streets and utilities in exchange for a right-of-way over private property ran with the land. Thus, the covenant did not bind covenantors after conveyance of the burdened property.\(^{202}\)

In reaching this holding, the court examined various elements often required for a covenant to run with the land.\(^{203}\) The court noted that one necessary element, privity of estate between the parties, can take several forms—mutual, horizontal or vertical.\(^{204}\) Because Maryland law had not yet determined the type of privity required, the court adopted a vertical privity requirement as the most rational and modern rule of law.\(^{205}\) The court then set forth a limited holding that, if the parties so intend, the liability of an original covenantor "on a covenant of the type involved here" will end once the burdened property is conveyed.\(^{206}\)

The Gallaghers bought a house situated on a half-acre parcel located in the middle of a large tract which the Bells owned and intended to develop in the future.\(^{207}\) Shortly thereafter, the Gallaghers entered into an agreement with the Bells under which the Gallaghers would dedicate some of their land for public streets and pay a pro rata share of the cost to install the streets and certain utilities.\(^{208}\) In 1979, before the Bells installed any streets or utilities, the

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201. 69 Md. App. 199, 516 A.2d 1028 (1986).
202. Id. at 220, 516 A.2d at 1039.
203. Spencer's Case, 77 Eng. Rep. 72 (1583), set forth various criteria for determining whether a covenant runs with the land. The two most important requirements were that the covenant concern something "in esse" and that the covenant "touch and concern" the land. Since then different requirements have developed—The four elements which courts frequently require for a covenant to run at law are that the covenant must touch and concern the land, the parties must intend for it to run, there must be privity of estate, and the covenant must be in writing. 5 R. Powell, The Law of Real Property § 673[1], at 60-37 to -38 (1987) (citations omitted).
204. See infra text accompanying notes 227-229.
205. See infra note 232 and accompanying text.
206. 69 Md. App. at 220, 516 A.2d at 1039.
207. Id. at 201, 516 A.2d at 1029. The parties' lands were once part of a 34-1/2 acre estate owned by the Sisters of Mercy of the Union in the United States of America, Incorporated. The Bells bought their tract from the Sisters of Mercy in 1959, at which time a clause in the contract mentioned the excepted parcel: "The existing house and lot in Section 4 [the Bells' tract] shall be excluded from this contract. Subsequent purchaser of said lot and house shall agree to dedicate half of street bounding said lot and share pro-rata cost of installing street and utilities by this purchaser of Section 4." Id. at 202, 516 A.2d at 1030. A year later the Sisters of Mercy sold the lot excluded from the covenant to the Gallaghers. Id.
208. The contract provided that the Bells would grant to the Gallaghers "a temporary
Gallaghers conveyed their property.\textsuperscript{209} The Bells began installing the roads in 1983. When Deborah Camalier, the successor to the Gallaghers' interest, refused to pay the pro rata share, the Bells demanded it of the Gallaghers. The Gallaghers refused and the Bells filed suit.\textsuperscript{210}

Whether the Gallaghers had any continuing liability on their promise to pay depended on whether the covenant was real, and therefore ran with the land, or was personal to the Gallaghers.\textsuperscript{211} The question of whether a covenant runs with the land normally arises when the party seeking to enforce the covenant is not the original covenantee or when the party against whom the covenant is sought to be enforced is not the original covenantor.\textsuperscript{212} In such cases the issue is whether the party who has succeeded to an interest of one of the original contracting parties can enforce the covenant or have it enforced against him or her.\textsuperscript{213}

right of way over that portion of the existing private road . . . leading to Bradley Boulevard from [the Gallaghers' property] which crosses [the Bells' property] until such time as said portion of said private road is supplanted by a dedicated and paved road." \textit{Id.} at 203, 516 A.2d at 1030. The contract further stated:

As part of the consideration for this agreement the [Gallaghers] do hereby covenant and agree for themselves, their heirs and assigns that they will dedicate one-half of the streets bounding on their said property and shall share pro-rata the cost of the installation of said streets and utilities by [the Bells]. \textit{Id.} at 204, 516 A.2d at 1030. The agreement was signed and recorded among the county land records. \textit{Id.}, 516 A.2d at 1031.

209. The Gallaghers sold their property to Deborah Camalier. Aware of the recorded agreement between the Bells and the Gallaghers, Camalier insisted that the Gallaghers indemnify her against the covenant. \textit{Id.} at 205, 516 A.2d at 1031. While the court ultimately held the Gallaghers not liable on the original covenant, it did not address the issue of their possible liability under the indemnity agreement, as this issue was not properly before the court. \textit{Id.} at 220, 516 A.2d at 1039.

210. \textit{Id.} at 205, 516 A.2d at 1031.

211. The difference "hinges upon whether the original covenantee parties' respective rights or duties can devolve upon their successors." R. Powell, supra note 203, § 673[1], at 60-36. Personal covenants are enforceable only between the original covenantee parties while real covenants run with the land and are enforceable against the parties' heirs and assigns.

212. 69 Md. App. at 206, 516 A.2d at 1032.

213. \textit{Id.} The court noted that the posture of the parties in \textit{Gallagher} was different from that traditionally seen in that they were the original parties to the contract. \textit{Id.} at 218, 516 A.2d at 1038. In a more traditional case, the Bells would have sued Camalier, arguing that the covenant ran with the land and thus bound her. Instead, the Bells sued the Gallaghers, asserting that the covenant was personal, not real. In order to avoid liability, the Gallaghers argued that the real covenant ran with the land and therefore relieved them of any obligation once they conveyed the property to Camalier. \textit{Id.} at 205, 516 A.2d at 1031. The court determined that the status of the parties did not alter the analysis to be used in determining whether the covenant ran with the land. \textit{Id.} at 206, 516 A.2d at 1032.
Most courts, including Maryland's, require four factors to co-exist in order for a covenant to run with the land. The covenant must be in writing, it must touch and concern the land, the parties must have intended for the covenant to run, and there must be privacy of estate.\(^2\)

As early as 1866, in Glenn v. Canby,\(^2\) the Court of Appeals announced as “established doctrine” that for a covenant to run at law it must touch and concern the land.\(^2\) While there are several “touch and concern” tests,\(^2\) the Gallagher court chose the test proposed by Dean Bigelow,\(^2\) which most courts and writers now follow:\(^2\) “[I]f the covenantor's legal interest in [the] land is rendered less valuable by the covenant's performance, then the burden of the covenant satisfies the requirement that the covenant touch and concern the land.”\(^2\) Applying the Bigelow test to the facts in Gallagher, the court found that the covenant burdened the Gallaghers' interest and rendered it less valuable;\(^2\) thus, the covenant touched and concerned the Gallaghers' land.

Maryland has adopted the view that the original parties' intent that the covenant run is “a co-equal factor” with the touch and concern requirement.\(^2\) In Gnau v. Kinlein\(^2\) the court stated that the

\(^{214}\) See supra note 203. The court noted that Maryland courts “occasionally . . . [stress] one or two factors to the exclusion of others; but on the whole, it seems that the criteria mentioned by Powell are also required in Maryland.” 69 Md. App. at 209, 516 A.2d at 1033.

\(^{215}\) 24 Md. 127 (1866).

\(^{216}\) Id. at 130. The court defined “touch and concern” as follows: “[A] covenant to run with the land must extend to the land, so that the thing required to be done will affect the quality, value, or mode of enjoying the estate conveyed, and thus constitute a condition annexed, or appurtenant to it.” Id. In other words, the covenant must burden the covenantor in the capacity as landowners of burdened property.

\(^{217}\) The “touch and concern” test, as defined by the Court of Appeals, states that whether a covenant runs with the land depends upon whether performance of the covenant will “tend necessarily to enhance [the] value [of the benefited land] or render it more convenient or beneficial to the owners or occupants.” Whalen v. Baltimore & Ohio Ry., 108 Md. 11, 20, 69 A. 390, 393 (1908). The Gallagher court found that the Whalen test was inappropriate for the case at hand because it “looks at the issue from the benefit point of view.” 69 Md. App. at 210, 516 A.2d at 1034. In Gallagher only the question of burden was at issue because the Bells, who brought the action to enforce the covenant, were the original covenantees. Id. at 211, 516 A.2d at 1034.


\(^{219}\) R. Powell, supra note 203, § 673[2], at 60-41.

\(^{220}\) Id. For other “touch and concern” tests, see 3 H. Tiffany, supra note 153, § 854, at 455; Restatement of Property § 537 (1944).

\(^{221}\) At the same time, the Bells benefited by the covenant's performance. 69 Md. App. at 211, 516 A.2d at 1034.

\(^{222}\) Id. at 212 n.9, 216 A.2d at 1035 n.9. The court looked to Tiffany, who stated that the parties to a covenant may prevent a covenant from running by indicating their intent
intention of the covenanting parties as to whether the covenant is personal or extends to their assignees "may be ascertained from the language of the conveyances alone or from that language together with other evidence of intent."\textsuperscript{224} The express language of the covenant bound the Gallaghers, "their heirs and assigns."\textsuperscript{225} This language and other extrinsic evidence supported the court's finding that the parties intended that the covenant run with the land and bind the Gallaghers' successor in interest.\textsuperscript{226}

For a covenant to run with the land, there also must be privity. Courts mention at least three kinds of privity of estate: \textit{mutual privity}, when the covenanting parties have a mutual and continuing interest in the same land;\textsuperscript{227} \textit{horizontal privity}, when the covenant arises pursuant to a conveyance in fee from one party to the other;\textsuperscript{228} and \textit{vertical privity}, when "the person presently claiming the benefit, or being subjected to the burden, is a successor to the estate of the to that effect. H. TIFFANY, supra note 158, § 854, at 461. See also Glenn v. Canby, 24 Md. 127, 131 (1866) (If a covenant does not touch and concern the land, then it will not run at law, "nor bind the assignee of the covenantor, though he be expressly included by the general term assigns." (emphasis in original)).

While the "touch and concern" test is objective, determining the intent of the parties "focuses on [their] subjective state of mind." R. POWELL, supra note 203, § 673[2][b], at 60-49. Intent normally is a question for the jury, but, as with any question of fact, "if, after viewing the evidence and all reasonable inferences from it in favor of the nonmoving party, the court is able to determine an answer as a matter of law, it may do so by granting a motion for judgment under Md. Rule 2-519 or a motion for judgment n.o.v. under Rule 2-532." 69 Md. App. at 212-13, 516 A.2d at 1035. The court examined the record and decided as a matter of law that the parties intended the covenant to run with the land. Id. at 215, 516 A.2d at 1036.

223. 217 Md. 43, 141 A.2d 492 (1957).
224. Id. at 48, 141 A.2d at 495.
225. 69 Md. App. at 204, 516 A.2d at 1030. Other evidence supporting the Gallaghers' position that they no longer were liable on performance of the covenant included: the covenant was intended to benefit the adjacent land of the Bells as covenantees; before commencing this action, the Bells filed a Declaration of Covenant among the land records asserting that because of the Gallaghers' conveyance to Camalier, the latter "became the assignee of the Gallaghers and bound by aforesaid Agreement regarding pro rata payment of the cost of installation of streets and utilities," id. at 214, 516 A.2d at 1036 (emphasis in original); and the Bells admitted that they originally sought to recover the pro-rata share from Camalier because of the inclusion of "heirs and assigns" in the covenant. Id. at 214-15, 516 A.2d at 1036.
226. Id. at 215, 516 A.2d at 1036.
227. Id. at 216, 516 A.2d at 1037. Powell notes that mutual privity arises from two sets of relationships—landlord-tenant and lessor-lessee—and is the "most demanding view of privity of estate." R. POWELL, supra note 203, § 673[2][c], at 60-59.
228. 69 Md. App. at 216, 516 A.2d at 1037. In the case at hand, there was no horizontal privity because the Gallaghers bought their tract from the Sisters of Mercy, not the Bells. See supra note 207. The court did not consider the possibility that the Bells' granting of an easement to the Gallaghers would satisfy the requirements of horizontal privity.
original person so benefited or burdened.'"229

Although Maryland law clearly required some form of privity,230 the type of privity was not established before Gallagher.231 Gallagher adopted the view that no more than vertical privity is required.232 Because Camalier was a successor to the estate of the original covenantors, the Gallaghers, the requirement of vertical privity was satisfied. Because the other three criteria necessary for a covenant to run with the land also were present,233 the court held that the covenant ran with the land and bound Camalier, but not the Gallaghers.234

The Gallagher court was correct in its view that vertical privity is the most rational choice of the various privities in that it is the easiest to examine.235 Nevertheless, the court’s holding, limited to a

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229. R. Powell, supra note 203, § 673[2][c], at 60-64.
230. See, e.g., Whalen v. Baltimore & Ohio Ry., 108 Md. 11, 20, 69 A. 390, 393 (1908) (finding that "there . . . must be a privity of estate between the contracting parties"); Donelson v. Polk, 64 Md. 501, 504 (1886) ("In regard to [privity of estate] there is no conflict of authority . . . "); Hintze v. Thomas, 7 Md. 346, 351 (1855) (holding that the liability of an assignee continues only so long as privity of estate continues, so that when the assignee makes an assignment, privity is transferred to the new assignee).
231. "Many modern cases still require some type of privity for covenants to run at law. Unfortunately, there is frequently no consistency as to the type of privity required even within a jurisdiction, and many courts just do not state which type of privity they require." R. Powell, supra note 203, § 673[2][c], at 60-67 (footnotes omitted).
232. 69 Md. App. at 217, 516 A.2d at 1037. The court noted that requiring vertical privity is "more rational" because it focuses on the devolutional relationship—that is, the relationship between the Gallaghers and Camalier—rather than on the relationship of the original contracting parties, an approach that can turn into a guessing game and "can create artificial results." Id. Vertical privity is the modern view according to Powell: "Modern legal writers unanimously favor the abolition of at least mutual and horizontal privity." R. Powell, supra note 203, § 673[2], at 60-67.
233. Gallagher did not discuss the requirement that for a covenant to run it must be in writing, as this requirement apparently was met. See supra note 208.
234. 69 Md. App. at 217, 516 A.2d at 1039. Having found that the covenant ran with the land, the court addressed the issue of whether the liability of the Gallaghers, as original covenantors, ended when they sold their land to Camalier. Id. at 217-20, 516 A.2d at 1037-39.

The court referred to Powell, id. at 218, 516 A.2d at 1038, who noted that many courts have held that a conveyance of the burdened land ends the covenantor's liability; this result normally reflects the intention of the original parties. R. Powell, supra note 203, § 673[3], at 60-73 to -74. Powell notes that such a result is "less likely to be true in the case of covenants to pay money, where the personal credit of the original covenantor is an important factor." Id. at 60-74.

The court found, however, that the Bells did not rely specifically upon the Gallaghers' credit when entering into the covenant. 69 Md. App. at 219-20, 516 A.2d at 1039. The Bells, having approached Camalier for payment on the covenant before going to the Gallaghers, indicated that "[t]hey wanted, and insisted upon, the undertaking from whomever purchased the burdened tract." Id. at 220, 516 A.2d at 1039.

235. Powell notes: "Vertical privity exists in all covenant situations except where a
covenant "of the type involved here,"236 that the continuing liability of a covenantor will end upon conveyance of the burdened property if the parties so intended is curious. While the court was not presented with the typical lawsuit in which the original covenantee brings an action against an assignee of the covenantor, it seems overly cautious in not setting forth the same ruling without the cryptic limitation. Gallagher may serve as an impetus for developing a rule of law that will eliminate the harsh result that may occur when any covenantor who conveys property burdened by a covenant running with the land subsequently is held liable on the promise.

RICHARD S. GORDON
MARY ELLEN QUINN JOHNSON
MARK B. MONDRY

successor to the burdened or benefited land is an adverse possessor or a disseisor." R. Powell, supra note 203, § 673[2][c], at 60-64.

236. 69 Md. App. at 220, 516 A.2d at 1039. The court stated that "the continuing liability of an original covenantor on a covenant of the type involved here will end upon his conveyance of the burdened property if the parties intended that to be the case." Id. (emphasis added).

The court chose not to follow the conclusion of the Pennsylvania court in Leh v. Burke, 231 Pa. Super. 98, 331 A.2d 755 (1974). Faced with facts similar to those in Gallagher, the Leh court concluded that when an affirmative covenant is found to run with the land, the person in possession of the burdened land when the covenant matures is responsible for its performance. Id. at 108, 331 A.2d at 761. The Gallagher court declared that it was unnecessary to establish such a rule. 69 Md. App. at 220, 516 A.2d at 1039. It remains to be determined whether courts will interpret a "covenant of the type involved here" to mean that Gallagher applies to all covenants to make a monetary payment or only to those to pay a pro rata share of the cost of installing streets and utilities.
VII. STATE GOVERNMENT AND ADMINISTRATION

A. Administrative Agencies

1. Judicial Review.—a. Exhaustion of Remedies.—Maryland National-Capital Park & Planning Commission v. Crawford represents a "reverse discrimination" action challenging the merits of the affirmative action policy of the Maryland-National Capital Park and Planning Commission (MNCPPC). Instead of addressing the merits of the policy, however, the opinion considered whether exhaustion of administrative remedies is a prerequisite to the filing of a civil rights action.

Elsie Crawford, a white female, worked as a secretary for the MNCPPC. She applied for a transfer from one division within the MNCPPC to another and was interviewed and ranked first among all applicants. Nevertheless, the position was given to another candidate as part of the MNCPPC's "good faith efforts to employ minority employees in all job categories in proportion to their representation in the regional workforce." Ms. Crawford then filed an administrative grievance.

The MNCPPC's administrative remedy scheme called for a review by the department director, an appeal to the executive director of the MNCPPC, and a final review by the Merit System Board. Before the Merit System Board issued its final decision, however, Crawford filed suit, seeking damages and injunctive relief against the MNCPPC and three of its officers under both title 42, section 1983 of the United States Code and the Maryland Constitution.

2. Id. at 11-12, 511 A.2d at 1084.
3. Id. at 5, 511 A.2d at 1080-81.
4. Id. at 6, 511 A.2d at 1081.
5. Id. at 7, 511 A.2d at 1081.
6. Id. at 7-8, 511 A.2d at 1081-82.
7. Id. at 8, 511 A.2d at 1082.
8. Id. at 8, 511 A.2d at 1082.

   "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State... subjects or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

10. While the opinion does not disclose the provision of the Maryland Constitution upon which Ms. Crawford relied, Md. Const. art. 24, the due process clause, has been construed to imply equal protection of the laws. See Attorney General v. Waldron, 289
The lower court ruled in Ms. Crawford's favor; the Court of Special Appeals affirmed the judgment.

On appeal the MNCPPC, along with the State of Maryland and the Maryland Commission on Human Relations as amici curiae, urged the Court of Appeals to dismiss the action for failure to exhaust administrative remedies, citing the policy that "where pursuant to a statute an administrative remedy is provided for a particular type of case, ordinarily the administrative remedy must be invoked and exhausted before relief is available." The MNCPPC also maintained that the affirmative action plan was constitutional.

Ms. Crawford had pursued her claim through three administrative levels. After being denied the position, she initially filed an administrative grievance with the MNCPPC directly, claiming that she had been denied the transfer solely because of her race. The director of the MNCPPC found that although Ms. Crawford was the first choice of the interview panel, the woman ultimately selected also was qualified and the decision to hire her was in accordance with the MNCPPC's affirmative action plan. Ms. Crawford next appealed this decision to the executive director of the MNCPPC. While the appeal was pending and before initiating the third and final stage of the administrative grievance procedure, Ms. Crawford filed suit in the Circuit Court for Prince George's County.


11. 307 Md. at 9-10, 511 A.2d at 1083.
13. 307 Md. at 13, 511 A.2d at 1085.
14. Id. at 31, 511 A.2d at 1094. The MNCPPC contended that Ms. Crawford had failed to exhaust its statutory in-house grievance system, thereby depriving the circuit court of jurisdiction. The amici contended that she also was required to exhaust remedies provided by the Equal Employment Opportunity Commission (EEOC) and the Maryland Commission on Human Relations. The Court of Appeals, while stating that it normally would not consider arguments that had been raised only in an amicus brief, declared that "because primary jurisdiction and exhaustion of administrative remedies are matters which the Court will address sua sponte in appropriate circumstances, they constitute exceptions to this general rule." Id. at 15 n.6, 511 A.2d at 1086 n.6.
15. Id. at 16, 511 A.2d at 1086.
16. Id. at 7, 511 A.2d at 1082.
17. Id. at 6, 511 A.2d at 1081.
18. Id. at 7, 511 A.2d at 1081.
19. Id., 511 A.2d at 1082.
days later, the executive director affirmed the director’s finding.\textsuperscript{20} Ms. Crawford then appealed this decision to the Merit System Board of the MNCPPC.\textsuperscript{21}

The Merit System Board ultimately determined that the race-based “non-selection” of Ms. Crawford for the vacancy “accorded with the terms of the Commission’s affirmative action plan”; therefore, the board upheld the selection of the other candidate.\textsuperscript{22} While the board’s decision was pending, the MNCPPC challenged the circuit court’s jurisdiction on the ground that Ms. Crawford had failed to exhaust her administrative remedies.\textsuperscript{23} The court overruled the demurrer and entered an order prohibiting the MNCPPC from altering evidence or attempting to influence potential testimony.\textsuperscript{24} The court did nothing else until the Merit System Board’s decision.\textsuperscript{25}

After the board’s decision the circuit court delivered an oral opinion which found that “the only reason Mrs. Crawford wasn’t transferred was that she was white.”\textsuperscript{26} The court also declared that the MNCPPC had failed to follow its own affirmative action plan, which contained an exception for “‘clearly’ more qualified applicants.”\textsuperscript{27} Judgment in favor of Ms. Crawford for $500 and a mandatory injunction ordering her transfer ensued.\textsuperscript{28}

The Court of Appeals pointed out that “it is not clear from the record how the transfer of an employee from one position to another in the same grade could affect the Commission’s compliance with the affirmative action plan.”\textsuperscript{29} Aside from this observation the court never questioned the plan itself. Instead, the court concentrated on the quasi-jurisdictional issue of exhaustion of administrative remedies as a preliminary step to the filing of a civil rights suit.\textsuperscript{30} The MNCPPC and amici curiae urged the court to require

\begin{itemize}
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. at 7-8, 511 A.2d at 1082. “The Board’s rationale for this decision was that the Commission’s affirmative action plan authorized, but did not require, a preference for minority candidates on a list of qualified candidates.” Id.
\item \textsuperscript{23} Id. at 8, 511 A.2d at 1082.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id. at 9, 511 A.2d at 1083.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id. at 6, 511 A.2d at 1081.
\item \textsuperscript{30} Id. at 13 & n.4, 511 A.2d at 1085 & n.4. See Board of Educ. v. Hubbard, 305 Md. 774, 787, 506 A.2d 625, 631 (1986) (“While the failure to invoke and exhaust an administrative remedy does not ordinarily result in a trial court’s being deprived of fundamen-
that employment discrimination plaintiffs not only complete the appropriate in-house grievance procedure, but also exhaust remedies provided by both the Equal Employment Opportunity Commission (EEOC) and the Maryland Human Relations Commission. The court declared these requirements to be too great a burden.

Relying initially on *Patsy v. Florida Board of Regents*, the court rejected the position of both the MNCPPC and amici curiae which urged strict adherence to the so-called “flexible exhaustion” rule. The Supreme Court held in *Patsy* that no exhaustion of state administrative remedies is required before beginning a civil rights action in federal courts. Although *Patsy* involved federal jurisdiction, the Court of Appeals noted that “the majority of state court decisions since *Patsy* have taken the position that the *Patsy* holding is applicable to a state court section 1983 action.”

Relying on the Maryland case of *County Executive of Prince George’s County v. Doe*, the Court of...
Appeals decided that notwithstanding Maryland policy, the state courts were required to give plaintiffs such as Ms. Crawford the full benefit of federal law. The court stated:

Consequently, if Congress in 42 U.S.C. § 1983 intended that exhaustion of state administrative remedies should not be a prerequisite to bringing an action under that federal statute, regardless of the judicial forum, then the "Maryland policy" concerning invocation and exhaustion of administrative remedies would be immaterial, and the Patsy holding would be fully applicable to state court section 1983 actions.\(^\text{38}\)

The MNCPPC and amici curiae had argued that the congressional intent was "aimed solely at federal court actions, and that Congress did not have such intent with regard to state court section 1983 actions."\(^\text{39}\) The court found, however, that "there was no violation of any applicable state law primary jurisdiction or exhaustion requirement."\(^\text{40}\) The MNCPPC and amici curiae also had contended that there were three separate administrative schemes which Ms. Crawford must exhaust before she could be entitled to have a state court hear her claim.\(^\text{41}\) The court determined that Ms. Crawford had exhausted one scheme and that the other two did not apply.\(^\text{42}\)

The court found that Ms. Crawford eventually had exhausted the MNCPPC's three-tier grievance procedure and that the lower court had properly exercised jurisdiction to allow her to go forward with her case.\(^\text{43}\) The lower court, noting the constitutional nature of

\(^{38}\) 307 Md. at 14-15, 511 A.2d at 1085-86 (emphasis in original).

\(^{39}\) Id. at 15, 511 A.2d at 1086.

\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) Id.

\(^{43}\) Id. at 17, 511 A.2d at 1087. In Gulf Oil Corp. v. United States Dep’t of Energy, 663 F.2d 296 (D.C. Cir. 1981), one federal court of appeals declared:

The time-honored purposes of exhaustion—to allow an agency to make a record, apply its expertise, and correct errors in its own processes as it goes along—do not seem particularly well-served here where the . . . court was dealing with an agency proceeding in which it had reason to believe something may have gone fundamentally awry with the way in which the proceeding itself was being conducted, something that transcended dubious or even patently erroneous legal rulings.

Id. at 309 (footnote omitted).
the claim involved, had done nothing more than retain jurisdiction pending completion of the in-house administrative process.44

The Court of Appeals went on to reject the assertion that the EEOC had primary jurisdiction over the complaint,45 finding that procedures under title 42, section 2000(e) of the United States Code,46 which provide access to the EEOC as a forum for obtaining relief from employment discrimination, and those under title 42, section 198347 "augment each other and are not mutually exclusive."48 The court was impressed by the reasoning of a recent opinion of the United States Court of Appeals for the Seventh Circuit, Trigg v. Fort Wayne Community Schools,49 which concluded:

[T]he Fourteenth Amendment and Title VII [of the 1964 Civil Rights Act] have granted public sector employees independent rights to be free of employment discrimination. A plaintiff may sue her state government employer for violations of the Fourteenth Amendment through § 1983 and escape Title VII's comprehensive remedial scheme, even if the same facts would suggest a violation of Title VII. This holding is consistent with the great weight of authority.50

The court likewise concluded that the Maryland Commission on Human Relations does not supply the "comprehensive remedial scheme"51 contemplated by the rule of statutory construction that ordinarily dictates exhaustion.52 According to the court, the jurisdiction of the state commission was designed to conform to that of the EEOC "so that the state Commission would handle employment discrimination in lieu of the federal agency."53 Thus, if the Maryland legislature did not intend for the commission's jurisdiction to extend beyond that of the EEOC, and if exhaustion of EEOC remedies is not a prerequisite to invoking a judicial remedy, then exhaustion of remedies provided by the Human Relations Commission is

44. 307 Md. at 17-18, 511 A.2d at 1087.
45. Id. at 19-22, 511 A.2d at 1088-89.
47. Id. § 1983.
48. 307 Md. at 20, 511 A.2d at 1089.
49. 766 F.2d 299 (7th Cir. 1985).
50. Id. at 302.
51. Secretary, Dep't of Human Resources v. Wilson, 286 Md. 639, 645, 409 A.2d 713, 717 (1979).
52. 307 Md. at 25, 511 A.2d at 1091. The court noted: "The rule of statutory construction, that ordinarily an administrative remedy must be invoked before resort to an independent judicial remedy, is in part based upon an inference from the comprehensiveness of the statutorily created scheme." Id.
53. Id. at 28, 511 A.2d at 1093.
After all this, the merits of the case were relatively simple. The MNCPPC attempted a constitutional justification of its affirmative action plan, stating:

[R]ace-conscious programs of selection may be applied to redress the continuing effects of past discrimination . . . . [A]ffirmative relief in the form of hiring quotas or goals is appropriate in order to rectify the past discriminatory hiring practices of public employers, notwithstanding that such remedies may result in some reverse discrimination.  

The court, however, did not address the merits of “race-conscious programs of selection” but merely found that the MNCPPC’s own policy was not followed. The affirmative action plan contained a provision which allowed the transfer if the particular applicant’s qualifications were “clearly superior” to those of others seeking the position. Ms. Crawford was such an applicant.

Crawford is a well-reasoned opinion in the field of administrative law. The court’s holding regarding the doctrine of exhaustion indicates the court’s unwillingness to impose costly and time-consuming administrative procedures on a plaintiff. While the exhaustion doctrine has been invoked when an agency has the authority to interpret a statute, there is simply no reason to force a plaintiff to cope with the procedures of three separate agencies before allowing entrance to the courthouse. The position of the Office of the Attorney General as amicus curiae seems insensitive to the difficulties of an ordinary person wandering in the valley of the shadow of bureaucracy. While there are often good reasons for adherence to an exhaustion requirement, the Court of Appeals properly refused to transform the doctrine of exhaustion into an iron-clad rule. Nevertheless, this decision’s effect on other controversies involving state and federal agencies should be limited, as the legislature endows

54. Id.

55. Id. at 31, 511 A.2d at 1094 (emphasis in original).

56. Id. at 32, 511 A.2d at 1095. The court stressed: “We need not, and do not, reach any of these matters in this opinion. What the above-reviewed contentions overlook is that the circuit court found as a fact that the Park and Planning Commission failed to follow its so-called affirmative action plan in this case.” Id.

57. Id. at 39, 511 A.2d at 1095 (quoting § 11 of the MNCPPC’s affirmative action plan).

58. Id., 511 A.2d at 1095-96.

59. See Board of Educ. v. Hubbard, 305 Md. 774, 788, 506 A.2d 625, 632 (1986) (finding that the Board of Education had statutory authority to interpret the Education Article).

60. See supra note 43.
each agency with peculiar remedial powers.\textsuperscript{61} Certainly, some disputes are more amenable to the expertise of an administrator or a commission than to the jurisdiction of a court.

\textit{b. Findings of Fact.}—The Court of Appeals held in \textit{Sinai Hospital of Baltimore, Inc. v. Maryland Health Resources Planning Commission}\textsuperscript{62} that there was substantial evidence to support either the granting or the denial of a certificate of need for additional cardiac surgery facilities. Therefore, the court affirmed the decision of the Maryland Health Resources Planning Commission\textsuperscript{63} (the Commission) denying two hospitals’ applications.

In September 1983 Sinai Hospital of Baltimore, Inc. (Sinai) and North Charles General Hospital (North Charles) each applied to the Commission for a certificate of need to perform open heart surgery.\textsuperscript{64} The Health-General Article requires that the Commission issue a certificate of need before a person or institution can develop, operate, or participate in certain health care projects.\textsuperscript{65} This requirement aims to ensure that both alterations in service capacity and major expenditures for health care facilities are necessary, affordable, and in keeping with the Commission’s policies.\textsuperscript{66}

The Central Maryland Health Systems Agency recommended that the Commission grant Sinai a certificate of need, while the Commission staff favored North Charles.\textsuperscript{67} The Commission desig-
nated one of its members to hold a hearing on the issue. The hearing officer recommended that the certificate of need be issued to Sinai, believing that the state health plan compelled the Commission to grant one certificate of need despite the adequacy of existing facilities. The full Commission subsequently denied both hospitals' petitions.

The Health-General Article requires that "[a]ll decisions of the Commission on an application for a certificate of need . . . shall be consistent with the State health plan and the standards for review established by the Commission." Using the formula provided by the state health plan for estimating the future need for adult cardiac surgery procedures, the Commission projected a 1986 need for 420 additional procedures. The Commission's standards for review required it to consider present utilization as well as future needs.

Sinai and North Charles argued that the Commission erred as a matter of law by disregarding the future need estimate calculated by using the state health plan formula. The hospitals further contended that the legislature intended that the state health plan take precedence over the Commission's standards for review.

The Court of Appeals determined that neither the state health plan nor the Commission's standards for review predominate; furthermore, there was no conflict between the results of the two analy-

approval for similar projects in the same area, their applications were subject to comparative review. Id. at 474, 509 A.2d at 1023; Md. Regs. Code tit. 10, § 24.01.07B(2) (1988). The Commission may grant only one certificate of need at a time for open heart surgery, in order to allow the new program to develop without competition until it reaches 350 procedures per year. 306 Md. at 476, 509 A.2d at 1204.

68. 306 Md. at 475, 509 A.2d at 1203.
69. Id.
71. 306 Md. at 476, 509 A.2d at 1204. The Commission multiplied the national use rate by the projected population of the Central Maryland Health Services Area two years in the future, and then subtracted the existing cardiac surgery capacity to determine the projected need. Id.
72. Id. at 477-78, 509 A.2d at 1204-05. Then-existing regulations required the Commission to consider "[t]he need for the proposed health services of the population served or to be served, including an analysis of present and future utilization." Id. at 477, 509 A.2d at 1204 (quoting Md. Regs. Code tit. 10, § 24.01.07(D) (1987) (emphasis in original)). The current version of the regulations mandates consideration of "the need analysis (if any) included in the State Health Plan" as well as "the Special Needs" of "groups which may be underserved." Md. Regs. Code tit. 10, § 24.01.07(H) (1988).
73. 306 Md. at 479, 509 A.2d at 1205.
74. Id. As the court noted, the state health plan declares that present need in the form of excessive waiting times is a necessary condition for granting a certificate of need; when there is no future need, excessive waiting time is not a sufficient condition for granting a certificate of need. Id. at 477, 509 A.2d at 1205.
The state health plan focused on future needs, whereas the Commission's regulation addressed present utilization of existing cardiac surgery facilities. The court stressed that the state health plan "neither provides a methodology for computing current need nor prohibits the Commission from establishing current need as one of the standards of review." Therefore, while the state health plan obliged the Commission to consider future needs as a factor in deciding whether to grant a certificate of need, the plan did not mandate that future need be the sole consideration. Consequently, the Commission did not err as a matter of law in denying the certificates of need based on a finding of no present need, even though a future need was predicted.

The court found that because there was no error of law, the only possible ground for overturning the Commission's decision would be an error in the Commission's factual findings. It is well established in Maryland that courts will not substitute their own judgment for that of an administrative agency when there is substantial evidence to support the agency's decision. The court found substantial evidence to support a decision either to add to cardiac surgery facilities or simply to maintain the existing level of service.

75. Id. at 479, 509 A.2d at 1205.
76. Id.
77. Id.
78. Id.
79. Id. In effect, the court found determinations of present need and future need each to be necessary but not sufficient conditions for issuance of the certificate of need.
80. Id. at 478-82, 509 A.2d at 1205-07.
81. The Court of Appeals has declared:

Whichever of the recognized tests the court uses—substantiality of the evidence on the record as a whole, clearly erroneous, fairly debatable or against the weight or preponderance of the evidence on the entire record—its appraisal or evaluation must be of the agency's fact-finding results and not an independent original estimate of or decision on the evidence. The required process is difficult to precisely articulate but it is plain that it requires restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions under any of the tests, all of which are similar. There are differences but they are slight and under any of the standards the judicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. This need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.

82. 306 Md. at 480-81, 509 A.2d at 1205. The court found that the waiting time for elective open heart surgery at the three hospitals offering the procedure was well below the one-month maximum established by the state health plan. Id. at 477, 509 A.2d at 1205. Moreover, the frequency of open heart surgery was decreasing nationwide, ap-
Because the Commission could have reasonably concluded that its standards for issuing certificates of need were not satisfied, the court upheld the Commission's denial of the hospitals' applications. 83

2. Savings and Loan Associations.—a. Right to Refund.—In Chevy Chase Savings & Loan, Inc. v. State 84 the Court of Appeals held that a savings and loan association which as a member had contributed capital to the Maryland Savings-Share Insurance Corporation (MSSIC) had no right to a refund from MSSIC's insurance fund upon withdrawing from the insolvent corporation unless funds remained after repaying creditors. 85 The court further held that MSSIC's delay in repaying central reserve fund contributions, which were used to maintain the liquidity of MSSIC members, resulted from a statutory modification of MSSIC's contract with Chevy Chase Savings & Loan (Chevy Chase) and was not an unconstitutional exercise of the State's power. 86

In 1962 the Maryland legislature created MSSIC as a nonstock, nonprofit corporation whose members were state-chartered savings and loan associations. 87 MSSIC maintained two separate funds; an insurance fund to insure the savings accounts of MSSIC members, and a central reserve fund to provide for the liquidity of MSSIC apparently as a result of new medicines and medical techniques, increased hospital efficiency, and economic factors. Id. at 481, 509 A.2d at 1206. Sinai and North Charles claimed that they could have cardiac surgery facilities operating within three months of Commission approval, diminishing the importance of the need projected more than two years in the future. Id., 509 A.2d at 1206-07. Nevertheless, the three existing cardiac surgery facilities were ready and willing to expand to provide an additional 220 procedures. Id., 509 A.2d at 1206.

83. Id. at 482; 509 A.2d at 1207.
85. Id. at 407, 509 A.2d at 682.
86. Id. at 387, 509 A.2d at 672.
87. Id. The State required all Maryland chartered savings and loan associations to obtain insurance through either the Maryland Savings-Share Insurance Corporation (MSSIC) or the Federal Savings and Loan Insurance Corporation (FSLIC). Id. at 388, 509 A.2d at 672. The purposes of MSSIC were to:

(1) Promote the elasticity and flexibility of the resources of members;
(2) Provide for the liquidity of members through a central reserve fund; and
(3) Insure the savings accounts of the members.


88. Md. Fin. Inst. Code Ann. § 10-105 (1980). MSSIC required each member to contribute to the insurance fund "as a capital deposit" an amount equal to two percent of its free share accounts. MSSIC Rule § 3-301, reprinted in 306 Md. at 417, 509 A.2d at 687 (appendix). MSSIC issued certificates of deposit as evidence of these contributions, but the certificates paid no interest or dividends. 306 Md. at 389, 509 A.2d at 672.
MSSIC obtained the capital necessary to pursue these purposes through the contributions of the member savings and loan associations.\(^8\) A 1974 amendment\(^9\) to the MSSIC statute which provided that "the Central Reserve Fund shall not be subject to payment of insurance claims against [MSSIC]"\(^10\) heightened the distinction between the central reserve fund and the insurance fund.

On October 12, 1984, Chevy Chase notified MSSIC of its intention to withdraw from MSSIC upon approval of Chevy Chase’s application for Federal Savings and Loan Insurance Corporation (FSLIC) membership.\(^11\) Early in 1985, financial difficulties caused the failure of two savings and loans and ultimately of MSSIC itself.\(^12\)

The General Assembly convened an extraordinary session between May 17 and 28, 1985, at which the legislature merged MSSIC into the newly created State of Maryland Deposit Insurance Fund Corporation (MDIF).\(^13\) The General Assembly formed MDIF as a non-stock, nonprofit corporation and a state agency within the Department of Licensing and Regulation.\(^14\) On May 22, 1985,

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89. Md. Fin. Inst. Code Ann. § 10-104(c) (1980). MSSIC Rule 3-901, reprinted in 306 Md. at 420-27, 509 A.2d at 688-92 (appendix). MSSIC members were required to capitalize the central reserve fund by buying interest-bearing "Capital Notes" issued by MSSIC. 306 Md. at 390, 509 A.2d at 673. Each member was obligated to purchase capital notes equivalent to one-half of one percent of assets for a savings and loan association having less than $75 million in assets, or one and one-half percent of assets for savings and loan associations having greater assets. MSSIC Rule § 3-901(B), reprinted in 306 Md. at 421, 509 A.2d at 688-89 (appendix).

90. Md. Fin. Inst. Code Ann. § 10-107(c) (1980) ("Each member shall make the investments and pay the assessments, premiums, and other charges that are required for participation in the corporation.").


92. Id.

93. 306 Md. at 397, 509 A.2d at 677.

94. Id. at 392, 509 A.2d at 674. A "silent run" on certain MSSIC-insured savings and loan associations in early 1985 caused these institutions to borrow heavily. An announcement by MSSIC on May 9, 1985, of a change in management at one of its member savings and loan associations caused the runs to increase and to spread to other institutions. On May 13, 1985, two savings and loan associations were placed in conservatorship; on May 14, 1985, the Governor proclaimed a state of emergency and suspended withdrawal from savings and loan associations insured by the insolvent MSSIC. Id.

95. Id. at 393, 509 A.2d at 674-75. The legislative objective behind the creation of the Maryland Deposit Insurance Fund Corporation (MDIF) was to provide insurance for those savings and loan associations that remained solvent after MSSIC became insolvent, until such time as they could obtain insurance from the Federal Savings and Loan Insurance Corporation (FSLIC) and to liquidate MSSIC’s assets in an orderly manner. Id. at 392-93, 509 A.2d at 674.

96. Id. at 393, 509 A.2d at 674-75. MSSIC, in contrast, was not a state agency; no action by its board of directors could take effect unless approved by the director of the
FSLIC approved Chevy Chase's membership application effective May 23, 1985; the following day Chevy Chase notified its depositors that FSLIC had insured their accounts. 97

On May 28, 1985, Chevy Chase demanded that MDIF, as MSSIC's successor in interest, repay $21,630,107 from the insurance fund and $42,970,900 from the central reserve fund. 98 Chevy Chase based its claim for return of its insurance fund contributions upon the theory that its right to repayment vested when it gave notice of intent to withdraw from MSSIC, or in the alternative, upon its withdrawal from MSSIC after obtaining FSLIC insurance. 99 Therefore, its claim took priority over depositors' claims because it was payable earlier than the depositors' claims. Chevy Chase contended that it had an unconditional right to the money on May 24, 1985, the date of its withdrawal from MSSIC. The depositors' claims, however, were not payable until there was a determination of the "net insurable loss" of each free share account of the member savings and loan in default. 100

The court rejected Chevy Chase's claim for reimbursement of its contributions to the insurance fund. 101 The court found that the earliest date on which Chevy Chase could seek repayment under MSSIC Rule 3-504 was May 24, 1985, the date on which Chevy Chase notified its depositors of the termination of MSSIC insurance. 102 Although there was cash in the insurance fund on that date, MSSIC was insolvent because its liabilities clearly exceeded its resources, even if the full extent of its liabilities was not yet known. 103

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97. Id. at 397; 509 A.2d at 677.
98. Id. at 397-98, 509 A.2d at 677. MSSIC Rule § 3-503, reprinted in 306 Md. at 418-19, 509 A.2d at 687-88 (appendix), governs repayment of insurance fund contributions to withdrawing members. MSSIC Rules §§ 3-901(B)(6) and 3-901(K), reprinted in 306 Md. at 422-23, 426-27, 509 A.2d at 690, 692 (appendix), govern repayment of central reserve fund contributions to withdrawing members.
99. 306 Md. at 400-01, 509 A.2d at 678.
100. Id. at 401, 509 A.2d at 679.
101. Id. at 399, 509 A.2d at 678.
102. Although May 24, 1985, was the earliest possible date of payment, MSSIC Rule § 3-503(B) provided that MSSIC should specify an insurance termination date no later than 12 months after the member gave notice of its intent to withdraw. Because the court found no record of MSSIC setting a "terminal date," it found that the terminal date could be as late as October 13, 1985. 306 Md. at 400, 509 A.2d at 678.
103. The court held that MSSIC became liable for the depositors' claims on May 18, 1985, although the claims were not liquidated and payable on that date according to traditional insurance rules. In support of its ruling, the court quoted a leading authority on insurance:
Therefore, all claims against MSSIC after May 18, 1985, the date of MDIF's creation, should be governed by the law relating to insolvency.\(^4\)

Maryland law prohibits a corporation from purchasing or redeeming any of its stock "if the corporation is insolvent or the transaction would cause the corporation to become insolvent."\(^5\) Because this law also governed MSSIC,\(^6\) the court found that return of insurance fund contributions to withdrawing members likewise was subject to the implied condition that MSSIC be solvent at the time of withdrawal.\(^7\) Chevy Chase could not withdraw its insurance fund contributions because MSSIC was insolvent before Chevy Chase satisfied the conditions for withdrawal established in MSSIC Rule 3-503.\(^8\)

Not only did the court reject Chevy Chase's arguments asserting its priority due to the timeliness of its claim, but the court also, through its analogy to ordinary business corporations, gave the claims of depositors, as creditors, higher priority than the claims of Chevy Chase as a shareholder.\(^9\) The depositors, as the intended beneficiaries of the insurance fund, stood as creditors when MSSIC became insolvent; therefore, their claims had priority over those of Chevy Chase.\(^10\)

\(^{104}\) "When a loss covered by the policy is sustained, the liability of the insurer is determined as of the date of the loss and according to the terms of the policy without regard to the fact that the insurer thereafter became insolvent or that the actual amount of the insured's claim was not determined until after the insurer had become insolvent."

\(^{105}\) Id. at 401-02, 509 A.2d at 679 (quoting 2A G. COUCH, COUCH ON INSURANCE § 22:74, at 679 (rev. ed. 1984)). Note, however, that the court also recognized that MSSIC was not subject to Maryland insurance regulations. Id. at 388, 509 A.2d at 672 (citing Md. Fin. Inst. Code Ann. § 10-114 (1980)).

\(^{106}\) 306 Md. at 402, 509 A.2d at 679.

\(^{107}\) MD. CORPS. & ASS'NS CODE ANN. § 2-311(c) (1985). The court viewed Chevy Chase's contribution to the insurance fund as equivalent to the purchase of stock in an ordinary business corporation. 306 Md. at 402, 509 A.2d at 679.

\(^{108}\) Id. See MSSIC Rule § 3-503, reprinted in 306 Md. at 418-19, 509 A.2d at 687-88 (appendix). The Court of Appeals previously had noted:

The general rule . . . is that after a building association has become insolvent . . . the right of every shareholder to equality in the distribution attaches as a paramount equity and no shareholder has the right to defeat that equality by withdrawing [assets from the association].

Wyman v. McKeever, 239 Md. 130, 133, 210 A.2d 537, 539 (1965).

\(^{109}\) 306 Md. at 402-03, 509 A.2d at 679.

\(^{110}\) Id. In cases involving mutual insurance companies, the Court of Appeals has held that a policyholder does not become a creditor unless the policy has matured.
The court next considered whether MSSIC's delay in repayment of contributions to the central reserve fund breached the contract between Chevy Chase and MSSIC. Chevy Chase argued that according to the terms of the contract, it was entitled to repayment of all its central reserve fund contributions on April 13, 1985, six months after giving notice of its intent to withdraw from MSSIC. The court disagreed, declaring that the contract between MSSIC and Chevy Chase gave Chevy Chase no right to repayment of its central reserve fund contributions until its membership in MSSIC terminated. The earliest date on which Chevy Chase before the insolvency. Baltimore & Ohio R.R. v. Baltimore & Ohio Employees' Relief Ass'n, 77 Md. 556, 573, 26 A. 1045, 1047-48 (1893) (finding that an accident insurance policy matured at the time an employee became disabled). Maryland has applied the same rule to members of fraternal benefit societies and mutual endowment societies. Failey v. Fee, 83 Md. 85, 95-96, 34 A. 839, 842 (1896) ("When the [insurance] certificates matured the holders thereupon became creditors, and they remain so notwithstanding the subsequent insolvency of the [fraternal] Order."). Chevy Chase's claim had not matured because it was still a member of MSSIC at the time MSSIC became insolvent. By contrast, the depositors were never members of MSSIC and thus their claims matured upon MSSIC's insolvency. See 306 Md. at 402-03, 509 A.2d at 679-80.

111. 306 Md. at 407, 509 A.2d at 682. The State did not dispute the claim that Chevy Chase was entitled to a return of its Central Reserve Fund contributions when the liquidity problems of member associations are resolved." Id. (quoting circuit court's holding).

112. The contract incorporated portions of the MSSIC Rules. See id. at 407-08, 509 A.2d at 682. The pertinent rule provided:

Membership in the [Central Reserve] Fund may be terminated should any member withdraw from membership in the Corporation or be expelled. Any withdrawing member shall notify the Fund of its intention to withdraw at least three (3) months prior to termination of its membership. In the event of such termination . . . the capital notes shall be surrendered and cancelled and payment shall be made of the investment in said notes plus accrued interest, if any, less any advances, loans or other indebtedness of the member, and the collateral, if any, shall be returned.

Any member having given notice of its intention to withdraw from membership and requesting payment of its capital notes, in accordance with the provisions of Section 3-901(B)(6) shall be entitled to receive the face amount of the capital notes within six months after notice of its intention to withdraw; in the event the Central Reserve Fund does not have sufficient cash available to pay the withdrawing member the full amount of the capital note, then, in that event the Fund may make partial payments of funds received from maturing securities to the withdrawing member until the full amount due the member is paid. Any such deferred payments shall continue to bear interest as though the member were still an active participant in the Fund.

MSSIC Rule § 3-901(B)(6), -901(K), reprinted in 306 Md. at 422-27, 509 A.2d at 690-92 (appendix).

113. 306 Md. at 407-08, 509 A.2d at 682.

114. Id. at 408, 509 A.2d at 682.
could have terminated its membership was May 24, 1985. Assuming that, under its contract with MSSIC, Chevy Chase was entitled to a total repayment of its central reserve fund contributions on that date, the merger of MSSIC into MDIF on May 18, 1985, changed that contract. Following the merger, withdrawals from the central reserve fund were subject to the terms adopted by MDIF’s director and approved by its board. Because the director and the board refused Chevy Chase’s request for repayment of central reserve fund contributions until liquidity problems were resolved, Chevy Chase was required to wait for repayment.

Finally, the court examined whether the State’s delay in repayment of central reserve fund contributions amounted to an unconstitutional taking of Chevy Chase’s property. In determining whether or not an unconstitutional taking has occurred, a court must consider “three factors which have ‘particular significance’: (1) ‘the economic impact of the regulation on the claimant’; (2) ‘the

115. Id.
116. The court assumed “that, but for [the merger], Chevy Chase would have been entitled to all of its contributions to the [central reserve fund] as of May 24, 1985, without regard to the liquidity requirements of MDIF’s members.” Id. at 409, 509 A.2d at 683. This approach allowed the court to avoid deciding the correct interpretation of MSSIC Rule § 3-901(K), which, according to the court, “bristles with questions of interpretation superimposed on questions of fact.” Id. at 408, 509 A.2d at 682.
117. Id. at 409, 509 A.2d at 683. The court declared that the merger of MSSIC into MDIF ended MSSIC’s corporate existence, and with it, all MSSIC rules that conflicted with the merger statute. Id. at 410, 509 A.2d at 683. Because this is the foundation of the court’s opinion, the date of Chevy Chase’s withdrawal from MSSIC takes on enormous significance. If Chevy Chase effectively had withdrawn from MSSIC prior to the merger, then the contract for return of Chevy Chase’s contribution would have become executory prior to the merger and the merger would not have affected the contract. In analyzing this aspect of the case, the court found that the legislation merging MSSIC into MDIF was effective May 18, 1985, but earlier in the opinion the court described the legislation as taking effect June 1, 1985, one week after Chevy Chase withdrew from MSSIC. Compare id. at 409, 509 A.2d at 683 with id. at 393, 509 A.2d at 674. The source of this ambiguity is the legislation itself: “[The Act] shall take effect from the date of its passage. However, if any provision, or portion of a provision of this Act cannot take effect immediately, the specific provision, or portion of a provision, shall take effect June 1, 1985.” Act of May 18, 1985, ch. 6, 1985 Md. Laws 4118, 4128-29. Although the court did not address this issue in its opinion, it is apparent that the court concluded that the relevant provisions took effect on May 18, 1985.
118. MD. FIN. INST. CODE ANN. § 10-112(b) (1985).
119. 306 Md. at 409-10, 509 A.2d at 683. On appeal Chevy Chase also raised the constitutional prohibition against impairment of contracts, but the Court of Appeals ruled that because Chevy Chase did not assert this issue in its complaint and the trial court did not decide the issue, the matter was not properly before it. Id. at 416, 509 A.2d at 686. The court stated that even if the issue of impairment had been properly raised, the outcome would have been the same. The merger did not significantly impair the contract, and the public purpose furthered by the delay outweighed any impairment that did exist. Id., 509 A.2d at 686-87.
extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' 

The Court of Appeals found that these factors did not outweigh the State's interest in resolving the economic emergency. In the court's judgment, the delay in repayment of central reserve fund contributions caused only a slight economic impact upon Chevy Chase. The court noted that the contributions earned interest until the time of repayment; Chevy Chase did not contend that the interest rate was a factor indicating that a taking had occurred. Furthermore, the delay in repayment did not interfere with a distinct, investment-backed expectation of Chevy Chase, because Chevy Chase could not expect the MSSIC bylaws to remain unchanged. The court emphasized that Chevy Chase chose to enter a regulated business and knew that MSSIC's charter was subject to legislative amendment. Therefore, although Chevy Chase expected to receive repayment of its central reserve fund contributions no later than six months after its withdrawal from MSSIC, because Chevy Chase was aware of the State's power to unilaterally change MSSIC's rules, its only legitimate expectation was that any such changes would be consistent with MSSIC's objectives.

The character of the state action resulting in the delay in repayment was consistent with the original purposes of MSSIC. The purpose of the central reserve fund was to provide liquidity for MSSIC members; the reason for the delay in repayment was that the fund's assets were needed to provide liquidity for MDIF's solvent members. In the court's view, the only change effectuated by the merger was that the repayment of central reserve fund contributions

121. 306 Md. at 414-16, 509 A.2d at 686-87. The Supreme Court applied this balancing approach in Noble State Bank v. Haskell, 219 U.S. 104 (1911).
122. 306 Md. at 412, 509 A.2d at 684.
123. Id. at 410-11, 509 A.2d at 684. Following the circuit court decision, the State appropriated funds for the central reserve fund and directed MDIF to repay members by December 31, 1986. The fact that Chevy Chase could expect payment between July 1, 1986, and December 31, 1986, and would receive interest for the delay influenced the appellate court's decision that the economic impact was slight. Id.
124. Because it found no legitimate expectation, the court did not explicitly consider whether this delay interfered with investment-backed expectations. The assurance that Chevy Chase's central reserve fund contribution would be repaid with interest may have satisfied the court with respect to the issue of interference.
125. Id. at 411-12, 509 A.2d at 684.
126. Id.
127. Id. at 412, 509 A.2d at 684.
was not conditioned expressly on the availability of funds in excess of MDIF’s reasonably anticipated needs. 128 Accordingly, the delay in repayment of Chevy Chase’s central reserve fund contributions pursuant to the MSSIC plan did not amount to an unconstitutional taking of its property. 129

The court correctly decided the insurance fund issue. MSSIC Rule 3-503 conditioned repayment of insurance fund contributions upon withdrawal from MSSIC. The date of Chevy Chase’s withdrawal was clearly May 24, 1985, and it was obvious that MSSIC was insolvent at that time. The court reasonably concluded that statutes governing corporations applied to the nonstock, nonprofit corporation and therefore prohibited MSSIC members from withdrawing assets when MSSIC became insolvent. In addition, it would be contrary to the principle of insurance if members of a group who undertook to spread a risk among themselves were permitted to escape that liability by withdrawing after the loss is realized.

The court’s decision on the central reserve fund issue is equally supportable. Because the effective date of the merger was May 18, 1985, MSSIC’s dissolution occurred before Chevy Chase’s withdrawal. Moreover, Chevy Chase had no legitimate expectation that the MSSIC bylaws would not change, beyond the expectation that any changes would be constitutional and consistent with MSSIC’s original purpose. MDIF maintained the central reserve fund for liquidity purposes, and lack of liquidity was the cause of the delay. MDIF would repay Chevy Chase’s central reserve fund contribution with a fair rate of interest by December 31, 1986. While Chevy Chase was not free to put these assets to other uses during this time, it is difficult to regard the delay as an unconstitutional taking.

b. Pro Rata Distribution.—A second case growing out of the 1985 savings and loan emergency was United Wire, Metal & Machine Health & Welfare Fund v. State of Maryland Deposit Insurance Fund Corp. 130 In United Wire the Court of Appeals held that the distribution plan proposed by the State of Maryland Deposit Insurance Fund Corporation (MDIF), under which some depositors of a failed savings and loan association would be paid in full while other depositors would receive less than their full deposits, violated neither the common-law rule of pro rata distribution nor state and federal equal

128. Id.
129. Id. at 416, 509 A.2d at 686.
United Wire was a major depositor in Old Court Savings and Loan, Inc. (Old Court), one of the savings and loan associations that failed in the spring of 1985. MDIF was the state agency charged with paying insured depositors for any net loss on their accounts after liquidation of the assets of the insolvent savings and loans. The General Assembly created MDIF after the failure of several large savings and loan associations rendered insolvent MDIF's predecessor, the Maryland Savings-Share Insurance Corporation (MSSIC).

In January 1986 the Governor announced the State's plan for financing the expected insurance losses. In March 1986 MDIF, as receiver of Old Court, moved in the Circuit Court for Baltimore City for authority to implement the general distribution plan for Old Court depositors. The immediate effect of the plan would be distribution of the full account balance of up to $5000 for each ordinary depositor, and up to $100,000 for each Individual Retirement Account (IRA) depositor. United Wire, which intervened in the receivership proceedings, opposed the motion on the grounds that the plan's disparate treatment of depositors violated the rule of pro rata distribution and was state action depriving United Wire of

131. Id. at 156-57, 512 A.2d at 1051-52.
132. The United Wire, Metal & Machine Health & Welfare Fund and the United Wire, Metal & Machine Pension Fund deposited approximately $16 million in Old Court Savings and Loan, Inc. (Old Court). Id. at 153, 512 A.2d at 1049.
133. Id. at 151-52, 512 A.2d at 1049. Old Court was placed in conservatorship in May 1985 and in receivership in November of the same year. Id.
134. Id. at 151, 512 A.2d at 1048.
135. Id. For a discussion of the creation of the Maryland Deposit Insurance Fund Corporation (MDIF), see supra notes 95-96 and accompanying text.
136. 307 Md. at 152, 512 A.2d at 1049. The general distribution plan included a variety of strategies tailored to each of the five troubled savings and loan associations. Id.
137. The plan provided for an immediate distribution to Old Court depositors in the following manner:
   - Each depositor with an aggregate deposit balance of less than $100 will receive payment in full from the State.
   - Each depositor with an aggregate deposit balance between $100 and $5000 will receive an interest-bearing transaction account at Maryland National Bank with a deposit balance equal to that depositor's former Old Court accounts.
   - Each depositor with an aggregate deposit balance exceeding $5000 will receive $5000 from the State.
   - Each depositor with an Individual Retirement Account (IRA) balance of $100,000 or less will receive an interest-bearing IRA at Maryland National Bank with a deposit balance equal to that depositor's former Old Court IRA.
Id. at 152-53, 512 A.2d at 1049.
equal protection. United Wire argued that the financing plan would "fundamentally alter the nature of the risks shared by co-equal depositors" in Old Court. While approximately half of the depositors would receive payment in full immediately, the other half would have to rely upon the State eventually fulfilling its insurance obligation. The State's distribution plan therefore would violate the common-law principle that each depositor in an insolvent savings and loan association has a right to equality in the distribution of its assets. Accordingly, United Wire contended that any distribution of funds must be pro rata.

Because the proposed plan would not distribute the assets of Old Court, the Court of Appeals held that United Wire's argument for pro rata distribution must rest on other grounds. Nevertheless, the court recognized that "it is also clear that the principle of equality of treatment extends beyond the distribution of assets of an insolvent savings and loan association." The court therefore considered whether the proposed distribution equalled MDIF's advance payment of insurance on deposits, or whether it more properly would represent voluntary state action. If the proposed

138. Id. at 153, 512 A.2d at 1049-50. The circuit court granted MDIF's motion and United Wire appealed from the order. Id. at 154, 512 A.2d at 1050.
139. Id.
140. Id. at 155, 512 A.2d at 1050-51.
141. Id. at 154, 512 A.2d at 1050-51. MDIF cited as authority Wyman v. McKeever, 239 Md. 130, 210 A.2d 537 (1965), in which the Court of Appeals declared:

The general rule, now firmly established by the great majority of the cases on the subject, is that after a building association has become insolvent in fact, even though this is not known, the right of every shareholder to equality in the distribution attaches as a paramount equity and no shareholder has the right to defeat that equality by withdrawing, perfecting an incompleted attempt to withdraw, or retaining the fruits of a completed withdrawal.

Id. at 133, 210 A.2d at 539.
142. 307 Md. at 153, 512 A.2d at 1049.
143. Id. at 154-55, 512 A.2d at 1050. The circuit court found as a matter of fact that the proposed distribution was not a distribution of the assets of Old Court in liquidation and therefore did not require pro rata distribution. Because United Wire did not contest this finding, the Court of Appeals expressed "no opinion on whether the obligation of MDIF as an insurer of the accounts in Old Court is in any way an asset of that association." Id. at 155 n.2, 512 A.2d at 1050 n.2.

144. Id. at 155, 512 A.2d at 1050. Although the Old Court assets were not to be distributed under the plan, they would be used in administering the plan. United Wire apparently used this as a basis for challenging the distribution. Id. at 153, 512 A.2d at 1049.
145. Id. at 155, 512 A.2d at 1050.
146. Id. at 155-56, 512 A.2d at 1051.
147. Id. at 157, 512 A.2d at 1051. The parties offered alternative interpretations of
distribution were an advance insurance payment, as United Wire suggested, then it would not be subject to the common-law rule of pro rata distribution.\textsuperscript{148} Section 10-110.1(c) of the Financial Institutions Article\textsuperscript{149} abolished any common-law rule of pro rata distribution that might otherwise have been applicable to the payment of

the nature of the proposed distribution. The court did not determine which interpretation was legally correct, but analyzed both interpretations and found that the proposed distribution was lawful regardless of which interpretation was used. \textit{Id.} at 156-57, 512 A.2d at 1051.

\textsuperscript{148} \textit{Id.} at 156, 512 A.2d at 1051.

\textsuperscript{149} The applicable statute, which became effective April 3, 1986, reads:

\begin{quote}
\begin{itemize}
\item\textit{(c) Cash payments or issuance of obligations.--Subject to any other conditions established under law, if the Fund Director is reasonably satisfied that an insurable loss will be incurred upon final liquidation, in order to facilitate the payment of deposit insurance to depositors of a member association and to reasonably reduce the administrative costs of a liquidation, including demands on any hardship withdrawal plan, the Fund may, either upon final liquidation or earlier, and either from available moneys in the Fund or from any other State funds advanced to the Fund for that purpose:}
\item\textit{(2) Make a cash payment or payments, in an amount equal to all or any portion of the depositors' savings accounts, to any or all of the depositors of a member association in receivership . . . .}
\end{itemize}
\end{quote}

\textit{MD. FIN. INST. CODE ANN. § 10-110.1(c) (1986 & Supp. 1987)} (emphasis added by the court). Although the statute took effect after the circuit court decision, the Court of Appeals noted that appellate courts ordinarily apply the law in effect at the time the case is decided. 307 Md. at 156, 512 A.2d at 1051. \textit{See, e.g.}, Pickett v. Prince George's County, 291 Md. 648, 662, 436 A.2d 449, 457 (1981) ("A well-known rule of law is that appellate courts decide cases according to then existing laws in the absence of some impairment of constitutional rights . . . ."); Mraz v. County Comm'rs, 291 Md. 81, 90, 433 A.2d 771, 776 (1981) ("[A] change in the law that does not impair existing substantive rights but only alters the procedures involved in the enforcement of those rights ordinarily applies to all actions whether accrued, pending, or future unless a contrary intention is expressed."); McClain v.-State-288-Md.-456,-464; 419-A.2d-369,-372-(1980) (collecting cases). For a further discussion of the applicability of newly enacted statutes, see the analysis of Washington Suburban Sanitary Comm'n v. Riverdale Heights Volunteer Fire Co., 308 Md. 556, 520 A.2d 1319 (1987), \textit{infra} notes 280-318 and accompanying text.

Note, however, that another amendment to the Financial Institutions Article, also effective April 3, 1986, reinforced the common-law rule of pro rata distribution:

\begin{quote}
\begin{itemize}
\item\textit{(f) Distribution of assets.--In any distribution of assets on liquidation of a savings and loan association for which a receiver has been appointed under § 9-708 of this Part II of this subtitle:}
\item\textit{(1) All unsecured claims of any class of priority shall be paid in full, or provision made for payment, before any claims of lesser priority are paid, and if there are insufficient funds to pay any class of claims of one priority in full, distribution to claimants in such class shall be made pro rata . . . .}
\end{itemize}
\end{quote}

\textit{MD. FIN. INST. CODE ANN. § 9-712 (1986)}. The court's opinion did not address this apparent conflict, perhaps assuming that the issue of insufficient funds was moot because depositors were to be repaid from state funds rather than Old Court's funds. Although the state funds may in fact be sufficient to repay all depositors in full, actual repayment remains subject to the vagaries of state politics. The court did not fully an-
insurance under the plan.\textsuperscript{150}

Moreover, even if the State’s payments to Old Court depositors were “voluntary [S]tate action,” as MDIF suggested, the rule of pro rata distribution still would not apply.\textsuperscript{151} Because the State would not be legally obligated to contribute, as a voluntary contributor it could distribute the funds on its own terms, as long as those terms were within constitutional limits.\textsuperscript{152}

The State has broad discretion in distributing its funds. Nevertheless, the equal protection clause of the fourteenth amendment to the United States Constitution and article 24 of the Maryland Declaration of Rights limit that discretion whenever individuals are afforded disparate treatment.\textsuperscript{153} The Supreme Court has held that an unequal distribution of state benefits is subject to scrutiny under the equal protection clause,\textsuperscript{154} but that “[g]enerally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose.”\textsuperscript{155}

The Court of Appeals found that the proposed distribution plan was intended to further two legitimate purposes. First, the plan would alleviate the financial hardship suffered by Old Court depositors by making some cash available before completion of the liquidation process.\textsuperscript{156} Second, the plan would reduce the costs of administering the receivership\textsuperscript{157} by reducing the number of affected depositors from 34,000 to approximately 17,000.\textsuperscript{158} Because the proposed distribution plan bore a rational relationship to its legitimate purposes, the plan did not violate the equal protection clause.\textsuperscript{159}

\textsuperscript{150} United Wire’s contention that the distribution plan fundamentally altered the nature of risks shared by co-equal depositors.

\textsuperscript{151} 307 Md. at 156, 512 A.2d at 1051.

\textsuperscript{152} Id. at 157, 512 A.2d at 1051 (quoting MDIF’s brief).

\textsuperscript{153} Id.

\textsuperscript{154} Id., 512 A.2d at 1052; U.S. Const. amend XIV; Md. Const. Decl. of Rts. art. 24. Although the Maryland Declaration of Rights has no express equal protection clause, the Court of Appeals has interpreted article 24 as imposing much the same requirement as the fourteenth amendment of the United States Constitution. See Attorney Gen. v. Waldron, 289 Md. 683, 704, 426 A.2d 929, 940-41 (1981).

\textsuperscript{155} Zobel v. Williams, 457 U.S. 55, 67 (1982) (holding that an Alaska plan to distribute surplus funds to state residents in proportion to the length of their residency violated the equal protection clause).

\textsuperscript{156} Id. at 60.

\textsuperscript{157} 307 Md. at 158, 512 A.2d at 1052.

\textsuperscript{158} Id.

\textsuperscript{159} Id. at 160, 512 A.2d at 1053.

\textsuperscript{159} Id. at 159-60, 512 A.2d at 1053. The Supreme Court summarized the law as follows:
United Wire also contested MDIF’s plan to create fully liquid IRA accounts for Old Court IRA depositors at Maryland National Bank with balances equal to the depositors’ Old Court IRA balances, up to $100,000 each. MDIF justified this aspect of the proposed distribution plan on the grounds that there was a substantial question as to whether or not a financial institution in receivership can serve as an IRA trustee, that distributions from an IRA to depositors under the age of fifty-nine would result in substantial tax penalties, and that pro rata distribution might prevent IRA depositors over age seventy from withdrawing the amounts required by the Internal Revenue Service. The court held that it was sufficient that MDIF could show that IRAs presented problems significantly different from other accounts and that the contested parts of the plan bore a rational relationship to the State’s purpose in resolving those problems.

Although the court correctly decided this case, it left a disconcerting question unresolved. In order for the court to hold that section 10-110.1(c) abolished the common-law rule of pro rata distribution with respect to the distribution of deposit insurance

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some “reasonable basis,” it does not offend the Constitution simply because the classification “is not made with mathematical nicety or because in practice it results in some inequality.” Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)). United Wire sought to establish that MDIF bore the burden of proving that the general distribution plan would be more cost effective than a pro rata distribution. The Court of Appeals refused to shift the burden of proof to MDIF, pointing out that “[i]f any state of facts reasonably can be conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed.” 307 Md. at 159, 512 A.2d at 1052-53 (quoting Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340, 352, 499 A.2d 178, 185 (1985)).

United Wire also argued that if IRAs were to be treated specially, then multi-employer benefit funds maintained pursuant to the Employees’ Retirement Income Security Act of 1974 (ERISA), such as themselves, must receive equal treatment. The court disagreed, however, distinguishing between accounts established as IRAs and accounts established through the investment decisions of pension fund managers, asserting that the problems of the former do not pertain to the latter. Id. at 161, 512 A.2d at 1053-54.


While United Wire presented persuasive rebuttals to all of these contentions, the court did not decide which interpretation of the rules governing IRAs was correct.

The court indicated that if MDIF had decided to pay IRA depositors simply to avoid being “peppered” with questions, this would be a sufficiently rational basis for MDIF’s action and would withstand judicial review. Id.
payments, the court first had to find that section 9-712 did not apply to the MDIF insurance. Section 10-110.1(c) allows unequal distributions "[s]ubject to any other conditions established under law."164 Section 9-712, amended at the same Special Session, contains such a condition by requiring that assets of a liquidated savings and loan association be distributed pro rata.165 The circuit court found that the MDIF insurance obligation was not an asset of Old Court.166 Because United Wire did not contest this factual finding, the Court of Appeals did not reconsider this aspect of the decision below and expressly denied deciding it.167 In spite of this uncertainty, the court properly determined that MDIF’s interpretation of the statute was reasonable. Moreover, because MDIF’s distribution plan was rationally related to the legitimate end of reducing the burden of administering the Old Court receivership, the plan did not violate equal protection.

3. Unemployment and Workers’ Compensation.—a. Employer’s Right to Set-off.—In Potter v. Bethesda Fire Department, Inc.168 the Court of Appeals held that a Montgomery County fire department was a “quasi-public corporation.” Therefore, the fire department was entitled to a set-off of workers’ compensation benefits against the disability retirement benefits received by a firefighter.169

The case culminated a nine-year struggle through the Maryland administrative and court systems.170 Theodore Potter was a salaried firefighter with the Bethesda Fire Department, Inc. (BFD).171 In 1978 he filed a claim for workers’ compensation due to a job-related injury.172 At that time the Insurance Company of North America (INA) was BFD’s insurer.173 Potter received a subsequent injury while Montgomery County insured BFD. Potter then retired under Montgomery County’s disability retirement program.174 Because Potter was receiving disability retirement benefits, BFD, Montgomery County, and INA claimed the right to a statutory set-off of work-

165. Id. § 9-712(f)(1) (1986).
166. 307 Md. at 154-55, 512 A.2d at 1050.
167. Id. at 155 & n.2, 512 A.2d at 1050 & n.2.
169. Id. at 365-66, 524 A.2d at 69-70.
170. For an analysis of the procedural aspects of this case, see Survey of Developments In Maryland Law—Civil Procedure, 45 Md. L. Rev. 501, 509 (1986).
171. 309 Md. at 349, 524 A.2d at 62.
172. Id.
173. Id.
174. Id.
The court first discussed the proper interpretation of sections 21(a)(2) and 33 of article 101, recognizing that a statute must be interpreted to effectuate the real and actual intention of the legislature. According to the court, section 21(a)(2) was designed to encompass "all the various and sundry bodies of a governmental nature in the diverse system of government existent in Maryland, ... and make each of them 'employers' in the contemplation of the Workmen's Compensation Act." The court relied on Frank v. Baltimore County, which held that the legislative scheme in sections 21 and 33 was to provide a single remedy for injured government employees eligible for double compensation, and to discharge an employer or an insurer from its obligation to pay workers' compensation when disability pension benefits exceed the amount of work-

175. Id. The relevant statutes, Md. Ann. Code art. 101, §§ 21, 33, 67 (1985 & Supp. 1987), address the overlapping of workers' compensation benefits and disability retirement benefits and identify the employers covered by these statutes. Section 21 provides in pertinent part:

(a) Coverage of employers.—The following shall constitute employers subject to the provisions of this article:

(1) Every person that has in the State one or more employees subject to this article.

(2) The State, any agency thereof, and each county, city, town, township, incorporated village, school district, sewer district, drainage district, public or quasi-public corporation, or any other political subdivision of the State that has one or more employees subject to this article.

Id. § 21(a) (Supp. 1987). Furthermore, § 21(b)(4) provides that, except in certain locations including Montgomery County, "every person who is a member of a volunteer fire or rescue squad ... shall be deemed for the purpose of this article, to be in the employment of the political subdivision of the State where the department is organized." See also id. at-(c)(5)-(1985)-(listing-localities-not-covered by-the-statute).

Section 33 provides in pertinent part:

(c) Whenever by statute, charter, ordinances, resolution, regulation or policy adopted thereunder, whether as part of a pension system or otherwise, any benefit or benefits are furnished employees of employers covered under § 21(a)(2) of this article, ... the benefit or benefits when furnished by the employer shall satisfy and discharge pro tanto or in full as the case may be, the liability or obligation of the employer and the Subsequent Injury Fund for any benefit under this article.

Id. § 33(c) (1985).

Finally, § 67 defines "employer" as "those persons who fall within the requirements of § 21(a) of this article." Id. § 67(2) (Supp. 1987).

The county, BFD, and INA contended that because Potter was receiving disability retirement benefits from Montgomery County in excess of any benefits he was eligible to receive from workers' compensation, they were entitled to a set-off of the workers' compensation paid to Potter. 309 Md. at 349-50, 524 A.2d at 62.

176. 309 Md. at 353, 524 A.2d at 63-64.

177. Id. at 355, 524 A.2d at 65.

ers' compensation benefits. Thus, if BFD was a covered employer under section 21(a)(2), BFD and its insurers, INA and Montgomery County, were entitled to a set-off pursuant to section 33(c). If section 21 did not apply to BFD, however, section 33(c) likewise would not apply and Potter could receive both types of benefits.

To fall within the scope of section 33(c), BFD had to qualify as a "quasi-public corporation." Because there was little case law regarding quasi-public corporations, the court relied on scholarly treatises and defined a quasi-public corporation as one which "has the characteristics of a public corporation in function, effect or status." The court found, however, that the legislative intent of section 21(a)(2) was to confine quasi-public corporations to those of a governmental nature only.

The court examined the Montgomery County Code, the fire

179. Id. at 659, 399 A.2d at 253-54.
180. 309 Md. at 356, 524 A.2d at 65. The court also noted Mazor v. Department of Correction, 279 Md. 355, 369 A.2d 82 (1977), which held that § 33 entitled both the employer and its insurer to discharge of its obligation. Id. at 360, 369 A.2d at 86.
181. 309 Md. at 356, 524 A.2d at 65. In Frank the Court of Appeals held that any employee benefit provided by a public employer, "whether as part of a [statutorily adopted] pension system or otherwise," is sufficient to bring section 33 into play, and that under the juxtaposition provided in that section there exists no reason why the employer should not be discharged from his compensation obligation whenever the total amount of any employee benefit, whether furnished entirely or partially by employer funds, is equal to or better than the workmen's compensation award.
182. 309 Md. at 356-57, 524 A.2d at 66. The court relied heavily on 1 C. SWERINGEN, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (rev. perm. ed. 1988), which defines quasi-public corporations as those which "fall within the class of private corporations, but which, nevertheless, by reason of the nature and extent of their operation and effect on the welfare of the public at large, have been styled quasi-public corporations." Id. § 63, at 600 (footnote omitted). The treatise further identifies quasi-public corporations as "private corporations which have accepted from the state the grant of a franchise or contract involving the performance of public duties." Id. at 601 (footnote omitted). Finally, it addresses fire departments specifically, stating: "A corporation organized for the protection of the property of fellow citizens from fire is not for the private gain and profit of its members but for the public benefit. Accordingly a fire engine company is considered to be a public or quasi municipal corporation . . . ." Id. at 602 (footnotes omitted). See 309 Md. at 357-58, 524 A.2d at 66.
183. 309 Md. at 356-57, 524 A.2d at 65. Article 101 does not define a "quasi-public" corporation; moreover, at the time of this case, only 12 cases had come before the Court of Appeals concerning "quasi-public" corporations. Id.
184. Id. at 357, 524 A.2d at 66. The court relied heavily on 1 C. SWERINGEN, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (rev. perm. ed. 1988), which defines quasi-public corporations as those which "fall within the class of private corporations, but which, nevertheless, by reason of the nature and extent of their operation and effect on the welfare of the public at large, have been styled quasi-public corporations." Id. § 63, at 600 (footnote omitted). The treatise further identifies quasi-public corporations as "private corporations which have accepted from the state the grant of a franchise or contract involving the performance of public duties." Id. at 601 (footnote omitted). Finally, it addresses fire departments specifically, stating: "A corporation organized for the protection of the property of fellow citizens from fire is not for the private gain and profit of its members but for the public benefit. Accordingly a fire engine company is considered to be a public or quasi municipal corporation . . . ." Id. at 602 (footnotes omitted). See 309 Md. at 357-58, 524 A.2d at 66.
185. 309 Md. at 358, 524 A.2d at 66.
186. MONTGOMERY COUNTY, MD., CODE § 21-4A(a) to -4A(c) (1984).
department's functions, and the extent of control that the county exercised over the fire department in concluding that the fire department was indeed a quasi-public corporation. Although BFD was privately chartered and was an independent corporate entity, if "the services the county has entrusted to it are so important and necessary to all of the people," the business is affected with a public interest and the corporation thus becomes quasi-public.

The court concluded that because the fire department was subject to the Workmen's Compensation Act, it was an employer under the provisions of the statute. Accordingly, Potter, as an employee of BFD, could receive workers' compensation for his injuries. Potter also was entitled to pension benefits; consequently, the provisions of article 101, section 33(c) applied. Section 33(c) states that employee benefits provided under section 21(a)(2), including pension benefits, discharge pro tanto the employer's obligation regarding workers' compensation. Therefore, BFD, Montgomery County, and INA were entitled to a set-off to the extent the disability pension met or exceeded Potter's workers' compensation benefits.

While Potter did not greatly alter existing Maryland law, the court's interpretation of sections 21 and 33 expanded the availability of the set-off provision by enlarging the range of quasi-public

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187. 309 Md. at 360-63, 524 A.2d at 67-69.
188. Id. at 361, 524 A.2d at 68.
189. Id. at 362, 524 A.2d at 68.
190. Id. at 365, 524 A.2d at 69-70.
191. Id., 524 A.2d at 70. The Montgomery County, Md., Code, ch. 21, Fire and Rescue Services (1984), provided insight into whether fire departments were to be treated as governmental in nature or as strictly private organizations. The court emphasized the county's control over the fire departments' locations, guidelines, communications, dispatchments, transfers of apparatus in emergencies, and master defense plans, to underscore the assertion that BFD was a quasi-public corporation. 309 Md. at 362-63, 524 A.2d at 67-68.

Moreover, the court pointed out that because the fire departments contributed to the general welfare, the county had a manifest interest in the corporations. The county also levied a tax on property owners to benefit the independent fire departments, because the departments provided a public function. Id.

Finally, the court focused on the benefits firefighters received that would have been unavailable to a private corporation's employees. The county was authorized to provide employees of independent fire and rescue corporations with pay plans, salaries, tax benefits, and workers' compensation benefits similar to those afforded government workers. Montgomery County, Md., Code §§ 20-37(c), 21-4m (1984). See 309 Md. at 364, 524 A.2d at 69.

192. 309 Md. at 365, 524 A.2d at 70.
194. 309 Md. at 365-66, 524 A.2d at 70.
corporations to include fire departments. Although this decision may lead to further expansion of the set-off provision, the court emphasized that only quasi-public corporations which are governmental in nature may invoke section 33.195

b. Statutory Employers.—The Court of Appeals held in Brady v. Ralph Parsons Co.196 that the Mass Transit Administration (MTA)197 was not a "statutory employer"198 under the Workmen's Compensation Act199 and therefore was not immune from common-law actions for negligence in the construction of the Baltimore subway.200 Accordingly, a company hired by the MTA to implement safety regulations at a subway construction site could not avoid tort liability by asserting the MTA's immunity.201

The MTA, as owner of the Baltimore subway, contracted with the Ralph Parsons Company (Parsons), for Parsons to act as a construction manager during the building of a Baltimore subway station.202 Parsons was to oversee all safety programs, assume responsibility for safety on the project, and "correct any unsafe acts or conditions that may be detected."203 The MTA also contracted with Hensel-Phelps Construction Company to be the principal con-

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195. Id. at 356-58, 524 A.2d at 65-66.
197. The Mass Transit Authority (MTA), an instrumentality of the Department of Transportation, owns the Baltimore subway and its stations. Id. at 489 & n.3, 520 A.2d at 719 & n.3.
198. A "statutory employer" is
1) a principal contractor;
2) who has contracted to perform work;
3) which is part of his trade, business or occupation; and
4) who has contracted with another party as a subcontractor for the execution by or under the subcontractor of the whole or any part of such work.
200. 308 Md. at 508, 520 A.2d at 729.
201. Id. Under Md. Ann. Code art. 101, § 58 (1985), a party who is neither an "actual" employer nor a "statutory" employer is a "third party" amenable to suits at law. The statute provides in relevant part:
Where injury or death for which compensation is payable under this article was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee, or in the case of death, his personal representative or dependents as hereinbefore defined, may proceed . . . by law against that other person to recover damages

Id.
202. 308 Md. at 490, 520 A.2d at 720.
203. Id. at 491, 520 A.2d at 720 (quoting the MTA-Ralph Parsons Company (Parsons) contract).
tractor on the project. Hensel-Phelps, in turn, subcontracted a portion of the construction work to Rocky Mountain Skylight Company, Donald Brady's employer.

In January 1981 Brady died after falling from a scaffold at the subway construction site. Brady's family filed a tort action in the Circuit Court for Baltimore City against Parsons, alleging that the company had negligently performed its contractual safety responsibilities. The circuit court granted Parson's motion for summary judgment, concluding that as Brady's "statutory employer," the MTA was immune from suits at law, and that Parsons, as an independent contractor for the MTA, shared this statutory immunity. Accordingly, Brady's family could not bring a tort action against Parsons; the 'exclusive remedy was a claim for workers' compensation.

According to the Court of Appeals, Parsons would have been entitled to judgment as a matter of law if: (1) the MTA was Brady's "statutory employer" and thus immune under the Act; and (2) Parsons was performing the MTA's nondelegable duty of providing a safe work site, rather than assuming a personal duty toward Brady. The central question before the court, therefore, was whether the MTA was a "statutory employer" within the meaning of the Act.

The court focused on article 101, sections 15 and 62. Section 15 provides that employers must provide compensation for the disa-

204. Id. at 490, 520 A.2d at 720.
205. Id.
206. Id. at 488-89, 520 A.2d at 719.
207. Id. at 491, 520 A.2d at 720. The circuit court dismissed the other parties originally named as defendants. Id. at 491 n.7, 520 A.2d at 720 n.7.
208. Id. at 494, 520 A.2d at 722. Neither party argued before the circuit court that the MTA was the "statutory employer" of the decedent. Id. at 494 n.11, 520 A.2d at 722 n.11.
209. Id. at 493-94, 520 A.2d at 721. The circuit court relied on Athas v. Hill, 300 Md. 133, 476 A.2d 710 (1984), concluding that Parsons shared this immunity. The Court of Appeals held in Athas that an employee could not sue a supervisory co-employee under § 58 for failure to provide a safe workplace. Because the responsibility for safety was a nondelegable duty of the employer, the supervising co-employee did not assume a personal duty toward the injured worker. Id. at 148, 476 A.2d at 718. The circuit court concluded that Athas' reasoning should be extended to include an independent contractor performing a statutory employer's nondelegable duty to provide a safe workplace. 308 Md. at 494, 520 A.2d at 721-22.
210. 308 Md. at 494-95, 520 A.2d at 722.
211. Brady's family appealed the circuit court's decision to the Court of Special Appeals. Before the intermediate court reviewed the case, the Court of Appeals granted certiorari. Id. at 495, 520 A.2d at 722.
212. Id. at 503 n.17, 520 A.2d at 726 n.17.
bility or death of an employee which results from an accidental in-
jury "arising out of and in the course of his employment without
regard to fault as a cause of such injury." Moreover, the statute
declares that workers' compensation shall be the employee's sole
remedy against the employer. Employers thus are "immune"
from any action at law that workers might bring against them.

Section 62 of the Act extends this immunity to the workers'
"statutory" employers—a principal contractor which employs
subcontractors. According to the statute, the principal contractor
must pay workers' compensation to its subcontractors' employees as
if those employees worked directly for the principal contractor.
A statutory employer is immune from suits at law under this section,
just as "actual" employers are immune under section 15. The
injured worker's sole remedy is a claim under the Act.

Unlike actual employers and statutory employers, however,
third parties are not immune from suits instituted by employees.
Because Rocky Mountain Skylight Company, and not the MTA, was
Brady's actual employer, the court had to determine whether the
MTA was Brady's statutory employer or a mere "third party." After

214. Id.
215. 308 Md. at 498, 520 A.2d at 723.
216. Id. at 499-500, 520 A.2d at 724-25. Section 62 provides in pertinent part:

When any person as a principal contractor, undertakes to execute any work
which is a part of his trade, business or occupation which he has contracted to
perform and contracts with any other person as subcontractor, for the execu-
tion by or under the subcontractor, of the whole or any part of the work under-
taken by the principal contractor, the principal contractor shall be liable to pay
to any workman employed in the execution of the work any compensation
under this article which he would have been liable to pay if that workman had been
immediately employed by him; and where compensation is claimed from or proceed-
ings are taken against the principal contractor, then, in the application of this
article, reference to the principal contractor shall be substituted for reference
to the employer, except that the amount of compensation shall be calculated
with reference to the earnings of the workman under the employer by whom he
is immediately employed.

do not appear in the statute. It was coined by the Court of Appeals in State v. Bennett
Bldg. Co., 154 Md. 159, 140 A. 52 (1928), in which the court noted that "[t]he result
then is that where the prescribed conditions exist, the principal contractor becomes by
the act the statutory employer of any workman employed in the execution of the work."
Id. at 162, 140 A. at 53.
218. 308 Md. at 502, 520 A.2d at 726.
219. Id.
220. See supra note 201.
221. 308 Md. at 488-89, 520 A.2d at 719.
setting forth the requirements for a principal contractor as used in the definition of statutory employer, the court noted that there must always be two contracts. The first, termed the “antecedent” or “principal” contract, is a contract between the principal contractor and a third party in which the principal contractor agrees to execute work for the third party. In the “subcontract” a subcontractor agrees to do all or part of the work that the principal contractor already agreed to perform for the third party.

Applying these requirements, the court concluded that the MTA could not be considered the statutory employer of a subcontractor’s employee because the MTA owned the entire subway; the MTA never had to enter into a principal contract with any third party. The MTA never promised to perform work for a third party; therefore, it could not possibly have entered into a second contract in which a subcontractor agreed to do work that the MTA had promised to perform. The MTA was thus a “third party” amenable to suits at law under section 58.

Because the MTA lacked statutory immunity, it could afford no

222. See supra note 198.
223. 308 Md. at 503-04, 520 A.2d at 726-27.
224. Id.
225. Id. at 504-05, 520 A.2d at 727. As the court observed, the true statutory employer in this case was Hensel-Phelps. Hensel-Phelps became the principal contractor by entering into an antecedent contract with the MTA, a third party, to build the subway station. Hensel-Phelps then subcontracted a portion of its contractual duties to Brady’s employer, Rocky Mountain. Id. at 508 n.24, 520 A.2d at 729 n.24.

In its motion for summary judgment, Parsons argued that it shared Hensel-Phelps’ statutory immunity because it was exercising Hensel-Phelps’ nondelegable duty to provide a safe place to work. Id. at 493-94, 520 A.2d at 721. The circuit court simply disregarded this argument in holding that the MTA was the statutory employer.

226. Id. at 505-06, 520 A.2d at 727-28. Parsons asserted at oral argument that the grant contract between the Maryland Department of Transportation and the United States was the antecedent contract. Because the record did not contain the grant contract, the court chose not to rule on the company’s contention. Id. at 505-06 n.22, 520 A.2d 727-28 n.22.

The court stated in the same footnote, however, that “a mere financing agreement, which grants funds for a construction project, between an owner or contractor and a third party will not give rise to an antecedent contract unless the agreement also requires that the owner or contractor perform work or services for the third party.” Id. Thus, the court implied that even if the grant contract had been entered into evidence the court would not have ruled it an antecedent contract.

227. Id. at 506, 520 A.2d at 728. The court acknowledged that the MTA contracted with Hensel-Phelps to build the subway station. This contract, however, was not a “subcontract” within the meaning of § 62. According to the court, a subcontract must be a contract that assigns some of the obligations of a prior contract to another party. Because the MTA had no prior contract from which obligations could be assigned, its contract with Hensel-Phelps could not be a subcontract. Id.
228. Id. at 508, 520 A.2d at 729.
protection to Parsons.\textsuperscript{229} The construction company, the court held, stood in no different position than any other third party liable to suit at law under section 58.\textsuperscript{230} Thus, the circuit court erred in granting Parsons summary judgment.\textsuperscript{231}

The Court of Appeals then refuted another argument that Parsons had advanced in favor of immunity. Parsons contended that it was acting as the MTA's agent within the meaning of section 7-702 of the Transportation Article.\textsuperscript{232} As an agent, Parsons argued, it was immune from suit; the sole remedy for Brady's family was an action against the MTA.\textsuperscript{233}

Because section 7-702 does not define an agent, the court set out to determine the legislative intent behind the statute.\textsuperscript{234} The concept of agency encompasses two types of relationships.\textsuperscript{235} A master-servant relationship exists when the master may "control and direct" the servant in performing work.\textsuperscript{236} In the relationship between an independent contractor and a principal, the independent contractor acts as the principal's agent, but is not subject to the principal's control.\textsuperscript{237}

According to the court, by using terms such as "employees" and "officers," "which are traditionally considered to be servants of a principal," the legislature intended the term "agent" to be given a similar construction.\textsuperscript{238} Thus, the court ruled, only those parties who met the definition of a servant would be considered "agents" under section 7-702. The definition thus excluded independent contractors.\textsuperscript{239}

\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 509, 520 A.2d at 729. Section 7-702 provides:
(a) Administration [MTA] liable for contracts and torts.—Subject to subsection (b) of this section, the Administration is liable for its contracts and torts and for the torts of its officers, agents, and employees in connection with the performance of the duties and functions of the Administration under this title.
(b) Exclusive remedy is suit.—The exclusive remedy for a breach of contract or for a tort committed by the Administration, its officers, agents, or employees is a suit against the Administration. No execution may be levied on any property of this State or of the Administration.


\textsuperscript{233} 308 Md. at 509, 520 A.2d at 729.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 510, 520 A.2d at 730.
\textsuperscript{236} Id. (citing Mackall v. Zayre Corp., 293 Md. 221, 230, 443 A.2d 98, 103 (1982)).
\textsuperscript{237} Id. See Restatement (Second) of Agency § 14N, comment a (1958) (explaining that an independent contractor is a type of agent, not servant).
\textsuperscript{238} 308 Md. at 512, 520 A.2d at 731.
\textsuperscript{239} Id.
The court next determined that Parsons did not meet the definition of a servant because the element of control was lacking. Parsons was a "separate, distinct business," which had not surrendered control over its operations or the conduct of its employees. Because the MTA had no right to supervise or control Parsons' work, Parsons was not an "agent" within the meaning of section 7-702 and therefore was not immune from suit.

In Brady the Court of Appeals made abundantly clear that it would strictly scrutinize any attempts by companies contracting with the MTA to claim immunity from tort actions. In light of this opinion it would be difficult to make a convincing argument that the MTA is a statutory employer; since the agency is unlikely to enter a principal contract with a third party. There also seems to be little chance of persuading a court that a company hired by the MTA is actually the MTA's servant. The court gave short shrift to Parsons' contentions that because it was required to make periodic reports to MTA and to consult with MTA about numerous phases of its work, it was a servant rather than an independent contractor.

According to the court, an employer's right to supervise an employee, merely to determine whether work is done according to the contract, does not prevent the relationship from being that of independent contractor and principal.

c. Striking Workers.—The Court of Appeals held in Sinai Hospital of Baltimore, Inc. v. Department of Employment & Training that striking workers were not disqualified from receiving unemployment compensation benefits on the ground that they had left employment voluntarily without good cause. Furthermore, workers who refused

240. Id. The burden of proving that one is a servant rests with the party asserting that status. Globe Indemnity Co. v. Victill Corp., 208 Md. 573, 584, 119 A.2d 423, 428-29 (1956).
241. Id. The court added that Parsons was not within the "business household" of the MTA. Id.
242. Id. at 513, 520 A.2d at 732. The court quickly dispensed with one other argument advanced by Parsons. Parsons asserted that it was immune from suit because, at the time of Brady's fall, Parsons was performing the nondelegable duty of Rocky Mountain, Brady's employer, to provide a safe workplace. As authority for this proposition, Parsons relied on the court's opinion in Athas. According to the court, however, since the Athas opinion stated that it was limited to cases arising under "similar facts and circumstances," its holding applied only to supervisory co-employees. Thus, the holding did not extend to Parsons, an independent contractor. Id. at 507-08, 520 A.2d at 729.
243. Id. at 513, 520 A.2d at 731.
244. Id.
246. Id. at 31, 522 A.2d at 384.
their employer's offer to return to their prestrike positions were not disqualified from unemployment compensation when that offer was made prior to workers filing claims for unemployment benefits.247

Members of the National Union of Hospital and Health Care Employees (the Union), called a strike against Sinai Hospital of Baltimore, Inc. (Sinai).248 The collective bargaining agreement between the Union and Sinai had expired, and the parties could not reach a new agreement.249 Sinai notified the striking Union members that they could return to their prestrike positions, but if they failed to do so, they would be replaced permanently and would be ineligible for unemployment benefits.250 Within the week Sinai replaced all of the striking employees; the strike soon ended.251

Because the employees had been permanently replaced during the strike, they filed for unemployment compensation benefits.252 Sinai opposed the employees' claims on two grounds. First, Sinai contended that the employees had left their jobs voluntarily and therefore were ineligible for benefits under article 95A, section 6(a).253 Second, because the employees had refused an offer of suitable employment from Sinai, they were disqualified from receiving unemployment compensation benefits under section 6(d).254 The dispute came before a special examiner of the Department of Em-

247. Id. at 45-46, 522 A.2d at 391.
248. Id. at 31-32, 522 A.2d at 384.
249. Id.
250. Id. at 32, 522 A.2d at 384. Sinai contended that by refusing to return to their jobs, the striking workers had refused an offer of suitable employment; therefore, under Md. Ann. Code art. 95A, § 6(d) (1985 & Supp. 1987), they would be disqualified from receiving unemployment benefits. 309 Md. at 32-33, 522 A.2d at 384.
251. Id. at 32, 522 A.2d at 384.
252. Id.

An individual shall be disqualified for benefits: . . . [i]f the Executive Director finds that the individual's unemployment is due to his leaving work voluntarily without good cause. Only a cause which is directly attributable to, arising from, or connected with the conditions of employment or actions of the employer may be considered good cause. . . . Only a substantial cause which is directly attributable to, arising from, or connected with the conditions of employment or actions of the employer, or another cause of such a necessitous or compelling nature that the individual had no reasonable alternative other than to leave the employment may be considered a valid circumstance.

254. 309 Md. at 32-33, 522 A.2d at 384. Md. Ann. Code art. 95A, § 6(d) (1985 & Supp. 1987), provides that an individual is disqualified from receiving benefits when "[t]he Executive Director finds that he failed, without good cause, either to apply for available, suitable work, when so directed by the Executive Director, or to accept suitable work when offered him." Therefore, Sinai contended that the employees had left their jobs voluntarily and were disqualified from receiving benefits under § 6(a), as well
ployment and Training, that department's Board of Appeals, and subsequently the Circuit Court for Baltimore City. All concluded that the workers were not disqualified.\textsuperscript{255}

In deciding whether the employees had left their employment voluntarily when they participated in the strike, the Court of Appeals examined the legislative intent behind section 6(a).\textsuperscript{256} The court cited its previous decision in \textit{Allen v. Core City Target Y. Program},\textsuperscript{257} in which it had declared that the statute "expresses a clear legislative intent that to disqualify a claimant from benefits evidence must establish that the claimant, by his or her own choice, intentionally, of his or her own free will, terminated the employment."\textsuperscript{258}

The Court of Appeals found that in labor disputes the employees are not seeking to terminate the employment; rather, they are trying to ameliorate poor working conditions and benefits in order to continue work.\textsuperscript{259} Thus, the court determined that the term "voluntary leaving" refers to a permanent severance of the employment relationship; it does not include a temporary interruption in the performance of services.\textsuperscript{260}

Furthermore, the court pointed out that subsection (a) does not

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\textsuperscript{255} \textit{Id.} at 31, 522 A.2d at 384. The lower courts and the agency found that the labor strike was a special situation which did not constitute a voluntary leaving and that the offer to return the employees to their pre-strike positions was made before the employees filed their claims; thus, the employees were not disqualified under either § 6(a) or (d). \textit{Id.} at 40-41, 45-46, 522 A.2d at 388, 391.

\textsuperscript{256} \textit{Id.} at 34-36, 522 A.2d at 385-86. The court focused both on the meaning of "voluntary" and on the reasoning behind other decisions which had found that a voluntary leaving did not occur when employees departed during a labor dispute. The court relied on \textit{Inter-Island Resorts, Ltd. v. Akahane}, 46 Haw. 140, 377 P.2d 715 (1962), in which the Supreme Court of Hawaii held that a temporary interruption in the performance of services, as in the case of striking workers in a labor dispute, is not a voluntary leaving as contemplated within the unemployment compensation statutes. \textit{Id.} at 150-51, 377 P.2d at 721-22. \textit{See also Mark Hopkins, Inc. v. California Employment Comm'n}, 24 Cal. 2d 744, 748-49, 151 P.2d 229, 291-32 (1944) (same); Penflex, Inc. v. Bryson, 506 Pa. 274, 287, 485 A.2d 359, 365 (1984) (same).

\textsuperscript{257} 309 Md. at 35-36, 522 A.2d at 386. The court cited \textit{Iron Molders' Union v. Allis-Chalmers Co.}, 166 F. 45, 52-53 (7th Cir. 1908), which held: "A strike is a cessation of work by employees in an effort to get for the employees more desirable terms . . . . Neither strike nor lock out completely terminates . . . the relationship between the parties."

\textsuperscript{258} 309 Md. at 36, 522 A.2d at 386-87.
apply to labor disputes at all. In determining that section 6(a) and section 6(e), which explicitly concerns labor disputes, are mutually exclusive, the court agreed with Employment Security Administration v. Browning-Ferris, Inc., and looked to the legislative intent behind the statute. Because unemployment compensation is remedial in nature, the court noted that it should read the statute liberally in favor of eligibility. A strict construction of disqualification provisions is consistent with this reading. The court found that while subsection (e) does not expressly preclude applying subsection (a) to unemployment arising from a labor dispute, reading the subsections together in light of the statute's purpose suggests that the subsections are exclusive. The court distinguished labor disputes from other types of employer-employee situations, finding that the legislature intended to treat persons leaving work due to a labor dispute differently from those who leave for other reasons. The court stressed that applying subsection (a) to labor disputes would render subsection (e) partially surplusage, which would be inconsistent with canons of statutory interpretation.

261. Md. Ann. Code art. 95A, § 6(c) (1986). The statute provides that an individual is disqualified from unemployment benefits when "unemployment is due to a stoppage of work, other than a lockout, which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed."

262. 292 Md. 515, 438 A.2d 1356 (1982). For a discussion of Browning-Ferris, see infra notes 268 and 270.

263. 309 Md. at 39-40, 522 A.2d at 388. The court noted that in interpreting a statute, it first must examine the language of the statute, taking care to read pertinent parts of the legislative language together; give effect to all those parts if possible; and render no part surplusage. The court also should look to the particular problem involved and the objectives the legislature sought to attain. Id.

264. Id. at 40, 522 A.2d at 388.

265. Id.

266. Id. Because the court found § 6(a) and (e) mutually exclusive, it was not required to decide whether the employees' departure constituted a constructive voluntary leaving or whether Sinai effectively discharged the employees when it permanently replaced them. Id. at 37, 522 A.2d at 387.


268. 309 Md. at 42, 522 A.2d at 389. The court relied on its decision in Employment Sec. Admin. v. Browning-Ferris, Inc., 292 Md. 515, 438 A.2d 1356 (1982). Browning-Ferris involved a situation similar to that in Sinai, as striking workers became unemployed because they were involved in a labor dispute. The court found compelling weight in both American and English precedents that "stoppage of work" as used in § 6(e) referred to the curtailment of the employer's operations. The court opined, "To interpret 'stoppage of work' as cessation of work by the individual employee would make the phrase practically synonymous with 'unemployment' as used in the same sentence." Id. at 524-25, 438 A.2d at 356.
The court also considered whether article 95A, section 2 incorporated a voluntariness disqualification into section 6(e) which would prevent employees who voluntarily stopped work to participate in a strike from receiving unemployment compensation benefits.\(^{269}\) Relying on its previous decision in *Browning-Ferris*, the court held that section 6(e) only disqualifies an employee from receiving benefits when the employer's business ceases operations due to a strike.\(^{270}\)

Next, the court addressed Sinai's contention that the employees were disqualified from receiving unemployment compensation under section 6(d) because they failed to accept suitable work offered to them by Sinai.\(^{272}\) The court found section 6(d) inapplicable because the employees had not filed claims for unemployment compensation when Sinai made the offer.\(^{273}\) The court reviewed the structure of article 95A and determined that "the legislative scheme contemplates (1) the filing of a claim and (2) an initial determination of eligibility by the Secretary."\(^{274}\) Thus, an employee cannot be disqualified from a benefit before a determination of eligibility for that benefit has been reached. The employees in Sinai had not filed any claims for benefits at the time Sinai made the offer for employment; therefore, they had not yet become eligible for the unemployment compensation. As a result, they could not be disqualified from receiving the benefit.\(^{275}\)

\(^{269}\) Section 2 declares the general policy of article 95A.

The legislature . . . declared that in its considered judgment the public good, and the general welfare of the citizens of this State require the enactment of this measure . . . for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. Md. Ann. Code art. 95A, § 2 (1985).

\(^{270}\) 309 Md. at 41, 522 A.2d at 387. *Browning-Ferris* rejected this contention, noting that the only disqualification in § 6 was the stoppage of work requirement and that § 2 did not encompass any general disqualification based on fault. 292 Md. at 525, 438 A.2d at 1362. Further, to incorporate § 2 into § 6(e) would render § 6(a), the voluntary leaving provision, superfluous, and § 6(e) controls § 2. Id. at 526-27, 438 A.2d at 1363.

\(^{272}\) Id. at 43, 522 A.2d at 390. For the pertinent text of the statute, see supra note 254.

\(^{273}\) 309 Md. at 44, 522 A.2d at 390.

\(^{274}\) Id. Md. Ann. Code art. 95A, § 7(b) (1985), directs that a claim for benefits "shall be made in accordance with such regulations as the Executive Director may prescribe." Section 4 finds an unemployed individual eligible to receive benefits only if he has registered for work and has made a claim for benefits. Id. § 4(a)-(b).

\(^{275}\) 309 Md. at 45-46, 522 A.2d at 391. The court reaffirmed its holding in State v. Wheatley, 192 Md. 44, 63 A.2d 644 (1948), in which the court had explained that a determination of eligibility is made at the time of a claimant's application for benefits. 309 Md. at 48-49, 63 A.2d at 646.
Finally, the court gave great weight to the opinion of the board, noting that while an agency's interpretation of the law is not binding on a court, the "agency's expertise in its particular field is entitled to deference."276 In this instance, the board's opinion was not inconsistent with that of the legislature or the courts.

This decision is consistent with the Court of Appeals' earlier decisions interpreting statutes concerning unemployment compensation. The court had previously determined that the particular intent of article 95A, section 6(e) controls over the general intent of section 2.277 Thus, a finding that employees who ceased work due to a labor strike are not disqualified from unemployment compensation benefits under section 6 comports with precedent. Likewise, the court's determination that section 6(a) does not apply to labor disputes, which fall under the domain of section 6(e), is consistent with the intent of the legislature.278

B. Governmental Functions

1. Governmental Immunity.—a. Retrospective Application of Immunity Statute.—In Washington Suburban Sanitary Commission v. Riverdale Heights Volunteer Fire Co.279 the Court of Appeals held that, absent a clear legislative intent to the contrary, a state statute conferring immunity on a fire company operated prospectively. Therefore, the statute did not apply to substantive issues in cases pending at the time the statute became effective.280

Fire damaged an apartment building in Riverdale in January 1980.281 The insurer paid $462,668 to settle the claim and then sued the Washington Suburban Sanitary Commission (WSSC), alleging that WSSC had failed to maintain the fire hydrant closest to the fire.282 When firefighters initially attempted to obtain water from the hydrant, it was dry.283 The firefighters then had to venture some distance to obtain water from a working hydrant, delaying

276. 309 Md. at 46, 522 A.2d at 391.
278. 309 Md. at 37-38, 522 A.2d at 387-88.
280. Id. at 568-69, 520 A.2d at 1326.
281. Id. at 558, 520 A.2d at 1320.
282. Id.
283. Id. The insurer alleged that WSSC had a duty to maintain the fire hydrants and that before the date of the fire it had been put on notice of the defective fire hydrant. Id.
their efforts to fight the fire. 284

In September 1984 WSSC filed a third-party negligence claim in the Circuit Court for Prince George's County against Riverdale Heights Volunteer Fire Company (the fire company), which had responded to the fire. 285 WSSC alleged that the fire company had been negligent in initially attaching its hoses to a hydrant it knew was inoperable. 286 The fire company moved to dismiss on the ground that section 5-309.1(a) of the Courts and Judicial Proceedings Article, 287 enacted in 1983, granted it immunity for ordinary negligence. 288 The circuit court granted the fire company's motion to dismiss; WSSC appealed. 289

The question before the Court of Appeals was whether the circuit court properly applied section 5-309.1(a) retrospectively. The fire company argued that unless a constitutional prohibition or contrary legislative intent mandates otherwise, the court should apply a newly enacted statute to decide substantive issues in cases pending when the statute takes effect. 290 To support this argument, the fire company relied on the 1964 Court of Appeals decision in Janda v. General Motors Corp. 291 and the 1974 Supreme Court decision in Bradley v. School Board of Richmond. 292

In Janda the Court of Appeals applied an amended unemployment law retrospectively. 293 Moreover, the Janda court set forth in

284. Id.
285. Id.
286. Id. WSSC asserted that the fire company's negligence was active and primary while any negligence on WSSC's part was passive and secondary. Alternatively, WSSC averred concurrent negligence. Id. at 558-59, 520 A.2d at 1320-21.
287. Section 5-309.1(a) took effect on July 1, 1983, more than three years after the fire. See Act of May 31, 1983, ch. 546, 1983 Md. Laws 1736. The statute provides: Notwithstanding any other provision of law, except for any willful or grossly negligent act, a fire company or rescue company, and the personnel of a fire company or rescue company, are immune from civil liability for any act or omission in the course of performing their duties.

288. 308 Md. at 559, 520 A.2d at 1321.
289. Id. The circuit court reasoned that § 5-309.1(a) applied to WSSC's claim for contribution or indemnity because WSSC had made no payments to the insurer by the date the statute took effect. WSSC then settled with the insurer, but appealed to the Court of Special Appeals. Before that court considered the case, however, the Court of Appeals issued a writ of certiorari on its own motion. Id.
290. Id. at 562, 520 A.2d at 1322.
291. 237 Md. 161, 205 A.2d 228 (1964).
293. 237 Md. at 171, 205 A.2d at 234. Janda involved the 1963 amendment of a 1962 unemployment law. The 1962 law, which took effect on December 6 of that year, prohibited employees who received payments in lieu of paid vacation from receiving unemployment benefits for weeks in which they had received those payments. Act of May 8,
dicta four rules for determining whether to apply a statute retro-
spectively or prospectively. According to the first rule, a statu-
tory change affecting only procedure ordinarily applies retrospec-
tively. Second, a statute affecting substantive law or rights will not apply retrospectively unless it is clear that the legisla-
ture so intended. Third, no matter what the legislative intent, a
court will not apply a statute retrospectively if to do so would harm
constitutionally protected rights. The fourth rule provided:

A statute which affects or controls a matter still in liti-
gation when it became law will be applied by the court re-
viewing the case at the time the statute takes effect
although it was not yet law when the decision appealed
from was rendered, even if matters or claims of substance
(not constitutionally protected), as distinguished from mat-
ters procedural or those affecting the remedy are involved,
unless the Legislature intended the contrary.

The fire company based its argument on this fourth rule.

According to the Riverdale Heights court, the Janda holding did
not apply because the statute at issue in Janda clearly reflected the legis-
lature's intent that the law apply retrospectively. Nevertheless, the court admitted that the last of Janda's four rules supported
the fire company's position. According to the court, however, the
fourth rule was inconsistent with Maryland law, which presumes that
a statute operates prospectively unless the statute reveals legislative intent to the contrary. Because of this inconsistency, and because
the court had never applied the rule to decide a case, the court re-

1963 the General Assembly amended this law to permit unemployment benefits when an
employer paid the allowance in lieu of vacation under a written contract in effect on
December 6, 1962, as long as the normal practice of the employer was not to grant
pay in lieu of vacation had not barred benefits before December 6, 1962, the Janda court
found a "clear and unmistakable" legislative intent to permit those discharged employ-
ees who had been disqualified from receiving benefits by the 1962 statute to become
qualified again. 237 Md. at 171, 205 A.2d at 234.

294. 237 Md. at 168-69, 205 A.2d at 232-33.
295. Id. at 168, 205 A.2d at 232.
296. Id. at 168-69, 205 A.2d at 232.
297. Id. at 169, 205 A.2d at 232-33.
298. Id., 205 A.2d at 233.
299. 308 Md. at 562, 520 A.2d at 1322.
300. Id.
301. Id.
302. Id. at 560-61, 520 A.2d at 1322.
jected Janda's fourth rule.\textsuperscript{303}

The court next addressed the fire company's argument that it should follow the Supreme Court's decision in \textit{Bradley v. School Board of Richmond} \textsuperscript{304} in deciding whether to apply section 5-309.1(a) retrospectively.\textsuperscript{305} \textit{Bradley} held that a statute authorizing the award of attorneys' fees in school desegregation cases should apply to a case pending on appeal when the statute became law.\textsuperscript{306} While the Supreme Court did not go so far as to hold that courts must always apply new laws to pending cases, it did "reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature."\textsuperscript{307}

After thoroughly analyzing the \textit{Bradley} decision, the Court of Appeals simply chose not to follow it.\textsuperscript{308} The court was "far from persuaded" that the Supreme Court's reasoning was more precise or led to a more predictable result than its own reasoning in previous decisions.\textsuperscript{309} Those decisions demonstrated that under Maryland law statutes are presumed to "operate prospectively, absent a clear legislative intent to the contrary."\textsuperscript{310} Thus, section 5-309.1(a) should be presumed to operate prospectively unless the General Assembly expressly intended retrospective application.\textsuperscript{311}

Examining the statute, the court found nothing to indicate that the legislature intended a retrospective effect.\textsuperscript{312} A retrospective application of the statute would deprive victims of a fire company's negligence of "fully accrued causes of action for compensatory damages."\textsuperscript{313} "A construction which produces that kind of interference with substantive rights, whether or not the interference is of constitutional magnitude, is to be avoided."\textsuperscript{314} Accordingly, the court re-
versed the circuit court’s decision and remanded the case for further proceedings on WSSC’s negligence claim. 315

In disapproving Janda’s fourth rule, the court did away with a rule which was clearly inconsistent with Maryland law. In rejecting Bradley’s reasoning, the court went a step further, finding that regardless of what the Supreme Court has said, statutes in Maryland operate prospectively absent a clear legislative intent otherwise. 316

The court could have stopped short of rejecting the Supreme Court’s reasoning while still holding that section 5-309.1(a) applied prospectively. Quoting one of its previous decisions, the Supreme Court noted in Bradley that “exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision ‘have been made to prevent manifest injustice.’ ” 317 In Bradley there was no manifest injustice in requiring the Richmond School Board to pay attorneys’ fees out of state funds; therefore, the new statute could be applied retrospectively. On the other hand, summarily removing a negligence victim’s fully accrued cause of action against the fire company would meet almost any definition of injustice. The Court of Appeals ignored this escape route, however, preferring to issue a prohibition against a general rule of retrospectivity.

b. Tort Immunity of Police Officers.—In Ashburn v. Anne Arundel County 318 the Court of Appeals declined to expand the tort liability of police officers in alcohol-related accidents. The court held that a police officer acting in a discretionary capacity, 319 as opposed to a ministerial one, is immune from any liability arising out of the action. 320 Accordingly, a police officer who exercises discretion in deciding not to detain a drunk driver will be immune from liability in

315. Id. at 570-71, 520 A.2d at 1326-27.
316. In a number of cases preceding this decision, the Court of Special Appeals did apply Bradley in order to give a statute retrospective effect. See, e.g., Maryland Ins. Guar. Ass’n v. Muhl, 66 Md. App. 359, 504 A.2d 637 (1986) (retrospectively applying statute assigning claim priorities in insured liquidation proceedings); Courtney v. Richmond, 55 Md. App. 382, 462 A.2d 1223 (1983) (retrospectively applying statute providing for granting of adoption decrees without parental consent); T & R Joint Venture v. Office of Planning & Zoning, 47 Md. App. 395, 424 A.2d 384 (1980) (retroactively applying ordinance giving standing to county agency in zoning case).
317. 416 U.S. at 716 (quoting Thorpe v. Housing Auth., 393 U.S. 268, 282 (1969)).
319. The Court of Appeals has defined discretionary capacity as follows: “[A]n act falls within the discretionary function of a public official if the decision which involves an exercise of his personal judgment also includes, to more than a minor degree, the manner in which the police power of the State should be utilized.” James v. Prince George’s County, 288 Md. 515, 327, 418 A.2d 1173, 1180 (1980).
320. 306 Md. at 626, 510 A.2d at 1082.
any suit arising from the drunk driver's subsequent actions.\textsuperscript{321}

Officer Dennis Freeberger of the Anne Arundel County Police Department discovered an intoxicated man, John Millham, in a pickup truck on a convenience store parking lot.\textsuperscript{322} The officer requested that Millham move his vehicle to the side of the lot and discontinue driving for the evening. As soon as the officer departed, Millham drove his truck from the lot and hit a pedestrian, John Ashburn.\textsuperscript{323} Ashburn, who lost his left leg in the accident, sued Millham, the police officer, the county, and the police department.\textsuperscript{324} He asserted that under section 16-205.1(b)(2) of the Transportation Article,\textsuperscript{325} police officers have a mandatory duty to detain all suspected drunk drivers.\textsuperscript{326}

Ashburn argued that the officer neglected his mandatory duty when he failed to detain Millham, and therefore was unable to claim immunity from liability.\textsuperscript{327} In addition, Ashburn argued that "under the circumstances of this case, a special duty was imposed upon Officer Freeberger to protect [Ashburn]."\textsuperscript{328} The defendants, on the other hand, argued that the officer was immune from liability under the public official immunity doctrine and that, even if this immunity were unavailable to him, Freeberger owed Ashburn no special duty to protect him from Millham's actions.\textsuperscript{329}

\textsuperscript{321} Id.
\textsuperscript{322} Id. at 619, 510 A.2d at 1079. The parties agreed that Millham was the driver of the vehicle and that under Maryland law he could have been charged with drunk driving. Id. at 619-20, 510 A.2d at 1079.
\textsuperscript{323} Id. at 620, 510 A.2d at 1079.
\textsuperscript{324} Id.
\textsuperscript{325} Md. Transp. Code Ann. § 16-205.1(b)(2) (1987). This statute provides:

Except as provided in subsection (c) of this section, if a police officer stops or detains any individual who the police officer has reasonable grounds to believe is or has been driving or attempting to drive a motor vehicle while intoxicated, while under the influence of alcohol, or in violation of an alcohol restriction, and who is not unconscious or otherwise incapable of refusing to take a chemical test for alcohol, the police officer shall:

(i) Detain the individual;
(ii) Request that the individual permit a chemical test to be taken of the individual's blood or breath to determine the alcoholic content of the individual's blood;
(iii) Advise the individual of the administrative penalties that shall be imposed for refusal to take the test; and
(iv) If the individual refuses to take the test, send a sworn report to the Administration within 72 hours after detention . . . .

Id.
\textsuperscript{326} 306 Md. at 620, 510 A.2d at 1079.
\textsuperscript{327} Id.
\textsuperscript{328} Id.
\textsuperscript{329} Id. at 620-21, 510 A.2d at 1079-80.
The Court of Appeals declared that "Officer Freeberger [was] a public official when acting within the scope of his law enforcement function," and that he exercised discretion in deciding not to arrest Millham. Until the middle of this century, the majority of American courts held that all public employees were liable for their own torts. Maryland, however, departed from this premise in the 1898 case of Cocking v. Wade, in which the Court of Appeals recognized the need to protect a public official from liability arising from the negligent performance of a discretionary aspect of the job. Maryland courts now apply the rule set forth in Duncan v. Koristenis to all tort claims against public officials: "[G]overnmental immunity is extended to all nonmalicious acts of public officials as opposed to public employees when acting in a discretionary as opposed to ministerial capacity."

The court did not agree with Ashburn that section 16-205.1(b)(2) set forth a mandatory procedure for the handling of drunk drivers. "By the plain meaning of this statute, its directives are not invoked until the officer 'stops or detains' any individual." Officer Freeberger did not "stop and detain" Millham, but rather "found" the drunk driver sitting in a truck; therefore, section

330. Id. at 622, 510 A.2d at 1080. See also Bradshaw v. Prince George's County, 284 Md. 294, 302, 396 A.2d at 255, 261 (1978) (finding that police officer acted within scope of duty in tending to victim at scene of crime); Robinson v. Board of County Comm'rs, 262 Md. 342, 347, 278 A.2d 71, 74 (1971) (finding that police officer was not immune for malicious acts in arresting plaintiff).

331. 306 Md. at 624, 510 A.2d at 1081.

332. Id. at 621, 510 A.2d at 1080. See also W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 132, at 1056 (5th ed. 1984) [hereinafter PROSSER & KEETON].

333. 87 Md. 529, 40 A. 104 (1898).

334. Id. at 541, 40 A. at 106. The Cocking court held that the decision of a sheriff not to move a prisoner was purely discretionary in scope. Because the court determined that the sheriff acted in good faith, he was not held accountable for the prisoner's death at the hands of a lynch mob. Id.


337. The Court of Appeals considers "stop and detain" to mean "apprehend." "[A]n accused is 'apprehended' when a police officer has reasonable grounds to believe that the person is or has been driving a motor vehicle while intoxicated or while under the influence of alcohol and the police officer reasonably acts upon that information by stopping or detaining the person." Willis v. State, 302 Md. 363, 376, 488 A.2d 171, 178 (1985).

338. 306 Md. at 625, 510 A.2d at 1082.
16-205.1(b)(2) did not apply.\textsuperscript{339}

The court went one step further by stating that even if the statute did apply and Freeberger’s actions were considered ministerial, the officer still would not be liable since Ashburn did not establish that Freeberger owed him a duty under tort law.\textsuperscript{340} As stated over eighty years ago in \textit{West Virginia Central Railway Co. v. Fuller},\textsuperscript{341} “[T]here can be no negligence where there is no duty that is due; for negligence is the breach of some duty that one person owes another.”\textsuperscript{342} Maryland courts follow the rule that absent a special relationship one has no duty\textsuperscript{343} to control a third person’s conduct so as to prevent harm to another.\textsuperscript{344} More particularly, “absent a ‘special relationship’ between police and victim, liability for failure to protect an individual citizen against injury caused by another citizen does not lie against police officers.”\textsuperscript{345}

The court stated that a police officer’s duty is to protect the public.\textsuperscript{346} “[I]f the police were held to a duty enforceable by each individual member of the public, then every complaint—whether real, imagined, or frivolous—would raise the spectre of civil liability for failure to respond.”\textsuperscript{347} This would result in unnecessary, hasty arrests by officers to avoid lawsuits and an increase in litigation, with a consequentially heavy burden on the court system.\textsuperscript{348} Thus, the court has recognized a special need to protect police officers from tort liability arising out of the performance of their duties. This recognition has allowed the police, as well as other public officials, to continue to make necessary discretionary decisions without the

\textsuperscript{339} Id. at 626, 510 A.2d at 1082.
\textsuperscript{340} Id.
\textsuperscript{341} 96-Md.-652, 54-A. 669.(1903).
\textsuperscript{342} Id. at 666, 54 A. at 671.
\textsuperscript{343} Duty has been defined as “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” \textsc{prosser & keeton, supra} note 333, § 53, at 356.
\textsuperscript{344} 306 Md. at 628, 510 A.2d at 1083. \textit{See also} Lamb \textit{v. Hopkins}, 303 Md. 236, 242-44, 492 A.2d 1297, 1300-01 (1985) (finding that probation officer owes no duty to third person for probationer’s harmful acts); \textsc{Restatement (Second) of Torts} § 315 (1965) (“There is no duty so to control the conduct of a third person as to prevent him from physical harm to another unless . . . a special relation exists . . . ”).
\textsuperscript{346} 306 Md. at 628, 510 A.2d at 1084. A police officer’s breach of duty to protect the public “is most properly actionable by the public in the form of criminal prosecution or administrative disposition.” \textit{Id.}
\textsuperscript{347} Id. at 629, 510 A.2d at 1084 (quoting Morgan, 468 A.2d at 1311).
\textsuperscript{348} Id. at 629-30, 510 A.2d at 1084.
added anxiety of possible lawsuits brought by angry citizens.\textsuperscript{349} If a police officer must worry about personal consequences every time a decision is made, then decisions will be few and far between. The nature of law enforcement dictates that a police officer must not be hindered from making split-second decisions.

The court made it clear that this holding does not preclude an individual from bringing a negligence action against a police officer.\textsuperscript{350} A suit will lie if the individual proves the existence of a special relationship with the police officer by showing that the "police officer affirmatively acted to protect the specific victim or a specific group of individuals like the victim, thereby inducing the victim's specific reliance upon the police protection."\textsuperscript{351} The court found that Freeberger's actions did not constitute an affirmative act specifically for the protection of Ashburn.\textsuperscript{352} The statute's purpose is to protect the public—not a particular class of individuals; therefore, no special relationship existed between Ashburn and Freeberger, and the officer was immune from any civil liability.\textsuperscript{353}

The court thus refused to expand tort law to impose liability on police officers for the actions of third parties in alcohol-related accidents.\textsuperscript{354} In recent years Maryland courts have attempted to limit the scope of liability in alcohol-related tort cases by specifically denying that public officials, or any other individuals, are liable for the

\textsuperscript{349} The court recognized that better fora in which to review charges against police officers for breaches of their duties are the disciplinary proceedings or criminal prosecution as found in \textit{Md. Ann. Code} art. 27, §§ 727-734D (1986). 306 Md. at 630, 510 A.2d at 1084.

\textsuperscript{350} 306 Md. at 630, 510 A.2d at 1085.

\textsuperscript{351} \textit{Id.} at 630-31, 510 A.2d at 1085.

\textsuperscript{352} \textit{Id.} at 631-32, 510 A.2d at 1085.

\textsuperscript{353} \textit{Id.} at 632, 510 A.2d at 1085. The majority of jurisdictions addressing the issue have found that there is no special relationship between a police officer and an individual injured by a drunk driver. \textit{Id. See, e.g.,} Jackson v. Clements, 146 Cal. App. 3d 983, 989, 194 Cal. Rptr. 553, 556 (1983) ("Although it is unquestionably the policy of this state to deter drunk driving, neither statutory nor decisional law authorized the recognition of a cause of action against these defendants based on the officers' failure to take the protective action suggested by the plaintiffs."); Crosby v. Town of Bethlehem, 90 A.D.2d 134, 135, 457 N.Y.S.2d 618, 619 (1982) (finding no special relationship).

A special relationship was established in Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984), in which police officers stopped an apparently intoxicated driver but then allowed the driver to continue driving. The driver eventually caused an accident that killed several people. The court based its holding on the foreseeability of the accident as a consequence of the failure to detain the drunk driver and the fact that the state statute appeared to protect both intoxicated individuals and any other users of the roads. \textit{Id.} at 762-64, 467 N.E.2d at 1303-05.

\textsuperscript{354} 306 Md. at 628, 510 A.2d at 1083.
actions of third parties who cause injury. The courts appear inclined not only to protect public officials from liability in such cases but also to extend protection from liability to almost everyone else except the drunk driver.

2. Election Law Violations.—In a four to three decision in Snyder v. Glusing the Court of Appeals held that in order to set aside a political election for violations of the election laws, the challenging party must prove by clear and convincing evidence that the outcome of the election might have been different had there been no violation. Because the trial judge’s application of this standard was not clearly erroneous, the appellate court affirmed the lower court’s determination that the results of the election should stand.

Gary Snyder was the unsuccessful candidate for State Senator from the Eighth Legislative District in the 1986 Republican primary election. The successful candidate, Edward Glusing, distributed a sample ballot which violated the election laws. Snyder alleged that had there been no violation, the outcome of the election might have changed.

Pursuant to article 33, section 19-2, Snyder petitioned the Circuit Court for Baltimore County to void Glusing’s nomination as State Senator. Snyder alleged that the ballot’s proponents violated article 33, section 11-3(b) by holding themselves out as the official Republican Committee, and section 26-16(a)(7) by failing to

355. This trend is demonstrated by the following trilogy of cases. In 1985 the court held in Lamb v. Hopkins, 303 Md. 236, 253, 492 A.2d 1297, 1306 (1985), that probation officers were not liable for the actions of a probationer despite the fact that they were aware of the probationer’s previous alcohol-related accidents. In 1986 the court decided Ashburn, holding that a police officer was not liable for the failure to arrest a drunk driver. Finally, in 1987 in Kuykendall v. Top Notch Laminates, Inc., 70 Md. App. 244, 520 A.2d 1115 (1987), the court held that an employer was not liable for the accident caused by two of its intoxicated employees after a nonmandatory business party. Id. at 252, 520 A.2d at 1118.


357. Id. at 427, 520 A.2d at 358.

358. Id.

359. Id. at 414, 520 A.2d at 351.

360. Id. at 418, 520 A.2d at 353. See infra note 365.

361. Id. at 420-21, 520 A.2d at 354.

362. Article 33, § 19-2 provides that, “If no other timely and adequate remedy is provided by this article . . . any registered voter may seek judicial relief from any act or omission relating to an election . . . on the grounds that the act or omission: . . . (2) may . . . have changed the outcome of the election.” Md. ANN. CODE art. 33, § 19-2 (1986).

363. 308 Md. at 417, 520 A.2d at 352. Snyder’s petition also sought to void Michael Kosmas’ election to the Republican State Central Committee, the official governing body of the Republican party. Id.
indicate on the ballot the candidate responsible for the literature.\textsuperscript{364} Finally, Snyder alleged that the ballot was false, fraudulent, and deceptive, and that its purpose was to mislead voters.\textsuperscript{365} The lower court disposed of the alleged section 11-3(b) violation, but found that the failure to identify Glusing as the candidate responsible for the ballot violated section 26-16(a)(7).\textsuperscript{366}

In the Court of Appeals' first consideration of this case,\textsuperscript{367} the court held that the trial court incorrectly applied the standard of proof mandated by article 33, section 19-5.\textsuperscript{368} The statute provides

364. \textit{Id.} at 417-18, 520 A.2d at 352-53. The sample ballot was distributed at the polls on the day of the primary. At the top of the ballot appeared the words, “Support your \textit{official} Republican ballot” next to a logo similar to that used by the Republican State Central Committee. The ballot also contained an endorsement statement signed by Helen Delich Bentley, the incumbent Congresswoman. At the bottom of the ballot appeared the words “Authority: Bernice Patterson, Treasurer.” The ballot endorsed a number of candidates, including Glusing for the State Senate and Kosmas for the Republican State Central Committee. Snyder discovered the text of the ballot on the day of the primary when he visited the polls. \textit{Id.} at 414-17, 520 A.2d at 351-52.

Snyder alleged a violation of Md. Ann. Code art. 33, § 11-3(b) (1986), which provides in pertinent part, “It shall be unlawful for any organization other than the State central committee for the State to hold itself out as the official organization or governing body of any political party.” Snyder further alleged that the ballot violated § 26-16(a)(7), which provides:

(a) The following persons shall be guilty of prohibited practices and shall be punished in accordance with the provisions of this section:

(7) Campaign Literature. Every person who ... causes to be published or distributed any ... sample ballot ... relating to or concerning any candidate ... for public or party office ... unless such ... sample ballot ... clearly indicates the name of the candidate or committee responsible for the literature and contains, but set apart therefrom, an authority line which shall include the name and address of the ... treasurer ... responsible for the publication or distribution of the same.

\textit{Id.} § 26-16(a)(7). Although the sample ballot declared, “Authority, Bernice Patterson, Treasurer,” it failed to name Glusing as the candidate for whom Patterson was treasurer. 308 Md. at 417-18, 520 A.2d at 352-53.


366. \textit{Id.} at 420-21, 520 A.2d at 354. At oral argument on this case's first trip to the Court of Appeals, Snyder's counsel was pressed to declare whether § 11-3(b) (1986) (per curiam). The trial court had adopted Glusing's argument that he could not, as a matter of law, violate § 11-3(b). Glusing relied on Culotta v. Raimondi, 251 Md. 384, 389, 247 A.2d 519, 522 (1968), in which the Court of Appeals held that individuals could not violate § 11-3(b) because they did not constitute an organization; § 11-3(b) proscribes only an organization's conduct. In its first consideration of this case, however, the Court of Appeals only addressed the issue of the § 26-16(a)(7) violation. 308 Md. at 419-20, 520 A.2d at 353-54; 307 Md. at 550, 515 A.2d at 768.

367. 307 Md. 548, 515 A.2d 767 (1986) (per curiam). The trial court had adopted Glusing's argument that he could not, as a matter of law, violate § 11-3(b). Glusing relied on Culotta v. Raimondi, 251 Md. 384, 389, 247 A.2d 519, 522 (1968), in which the Court of Appeals held that individuals could not violate § 11-3(b) because they did not constitute an organization; § 11-3(b) proscribes only an organization's conduct. In its first consideration of this case, however, the Court of Appeals only addressed the issue of the § 26-16(a)(7) violation. 308 Md. at 419-20, 520 A.2d at 353-54; 307 Md. at 550, 515 A.2d at 768.

368. 308 Md. at 421, 520 A.2d at 354.
that a court may nullify an election when an act or omission materially affected the rights of the parties or the purity of the election process, or might have changed the outcome of an election.\textsuperscript{369} The lower court required Snyder to show by clear and convincing evidence that the use of the sample ballot in fact changed the outcome of the election, whereas the proper application of section 19-5 would have required Snyder to show that the use of the sample ballot might have altered the results.\textsuperscript{370} The Court of Appeals therefore reversed and remanded the case.\textsuperscript{371} On remand the lower court found that Snyder had presented clear and convincing evidence that Glusing had violated section 26-16(a)(7) and that the use of the improper sample ballot constituted an act or omission under article 33 which materially affected the parties’ rights and interests and the purity of the election process.\textsuperscript{372} Nevertheless, the trial court determined that there was insufficient evidence to prove that the outcome of the election might have changed absent the violation.\textsuperscript{373}

On appeal for the second time, the Court of Appeals considered Snyder’s contention that the lower court had erred in considering only the effect of the 26-16(a)(7) violation, rather than the effect of the defective ballot as a whole.\textsuperscript{374} In determining that the trial court did not err, the court found that the trial court’s consideration of a hypothetical, violation-free sample ballot was an acceptable approach to the complex causation problem.\textsuperscript{375}

The majority devoted most of its opinion to an analysis of the

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\textsuperscript{369} \textit{Md. Ann. Code} art. 33, § 19-5 (1986). The statute provides:

Upon a finding, based upon clear and convincing evidence, that the act or omission involved materially affected the rights of interested parties or the purity of the elections-process and;

(1) \textit{Might} have changed the outcome of an election already held, the court shall:

(i) Declare null and void the election . . . or

(ii) Order any other relief that will provide an adequate remedy.

\textit{Id.} (emphasis added).

\textsuperscript{370} 308 Md. at 420, 520 A.2d at 354.

\textsuperscript{371} \textit{Id.} at 421, 520 A.2d at 354.

\textsuperscript{372} \textit{Id.} at 421-22, 520 A.2d at 355.

\textsuperscript{373} \textit{Id.} at 422, 520 A.2d at 355.

\textsuperscript{374} \textit{Id.} Snyder asserted that it was the \textit{combined} effect of the § 26-16(a)(7) violation and the representations of official Republican status, whether the latter constituted a § 11-3(b) violation or not, which might have changed the outcome of the election. \textit{Id.}

\textsuperscript{375} \textit{Id.} at 423, 520 A.2d at 356. The lower court imagined an error-free sample ballot identifying Glusing as the candidate responsible for the ballot, and thus eliminating the inference that Glusing was the “official” Republican candidate. The trial court concluded that Snyder had failed to prove that an error-free ballot might have changed the outcome of the election. \textit{Id.}
legislative intent of section 19-5. The majority determined that section 19-5 requires one contesting an election to demonstrate that the alleged violation might have changed the outcome of the election, not that the violation absolutely would have changed the election results. Combining the "clear and convincing" standard of proof with the language of the statute, the court determined that the section 19-5 burden is satisfied when evidence shows that there is a substantial probability that the outcome might have been different.

The majority declared that the lower court judge did not err in concluding that Snyder had failed to prove by clear and convincing evidence that the outcome of the election might have been different had there been no violation of the election law. It is for the trier of fact to decide the strength of the causal connection between the violation and the election outcome; because there was evidence which tended to support the trial court’s decision, the Court of Appeals could not hold that this decision was clearly erroneous.

The dissent focused on the application of the standard of proof and the legislative intent behind the statute to find that the trial judge and the majority had read article 33 too narrowly. Noting that article 33, subtitle 19, speaks of an "act or omission" and not merely a violation, the dissent argued that the legislature intended to provide judicial relief to a voter from any act inconsistent with article 33 regardless of whether or not that act amounted to statutory violation. Thus, the dissent faulted the trial court and the majority for looking only to technical violations of the election laws and failing to consider any other act or omission which may have changed the election’s outcome.

The dissent also found that the distribution of the sample ballots violated section 11-3(b), which prohibits an "organization" from holding itself out as the "official" State Central Committee of a political party. The dissent argued that several individuals worked-
ing together may constitute an "organization." Thus, even if Glus-
ing and his supporters did not technically violate section 11-3(b), they clearly violated the statute's spirit. The dissent concluded that the trial judge was required to look both to the technical section 26-16(a)(7) violation and to the act of distribution of sample ballots to determine whether the outcome of the election might have been changed. By not applying this broader scope of review, the trial judge failed to reach the correct conclusion.

In interpreting the statutory provisions, the Court of Appeals found a legislative intent to provide a uniform procedure for affording judicial relief for election-related acts. Moreover, the legislature mandated that the statute be interpreted liberally to effectuate its purposes. The majority in this case focused only on the construction of the statutory language. Nevertheless, it is clear from the divided court and the language of the legislative history that there may be some latitude in interpreting this statute to include a

sons formed for the purpose of assisting the promotion of the success or defeat of any candidate." Md. Ann. Code art. 33, § 1-1(a)(12) (1986 & Supp. 1987). Thus, the dissent argued, the Glusing-Patterson-Kosmas association, as well as the distributors of the sample ballots, constituted an organization under § 1-1(a)(12), and therefore would be violative of § 11-3(b). 308 Md. at 431, 520 A.2d at 360.

385. 308 Md. at 432, 520 A.2d at 360.
386. Id.
387. Act of May 28, 1985, ch. 755, 1985 Md. Laws 3559. In 1985 the General Assembly repealed and re-enacted portions of the election law. The new statute, but not the old, employed the "act or omission" language which is central to the Snyder opinion. The preamble to the 1985 Act declared:

The General Assembly of Maryland, recognizing that the timely determination of issues arising with respect to elections will facilitate the administration of elections, promote equity among interested parties, and enhance the confidence of the citizens of the State in the elections process, and recognizing that existing law does not uniformly provide for such determinations, and recognizing that the delayed determination of issues that may affect the outcome of elections often does not provide an adequate remedy, and concluding that a judicial determination of election-related issues affords the fullest opportunity for providing a timely and adequate remedy, enacts this statute for the purposes and objectives hereinabove mentioned and declares that it should be liberally construed to effectuate these purposes and objectives.

Id. at 3560. See 308 Md. at 424-25, 520 A.2d at 356-57.
388. 308 Md. at 425, 520 A.2d at 356.
more expansive reading of acts which might affect an election's outcome.

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VIII. Taxation

A. Condominium Conversion

1. Mid-Cycle Reassessment of Property.—In Supervisor of Assessments v. Chase Associates the Court of Appeals held that converting an apartment building to condominiums and filing a condominium declaration constituted neither a change in use nor a subdivision of land. Therefore, a mid-cycle reassessment of the property was unauthorized.

The State Department of Assessments and Taxation assesses real property every three years, and normally does not modify the assessments within the three-year cycle. Nevertheless, when a "substantial change occurs in the use of the property" or when the property is subdivided, it may be inspected and revalued. Chase Associates questioned the legality of a mid-cycle reassessment of a residential apartment building that it had converted to condominiums.

Chase purchased the property in January 1981 and filed a condominium declaration in June. Subsequently Chase received retroactive, individual assessment notices for each of the units, with a total value over three times greater than the 1980 assessed value. Chase and the unit owners appealed.

1. 306 Md. 568, 510 A.2d 568 (1986). This case consolidated two appeals brought by the Supervisor of Assessments from circuit court judgments for the building owner (Chase Associates) and individual unit owners, and for Marvin Ellin, who owned eleven units. Id. at 573-74, 510 A.2d at 570.
2. Id. at 578-79, 510 A.2d at 573.
3. Id. at 570, 510 A.2d at 569. See Md. Ann. Code art. 81, § 232(8) (1980). This statute was amended in 1979 to change the requirement of annual reassessment to one of triennial review. The provisions of article 81 governing real property taxation were recodified as part of the Tax-Property Article. The recodified provisions took effect February 1, 1986, and were not applied in Chase. 306 Md. at 570, 510 A.2d at 569.
6. 306 Md. at 572, 510 A.2d at 570.
7. Id. at 571, 510 A.2d at 569. Chase Associates purchased the outstanding stock of what was then a cooperative. As the units were sold, the buyers reimbursed Chase for their share of the real property taxes, based on Chase's December 1980 assessment notice, which took effect on July 1, 1981. Id. at 572, 510 A.2d at 570.
8. Id. The aggregated individual values of the 1981 assessment totalled $14,175,350, while the 1980 assessment reflected a value of $3,603,700.
The court considered whether converting the building to condominiums constituted a "change in use" within the meaning of article 81, section 232(8)(d)(2) and whether filing a condominium declaration subdivided the land within the meaning of article 81, section 19(a)(1).10 Addressing the first issue, the court concluded that section 19(a)(1)'s provision that "land may be reassessed whenever it has been subdivided" did not apply to the conversion to condominiums since the building was not "land."11 The court pointed to the preceding sentence of the statute, which stated that "the land itself and the buildings or other improvements thereon shall be valued and assessed separately" to establish the limited meaning of "land."12

The court then considered whether the filing of a condominium declaration constituted a subdivision of the land.13 Noting the narrow meaning of "subdivision" in land use law as a "formal division of a parcel of land into several smaller lots to be separately sold,

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The Supervisor rescinded the reassessment for the first year, but affirmed it for the second and third years of the triennial cycle. Id. The Property Tax Assessment Appeals Board upheld the Supervisor's reassessment. Id. at 573, 510 A.2d at 570. In response, two separate appeals were filed to the Maryland Tax Court, one by Chase Associates and the unit owners, and the other by Ellin. The Tax Court upheld the reassessments on the basis of the Supervisor's "substantial change in use" rationale. The Circuit Court for Baltimore City reversed in both cases. Id. The Supervisor appealed to the Court of Special Appeals; the Court of Appeals granted certiorari before the Court of Special Appeals considered the cases. Id. at 573-74, 510 A.2d at 570-71.


[any property shall be reviewed, physically inspected and revalued . . . in any year that: (1) The zoning classification of the property is changed; (2) A substantial change occurs in the use of the property; (3) Extensive improvements are made to the existing property; (4) The previous assessment was clearly erroneous due to an error in calculation or measurement of the improvements on the property.

After the Chase decision, these provisions were recodified together at Md. Tax-Prope.


In 1986 the General Assembly made several significant changes to provisions concerning reassessment. New § 8-104(c)(1)(v) now requires revaluation when "a subdivision occurs." "Subdivision" is "the division of real property into two or more parcels by subdivision plat, condominium plat, time-share, metes and bounds, or other means." Id. (Supp. 1987). In § 8-104(c)(1)(ii) the change in use provision has been expanded to include "a change in use or character." Id. The statute no longer requires that the change be "substantial." It is not clear whether condominium conversion would trigger a reassessment under the new statute.

11. 306 Md. at 576, 510 A.2d at 572.

12. Id. at 575, 510 A.2d at 571.

13. Id.
leased, or developed," the court held that the condominium regime had not "subdivided" the land. According to the court, no subdivision occurred because each individual owner continued to possess an undivided interest in the common areas, including the land.

Finally, the court held that converting the apartment building to condominiums did not amount to a "substantial change in use" of the property. The court found that the Maryland Tax Court had incorrectly equated "change in value" with "change in use." The purpose of mid-cycle reassessments is to improve "the accuracy with which a property's assessed value reflects its current value" throughout the cycle. Interpreting "change in use" to encompass every event that might change the value of the property would not only unreasonably stretch the meaning of the word "use," but would ignore the legislature's purpose in enacting the statute.

The legislature sought to link reassessment with the occurrence of specific events, including a substantial change in use, but not a mere change in value.

After interpreting the phrase "change in use," the court decided that Chase's conversion of the apartment building into condominiums did not constitute such a change. Converting the building to condominiums, the court held, resulted in a change of ownership, but not a change in use. Although the Supervisor of

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15. 306 Md. at 576, 510 A.2d at 572.
17. 306 Md. at 578, 510 A.2d at 573.
18. Id. at 577, 510 A.2d at 572-73. The Tax Court assumed that changing the use to condominiums would increase the value. The Court of Appeals pointed out, however, that the statute was not triggered by every change in value, but only by those amounting to a "substantial change in use." The court gave the word "use" its "ordinary meaning" of "the purpose or object to which something is applied." Id. (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2523 (unabridged ed. 1971)). In the context of the case, "use" specifically referred to "the nature of the activities pursued on the property." Id. at 578, 510 A.2d at 573 (citing Martin v. Liberty County Bd. of Tax Assessors, 152 Ga. App. 340, 343, 262 S.E.2d 609, 612 (1979) (finding that for tax assessment purposes, "use" refers to activity pursued on the property)).
19. Id. at 577, 510 A.2d at 572. The court suggested that the statute may have been drafted narrowly out of concern for the administrative burden which a general reassessment provision would create, and the "predictability and consistency" with which the reassessment statute would be used. Id.
20. Id.
21. Id. at 577-78, 510 A.2d at 572-73.
22. Id. at 578, 510 A.2d at 573.
23. Id. Cf. Bridge Park Co. v. Borough of Highland Park, 113 N.J. Super. 219, 222,
Assessments had consistently interpreted condominium conversion as a change in use for the purpose of reassessments, the court nevertheless concluded that consistent interpretation did not justify ignoring the statute's plain meaning.24

The Court of Appeals in Chase determined that condominium conversion does not trigger mid-cycle reassessment by examining the restrictive statutory language. The court observed, however, that mid-cycle reassessment is intended to improve the accuracy with which an assessment reflects a property's current value. Converting to condominiums usually leads to an increase in value. Clearly, the legislature could add condominium conversion to the statutory list of specified events that trigger mid-cycle reassessment.

While condominium projects and owners have received a favorable result under the decision in Chase, the court reached this result by interpreting statutory language that has since changed. The most recent provision authorizes reassessment of property whenever "a change in use or character" or "a subdivision" occurs. "Subdivision" includes "the division of real property into two or more parcels by . . . condominium plat."25 It is unresolved whether condominium conversion would constitute a "change in character" or a "subdivision" under this new statute.26

2. Transfer Tax.—The Court of Appeals held in Nordheimer v. Montgomery County27 that Maryland's statute authorizing the Montgomery County condominium transfer tax ordinance did not conflict with the Maryland Horizontal Property Act.28 The court also declared that the county transfer tax did not violate the equal protection provisions of the state and federal constitutions.29

The Maryland Horizontal Property Act30 prohibits local gov-

24. 306 Md. at 579, 510 A.2d at 573.
28. Id. at 100, 512 A.2d at 387. The court also held that taxpayers had no cause of action for a declaratory judgment or for a refund of condominium taxes already paid. Id. at 98, 512 A.2d at 386.
29. Id. at 104, 512 A.2d at 388.
ernments from enacting laws that impose burdens on condominium properties but not on all other similar property.\textsuperscript{31} The act provides that in the event of a conflict between the statute and any other law, the act shall prevail.\textsuperscript{32} Chapter 648 of the Acts of 1980 authorized Montgomery County to impose a four percent tax on the initial transfers of condominium units.\textsuperscript{33} Montgomery County then amended its code pursuant to the power granted to it by the legislature to tax the initial condominium transfers.\textsuperscript{34}

Parkside Associates acquired title to a 954-unit apartment complex in July 1980, converted the apartments to condominiums, and began selling units in April 1981.\textsuperscript{35} Montgomery County demanded that Parkside Associates pay over $2,700,000 in taxes on the initial title transfers pursuant to section 52-21(h) of the Montgomery County Code.\textsuperscript{36} Parkside Associates paid the taxes.\textsuperscript{37} Later the Parkside tenants brought an action against Parkside Associates; Nordheimer, who was a Parkside Associates general partner; and Montgomery County, seeking a declaratory judgment that the condominium transfer tax was invalid.\textsuperscript{38} Parkside Associates and Nordheimer filed a cross-complaint against the County, seeking a refund of taxes already paid, an injunction against requiring pay-

\textsuperscript{31} The statute provides:

\textit{Except as otherwise provided in this title, a county, city, or other jurisdiction may not enact any law, ordinance, or regulation which would impose a burden or restriction on a condominium that is not imposed on all other property of similar character not subjected to a condominium regime. Any such law, ordinance, or regulation, is void. Except as otherwise expressly provided in §§ 11-130, 11-138, 11-139, and 11-140 of this title, the provisions of this title are statewide in their effect. Any law, ordinance, or regulation enacted by a county, city, or other jurisdiction is preempted by the subject and material of this title.}\n
\textit{Id. For a detailed discussion of the Horizontal-Property Act, see Rockville Grosvenor, Inc. v. Montgomery County, 289 Md. 74, 422 A.2d 353 (1980).}

\textsuperscript{32} MD. REAL PROP. CODE ANN. § 11-122(b) (1988).

\textsuperscript{33} 307 Md. at 89, 512 A.2d at 381. Chapter 648 of the Acts of 1980 amended the public local laws of Montgomery County and specifically authorized the county to impose a tax of "four percent of the value of the consideration for the initial transfer of a residential unit subject to a condominium regime offered for rent for residential purposes prior to the establishment of the condominium regime. The tax shall be paid by the initial transferor of the residential unit." Act of May 20, 1980, ch. 648, 1980 Md. Laws 2258.

\textsuperscript{34} 307 Md. at 89, 512 A.2d at 381; MONTGOMERY COUNTY, Md., CODE § 52-21 (1984).

\textsuperscript{35} 307 Md. at 90, 512 A.2d at 381.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id. at 90-91, 512 A.2d at 381-82. The tenants claimed that the transfer tax violated the Maryland Horizontal Property Act and the equal protection clauses of both the Maryland and the United States Constitutions. Id.
ment of taxes on future transfers, and a declaration that the transfer tax was invalid. The circuit court granted the County’s motion for summary judgment, and all parties but Montgomery County appealed.

Parkside Associates argued that taxing transfers of condominium units violated the Horizontal Property Act’s prohibition against laws burdening only condominiums. Parkside Associates pointed to the absence of a similar tax on initial transfers of cooperative units as evidence of the unequal burden on condominium transfers, and asserted that the Horizontal Property Act must prevail over the “conflicting” provision authorizing the county tax. Furthermore, Parkside Associates claimed that the tax violated the equal protection provisions of the state and federal constitutions.

In addressing whether chapter 648 conflicted with the Horizontal Property Act, the court held that although the act prevents local governments from imposing a condominium transfer tax without imposing a similar tax on cooperative units, chapter 648 does not conflict with the equal burden provision of the act, but rather creates a limited exception. The Horizontal Property Act states that no “county, city, or other jurisdiction” may enact a law imposing a burden only on condominiums. By its terms, this provision does not apply to the State. Therefore, the Horizontal Property Act did not prohibit the General Assembly from enacting chapter 648 authorizing the county condominium transfer tax ordinance.

The court also rejected Parkside Associates’ equal protection challenge to the county transfer tax ordinance. Because the statute in question involved no suspect class or fundamental right, the rational basis test was applied. A tax statute satisfies the test for

39. Id. at 91-92, 512 A.2d at 382.
40. Id. at 92, 512 A.2d at 382. The Court of Appeals granted certiorari before the Court of Special Appeals heard the case. Id.
41. Id. at 92-93, 512 A.2d at 382-83.
42. Id. On July 1, 1981, the General Assembly authorized and Montgomery County enacted a tax on the initial transfer of cooperative units. Id. at 94, 512 A.2d at 383.
43. Id. at 93, 512 A.2d at 383.
44. Id. at 101, 512 A.2d at 387.
45. Id. at 100-01, 512 A.2d at 386-87.
46. MD. REAL PROP. CODE ANN. § 11-122(b) (1988).
47. 307 Md. at 100, 512 A.2d at 387.
48. Id.
49. Id. at 101, 512 A.2d at 387. The General Assembly ordinarily cannot pass a statute that binds future General Assemblies. See, e.g., Montgomery County v. Bigelow, 196 Md. 413, 423, 77 A.2d 164, 167 (1950) (noting that “[t]he legislature cannot by statute ‘preclude’ the repeal of any statute by a subsequent legislature’); Wright v. Wright’s Lessee, 2 Md. 429, 449 (1852) (finding no constitutional power of one legisla-
equal protection purposes if "the classifications made in imposing the tax are not utterly arbitrary."\(^5\) Even if there exists no reasonable difference between condominiums and cooperatives relevant to the purposes of the tax, since a tax statute needs no other purpose than that of raising revenue, any "imaginable factual basis" for justifying the classifications will suffice.\(^5\) Because Parkside Associates had not met its burden of demonstrating that the distinction between condominium and cooperative transfers was "palpably arbitrary," the court rejected Parkside Associates' equal protection argument.\(^5\)

The decision in Nordheimer rested on the conclusion that the Horizontal Property Act, in providing that no "county, city, or other jurisdiction" may enact laws imposing unequal burdens on condominiums, did not apply to the State. This conclusion is unassailable in light of the undisputed principle that a statute only applies to the State when the legislature expressly names the State in the statute or when the statute reflects a clear intent that it apply to the State.\(^5\) Furthermore, to hold that the Horizontal Property Act prohibited the General Assembly from authorizing the county transfer tax would violate the principle that the General Assembly ordinarily cannot restrict future legislatures.\(^5\)

\(^{50}\) 307 Md. at 102, 512 A.2d at 387.

\(^{51}\) Id. at 102-03, 512 A.2d at 387-88 (quoting Lane Corp. v. Comptroller of the Treasury, 228 Md. 90, 97, 178 A.2d 904, 908 (1962) ("absolute mathematical equality" not required in tax classifications)). See Villa Nova v. Comptroller of the Treasury, 256 Md. 381, 391, 260 A.2d 307, 312 (1970) ("It is only when the attempted classification has no reasonable basis in the nature of the businesses classified and burdens are imposed unequally on taxpayers between whom there is no real difference that the courts will interfere.").

\(^{52}\) 307 Md. at 102-03, 512 A.2d at 387-88. The court applied the "palpably arbitrary" standard set forth in Lane Corp., 228 Md. at 97, 178 A.2d at 908.

\(^{53}\) 307 Md. at 104, 512 A.2d at 388.

\(^{54}\) See, e.g., In re Arnold M., 298 Md. 515, 522, 471 A.2d 313, 316 (1984) (finding the State not a "parent" for purposes of child abuse statute because "no commonly understood meaning of that word encompasses the State, its agencies or instrumentalities," and statute did not make it "clear and indisputable" that State was intended to come within its provisions); City of Baltimore v. State, 281 Md. 217, 223, 378 A.2d 1326, 1329 (1977) (The State is not bound by a legislative enactment "unless the enactment specifically names the State or manifests a clear and indisputable intention that the State is to be bound.").

\(^{55}\) See supra note 49.
B. Foreign Corporations

1. Exemptions for Foreign Sales Corporations.—In Comptroller of the Treasury v. Armco, Inc. the Court of Special Appeals held that a Maryland statute which exempts from state tax the income of an affiliated domestic international sales corporation (DISC) only when the DISC’s parent corporation has at least fifty percent of its net income allocable to Maryland, discriminates on the basis of a corporation’s business location, and thereby violates the commerce clause of the United States Constitution. Nevertheless, due process principles allow the State to tax interest income received by a nondomiciliary corporation conducting business in Maryland if the income is related to the corporation’s Maryland business.

In 1978 the General Assembly amended article 81, section 280A(c) to prevent double taxation of DISCs in Maryland. The amendment excluded from a DISC’s state taxable income the percentage of dividends equivalent to what may be excluded under the amended Internal Revenue Code. The exclusion, however, is only

58. Congress created domestic international sales corporations (DISCs) in 1971 when it amended the Internal Revenue Code of 1954 to provide incentives for United States firms to increase their exports. A DISC was a hollow bookkeeping entity with a favored tax treatment, established to isolate a corporation’s foreign sales. It had no assets, property, or personnel, and was not subject to federal tax. One-half of the DISC’s income was taxable to the parent corporation, while tax on the remaining one-half was deferred until either the accumulated income was distributed to the shareholders or the DISC no longer qualified for special tax treatment. 70 Md. App. at 407, 521 A.2d at 786-87. See Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 390-92 (1984); 26 U.S.C. §§ 991-997 (1982).

The Tax Reform Act of 1984, 26 U.S.C. §§ 921-927, 991-997 (Supp. III 1985), terminated DISCs in most instances to address technical objections raised by foreign trading partners. Foreign Sales Corporations (FSCs) were created to replace DISCs. FSCs provide comparable federal tax benefits. See Tatarowicz, State Taxation of Accumulated DISC Income and Foreign Sales Corporations, 4 J. ST. TAX’N 3 (1985).

59. 70 Md. App. at 413, 521 A.2d at 790. The commerce clause provides that “[t]he Congress shall have the power . . . to regulate commerce with foreign nations and among the several States, and with Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

The Supreme Court has held that the commerce clause was adopted “to create an area of free trade among the several states.” McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944). Furthermore, the commerce clause is “not merely an authorization to Congress to enact laws for the protection or encouragement of commerce among the States, but . . . even without implementing legislation by Congress is a limitation upon the power of the States.” Freeman v. Hewit, 329 U.S. 249, 252 (1946).

60. 70 Md. App. at 424, 521 A.2d at 795.
61. Id. at 408, 521 A.2d at 787. Without a special provision, a state could tax the DISC’s allocable income both when it is in the hands of the DISC and when it is in the hands of the parent corporation. Id.
available when a parent corporation's DISC has at least fifty percent of its net taxable income subject to Maryland taxation.\textsuperscript{63}

After the General Assembly enacted the tax exclusion provision for DISCs, Armco excluded $17,643,847 that it received from its DISC, Armco Export Sales Corporation, from its determination of state taxable income.\textsuperscript{64} The Comptroller of the Treasury found that the DISC did not qualify for the tax exclusion because only two percent of its net income was subject to Maryland tax.\textsuperscript{65} Therefore, the Comptroller assessed Armco an additional $23,499 in tax.\textsuperscript{66} Armco conceded that it did not qualify for the exclusion under the statute, but appealed the assessment to the Tax Court, arguing that the statute violated the commerce clause.\textsuperscript{67} The Tax Court affirmed the Comptroller's ruling on the grounds that the court lacked subject matter jurisdiction to declare the statute unconstitutional.\textsuperscript{68} The Circuit Court for Baltimore City reversed the order of the Tax Court, holding that the statute unconstitutionally discriminated against interstate commerce.\textsuperscript{69}

In affirming the circuit court's decision the Court of Special Appeals relied on Supreme Court decisions which have held that the purpose of the commerce clause is to protect free trade by avoiding preferential treatment for in-state businesses.\textsuperscript{70} The court ruled that because section 280A(c)(7) only permits a tax advantage for parent corporations with DISCs conducting at least fifty percent of their business in Maryland, the statute impermissibly discriminates against interstate commerce.\textsuperscript{71} The court dismissed the Comptrol-

\begin{footnotesize}
There shall be subtracted from taxable income of the taxpayer the following items to the extent included in federal income: ... (7) to the extent that the dividends received from an affiliated domestic international sales corporation (as defined by Internal Revenue Code of 1954 § 992(a)), which is equivalent to the percentage that would be excluded if the domestic international sales corporation was not qualified under § 992(a). However, this exclusion shall be available only if at least 50 percent of the net taxable income of the domestic international sales corporation is subject to Maryland taxation.

\textit{Id.}

\textsuperscript{63.} \textit{Id.}
\textsuperscript{64.} 70 Md. App. at 409, 521 A.2d at 788.
\textsuperscript{65.} \textit{Id.}
\textsuperscript{66.} \textit{Id.}
\textsuperscript{67.} \textit{Id.} at 410, 521 A.2d at 788.
\textsuperscript{68.} \textit{Id.}
\textsuperscript{69.} \textit{Id.}
\textsuperscript{71.} 70 Md. App. at 411, 521 A.2d at 789.
\end{footnotesize}
ler's assertion that the limited exclusion was permissible because it was designed to eliminate double taxation, reasoning that a company with less than fifty percent of its income allocable to Maryland always will pay a double tax.\textsuperscript{72} Furthermore, the court rejected the Comptroller's argument that because Maryland has adopted a constitutionally acceptable apportionment formula to determine a DISC's state tax, the qualified tax exclusion also is constitutional.\textsuperscript{73} Instead, the court found that the apportionment formula's constitutionality is irrelevant to the question whether the qualified tax exclusion discriminates against interstate commerce.\textsuperscript{74}

After deciding that section 280A(c)(7) was unconstitutional, the court considered whether to invalidate the entire subsection of the statute or sever the unconstitutional limitation.\textsuperscript{75} The court examined legislative intent to determine if the legislature would have enacted the provision had it known the limitation was invalid.\textsuperscript{76} The court found that the legislature's intent was to address the problem of double taxation of DISCs. Severing the unconstitutional provision would achieve this goal by extending the tax exemption to all parent corporations conducting business in Maryland.\textsuperscript{77} Consequently, the court severed the provision.

Next the court considered whether the State violated due process by taxing interest payments Armco received from loans made to the Iron Ore Company of Canada (IOCC).\textsuperscript{78} The State could tax Armco's interest income only if there was a "minimal connection" or "nexus" between the interstate activities of Armco and Maryland,

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  \item \textsuperscript{72} Id. at 413, 521 A.2d at 790. The Comptroller appeared to argue that the intent was not to discriminate against interstate commerce, but rather to put a ceiling on the double tax. \textit{Id.}
  \item \textsuperscript{73} Id. at 414, 521 A.2d at 790.
  \item \textsuperscript{74} Id. at 415, 521 A.2d at 791.
  \item \textsuperscript{75} Id. at 416, 521 A.2d at 791.
  \item \textsuperscript{76} \textit{Id.} The court presumed that the legislature generally desires its invalid enactments to be severed if possible. \textit{Id.} Nevertheless, "courts have often refused to sever when the severed statute would impose a duty, sanction, or substantial hardship on the otherwise excepted class." O.C. Taxpayers for Equal Rights, Inc. v. Mayor of Ocean City, 280 Md. 585, 600, 375 A.2d 541, 550 (1977).
  \item \textsuperscript{77} 70 Md. App. at 417, 521 A.2d at 792. Striking the entire provision would deny the tax benefit to all parent corporations conducting business in Maryland. \textit{Id.}
  \item \textsuperscript{78} \textit{Id.} In 1978 Armco received $282,570 in interest payments from a loan made to the Iron Ore Company of Canada (IOCC). Armco excluded this income from taxable income in its Maryland return. The Comptroller, however, added the interest to Armco's state taxable income. \textit{Id.} at 411, 521 A.2d at 789. The Tax Court reversed the Comptroller's assessment on the grounds that the activities of Armco and IOCC were not unitary. \textit{Id.} The Circuit Court for Baltimore City reversed the Tax Court, holding that since Armco operated a financial services subsidiary, the State could tax Armco's interest income from the loan it made to IOCC. \textit{Id.}
\end{itemize}
as well as a "rational relationship between the income attributed to the state and intrastate values of the enterprise." Armco argued that because Armco and IOCC were not a unitary business, the State could not apportion the interest income to Maryland. The court, however, held that a lack of unitariness did not per se preclude the State from taxing any income Armco received from IOCC. There are "variations on the theme" of unitariness; the "economic realities" of an enterprise dictate the apportionability of income the parent receives. Because a state tax is presumed constitutional, the burden was on taxpayer Armco to prove that the interest income was unrelated to its unitary business operations in Maryland. The court could not determine whether Armco had met this burden, since the Tax Court did not examine the issue and the factual record was incomplete. Thus, the court remanded the case to allow the Tax Court to answer this purely factual question.

When deciding commerce clause issues, the Supreme Court has prohibited a state from imposing a tax "which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." If individual states were permitted to enact laws favoring out-of-state businesses, it "would invite a multiplication of preferential trade areas destructive of free trade which the clause protects." State taxes with either a discriminatory purpose or discriminatory effect thus have been found to violate the commerce clause. A case-by-case approach is necessary to properly balance the national interest in maintaining open trade with a state's interest in exercising its taxing powers.

Numerous Supreme Court decisions have held that when states apply a particular tax to both interstate and intrastate commerce, tax benefits for local businesses are unconstitutional unless similar ben-

80. 70 Md. App. at 420, 521 A.2d at 793. The State validly may tax the income of a corporation if it finds unitariness between the corporation's activities in the State and the corporation's activities that generated the income. Id.
82. 70 Md. App. at 420, 521 A.2d at 793 (quoting Mobil, 445 U.S. at 441).
83. Id. at 418, 521 A.2d at 792.
84. Id. at 425, 521 A.2d at 796.
benefits are given to out-of-state businesses. For example, in *Maryland v. Louisiana* the Supreme Court held unconstitutional Louisiana's "First Use" tax, which imposed a tax on natural gas brought into the state while exempting local gas users. Similarly, in *Boston Stock Exchange v. State Tax Commission* a New York statute which subjected out-of-state sales of securities to a higher tax than in-state sales was unconstitutional because it promoted intrastate sales at the expense of interstate sales. The Court found in *Westinghouse Electric Corp. v. Tully* that a tax credit limited to gross receipts from a DISC's export of goods from New York State unconstitutionally penalized DISCs that conducted shipping from other states.

The Court of Special Appeals applied the correct commerce clause analysis in *Armco*. The State only provided a tax benefit to DISCs conducting at least fifty percent of their business in Maryland. As a result, DISCs conducting less than half their business in the State paid a tax which Maryland DISCs did not. The tax exclusion clearly provided a commercial advantage to local businesses in Maryland and had a discriminatory effect which violated the commerce clause.

In severing the unconstitutional section of the statute, rather than invalidating the entire provision, the court followed a series of Court of Appeals decisions. Because a statute is presumptively severable, and because severance in this case would not unduly burden Armco, the court correctly decided that it was unnecessary to invalidate the entire provision. The legislature's dominant pur-

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89. See supra note 59.
90. 451 U.S. 725 (1981). The Supreme Court developed a four-part test to determine the validity of a state tax under the commerce clause. A state tax is valid only if the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services provided by the State." *Id.* at 754.
91. *Id.* at 760.
93. *Id.* at 336-37.
95. *Id.* at 401, 407.
97. See *O.C. Taxpayers*, 280 Md. at 600-01, 375 A.2d at 549-50.
pose in enacting section 280A(c)(7) was to limit double taxation of DISCs; the court’s severing of the unconstitutional portion of the statute still allowed Maryland to accomplish the legislature’s goal.

While the court did not decide whether Maryland’s tax on IOCC’s interest payments to Armco violated due process, the court held that a lack of unitariness between a “taxpayer and payor corporation” does not necessarily preclude a state from taxing income which the taxpayer receives from the payor. This determination is consistent with the Supreme Court’s holding that “the Constitution imposes no single formula on the States” for determining state tax on income arising out of interstate activities. The court focused on whether Armco made the loan to IOCC as an “extraordinary isolated transaction” or in the ordinary course of business. Because it was unclear whether Armco had demonstrated that it had not earned the interest income as a part of its unitary business, the court properly remanded the case to the Tax Court.

2. Solicitation of Business in Maryland.—The Court of Special Appeals held in *Matthew Bender & Co. v. Comptroller of the Treasury* that article 81, section 316(c) of the Annotated Code of Maryland and title 15, section 381(a) of the United States Code permit the Comptroller of the Treasury to consider “solicitation” along with other activities conducted within Maryland when determining whether a foreign corporation is “doing business” in the State and thus subject to Maryland taxation.

Under article 81, section 316, foreign corporations must pay tax only on income derived from business carried on within the State. The corporation may determine the amount of taxable income through separate accounting or, in the case of a unitary business, through measuring the corporation’s property, payroll, and sales located in Maryland. Title 15, section 381(a) of the United States Code, however, limits taxation under section 316 by

98. 70 Md. App. at 422, 521 A.2d at 794.
100. 70 Md. App. at 423-25, 521 A.2d at 795-96.
104. 67 Md. App. at 711, 509 A.2d at 711.
105. Md. ANN. CODE art. 81, § 316 (1980 & Supp. 1987). The current version of § 316, which took effect July 1, 1987, provides the same methods for determining taxable income as those applied by the court. See id.
106. id. at (b), (c) (Supp. 1987).
107. 15 U.S.C. § 381(a) (1982). The statute provides:
prohibiting any state from collecting a tax from a corporation if the only business conducted within that state is solicitation of orders for products to be delivered from outside the state. 108

Matthew Bender is a publisher of legal texts with its principal offices outside of Maryland. 109 In 1981 the Comptroller of the Treasury mailed Bender a notice informing the company that it was liable for Maryland income taxes for 1975 through 1980 because Bender had conducted business within the State. 110 Bender paid $74,081 to cover the tax and the assessed interest, 111 and then filed an amended return requesting a full refund. 112 The Comptroller denied this request, and Bender appealed to the Tax Court. 113

The Tax Court reversed the Comptroller’s denial of the refund request, holding that Bender’s activities were not sufficient to trigger Maryland income tax under the State statute. 114 The circuit court, however, reversed the Tax Court’s order, finding that Bender

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

1. the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivered from a point outside the State; and

2. the solicitation of orders by such person or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Id.

108. Section 316, which Congress enacted in response to Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), was intended to relieve the perceived administrative burdens of state taxation. Developments in the Law—Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 974 (1962). In Northwestern States the United States Supreme Court held that due process does not bar a state from taxing a foreign corporation’s net income derived solely from the interstate sale of products. 358 U.S. at 464-65.

109. 67 Md. App. at 696, 509 A.2d at 703.

110. Id. Although Bender solicited orders from customers in Maryland through mail orders and commissioned sales personnel, orders for publications were sent to Bender’s principal offices. Bender received printing services from a Maryland printer, Port City Press, and Bender sent representatives to Maryland to consult with the printer from time to time. Bender also supplied Port City Press with paper for printing. Id. at 697, 509 A.2d at 703-04.

111. Id. at 696, 509 A.2d at 703.

112. Id.

113. Id.

114. Id. at 697, 509 A.2d at 704.
was conducting business within Maryland and was therefore subject to taxation for the years in question.\footnote{115}{Id. at 698, 509 A.2d at 704.}

In determining whether the circuit court erroneously had reversed the Tax Court, the Court of Special Appeals identified and applied the three-pronged analysis for review of a Tax Court decision\footnote{116}{Id. at 705, 509 A.2d at 708. The court refers to the circuit court's review of the Tax Court's judgment as "appellate." \textit{Id.}, 509 A.2d at 707. In a strict sense, however, because the Tax Court is an administrative agency and does not exercise a judicial function, review of its decision is an exercise of original jurisdiction, not appellate review. \textit{Shell Oil Co. v. Supervisor of Assessments}, 276 Md. 36, 47, 343 A.2d 521, 527 (1975).} derived from the Court of Appeals decision in \textit{Ramsay, Scarlett & Co. v. Comptroller of the Treasury}..\footnote{117}{Id., 509 A.2d at 705, 509 A.2d at 708. The court refers to the circuit court's review of the Tax Court's judgment as "appellate." \textit{Id.}, 509 A.2d at 707. In a strict sense, however, because the Tax Court is an administrative agency and does not exercise a judicial function, review of its decision is an exercise of original jurisdiction, not appellate review. \textit{Shell Oil Co. v. Supervisor of Assessments}, 276 Md. 36, 47, 343 A.2d 521, 527 (1975).} First, the court must determine whether the agency recognized and applied the correct principles of law to the case.\footnote{118}{\textit{Id.}, at 705, 509 A.2d at 708. The court refers to the circuit court's review of the Tax Court's judgment as "appellate." \textit{Id.}, 509 A.2d at 707. In a strict sense, however, because the Tax Court is an administrative agency and does not exercise a judicial function, review of its decision is an exercise of original jurisdiction, not appellate review. \textit{Shell Oil Co. v. Supervisor of Assessments}, 276 Md. 36, 47, 343 A.2d 521, 527 (1975).} Second, the agency's factual findings must be supported by substantial evidence.\footnote{119}{\textit{Id.}, at 705, 509 A.2d at 708. The court refers to the circuit court's review of the Tax Court's judgment as "appellate." \textit{Id.}, 509 A.2d at 707. In a strict sense, however, because the Tax Court is an administrative agency and does not exercise a judicial function, review of its decision is an exercise of original jurisdiction, not appellate review. \textit{Shell Oil Co. v. Supervisor of Assessments}, 276 Md. 36, 47, 343 A.2d 521, 527 (1975).} Finally, the reviewing court must assess whether the agency appropriately applied the law to the facts.\footnote{120}{\textit{Id.}, at 705, 509 A.2d at 708. The court refers to the circuit court's review of the Tax Court's judgment as "appellate." \textit{Id.}, 509 A.2d at 707. In a strict sense, however, because the Tax Court is an administrative agency and does not exercise a judicial function, review of its decision is an exercise of original jurisdiction, not appellate review. \textit{Shell Oil Co. v. Supervisor of Assessments}, 276 Md. 36, 47, 343 A.2d 521, 527 (1975).}

The Court of Special Appeals held that the Tax Court did not apply the correct principles of law when it failed to consider Bender's solicitation activities along with its other activities in determining whether Bender owed Maryland taxes.\footnote{121}{\textit{Id.}, at 705, 509 A.2d at 708. The court refers to the circuit court's review of the Tax Court's judgment as "appellate." \textit{Id.}, 509 A.2d at 707. In a strict sense, however, because the Tax Court is an administrative agency and does not exercise a judicial function, review of its decision is an exercise of original jurisdiction, not appellate review. \textit{Shell Oil Co. v. Supervisor of Assessments}, 276 Md. 36, 47, 343 A.2d 521, 527 (1975).} The court found no support for the Tax Court's interpretation of title 15, section 381(a) of the United States Code, inasmuch as nothing in the statute precludes a state from considering solicitation along with other intrastate activities in determining a corporation's tax liability.\footnote{122}{\textit{Id.}, at 705, 509 A.2d at 708. The court refers to the circuit court's review of the Tax Court's judgment as "appellate." \textit{Id.}, 509 A.2d at 707. In a strict sense, however, because the Tax Court is an administrative agency and does not exercise a judicial function, review of its decision is an exercise of original jurisdiction, not appellate review. \textit{Shell Oil Co. v. Supervisor of Assessments}, 276 Md. 36, 47, 343 A.2d 521, 527 (1975).} Thus, the circuit court properly reversed that aspect of the Tax Court's decision.\footnote{123}{\textit{Id.}, at 705, 509 A.2d at 708. The court refers to the circuit court's review of the Tax Court's judgment as "appellate." \textit{Id.}, 509 A.2d at 707. In a strict sense, however, because the Tax Court is an administrative agency and does not exercise a judicial function, review of its decision is an exercise of original jurisdiction, not appellate review. \textit{Shell Oil Co. v. Supervisor of Assessments}, 276 Md. 36, 47, 343 A.2d 521, 527 (1975).}
The circuit court, however, improperly substituted its judgment for that of the Tax Court when it found that Bender indeed was doing business in Maryland. The proper course would have been for the court to remand the case to allow the Tax Court to apply the correct interpretation of section 381 to the facts. Because the determination of whether Bender was "doing business" in Maryland was within the expertise of the Tax Court, the Court of Special Appeals held that neither the circuit court nor itself should decide this issue.

Under article 81, section 229(o), the circuit court must affirm the Tax Court's order if it is not erroneous as a matter of law and if it is supported by substantial evidence appearing in the record. The Court of Appeals consistently has interpreted this statute to mean that the judiciary is under no statutory constraint when it reverses the Tax Court for an erroneous conclusion of law. Because the circuit court found that the Tax Court committed an error of law in failing to consider solicitation along with other activities, Bender does not depart from precedent.

The Court of Special Appeals also determined that the circuit court improperly substituted its judgment for that of the Tax Court in finding that Bender was conducting business within Maryland. Under section 229(o), the circuit court may not reverse the Tax Court if the Tax Court has not committed an error of law and if the Tax Court's decision is supported by substantial evidence. Judicial review of a decision of the Tax Court is limited; it "need not and must not be either judicial fact finding or a substitution of judicial judgment for agency judgment."

Title 15, section 381(a) of the United States Code exempts a corporation from state taxation if the corporation's only business activity within the state is solicitation of orders for the sale of tangible personal property.
ble personal property when the orders are approved and filled outside of the state.134 The statute and its legislative history135 do not distinguish between business activities which are related to solicitation and those which are not; rather, the statute merely states that solicitation alone does not subject a corporation to state tax liability.136 Thus, once it is established that a corporation engages in business activities beyond mere solicitation, a state may examine those activities together with solicitation to determine whether the state may tax the corporation. The Court of Special Appeals therefore correctly directed the circuit court to remand the case to the Tax Court with instructions to consider Bender's solicitation activities along with its other activities in order to determine whether Bender was doing business in Maryland and thus was subject to state tax.

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134. Id.
136. For the text of the statute, see supra note 107.
IX. Torts

A. Negligence

1. Duty.—a. Banks.—The Court of Appeals held in Jacques v. First National Bank of Maryland\(^1\) that once a bank has agreed to process a loan, it owes its customer a duty of reasonable care in the processing and evaluation of the loan application.\(^2\) Declaring that a cause of action in negligence exists when a defendant bank has "failed to exercise that degree of care which a reasonably prudent bank would have exercised under the same or similar circumstances,"\(^3\) the court found a duty which never before had been recognized in Maryland.\(^4\)

On July 30, 1980, Robert and Margaret Jacques entered into a residential sales contract contingent upon their ability to obtain specified financing.\(^5\) The parties modified the contract to require the Jacques to increase their downpayment to "whatever amount necessary to qualify for a mortgage loan."\(^6\) The Jacques submitted an application for a mortgage along with the contract and addendum to the First National Bank of Maryland (the Bank).\(^7\) The Jacques also paid the required $144 fee for the appraisal and credit report necessary to initiate processing of the loan.\(^8\) When the Bank informed the Jacques that they qualified for a loan well below their expectations,\(^9\) the Jacques requested that their application be refused outright; the Bank denied the request under the provisions of

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2. Id. at 544, 515 A.2d at 764.
3. Id.
4. See Jacques v. First Nat'l Bank of Maryland, 62 Md. App. 54, 60, 488 A.2d 210, 212-13 (1985) ("The Jacques have requested that this Court recognize a duty which has never before been recognized in Maryland; a duty which would run in direct conflict with the long established right of a person to refuse to do business with others, for nearly any reason or for no reason at all.").
5. 307 Md. at 528-29, 515 A.2d at 756-57. The contract required the Jacques to secure the purchase price of $142,000 by paying $30,000 down and the balance of $112,000 through a conventional deed of trust, due in 30 years and bearing interest at the rate of 12-1/4% per year. Id.
6. Id. at 529, 515 A.2d at 757.
7. Id.
8. Id.
9. Id. at 530, 515 A.2d at 757. The Bank informed the Jacques that they qualified for a loan of only $41,400. The Jacques then attempted to obtain financing from Metropolitan Federal Savings and Loan, which issued a commitment for a 30-year loan in the amount of $100,000 at 13-7/8% interest. Id.
the contract.10 The Jacques proceeded to settlement with the
Bank's mortgage loan, obtaining the balance of the money from
relatives and a short-term personal loan of $50,000 from the Bank.11

The Jacques sued the Bank in the Circuit Court for Montgom-
ery County and went to trial before a jury on counts of malicious
interference with contract, gross negligence, and negligence.12 The
jury returned a verdict in favor of the Bank on the first two counts
and in favor of the Jacques on the negligence count.13 The Jacques
appealed on the ground that the judge erred in instructing the jury
concerning the plaintiffs' duty to mitigate damages; the Bank cross-
appealed, asserting that it owed no duty in processing a loan
application.14

The Court of Special Appeals held that, prior to the parties en-
tering into a contractual relation, the Bank did not owe the Jacques
a duty of care in processing the loan application.15 Because the in-
termediate appellate court did not address the Jacques' argument
concerning the duty to mitigate damages, the Court of Appeals con-
sidered only the duty of care issue. Concluding that the Bank owed
a duty of care, the Court of Appeals reversed the lower court and
remanded for proceedings on the Jacques' contentions.16

The Court of Appeals reasoned that the Bank and the Jacques
had a contractual relationship which included an implied promise to
use reasonable care.17 The issue was whether a breach of this im-
plied promise gave rise to a cause of action in negligence.18

The court found that the mere negligent breach of a contractual
duty, standing alone, will not sustain an action in tort.19 There are

10. Id. On appeal, the court considered whether the Bank owed a duty of care to
accede to the applicants' request in order to avoid economic loss. The court found that
the Bank correctly refused the request as it was obligated under the contract to offer a
commitment in the amount for which it deemed the applicants to be qualified. Id. at
541, 515 A.2d at 763.
11. Id. at 530, 515 A.2d at 757.
12. Id. at 527, 530-31, 515 A.2d at 756-58. The Jacques' complaint was in five
counts: malicious interference with contract, breach of fidelity, negligence, gross negli-
gence, and prima facie tort. The trial court directed a verdict against the Jacques on the
breach of fidelity count. The Jacques entered a voluntary dismissal on the prima facie
tort count. 62 Md. App. at 58, 488 A.2d at 212.
13. 307 Md. at 531, 515 A.2d at 758.
14. Id.
16. 307 Md. at 545, 515 A.2d at 765.
17. Id. at 540, 515 A.2d at 762.
18. Id. at 554-55, 515 A.2d at 759-60.
19. Id. at 534, 515 A.2d at 759. See Heckrotte v. Riddle, 224 Md. 591, 595, 168 A.2d
879, 882 (1961) ("The mere negligent breach of a contract, absent a duty or obligation
two considerations in finding a tort duty: "the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties." Because the foreseeable harm here involved only economic loss, the court required an "intimate nexus" between the parties, which may be satisfied by contractual privity or its equivalent, as a condition to the imposition of tort liability.

The court took care not to overturn the common-law rule that "ordinarily a proprietor may refuse to do business with a person for any reason except race, color, creed, or national origin." Here, however, the Bank did not refuse, but instead undertook to process the Jacques' mortgage application. The court focused on the relationship between the parties in determining whether it should recognize a concomitant tort duty under these circumstances. More precisely, the court set out to determine whether its "intimate nexus" requirement had been satisfied.

The court reasoned that the extraordinary financing provisions in the real estate contract put the Bank on notice of the Jacques' vulnerability due to their legal obligation to proceed to settlement with whatever loan the Bank offered them. The court also considered the nature of the banking industry, noting that "[t]he law generally recognizes a tort duty of due care arising from contractual dealings with professionals such as physicians, attorneys, architects, imposed by law independent of that arising out of the contract itself, is not enough to maintain an action sounding in tort.

20. 307 Md. at 534, 515 A.2d at 759.
21. Id. at 535, 515 A.2d at 760. The court relied on two early, leading economic loss decisions that considered claims of the existence of tort duties. In Glanzer v. Shepard, 233 N.Y. 236, 238-39, 135 N.E. 275, 275-76 (1922), the Court of Appeals of New York held that a public weigher of beans was liable to the buyer for negligent weighing. In Ultramares Corp. v. Touche, 255 N.Y. 170, 188, 174 N.E. 441, 448 (1931), the same court found that a public accountant was liable in tort, but only to the client, for negligent preparation of a balance sheet.
22. 307 Md. at 534-35, 515 A.2d at 759-60. The court found it significant that in both Glanzer and Ultramares the New York court had no difficulty in finding that the actors under each contract owed a duty of care to the parties with whom they had contractual privity or its legal equivalent. Id. at 536, 515 A.2d at 760-61. "By contrast, where the risk created is personal injury, no such relationship need be shown." Id. at 535, 515 A.2d at 760. See MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (manufacturer held liable for consumer's injuries resulting from defective automobile).
23. 307 Md. at 539, 515 A.2d at 762. The court recently reaffirmed this rule in Silvert v. Ramsey, 301 Md. 96, 100-01, 482 A.2d 147, 149-50 (1984) (finding that racetrack owner had right to eject track patron previously convicted of violating lottery laws).
24. 307 Md. at 540, 515 A.2d at 762. 
25. Id. at 540-41, 515 A.2d at 762-63.
and public accountants." In addition, the court looked to its holding in *St. Paul at Chase Corp. v. Manufacturers Life Insurance*, which declared that in occupations requiring special skill, those who represent that they possess the particular skill will be obliged to act with reasonable care.

The court focused on decisions which have relied heavily on the nature of the industry in deciding whether to impose tort liability absent a contractual relationship. In *Djowharzadeh v. City National Bank & Trust Co.*, the Court of Appeals of Oklahoma found that a bank owed a duty to maintain the confidentiality of information provided by a loan applicant, stressing the close relationship between the banking industry and public interest. Similarly, the Supreme Court of Iowa held in *Duffie v. Bankers' Life Association of Des Moines* that an insurance company has a duty to act promptly regarding all applications submitted. The Iowa court emphasized that the insurance industry was affected with a public interest; moreover, an insurance company required a state franchise in order to do business.

The court considered the public nature of the business in *Jacques*, but carefully pointed out that it was not assigning this part of the test as much weight as did the Iowa and Oklahoma courts. Because the court found that a contractual relation existed, it was not necessary to determine the Bank's liability absent a contract.

26. *Id.* at 541, 515 A.2d at 763.
27. 262 Md. 192, 278 A.2d 12, *cert. denied*, 404 U.S. 857 (1971) (finding that mortgage broker had duty to act with reasonable care).
28. *Id.* at 219, 278 A.2d at 26 (adopting trial court's conclusions of law).
30. *Id.* at 619. The court stated:

> Banks exist and operate almost solely by using public funds and are invested with enormous public trust. Their financial power within the community amounts to virtual financial monopoly in the field of lending. The legislature has carefully defined their corporate charge within finite limits in direct proportion to their power.

*Id.*

31. 160 Iowa 19, 139 N.W. 1087 (1919).
32. *Id.* at 25, 139 N.W. at 1089.
33. 307 Md. at 542, 515 A.2d at 763.
34. *Id.* at 539, 515 A.2d at 762. The court distinguished the case at bar from situations in which a prospective customer simply submits an application for a loan. *Id.* When a bank or insurance company has not undertaken to process an application, courts generally have found no duty. See, *e.g.*, *Patten v. Continental Casualty Co.*, 162 Ohio St. 18, 24, 120 N.E.2d 441, 444-45 (1954) (no duty to act on insurance policy within a reasonable time absent a contract); *Zayc v. John Hancock Mut. Life Ins. Co.*, 338 Pa. 426, 429, 13 A.2d 34, 36 (1940) (delay in acceptance of contract not actionable unless a contract can be found).
The possibility exists that in the future Maryland courts will face the question of imposing tort liability on a bank absent a contract when the only foreseeable damages are monetary. In light of the court's reluctance to abrogate the common-law rule that a party may refuse to do business with another party for any reason, it seems unlikely that absent an agreement supported by valuable consideration, banks and other similarly situated institutions will have a duty of reasonable care imposed upon them.

The opinion in Jacques suggests that the court may be willing to extend tort actions for economic loss absent the requirement of privity when the relationship between the parties satisfies the alternative "intimate nexus" requirement. In light of the factors considered by the court in Jacques in determining whether there was an "intimate nexus" between the parties, it is possible that the court will extend liability to other professionals who conceivably could stand in a similar relationship to their clients.

b. Builders, Developers, and Architects.—In Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co. the Court of Appeals extended tort liability to builders, developers, and architects for the risk of personal injury to parties who enjoy no contractual privity with them. The court held that privity is not an absolute prerequisite to the existence of a tort duty in this type of case, and that the duty of builders and architects to use due care in the design, inspection, and construction of a building extends to those persons foreseeably subjected to the risk of personal injury because of a latent and unreasonably dangerous condition resulting from that negligence.

The court also stated that when a hazardous defect is discovered before injury results, a negligence action will lie for the recovery of the reasonable cost of correcting the defect.

The council of unit owners of Atlantis Condominiums and three individual unit owners brought suit against the general contractor, developer, and architects responsible for the build-

35. 308 Md. 18, 517 A.2d 336 (1986).
36. Id. at 22, 517 A.2d at 338.
37. Id.
38. Id.
39. The Atlantis Condominium is a 21-story building in Ocean City, Maryland, consisting of 198 individual units. Id.
40. The unit owners alleged that the general contractor, Whiting-Turner Contracting Company, negligently constructed the building. Id. at 23, 517 A.2d at 339.
ing's construction. The unit owners alleged that the defendants' negligent construction and installation of ten vertical utility shafts and the related electrical work resulted in latent defects which could have resulted in a fire threatening the safety of the owners and their property.\textsuperscript{43} The lower court sustained the defendants' demurrers and concluded that "Maryland law would not recognize a tort duty in the absence of privity under these circumstances, and that in any event a duty would not be recognized where only economic loss was claimed."\textsuperscript{44}

The Court of Appeals advanced the general premise that the decision to impose a duty should not rest on the "fortuitous circumstances of the nature of the resultant damage,"\textsuperscript{45} but instead on the magnitude of the risk created by the negligent conduct of the builders and architects.\textsuperscript{46} The court then examined a developer's potential liability for hazardous conditions in each of three roles: owner and occupier of the land, creator of the improvement, and vendor of the dwelling units.\textsuperscript{47}

As owner of the property, a developer has a nondelegable duty to those persons who may come upon the property; however, the scope of the duty depends on the status of the individual entering the land.\textsuperscript{48} When the developer, as owner, sells the property, the developer generally is liable only if the hazardous defect existed at the time of the sale and the developer "knew or had reason to know of the condition and of the risk involved, and failed to disclose that information to the vendee."\textsuperscript{49} After the sale of the property the landowner's liability extends only to actual personal injury. The

\textsuperscript{41} The unit owners alleged that the developer, Colonial Mortgage Service Company, negligently or knowingly permitted the defective construction, which deviated from building plans and the building code. They also claimed Colonial negligently obtained an occupancy permit and negligently misrepresented, through advertising and the sale of the units, the "building's suitability for occupancy." \textit{Id.}

\textsuperscript{42} The unit owners sued the design and supervising architects, Meyers & D'Aleo, Inc., for negligently inspecting, supervising, and accepting the work. Alexander Ewing and the partnership of Ewing Cole Erdman Rizzio Cherry Parsky, the architects employed to inspect and certify the building, were sued for negligent inspection and misrepresentation of the building's habitability. \textit{Id.}

\textsuperscript{43} \textit{Id.} at 22, 517 A.2d at 338.
\textsuperscript{44} \textit{Id.} at 24, 517 A.2d at 339.
\textsuperscript{45} \textit{Id.} at 35, 517 A.2d at 345.

\textsuperscript{46} "[C]onditions that present a risk to general health, welfare, or comfort but fall short of presenting a clear danger of death or personal injury will not suffice." \textit{Id.} at 35 n.5, 517 A.2d at 345 n.5.

\textsuperscript{47} \textit{Id.} at 37, 517 A.2d at 346.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
unit owners did not allege that the developer’s negligence had in fact resulted in personal injury.\textsuperscript{50}

As a vendor of residential property, a developer had no liability at common law because implied warranties for the sale of improved real property did not exist. The rule of \textit{caveat emptor} reigned supreme.\textsuperscript{51} The legislature has passed laws imposing implied warranties\textsuperscript{52} in these cases, but the unit owners did not allege a breach of this warranty.\textsuperscript{53}

Finally, when, as in the instant case, the developer is the creator of the building project and there is a violation of a building code provision which has caused or could cause death or personal injury, a nondelegable duty is imposed on the developer.\textsuperscript{54} A developer who is liable only by reason of vicarious liability resulting from this nondelegable duty has a right to indemnity from the negligent party. Thus, as creator of the building project, the developer in this case was liable for the hazardous risk created by architects’ and builders’ negligent construction in violation of a safety provision of the building code.\textsuperscript{55}

Originally, tort liability of builders and architects did not extend to third parties with whom there was no contractual privity.\textsuperscript{56} Gradually the law recognized exceptions to this general rule.\textsuperscript{57} Nevertheless, courts have been reluctant to extend these exceptions as

\textsuperscript{50} Id. at 38, 517 A.2d at 346.
\textsuperscript{51} Id.
\textsuperscript{52} The legislature did not take the initial step away from the rule of \textit{caveat emptor} in this area of tort law until 1970. See Md. REAL PROP. CODE ANN. § 10-203(a) (1988) (warranties in contracts for sale of land). The legislature passed additional legislation to provide implied warranties for the sale by a developer of newly constructed or converted condominium units. See id. § 11-131.
\textsuperscript{53} 308 Md. at 38, 517 A.2d at 347.
\textsuperscript{54} Id. at 39, 517 A.2d at 347. The court suggested that if the question of nondelegable duty had been based on a broader claim, it would have found liability based on "unreasonably dangerous conditions created as a result of development." Id.
\textsuperscript{55} Id. at 40-41, 517 A.2d at 348.
\textsuperscript{56} Id. at 24, 517 A.2d at 339.
\textsuperscript{57} These exceptions include instances in which: (1) the builder fraudulently or deliberately obscured defects in the construction, see Bryson v. Hines, 268 F. 290, 294 (4th Cir. 1920) (delivery to government of negligently constructed railroad track); Pennsylvania Steel Co. v. Elmore & Hamilton Contracting Co., 175 F. 176, 177 (C.C.S.D.N.Y. 1909) (fraudulent concealment of defects in bridge concrete); (2) the construction created a defect that was imminently or inherently dangerous, see Johnston v. Long, 56 Cal. App. 2d 834, 133 P.2d 409, 410 (1943) (negligent maintenance of door); Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 577, 14 N.E.2d 339, 341 (1938) (negligent installation of furnace); and (3) the construction created a nuisance per se, see Littell v. Argus Prod. Co., 78 F.2d 955, 957 (10th Cir. 1935) (construction of oil derrick). 308 Md. at 25, 517 A.2d at 340.
far as in the area of products liability,\textsuperscript{58} where a manufacturer’s duty of care has been extended “just about as far as the prudent eye can foresee unreasonable harm.”\textsuperscript{59} In the case of a builder, there has been no tort liability for injuries which occurred after the owner accepted the building or other subject of the contract.\textsuperscript{60}

The general rule which has evolved declares:

[T]he contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done. This applies not only to contractors doing original work, but also to those who make repairs, or install parts, as well as supervising architects and engineers. There may be liability for negligent design, as well as for negligent construction.\textsuperscript{61}

This rule extends the duty of builders and architects to a third person even in instances in which the owner has accepted the work.\textsuperscript{62} Several courts across the Nation already have recognized this rule as law.\textsuperscript{63}

While traditionally Maryland has not embraced this general

\textsuperscript{58} Exceptions to nonliability in the area of products liability extend to negligence for failure to: (1) inspect or test the materials, see Trowbridge v. Abrasive Co., 190 F.2d 825, 828 (3d Cir. 1951) (inspection of grinding wheels); Pierce v. Ford Motor Co., 190 F.2d 910, 912 (4th Cir.), \textit{cert. denied}, 342 U.S. 887 (1951) (inspection of new automobile parts); (2) inspect or test the finished product, see Kriss v. Kelsey Hayes Co., 29 A.D.2d 901, 287 N.Y.S.2d 926, 927 (1968) (inspection of pliers); (3) discover any defects or dangerous elements, see Walton v. Sherwin Williams Co., 191 F.2d 277, 282 (8th Cir. 1951) (ingredient in weed killer); (4) make accurate representations in advertising and sales, see Hoskins v. Jackson Grain Co., 63 So. 2d 514, 515 (Fla. 1953) (labeling of seed packets); and (5) disclose known defects and dangers, see Schubert v. J.R.-Clark Co., 49 Minn. 331, 339, 51 N.W. 1103, 1105 (1892) (defects in ladder). \textit{See generally W. PROSSER, D. DOBBS, R. KEETON \\& D. OWEN, PROSSER \\& KEETON ON THE LAW OF TORTS} § 96, at 684 (5th ed. 1984) [hereinafter PROSSER \\& KEETON].

\textsuperscript{59} 308 Md. at 26, 517 A.2d at 340. In products liability cases the beginning of this trend away from nonliability started in MacPherson v. Buick Motor Co., 214 N.Y. 382, 111 N.E. 1050 (1916).

\textsuperscript{60} 308 Md. at 26, 517 A.2d at 340.

\textsuperscript{61} PROSSER \\& KEETON, supra note 58, § 104(A), at 723.

\textsuperscript{62} 308 Md. at 28, 517 A.2d at 341.

rule, an examination of pertinent case law reveals the development of the law in this direction. For example, in Marlboro Shirt Co. v. American District Telegraph Co. the Court of Appeals held that a contractor who failed to fulfill a contract owed no duty to the general public for negligent actions resulting in property damage.

The court in Otis Elevator Co. v. Embert assumed "the existence of tort duty on the part of the elevator maintenance contractor in favor of a user of the elevator, notwithstanding the absence of privity." The court denied recovery to the injured elevator user not because of the absence of privity but because it could find no duty of the elevator company which could be related to the accident.

Finally, in Krieger v. J.E. Greiner Co. and Coffey v. Derby Steel Co. the court reaffirmed its holding in Otis. The court based its decisions not upon whether a duty was owed to third parties, but upon whether there existed any duty related to the suffered injury.

The court in Council of Co-Owners followed this general trend by extending tort liability of contractors, architects, and developers to third parties for negligent construction despite the lack of privity. The changes in this area of tort law parallel those in the area of products liability, in which the requirement of privity for recovery in tort actions has been all but abolished. One easily can predict an increased broadening of liability in the construction area.

Oftentimes construction defects are discovered well after the owner has accepted the building. If the contractor, architect, and developer cause a defect through negligent construction, they should be held liable for any damages caused, especially if personal

64. 196 Md. 565, 77 A.2d 776 (1951).
65. Id. at 571-72, 77 A.2d at 778.
66. 198 Md. 585, 84 A.2d 876 (1951).
67. 308 Md. at 30, 517 A.2d at 342. See Embert, 198 Md. at 599, 84 A.2d, at 882 ("[W]e shall assume that MacPherson v. Buick Motor Company and the cases which antici- pated or followed it are law in Maryland.").
68. Embert, 198 Md. at 602, 84 A.2d at 883.
69. 282 Md. 50, 382 A.2d-1069 (1978) (finding that consulting and design contracts imposed no duty to supervise safety).
70. 291 Md. 241, 434 A.2d 564 (1981) (finding plaintiff’s fall unrelated to defendant’s duty to inspect steel beam).
71. Krieger, 282 Md. at 69, 382 A.2d at 1079; Coffey, 291 Md. at 259, 434 A.2d at 574. See 308 Md. at 30, 517 A.2d at 343.
injury is involved. It is an easy step from allowing recovery after the injury has occurred to recovering in tort law after the defect is discovered but before the injury has occurred. A latent defect with the potential to cause serious physical harm is just as undesirable as one that already has done so.\textsuperscript{73}

The court has taken its first step to allow recovery for negligent construction which has the potential for injury, even though the holding extends only to the risk of personal injury and not to economic injury.\textsuperscript{74} Contractors, architects, and developers are expected to deliver hazard-free buildings, and they should be responsible for any negligent actions which prevent their finished product from being safe.

c. Property Owners.—In Flowers v. Rock Creek Terrace Limited Partnership\textsuperscript{75} the Court of Appeals refused to abolish the firefighter’s rule\textsuperscript{76} and thereby extend tort law to encompass negligence suits by firefighters\textsuperscript{77} injured during the course of their dangerous employment.\textsuperscript{78} The court held that the owner or occupant of the property has no duty to keep the property prepared and safe for firefighters; nevertheless, the owner or occupant must abstain from willful or wanton misconduct or entrapment and warn of hidden dangers.\textsuperscript{79} The court based its holding not on the traditional premises liability rationale that firefighters are mere licensees,\textsuperscript{80} but on the newer the-

\begin{itemize}
\item \textsuperscript{73} The court in Council of Co-Owners stated that “it is not necessary . . . to wait until bodily harm occurs, and an action will lie to recover the cost of repairing a condition created by such a breach of duty where there is shown to exist an actual risk of death or bodily injury.” 308 Md. at 40-41, 517 A.2d at 348.
\item \textsuperscript{74} In products liability cases recovery often is denied whether privity is present or not if the injury is a purely economic one. \textit{Id.} at 33, 517-A.2d at 344. Nevertheless, some courts refuse to distinguish between the risk of physical injury and the risk of economic loss. \textit{Id.} at 34, 517-A.2d at 345. \textit{See} Barnes v. Mac Brown & Co., 264 Ind. 227, 230, 342 N.E.2d 619, 621 (1976) (sale of real estate). Perhaps the court’s next step will be to extend recovery to include the risk of economic harm.
\item \textsuperscript{75} 308 Md. 432, 520 A.2d 361 (1987).
\item \textsuperscript{76} The firefighter’s rule limits a firefighter’s ability to recover in tort for injuries arising out of the course of employment, because of the inherently hazardous nature of that occupation. \textit{Id.} at 447, 520 A.2d at 368.
\item \textsuperscript{77} The firefighter’s rule also applies to police officers. \textit{Id.} at 442 n.4, 520 A.2d at 366 n.4.
\item \textsuperscript{78} \textit{Id.} at 447-48, 520 A.2d at 368.
\item \textsuperscript{79} \textit{Id.} at 443, 520 A.2d at 366.
\item \textsuperscript{80} \textit{Id.} at 444, 520 A.2d at 367. The classification of firefighters as licensees, not invitees, is significant: An invitee is in general a person invited or permitted to enter or remain on another’s property for purposes connected with or related to the owner’s business; the owner must use reasonable and ordinary care to keep his premises safe for the invitee and to protect him from injury caused by an unreasonable
ory of public policy.81

David Flowers, a firefighter with the Kensington Volunteer Fire Department, responded, along with other members of the department, to a fire alarm at the Rock Creek Terrace Apartments. The twelfth floor lobby became so smoke-filled that it was impossible to see. While evacuating tenants from the twelfth floor, Flowers fell down an open elevator shaft and sustained severe and permanent injuries.82 Flowers sued Rock Creek Terrace Limited Partnership, the apartment owners; Sting Security, Inc., the supplier of the building's security services; Larry Cline, a Sting Security employee; and Westinghouse Electric Corporation, the elevator manufacturer.83

The court held that because Flowers was a firefighter injured on the job, the firefighter's rule prevented him from bringing suit under tort law. The defendants had no duty to keep the premises safe for firefighters, but merely a duty to warn of any hidden dangers.84 The court found it inappropriate to base its holding on the traditional premises liability rationale in a case in which three of the four defendants were not owners of the property.85 Rather, the court focused on public policy: "[I]t is the nature of the firefighting occupation that limits a fireman's ability to recover in tort for work-related injuries."86

The firefighter's rule has a long history in tort law in Maryland

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81. 308 Md. at 447, 520 A.2d at 368.
82. Id. at 436-37, 520 A.2d at 363.
83. Id. at 437, 520 A.2d at 363. Flowers alleged as the basis of his suit four factual foundations for liability:
that Rock Creek and Sting Security knew of prior suspicious fires and failed to take any measures to prevent future fires, that Rock Creek failed to adopt reasonable safety precautions, including the installation of smoke detectors and sprinklers, that Rock Creek and Westinghouse installed an elevator system which was not sufficiently fire proof, and that Rock Creek, Sting Security and Westinghouse failed to warn Flowers of the open elevator shaft.

Id.

84. Id. at 443, 520 A.2d at 366. The court declared that "an open elevator shaft concealed by the smoke of the fire is not a hidden danger in the sense of an unreasonable danger that a fireman could not anticipate upon attempting to perform his firefighting duties." Id. at 452, 520 A.2d at 370-71.
85. Id. at 443, 520 A.2d at 366.
86. Id. at 447, 520 A.2d at 368.
and across the country. Earlier cases barred firefighters from recovering in tort for injuries received in the course of employment because of their status on the premises as licensees. Later cases, though still based on the premises liability theory, recognized the inherent dangerousness of a firefighter's job. A firefighter is exposed to the risk of fire-related injuries often attributable to a property owner's negligence. The general rule, as developed, was that property owners ordinarily did not owe a duty of reasonable care to firefighters.87

Maryland first considered the duty owed to a firefighter in Steinwedel v. Hilbert.88 The Court of Appeals held that "a fireman entering premises to put out fire is a licensee only, and not an invitee, and that the owner or occupant of the premises is not under any duty of care to keep his premises prepared and safe for a fireman."89 Forty years later in Aravanis v. Eisenberg90 the Court of Appeals based its decision on the premises liability theory, but for the first time recognized the implications which arise because of a firefighter's public function.91 The court denied an injured firefighter recovery in a tort action, although the court intimated that the merits of Aravanis' position depended on "whether the initial occupational hazard of the fire being no longer involved, the fireman retains his status as a licensee only, or whether he is entitled to the greater care due an invitee."92

The court explored this concept of changing status more closely in Sherman v. Suburban Trust Co.93 Sherman, a police officer, responded to a call from a bank concerning a forged check. While in a small teller's cage, Sherman bent over to pick up the dropped forged check and hit his back on a coin changing machine.94 The court held that the change in status from licensee to invitee as stated

87. Id. at 439, 520 A.2d at 364.
88. 149 Md. 121, 131 A. 44 (1925).
89. Id. at 123-24, 131 A. at 45. Steinwedel, an employee of the Fire Insurance Salvage Corps of Baltimore, entered the defendant's leased premises to fight a fire and was injured falling down an open and unguarded elevator shaft. Id. at 122, 131 A. at 45.
91. The court in Aravanis stated:
[I]f the fireman is injured by the flames or gases of the conflagration, apart from unusual factors operative after the fire has begun, he cannot recover. Fighting the fire, however caused, is his occupation. Compensation for injuries sustained in the fulfilment of his duties, absent other circumstances, is the obligation of society. Id. at 251, 206 A.2d at 153 (footnote omitted).
92. Id. at 254, 206 A.2d at 155.
94. Id. at 239-40, 384 A.2d at 78.
in Aravanis was not relevant because Sherman was injured during, not after, the period of risk anticipated in responding to the bank’s call.\textsuperscript{95} Sherman therefore was unable to recover under tort law based on his status as a licensee.

The court in Flowers, following the lead of several other states,\textsuperscript{96} thus has redefined the basis for the firefighter’s rule without changing its overall effect. The necessity of limiting police officers’ and firefighters’ recovery for job-related injuries under tort law remains paramount.\textsuperscript{97} Without the firefighter’s rule, the courts would be crowded with tort cases involving police officers and firefighters because of the potential for liability arising from the nature of their jobs.

The court also has placed the rule on a much firmer base. The old premises liability theory did not fully encompass all conceivable cases involving injury to police officers and firefighters, since it could be invoked only by property owners or occupants who faced liability due to their negligence. Had the court not redefined the basis of the firefighter’s rule, both Westinghouse and Sting Security could have been liable for Flowers’ injury because they did not enjoy the status of property owners. This would open the door to numerous other tort actions.

A rule based on public policy considerations covers all possible circumstances because it focuses on the relationship between the public and the firefighter or police officer. A person who accepts a job as a police officer or firefighter promises to protect the public and must accept the risks inherent in the vocation, including the risk of injury caused by the negligence of a citizen whom the public ser-

\textsuperscript{95} Id. at 246, 384 A.2d at 81.

\textsuperscript{96} See, e.g., Pottebaum v. Hinds, 347 N.W.2d 642, 645 (Iowa 1984) ("[B]asing the fireman’s rule on the status of the injured party would seem to unfairly limit the rule’s application to the landowner/occupant context . . . ."); Calvert v. Garvey Elevators, Inc., 236 Kan. 570, 577, 694 P.2d 433, 439 (1985) ("The Fireman’s Rule in Kansas is not to be based upon ‘premises law,’ or categorizing fire fighters as mere licensees when performing their duties, but upon public policy."); Armstrong v. Mailand, 284 N.W.2d 343, 350 (Minn. 1979) ("[W]e conclude that firemen are not classified as licensees, invitees, or sui generis.").

\textsuperscript{97} Police officers and firefighters can recover under tort law in some instances: Negligent acts not protected by the fireman’s rule may include failure to warn the firemen of pre-existing hidden dangers where there was knowledge of the danger and an opportunity to warn. They also may include acts which occur subsequent to the safety officer’s arrival on the scene and which are outside of his anticipated occupational hazards . . . . Moreover, the fireman’s rule does not apply to suits against arsonists or those engaging in similar misconduct. 308 Md. at 448-49, 520 A.2d at 369 (footnotes and citations omitted).
vant has sworn to protect.  

2. Tortfeasor Releases.—In Morgan v. Cohen the Court of Appeals overruled precedent set in Lanasa v. Beggs by holding that in the case of concurrent or subsequent tortfeasors, a release of one does not release the other unless done so in unambiguous terms. If the release is ambiguous, the court must look to the intent of the parties to determine the nature and extent of the release.

This case consolidated two separate appeals from judgments in favor of Dr. Edward Cohen. Dr. Cohen, an orthopedic surgeon, treated Darlyn Morgan for a broken leg resulting from a motorcycle accident. After an unsuccessful second operation by Dr. Cohen, Morgan settled her claim against the driver of the motorcycle and executed a release. Ten months later, another physician performed a third operation which healed Morgan’s injury, although her left leg remained two inches shorter than the right. Morgan alleged that the permanent deformity was caused by Dr. Cohen’s negligent treatment.

Dr. Cohen also treated Wendy Hovermill for a dislocation of her pelvis resulting from an automobile accident. The doctor allegedly discontinued traction too soon, thus causing an immediate redislocation of the pelvis and permanent injuries to Hovermill. Hovermill settled the suit against the original tortfeasor and exe-
1988] Torts 1017
cuted a release.¹⁰⁶

Both Morgan and Hovermill sued Dr. Cohen for his negligent
treatment of their injuries, but Dr. Cohen was granted summary
judgment in both suits.¹⁰⁷ The Circuit Court for Baltimore City
based its decision in Morgan's case solely on the release. In
Hovermill's case, the Circuit Court for Baltimore County "charac-
terized the alleged negligent treatment as an aggravation of a single
bodily injury and held that that single injury had been both satisfied
and released."¹⁰⁸ Morgan and Hovermill requested that the court
apply article 79, section 13¹⁰⁹ retroactively and adopt the "modern
rule"¹¹⁰ pertaining to releases of this nature.¹¹¹ They contended
that the injuries inflicted by Dr. Cohen were separate from those
received in the motor vehicle accidents and that because the re-
leases were ambiguous, parol evidence should be admissible to
prove intent.¹¹²

The court first examined the Maryland version of the Uniform

¹⁰⁶ Id. Because Hovermill was a minor, her mother actually executed the release on
her behalf. The document stated in relevant part that Hovermill released "Jones . . . and
all other persons . . . from any and all claims (and) damages . . . of whatsoever kind or
nature, and particularly on account of . . . bodily injuries, known and unknown and
which have resulted or may in the future develop, sustained by [Hovermill] in conse-
quence of [the] accident." Id.
¹⁰⁷ Id. at 309, 523 A.2d at 1005.
¹⁰⁸ Id. at 308-09, 523 A.2d at 1005.
¹⁰⁹ Id. at 309, 523 A.2d at 1005. This statute, which took effect July 1, 1986,
provides:

A release executed by a person who has sustained personal injuries does
not discharge a subsequent tort-feasor who is not a party to the release and:
(1) Whose responsibility for the injured person's injuries is unknown at the
time of execution of the release; or
(2) Who is not specifically identified in the release.

MD. ANN. CODE art. 79, § 13 (Supp. 1987). Because Morgan's and Hovermill's accidents
occurred in 1980 and 1979, respectively, the statute did not apply to their causes of
action. 308 Md. at 307-08, 523 A.2d at 1004-05. The statute abrogated Maryland's com-
mon-law rule concerning releases of joint tortfeasors. In effect, Morgan and Hovermill
were asking the court to do the same by judicial fiat regarding all causes of action which
arose before July 1, 1986, and for which the statute of limitations had not yet run.

¹¹⁰ The "modern rule" which many courts have adopted states that the physician is
not released, as a matter of law, by release of the original tortfeasor unless the release
contains clear language to that effect. 309 Md. at 309 n.3, 523 A.2d at 1005 n.3. See also
& School of Nursing, 212 Kan. 35, 41-42, 510 P.2d 145, 151 (1973) (same); Annotation,
Release of One Responsible for Injury as Affecting Liability of Physician or Surgeon for Negligent

¹¹¹ 309 Md. at 309, 523 A.2d at 1005.
¹¹² Id. at 310, 523 A.2d at 1005.
Contribution Among Tort-feasors Act\textsuperscript{113} which provides that "recovery of a judgment by the injured person against one joint tort-feasor does not discharge the other joint tort-feasor."\textsuperscript{114} The court declared that this statute, which in effect changed the \textit{Lanasa} rule, applied "at least when the tortious conduct is concerted or the torts are concurrent."\textsuperscript{115} It refused, however, to hold that the statute extended to successive tortfeasors,\textsuperscript{116} though the court noted that "the Act abrogated the common law rule that the release of one joint tortfeasor releases all."\textsuperscript{117} The court found that if the Act applied to these cases, Dr. Cohen would not be discharged from liability unless a contrary intent were determined from the release. It then held that it would reach the same result even if the Act did not apply, thereby overruling \textit{Lanasa}.\textsuperscript{118} The court declared:

The parties to a release, absent legislative restriction, ordinarily are free to expand or contract the scope of the instrument in accordance with their agreement. They should not have to fear that a court will later rule that a release of the original tortfeasor also released the physician by operation of law.\textsuperscript{119} The court then turned to the terms of the actual releases to determine from their intent whether or not they in fact discharged Dr. Cohen from liability.\textsuperscript{120} The court found that the injuries which Dr. Cohen inflicted on Morgan and Hovermill were not caused by the accidents.\textsuperscript{121} This made them "separate and additional harms for which . . . he could be held independently liable, assuming proper proof."\textsuperscript{122} The court determined that the releases, though couched in broad and unam-

\begin{itemize}
\item \textsuperscript{113} MD. ANN. CODE art. 50, §§ 16-24 (1986).
\item \textsuperscript{114} Id. § 18.
\item \textsuperscript{115} 309 Md. at 315, 523 A.2d at 1008.
\item \textsuperscript{116} Id. The court in Trieschman v. Eaton, 224 Md. 111, 115, 166 A.2d 892, 894 (1961), stated that the Act's definition of joint tortfeasors "literally embraces successive wrongdoers liable for the same harm even though one may be also liable to the injured person for additional damages."
\item \textsuperscript{117} 309 Md. at 315-16, 523 A.2d at 1008 (footnote omitted).
\item \textsuperscript{118} Id. at 316, 523 A.2d at 1008-09.
\item \textsuperscript{119} Id., 523 A.2d at 1009.
\item \textsuperscript{120} Id. at 317, 523 A.2d at 1009.
\item \textsuperscript{121} Id. at 318, 523 A.2d at 1009. The court acknowledged that the original tortfeasors also could have been liable for the injuries suffered after the accidents. Dr. Cohen's alleged negligence came after the accidents; "but for" the accidents Dr. Cohen would not have treated Morgan and Hovermill. Id.
\item \textsuperscript{122} Id., 523 A.2d at 1009-10.
\end{itemize}
biguous terms as to the original tortfeasors, were ambiguous as to the subsequent torts; therefore, parol evidence was admissible to show the parties' intent.\textsuperscript{123} The court then remanded the cases for further proceedings.\textsuperscript{124}

Judge Rodowsky dissented, stating that Morgan and Hovermill had discharged their claims against Dr. Cohen when they executed the releases.\textsuperscript{125} "It remains a matter of law that the wrong of the original tortfeasor is a proximate cause of the aggravation of the bodily harm also caused by the treating physician,"\textsuperscript{126} therefore, a release of the original tortfeasor is a release of the subsequent tortfeasor. Rodowsky stressed that allowing parol evidence to prove the intent of the releases would adversely affect Maryland contract law.\textsuperscript{127}

American tort law in this area is clear concerning certain well-defined principles. A negligent party is liable for the harm he or she causes directly as well as any additional harm caused by a third party who attempts to help the victim, even if the third party acts negligently.\textsuperscript{128} A physician who negligently treats the victim is liable only for his or her own actions.\textsuperscript{129} The courts consider this negligent treatment a subsequent tort for which the original negligent party is jointly liable.\textsuperscript{130} Nevertheless, much confusion exists throughout the country regarding the difference between jointly liable concurrent or successive tortfeasors and joint tortfeasors as they existed at common law,\textsuperscript{131} and between releases and satisfaction.\textsuperscript{132} The Maryland

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\textsuperscript{123} \textit{Id.}, 523 A.2d at 1010.
\textsuperscript{124} \textit{Id.} at 320, 523 A.2d at 1010.
\textsuperscript{125} \textit{Id.} at 321, 523 A.2d at 1011.
\textsuperscript{126} \textit{Id.} at 322, 523 A.2d at 1011.
\textsuperscript{127} \textit{Id.} at 323, 523 A.2d at 1012.
\textsuperscript{128} \textit{Id.} at 310, 523 A.2d at 1005-06. \textit{See also Restatement (Second) of Torts} § 457 (1964).
\textsuperscript{129} 309 Md. at 310, 523 A.2d at 1006. \textit{See also Restatement (Second) of Torts} § 433A comment c (1964).
\textsuperscript{130} 309 Md. at 310, 523 A.2d at 1005-06. \textit{See also Trieschman v. Eaton}, 224 Md. 111, 115, 166 A.2d 892, 894 (1961) (finding successive wrongdoers liable for the same harm).
\textsuperscript{131} Jointly liable concurrent or successive tortfeasors are those "who did not act in concert...[but] had done...acts that had combined to cause a single harm." 309 Md. at 311, 523 A.2d at 1006. Originally, joint tortfeasors were those defendants "who acted in concert, and the act of one was considered the act of all." \textit{Id.} Eventually, courts applied the term joint tortfeasors both to jointly liable concurrent tortfeasors and true joint tortfeasors. At the same time, courts developed a principle which applied to both types of tortfeasors: "[T]he plaintiff was entitled to but one compensation for his loss, and that satisfaction of his claim, even by a stranger to the action, would prevent its further enforcement." \textit{Id.} at 312, 523 A.2d at 1006.
\textsuperscript{132} "A satisfaction is an acceptance of full compensation for the injury; a release is a
cases provide no exception to the general confusion.\textsuperscript{133}

In \textit{Cox v. Maryland Electric Railways}\textsuperscript{134} the Court of Appeals declared that "[i]t is neither just nor lawful that there should be more than one satisfaction for the same injury, whether that injury be done by one or more."\textsuperscript{135} Because \textit{Cox} simply articulated the desire to prevent double recovery, it was unnecessary for the court to distinguish between true joint tortfeasors and jointly liable concurrent or subsequent tortfeasors.\textsuperscript{136}

The court in \textit{Lanasa v. Beggs}\textsuperscript{137} extended \textit{Cox}'s holding, but in so doing caused confusion. In \textit{Lanasa} the plaintiff was injured when the taxicab in which she was riding collided with a truck.\textsuperscript{138} If a court deemed both drivers to be negligent, then the torts would not be joint but concurrent. The plaintiff executed for consideration a covenant not to sue the cab company, yet retained the right to take action against the truck driver.\textsuperscript{139} The court held that the covenant not to sue was satisfaction which precluded a suit against the truck driver.\textsuperscript{140} In so doing, the court incorrectly extended \textit{Cox} to apply unity of action to concurrent tortfeasors as well as joint tortfeasors. The court also confused the terms release, satisfaction, and covenant not to sue.\textsuperscript{141}

In an attempt to clarify existing Maryland tort law, the \textit{Morgan} court overruled \textit{Lanasa}. The court seemed to base its decision on the Maryland statute which took effect in 1986, even though the court claimed to reach its holding because of \textit{Lanasa}'s erroneous surrender of the cause of action, which might be gratuitous, or given for inadequate consideration." Prosser, \textit{Joint Torts and Several Liability}, 25 CALIF. L. REV. 413, 423 (1937) (footnote omitted), cited with approval in 309 Md. at 312, 523 A.2d at 1007. A release at common law to one of two true joint tortfeasors released the other because of their concerted action. A release to one of two concurrent or subsequent tortfeasors would not necessarily release the other because they were independent wrongdoers. 309 Md. at 312, 523 A.2d at 1007.

\begin{itemize}
\item 133. 309 Md. at 313, 523 A.2d at 1007.
\item 134. 126 Md. 300, 95 A. 43 (1915).
\item 135. \textit{id.} at 306, 95 A. at 44.
\item 136. 309 Md. at 314, 523 A.2d at 1007-08.
\item 137. 159 Md. 311, 151 A. 21 (1930).
\item 138. \textit{id.} at 313, 151 A. at 22.
\item 139. \textit{id.} at 318-19, 151 A. at 25.
\item 140. \textit{id.} at 322-23, 151 A. at 26-27. The court stated:
\begin{quote}
[S]ince this cause of action is an entire and indivisible cause of action, its full satisfaction by one of the joint tortfeasors is a complete satisfaction as to the other joint tortfeasors. . . . The rule of this court is founded on the indissoluble unity of a cause of action against joint tortfeasors.
\end{quote}
\textit{Id.}
\item 141. 309 Md. at 314, 523 A.2d at 1008.
\end{itemize}
reading of Cox.\textsuperscript{142} Without the passage of the statute, it is doubtful that the Maryland court would have taken such an enormous step as to overrule a longstanding precedent.

This ruling dispensed with the general confusion and corrected what appeared to be an inequitable situation. When Morgan and Hovermill executed their releases as to the original tortfeasors, they had no reason to expect that Dr. Cohen's treatment would cause them harm. Without this holding, an injured party might be reluctant to execute a release until the victim was certain that the medical treatments had caused no ill effects. The court in \textit{Morgan} has assured that plaintiffs will feel free to avoid litigation by releasing an original tortfeasor without foregoing a cause of action for a doctor's subsequent negligent treatment.

\textbf{B. Intentional Torts}

\textit{1. Tortious Interference with Contract.—In Ronald M. Sharrow, Chartered v. State Farm Mutual Automobile Insurance Co.}\textsuperscript{143} the Court of Appeals held that an attorney adequately stated a cause of action for tortious interference with contract against an insurer who capitalized on a client's need for money by negotiating with the client and requiring him to state falsely that he had advised his attorney of his intention to settle directly with the insurer.\textsuperscript{144} This holding represents the adoption by Maryland courts of a broad rule that does not require the insurer's actions to be egregious in nature, but rather defines as actionable "any purposeful conduct, however subtle, by which an insurer improperly and intentionally induces or persuades a client to discharge his counsel and settle directly with it."\textsuperscript{145}

Sharrow averred that State Farm, knowing that Sharrow was representing the client, sensed that the client was in desperate need of money when the client contacted the insurer for an advance on his pending claim.\textsuperscript{146} State Farm denied the request for an advance and instead negotiated a settlement with the client which required him to execute a document discharging Sharrow as his attorney and stating that he had advised Sharrow of his intention to settle his

\begin{footnotes}
\item[142] "\textit{Lanasa erroneously read Cox to extend the notion of a unity of action to concurrent tortfeasors as well.}" \textit{Id.}
\item[143] 306 Md. 754, 511 A.2d 492 (1986).
\item[144] \textit{Id.} at 770, 511 A.2d at 500-01.
\item[145] \textit{Id.} at 767, 511 A.2d at 499.
\item[146] \textit{Id.} at 757, 511 A.2d at 494. Sharrow was representing Donald Zorbach in a suit regarding injuries Zorbach sustained in an automobile accident. \textit{Id.} at 756, 511 A.2d at 493.
\end{footnotes}
MARYLAND LAW REVIEW

claim directly.147 Sharrow sued State Farm in the Circuit Court for Baltimore City for tortious interference with contract.148 State Farm demurred to the complaint.149 The circuit court dismissed the complaint and the Court of Special Appeals affirmed the trial court's judgment.150

Speaking through Judge Wilner, the Court of Special Appeals151 recognized that most cases imposing liability for interference with an attorney-client relationship have required "'egregious' conduct by the insurance company,152 such as a fraudulent statement made to induce the client to dismiss the attorney and settle directly with the insurer.153 The Court of Appeals found this standard overly restrictive, holding that the better rule makes actionable any conduct, however subtle, which induces or persuades a client to discharge an attorney.154

Maryland has long recognized the tort of intentional or malicious interference with contract.155 One hundred years ago, the Court of Appeals decided the seminal case of Knickerbocker Ice Co. v.

147. Id. at 757, 511 A.2d at 494.
148. Id. at 756, 511 A.2d at 493.
149. Id. at 760, 511 A.2d at 495.
150. Id.
152. For cases requiring that an insurer's conduct be egregious in order to be actionable, see Volz v. Liberty Mut. Ins. Co., 498 F.2d 659, 663 (5th Cir. 1974), and Herman v. Prudence Mut. Casualty Co., 41 Ill. 2d 468, 476-77, 244 N.E.2d 809, 813 (1969).
153. 63 Md. App. at 420, 492 A.2d at 982. See Lurie v. New Amsterdam Casualty Co., 270 N.Y. 379, 1 N.E. 2d 472 (1936) (insurance company threatened claimant, stating that unless he repudiated the retainer with his attorney, he would receive no compensation for his injuries); Klauder v. Cregar, 327-Pa. 1, 192 A. 667 (1937) (claimant induced into settlement by adjuster who informed her that "if she would settle out of court, the power of attorney . . . that she signed would be no good, that she would not have to pay her attorney if she settled").
154. 306 Md. at 766-67, 511 A.2d at 499. The RESTATEMENT (SECOND) OF TORTS § 766 (1977) declares:

There is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract. The interference is often by inducement. The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus it may be a simple request or persuasion exerting only moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made. Or it may be a threat by the actor of physical or economic harm to the third person or to persons in whose welfare he is interested. Or it may be the promise of a benefit to the third person if he will refrain from dealing with the other.

Id.

155. 306 Md. at 763, 511 A.2d at 497.
The court found that an action in tort would lie when a person induced a party to a contract to break it, intending thereby to injure the other or to benefit personally. The plaintiff need not prove express malice, but only that the defendant interfered wrongfully and without justification. In Natural Design v. Rouse Co., the court held that an action will lie when, absent a breach of contract, there is malicious or wrongful interference with an economic relationship. This cause of action likewise requires only legal malice, rather than ill will or spite.

It is well settled that contracts between attorneys and clients, like other business contracts, are protected from tortious interference by third parties. Furthermore, "[t]he great weight of authority sustains the right of a client at any time before judgment, if, acting in good faith, to compromise, settle or dismiss [a] cause of action without [the] attorney's intervention, knowledge or consent." Additionally, an insurer has both a right and a duty to settle a claim within its insured's policy limits if it is reasonable to do so.

The court in Sharrow reasoned, however, that the insurer's duty

156. 107 Md. 556, 69 A. 405 (1887). In Knickerbocker a dairy and the Sumwalt Ice and Coal Company entered into a contract whereby Sumwalt agreed to supply ice to the dairy. Because of business exigencies, Sumwalt was forced to purchase ice from Knickerbocker Ice Company, which then threatened to cease supplying ice to Sumwalt if it continued to supply the dairy. Id. at 558, 69 A. at 406.
157. Id. at 565, 69 A. at 409.
158. Id. at 568, 69 A. at 411.
162. See Annotation, Liability in Tort for Interference with Attorney-Client or Physician-Patient Relationship, 26 A.L.R.3d 679 (1969). Some courts have found that the doctrine of tortious interference with contract does not apply to attorney-client contracts. See, e.g., Walsh v. O'Neill, 350 Mass. 586, 589-90, 215 N.E.2d 915, 918 (1966) ("There is, we think, a strong public policy to assure one in need of legal help freedom to select an attorney, to change attorneys, and to seek and obtain advice as to the competency and suitability of any attorney for the particular need of the client."); Orr v. Mutual Benefit & Health Accident Ass'n, 240 Mo. App. 236, 242, 207 S.W.2d 511, 515 (1947) (finding that insurer had a right to settle claim directly with insured).
164. 306 Md. at 766, 511 A.2d at 498. See State Farm v. White, 248 Md. 324, 333, 36 A.2d 269, 273 (1967) (holding that insurer's duty to insured to settle within policy limits contains elements of both good faith and reasonable care).
does not permit it to interfere with a contingent fee contract between attorney and client by inducing the client to settle directly with the insurer.  

Nevertheless, the precise nature of the conduct necessary to constitute a cause of action is a matter of some dispute in the courts. For example, a number of jurisdictions require egregious conduct "which would appear to leave inactionable more subtle and sophisticated means of inducing a client to discharge his attorney." Another line of cases merely considers whether it was the purposeful conduct of the insurer or the client that resulted in the discharge of counsel and the direct settlement between the client and the insurer.

The Court of Appeals followed the broader rule, defining as actionable intentional conduct designed to improperly induce a client to repudiate the attorney-client contract and settle directly with the insurer. In accordance with this line of cases, the court viewed the central issue as whether it was the insurer's or the client's conduct that triggered the discharge of the attorney.

This decision establishes that attorney-client contracts are protected under Maryland law from tortious interference by third parties. Furthermore, a third party's conduct need not be egregious in order to state a cause of action. Attorneys thus are afforded a high degree of protection from the potential misconduct of an insurance company who aggressively seeks settlement with an injured party.

2. Intentional Infliction of Emotional Distress.—The Court of Special Appeals held in Reagan v. Rider that severe emotional distress, as a requisite element of a cause of action for the intentional infliction of emotional distress, may be determined by the nature of the defendant's conduct along with evidence of the intensity and duration of the distress. Furthermore, in many cases a court may

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165. 306 Md. at 766, 511 A.2d at 498.
166. Id. at 767, 511 A.2d at 499.
167. Id. at 768 n.4, 511 A.2d at 499 n.4. See supra note 152.
169. 306 Md. at 767, 511 A.2d at 499.
170. Id. at 768, 511 A.2d at 499.
171. Id. at 765, 511 A.2d at 496.
172. Id. at 767, 511 A.2d at 499.
174. Id. at 513, 521 A.2d at 1251.
infer the existence of the distress solely from the extreme and outrageous nature of the defendant's conduct. 175

Glenda Rider testified that between the ages of eleven and seventeen she was subjected to sexual abuse by her stepfather, John Reagan. 176 Rider sued her stepfather in the Circuit Court for Baltimore County for assault, battery, intentional infliction of emotional distress, and invasion of privacy. 177 The court dismissed all counts except that for intentional infliction of emotional distress, 178 which was submitted to the jury and resulted in a verdict for Rider in the amount of $28,845. 179 Reagan appealed from that judgment. 180

On appeal the court considered whether the evidence presented at trial was sufficient to allow the jury to consider the issue of causation as well as that of the severity of the emotional distress. 181 Regarding causation, the court held that the expert testimony in the case provided sufficient evidence to allow the issue to go to the jury; 182 furthermore, the distress need not immediately follow the event which caused it. 183 As to the severity issue, the court held that the nature of Reagan's conduct and the intensity and duration of Rider's emotional distress allowed the jury properly to find that the emotional distress was severe. 184

The court's holding represents a departure from the strict requirements of the cause of action for intentional infliction of emo-

175. Id.
176. Id. at 506, 521 A.2d at 1247 (“What began as harmless backrubs soon progressed to sexual contact, including masturbation and cunnilingus, but not sexual intercourse . . . . [T]here were several hundred such encounters over a six-year period, when she was between the ages of 11 and 17.”).
177. Id. at 505, 521 A.2d at 1247.
178. Id.
179. Id. The award included $18,845 compensatory damages and $10,000 punitive damages. Id.
180. Id.
181. Id.
182. Id. at 508, 521 A.2d at 1248.
183. Id. at 507, 521 A.2d at 1248. Reagan asserted that because Rider's emotional distress did not become apparent immediately after and in direct response to the sexual acts, she failed to show a causal connection. Id. Reagan pointed to Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, cert. denied, 304 Md. 631, 500 A.2d 649 (1985), in support of his assertion. The court there stated: “The evidence concerning the cause of Ms. Cook's distress is . . . . unequivocal: her testimony and that of her husband revealed that she was affected immediately following and in direct response to her termination.” Id. at 19, 494 A.2d at 221. The court reasoned in Reagan that while the emotional distress in Moniodis did follow immediately and in direct response to an act, Moniodis did not hold immediacy to be a requirement. Additionally, the Reagan court relied on expert testimony in order to find that the jury properly could have concluded that causation was established. 70 Md. App. at 507-08, 521 A.2d at 1248.
184. 70 Md. App. at 514, 521 A.2d at 1251.
tional distress. Ten years ago, *Harris v. Jones* \(^{185}\) reached the highest court in Maryland. This case of first impression recognized the intentional infliction of emotional distress as a new and independent tort and repudiated earlier holdings that such claims could not be sustained except as a parasitic element of damage accompanying an established tort. \(^{186}\) The Court of Appeals held that in order to maintain a claim for the new tort, four elements must coalesce:

1. The conduct must be intentional or reckless;
2. The conduct must be extreme and outrageous;
3. There must be a causal connection between the wrongful conduct and the emotional distress; and
4. The emotional distress must be severe. \(^{187}\)

Noting that thirty-seven jurisdictions then appeared to have recognized the cause of action, \(^{188}\) the court adopted the reasoning of the Supreme Court of Virginia in *Womack v. Eldridge*. \(^{189}\) The Court of Appeals noted that the Virginia court was concerned with distinguishing true from spurious claims and the "trifling annoyance from the serious wrong." \(^{190}\)

Since that time Maryland courts have faced repeated attempts to extend the availability of the cause of action. \(^{191}\) Until *Reagan*, however, the courts had declined to do so. The Court of Special Appeals relied on these earlier Maryland cases and the *Restatement (Second) of Torts* in order to distinguish between severe emotional response and mere emotional upset. \(^{192}\) The *Restatement* stresses that "the law intervenes only where the distress inflicted is so severe...

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186. "Id." at 566, 380 A.2d at 614.
187. Id. The court stated that the four requisite elements of the tort are not to be considered independently, but rather are to coalesce into a single body. *Id.*
188. *Id.* at 564, 380 A.2d at 613.
190. 281 Md. at 566, 380 A.2d at 614.
192. 70 Md. App. at 509, 521 A.2d at 1249.
that no reasonable man could be expected to endure it." The court therefore focused on the intensity and duration of the distress in determining its severity.

Without losing sight of the policy concerns underlying a strict application of the tort's four elements, the court reasoned that the severity of the distress need not be manifested by an inability to function in day-to-day life. Although earlier case law seemed to construe the severity requirement as necessitating such a showing, the court distinguished the instant case in that Rider produced medical evidence in support of her claim in addition to evidence as to the nature of the outrageous conduct. The court reasoned that the very nature of the conduct along with the expert testimony guaranteed that the emotional distress was genuine and serious.

The ramifications of this decision may be far-reaching. The

194. 70 Md. App. at 509-10, 521 A.2d at 1249.
195. Id. at 509, 521 A.2d at 1248.
196. Id. at 513, 521 A.2d at 1250.
197. For example, in Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985), cert. denied, 304 Md. 631, 500 A.2d 649 (1985), the Court of Special Appeals found that there was no evidence from which a jury properly could have concluded that three of the plaintiffs suffered the sort of disablement required by Harris. In Moniodis plaintiffs each suffered symptoms such as lost sleep, increased smoking, and hives. Id. at 16, 494 A.2d at 219-20. None of the three indicated even a temporary inability to carry on to some degree the daily routine of their lives. The prevailing plaintiff, however, produced evidence to the effect that she no longer was able to participate in the daily routine of life. Id. Importantly, the Moniodis court found that the evidence was "more than enough to permit a jury finding that Ms. Cook was severely distressed." Id.

Likewise, in Leese v. Baltimore County, 64 Md. App. 442, 497 A.2d 159, cert. denied, 305 Md. 106, 501 A.2d 845 (1985), the court applied the requirements of Harris and found that the plaintiff's amended declaration did not contain the specific facts which must be pleaded in order to set forth a prima facie case of severe injury. Id. at 472, 497 A.2d at 174-75. The holding in Leese further indicated that in order to plead a cause of action for the intentional infliction of emotional distress, plaintiffs must show some sort of resultant functional disability as a result of the defendant's actions. Id. The court required that severe emotional distress be manifested by an inability to function or tend to necessary matters. Id. Finally, in Hamilton v. Ford Motor Credit Co., 66 Md. App. 46, 60, 502 A.2d 1057, 1250 (1986), the court found that the plaintiff failed to show that her emotional distress was severe because she produced no evidence that she could not function or tend to her everyday affairs.

198. 70 Md. App. at 513, 521 A.2d at 1250. The court stated that while medical evidence in support of a claim is not an absolute prerequisite to recovery, it is an important factor in assessing the severity of the distress. Id.

199. Id., 521 A.2d at 1251. The nature of the conduct can assure that the claim for emotional distress is genuine and serious. The court found that "[w]hen the acts of the defendant are so horrible, so atrocious and so barbaric that no civilized person could be expected to endure them without suffering mental distress, the jury may find as a matter of law that 'severe' emotional distress resulted." Id.
court at last appears willing to relax the previously strict formal requirements for stating a cause of action for intentional infliction of emotional distress. In the court's view, the law still may protect defendants from spurious claims by viewing the four elements not discretely but rather as a combination of four factors which together comprise a whole. The holding thus expands the law to provide a plaintiff with a cause of action even when actual evidence of the severity of the distress is lacking. A plaintiff may recover if evidence establishes that the defendant's conduct was so outrageous as to allow an inference of severe harm.

C. Insurance

1. Household Exclusion Clause.—In State Farm Mutual Automobile Insurance Co. v. Nationwide Mutual Insurance Co. the Court of Appeals reaffirmed the rule that a household exclusion clause in an automobile liability insurance policy is invalid as contrary to public policy. Moreover, the court clarified recent precedent by holding that this invalidity extends only to the amount of the minimum liability coverage required by statute.

State Farm Mutual Automobile Insurance Company (State Farm) issued Robert Carroll, Jr. an automobile liability insurance policy which provided $100,000 coverage for each person and $300,000 for each accident. The policy contained a household exclusion clause which excluded coverage for injury to "any insured or any member of an insured's family residing in the insured's household."

Carroll allowed a friend, Christina Glass, to drive his car while Carroll and another friend rode as passengers. The car went off the road, killing Glass and the other friend and injuring Carroll. Glass was insured by Nationwide Mutual Insurance Company (Nationwide) through a policy which provided coverage for any acci-

200. Id. at 513-14, 521 A.2d at 1251.
203. 307 Md. at 633, 516 A.2d at 587. The statutory minimum personal injury coverage is $20,000 for any one person and $40,000 for any two or more persons. MD. TRANSP. CODE ANN. § 17-103(b)(1) (1987); MD. ANN. CODE art. 48A, § 541(a) (1986).
204. 307 Md. at 633, 516 A.2d at 587.
205. Id.
206. Id.
dent involving her use of a motor vehicle belonging to someone other than a member of her household.\footnote{207}

Carroll sued Glass' estate, asserting that Nationwide was the primary insurer for the accident.\footnote{208} Nationwide then brought the instant suit, seeking a declaration that the household exclusion clause in State Farm's policy to Carroll was void in its entirety as contrary to public policy, thereby making State Farm the primary insurer.\footnote{209} State Farm, on the other hand, asked the trial court to uphold the clause and declare Nationwide the primary insurer.\footnote{210} Alternatively, State Farm argued that should the court rule the exclusion invalid, State Farm's liability should be limited to the statutory minimum requirements for insurance coverage.\footnote{211}

Both Nationwide and State Farm focused their arguments on the proper interpretation of *Jennings v. Government Employees Insurance Co.*\footnote{212} The Court of Appeals ruled in *Jennings* that household exclusion clauses in automobile liability insurance policies were void as against public policy.\footnote{213} The *Jennings* court, however, had not been required to determine the extent of the invalidation.\footnote{214} In the circuit court both State Farm and Nationwide agreed that if *Jennings* applied, State Farm's argument that the household exclusion provision was entirely valid would fail.\footnote{215} The trial court not only applied *Jennings* to the instant action, but interpreted *Jennings* to render State Farm's household exclusion clause completely invalid.\footnote{216}

\begin{footnotes}
\item[207] Id. at 633-34, 516 A.2d at 587.
\item[208] Id. at 634, 516 A.2d at 587.
\item[209] Id.
\item[210] Id.
\item[211] Id.
\item[212] 302 Md. 352, 488 A.2d 166 (1985). See 307 Md. at 634-35, 516 A.2d at 587. Jennings was injured while a passenger in his own car being driven by his stepson. 302 Md. at 353-54, 488 A.2d at 167. Jennings carried a policy through Government Employees Insurance Company (GEICO); the policy contained a household exclusion similar to that in Carroll's policy. Id. at 354, 488 A.2d at 167.
\item[213] *Jennings*, 302 Md. at 362, 488 A.2d at 171.
\item[214] 307 Md. at 633, 516 A.2d at 586-87.
\item[215] Id. at 634, 516 A.2d at 587. *Jennings* was decided while the instant case was pending before the circuit court; therefore, State Farm contended that the court should not apply *Jennings* retrospectively to invalidate the policy provisions. Id.
\item[216] Id.
\end{footnotes}
Court of Appeals issued a writ of certiorari while State Farm’s appeal in the Court of Special Appeals was pending.\textsuperscript{217}

Before the Court of Appeals, State Farm argued that since public policy requires no more coverage than that specified by statute, any exclusion clause should be valid with respect to any amounts in excess of that statutory minimum requirement.\textsuperscript{218} Nationwide, on the other hand, interpreted \textit{Jennings} to mean that because a household exclusion clause is invalid, it should be stricken in its entirety from the policy.\textsuperscript{219} Therefore, the policy should be read as though the clause never existed, making State Farm the primary insurer and further requiring that the bodily injury coverage in Carroll’s policy apply to any accident in which Carroll was involved.\textsuperscript{220}

The court first reviewed the historical development of Maryland law with respect to household exclusion rules, noting that before 1972 courts did not question the validity of the clauses.\textsuperscript{221} The court pointed out, however, that in 1972 the General Assembly substantially changed public policy in Maryland concerning motor vehicle insurance by mandating compulsory insurance and minimum coverage.\textsuperscript{222} As Judge Eldridge declared in \textit{Jennings}, “[A] clause in an insurance policy, which is contrary to ‘the public policy of this State, as set forth in . . . the Insurance Code’ or other statute, is invalid and unenforceable.”\textsuperscript{223}

While basing its decision on this established principle, the \textit{State Farm} court found that Nationwide read \textit{Jennings} too broadly.\textsuperscript{224} Instead, the court determined that \textit{Jennings} more properly supported State Farm’s argument. The court stressed that the legislature merely mandated minimum liability coverage. Furthermore, liability coverage in excess of the statutory minimum is expressly authorized by article 48A, section 541.\textsuperscript{225} Any clause which excludes coverage of the insured would violate public policy only to the ex-

\begin{itemize}
\item \textsuperscript{217} \textit{Id}.
\item \textsuperscript{218} \textit{Id}. at 634-35, 516 A.2d at 587.
\item \textsuperscript{219} \textit{Id}. at 635, 516 A.2d at 587.
\item \textsuperscript{220} \textit{Id}.
\item \textsuperscript{221} \textit{Id}., 516 A.2d at 588.
\item \textsuperscript{222} \textit{Id}.
\item \textsuperscript{223} \textit{Jennings}, 302 Md. at 356, 486 A.2d at 168 (quoting Guardian Life Ins. Co. of Am. v. Insurance Comm’r, 293 Md. 629, 643, 446 A.2d 1140, 1147 (1982)).
\item \textsuperscript{224} 307 Md. at 636, 516 A.2d at 588.
\item \textsuperscript{225} MD. ANN. CODE art. 48A, § 541 (1986). Subsection (b) of the statute provides in pertinent part: “Nothing in this subtitle or in Title 17 of the Transportation Article prevents an insurer from issuing . . . a policy of motor vehicle insurance providing liability coverage in excess of the requirements of the Maryland Vehicle Law.” Subsection (c)(2) further declares: “There shall be available to the insured the opportunity to con-
tent that it prevents the insured from enjoying mandatory minimum coverage. Thus, such exclusion clauses would be valid as against any amounts in excess of these requirements. Accordingly, the Court of Appeals reversed the decision of the circuit court and determined that State Farm, as the primary insurer, would be liable only for the statutorily required minimum coverage.

2. Uninsured Motorist Coverage.—The Court of Appeals held in Hoffman v. United Services Automobile Association that an express agreement with the insured could bind an insurer to provide uninsured motorist coverage in excess of the statutory minimum. Moreover, the court reaffirmed the general rule that prohibits "stacking" of uninsured motorist policies.

Kenneth and Sandra Hoffman as named insureds purchased an insurance policy for their two vehicles, paying separate premiums for each vehicle. The policy from United Services Automobile Association (USAA) contained liability and uninsured motorist coverage, as well as a "Supplementary Uninsured Motorists" endorsement. This endorsement amended the definition of an "uninsured" vehicle to include an "underinsured" vehicle and proceeded to define an "underinsured" vehicle. The policy provided $300,000 coverage for each person injured and $500,000 for each accident ($300,000/$500,000).

While visiting in Connecticut, the Hoffmans were passengers in a car driven by Richard Whelan, a Connecticut resident. Richard Nowakowski, also a Connecticut resident, struck Whelan's car, killing Sandra Hoffman and inflicting serious injuries on Kenneth Hoffman.

Whelan's insurance policy from Hanover Insurance Company contained underinsured coverage limits of $50,000/$100,000. Nowakowski held a policy from Travelers Insurance Company con-

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226. 307 Md. at 637, 516 A.2d at 589.
227. Id. at 644, 516 A.2d at 592.
229. Id. at 179, 522 A.2d at 1326.
230. "Stacking" describes a situation in which all available policies are added together to create a larger pool from which the injured party may draw when a single policy is insufficient to make the individual whole.
231. 309 Md. at 183, 522 A.2d at 1328.
232. Id. at 168-69, 522 A.2d at 1320-21.
233. Id. at 169, 522 A.2d at 1321.
234. Id.
taining liability coverage of only $20,000/$40,000.\textsuperscript{235} Whelan and Hoffman sued Nowakowski in Connecticut state court.\textsuperscript{236} Upon agreement between the parties, the court apportioned Nowakowski's liability coverage and Whelan's underinsured motorist coverage.\textsuperscript{237} The estate of Sandra Hoffman received the full person limit of $20,000 from Nowakowski's liability coverage and $30,000 from Whelan's underinsured motorist coverage.\textsuperscript{238} The court granted Kenneth Hoffman $5398 from Nowakowski's coverage and $8379 from Whelan's coverage.\textsuperscript{239}

Hoffman then sued USAA in the United States District Court for the District of Connecticut for the benefits under his policy's "Supplementary Uninsured Motorists" endorsement.\textsuperscript{240} Hoffman also sought to combine the limits of his and his wife's underinsured motorist coverage on their two vehicles to reach a total coverage of $600,000/$1,000,000.\textsuperscript{241}

In opposition USAA argued that article 48A, section 543(a),\textsuperscript{242} prohibited Hoffman from recovering "uninsured" motorist benefits from USAA since the estate already recovered $50,000 from another insurer.\textsuperscript{243} Moreover, USAA stressed that the amount already recovered exceeded the statutorily required uninsured motorist coverage.\textsuperscript{244} Finally, USAA argued that should Hoffman be permitted to recover under his policy, both the policy's language and Maryland law prohibit "stacking," thereby limiting USAA's exposure to a single coverage of $300,000/$500,000.\textsuperscript{245}

\textsuperscript{235} Id. The court assumed that Nowakowski's low liability limits established him as the underinsured motorist, thereby triggering the underinsured motorist coverage of both Hanover Insurance Company and the United Services Automobile Association. Id.\textsuperscript{236} Id. Kenneth Hoffman sued both individually and as the personal representative of his wife's estate. Id.\textsuperscript{237} Id.\textsuperscript{238} Id. at 169-70, 522 A.2d at 1321. The court arrived at this figure by deducting the $20,000 received from Nowakowski's coverage from the full person limit of $50,000 under Whelan's policy. Id.\textsuperscript{239} Id. at 170, 522 A.2d at 1321.\textsuperscript{240} Id.\textsuperscript{241} Id.\textsuperscript{242} MD. ANN. CODE art. 48A, § 543(a) (1986). The statute provides: "Notwithstanding any other provisions of this subtitle, no person shall recover benefits under the coverages required in §§ 539 and 541 of this article from more than one motor vehicle liability policy or insurer on either a duplicative or supplemental basis." Id.\textsuperscript{243} 309 Md. at 170, 522 A.2d at 1321.\textsuperscript{244} Id. Maryland statutes require every motor vehicle liability insurance policy issued in Maryland to have uninsured motorist coverage in the amount of $20,000/$40,000. MD. ANN. CODE art. 48A, § 541(c) (1986); MD. TRANSP. CODE ANN. § 17-103(b)(1) (1987).\textsuperscript{245} 309 Md. at 170, 522 A.2d at 1321.
With respect to USAA's first argument, Hoffman claimed that his coverage was issued in addition to the statutorily required coverage and therefore was beyond the intended reach of section 543(a). As to the second argument, Hoffman claimed that since he was paying two separate premiums he was entitled to recover under each. The federal court certified questions pertaining to these issues to the Maryland Court of Appeals.

In addressing USAA's contentions, the Court of Appeals first reiterated the intent of the uninsured motorist coverage, as declared in Nationwide Mutual Insurance Co. v. Webb. "[T]he purpose of uninsured motorist statute is 'that each insured under such coverage have available the full statutory minimum to exactly the same extent as would have been available had the tortfeasor complied with the minimum requirements of the financial responsibility Law.' " Next, the court examined the language of the policy itself. By the express language of the supplementary endorsement, the court found that USAA agreed to extend coverage to an "underinsured" motorist. "Underinsured motorist coverage applies when an insured is involved in an accident with a motorist, who may carry extensive liability insurance far in excess of any amounts statutorily required, but whose liability coverage is less than the insured's underinsured motorist coverage." The court carefully considered three earlier Maryland cases on which USAA had relied. In Travelers Insurance Co. v. Benton the court had construed article 48A, sections 539 and 543(a), to rule that an injured plaintiff could recover personal injury benefits under only one policy. The court extended Benton's principles to uninsured motorist coverage in Yarmouth v. Government Employees Insurance Co., noting that section 543(a) expressly governs recovery of both

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246. Id. at 170-71, 522 A.2d at 1321.
247. Id. at 171, 522 A.2d at 1322. In all, four questions were certified.
250. 309 Md. at 173-74, 522 A.2d at 1323.
251. Id. at 174, 522 A.2d at 1323 (citing 8C J. Appelman, Insurance Law and Practice § 5103, at 515-16 (1981) and Note, Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties, 64 N.C.L. Rev. 1408, 1408 n.4 (1986)).
252. Id. at 174-77, 522 A.2d at 1329-25.
254. Id. at 545-46, 365 A.2d at 1003-04.
uninsured motorist benefits and personal injury protection benefits.\textsuperscript{257} Finally, in \textit{Rafferty v. Allstate Insurance Co.}\textsuperscript{258} the court determined that section 543(a) prohibited additional recovery from a secondary insurer when the primary insurer already had paid more than the statutory minimum.\textsuperscript{259}

According to the court, USAA's reliance on the three cases was misplaced.\textsuperscript{260} While the policy coverages at issue in those cases were similar to each other, they were distinguishable from USAA's policy in that none provided a supplementary endorsement.\textsuperscript{261} Moreover, the court found that the language of section 543(a) supports additional recovery under the optional excess uninsured motorist coverage.\textsuperscript{262} The court determined that the General Assembly, through express language in the statute, precluded the application of section 543(a) to coverages not required in sections 539 and 541.\textsuperscript{263} This proposition found additional support in section 541(b), which declares that nothing prevents an insurer from providing liability coverage which exceeds the minimum statutory amount.\textsuperscript{264} Moreover, amendments to section 541 enacted shortly after the case began provided implicit support to the finding that section 543(a) would not preclude recovery under a second policy when the insurer issues "underinsured" coverage.\textsuperscript{265}

\textsuperscript{257} \textit{Id.} at 264, 407 A.2d at 319.
\textsuperscript{258} 305 Md. 63, 492 A.2d 290 (1985).
\textsuperscript{259} \textit{Id.} at 71, 492 A.2d at 294-95.
\textsuperscript{260} 309 Md. at 176, 522 A.2d at 1324.
\textsuperscript{261} \textit{Id.}
\textsuperscript{262} \textit{Id.} at 177, 522 A.2d at 1325. For the text of the statute, see supra note 242.
\textsuperscript{263} 309 Md. at 177, 522 A.2d at 1325. Section 539 requires only a minimum personal injury protection in the amount of $2500. Section 541(a) requires minimum liability coverage in the amount of $20,000/$40,000. Section 541(c) requires minimum uninsured motorist coverage in the amount of $20,000/$40,000. See \textit{MD. ANN. CODE} art. 48A, §§ 539, 541 (1986).
\textsuperscript{264} \textit{Id.} § 541(b).
\textsuperscript{265} 309 Md. at 178, 522 A.2d at 1325. In 1981 the General Assembly added § 541(c)(1), which redefined "uninsured" vehicle to include any vehicle with liability coverage "less than the amount provided to the insured under this subsection." Act of May 19, 1981, ch. 510, 1981 Md. Laws 2122, 2123. This moved § 541(c) to § 541(c)(2) and added the requirement that insurers "shall [make] available to the insured the opportunity to contract for higher amounts than those provided under Title 17 of the Transportation Article." \textit{Id.} at 2122. Finally, the General Assembly added section 541(c)(3) which states: "[T]he limit of liability for an insurer providing uninsured motorist coverage under this subsection is the amount of that coverage less the sum of the limits under the liability insurance policies ... applicable to the bodily injury or death of the insured." \textit{Id.} at 2123-24. The court noted that a legislative committee memorandum interpreted this amendment as making uninsured motorist coverage operate as underinsured motorist coverage. 309 Md. at 178-79, 522 A.2d at 1325.

The court held that it would deprive the 1981 changes of their force to read
In addressing the question of "stacking" policies, the court cited its recent decision in *Howell v. Harleysville Mutual Insurance Co.*\(^{266}\) and held that the express language of the policy limited Kenneth Hoffman's recovery to $300,000/$500,000.\(^{267}\) The court rejected Hoffman's contention that he was permitted to aggregate coverage limits because he was paying separate premiums on each of his vehicles. The court found that the second premium served merely to pay for the increased risk of added passengers and miles.\(^{268}\)

As a result of this decision, if an insurer provides in its policy, or in any supplements thereto, coverage in greater amount or scope than the minimum required by statute, the insurer will be unable to rely on section 543(a) to preclude payment to the insured.\(^{269}\) An insured will be entitled to supplemental recovery even though the insured previously has recovered from another insurer, as long as the prior recovery does not exceed the supplemental coverage. Nevertheless, the court's prohibition against "stacking" underinsured motorist coverage will prevent an insured from recovering under multiple policies issued by a single insurer.\(^{270}\)

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\(^{266}\) 305 Md. 435, 505 A.2d 109 (1986) (certified question case holding that stacking of uninsured motorist benefits is prohibited).

\(^{267}\) 309 Md. at 182, 522 A.2d at 1327.

\(^{268}\) *Id.* at 183, 522 A.2d at 1327-28.

\(^{269}\) *Id.* at 179, 522 A.2d at 1326.

\(^{270}\) *Id.* at 183, 522 A.2d at 1327-28.