Survey - Developments in Maryland Law, 1988-89

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Legal History, Theory and Process Commons

Recommended Citation
Survey - Developments in Maryland Law, 1988-89, 49 Md. L. Rev. 509 (1990)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol49/iss3/3

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
# TABLE OF CONTENTS

## I. CIVIL PROCEDURE ........................................ 511
   A. Collateral Estoppel ................................... 511
   B. Modernization of the State's Interpleader Practice ....... 521

## II. CONSTITUTIONAL LAW .................................... 534
   A. Discrimination in Jury Selection ........................ 534
   B. State Withdraws Preferential Tax Treatment from All-Male Country Club ............ 549
   C. The Maryland Contract Lien Act .................... 564
   D. Voter Initiatives .................................... 573
   E. Certificates of Candidacy: First Amendment Violation ... 583
   F. First Amendment Protection for Public Employees ...... 594

## III. CRIMINAL LAW ........................................... 604
   A. Witness' Privilege Against Self-Incrimination .......... 604
   B. Disclosure of Grand Jury Information for Civil Use .... 614
   C. Fair Trials for AIDS-Afflicted Defendants .............. 627
   D. Preserving Sufficiency of the Evidence Review .......... 637
   E. Knowledge as an Element in Possession Offenses ........ 647
   F. Rejection of the Crime of Attempted Felony Murder .... 656

## IV. EVIDENCE .................................................. 671
   A. Evidence of Prior Convictions .......................... 671

## V. FAMILY LAW ............................................. 681
   A. Use of Contempt Power in Paternity Proceedings ........ 681

## VI. LABOR LAW ................................................ 691
   A. Agreements to Arbitrate Future Disputes ............... 691
   B. Limiting the Tort of Abusive Discharge ............... 702

## VII. PROPERTY ................................................ 715

509
A. Real Property ...................................... 715
B. Joint Will Contracts ................................. 727

VIII. STATE GOVERNMENT AND ADMINISTRATION .......... 738
A. Scope of State Agency's Authority .................... 738

IX. TORTS ........................................... 750
A. Immunity for Blood Suppliers ........................... 750
B. Parent-Child Immunity ................................ 761
C. Statute of Limitations—Products Liability .......... 773
D. Statutes of Limitations—Wrongful Death and Survival Actions ........................................... 782
E. Loss of Parental Consortium ............................ 799
F. Insurance Coverage of Injuries That Occur at Home Day Care .............................................. 812
G. Intentional Interference with Business Relations ....... 829

SURVEY TABLE OF CASES .................................. 842
I. CIVIL PROCEDURE

A. Collateral Estoppel

In *Welsh v. Gerber Products, Inc.*, the Court of Appeals held that the entry of a satisfied judgment order against one tortfeasor did not bar an injured person's subsequent claims against other concurrent tortfeasors. Specifically, the court found that the entry of a consent judgment generally did not have collateral estoppel effect on the issue of damages, and thus did not preclude a plaintiff from pursuing claims against additional tortfeasors. In so holding, the court overruled its prior decision in *Grantham v. Board of County Commissioners* and re-examined the common-law rule that further actions against all other tortfeasors are barred when a judgment against one tortfeasor is satisfied. *Welsh* represents another step back in the gradual retreat from the dogmatic invocation of the collateral estoppel doctrine. It also reflects a more thoughtful, modern approach characterized by the courts' greater sensitivity to the parties' actual intentions when they enter a consent judgment.

Prior to *Welsh*, an injured person's satisfaction of judgment

---


2. Concurrent tortfeasors are those whose acts merge to cause a single injury, but who did not act in concert; they often are referred to as joint tortfeasors. W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 47, at 328-29 (5th ed. 1984). By contrast, true common-law joint tortfeasors are those who acted in concert and the act of one was considered the act of all, i.e., the concerted action resulted in only one wrong for which each tortfeasor was jointly and severally liable with the others for the total damages. *Id.* § 46, at 322-23. Subsequent tortfeasors are those whose tortious acts cause an injured party harm in addition to the harm that is caused by the original tortfeasor. The original tortfeasor is liable for the harm he causes directly and also for any additional harm that results from a third party's efforts to render aid, whether those acts are performed properly or negligently. Morgan v. Cohen, 309 Md. 304, 309-10, 523 A.2d 1003, 1005-06 (1987). The Maryland Annotated Code defines "joint-tortfeasor" as "two or more persons jointly and severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." MD. ANN. CODE art. 50, § 16 (1986).

3. A consent judgment is "[a] judgment, the provisions and terms of which are settled and agreed to by the parties to the action." BLACK'S LAW DICTIONARY 756 (5th ed. 1979).

4. *Welsh*, 315 Md. at 522-3, 555 A.2d at 492. The court declined to address whether a consent judgment for damages would preclude a defendant's subsequent litigation with a third party on the issue of the defendant's negligence. *Id.* at 522 n.7, 555 A.2d at 492 n.7.

5. 251 Md. 28, 246 A.2d 548 (1968).

6. *Welsh*, 315 Md. at 522-23, 555 A.2d at 492. The Court of Appeals recognized this common-law rule in *Grantham*, 251 Md. at 40, 246 A.2d at 555 (holding that satisfaction of judgment entered against one tortfeasor also releases other joint tortfeasors).
against one tortfeasor prevented the injured person from pursuing claims against other concurrent tortfeasors.\textsuperscript{7} The purpose of this rule was to effectuate the common-law prohibition against double recovery.\textsuperscript{8} Yet Maryland courts have applied the rule without either inquiring into the nature of the prior recovery or discerning whether the recovery actually represented, or was intended to rep-

\textsuperscript{7} Two evolving areas of law have converged to create the current confusion over the effect of a release of one of two concurrent tortfeasors when the release expressly stipulates that only one of the two is to be released. Jointly liable concurrent or subsequent tortfeasors often are confused with “true” common-law joint tortfeasors because of careless legal analysis and statutory changes to the common law. At common law, the early joint tortfeasor cases encompassed only those in which the defendants acted in concert, and the act of one was considered to be the act of all. Prosser, \textit{Joint Torts and Several Liability}, 25 Calif. L. Rev. 413, 415 (1937). Because only one wrong occurred through a concerted action, only a single cause of action existed for which each defendant was jointly and severally liable for the totality of the damages. \textit{Id.} at 414. In cases in which the tortfeasors had committed acts that merged to cause a single injury, but had not acted in concert, the injured party could not join the tortfeasors. \textit{Id.} As courts began to consolidate all claims from one transaction into a single suit, “joint tortfeasor” came to apply to concurrent tortfeasors as well as to those who acted in concert. \textit{Id.} at 418-19.

At the same time, a separate principle developed that the plaintiff could receive only one compensation for his loss. \textit{Id.} at 421. Once his claim was satisfied, he was barred from taking further action on that claim. \textit{Id.} at 421-22. The purpose of the rule clearly was to prevent the unjust enrichment of an injured party, \textit{i.e.}, double recovery, and it applies equally to joint tortfeasors, concurrent tortfeasors who have not acted in concert, and even to payments made by parties who have no ties at all to the action. \textit{Id.} at 422. Courts, however, continued to look at the identity of the cause of action, that is, whether the cause of action was indivisible, such that satisfaction by one tortfeasor was tantamount to complete satisfaction as to the remaining tortfeasors. \textit{Id.}

A satisfaction occurs when an injured party accepts full compensation for his or her injury. \textit{Id.} at 423. A release, on the other hand, occurs when the injured party relinquishes the actual cause of action. \textit{Id.} At common law, the effect of a release of one of two tortfeasors who had acted in concert released the other because there was a single cause of action. \textit{Id.} By contrast, there is no reason to conclude that a release of one of two concurrent tortfeasors, who have not acted in concert but who are liable for the same injury, would release the other \textit{unless} the release was based on an actual satisfaction of the claim. \textit{Id.} Although the two are entirely distinct, the courts have confused not only satisfaction and release, but also concurrent tortfeasors and true common-law joint tortfeasors. \textit{Id.} As a result, a number of courts have held that the release of one of two concurrent tortfeasors releases the other—even though the release expressly stipulates that only one of the two is to be released—without reference to the amount of compensation paid to the injured party. \textit{Id.} at 423-24; see Morgan v. Cohen, 309 Md. 304, 310-12, 523 A.2d 1003, 1006-07 (1987).

In 1987, the Court of Appeals held that the satisfaction of a judgment against an original tortfeasor did not automatically preclude an action against subsequent tortfeasors. \textit{Id.} at 319, 523 A.2d at 1011. In its analysis, the court clearly distinguished the subsequent tortfeasor fact pattern from one that involves concurrent tortfeasors. \textit{Id.}, 523 A.2d at 1010.

\textsuperscript{8} Welsh, 315 Md. at 524, 555 A.2d at 493; see Lanasa v. Beggs, 159 Md. 311, 320, 151 A. 21, 25 (1930) (“It is neither just nor lawful that there should be more than one satisfaction for the same injury . . .”).
resent, a full and fair determination of damages for the injuries sustained.\textsuperscript{9}

Application of collateral estoppel without inquiry into the nature of the prior recovery contravenes the legislative directive evident in the Maryland Uniform Contribution Among Tortfeasors Act (MUCATA),\textsuperscript{10} and renders an inequitable result by denying plaintiffs the opportunity to obtain full satisfaction for their injuries. Welsh changes Maryland law by requiring a more analytical evaluation of the nature of a prior judgment before imbuing it with preclusive effects in a subsequent action against a joint tortfeasor.

\textit{1. The Case.}—On January 26, 1983, the Welsh family was involved in an automobile collision with James Voigt, II.\textsuperscript{11} Michael Welsh, the infant son of Kathleen and Patrick Welsh, was riding in a car seat manufactured by Gerber Products, Inc. (Gerber) at the time Voigt struck the Welsh vehicle.\textsuperscript{12} The infant was thrown forward and incurred severe and permanent head injuries when the seat failed to restrain him.\textsuperscript{13}

On February 9, 1984, the Welshes filed a negligence action against Voigt in the Montgomery County Circuit Court.\textsuperscript{14} The parties agreed to settle the litigation for an amount equal to the policy limits on Voigt’s automobile insurance coverage.\textsuperscript{15} The settlement, as announced and subsequently approved in open court, purported to accept the settlement figure without prejudice to the Welshes’ rights against other individuals or insurers.\textsuperscript{16} On July 25, 1985,\textsuperscript{17}

\begin{itemize}
\item[9.] See, e.g., infra note 58 and accompanying text.
\item[10.] Md. Ann. Code art. 50, §§ 16-24 (1986). Section 19 of the Maryland Uniform Contribution Among Tortfeasors Act (MUCATA) provides that “[a] release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides . . . .” Appellants argued that this language “contemplates situations when a judgment has been entered and satisfied by payment of consideration.” Brief for Appellant at 15, Welsh (No. 87-19).
\item[11.] Welsh, 315 Md. at 512, 555 A.2d at 487.
\item[12.] \textit{Id}.
\item[13.] \textit{Id}.
\item[14.] \textit{Id}.
\item[15.] \textit{Id}. The settlement took the form of a deferred payment plan in the nature of an annuity administered by Continental Casualty Company. \textit{Id}. at 513, 555 A.2d at 487.
\item[16.] \textit{Id} at 512, 555 A.2d at 487.
\item[17.] Appellees’ brief appears to contain a typographical error in one of the dates mentioned. Appellees report that the parties executed a written copy of their agreement on July 25, 1986. In a subsequent paragraph, they report that the parties filed a joint motion for approval of that agreement on July 26, 1985. Because the Welshes filed their action in federal district court on January 21, 1986, it would seem that the correct date on which the parties executed their written agreement is July 25, 1985. Brief for Appellee at 4-5, Welsh (No. 87-19); see also Welsh, 315 Md. at 513, 555 A.2d at 487.
\end{itemize}
the parties executed their agreement and the Welshes signed a release in favor of Voigt that once again reserved their rights against other tortfeasors, subject to the MUCATA's reduction provision.\textsuperscript{18}

To avoid the risk of litigation when the infant reached the age of majority, Voigt urged the entry of a judgment to terminate any liability that he might have as a result of the accident.\textsuperscript{19} On July 26, 1985, the parties asked the court to approve the settlement agreement and to enter a consent judgment.\textsuperscript{20} Additionally, the parties filed a "'Statement of Satisfaction of Judgment' " that the clerk recorded on the docket sheet with the entry "'PAID AND SATISFIED.' "\textsuperscript{21}

On January 21, 1986, the Welshes filed suit in the United States District Court for the District of Maryland against Gerber and others\textsuperscript{22} alleging that the defective car seat was the proximate cause of their son's injuries.\textsuperscript{23} The defendants moved for summary judgment, arguing that the state court judgment satisfied against Voigt precluded further action to recover damages for the same injury as a matter of law.\textsuperscript{24} The district court granted Gerber's summary judgment motion and the Welshes appealed.\textsuperscript{25}

The Court of Appeals for the Fourth Circuit correctly perceived that the law in Maryland was unsettled with regard to the operation of nonmutual, defensive collateral estoppel in joint tortfeasor cases.\textsuperscript{26} Accordingly, pursuant to Maryland's Uniform Certification of Questions of Law Act,\textsuperscript{27} the Fourth Circuit certified the following question to the Maryland Court of Appeals:

---

\textsuperscript{18} Id. The pro rata reduction provision states:
A release by the injured person of one joint tort-feasor does not relieve him from liability to make contribution to another joint tort-feasor unless the release is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tort-feasor, of the injured person's damages recoverable against all other tort-feasors.

\textsuperscript{19} Welsh, 315 Md. at 513, 555 A.2d at 487.

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id. The other defendants in the suit were Century Products, Inc. and Sears, Roebuck & Company. Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id. at 514, 555 A.2d at 487.

\textsuperscript{25} Id.

\textsuperscript{26} Welsh v. Gerber Prods., Inc., 839 F.2d 1035, 1038 (4th Cir. 1988). For an explanation of the doctrine of mutuality, see infra note 35. For the distinction between offensive and defensive collateral estoppel, see infra note 37.

\textsuperscript{27} Md. CTS. & JUD. PROC. CODE ANN. § 12-603(a) (1989). The statute reads in part: "'(a) Form.—A certification order shall set forth: (1) The question of law to be answered;
Under Maryland law does the entry of a satisfied judgment order in *Welsh v. Voigt* in the Circuit Court for Montgomery County, Maryland, preclude as a matter of law, any further claims by the Welshes against Gerber et al. for injuries suffered by Michael Welsh in the January 23, 1983, automobile accident?\(^{28}\)

The Maryland Court of Appeals' response to the certified question was a well-reasoned and enlightened "no."\(^ {29}\)

2. Legal Background.—Collateral estoppel, also known as issue preclusion, is a device that courts use to limit litigation and to help secure finality of judgments.\(^ {30}\) When applied properly, the doctrine will preclude the relitigation of facts or issues whose determination was essential to the judgment in a prior action.\(^ {31}\) Issue preclusion thus strikes a balance between assuring claimants a day in court, and limiting them to a single, full and fair opportunity to litigate.\(^ {32}\) Judge Traynor clearly delineated the key to the proper application of collateral estoppel in *Bernhard v. Bank of America National Trust & Savings Association.*\(^ {33}\) The three criteria identified in this 1942 landmark decision were as follows:

"[1.] Was the issue decided in the prior adjudication identical with the one presented in the action in question?
[2.] Was there a final judgment on the merits?
[3.] Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"\(^ {34}\) Although most jurisdictions found *Bernhard* persuasive, many were reluctant to reject completely the mutuality requirement as Traynor did in his third criterion.\(^ {35}\) The Maryland Court of Appeals did not abandon

---

\(^ {28}\) See *Welsh*, 839 F.2d at 1039.

\(^ {29}\) *Welsh*, 312 Md. at 515, 555 A.2d at 488.


\(^ {31}\) *Restatement (Second) of Judgments* § 27 (1982). "Issue Preclusion—General Rule[:] When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Id.*


\(^ {33}\) 19 Cal. 2d 807, 122 P.2d 892 (1942).

\(^ {34}\) *Id.* at 813, 122 P.2d at 895.

the mutuality requirement until 1968 in *Pat Perusse Realty Co. v. Lingo*. In that case, the court allowed the defendant to use non-mutual, defensive collateral estoppel against the plaintiff realty company, which had lost a prior case against the defendant's husband on the same cause of action.

In the case of consent judgments, the parties do not actually litigate the issues underlying the claim. Application of the collateral estoppel doctrine to consent judgments, then, may prevent litigants from ever receiving an adjudication on the merits of their claims and from acquiring an adequate recovery. For these reasons, the *Restatement (Second) of Judgments* clearly states:

> In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, [collateral estoppel] does not apply with respect to any issue in a subsequent action. The judgment may be conclusive, however, with respect to one or more issues, if the parties have entered an agreement manifesting such an intention.

The *Restatement* position echoes that of a number of eminent legal scholars, and is promulgated by the Supreme Court. (1970). The judge-made doctrine of mutuality of estoppel requires that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action." *Blonder-Tongue*, 402 U.S. at 320.

36. 249 Md. 33, 238 A.2d 100 (1968). One year earlier, the Federal District Court for the District of Maryland, stating what it believed would be the Maryland Court of Appeals' decision, held "that as long as the party against whom the judgment was sought to be used had a full and fair opportunity to be heard on the issue there would be no constitutional impediment to the application of the doctrine of collateral estoppel where there was no mutuality." *State v. Capital Airlines, Inc.*, 267 F. Supp. 298, 304 (D. Md. 1967). In 1971, the Supreme Court abandoned the mutuality requirement in *Blonder-Tongue*, 402 U.S. at 350.

37. The Supreme Court described the difference between offensive and defensive use of collateral estoppel as follows:

> Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.


38. *Pat Perusse*, 249 Md. at 34, 238 A.2d at 101.


40. *Id.*

Torn between the principles elucidated by Judge Traynor and "[t]he old and still generally prevailing rule . . . that a judgment by consent is as sound a base on which to ground collateral estoppel as a judgment after an adversary trial," Maryland courts have muddied the application of the doctrine. For example, the court in *Travelers Insurance Co. v. Godsey* accurately stated that collateral estoppel should apply only to issues actually litigated and determined. Nevertheless, the court announced, in a conclusory manner, that a consent judgment is a determination on the merits to which collateral estoppel applies.

The confusion evident in the case law results from the tension between the MUCATA and the vestiges of the common-law rule, as expressed in *Cox v. Maryland Electric Railways,* that a release of one tortfeasor releases all other tortfeasors. This rule operated regardless of the parties' intentions because it was believed that there was only one cause of action for a joint tort and therefore only one satisfaction.

The Maryland legislature abrogated this rule when it enacted the MUCATA in 1941. The MUCATA sanctions settlement with one or more tortfeasors until a claimant has received full satisfaction for his or her injuries. The statute protects tortfeasors from

---

42. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979) (there is a difference in position between a party who has never litigated an issue, and one who has fully litigated and lost); Blonder-Tongue Laboratories v. University of Illinois Found., 402 U.S. 313, 329 (1971) ("the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard"); Lawlor v. National Screen Serv., 349 U.S. 322, 326 (1955) ("Under the doctrine of collateral estoppel . . . a judgment precludes litigation of issues actually litigated.").

45. Id.
46. 126 Md. 300, 95 A. 43 (1915).
47. Id. at 305, 95 A. at 44.
49. Md. Ann. Code art. 50, §§ 16-24 (1986). All United States jurisdictions have abrogated the rule that a release of one tortfeasor releases all other tortfeasors, either by statute or by case law. See Note, supra note 48, at 497.
50. Md. Ann. Code art. 50, § 18 (1986); see Grantham v. Board of County Comm'rs, 251 Md. 28, 246 A.2d 548 (1968). Section 16 of the MUCATA defines "joint tortfeasors" and "injured person" as follows:
   (a) "Joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. (b) "Injured person" means any person having a claim in tort for injury to person or property.
overcompensating a claimant who has released one or more tortfeasors by reducing the injured person’s claim, either by the amount paid for a release or by any amount that the release states the claim will be reduced.\(^5\) If an injured person enters settlement agreements with individual tortfeasors, and upon receipt of the agreed settlement releases those tortfeasors, the injured party may pursue all other responsible parties until he or she has received full satisfaction, which represents damages for the totality of harm suffered.\(^5\)

If the facts unique to a particular controversy, however, dictate that the settlement be given a degree of finality available only by judicial decree,\(^5\) a claimant could be precluded from ever receiving full satisfaction. A nonsettling tortfeasor could invoke the doctrine of nonmutual, defensive collateral estoppel to bar the plaintiff from further recovery.\(^5\) Maryland courts merely supplanted the old common-law rule regarding releases with an equivalent rule regarding judgments. Thus, while the MUCATA allows an injured person to secure judgments against multiple tortfeasors,\(^5\) the Maryland courts have allowed only one satisfied judgment.\(^5\) In *Grantham v. Board of County Commissioners*,\(^5\) the court maintained this posture even when the parties clearly intended that their stipulated judgment against the defendant doctor not bar further claims by the in-

---


A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides; but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

\(\text{Id.}\)

52. \(\text{Id.}\)

53. For example, in *Welch*, Voigt insisted on the entry of a judgment to protect himself from the threat of further litigation when the Welshes’ infant son reached the age of majority. See supra note 19 and accompanying text.

54. See MPC, Inc. v. Kenny, 279 Md. 29, 34, 367 A.2d 486, 490 (1977) (although prior case terminated upon a consent judgment, appellants would be bound by determinations implicit in the judgment against them); Bell v. Allstate Ins. Co., 265 Md. 727, 729, 291 A.2d 478, 479 (1972) (there may be only one satisfaction of a single harm, no matter how many tortfeasors involved); Travelers Ins. Co. v. Godsey, 260 Md. 669, 676, 273 A.2d 431, 435 (1971) (“the old and still generally prevailing rule is that a judgment by consent is as sound a base on which to ground collateral estoppel as a judgment after an adversary trial”); *Grantham*, 251 Md. at 40, 246 A.2d at 555 (further action is barred when a judgment against one tortfeasor is satisfied).


56. See *Grantham v. Board of County Comm’rs*, 251 Md. 28, 40, 246 A.2d 548, 555 (1968).

57. 251 Md. 28, 246 A.2d 548 (1968).
jured party against another tortfeasor.\textsuperscript{58}

To overcome the harsh results of the doctrine as it routinely was misapplied, the Maryland courts sought piecemeal exceptions to the rule. In \textit{Treischman v. Eaton},\textsuperscript{59} the Baltimore City Superior Court granted the defendant's motion for summary judgment on the ground that the plaintiff had earlier entered into a consent judgment with the original tortfeasor, thereby discharging claims against subsequent tortfeasors.\textsuperscript{60} The Court of Appeals reversed, holding that the consent judgment—to be paid in installments over a ten year period—had not been fully satisfied.\textsuperscript{61}

More recently, in \textit{Hovermill v. Cohen},\textsuperscript{62} the Court of Appeals held that the complete satisfaction of a consent judgment entered against an original tortfeasor would not bar further claims against a subsequent tortfeasor.\textsuperscript{63} The \textit{Hovermill} court, relying on principles of contract interpretation to determine the parties' intent as expressed in the release, overruled \textit{Cox} and \textit{Lanasa v. Beggs} and found unpersuasive those portions of \textit{Grantham} that relied on \textit{Cox} and \textit{Lanasa}.\textsuperscript{64} The Court of Special Appeals noted another exception in \textit{Hartlove v. Bedco Mobility} in which it held that a judgment of the Health Claims Arbitration Panel did not preclude further claims against joint tortfeasors.\textsuperscript{65}

\section{Analysis.}

In \textit{Welsh}, the Court of Appeals held that a consent judgment does not necessarily embody an actual adjudication of the damages issue; courts should determine the parties' intentions and whether the consent judgment represents an actual adjudication of a particular issue.\textsuperscript{66} The court concluded that consent judgments should not automatically bar the subsequent litigation of issues be-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} \textit{Id.} at 31, 246 A.2d at 549.
\item \textsuperscript{59} 224 Md. 111, 166 A.2d 892 (1961).
\item \textsuperscript{60} \textit{Id.} at 113, 166 A.2d at 893.
\item \textsuperscript{61} \textit{Id.} at 119, 166 A.2d at 896. \textit{Treischman} also is notable in that it extended the common-law definition of joint tortfeasor to include concurrent and subsequent tortfeasors. \textit{Id.} at 115, 166 A.2d at 894.
\item \textsuperscript{62} This case was consolidated on appeal with \textit{Morgan v. Cohen}, 309 Md. 304, 523 A.2d 1003 (1987).
\item \textsuperscript{63} \textit{Id.} at 306, 523 A.2d at 1004.
\item \textsuperscript{64} 126 Md. 300, 95 A. 43 (1915); see supra text accompanying note 46.
\item \textsuperscript{65} See supra note 8. The \textit{Lanasa} court extended \textit{Cox} to apply unity of action to concurrent, as well as joint, tortfeasors. 159 Md. 311, 322-23, 151 A.2d 21, 26-27 (1930).
\item \textsuperscript{66} 251 Md. 28, 246 A.2d 548 (1968); see supra note 6.
\item \textsuperscript{67} \textit{Morgan v. Cohen}, 309 Md. 304, 319, 523 A.2d 1003, 1011 (1987).
\item \textsuperscript{68} 72 Md. App. 208, 527 A.2d 1342 (1987).
\item \textsuperscript{69} \textit{Id.} at 213, 527 A.2d at 1344.
\item \textsuperscript{70} 315 Md. at 515-16, 555 A.2d at 488.
\end{itemize}
\end{footnotesize}
cause "there are many situations where application of the doctrine of nonmutual collateral estoppel would be manifestly unfair." In reaching this conclusion, the court rejected Gerber's argument that a consent judgment ought to have the same binding effect as a general verdict rendered by a jury. Specifically, the court noted that Gerber's argument did not square with the fact that at the time the court entered the consent judgment, the Welshes' counsel stated "'we are accepting the policy limits without prejudice to any rights we have against other individuals, or insurance carriers.'" The court based its decision on the belief that it was "unrealistic" to hold that a consent judgment necessarily embodies actual litigation of the issue of damages. The court was persuaded to adopt this "modern view" by its perception of a similar trend in other jurisdictions and the consensus established by prominent legal scholars and the American Law Institute. In addition, the court sought to adopt a position that would facilitate the parties' ability to settle their disputes in accord with the strong public policy which

71. Id. at 517, 555 A.2d at 489.
72. Brief for Appellee at 9-12, Welsh (No. 87-19). Appellee's position relies chiefly on MPC, Inc. v. Kenny, 279 Md. 29, 34, 367 A.2d 486, 490 (1977) (although prior case terminated upon a consent judgment, appellants would be bound by determinations implicit in judgments against them), Missler v. Anne Arundel County, 271 Md. 70, 314 A.2d 451 (1974) (entry of a final judgment in prior suit precluded considerations of a related issue in the instant case), overruled by Frontier Van Lines v. Maryland Bank & Trust Co., 274 Md. 621, 336 A.2d 778 (1975), Kirsner v. Fleischmann, 261 Md. 164, 170, 274 A.2d 339, 343 (1971) (fact that client entered consent decrees for tax deficiencies and did so pursuant to agreement with his attorneys added element of judicial conclusiveness to his contractual act to accept less than specific performance from his attorneys), cert. denied, 404 U.S. 856 (1971), and Travelers Ins. Co. v. Godsey, 260 Md. 669, 676, 273 A.2d 431, 435 (1971) ("The old and still generally prevailing rule is that a judgment by consent is as sound a base on which to ground collateral estoppel as a judgment after an adversary trial.").
73. Welsh, 315 Md. at 525, 555 A.2d at 493.
74. Id. at 522, 555 A.2d at 492.
75. See, e.g., Balbirer v. Austin, 790 F.2d 1524, 1528 (11th Cir. 1986) (consent judgment cannot constitute collateral estoppel unless the party pleading collateral estoppel can prove that the parties intended the consent judgment to operate as a final adjudication of a particular issue); Avondale Shipyards v. Insured Lloyd's, 786 F.2d 1265, 1269 (5th Cir. 1986) (prior district court order granting partial summary judgment was not a final judgment for the purposes of collateral estoppel); Southern Pac. Communications v. American Tel. & Tel. Co., 740 F.2d 1011, 1020 (D.C. Cir. 1984) (court did not abuse discretion in refusing to grant collateral estoppel effect when judgment specifically stated that it would not have binding effect); Fruehauf Trailer Co. v. Gilmore, 167 F.2d 324, 330 (10th Cir. 1948) (consent judgment was not based on findings of fact or any determination on the merits and thus was not conclusive in determining negligence).
76. See generally Restatement (Second) of Judgments § 29 (1982); J. Moore, W. Taggart & J. Wicker, supra note 41; James, supra note 30.
favors settlements. The Welsh court explicitly overruled Grantham v. Board of County Commissioners when it adopted the "intent test." In Grantham, the court erred when it refused to discern the parties' intent before it gave preclusive effect to the consent judgment. The Welsh court, however, admirably distinguished a judicial determination of damages from a mere compromise between the parties that takes the form of a judgment.

4. Conclusion.—In Welsh, the Court of Appeals squarely confronted the policy considerations that underlie the doctrine of collateral estoppel. The court examined the applicability of the doctrine in light of the agreement between the Welshes and Voigt and concluded that the parties' unambiguous intent was that the Welshes should not be bound by the consent judgment. Further, the court held that to bind the parties contrary to their intentions would be manifestly unfair. The issues that the parties agreed upon in the consent judgment were not actually litigated; therefore, the doctrine of collateral estoppel should not, and did not, apply.

Before a Maryland court applies the doctrine in the future, it must analyze the basis of a consent judgment to determine what issues, if any, actually were litigated, and whether the parties intended any part of the judgment to bar future litigation. The limitation on the doctrine's applicability will facilitate the settlement of claims in joint tortfeasor situations, and will shield plaintiffs from an unduly harsh and frequently inequitable doctrine that has been applied indiscriminately for far too long.

B. Modernization of the State's Interpleader Practice

In Farmers & Mechanics National Bank v. Walser, the Court of Appeals addressed for the first time the impact of the State's inter-
pleader rule on the four traditional interpleader requirements. The court held that an interpleader action can proceed even if one of the defendants alleges that the stakeholder has incurred a liability to that defendant independent of the interpleader claim. The decision expressly abolishes the fourth traditional prerequisite for interpleader, that is, that a stakeholder cannot be independently liable to any of the claimants. In so holding, the court overruled Steffey, Inc. v. American Bank Stationery Co. to the extent that the 1931 decision required stakeholders to be free of independent liability to a claimant. The court, addressing two other interpleader issues, limited an interpleader court's injunction power to claims that involve the interpleaded fund, and also found adversity sufficient to support an interpleader action when defendants' claims against a stakeholder are "inextricably interrelated."

The Court of Appeals' decision in Farmers & Mechanics, along with the court's adoption of rule 2-221, modernizes the State's law on interpleader. First, the court has significantly expanded the availability of interpleader by abandoning the historical limitations on an interpleader action. Second, the decision brings the State in line with federal interpleader practice and, by relying heavily on federal law in its reasoning, the court makes clear that it will observe and adhere to federal interpleader decisions. Finally, the court gives guidance to lower courts that face the additional complexities brought on by the expansion of interpleader actions.

85. Id. at 381, 558 A.2d at 1215. For a list of the four traditional interpleader requirements, see infra text accompanying note 127.
86. Farmers & Mechanics, 316 Md. at 382, 558 A.2d at 1216.
87. Id. For a history of the development of the no-independent-liability requirement, see Hazard & Moskovitz, An Historical Critical Analysis [sic] of Interpleader, 52 CALIF. L. REV. 706, 737-44, 750 (1964) (the requirement "was a response to a now obsolete procedural difficulty . . . ."). Other commentators also have criticized this requirement as illogical and unsupported by the common law. See Chafee, Modernizing Interpleader, 30 YALE L.J. 814, 843 (1921) (suggesting that "[j]ust because interpleader would sometimes be unfair to the claimant who alleges the independent liability, this does not make it always unfair, and when it is not so, relief should be given . . . ."); Rogers, Historical Origins of Interpleader, 51 YALE L.J. 924, 925 (1942) (the requirement of privity among all parties and no independent liability of the defendant were "grounded in historical error").
88. 161 Md. 124, 127-28, 155 A. 306, 307 (1931) (the Steffey court adopted Pomeroy's statement of the four requirements needed to maintain an interpleader action); see infra text accompanying notes 146-148 for a discussion of Steffey.
89. Farmers & Mechanics, 316 Md. at 382, 558 A.2d at 1216.
90. Id. at 384, 558 A.2d at 1216-17; see also infra notes 161-164 and accompanying text.
91. Id. at 388, 558 A.2d at 1218; see also infra notes 165-167 and accompanying text.
92. MD. R. 2-221. For the text of the Rule, see infra note 152.
1. **The Case.**—In 1981, Billy and Sally Walser opened a joint agency trust at the Farmers & Mechanics National Bank (the Bank).\(^93\) The agency agreement provided that the Bank would hold any principal collected in the account subject to the written instructions of both Billy and Sally, and that either the Bank or both Billy and Sally could terminate the agreement upon thirty days written notice.\(^94\)

In 1983, Billy directed the Bank to deposit the account's assets into an individual agency account in his name alone.\(^95\) The Bank complied with his request without the required authorization by Sally or the required thirty-day notice.\(^96\)

Billy died in 1985 and Sally, along with Billy's three children by a previous marriage, was appointed personal representative of Billy Walser's estate (the estate).\(^97\) Acting in their capacity as personal representatives, Sally and Billy's three children directed the Bank to deposit the proceeds from Billy's individual account into the estate's account.\(^98\) The Bank complied with this request.\(^99\)

In 1987, Sally's personal attorney sent a letter to the Bank regarding the original joint account.\(^100\) The letter advised the Bank that its transfer of the joint funds to Billy's individual account was done without Sally's required authorization.\(^101\) The letter further directed the Bank to transfer all of those funds into Sally's individual account.\(^102\)

The Bank refused to honor Sally's request. Instead, the Bank brought an interpleader action in the Frederick County Circuit Court,\(^103\) naming Sally and the estate as defendants in the complaint.\(^104\) Sally initially filed an answer admitting that interpleader was appropriate.\(^105\) Later, she filed various motions\(^106\) alleging that

\(^{93}\) 316 Md. at 368-69, 558 A.2d at 1209.
\(^{94}\) Id. at 369, 558 A.2d at 1209.
\(^{95}\) Id. On the date of Billy's request, the joint account contained $122,723.18 in cash and a Federal National Mortgage Association note with a book value of $99,656.25. Id.
\(^{96}\) Id.
\(^{97}\) Id. at 369-70, 558 A.2d at 1209.
\(^{98}\) Id. at 370, 558 A.2d at 1209.
\(^{99}\) Id., 558 A.2d at 1210. On the date of Billy's death, the individual account had a cash value of $385,874.96. Id., 558 A.2d at 1209-10.
\(^{100}\) Id., 558 A.2d at 1210.
\(^{101}\) Id.
\(^{102}\) Id.
\(^{103}\) Id.
\(^{104}\) Id.
\(^{105}\) Id. at 371, 558 A.2d at 1210.
\(^{106}\) Id. Sally filed an amended answer to the interpleader complaint, an answer to
interpleader was inappropriate because her claim against the Bank was entirely independent of and unrelated to the estate’s claim.\textsuperscript{107} She argued that the estate claimed funds properly in its own account, whereas she claimed funds from the original joint account.\textsuperscript{108} Based on her allegation of independent liability, the trial court granted Sally’s motion to dismiss the interpleader action.\textsuperscript{109} The Bank appealed to the Court of Special Appeals. The Court of Appeals granted certiorari prior to a decision by that court.\textsuperscript{110}

The Court of Appeals held that the trial court’s dismissal of the interpleader action based upon Sally’s assertion of independent liability was erroneous and vacated that judgment.\textsuperscript{111} The court further held that Sally’s claim and that of the estate were “inextricably interrelated” and therefore provided the necessary adversity between Sally and the estate.\textsuperscript{112} The court then remanded the case to the circuit court with instructions to reinstate the complaint for interpleader and to consolidate Sally’s claim with the interpleader proceeding.\textsuperscript{113}

2. **Legal Background.**—The essence of the interpleader action is that a person confronted with competing claims over property or an obligation “ought not to be liable twice.”\textsuperscript{114} It is designed for situations in which one stakeholder cannot satisfy one party’s demands without the risk of a claim from another party—thus exposing the stakeholder to the risk of double payment.\textsuperscript{115} Interpleader offers the stakeholder several forms of protection: (1) the stakeholder is relieved from the risk of determining which claimant has the better

\begin{footnotesize}
\begin{enumerate}
  \item Id.
  \item Id.
  \item Id.
  \item Id. at 372, 558 A.2d at 1211.
  \item Id. at 382, 388, 558 A.2d at 1216, 1219.
  \item Id. at 388, 558 A.2d at 1219; see infra text accompanying note 127.
  \item Farmers & Mechanics, 312 Md. at 338, 558 A.2d at 1219. The Court of Appeals denied the Bank’s motion for summary judgment in which the Bank asked to be dismissed from any liability other than payment of the disputed funds. Id.
  \item Hazard & Moskovitz, supra note 87, at 706. Modern understanding and practice of interpleader owes much to Professor Zechariah Chafee, Jr., who wrote a seminal series of articles on the subject. See Chafee, supra note 87; Chafee, Interstate Interpleader, 33 Yale L.J. 685 (1924); Chafee, Interpleader in the United States Courts, 41 Yale L.J. 1134 (1932); Chafee, Interpleader in the United States Courts II, 42 Yale L.J. 41 (1932); Chafee, Federal Interpleader Since the Act of 1936, 49 Yale L.J. 377 (1940); Chafee, Broadening the Second Stage of Interpleader, 56 Harv. L. Rev. 541 (1943).
  \item P. Niemeyer & L. Richards, Maryland Rules Commentary 106 (1984).
\end{enumerate}
\end{footnotesize}
claim, (2) when the stakeholder has no interest in the property, he or she need not be involved at all in the controversy between the claimants, and (3) even if the stakeholder claims an interest in the property, he or she still is spared the trouble of multiple suits and "the possibility of multiple liability that could result from adverse determinations in different courts."  

In interpleader actions, the stakeholder generally puts the disputed money into a "pot" and demands that all persons making a claim to the "pot" file suit against one another for the right to the money. An interpleader action consists of two phases. In the first phase, the stakeholder files a complaint seeking a mandatory injunction, which requires the claimants to come into court to decide who gets the property. The court then issues an order of interpleader, which requires the claimants to interplead among themselves and releases the stakeholder from any further responsibility for the fund. The second phase consists of litigation between the claimants for the property. One of the claimants is redesignated as the plaintiff and the other(s) as defendant(s). The litigation then proceeds in a normal fashion. Interpleader originated as a fourteenth-century remedy that a defendant in a detinue action used when he did not know to whom he should deliver the chattel in his possession. Modern interpleader, however, is derived from chancery practices of the eighteenth and nineteenth centuries. The earliest reported cases demonstrated some flexibility in the application of interpleader but,

---

116. 7 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1702, at 494-95 (2d ed. 1986) [hereinafter FEDERAL PRACTICE].
118. Id. Historically, the first phase arose from the equity courts, while the second phase arose from the law courts. Id.
119. Id.
120. Id. In a "pure" interpleader action, the court may include an injunction that directs the claimants not to sue the stakeholder in any independent action. Id.
121. Id. at 108.
122. Id. at 107.
123. Id. at 108.
124. Hazard & Moskovitz, supra note 87, at 709.
in the nineteenth century, interpleader evolved into a remedy that demanded claimants meet four essential requirements.126

Professor Pomeroy summarized these essential requirements as follows:

1. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; 2. All their adverse titles or claims must be dependent, or be derived from a common source; 3. The person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter; 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder.127

Literal adherence to these requirements limited the use of interpleader to a narrow range of situations.128 As a result, courts and legislatures have employed several methods to expand the permissible application of the action. Some courts chose simply to honor these requirements in name only.129 Equity courts stretched the requirements, for example, by allowing a bill in the “nature” of interpleader for cases in which the stakeholder denied liability to one of the claimants.130

Congress enacted the Federal Interpleader Act (the Act) in 1936131 to further expand the use of the interpleader action.132 The

126. Id. at 442.
127. 4 J. POMEROY, EQUITY JURISPRUDENCE § 1322, at 906 (5th ed. 1941).
128. FEDERAL PRACTICE, supra note 116, § 1701, at 485. Commentators have heavily criticized all four requirements. See, e.g., Hazard & Moskovitz, supra note 87, at 749-50.
129. Id.
130. Id.

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or
Act expressly eliminated the first and second requirements, that is, that the parties claim the same chose or duty and that the conflicting claims arise from the same source.\textsuperscript{135} By allowing an action "in the nature of interpleader," Congress impliedly eliminated the third requirement as well.\textsuperscript{134} In 1938, Congress promulgated rule 22 of the Federal Rules of Civil Procedure,\textsuperscript{135} which expressly eliminated the first three historic limitations on interpleader.\textsuperscript{136}

The decline in the fourth requirement's validity has not been as complete as that of the first three. The federal cases are not in total agreement on this issue.\textsuperscript{137} In the early cases decided under the 1936 Interpleader Act, courts continued to apply the no-independent-liability requirement.\textsuperscript{138} Passage of federal rule 22 weakened

\begin{itemize}
  \item the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.
  \item Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.
\end{itemize}


\textsuperscript{132} Congress first passed an interpleader statute in 1917, which subsequently was modified in 1925 and 1926. This legislation, however, did not modify the historical interpleader remedy; the legislation merely expanded federal equity jurisdiction to interpleader actions brought by certain organizations. See Federal Practice, supra note 116, § 1701, at 486-88.

\textsuperscript{133} 28 U.S.C. § 1335(b) (1982).

\textsuperscript{134} Id. § 1335(a).

\textsuperscript{135} Fed. R. Civ. P. 22. The text of the Rule is as follows:

\begin{enumerate}
  \item Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.
  \item The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.
\end{enumerate}

\textit{Id.}

\textsuperscript{136} See Federal Practice, supra note 116, § 1701, at 492.

\textsuperscript{137} See id., § 1706, at 518.

\textsuperscript{138} Id. at 519; see Poland v. Atlantis Credit Corp., 179 F. Supp. 863, 867 (S.D.N.Y. 1960) (issue of independent liability determines whether plaintiff may maintain an interpleader action); American-Hawaiian S.S. Co. v. Bowring & Co., 150 F. Supp. 449, 454 (S.D.N.Y. 1957) (burden is on party seeking the interpleader to prove that he has not
the viability of this traditional prerequisite.\textsuperscript{139} The Rule prevents a
defendant from objecting to an interpleader complaint on the
ground that "the plaintiff avers that the plaintiff is not liable in
whole or in part to any or all of the claimants."\textsuperscript{140} Federal courts
have interpreted the Rule's language as fatal to the no-independent-
liability restriction.\textsuperscript{141} Indeed, the recent trend of federal courts is
to reject this limitation entirely.\textsuperscript{142} Professors Wright, Miller, and
Kane support this trend, stating that "there is no reason today . . .
for continuing to honor a limitation . . . that has no claim to validity
other than that it is old."\textsuperscript{143}

Some states that have enacted interpleader rules similar to fed-
eral rule 22 also have rejected the fourth requirement.\textsuperscript{144} In line
with the federal courts' reasoning, these state courts have found that
modern interpleader practice has removed the historical rationale
for restricting the use of interpleader. As an Alabama court ex-
plained: "Considering the liberality of the new rules of civil proce-
dure [providing joinder of parties and actions], it appears counter
productive [sic] to their purpose to deny interpleader when there is
a fund to which there are or may be adverse claimants, so long as
the court has jurisdiction of the parties."\textsuperscript{145}

Maryland adopted the four traditional requirements for main-
taining an interpleader action in Steffey, Inc. v. American Bank Station-

\textsuperscript{139} FED. R. Civ. P. 22. For the text of rule 22, see \textit{supra} note 135; \textit{Federal Practice, supra} note 116, § 1706, at 521.

\textsuperscript{140} FED. R. Civ. P. 22(1).

\textsuperscript{141} \textit{See}, e.g., Olivier v. Humble Oil & Ref. Co., 225 F. Supp. 536, 539 (E.D. La. 1963); Girard Trust Co. v. Vance, 5 F.R.D. 109, 113 (E.D. Pa. 1946) (dictum); \textit{see also Federal Practice, supra} note 116, § 1706, at 521.

\textsuperscript{142} \textit{See}, e.g., Libby, McNeill, and Libby Corp. v. City Nat'l Bank, 592 F.2d 504, 507 (9th Cir. 1978); Dakota Livestock Co. v. Keim, 552 F.2d 1302, 1307 (8th Cir. 1977); \textit{see Federal Practice, supra} note 116, § 1706, at 520.

\textsuperscript{143} \textit{Federal Practice, supra} note 116, § 1706, at 521-22.

\textsuperscript{144} Farmers & Mechanics, 316 Md. at 378, 558 A.2d at 1213; \textit{see}, e.g., Alabama Farm Bureau Mut. Casualty Ins. Co. v. Smith, 406 So. 2d 913, 915 (Ala. Civ. App.) (allowing
interpleader suit to proceed even though defendant had alleged independent liability), \textit{cert. denied}, 406 So. 2d 916 (Ala. 1981); Dick v. First Nat'l Bank, 334 So. 2d 922, 926 (Ala.
Civ. App. 1976) (noting that modern interpleader practice abolished the four classic
interpleader requirements); First Nat'l Bank v. Middleton, 480 So. 2d 1153, 1155-57
(Miss. 1985) (citing federal law, the court held that the State's interpleader rule elimi-
nated the four classic requirements); Jersey Ins. Co. v. Altieri, 5 N.J. Super. 577, 581, 68
A.2d 852, 854 (Ch. Div. 1949) (holding that the State's modernized interpleader prac-
tice permitted an interpleader action despite an allegation of independent liability).

\textsuperscript{145} \textit{Dick}, 334 So. 2d at 926.
In Steffey, a seller brought an interpleader action because he was uncertain as to who should get the commission from the sale of his real estate. The court, citing Pomeroy's four essential elements of interpleader, dismissed the action because the plaintiff seller was not a "disinterested party." The Court of Appeals' adoption of rules BU70 and BU71 in 1961 signaled the next significant change in the State's interpleader law. These rules, modeled in part after the language of federal rule 22, substantially undermined the validity of the four classic elements of common-law interpleader. In 1984, the Court of Appeals revised the Maryland Rules and created rule 2-221, which

---

146. 161 Md. 124, 155 A. 306 (1931), overruled by Farmers & Mechanics, 316 Md. at 382, 558 A.2d at 1216. The trial court cited Steffey as requiring the dismissal of the interpleader action. Farmers & Mechanics, 316 Md. at 371-72, 558 A.2d at 1210.

147. 161 Md. at 127, 155 A. at 307.

148. Id. at 127-28, 131, 155 A. at 307, 308.

149. Md. R. BU70-BU71 (rescinded by the Court of Appeals in 1983). The text of the former rules was as follows:

Rule BU70. When Remedy Available.

a. Conditions.

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical, but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants.

b. Counterclaim or Cross-Claim.

A defendant exposed to similar liability may obtain such interpleader by way of counterclaim or cross-claim pursuant to Rule 314 (Counterclaim and Cross-Claim).

c. Supplemental to Joinder of Parties Under Rule 313.

This Subtitle supplements and does not limit the joinder of parties permitted in Rule 313 (Joinder of Parties and Claims — Permissive).

Rule BU71. Bill.

a. Allegations — Payment Into Court.

A bill of interpleader shall state the specific claims of the defendants with respect to the property in controversy and the plaintiff shall pay or tender into court such property or so much thereof as shall then be due.

b. Prayers for Relief.

In addition to the prayer that the defendants shall be required to interplead and settle their claims between themselves, the plaintiff may pray the passage of an injunction to restrain the defendants from bringing or prosecuting any action against the plaintiff with respect to the same subject matter.

c. Verification — Oath Against Collusion.

The bill shall be verified by the plaintiff and shall include an oath that there is no collusion between the plaintiff and any defendant.

Id.

150. Farmers & Mechanics, 316 Md. at 379, 558 A.2d at 1214.

151. See id.
although newly written, was a product of, *inter alia*, Rule BU70 and, apparently BU71.\textsuperscript{152} The commentators expressly noted the tight nexus between the new Rule, the former BU rules, and federal rule

---

\textsuperscript{152} Md. R. 2-221. The text of the Rule is as follows:

(a) Interpleader Action.—An action for interpleader or in the nature of interpleader may be brought against two or more adverse claimants who claim or may claim to be entitled to property. The claims of the several defendants or the title on which their claims depend need not have a common origin or be identical but may be adverse to and independent of each other. The plaintiff may deny liability in whole or in part to any or all of the defendants. A defendant may likewise obtain interpleader by way of counterclaim or cross-claim. The provisions of this Rule supplement and do not in any way limit the joinder of parties permitted by Rule 2-212. The complaint for interpleader shall specify the nature and value of the property and may be accompanied by payment or tender into court of the property. The complaint may request, and the court may grant prior to entry of the order of interpleader pursuant to section (b) of this Rule, appropriate ancillary relief, including ex parte or preliminary injunctive relief.

(b) Order of Interpleader.—After the defendants have had an opportunity to answer the complaint and oppose the request for interpleader, the court shall promptly schedule a hearing to determine the appropriate order to be entered. The order may:

(1) dismiss the interpleader action;

(2) require the defendants to interplead as to the property within a time specified, designating one or more of them as plaintiffs and one or more of them as defendants;

(3) direct the original plaintiff (the party bringing the interpleader action) to deposit the property or the value of the property into court to abide the judgment of the court or to file a bond with such surety as the court deems proper, conditioned upon compliance by the plaintiff with the future order or judgment of the court with respect to the property;

(4) enjoin the original defendants from bringing or prosecuting any other action affecting the property;

(5) discharge the original plaintiff from further liability with respect to the property upon deposit of the property with the court;

(6) award the original plaintiff costs and reasonable attorney's fees from the property if that plaintiff brought the action in good faith as an impartial stakeholder;

(7) direct the distribution of any part of the property not in dispute.

(c) Jury Trial.—A demand for jury trial as to those issues that are triable of right by a jury shall be filed not later than 15 days after the entry of the order of interpleader or such other time as the court may specify in the order of interpleader.

(d) Subsequent Procedure.—Within the time specified in the order of interpleader, the designated plaintiff shall file a complaint setting forth the claim of that plaintiff and shall serve each designated defendant pursuant to Rule 1-321. The action thereafter shall proceed as any other action.

*Id.* Parts (c) and (d), concerning jury trial and subsequent procedure, are derived from former rules BU73 and BU74. See Md. R. 2-221 annot. Oddly, the annotations list Fed. R. Civ. P. 22(1) and rule BU70 as the sources from which rule 2-221(a) is derived, but make no mention of rule BU71, although the new Rule seems to incorporate some of its language.
22. With respect to federal rule 22, commentators Niemeyer and Richards stated that subsection (a) of rule 2-221 “has language reminiscent of F. R. Civ. P. 22(1) [and] the remainder of the rule adopts a practice that is sufficiently similar to the federal practice [so] that the federal cases will be useful for interpretative guidelines.”

3. Analysis.—Farmers & Mechanics represents the first time that the Court of Appeals has considered the effect of the adoption of rule 2-221 on the classic interpleader requirements. Relying on both federal precedent that abolished the first three traditional requirements and the similarity between the federal and the state rule, the court concluded that rule 2-221 abolished the first three traditional requirements as well. The court also rejected the fourth traditional interpleader requirement. As with its treatment of the first three requirements, the court found persuasive the recent trend in federal cases as well as the fact that the Maryland Rule is modeled after the federal rule. The court also relied on the precedent set by other states that have abolished the no-independent-liability requirement under interpleader rules similar to Maryland’s rule 2-221. Finally, the court reasoned that modern rules of procedure have invalidated the historical reasons for restricting the use of interpleader.

Farmers & Mechanics clarified two other interpleader issues. The court decided that the State’s interpleader rule prohibits a court from enjoining a defendant who wants to litigate an independent claim against a stakeholder. The Rule states in relevant part that a court may “enjoin the original defendants from bringing or prosecuting any other action affecting the property.” Federal courts that have addressed this issue have limited the court’s injunction power to claims which involve the interpled fund.

154. Id. at 105-06.
155. 316 Md. at 381, 558 A.2d at 1215. The Court of Appeals never considered the effect of former rules BU70-BU74. See id. at 379-81, 558 A.2d at 1214-15.
156. Id. at 382, 558 A.2d at 1215.
157. Id., 558 A.2d at 1216.
158. Id., 558 A.2d at 1215-16.
159. Id. at 378-79, 382, 558 A.2d at 1213-14, 1215.
160. Id. at 382, 558 A.2d at 1216.
161. Id. at 384, 558 A.2d at 1217. This issue has never arisen before in Maryland because, prior to this decision, a court would have dismissed the interpleader action based on a claim of independent liability.
162. Md. R. 2-221(b)(4).
163. See, e.g., State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533-34 (1967); Travelers Indemnity Co. v. Greyhound Lines, Inc., 377 F.2d 325, 327-28 (5th Cir.) (per
Mechanics followed these federal courts, noting that to hold otherwise would allow a stakeholder to avoid additional liability by merely depositing a partial fund with the court.\textsuperscript{164}

The court rejected the contention that Sally and the estate lacked the adversity necessary for an interpleader action because Sally had waived any claim to the interpled fund.\textsuperscript{165} The court held that as long as the defendants’ claims were against the same stakeholder and the claims were inextricably interrelated, the necessary adversity would exist despite the defendants’ failure to seek payment from the same fund.\textsuperscript{166} The court noted that a contrary ruling would allow a defendant who alleged independent liability to defeat an interpleader action by forsaking the escrowed fund.\textsuperscript{167}

4. Conclusion.—With Farmers & Mechanics, the Court of Appeals has brought the State in line with federal interpleader practice. The court’s reliance on modern federal interpleader case law signifies that federal interpleader practice will shape the answers to future interpleader questions in Maryland.

The decision also provides lower courts with guidance when they decide interpleader cases in which a defendant alleges a stakeholder’s independent liability.\textsuperscript{168} Farmers & Mechanics instructs a lower court that if, after the stakeholder has deposited the money with the court and requested an order of interpleader, a party alleges the independent liability of the stakeholder, then the stakeholder should remain in the suit.\textsuperscript{169} The defendants then should litigate the fund’s ownership among themselves.\textsuperscript{170} If the defendant who alleges the stakeholder’s independent liability prevails, and his claim is equivalent to the amount deposited in the court, then the proceeding may end.\textsuperscript{171} If, however, this defendant is unsuccessful in the second phase or the defendant asserts liability greater than the amount of the fund, the stakeholder and the defendant should

\textsuperscript{164} 316 Md. at 384, 558 A.2d at 1217.
\textsuperscript{165} Id. at 387, 558 A.2d at 1218. The adversity requirement is derived from the language of the interpleader rule. See Md. R. 2-221(a). For the text of the Rule, see supra note 152.
\textsuperscript{166} Farmers & Mechanics, 316 Md. at 388, 558 A.2d at 1218.
\textsuperscript{167} Id. at 387-88, 558 A.2d at 1218.
\textsuperscript{168} Id. at 385-86, 558 A.2d at 1217-18.
\textsuperscript{169} Id. at 386, 558 A.2d at 1217.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
continue the interpleader action to resolve the issue.\textsuperscript{172}

Finally, \textit{Farmers & Mechanics} makes an interpleader action available to a wider class of stakeholders. No longer will a court dismiss an interpleader action merely because a claimant contends that the stakeholder has incurred an independent liability to the claimant. Rule 1-201 states that the Maryland Rules shall be construed "to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay."\textsuperscript{173} By increasing the availability of interpleader to plaintiff stakeholders against whom claimants have asserted a claim of independent liability, the court has furthered the goals of rule 1-201. Through its promulgation of rule 2-221 and the decision in \textit{Farmers & Mechanics}, the Court of Appeals has modernized the State's interpleader practice.

\begin{flushright}
\textbf{DEBORAH KRAVITZ}
\textbf{MICHAEL W. DONOHUE}
\end{flushright}

\textsuperscript{172} Id., 558 A.2d at 1217-18.
\textsuperscript{173} Md. R. 1-201.
II. CONSTITUTIONAL LAW

A. Discrimination in Jury Selection

In State v. Gorman, the Court of Appeals held that a white defendant could not challenge on either fourteenth or sixth amendment grounds the prosecutor’s use of peremptory challenges to strike a black member of the venire when the court empaneled the jury. The court applied the Supreme Court’s test, enunciated in Batson v. Kentucky, for establishing a prima facie case of racially motivated discrimination in the jury selection process. The court found that the prosecution’s use of its peremptory challenges had not denied the defendant equal protection of the law because the prosecution did not exercise its peremptory challenges to strike members of the defendant’s own race. The Court of Appeals also rejected Gorman’s sixth amendment claim that the prosecutor’s actions denied him a jury comprised of a fair-cross-section of the community. In so doing, the court implicitly opted to defend the integrity of the peremptory challenge at the possible expense of the reputation and functioning of the State’s juries.

2. Id. at 419, 554 A.2d at 1211.
4. The question has arisen whether the Batson rule should extend to defense counsel as well as prosecutors. Batson, 476 U.S. at 89 n.12; see Md. CTS. & Jud. PROC. CODE ANN. § 8-301 (1989) (permitting both parties in a criminal proceeding to exercise peremptory challenges when the court empanel a jury); Md. R. 4-313. For a discussion of this question, see Goldwasser, Limiting a Criminal Defendant’s Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 HARV. L. REV. 808 (1989) (arguing that Batson should not impinge upon defendants’ use of peremptory challenges because defendants are not state actors). There also is a question of whether the Batson rule should apply to juries in civil actions. See Patton, The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review, 19 TEX. TECH L. REV. 921 (1988).
5. Gorman, 315 Md. at 416, 554 A.2d at 1209-10. The court also denied the defendant’s claim that alleged a violation of the fourteenth amendment due process clause. Id. at 417, 554 A.2d at 1210; see U.S. CONST. amend. XIV, § 2.
6. Gorman, 315 Md. at 419, 554 A.2d at 1211; see U.S. CONST. amend. VI; Williams v. Florida, 399 U.S. 78, 100 (1970) (holding that the sixth amendment intends a fair possibility of obtaining a representative cross-section of the community).
Ten months later, the Supreme Court considered similar questions in *Holland v. Illinois*.\(^7\) Although the Court reached the same result as that in *Gorman*, the majority only considered the sixth amendment fair-cross-section issue.\(^8\) More importantly, concurring and dissenting opinions made it clear that had the Court considered the equal protection challenge, it would have reached a very different conclusion than the Court of Appeals did in *Gorman*.\(^9\)

1. **The Case.**—The court was to try Robert W. Gorman for robbery with a deadly weapon. During petit jury selection, the prosecution peremptorily challenged the only two black persons on the panel.\(^10\) At trial, Gorman objected to the State's use of the peremptory challenges, but accepted the jury as empaneled.\(^11\) The jury found Gorman guilty; the Court of Special Appeals affirmed.\(^12\) The Court of Appeals denied both Gorman's petition for a writ of certiorari and his motion for reconsideration.\(^13\) The United States Supreme Court vacated the Court of Special Appeals' decision and remanded the case to that court for consideration in light of *Batson*.\(^14\) The Court of Special Appeals reversed its decision and remanded the case for a new trial;\(^15\) it also denied the State's motion for reconsideration.\(^16\) The Court of Appeals granted the State's petition and Gorman's conditional cross-petition for writs of certiorari.\(^17\)

---

8. Id. at 811 n.3.
9. Id. at 811-12 (Kennedy, J., concurring); id. at 812-19 (Marshall, J., dissenting); id. at 820-21 (Stevens, J., dissenting).
11. Id. In Maryland, a party must make a *Batson* objection no later than the time that the last juror has been seated, and before the jury has been sworn in. It is unnecessary for a party to object at the time the prospective juror is excluded and also after the jury is seated, as some states have held. *Stanley v. State*, 313 Md. 50, 68-70, 542 A.2d 1267, 1207-08 (1988).
13. Id.
14. *Gorman v. Maryland*, 480 U.S. 913 (1987). At the time of Gorman's trial, Swain *v. Alabama*, 380 U.S. 202 (1965), was the controlling authority because *Batson* still was pending in the Supreme Court. *Gorman*, 315 Md. at 412, 554 A.2d at 1207. The Court applied the *Batson* decision retroactively in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that the *Batson* rule is to be applied retroactively to all cases in which direct review is pending, regardless of whether *Batson* represents a clear break with the former rule). The Supreme Court, therefore, instructed the Court of Special Appeals to review *Gorman* in light of *Batson*, by way of reference to *Griffith*. *Gorman*, 480 U.S. at 919.
15. *Gorman*, 315 Md. at 405, 554 A.2d at 1204.
16. Id.
17. Id. After the Court of Appeals decided the case, Gorman filed another petition for certiorari with the Supreme Court on May 25, 1989.
2. Legal Background.—Until the Supreme Court decided *Batson v. Kentucky*, Maryland courts had followed the evidentiary holding in *Swain v. Alabama*, which required proof that the prosecution repeatedly had struck blacks from juries over a number of cases to establish a violation of the equal protection clause. The Court of Appeals relied on *Swain in Brice v. State*, in which the court held that the exercise of peremptory challenges must be "unfettered and may be exercised by either party for any reason . . . and no inquiry may be made in regard to why it is exercised." In *Lawrence v. State*, the court cited *Swain* and stated that only when blacks never serve on petit juries in "case after case" might one draw the inference that the use of the peremptory challenge violated the equal protection clause. *Swain* placed such a heavy evidentiary burden on defendants that its progressive substantive commentary on the equal protection clause was unenforceable.

In *Batson*, the Supreme Court held that a defendant could establish an inference of purposeful discrimination by showing: (1) that the defendant is a member of a cognizable racial group, (2) that

20. *Id.* at 227.
22. *Id.* at 366, 286 A.2d at 139.
24. *Id.* at 570-71, 457 A.2d at 1133.
25. The Court in *Swain* made it clear that the peremptory challenge should not be "used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." 380 U.S. 202, 224 (1964).
26. Defendants would have to "investigate over a number of cases, the race of persons tried . . . the racial composition of the venire and petit jury," and the nature of the use of peremptories—all of which would be difficult to establish in any case, but impossible to establish in jurisdictions that do not record such details. *Batson v. Kentucky*, 476 U.S. 79, 93 n.17 (1986).
27. As a guide for determining group cognizability, *Batson* cites *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (holding that the first step in establishing an equal protection violation during jury selection is to show that the excluded group is both recognizable and distinct; within that community, Mexican-Americans were found to be underprivileged compared to whites). 476 U.S. at 94. *Castaneda* relied on the Court's earlier holding in *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (one method of proving group distinctiveness is to show that the community, by its attitudes, treated the groups as distinct).

Courts also have borrowed for equal protection analyses a separate cognizability standard conceived for the purposes of the sixth amendment's fair-cross-section requirement. See United States v. *Sgro*, 816 F.2d 30, 33 (1st Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988); *Barber v. Ponte*, 772 F.2d 982, 992 (1st Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1050 (1986). This test requires that the group (1) be "definable and limited by some clearly identifiable factor," (2) share "a common thread of attitudes, ideas, or experiences," and (3) share a community of interests "such that the group's
the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and (3) that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptories to exclude the venire member because of race. Once the defendant meets this burden, the prosecutor must come forward with a neutral explanation. "The state has the burden of showing that 1) a reason other than the race of the juror did exist, and 2) the reason has some reasonable nexus to the case and was in fact the motivating factor in the exercise of the challenge." The trial court then evaluates the explanation to determine whether the prosecutor engaged in purposeful discrimination.

interests cannot be adequately represented if the group is excluded from the jury selection process." Sgro, 816 F.2d at 33. But see Lockhart v. McCree, 476 U.S. 162 (1986), which stated that "groups defined solely in terms of shared attitudes [such as an inability to vote for the death penalty] that would prevent or substantially impair members of the group from performing one of their duties as jurors, are not 'distinctive groups' for fair-cross-section purposes." Id. at 174.

28. The Court of Appeals interpreted the Supreme Court's use of the words 'prima facie case' and 'inference' to mean "rebuttable presumption." Gorman, 315 Md. at 410, 554 A.2d at 1206; see Stanley v. State, 313 Md. 50, 60, 542 A.2d 1267, 1272 (1988). In Stanley, the court held that the State's use of 80% of its peremptory challenges to strike blacks from the petit jury when they composed less than 25% of the venire, constituted circumstances sufficient to raise the inference that the prosecutor discriminated against blacks. Id. at 72, 542 A.2d at 1278. The fact that three blacks remained on the final panel was not a determinative fact. Id. Striking a single black venire member could raise an inference of discrimination if that person were the only black on the panel. Id. at 85, 542 A.2d at 1286. Finally, the Stanley court held that a prima facie case of discrimination exists when the State uses peremptories in a manner which assures that no blacks will serve on a jury that is to try a black defendant. Id., 542 A.2d at 1285; see also Gray v. State, 317 Md. 250, 562 A.2d 1278 (1989) (no blacks left on panel); Chew v. State, 317 Md. 233, 562 A.2d 1270 (1989) (same).


30. Id. at 94; see also Stanley, 313 Md. at 61, 542 A.2d at 1272. When this occurs with the jury venire in the courtroom, a bench conference will suffice in which the prosecutor may explain his reasons and the defendant may rebut. The judge need not administer an oath to the prosecutor. Gray, 317 Md. at 256, 562 A.2d at 1282; see also Stanley, 313 Md. at 92, 542 A.2d at 1288 (new trial required if State does not meet burden).

Other procedural rules apply to Batson objections subsequent to the jury's selection. When a reasonable possibility exists that the court can reconstruct the events which occurred at jury selection, it should attempt to do so. Should it appear at a limited remand hearing that the passage of time precludes fair consideration of the issues, the judge should order a new trial. Chew, 317 Md. at 239, 562 A.2d at 1273.


32. Batson v. Kentucky, 476 U.S. 79, 97 (1986). The prosecution's explanation must go beyond a mere statement that black jurors would be partial to the defendant because of their shared race. It need not, however, rise to the level of an excuse that would justify a challenge for cause. Id.
3. Analysis.—a. Role of Peremptory Challenge Reaffirmed.—In Gorman, the Court of Appeals treated the peremptory challenge with great reverence, devoting an entire section of the opinion to restoring its reputation, which had become tarnished in the aftermath of Batson. In so doing, it cited Swain eight times and quoted from it on four of those occasions. These references to Swain laid a foundation for the court's skeptical approach to Gorman's equal protection argument and attempted to justify the court's rejection of his claim.

The court began its analysis by noting that the Court of Special Appeals should have "probed a little deeper," and not "simply assumed" that Batson would apply because the Supreme Court remanded the case. It rejected the Court of Special Appeals' decision by finding that the second Batson requirement was not met: the prosecution did not use the peremptories to strike members of Gorman's race. The majority marshalled textual evidence from Batson to support its view that the Supreme Court had a "black defendant—black juryman frame of reference" in mind when it decided that case. This context strengthened a finding that the fact patterns in Batson and Gorman were distinguishable. It also allowed the court to create an inference that, whereas the Supreme Court in Batson responded to discriminatory practices, no such practices

33. 315 Md. at 405-08, 554 A.2d at 1204-06.
34. Id. The dissent noted that "this emphasis on Swain is inappropriate," because neither the federal nor Maryland Constitution guarantees the right to use peremptory challenges, nor does the case law affirm it. Id. at 424-25, 554 A.2d at 1214 (Eldridge, J., dissenting).
35. The Court of Special Appeals also has suggested that attempts to regulate the peremptory challenge are likely to emasculate it. See Chew v. State, 71 Md. App. 681, 703-17, 527 A.2d 332, 344-50 (1987), vacated, 317 Md. 233, 562 A.2d 1270 (1989). The Court of Special Appeals' approach in Chew, however, was quite different from that taken by the Gorman court. The Court of Special Appeals asked how courts will handle: (1) challenges that arise from a prosecutor's mixed motives (regarding age, occupation, etc., ... in addition to the race of the juror); (2) the affirmative challenge (one designed to make a place on the panel for the "dream juror,"...); (3) the defendant's challenges; (4) other challenges based upon verifiable group characteristics (religious, sexual, ethnic, etc., ...); and (5) challenges to jurors whose race is difficult to determine, see, e.g., Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609-13 (1987) (42 U.S.C § 1981 protects persons who are subjected to intentional discrimination based upon their Arabian ancestry—even though Arabians are caucasians). Chew, 71 Md. App. at 704-17, 527 A.2d at 344-50.
36. Gorman, 315 Md. at 414, 554 A.2d at 1208.
37. Id. at 416, 554 A.2d at 1210; accord State v. Smith, 737 S.W.2d 731, 733 (Mo. Ct. App. 1987) (no case cited or located holding that a member of one race was denied equal protection when members of another race were excluded from the jury), cert. denied, 109 S. Ct. 1311 (1989).
38. Gorman, 315 Md. at 414-16, 554 A.2d at 1209-10.
plausibly could exist under the *Gorman* facts.\(^{39}\)

The Court of Appeals acknowledged that *Batson* left more questions than answers\(^ {40}\) and repeated the Supreme Court’s warning that “much litigation will be required to spell out the contours of the Court’s equal protection holding [in *Batson*].”\(^ {41}\) It declined, however, to be part of that process because it could not predict what the Supreme Court would do in this situation.\(^ {42}\)

The court next discussed *Gorman*’s reliance on *Peters v. Kiff*\(^ {43}\) for the proposition that he had standing to claim a violation of the fourteenth amendment due process clause.\(^ {44}\) In rejecting this argument, the court distinguished between the illegal exclusion of a class of citizens prior to the venire stage in *Peters*,\(^ {45}\) and the use of peremptories in *Gorman*.\(^ {46}\) Under the court’s reasoning, the *Batson* Court never declared that the use of peremptories was per se unconstitutional, nor did the prosecutor’s challenges in *Gorman* evidence “such racial discrimination as to amount to a violation of due process as envisioned in *Peters*.”\(^ {47}\)

Prior to *Batson*, federal and state courts that wanted to circumvent *Swain* followed *People v. Wheeler*,\(^ {48}\) a California Supreme Court

---

\(^{39}\) *Id.* at 416, 554 A.2d at 1209-10. The court did not focus on *Gorman*’s standing to assert the claim that the prosecution’s actions violated his right to equal protection. It did note, however, that it was “unable to conceive of a sound rationalization as to how the peremptory striking of blacks from the petit jury panel would deny a white defendant equal protection of the laws.” *Id.*


\(^{41}\) *Gorman*, 315 Md. at 415, 554 A.2d at 1209 (quoting *Batson v. Kentucky*, 476 U.S. 79, 102 (1986)).

\(^{42}\) *Id.* at 416, 554 A.2d at 1209-10.

\(^{43}\) 407 U.S. 493, 504 (1972) (whatever his race, a criminal defendant has standing to challenge the system used to select his jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of the law).

\(^{44}\) *Gorman*, 315 Md. at 417, 554 A.2d at 1210.

\(^{45}\) *Id.*. In *Peters*, blacks systematically were excluded from juries by the use of jury lists drawn from segregated tax digests. These lists underrepresented the proportion of black residents to white residents in the county. *Peters*, 407 U.S. at 496 n.3.

\(^{46}\) 315 Md. at 417, 554 A.2d at 1210.

\(^{47}\) *Id.*

\(^{48}\) 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); see, e.g., *Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985) (prosecutor’s systematic use of peremptories to excuse members of a cognizable group offended the sixth amendment’s protection of the defendant’s interest in a fair trial and the public’s interest in the integrity of the judicial process); *McCray v. Abrams*, 750 F.2d 1113, 1131-32 (2d Cir. 1984) (peremptories exerc-
decision which held that the sixth amendment's fair cross-section requirement protects defendants from racially motivated peremptory strikes. On appeal before the Supreme Court, Batson had invoked Wheeler's reasoning. The Gorman court, however, rejected that argument because the Batson Court had refused to consider it. Moreover, the court noted that shortly after the Supreme

cised on the basis of the individual venire member's group affiliation violate the fair-cross-section requirement); State ex rel Criminal Div. of Attorney Gen.'s Office v. Superior Court, 157 Ariz. 541, 544, 760 P.2d 541, 544 (1988) (prosecutor's racially motivated use of peremptory challenges in a particular case violated the sixth amendment's jury guarantee clause in light of Batson's condemnation of improper uses of peremptory challenges); Fields v. People, 732 P.2d 1145, 1150-51 (Colo. 1987) (strongly suggesting in dicta that discriminatory jury selection violated equal protection, although defendant was not a member of the excluded class); Riley v. State, 496 A.2d 997, 1012 (Del. 1985) (the use of peremptory challenges to exclude prospective jurors solely on the basis of race violated a criminal defendant's right under the Delaware constitution to a trial by an impartial jury), cert. denied, 478 U.S. 1022 (1986); Kibler v. State, 546 So. 2d 710, 712 (Fla. 1989) (under the Florida Constitution's impartial jury clause, it is unnecessary that the defendant who objects to peremptory challenges directed at members of a cognizable racial group be of the same race as the jurors being challenged); State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (the Florida Constitution prohibits the exercise of peremptory challenges in criminal cases solely because of race); Commonwealth v. Soares, 377 Mass. 461, 487, 387 N.E.2d 499, 515 (peremptory challenge to exclude black members of the jury drawn from a representative cross-section of the community by the intentional exclusion of identifiable groups), cert. denied, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 489, 612 P.2d 716, 718 (Ct. App. 1980) (under the Wheeler-Soares rational and the New Mexico Constitution's equivalent of the sixth amendment, the absolute number of challenges against a cognizable group in one case can raise the inference of systematic acts by the prosecutor); Seubert v. State, 749 S.W.2d 585, 588 (Tex. Ct. App. 1988) (Batson guides decision that prosecution's peremptory challenges of black venire members, with no knowledge of those individuals except race, made a prima facie case that the challenge violated a white defendant's right to have a jury comprised of a fair cross-section of the community).

49. 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. Duncan v. Louisiana, 391 U.S. 145, 149 (1968), held that the fourteenth amendment guarantees a jury trial in all state criminal cases which, if tried in a federal court, would come within the sixth amendment's guarantee of trial by jury. In the aftermath of Duncan, the Court ruled that juries must be "large enough to provide a fair possibility for obtaining a representative cross-section of the community." Williams v. Florida, 399 U.S. 78, 100 (1970). In Taylor v. Louisiana, 419 U.S. 522, 538 (1975), the Court softened the fair-cross-section requirement; the Court held that the defendant's petit jury need not have a particular composition, as long as the venire is not composed in such a way that distinctive groups are excluded systematically. Id. at 538; see also Duren v. Missouri, 439 U.S. 357, 364 (1979) (holding that a party could establish a prima facie violation of the fair-cross-section requirement by showing that (1) the excluded group is distinctive in the community, (2) the representation of this group in venires is not "fair and reasonable" in relation to the proportion of the group in the community, and (3) such under-representation is the result of the group's systematic exclusion in the jury selection process).

51. 315 Md. at 417-19, 554 A.2d at 1210-11.
52. The Batson court based its decision solely on the fourteenth amendment equal
Court decided Batson, the Court in Lockhart v. McCree53 refused to extend the fair-cross-section requirement from venires to petit juries.54

b. Interpretation and Consequences.—The Gorman court attempted to straddle the gulf that lies between the Batson and Swain decisions by reaffirming the "venerable" role of peremptory challenges without flouting the evidentiary rule of Batson. This awkward balancing act sustains itself at the expense of an important teaching of Batson and Peters—that the discriminatory striking of jurors injures the juror and the criminal justice system, as well as the defendant. The court's decision that Batson is "simply not applicable," typifies Gorman's shortcomings—the court does not probe the alleged discrimination any more deeply than did the Court of Special Appeals. As a result, the Court of Appeals failed to determine whether discrimination actually occurred, and in the process, established a precedent tolerant of future discrimination in jury selection whenever the defendant is white.

Gorman's failure results from its treatment of Batson's evidentiary formulation as a substantive holding.57 Batson actually changed nothing of substance. Indeed, the Batson Court quoted heavily from that portion of Swain which Batson did not overrule and which described the nature of an equal protection violation.58 But Batson's novelty lies in the fact that it overruled Swain's evidentiary formulation. Swain had "declined to scrutinize" the actions of prosecutors in particular cases and created a presumption that they acted prop-

protection clause, which defendant Batson explicitly refused to brief. Gorman, 315 Md. at 417-18, 554 A.2d at 1210; see Batson, 476 U.S. at 84 n.4 (expressing no view on the merits of Batson's sixth amendment arguments and grounding decision in equal protection principles).

54. Gorman, 315 Md. at 419, 554 A.2d at 1211. The Supreme Court viewed the extension of this requirement to petit juries as unworkable and unsound. Therefore, the scope of the fair-cross-section requirement applies only to the jury panel or venire. Lockhart, 476 U.S. at 173-74.
55. 315 Md. at 405, 554 A.2d at 1204.
56. Id. at 416, 554 A.2d at 1210.
57. See id. at 421, 554 A.2d at 1212 (Eldridge, J., dissenting); see also Holland v. Illinois, 110 S. Ct. 803, 812 (1990) (Kennedy, J., concurring) (significance of Batson is procedural).
   It was impermissible for a prosecutor to use his peremptory challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population."
   Id. (quoting Swain v. Alabama, 380 U.S. 202, 224 (1965)).
erly when defendants complained of discrimination in the selection only of their own juries.59 As such, a black defendant could make a prima facie case of discrimination only by showing that the peremptory strikes had been systematically used to remove blacks from juries over numerous cases.60 The Gorman court should have treated Batson for what it was—a means to overcome the presumption that the prosecutor properly exercised the state’s peremptory challenges. The Supreme Court stated outright that defendants may establish a prima facie case “in other ways” than by Swain’s burdensome test.61 The Batson prima facie showing is only one possible formula for establishing an equal protection violation; it should not prevent defendants whose cases deviate from the Batson paradigm from making prima facie showings in unspecified ways.62

The dissent in Gorman more appropriately framed the issue in terms of standing, asserting that the majority’s substantive equal protection holding, in fact, is a standing decision.63 According to the dissent, the Gorman majority based its decision on the “same-class rule,” which limits standing to bring a Batson challenge to defendants who are members of the same cognizable group as the juror who was struck.64 Justice Kennedy, concurring in Holland v.

59. Id.; see Swain, 380 U.S. at 221-22.
60. [A]n inference of purposeful discrimination would be raised on evidence that a prosecutor, “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries.” Batson, 476 U.S. at 91-92 (quoting Swain, 380 U.S. at 223) (emphasis added); see also id. at 92 n.17.
61. Id. at 95.
62. See Holland v. Illinois, 110 S. Ct. 803, 812 (1990) (Kennedy, J., concurring) (“Where this obvious ground for suspicion is absent, different methods of proof may be appropriate); see also Fields v. People, 732 P.2d 1145, 1150-51 (Colo. 1987) (strongly suggesting that discriminatory jury selection violated equal protection, although defendant was not a member of the excluded class); Kibler v. State, 546 So. 2d 710, 711 (Fla. 1989) (court unconvinced that the Supreme Court would preclude white defendants from equal protection attacks on discriminatory peremptory strikes).
63. See 315 Md. at 421, 554 A.2d at 1212 (Eldridge, J., dissenting).
64. Id. at 423-34, 554 A.2d at 1213-18. The dissent enumerates numerous federal and state cases that adopt and reject the same-class rule. Id. at 425 n.4, 554 A.2d at 1214 n.4. A Maryland decision that permits a defendant to object to the exclusion of jurors of a different class is particularly noteworthy. See State v. Madison, 240 Md. 265, 270-74, 213 A.2d 880, 883-86 (1965) (defendant had standing to challenge the exclusion of those who did not believe in God even though he believed in God). The Supreme Court cited Madison in Peters v. Kiff, 407 U.S. 493, 496 n.4 (1972).

The Peters Court rejected the argument that, because a black defendant’s right to challenge the exclusion of black jurors rests on a presumption that the jury otherwise will be prejudiced against him, no such presumption is available to a white defendant.
Illinois, relied on two propositions to overcome this standing problem: first, that individual jurors have standing to challenge their racially motivated exclusions from juries, and second, because they rarely if ever do, defendants may assert third party standing to protect the jurors' rights. Justice Kennedy emphasized the substantiability of the relationship between the defendant and the juror as an important consideration.

The court also erred when it disregarded language in Batson suggesting that courts ought not to focus exclusively on the defendant's injury. The Batson Court was interested in preventing harms

It is argued that a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on a presumption that a jury so constituted will be prejudiced against him; that no such presumption is available to a white defendant; and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief. . . . That argument takes too narrow a view of the kinds of harm that flow from discrimination in jury selection.

Id. at 499.

Moreover, by even minimally increasing the scope of a search for harm, it is possible to imagine circumstances under which the racially motivated striking of a black juror could harm a white defendant even though the defendant's race in no way influenced the prosecutor's racial motivations. For example, suppose that statistics (or the prosecutor's instincts) indicated that black jurors in that jurisdiction sentenced more lightly than white jurors—the defendant would lose a moderating influence on his sentence for an unjustifiable reason. It is possible to imagine instances in which a prosecutor might perceive blacks to be more sympathetic to particular defenses raised by the defendant. See Uelman, Striking Jurors Under Batson v. Kentucky, 2 CRIM. JUST. 2, 3-4 (1987) (suggesting such cases might arise when a defendant claims self-defense against police brutality, or when the defendant is arrested in a civil rights demonstration).

65. 110 S. Ct. at 811 (Kennedy, J., concurring).
66. Id. at 812 (citing Carter v. Jury Comm'n, 396 U.S. 320, 329-30 (1970)).
67. Id. (citing Singleton, 428 U.S. 106, 113-18 (1976)) (to determine whether third party standing is appropriate, the Court looks to the quality of the relationship between the litigant and the holder of the right, and to the right holder's ability to assert that right).
68. Justice Kennedy referred to Singleton, 428 U.S. at 114-15, in support of his proposition that a substantial relationship between a litigant and the holder of a right might entitle the former to raise the right in litigation. Kennedy suggested by implication that the situation in Singleton compared favorably with that in Holland. In Singleton, a plurality took the position that when a woman's right to an abortion was bound up with a doctor's wish to perform the operation, a court considering the scope of the right could properly make its decision even when the right was raised by the doctor because the woman's enjoyment of the right would be affected. Id.
69. Id.; see also Goldwasser, supra note 4, at 820 (citing Singleton, 428 U.S. 106 (1976)); Patton, supra note 4, at 960 n.245 (Batson's standing requirement impedes Batson's desire to protect the public and prospective jurors from discrimination).
70. In addition to the language in Batson, see infra notes 71-73 and accompanying text, Justice O'Connor wrote:

Batson, in my view, depends upon this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on
that arise from the discriminatory use of peremptory challenges which "extend[] beyond that inflicted on the defendant," to excluded jurors and the community at large. The Batson Court also made clear that it believed racial discrimination in jury selection "undermine[s] public confidence in the fairness of our system of justice." The Court of Appeals failed to attach any significance to language in Batson suggesting that the Court believes secondary interests are injured in discriminatory jury selection cases.

Perhaps the best thing that can be said for Gorman is that its effect on Maryland law will be limited sharply by the combined effect of Holland's concurring and dissenting opinions. Five members of the Court agreed that if Holland, a white defendant, had attacked the discriminatory use of peremptory strikes to remove blacks from his jury under the equal protection clause instead of under the sixth amendment, they would have upheld his challenge. Thus, if the Supreme Court grants Gorman certiorari, the Court probably will reverse the Court of Appeals' decision. Otherwise, Gorman is destined to languish—disused and bad equal protection law.

When the Supreme Court explained its refusal to consider Bat-
son's sixth amendment claims, the Court commented that the "resolution of [Batson's] claim properly turns on application of equal protection principles,"76 emphasizing the central position of the equal protection doctrine in jury discrimination cases. Although the Gorman court stumbled when it analyzed the equal protection claim, it correctly surmised from the Batson footnote that the Supreme Court would not tolerate any extension of the sixth amendment's fair-cross-section requirement to the petit jury.77 Holland ratified the Gorman court's use of recent Supreme Court decisions as authority for rejecting the defendant's sixth amendment claim.78 The Gorman court noted that after the Batson court overruled Swain's evidentiary requirements, the Batson Court refused to consider fair-cross-section arguments and agreed with the unsuccessful respondent that the resolution of Batson's claim revolved around equal protection principles.79 The Gorman court also took notice of Lockhart v. McCree,80 which denied that the fair-cross-section requirement applies to petit juries, and restricted it to venires.81 The Lockhart Court reasoned that it would be "unworkable" to extend the fair-cross-section requirement to as small a unit as the petit jury.82 The Supreme Court has recognized that a party frequently might be able to show group underrepresentation at the petit jury level, and that it would be exceedingly difficult to force courts to correct disproportional group representation in every such case.83

Writing for the majority in Holland,84 Justice Scalia's arguments went beyond merely noting the practical difficulties that an extension of the fair-cross-section requirement would create. First, Scalia rejected defendant Holland's "fundamental thesis" that the State's elimination of an entire group from the petit jury deprived him of the fair possibility of having a representative jury.85 The Court, he

77. 315 Md. at 418-19, 542 A.2d at 1211.
78. 110 S. Ct. at 809 (the requirement that a representative fair-cross-section be present at the venire stage can be disrupted at the jury-panel stage to serve the states' legitimate interest in disqualifying a group that may not be able to serve impartially in a particular case).
79. Batson, 476 U.S. at 84 n.4.
81. Id. at 173-74; see Gorman, 315 Md. at 419, 554 A.2d at 1211.
82. 476 U.S. at 174. The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury. Id. at 173-74.
85. Id. at 806.
explained, had demanded only representative venires in the past.\textsuperscript{86} It never had forbidden either the defendant or the State from diminishing the panel’s representativeness through the use of peremptories; indeed, Scalia argued, to do so is inconsistent with the theoretical role of the peremptory challenge in trials.\textsuperscript{87} Moreover, the fair-cross-section requirement is designed to assure impartiality rather than representativeness.\textsuperscript{88} The peremptory challenge is the weapon that both sides legitimately may use to remove groups which they suspect will be partial to their adversary.\textsuperscript{89} Like the \textit{Gorman} court, the \textit{Holland} majority thus went out of its way to restore the luster of the “venerable” peremptory challenge.\textsuperscript{90} It, therefore, would appear that the portion of \textit{Gorman} which addressed the sixth amendment challenge will remain good law for the foreseeable future.

Apart from the equal protection and fair-cross-section claims, a third constitutional challenge to discriminatory jury selections may exist. \textit{Peters v. Kiff}\textsuperscript{91} linked procedural due process requirements to

\begin{itemize}
  \item \textsuperscript{86} \textit{Id.} at 806-07.
  \item \textsuperscript{87} \textit{Id.} at 807.
  \item \textsuperscript{88} \textit{Id.}
  \item \textsuperscript{89} \textit{Id.} at 807-09.
  \item \textsuperscript{90} \textit{Id.} at 808.
  \item \textsuperscript{91} 407 U.S. 493 (1972). In his concurrence in \textit{Peters}, Justice White, joined by Justices Brennan and Powell, argued that 18 U.S.C. § 243 should determine the outcome of that case. 407 U.S. at 505. The statute provides:
    
    No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection of summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.
    
    18 U.S.C. § 243 (1988). The statute’s language is clear. “By this unambiguous provision, now contained in 18 U.S.C. § 243, Congress put cases involving exclusions from jury service on grounds of race in a class by themselves.” \textit{Peters}, 407 U.S. at 505-06 (White J., concurring). Section 243 focuses on the juror, rather than the defendant and therefore, the statute presents a standing problem different than that presented in \textit{Gorman}. Under § 243, injured potential jurors explicitly are given standing under the statute. Thus, as Justice Burger, joined in his dissent by Justices Blackmun and Rehnquist, said, Peters had no better standing under § 243 than he did under the equal protection clause that § 243 was designed to enforce. \textit{Id.} at 512 (Burger, C.J., dissenting). But Justice White noted that a black defendant successfully relied on the statute in \textit{Hill v. Texas}, 316 U.S. 400, 404 (1942). \textit{Peters}, 407 U.S. at 506 (White, J., concurring). As such, \textit{Peters’} only truly novel aspect is that the Court granted a white defendant standing. On that point, White believed that the statutory policy against discrimination called for a court to confer standing on any defendant. \textit{Id.} at 507. This position implicitly adopts a form of reasoning not unlike Justice Kennedy’s in \textit{Holland}. 110 S. Ct. 803, 812 (1990).
    
    Justices White (concurring) and Burger (dissenting) agreed that petitioner Peters’ reading of § 243 was expansive. \textit{Peters}, 407 U.S. at 506-07 (White, J., concurring); \textit{id.} at
the equal protection clause when the Court held that "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law." The Court's comment in *Batson* that a defendant has the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria, similarly could support a due process standard for jury selection procedures when, as here, some element of an equal protection violation arguably was missing. Now that *Swain v. Alabama* no longer controls and a single discriminatory strike may implicate the equal protection clause, it would seem that the courts should tighten jury selection standards under a related due process analysis.

The majority's distinction of *Gorman* and *Peters* does not justify denying Gorman relief under the due process clause. The court understood *Peters* to address only illegal and unconstitutional jury selection "procedures." And, because the majority does not equate a discriminatory peremptory challenge with an illegal procedure,

---

512 (Burger, C.J., dissenting). White admitted that no precedent exists for setting aside a conviction if the defendant was not a member of the excluded group. *Id.* at 506 (White, J., concurring). He, however, believed that to confer standing on the defendant to enforce the statute would be an effective means of implementing the fourteenth amendment policy which the statute embodies. *Id.* at 506-07. Burger implied that if the policy embodied in the statute is in need of more effective implementation, then Congress should modify the statute. *Id.* at 513 (Burger, C.J., dissenting). Moreover, he argued, the courts should not expand statutory language beyond the underlying policy enunciated in the fourteenth amendment, especially when, as in *Peters*, a convicted criminal who never even objected to his jury during trial attempts to use the statute to overturn his conviction. *Id.* at 513.

92. 407 U.S. at 504. *Peters* also holds that: "the unconstitutional state action, occur[s] whether the defendant is white or Negro, whether he is acquitted or convicted." *Id.* at 498. Thus, the *Gorman* dissent notes that the *Peters* Court found a violation of due process when the juror and the defendant were not of the same race. 315 Md. at 227-29, 542 A.2d at 1216-17 (Eldridge, J., dissenting). The dissent found support for this interpretation of *Peters* in Justice Marshall's comments, who reaffirmed the link between equal protection violations and due process violations in *Ford v. Kentucky*, 469 U.S. 984, 985-88 (1984) (Marshall, J., dissenting from denial of certiorari).

93. See 476 U.S. 79, 85-86 (1986). This is precisely the logic that guided the *Peters* Court. *See Seubert v. State*, 749 S.W.2d 585, 586-87 (Tex. Ct. App. 1988) (while the defendant must share the juror's race to assert an equal protection argument under *Batson*, he need not be of the same race as the excluded jurors to assert a denial of his due process right to a jury comprised of a fair-cross-section of the community). The *Seubert* court used a sixth amendment standard as a benchmark to assess the process that was "due," just as the *Peters* Court used an equal protection benchmark in its due process analysis. *See also Note, Due Process Limits on Prosecutorial Challenges*, 102 Harv. L. Rev. 1013 (1989) (arguing that a due process standard would correct the shortcomings of the equal protection and sixth amendment approaches to discrimination in jury selection).

94. *Gorman*, 315 Md. at 417, 554 A.2d at 1210; *see supra* note 45.
the former does not rise to the level of the due process violation that the Court found in *Peters*. The *Peters* opinion, however, does not suggest that such a narrow reading of either "procedure" or "system" is either necessary or appropriate. Nor does it deny that peremptory challenges can be a "procedure" or "system" by which a jury is empaneled.

Moreover, if the only difference between the *Peters* and *Gorman* fact patterns is the means by which blacks were excluded from the juries, it is reasonable to inquire just how *Batson*’s evidentiary ruling impacts that distinction. *Batson* lowers the defendant’s evidentiary burden of establishing a prima facie case of discrimination: it no longer is necessary to show the systemic exclusions required in *Swain*. If the Court has eased the evidentiary requirements of an equal protection claim, then if anything, those requirements should facilitate the finding of due process violations in cases in which the facts are similar to those in *Peters*. There is no logical reason why the Court would uphold only challenges to systemic violations under a due process analysis after it upheld challenges to nonsystemic violations under the equal protection clause.

4. Conclusion.—*Gorman*’s impact on Maryland law at best will be slight. The court attempted to limit *Batson* challenges to cases in which the defendant and those jurors who were struck from the petit jury are members of the same cognizable group. In so doing, it rejected three alternative constitutional challenges and appears to provide prosecutors with a sturdy shield whenever they strike jurors who do not share some group affiliation with the defendant. If *Gorman* was the last word on this issue, it would have set a powerful precedent in Maryland. *Gorman*, however, was not the last word.

95. *Gorman*, 315 Md. at 417, 554 A.2d at 1210.

[Principles of due process] compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. *Id.* The breadth of this language does not appear to support the Court of Appeals’ narrow interpretation of *Peters*.

97. Certainly, the means by which blacks were excluded from jury lists in *Peters* was a system, but that is not to say that a single prosecutor’s exclusion of blacks from a petit jury by the use of peremptories might not constitute a system as well. A system is "any formulated method or plan." THE RANDOM HOUSE DICTIONARY 883 (1980). As such, a prosecutor’s deliberate use of peremptories to eliminate blacks as a group from the jury panel constitutes a "system."

98. See supra notes 19-32 and accompanying text.
Justice Kennedy’s concurring opinion in *Holland* threw the *Gorman* decision into serious doubt. Although the *Holland* Court agreed with *Gorman* that the courts must respect the integrity of the peremptory challenge, and that the courts cannot extend the fair-cross-section requirement to the venire stage, Justice Kennedy’s accord with the dissent rendered both points much less significant. Henceforth, a white defendant may bring under *Batson* a fourteenth amendment equal protection challenge against his or her jury’s composition. In all probability, the battle will shift to the issues of what the defendant must show to satisfy his or her burden of establishing a prima facie case of an equal protection violation, and how may the state rebut such a showing.

**B. State Withdraws Preferential Tax Treatment from All-Male Country Club**

After a protracted series of legal proceedings, the Court of Appeals in *State v. Burning Tree Club, Inc.* finally rebuffed Burning Tree Country Club’s (Burning Tree) efforts to maintain its state-supported preferential tax treatment despite its men-only policies. In so doing, the court rejected two of Burning Tree’s most compelling arguments; namely, that the State’s prohibition against discrimination by clubs which receive the tax benefit violated the contract clause of the United States Constitution and vitiated the club members’ guaranteed rights of association. The court did agree with another of Burning Tree’s arguments: that is, that the statutory exception for periodic discrimination violated the Maryland Equal Rights Amendment (the ERA). The court, however, ruled that this exception was severable from the remainder of the statute which contained the general prohibition against discrimination. By so ruling, the court neatly sidestepped Burning Tree’s efforts to force the court to invalidate the statute as a whole, which would have permitted the club to retain both its preferential tax treatment and its discriminatory practices toward women.

100. *Id.* at 261-62, 554 A.2d at 370-71. The court also rejected Burning Tree’s other two arguments. First, that chapter 334, which prohibits discrimination, has prospective effect only and did not affect Burning Tree’s current agreement with the State; second, that the statute was a “special law” passed in violation of the Maryland Constitution. This Note does not address the first argument further. For a discussion of the second argument, see *infra* notes 154-171 and accompanying text.
101. *Burning Tree*, 315 Md. at 263, 290, 554 A.2d at 371, 384.
102. *Id.*
103. Burning Tree had employed this tactic successfully once before in *Burning Tree*
1. The Case.—In 1965, the General Assembly enacted chapter 399 to the Laws of Maryland. Chapter 399 permitted the State to enter into agreements—use assessment contracts—with private country clubs whereby the State would give the clubs favorable tax assessments provided that the clubs maintain their land as open spaces. Chapter 399’s express purpose was to prevent country clubs from selling or developing their land. Burning Tree, a private men’s golf club in Montgomery County, entered into a ten-year contract with the State pursuant to this statute, agreeing to maintain the club’s land as open space in return for favorable tax assessments.

Chapter 870 of the Acts of 1974 amended chapter 399. Chapter 870 provided that country clubs which discriminated on any basis, including that of sex, no longer would qualify for the preferential tax assessment. There were two exceptions to chapter 870’s general prohibition against discrimination: the prohibition would not apply to country clubs “whose facilities are operated with

Club, Inc. v. Bainum, 305 Md. 53, 82, 501 A.2d 817, 831 (1985); see infra text accompanying note 173.


105. The State based a club’s preferential tax treatment on an “assessment of the property as underdeveloped land, rather than on a ‘best use’ assessment as if the land were developed to the same density as the surrounding area.” Bainum, 305 Md. at 57, 501 A.2d at 819.


107. Bainum, 305 Md. at 56-57, 501 A.2d at 818. The Preamble to the 1965 Act declares that:

[it is] in the general public interest that [country club] uses should be encouraged in order to provide open spaces and provide recreational facilities and to prevent the forced conversion of such country clubs to more intensive or different uses as a result of economic pressures caused by the assessment of country club land and improvements at a rate or level incompatible with the practical use of such property for country clubs.


108. Use of the phrase “a private men’s golf club” does not fully explain Burning Tree’s policies. Not only are women not allowed to become members or enjoy guest privileges, but they also are not allowed to enter or use the clubhouse. Burning Tree Club, Inc. v. Bainum, 305 Md. 53, 58, 501 A.2d 817, 819 (1985). “It is only by appointment on specific days in December that a member’s wife may obtain limited access to the pro shop to purchase Christmas gifts for her husband.” Id.

109. Burning Tree, 315 Md. at 259, 554 A.2d at 369.


111. Id. at 2914.
the primary purpose . . . to . . . benefit members of a particular sex, nor to the clubs which exclude certain sexes only on certain days and at certain times [i.e., periodic discrimination]." Although Burning Tree restricted its membership to men and their male guests only, it qualified under the primary purpose exception and in 1975 extended its use assessment contract with the State. In 1981, Burning Tree and the State entered into a fifty-year use assessment contract.

In 1983, two private persons brought suit against Burning Tree seeking, inter alia, a declaration that chapter 870's primary purpose exception violated the ERA and that Burning Tree was not entitled to further tax benefits. On appeal, a majority of the Court of Appeals held that the primary purpose provision was inconsistent with the ERA. A different majority of the court, however, concluded that the invalid primary purpose provision was not severable from the remainder of chapter 870. Thus, the court annulled chapter 870 in its entirety. Burning Tree, therefore, could continue its discriminatory policies and still receive the favorable tax assessments.

The General Assembly responded to the Bainum decision by enacting chapter 334, which reinstated the prohibition against sex discrimination by country clubs that held use assessment contracts, and modified chapter 870 to exclude the primary purpose exception.

---

112. Id. (emphasis omitted).
113. Burning Tree, 315 Md. at 259, 554 A.2d at 369.
114. Id.
116. Id. at 59-60, 501 A.2d at 820. Prior to the Bainum decision, the Attorney General addressed the constitutionality of the primary purpose provision. He concluded that a "single-sex country club receiving a tax preference under Article 81, § 19(e) [chapter 870] violates the ERA when it excludes the opposite sex as members and guests; and the State violates the ERA when, pursuant to that same state statute, it encourages, endorses, and benefits from such discrimination." 68 Op. Md. Att'y Gen. 173, 183 (1983). The Attorney General then instituted an action in the State's name and on his own behalf asking the court to declare the primary purpose exception unconstitutional. State ex rel Attorney Gen. v. Burning Tree Club, Inc., 301 Md. 9, 13-14, 481 A.2d 785, 787 (1984). Because the Attorney General lacked the authority to challenge the state statute's constitutionality, the court did not address the issue. Id. at 34, 481 A.2d at 798.
118. Bainum, 305 Md. at 84, 501 A.2d at 833.
119. Id. at 81-82, 501 A.2d at 831.
120. Burning Tree, 315 Md. at 260, 554 A.2d at 370.
Chapter 334, however, retained the periodic discrimination exception. Pursuant to chapter 334, the Montgomery County Supervisor of Assessments notified Burning Tree that the club’s lands no longer would be assessed in accordance with its current use assessment contract because of its discriminatory policies.

In its action against the State, Burning Tree argued that it still was entitled to receive the favorable tax assessments. The circuit court held that the periodic discrimination provision violated the ERA and was not severable from the remainder of the statute. Burning Tree and the State both appealed the decision. Before the Court of Special Appeals could hear the case, the Court of Appeals granted certiorari. In finding that Burning Tree was not entitled to continued preferential tax treatment, the Court of Appeals held that the enactment of chapter 334 did not violate the contract clause of the United States Constitution, did not vitiate Burning Tree’s members’ freedom of association rights under the United States Constitution, was not a “special law” in violation of the Maryland Constitution, and that chapter 334’s periodic discrimination exception, while invalid, was severable from the remainder of the statute. Each of these issues will be discussed summarily.

2. United States Constitution.—a. Contract Clause.—Burning Tree argued that because the primary purpose exception was valid when the club entered into the fifty-year use assessment contract with the State, the withdrawal of this benefit would violate the contract clause of the United States Constitution. Burning Tree contended that the General Assembly’s elimination of the primary purpose exception in chapter 334 imposed a much heavier contractual obligation on the club because the State would assess its lands at a much higher value in the future.

122. In Bainum, the Court of Appeals referred to this provision as being “completely superfluous” and struck it down. 305 Md. 53, 84, 501 A.2d 817, 832 (1985).
123. Burning Tree, 315 Md. at 261, 554 A.2d at 370. The club did not qualify under the periodic discrimination exception to chapter 334 because it engaged in a blanket discrimination of women.
124. Id.
125. Id. at 262, 554 A.2d at 370.
126. Id., 554 A.2d at 371.
127. Id. at 261-63, 554 A.2d at 370-71. The Court of Appeals did not address whether a single-sex private country club can continue to exclude women from its membership.
129. Burning Tree, 315 Md. at 268, 554 A.2d at 373. Unless the club ended its discriminatory practices or the court struck down chapter 334 in its entirety, Burning Tree’s tax
Under traditional contract clause analysis, the first issue that a court addresses is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." If there is a substantial impairment, then the state must have a legitimate public purpose behind the regulation to justify the impairment. Next, the court must ask whether the adjustment of the contracting parties' rights and responsibilities is based "upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislature's] adoption."

In its analysis, the Court of Appeals assumed that the contractual relationship between the State and Burning Tree had been impaired substantially as a result of chapter 334's enactment, and focused on the State's purpose in enacting the legislation. Writing for the majority, Judge Eldridge stated that the "public purpose behind Ch. 334 was the elimination of state-sanctioned sex discrimination. The significance and legitimacy of this purpose is beyond doubt." Although the statute's enactment may have impaired the contractual relationship between Burning Tree and the State with a resultant economic loss to Burning Tree, the State's interest in preventing sex-based discrimination outweighed any such impairment. Thus, chapter 334 did not violate the contract clause. The court's application of the contract clause accords with recent cases.

Assessments would increase from $38,000 a year to more than $300,000 a year. Leff, Md. to Dun Burning Tree, Wash. Post, Oct. 4, 1989, at D1, col. 2.


131. United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977) (law that repealed covenant not to subsidize rail passenger transportation from security pledged on bonds violated contract clause); see also Energy Reserves Group, 459 U.S. at 411.

132. United States Trust Co., 431 U.S. at 22; see also Chevy Chase Sav. & Loan, Inc. v. State, 306 Md. 384, 416, 509 A.2d 670, 687 (1986); Robert T. Foley Co. v. Washington Suburban Sanitary Comm'n, 283 Md. 140, 152, 389 A.2d 350, 357 (1978) (in case of public agency providing public benefit, government should not be bound by rate as beneficiary does not have vested contract right protecting against rate increase).

133. Burning Tree, 315 Md. at 271, 554 A.2d at 375.

134. Id. at 272, 554 A.2d at 375.

135. Id.


The court also noted that the legal system presumes that contracting parties are "mindful of existing law." Burning Tree, 315 Md. at 270, 554 A.2d at 374 (quoting
b. Association Rights.—Burning Tree also alleged that chapter 334 violated the club members’ guaranteed rights to association, \(^{137}\) as “its ‘size, purpose, policies, selectivity, congeniality’ and exclusivity imbue it with associational rights.” \(^{138}\) While not specifically stated, it appears that Burning Tree advocated treatment as a group possessing intimate, as opposed to expressive, association rights, which would thereby insulate the club from antidiscrimination legislation and State interference. \(^{139}\)

*Roberts v. United States* \(^{140}\) defined the framework to determine whether the right to intimate association exists in a given case. In *Roberts*, the Supreme Court addressed a conflict between the State’s effort to eliminate sex-based discrimination and the constitutional freedom of association of a private, young men’s civic organization (the Jaycees). \(^{141}\) The Court noted that:

Wright v. Commercial Sav. Bank, 297 Md. 148, 153, 464 A.2d 1080, 1083 (1983)); see Abilene Nat’l Bank v. Dolley, 228 U.S. 1, 5 (1913) (“Contracts made after the law was in force . . . are made subject to it, and impose only such obligation . . . as the law permits.”); Prince George’s Country Club, Inc. v. Edmund R. Carr, Inc., 235 Md. 591, 608, 202 A.2d 354, 363 (1964) (already existing law implied in every contract); Holmes v. Sharretts, 228 Md. 358, 367, 180 A.2d 302, 306 (1962) (parties to trust agreement presumed to know existing law). Because the General Assembly enacted the ERA in 1972 and mandated equality of rights under the law, the court stated that Burning Tree should have been aware that sex-based classifications by the State generally were forbidden. *Burning Tree*, 315 Md. at 269, 554 A.2d at 374; see also Rand v. Rand, 280 Md. 508, 515-16, 374 A.2d 900, 904-05 (1977) (ERA requires allocation of child support irrespective of parent’s gender). Judge Eldridge stated that this primary purpose “provision violated the ERA and was invalid from its inception.” *Burning Tree*, 315 Md. at 270, 554 A.2d at 374. And, even though Burning Tree may have relied on the invalid provision, the “Contract Clause does not bind the State to carry out the terms of a statute which was [deemed] unconstitutional.” *Id.*

137. *Burning Tree*, 315 Md. at 276, 554 A.2d at 377.
138. *Id.*, 554 A.2d at 378.
139. *Id.* “Intimate association rights” are those that safeguard the right to enter into personal, intimate human relationships free from the state’s unjustified interference. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984). The Bill of Rights, “which is designed to secure individual liberty . . .”, *id.* at 618, is the source of such protections. The freedom of intimate association is to be distinguished from the freedom of expressive association, which protects the right to associate for the purpose of engaging in activity protected by the first amendment. *Id.* at 622. In the case at hand, the court found that Burning Tree erroneously sought first amendment protection, while asserting its right to intimate association. Thus, based on the allegations of its complaint, the Court of Appeals inferred that Burning Tree wished the court to address its intimate association rights. *Burning Tree*, 315 Md. at 277, 554 A.2d at 378.

For discussions that further distinguish expressive and intimate association rights, see *Roberts*, 468 U.S. at 609; Marshall, *Discrimination and the Right of Association*, 81 Nw. U.L. Rev. 68 (1986).

141. 468 U.S. at 612.
certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State . . . . Protecting these relationships . . . therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.\textsuperscript{142}

To determine the degree of protection that the Constitution affords, a court must assess carefully “where that relationship’s objective characteristics locate it on a spectrum from the most intimate [\textit{e.g.}, a family—affording the most protection] to the most attenuated of personal attachments [\textit{e.g.}, a large business enterprise—affording the least protection].”\textsuperscript{143} Factors relevant in placing a relationship on this spectrum include: size, purpose, selectivity, policies, and congeniality.\textsuperscript{144} In \textit{Roberts}, the Court concluded that the Jaycees were neither small nor selective and, moreover, much of the activity central to the association involved strangers.\textsuperscript{145} As such, the Jaycees lacked the distinctive characteristics necessary to afford the organization constitutional protection.\textsuperscript{146}

To determine Burning Tree’s position on this continuum, the Court of Appeals looked to its size (approximately 440 members), founding (small group of congenial men devoted solely to the game of golf), selectivity (individuals may not apply to join, but must be proposed by current members), and policy (prohibiting the discussion of business matters at the club, exemplifying its personal nature),\textsuperscript{147} and found these factors wanting. With respect to its size, the court noted that Burning Tree was not so small as to give rise to constitutional protection; the court relied on \textit{Roberts} and \textit{Board of Directors of Rotary International v. Rotary Club of Duarte},\textsuperscript{148} in which local chapters contained at least 400 members and as few as 20 members and in which the Supreme Court failed to find intimate association rights.\textsuperscript{149} As to the policy and selectivity factors, the court noted

\textsuperscript{142} \textit{Id.} at 618-19.
\textsuperscript{143} \textit{Id.} at 620.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.} at 621.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Burning Tree}, 315 Md. at 280, 554 A.2d at 379.
\textsuperscript{148} 481 U.S. 537 (1987). As in \textit{Roberts}, the Court in \textit{Rotary Club} considered the “size, purpose, selectivity, and whether others are eschewed from critical aspects of the relationship” to determine whether a group is entitled to intimate associational rights. \textit{Id.} at 546.
\textsuperscript{149} \textit{Burning Tree}, 315 Md. at 280-81, 554 A.2d at 379-80.
that "Burning Tree has not established that it qualifies for ... intimate association rights ..." because the court could not determine whether business conversations occurred at the club and the degree of selectivity that occurred in club admissions.

The court's conclusion mirrors the current trend of denying protection to groups that claim intimate association rights when the group is not a family. While the Rotary Club Court stated that the existence of a family relationship alone is not conclusive in determining whether intimate association rights exist, the Court has yet to recognize such rights in a nonfamilial association.

3. Maryland Constitution.—a. Special Law.—Burning Tree also asserted that chapter 334 violated article III, section 33 of the Maryland Constitution in that the statute constituted a special law. It claimed that chapter 870, as originally enacted, created a class of clubs that were permitted to discriminate on the basis of sex and yet still receive the preferential tax assessments under the open spaces.
policy. With the passage of chapter 334 and the elimination of the primary purpose exception, however, Burning Tree contends that it now was the only member of that class affected, as other clubs still benefitted from the periodic discrimination exception.

Maryland courts have defined a "special law" as "one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class." Section 33's purpose is to prevent the General Assembly from passing laws that will benefit a particular class or individual. To determine whether a law is "special," and thus in violation of section 33, the court may consider the following factors: (i) whether the underlying purpose of the legislation is to benefit or burden a particular class member or members, (ii) whether the statute identifies particular individuals or entities, (iii) whether the statute has a substantive effect, and (iv) whether the statute favors or discriminates against a particular individual or business.

The Court of Appeals gave two reasons why chapter 334 did not violate section 33. First, the court noted that Burning Tree was not the only member of the class affected, as other clubs still benefitted from the periodic discrimination exception. Second, the court found that the underlying purpose of the legislation was to benefit or burden a particular class member or members, as the statute identified particular individuals or entities.

155. *Burning Tree*, 315 Md. at 273, 554 A.2d at 376.

156. Id.

157. Id.


159. *Potomac Sand & Gravel Co. v. Governor*, 266 Md. 358, 378, 293 A.2d 241, 251 (law that prohibits dredging in limited geographic area found not "special"), *cert. denied*, 409 U.S. 1040 (1972); *see also Montague v. State*, 54 Md. 481, 489-90 (1880) (collateral inheritance tax deemed not a special law).


161. *Good Samaritan Hosp.*, 299 Md. at 330, 473 A.2d at 902; *see Reyes v. Prince George's County*, 281 Md. 279, 305-06, 380 A.2d 12, 26-27 (1977) (law that referred to sports stadium generally and not by name held not special even though it was the only arena in the county). Other considerations may include the public's interest in the general law or whether the legislature arbitrarily drew the lines when it defined a class. *Good Samaritan Hosp.*, 299 Md. at 330, 473 A.2d at 902; *see Jones v. House of Reformation*, 176 Md. 43, 56, 3 A.2d 728, 734 (1939) ("[W]hile the constitutional provision was wisely designed to prevent the dispensation or grant of special privileges to special interests, . . . it was never intended . . . to foreclose to the sovereign the right to pass special legislation 'to serve a particular need, to meet some special evil, or to promote some public interest, for which the general law is inadequate. . . .'")); *Littleton v. Hagerstown*, 150 Md. 163, 176, 132 A. 773, 778-79 (1926).

162. *Good Samaritan Hosp.*, 299 Md. at 330, 473 A.2d at 902; *see Beauchamp*, 256 Md. at 549, 261 A.2d at 465.

163. *Good Samaritan Hosp.*, 299 Md. at 330, 473 A.2d at 902; *see Littleton*, 150 Md. at 183, 132 A. at 786 (law that excepted Hagerstown from Public Service Commission control held special).
not constitute a special law. First, because the court’s decision in *Burning Tree* \(^{164}\) invalidated the periodic discrimination exception, *Burning Tree* will not be the only club forced to change its discriminatory policies or face the loss of preferential tax assessments.\(^{165}\) Consequently, chapter 334 is not a special law within the meaning of the definition.

Second, even if the court had upheld the periodic discrimination exception, chapter 334 still would not be a “special law” because the Act was not directed specifically at *Burning Tree* or any other country club.\(^{166}\) The court found that chapter 334 applied to all current and future use assessment contracts because the statute did not mention a particular club and *Burning Tree* was not the only club affected by chapter 334’s general prohibition on sex discrimination.\(^{167}\) The court held that “[t]his is clearly not a case where a single entity is affected by a law;”\(^{168}\) therefore, the statute did not violate section 33 of the Maryland Constitution.

The court’s conclusion is consistent with its prior decision in *Reyes v. Prince George’s County*.\(^{169}\) In *Reyes*, the court held that an act, which permitted the county to sell bonds to purchase any sports stadium in the county, was not a special law even though there was only one such stadium when the legislature passed the act.\(^{170}\) As in *Reyes*, the *Burning Tree* court found that a statute may affect future classes of individuals and not constitute a “special” law.\(^{171}\)

---

\(^{164}\) *See infra* notes 172-185 and accompanying text.

\(^{165}\) 315 Md. at 273, 554 A.2d at 376. There is no indication, however, that any other club benefitted from the periodic discrimination provision.

\(^{166}\) *Id.* at 274, 554 A.2d at 376.

\(^{167}\) *Id.*

\(^{168}\) *Id.* at 275, 554 A.2d at 377.

\(^{169}\) 281 Md. 279, 380 A.2d 12 (1977); *see also* Potomac Sand & Gravel Co. v. Governor, 266 Md. 358, 379, 293 A.2d 241, 252 (statute that prohibited the dredging of the Charles County wetlands was not a special law even though it currently affected only one company), *cert. denied*, 409 U.S. 1040 (1972); *cf.* Cities Serv. Co. v. Governor, 290 Md. 553, 570-72, 431 A.2d 663, 673-74 (1981) (“mass merchandiser exception” was a special law because one and only one entity was or ever could be benefitted by it).

\(^{170}\) 281 Md. at 305-06, 380 A.2d at 27.

\(^{171}\) 315 Md. at 275, 554 A.2d at 377; *Reyes*, 281 Md. at 306, 380 A.2d at 27. It is possible, although unlikely, that another stadium could be built in Prince George’s County or that another all-male golf club could be established in Maryland.

\(^{172}\) *Burning Tree*, 315 Md. at 290, 554 A.2d at 384.
force the court to repeat its action in Bainum, that is, to strike the statute down in its entirety, which would preserve the club’s favorable tax assessments.\textsuperscript{173}

The State’s ERA provides: “Equality of rights under the law shall not be abridged or denied because of sex.”\textsuperscript{174} To determine whether a statute violates the ERA, the Court of Appeals has concluded that first, a party must show state action, and second, the court must be satisfied that the statute abridges equality of rights based on sex.\textsuperscript{175} In Maryland, the applicable standard in an equal protection analysis at the very least is strict scrutiny.\textsuperscript{176} The court most recently considered the ERA in Bainum, in which the court found that chapter 870’s primary purpose provision violated the ERA.\textsuperscript{177}

A majority of the Bainum court concluded that if the General Assembly enacts a statute which makes sex-based classifications, as chapter 870 did with the primary purpose exception,\textsuperscript{178} then the classification in and of itself constitutes state action.\textsuperscript{179} The court noted that “[o]bviously the equality ‘under law’ which the E.R.A. guarantees embraces an enactment by the General Assembly.”\textsuperscript{180} In Burning Tree, the court applied the same reasoning when it analyzed the periodic discrimination provision’s validity. This provision states that “[i]f the country club excludes certain sexes on specific days or at specific times on the basis of sex, the country club does not discriminate. . . .”\textsuperscript{181} The court found that the General Assembly’s enactment of chapter 334 in and of itself constituted state action because chapter 334 not only made explicit distinctions based on sex, but also distinguished between periodic and total discrimination.\textsuperscript{182}

\textsuperscript{173} 305 Md. 53, 82, 501 A.2d 817, 831 (1985).
\textsuperscript{175} Bainum, 305 Md. at 70, 501 A.2d at 825.
\textsuperscript{176} Id. at 98, 501 A.2d at 840; see Comment, supra note 174, at 1172.
\textsuperscript{177} 305 Md. at 83-84, 501 A.2d at 832.
\textsuperscript{178} Chapter 870’s periodic discrimination exception was not at issue in Bainum.
\textsuperscript{180} Id., 501 A.2d at 833.
\textsuperscript{181} MD. TAX-PROP. CODE ANN. § 8-214(b) (Supp. 1988).
\textsuperscript{182} Burning Tree, 315 Md. at 294, 554 A.2d at 386.
To determine whether chapter 334 abridged any equality of rights based on sex, the court again relied on its earlier decision in *Bainum*. The court noted that chapter 870's primary purpose provision was unconstitutional on its face because it created a sex-based classification to determine the applicability of the preferential tax assessments. In the same respect, chapter 334 also failed. The Court of Appeals cited two such reasons: "First, the statute distinguishes between sex discrimination and other types of discrimination. Second, the statute creates a classification that distinguishes between discrimination on the basis of sex which is periodic (permitted) and discrimination on the basis of sex which is total (prohibited)."

The court concluded that the periodic discrimination provision violated the ERA; the court then considered the final issue of whether this exception was severable from the remainder of chapter 334, which otherwise included the fundamental prohibition against discrimination. After a detailed analysis of chapter 334's legislative history, the court held that the exception was severable; as a result, Burning Tree no longer would receive the preferential tax assessments.

183. *Id.*
185. *Burning Tree*, 315 Md. at 294-95, 554 A.2d at 386.
186. *Id.* at 296, 554 A.2d at 387.
187. *Id.* at 300, 554 A.2d at 389. Note that a majority of the *Bainum* court held that the invalid primary purpose provision was not severable from chapter 334. 305 Md. at 84, 88, 501 A.2d at 832-33, 835 (Rodowsky, J., concurring). The two cases are not clearly distinguishable. In *Bainum*, the majority concluded that it was not "the dominant purpose of the General Assembly... to enact a bar against sex discrimination which was to operate absent the primary purpose provision." *Id.* at 83, 501 A.2d at 832. The *Burning Tree* court, however, concluded that "the 'dominant purpose' of the General Assembly in enacting ch. 334 [after the primary purpose provision was found unconstitutional] was to reinstate sex as a prohibited basis for discrimination, regardless of the validity of the periodic discrimination provision." 315 Md. at 297, 554 A.2d at 388.

While the court in both cases devoted much time to the legislative history of chapters 870 and 334, the court did not clearly define the distinction between the relationship of the two exceptions with the general prohibition against discrimination. *Id.* at 302-05, 554 A.2d at 390-92 (McAuliffe, J., dissenting).
4. Analysis.—In *Burning Tree*, the court was forced to reconcile two fundamental and competing constitutional interests; namely, the State's interest in guaranteeing equal protection under the law and the privacy and associational rights of private groups. To resolve this problem, the court severed the provision that permitted the State's support of private discrimination based on sex, but allowed *Burning Tree* the freedom to continue its men-only policy—minus state support. In so doing, the court clarified the standards that courts are to employ when they analyze future equal protection and association rights claims.

4.1. Equal Protection.—The court most recently set forth an equal protection analysis under the State's law in *Bainum*. In that case, the court addressed both the level of scrutiny to be applied and the state action necessary to support an equal protection claim. While the judges considered the ERA requirements from somewhat different perspectives, a workable standard did emerge from the case.

In *Rand v. Rand*, it appeared that the State's courts would analyze equal protection claims under the strict scrutiny standard. The court noted that the "words of the E.R.A. are clear and unambiguous; ... [t]his language mandating equality of rights can only mean that sex is not a factor." Nevertheless, the *Bainum* court suggested a somewhat lower standard, but one that still is more stringent than the intermediate level of review which federal courts apply in cases of gender-based classifications. Judge Eldridge wrote that "the E.R.A. renders sex-based classifications suspect and subject to at least strict scrutiny, with the burden of persuasion being upon those attempting to justify the classifications. In this respect, the E.R.A. makes sex classifications subject to at least the same scrutiny as racial classifications." The *Burning Tree* court followed this standard and required that the State prove more than a substantial interest to justify the statute. The court invalidated the statute when the State failed to meet this burden.

---

188. 305 Md. at 53, 501 A.2d at 817.
189. *Id.*
191. *Id.* at 511-12, 374 A.2d at 902-03.
192. *Id.*; see *Brown, Emerson, Falk & Freedman*, *supra* note 174, at 892.
194. 315 Md. at 295-96, 554 A.2d at 386-87.
195. *Id.*
Bainum also is the leading case that defines the state action necessary to maintain an ERA claim. Courts have interpreted the "under the law" clause of the ERA to be the equivalent of "state action" under the fourteenth amendment.\textsuperscript{196} These two concepts "are essentially the same."\textsuperscript{197}

The importance of the state action requirement becomes clear when one considers individuals' rights and freedoms to associate with whomever they please. As individuals have constitutional association rights that protect them from the state's interference, requiring anything less than state action or to interpret state action too broadly for ERA claims would be inconsistent with these fundamental rights.\textsuperscript{198} In Burning Tree, this conflict between state action and association rights did not arise because the State did not challenge Burning Tree's discriminatory policies as violating the ERA. Thus, the scope of state action was considered only in light of the statute, and not the association.

b. Association Rights.—While Burning Tree does not confront directly the issue of when the State may interfere with a private organization's affairs, the court made clear that the State's taxpayers will not subsidize Burning Tree's discriminatory policies. Although the right to associate arguably may be equated with the right to discriminate, it does not follow that Maryland or any other state should encourage associations to discriminate.\textsuperscript{199}

5. Consequences of Burning Tree.—While the Court of Appeals addressed a number of issues in Burning Tree, only its invalidation of chapter 334's periodic discrimination provision specifically changed Maryland law. The repercussions of invalidating this exception, however, are not yet known. Thirty-two country clubs currently benefit from use assessment contracts.\textsuperscript{200} Prior to the Burning Tree decision, the State required private clubs to sign, consistent with the open spaces policy, an affidavit stating that they did not discriminate

\textsuperscript{196} Bainum, 305 Md. at 90 n.3, 501 A.2d at 836 n.3 (Eldridge, J., concurring in part and dissenting in part).
\textsuperscript{197} Id.
\textsuperscript{198} See Note, supra note 174.
\textsuperscript{199} See Marshall, supra note 139.
\textsuperscript{200} Interview with Gene L. Burner, Director of the State Department of Assessments and Taxation, and William H. Riley, III, Assistant Director of the State Department of Assessments and Taxation (Sept. 18, 1989). Mr. Burner and Mr. Riley kindly discussed the Burning Tree issues along with the effect that decision will have on current use assessment agreements.
as a prerequisite to receiving preferential tax assessments.  

Now that the court has severed the periodic discrimination exception from the statute, a club cannot discriminate in any way if it is to qualify for preferential tax treatment under the open spaces policy.  

The problem for the Attorney General and the courts will be to define discrimination within a private club setting. Single-sex clubhouse privileges, tee-off times, tournaments, and so forth, are among private country clubs' regular practices. The present law is silent on whether such practices constitute discrimination within the meaning of chapter 334 or the ERA. Currently, the Attorney General's office is conducting a survey in which it asks country clubs about their policies with respect to potentially discriminatory practices. The Attorney General will review the questionnaires and presumably examine use assessment contracts when necessary. At present, the Department of Assessments and Taxation will not alter use assessment contracts unless the Attorney General directs it to do so.  

From another perspective, the country clubs that benefit from the preferential assessments potentially face large tax increases in the wake of the court's invalidation of the periodic discrimination exception. For example, Burning Tree stands to lose $1.2 million as a result of the court's decision. But if a country club has little at stake financially, it could continue its current periodic discrimination and forego the lower assessment.  

6. Conclusion.—Burning Tree has ended the State's support of private clubs that discriminate based on sex. In so doing, the court has reiterated the State's commitment to equality under the law. What the decision does not address, however, is the degree to which private clubs may limit membership under the veil of associational rights. It seems clear, however, that such groups may continue their exclusive practices, absent state action.  

C. The Maryland Contract Lien Act  

In *Golden Sands Club Condominium, Inc. v. Waller*, the Court of  

201. *Id.*  
203. *See Interview, supra note 200.*  
204. *Id.*  
206. *See Interview, supra note 200.*  
207. 313 Md. 484, 545 A.2d 1332 (1988).
Appeals affirmed the constitutionality\textsuperscript{208} of the Maryland Contract Lien Act (the Act).\textsuperscript{209} The Act, which the General Assembly enacted in 1985, functions primarily as a creditor remedy.\textsuperscript{210} The statute provides procedures to establish and enforce a lien against property—in this case, a condominium unit—due to a breach of contract—in this case, failure to pay certain assessments chargeable against the unit;\textsuperscript{211} thus, the statute provides the creditor with an efficient mechanism to collect delinquent assessments.\textsuperscript{212} This process, however, may conflict with the debtor's due process rights.\textsuperscript{213} Thus, a constitutional analysis of such creditor remedies necessarily involves a balancing of the creditor's and the debtor's respective interests.\textsuperscript{214}

In \textit{Golden Sands}, the Court of Appeals concluded that the State's Contract Lien Act adequately accommodates both interests.\textsuperscript{215} The provision of the Act that required property owners to file their actions in a circuit court did not impermissibly compromise the owners' right to a hearing.\textsuperscript{216} In addition, the court held that the provision for notice by certified or registered mail was constitution-

\textsuperscript{208} \textit{Id}. at 486-87, 545 A.2d at 1333-34.
\textsuperscript{210} See generally Catz & Robinson, \textit{Due Process and Creditor's Remedies: From "Sniadach" and "Fuentes" to "Mitchell", "North Georgia" and Beyond}, 28 RUTGERS L. REV. 541, 541 (1975) (defining various procedures as creditor remedies when their primary function is to ensure satisfaction of some type of debt).
\textsuperscript{211} \textit{Golden Sands}, 313 Md. at 486, 545 A.2d at 1333; see MD. REAL PROP. CODE ANN. §§ 14-203 to -204 (1988 & Supp. 1989). Section 14-203 outlines the necessary procedure to be followed for a party to create a lien for breach of contract. Section 14-204(a) states that such a lien may be enforced and foreclosed according to the same requirements for mortgages or deeds of trust. Such enforcement action must be brought within three years of the recordation of the lien. \textit{Id}. § 14-203(c).
\textsuperscript{212} MD. REAL PROP. CODE ANN. § 14-203 (1988 & Supp. 1989); \textit{Golden Sands}, 313 Md. at 495, 545 A.2d at 1338.
\textsuperscript{213} The fourteenth amendment due process clause states: "Nor shall any state deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. The complaint in \textit{Golden Sands} questioned whether the State's Contract Lien Act (the Act) satisfied the procedural, not substantive, due process right to both a hearing and notice. 313 Md. at 487-88, 545 A.2d at 1334. For a comparison of procedural versus substantive due process review, see J. NOWAK, CONSTITUTIONAL LAW § 10.6 (3d ed. 1986).
\textsuperscript{215} 313 Md. at 495, 545 A.2d at 1337-38.
\textsuperscript{216} \textit{Id}.
ally sufficient.\textsuperscript{217} This Note reviews the impact of the court’s decision on debtors’ due process protection in the realm of creditor remedies.

1. The Case.—Golden Sands Club Condominium, Inc. (Golden Sands) governed the condominium complex in which Harry Waller owned one unit.\textsuperscript{218} Golden Sands levied various assessments against Waller\textsuperscript{219} in accordance with both the relevant section of the Maryland Condominium Act\textsuperscript{220} and the condominium master deed and bylaws.\textsuperscript{221} Waller repeatedly failed to pay these assessments, and the debt that he owed to Golden Sands eventually exceeded ten thousand dollars.\textsuperscript{222} Because of the delinquent assessments and related costs, Golden Sands notified Waller of its intention to create a lien against the condominium unit as authorized by the Maryland Contract Lien Act.\textsuperscript{223}

In response, and in accordance with section 14-203(c) of the Act,\textsuperscript{224} Waller brought suit and claimed that the statutory lien provisions violated his constitutional right to procedural due process.\textsuperscript{225} The Worcester County Circuit Court found that the Act was unconstitutional because it required the property owner to file suit to acquire the right to a hearing.\textsuperscript{226} In reaching its decision, the lower court looked to comparable provisions of the State’s Mechanics’ Lien Law,\textsuperscript{227} a statute closely related to the Act.\textsuperscript{228} The Mechan-
ics' Lien Law includes several procedural safeguards that are absent from the Act. The court held that these procedures delineate the minimum requirements of due process, and struck down the Act's hearing provision. Golden Sands then appealed to the Court of Special Appeals. Before the intermediate appellate court heard the case, the Court of Appeals granted certiorari to consider the important issue of whether the Act's procedures violate due process of law as required by the United States and Maryland Constitutions.

The Court of Appeals reversed the circuit court's judgment, finding that the procedures satisfied due process requirements. The Court of Appeals first addressed the hearing provision. Although the court acknowledged that the comparable provisions of the Mechanics' Lien Law are more stringent, the court nevertheless rejected the lower court's holding that those provisions represent the minimum requirements of due process. The court stressed that the timing of the hearing was adequate constitutionally because the opportunity arose before any lien attached to the condominium owner's property. In addition, the court upheld the procedure to initiate a hearing, despite the burden placed on the property owner, noting that the procedure fairly represents a balance of the parties' respective interests.

229. Id. at 491, 545 A.2d at 1336. The procedures required before a mechanic's lien will attach include the following: (1) if the claimant is a subcontractor, he must give written notice within 90 days after supplying work or materials, (2) the claimant must file in the circuit court a petition, which is supported by an affidavit and all relevant documents, (3) the court must find the petition facially sufficient, and (4) the court must give the owner an opportunity to be heard. Md. REAL PROP. CODE ANN. § 9-105 (1988).

230. Golden Sands, 313 Md. at 490, 545 A.2d at 1335. The circuit court did not address the adequacy of the notice provision. Id. at 488, 545 A.2d at 1334.

231. Id. at 487, 545 A.2d at 1334.


233. Golden Sands, 313 Md. at 486, 545 A.2d at 1333. The federal and state claims were based respectively on the fourteenth amendment to the United States Constitution and article 24 of the Maryland Declaration of Rights. See id. at 486 n.1, 545 A.2d at 1333 n.1.

234. Id. at 504, 545 A.2d at 1342.

235. Id. at 488-95, 545 A.2d at 1334-38.

236. Id. at 492, 545 A.2d at 1336.

237. Id.

238. Id. at 494-95, 545 A.2d at 1337-38. The respective interests involved were (1) the creditor's interest in a reasonable mechanism for the collection of delinquent assessments, (2) the debtor's interest in not being deprived erroneously of his property, and (3) the government's interest in the statute's intent and in "efficiency and minimal involvement of the judiciary." Id.
The Court of Appeals also addressed the Act's notice provision, in accordance with Mullane v. Central Hanover Bank & Trust Co. and its progeny, the court found that the notice provision was sufficient, emphasizing that notice by certified or registered mail was a reasonably calculated means of informing the condominium unit owner of the action.

2. Legal Background.—In 1985, the General Assembly enacted the present Contract Lien Act. The Act's purpose is to give creditors a process by which they can establish and enforce a lien against a condominium unit to collect a debt chargeable to that unit. The State employs a wide variety of "creditor remedies;" many traditionally allowed the ex parte seizure of property without giving the property owner prior notice or the opportunity to be heard. An initial acceptance of these remedies has given way to widespread litigation regarding their procedural validity. Both the opportunity to be heard "at a meaningful time" and in a meaningful manner, and the right to receive timely and adequate notice have come to be viewed as fundamental to due process. As a result,

240. Golden Sands, 313 Md. at 495-504, 545 A.2d at 1388-42.
241. 339 U.S. 306, 314 (1950) (holding that notice must be "reasonably calculated, under all the circumstances" to provide interested parties with the necessary information about the action).
242. See, e.g., Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 491 (1988) (holding that due process required notice by mail, rather than publication, to known or reasonably ascertainable creditors); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983) (holding that notice by publication and posting to mortgagees was not reasonably calculated when the names and addresses were reasonably ascertainable); Greene v. Lindsey, 456 U.S. 444, 453-54 (1982) (holding that posting a summons on a tenant's apartment door was not a reasonably calculated means of providing notice). See generally L. Tribe, American Constitutional Law § 10-15, at 732-36 (2d ed. 1988).
243. Golden Sands, 313 Md. at 503, 545 A.2d at 1342.
245. Golden Sands, 313 Md. at 486, 545 A.2d at 1333.
246. Catz & Robinson, supra note 210, at 541. The procedures that the different states follow include: attachment, sequestrian, garnishment, replevin, and repossession. Id.
247. Id.
248. See, e.g., Coffin Bros. v. Bennett, 277 U.S. 29, 31 (1928) (upholding a Georgia law that allowed for the immediate attachment of a lien without notice or a hearing, because the stockholder/debtor always could take the case into court later).
249. Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (stating that the opportunity to be heard at a "meaningful time" is essential to due process).
courts increasingly have struggled with the notice and hearing provisions of these state commercial statutes.\textsuperscript{251}

Beginning in 1969, the Supreme Court decided a series of cases that concerned creditor remedies.\textsuperscript{252} The cases challenged prejudgment creditor remedies that provided for neither a hearing nor notice prior to the attachment of property.\textsuperscript{253} In \textit{Sniadach v. Family Finance Corp.},\textsuperscript{254} the Court held unconstitutional a prejudgment garnishment procedure that allowed a creditor to freeze a debtor’s wages pending the outcome of the creditor’s claim.\textsuperscript{255} By so holding, the Court indicated that prejudgment creditor remedies could not be insulated from constitutional attack and greatly expanded the possessor/debtor’s due process protection.\textsuperscript{256} The Court asserted in \textit{Sniadach}, and in the subsequent case of \textit{Fuentes v. Shevin},\textsuperscript{257} that absent special circumstances, both notice and a hearing before the seizure of any property are essential to due process protection.\textsuperscript{258} Although the Court subsequently retreated from this initial expansion of due process protection\textsuperscript{259} in \textit{Mitchell v. W. T. Grant Co.}\textsuperscript{260} and \textit{North Georgia Finishing, Inc. v. Di-Chem, Inc.},\textsuperscript{261} the law remains relatively clear that in the absence of other procedural safeguards,\textsuperscript{262} a

\textsuperscript{251} North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 610 (1975) (Powell, J., concurring) (stating that the “expansion of concepts of procedural due process” required more careful analysis of statutory provisions than in the past). To attain this due process right, the injured party must show that state action has resulted in the deprivation of a substantial interest in property within the meaning of the due process clause. Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976); Department of Transp. v. Armacost, 299 Md. 392, 416, 474 A.2d 191, 203 (1984). In the present case, the circuit court held that both of these prerequisites were satisfied; therefore, the Court of Appeals did not address the issue. \textit{Golden Sands}, 313 Md at 488 n.4, 545 A.2d at 1344 n.4.

\textsuperscript{252} See generally Catz & Robinson, supra note 210, at 541-42.

\textsuperscript{253} \textit{Id.} at 541.


\textsuperscript{255} \textit{Id.} at 338-42.

\textsuperscript{256} Catz & Robinson, supra note 210, at 546.

\textsuperscript{257} 407 U.S. 67, 80-87 (1972) (holding that prejudgment replevin statutes in Florida and Pennsylvania violated due process because neither provided for notice or a hearing prior to the seizure of property).

\textsuperscript{258} \textit{Id.; Sniadach}, 395 U.S. at 339-42.

\textsuperscript{259} Catz & Robinson, supra note 210, at 556-68.

\textsuperscript{260} 416 U.S. 600, 607 (1974) (upholding a Louisiana sequestration statute that did not provide for prior notice or hearing, but did provide a number of other procedural safeguards).

\textsuperscript{261} 419 U.S. 601, 607 (1975) (holding that a Georgia garnishment statute violated due process because it did not afford any of the Mitchell safeguards). See generally Mitchell, 416 U.S. at 607.

\textsuperscript{262} See Mitchell, 416 U.S. at 605-06. The Louisiana statute’s safeguards included the requirement of a creditor’s sworn affidavit and the debtor’s opportunity for an immediate postseizure hearing. \textit{Id.} See generally Catz & Robinson, supra note 210, at 556-68, 585.
creditor may not deprive a debtor of a property interest without a timely hearing. 263

State courts generally have followed the Supreme Court in holding that a debtor must have a fair opportunity to be heard before he is deprived of his property. 264 Requiring a property owner to request a hearing is not inconsistent with a fair opportunity, 265 although it is not clear that requiring the property owner to file suit also constitutes a fair opportunity.

Due process also requires that the interested party receive timely and adequate notice. 266 Mullane v. Central Hanover Bank and Trust Co. 267 is the leading authority for an analysis of the adequacy of notice. 268 In Mullane, the Supreme Court established that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 269 The key focus is the reasonableness of the notification method that the state has chosen. 270 In general, the cases since Mullane have considered notice solely by publication or posting unreasonable when the interested party's name and address are reasonably ascertainable. 271 Courts, however, generally have upheld notice by either ordinary or certified mail. 272

When it struck down the hearing provision of the Contract Lien

---

264. See, e.g., id.
265. United States v. An Article of Device "Theramatic", 715 F.2d 1339, 1343 (9th Cir. 1983) (holding that requiring the defendant to request a hearing did not violate due process).
267. See id.; supra note 241.
268. Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 484 (1988) (stating that the Court consistently has followed the principles established in Mullane).
269. 339 U.S. at 314. The content of the notice is as important as the method of sending notice. Both aspects of notice must be reasonably calculated to inform the interested party of any available opportunity to present objections. Id.; see also Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-15 (1978) (holding that the notice mailed by a utility company that threatened to terminate service was constitutionally inadequate because the notice failed to advise customers of the proper procedures for protesting the utility's action).
271. See supra note 242.
272. See, e.g., Greene v. Lindsey, 456 U.S. 444, 455 (1982) ("notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings"); Weigner v. City of New York, 852 F.2d 646, 650 (2d Cir. 1988) ("In the context of a wide variety of proceedings that threaten to deprive individuals of their property interests, the Supreme Court has consistently held that mailed notice satisfies the requirements of due process").
Maryland Law Review

Act, the circuit court used the Mechanic’s Lien Law as its primary frame of reference.\(^{273}\) The Mechanic’s Lien Law is meaningful to the case at bar not only because it is closely related to the Act, but also because the General Assembly substantially rewrote the Mechanics’ Lien Law after the circuit court found it to be unconstitutional.\(^{274}\)

The Mechanics’ Lien Law faced a constitutional challenge in Barry Properties v. Fick Bros. Roofing Co.\(^{275}\) In Barry, the Court of Appeals concluded that the Mechanics’ Lien Law violated due process because it allowed a lien to attach to the owner’s property without prior notice or hearing.\(^{276}\) The Court of Appeals explained that a lien cannot attach to property constitutionally until the creditor prevails in a suit to enforce the claim or “some other appropriate proceeding providing notice and a hearing.”\(^{277}\)

The General Assembly rewrote the Mechanics’ Lien Law in response to Barry.\(^{278}\) Under the current law, which the Court of Special Appeals has held constitutional,\(^ {279}\) the court can impose the lien only after the creditor files suit and the owner has had an opportunity to contest the claim.\(^ {280}\) The circuit court subsequently held that the revised Mechanics’ Lien Law represented the minimum requirements of due process.\(^ {281}\)

The foregoing discussion illustrates the uncertainty that surrounded the notice and hearing provisions of state commercial statutes. The various decisions that balanced creditors’ interests against debtors’ vital due process rights left the law in a muddled

\(^{273}\) Golden Sands, 313 Md. at 490, 545 A.2d at 1335.

\(^{274}\) Id. at 491, 545 A.2d at 1335-36.

\(^{275}\) 277 Md. 15, 353 A.2d 222 (1976).

\(^{276}\) Id. at 31, 353 A.2d at 232. The purpose of the Mechanics’ Lien Law is to encourage construction by ensuring that those who contribute to a project, either with materials or labor, are compensated adequately for such contributions. Id. at 18, 353 A.2d at 225.

\(^{277}\) Id. at 37, 353 A.2d at 235.

\(^{278}\) Golden Sands, 313 Md. at 491, 545 A.2d at 1335-36. Under the prior Mechanics’ Lien Law, once a contractor supplied work or materials, a lien immediately attached to the property. Barry, 277 Md. at 19, 353 A.2d at 225-26. The General Assembly’s changes made it explicit that a lien could not attach immediately; the property owner had to have an opportunity to be heard. Golden Sands, 313 Md. at 491, 545 A.2d at 1336.

\(^{279}\) AMI Operating Partners Ltd. Partnership v. JAD Enters., Inc., 77 Md. App. 654, 664, 551 A.2d 888, 892 (1989) (holding that the Mechanics’ Lien Law does not violate due process despite the fact that an owner is not in privity with subcontractors imposing the lien).

\(^{280}\) See supra note 229.

\(^{281}\) Golden Sands, 313 Md. at 491, 545 A.2d at 1336.
and ambiguous state prior to *Golden Sands*.282

3. **Analysis.**—In *Golden Sands Club Condominium, Inc. v. Waller*,283 the Court of Appeals addressed this ambiguity.284 By concluding that the Act's procedures sufficiently accommodated both debtors' and creditors' interests, the court resisted any temptation to expand debtors' due process rights.285

In its due process analysis of the Act, the court looked to both the timing and the fairness of the hearing provided.286 The court first disposed of the timing issue by reciting the rule recognized in *Barry Properties*:287 Due process is satisfied if a fair opportunity for judicial scrutiny is provided *prior* to the attachment of a lien.288 In accordance with this principle, the court concluded that the timing of the hearing was adequate because the opportunity for a hearing arose prior to attachment of the lien.289

The court next addressed the procedural fairness of placing the burden on the property owner to file suit in circuit court to obtain a hearing.290 The court rejected any notion that a fixed standard governs due process requirements.291 Rather, the court indicated that the statutory provision satisfies due process when it represents a fair balance of the parties' respective interests.292 The court, while it acknowledged the burden placed on the property owner, nevertheless decided that the procedure satisfied due process.293

In analyzing whether the procedure fairly balanced the parties' respective interests, the court gave little weight to the filing require-

---

282. See Catz & Robinson, supra note 210, at 585.
283. 313 Md. 484, 545 A.2d 1332 (1988).
284. Id. at 487-88, 545 A.2d at 1334.
285. Id.
286. Id. at 492-95, 545 A.2d at 1336-38.
288. Id. at 30-32, 353 A.2d at 231-33.
289. *Golden Sands*, 313 Md. at 492-93, 545 A.2d at 1336-37. Early opportunity for a hearing made the probable cause determination and the affidavit mechanism included in the Mechanics' Lien Law superfluous. *Id.*
290. Id. at 493, 545 A.2d at 1337.
291. Id. at 493-94, 545 A.2d at 1337; see, e.g., Department of Transp. v. Armacost, 299 Md. 392, 416, 474 A.2d 191, 203 (1984) ("due process is flexible and calls for only such procedural protection as the particular situation demands").
292. *Golden Sands*, 313 Md. at 493-94, 545 A.2d at 1337; see Finberg v. Sullivan, 634 F.2d 50, 58 (3d Cir. 1980) (holding that a Pennsylvania post-judgment garnishment procedure violated due process because it failed to require: (1) a sufficiently prompt hearing, or (2) adequate notice, because the content of such notice did not include important exemption information).
293. *Golden Sands*, 313 Md. at 495, 545 A.2d at 1337-38.
ment and equated it to a simple request for a hearing. 294 Viewing this burden as minimal, the court concluded that a constitutional balance of interests existed. 295 One, however, could argue that the filing requirement placed an onerous burden on the property owner, favored the creditor, and evaded any such balance of interests. 296

The Court of Appeals went on to address the notice provision, an issue that the circuit court did not review. 297 The court recognized the increased importance of the notice provision that resulted from the determination that it is constitutional to require a property owner to file suit to secure a hearing. 298 Notice became the only device that informed the owner not only of the lien being sought, but also of the action necessary to oppose the lien. 299 After analyzing it in this light, the court upheld the notice provision as constitutional. 300

Based on the standard developed in Mullane v. Central Hanover Bank & Trust Co. 301 and its progeny, 302 the court concluded that notice by certified or registered mail was a reasonably calculated means of informing the property owner that his unit will be subject to a contract lien. 303 Case law supports this aspect of the court's decision; prior cases have held that notice by certified or registered mail is sufficient. 304 Although the court's reasoning is sound with regard to the notice provision, the debtor's increased reliance on notice because of the hearing provision's requirement gives rise to some uneasiness. As the property owner argued, requiring actual receipt of notice in this case would be more reassuring than merely notice that is reasonably calculated to inform. 305 It is this uneasi-

294. Id.

295. Id.

296. The creditor only had to send one letter of notification and, if the debtor did not respond, the creditor would have a lien in 120 days. Md. Real Prop. Code Ann. § 14-203(a) (1988 & Supp. 1989). The debtor, however, who already may have faced financial difficulty, had to file a suit—including a complaint, an affidavit, and a request for a hearing—in the circuit court within 30 days, and incur the related costs. Id. § 14-203(c). As no suit is truly "uncomplicated," such action by the debtor easily could have required a lawyer's aid, further increasing the debtor's expense.

297. Golden Sands, 313 Md. at 495-504, 545 A.2d at 1338-42.

298. Id. at 495, 545 A.2d at 1338.

299. Id.

300. Id. at 503, 545 A.2d at 1342.


302. See supra note 242.

303. Golden Sands, 313 Md. at 503, 545 A.2d at 1342.

304. See supra notes 271-272.

305. Although actual receipt would be more reassuring, the courts generally have not
ness that, in all likelihood, led the court to discuss the notice provision at such length in the opinion.

4. Conclusion.—In finding that neither the notice nor the hearing provisions of the Maryland Contract Lien Act violate due process, the court strongly resisted any further expansion of the debtor's due process rights. The court rejected arguments for increased due process protection and concluded that the Act fairly accommodated the parties' respective interests.

In so holding, the court avoided establishing the comparable provisions of the Mechanic's Lien Law as the minimum required by due process. The balance of interests analysis that the court used ostensibly is more flexible than validating a minimum standard of due process requirement. Therefore, although the court restricted the debtor's rights in this case, it may not do so in future decisions. Nonetheless, the minimal weight that the court gave to the debtor's interest in this case suggests that the court is unlikely to dramatically expand debtors' due process rights in the realm of creditor remedies.

D. Voter Initiatives

In *Maryland State Administrative Board of Election Laws v. Talbot County*, the Court of Appeals affirmed a declaratory judgment that a Talbot County charter provision which permitted voter-initiated legislation violated the State's constitution. The court concluded that voters in charter counties may not circumvent their county councils' authority by independently initiating and ratifying legislation; the court thus reinforced its traditional position that the State's elected bodies should be the sole source of law except in narrow situations.

---

required it. See, e.g., Weigner v. City of New York, 852 F.2d 646, 649 (2d Cir. 1988) (stating that the state need only employ means which are "reasonably calculated" and need not eliminate "all risk of non-receipt").


307. *Id.* at 495, 503-04, 545 A.2d at 1338, 1342.

308. *Id.* at 492, 545 A.2d at 1336.


310. *Id.* at 348, 558 A.2d at 732. The court stated that the charter provision in question violated article XI-A of the Maryland Constitution (the Home Rule Amendment), which reads in relevant part: "Every charter ... shall provide for an elective legislative body ... [which] shall have full power to enact local laws of said City or County including the power to repeal or amend local laws of said City or County enacted by the General Assembly ... ." *Md. Const.* art. XI-A, § 3.

311. *Talbot County*, 316 Md. at 348, 558 A.2d at 732.
rowly defined circumstances.\textsuperscript{312}

In its haste to rule out voter initiatives, however, the court diverged from its previous interpretation of the State's Uniform Declaratory Judgments Act\textsuperscript{313} as to when a justiciable controversy exists. Specifically, the court dodged case precedent that requires elected bodies to uphold the rules they enact\textsuperscript{314} and absolves election boards from defending laws in which they have no concrete interest.\textsuperscript{315} The court instead permitted the Talbot County Council and the County Attorney, the parties who sought to avoid a voter initiative on the county ballot, to pursue a declaratory judgment against state and local election boards as well as against several private defendants.\textsuperscript{316} Consequently, the decision in \textit{Talbot County} undermines state public officials’ responsibility to uphold the very charters that grant their authority, casts on disinterested parties and private individuals the expense of defending certain laws, and obscures the rules that indicate when the court ought to deliver a declaratory judgement.

\textbf{1. The Case.}—The \textit{Talbot County} controversy arose from ardent community objection to the Talbot County Council’s (the Council) decision in May 1987 to build a new county detention center approximately 700 feet from the existing county jail.\textsuperscript{317} When the Council remained unmoved by various citizens’ and community

\begin{itemize}
\item \textsuperscript{312} The court preserved the voters’ right to reject through referendums legislation that county councils passed if permitted in their county charters. \textit{Id.}
\item \textsuperscript{313} The Maryland Uniform Declaratory Judgments Act states in relevant part:

\begin{quote}
[A] court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:
\begin{enumerate}
\item actual controversy exists between contending parties;
\item claims are present between the parties involved which indicate imminent and inevitable litigation; or
\item A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.
\end{enumerate}
\end{quote}

\item \textsuperscript{314} Anne Arundel County \textit{v. Moushabek}, 269 Md. 419, 422, 306 A.2d 517, 519 (1973) ("County charter is to its legislative body as the constitution of Maryland is to the General Assembly of Maryland."); see \textit{infra} note 335.
\item \textsuperscript{315} Harford County \textit{v. Schultz}, 280 Md. 77, 85, 371 A.2d 428, 432 (1977) (Board of Supervisors of Elections has "no interest one way or the other" in County's action seeking declaration that two bills which County Council passed were invalid); see \textit{infra} note 335.
\item \textsuperscript{316} \textit{Talbot County}, 316 Md. at 337, 558 A.2d at 726; see \textit{infra} text accompanying note 327.
\item \textsuperscript{317} 316 Md. at 336, 558 A.2d at 726.
\end{itemize}
groups’ disapproval of this site, protesters resorted to section 216 of the county charter, which permitted them to write their own bill—subject to voter approval—that effectively aborted construction of the jail.318 The bill, designed and promoted by community activists, provided: “That no detention center, jail, or other correctional facility be constructed, and operated within five hundred (500) feet of a church, school, cultural building, library, recreational area, or residence.”319 Activists garnered over 2000 signatures in support of the bill and prepared to put the issue to a vote.320

In June 1988, the Council and the County Attorney, James M. Slay, filed suit in the Talbot County Circuit Court seeking a judgment declaring that section 216 violates article XI-A of the Maryland Constitution321 (the Home Rule Amendment).322 Slay and the Council sought to void the initiative and to enjoin state and local officials from placing it on the ballot.323 They argued that because

318. Id. at 337, 558 A.2d at 726. Section 216 of the Talbot County Charter reads:

(a) A bill may be initiated by the voters upon petition, in the form prescribed by law, of not less than ten percentum of the qualified voters of the County as of January 1 of the current year. Initiated bills shall conform to the requirements provided in Section 213 (a) of this Charter, except that the bill shall be styled: ‘Be it enacted by the People of Talbot County, Maryland.’ The petition shall be filed with the Board of Supervisors of Elections of Talbot County.

(b) If a petition is filed, the bill shall be referred to the qualified voters of the County at the next ensuing regular election held for members of the House of Representatives of the United States. If the bill is approved by a majority voting thereon, it shall take effect thirty calendar days thereafter.


319. Talbot County, 316 Md. at 337, 558 A.2d at 726.

320. Id. The citizens’ selection of the county charter’s direct initiative provision instead of its referendum provision is attributable to the language of § 217 of the Talbot County Charter that prohibits referendums on laws “appropriating funds for current expenses of the County government.” TALBOT COUNTY, MD., CHARTER § 217 (1974).


322. Talbot County, 316 Md. at 337, 558 A.2d at 726. Maryland was the second state to make charter home rule available to its counties; California was the first. Moser, County Home Rule—Sharing the State’s Legislative Power with Maryland Counties, 28 Md. L. REV. 327, 331 (1968). The Maryland legislature approved the Home Rule Amendment to the Maryland Constitution in 1915, granting individual counties a wide variety of law-making powers. See id. at 331. The amendment provided for a process under which citizens could elect a commission charged with constructing a charter that would be subject to the approval of a majority vote. Id. at 333. Eight Maryland Counties (Baltimore, Anne Arundel, Wicomico, Talbot, Prince George’s, Montgomery, Howard, and Harford) and Baltimore City have adopted such charters. Ritchmount Partnership v. Board of Supervisors of Elections, 283 Md. 48, 53-54, 388 A.2d 523, 527 (1978). The remainder of the State’s counties are “code counties,” granted some local autonomy, but under significantly more of the state legislature’s authority. Moser, supra, at 332.

323. Talbot County, 316 Md. at 337, 558 A.2d at 726.
the Home Rule Amendment vests in the Council "full power"\footnote{See Md. Const. art. XI-A, § 3; see also infra note 355 and accompanying text.} to enact legislation, voters may not circumvent this authority by making the law themselves.\footnote{Talbot County, 316 Md. at 337, 558 A.2d at 726.}

Slay and the Council initially named the County Board of Supervisors of Elections (the local board) and the Maryland State Administrative Board of Election Laws (SABEL) as defendants in the suit.\footnote{Id.} Shortly thereafter, they added as defendants a political committee composed of citizens who actively promoted the detention center initiative, and two private defendants, Gerald Gibson and John A. Henry.\footnote{Id., at 338, 558 A.2d at 726-27.} The amended complaint identified Gibson and Henry as signatories to the initiative petitions and active proponents of its aim.\footnote{Id., 558 A.2d at 727.}

The Talbot County Circuit Court declared the charter provision an unconstitutional violation of the Home Rule Amendment and enjoined placement of the initiative on the election ballot.\footnote{Id., 558 A.2d at 727.} SABEL and the private defendants appealed.\footnote{Id.} Prior to a decision by the Court of Special Appeals, the Court of Appeals granted certiorari.\footnote{Id. at 339, 558 A.2d at 727.}

2. Legal Background.—a. "Justiciable Controversy".—Before they argued the merits of voter initiatives in Talbot County, SABEL, the local board, and the private defendants attempted to persuade the court that the case did not amount to a "justiciable controversy."

The court noted that a justiciable controversy exists when interested parties assert adverse claims upon an accrued state of facts "wherein a legal decision is sought or demanded"\footnote{Id. at 339, 558 A.2d at 727.} and that it is an "absolute prerequisite" for the continued vitality of a declaratory judgment action.\footnote{Talbot County, 316 Md. at 339, 558 A.2d at 727.}

When confronted with the justiciability issue, the Court of Ap—

\footnote{324. See Md. Const. art. XI-A, § 3; see also infra note 355 and accompanying text.}
\footnote{325. Talbot County, 316 Md. at 337, 558 A.2d at 726.}
\footnote{326. Id.}
\footnote{327. Id.}
\footnote{328. Id. at 338, 558 A.2d at 726-27.}
\footnote{329. Id., 558 A.2d at 727.}
\footnote{330. Id.}
\footnote{331. Id.}
\footnote{332. Id. at 339, 558 A.2d at 727.}
\footnote{333. Id. The court explained the requirements for justiciability as follows: "[T]he issue presented to the court should not decide moot, theoretical or abstract questions. Moreover, the plaintiffs must have standing to bring suit. And there must be an 'actual controversy' which exists between the parties." Id. (citations omitted); see Reyes v. Prince George's County, 281 Md. 279, 288, 380 A.2d 12, 17 (1977) (citing 1 W. Anderson, Actions for Declaratory Judgments 67 (2d ed. 1951)).}
\footnote{334. Talbot County, 316 Md. at 339, 558 A.2d at 727.}
appeals specifically has precluded public officials from seeking a declaratory judgment against certain laws they were elected to uphold and has absolved election boards from defending laws in which they have no interest. For example, in State ex rel Attorney General v. Burning Tree Club, Inc., the court held that the State’s Attorney General does not have standing to bring a declaratory judgment action which challenges the constitutionality of a statute enacted by the General Assembly. The court refused to render a declaratory judgment because enforcing the statute did not present the Attorney General with a “dilemma” of potential action for damages or disciplinary measures for either refusing to act under the statute or administering a statute later found unconstitutional. In finding that the Attorney General was an inappropriate plaintiff, the court said, “[a] statute, with its presumption of constitutionality, has [a] right to an advocate of its validity.” The Burning Tree court held that the Attorney General is obligated to be that advocate. In Talbot County, the state, local, and private defendants argued that the Council members and the County Attorney are similarly obligated to defend county law.

SABEL, the local board, and the private defendants also pointed to state precedent on justiciability. The defendants noted that the court had found a declaratory judgment action, which Harford County brought against its Board of Supervisors of Elections to have the court declare its charter provisions unconstitutional, was not justiciable. In Harford County v. Schultz, the court found that if county officials simply did not wish to enforce their own laws, the election board was not the appropriate body to defend it. According to the court, the case fell short of meeting

335. See State ex rel Attorney Gen. v. Burning Tree Club, Inc., 301 Md. 9, 37, 481 A.2d 785, 799 (1984) (Maryland Attorney General may not seek declaratory judgment against the constitutionality of an enactment by the General Assembly); see also Harford County v. Schultz, 280 Md. 77, 86, 371 A.2d 428, 432 (1977) (suit by county officials against county election board, seeking to have county charter declared unconstitutional, was nonjusticiable and presented no actual controversy).
337. Id. at 30, 481 A.2d at 797.
338. Id. at 19-26, 481 A.2d at 789-93.
339. Id. at 36, 481 A.2d at 799.
340. Id. at 37, 481 A.2d at 799.
341. 316 Md. at 340, 558 A.2d at 728.
342. Id. at 339, 558 A.2d at 727.
344. Id. at 85, 371 A.2d at 432. The court stated:

Here we have the anomalous situation of the attack on the validity of the ordinance being by the political subdivision which enacted it. It would be similar to
the provisions of the Declaratory Judgment Act because it lacked both an actual controversy between the parties and a concrete interest in the issue by the defendants. Because "no justiciable issue was presented to the trial court," the court said, "the court lacked jurisdiction to make a determination in the case."

b. Voter Initiatives.—Historically, the American electorate has used two specific political processes to define or create law without its designated representatives' consent. The more common method is the referendum, whereby citizens vote to approve or disapprove laws created by the legislatures. Voter initiatives, through which citizen-written bills become law if approved by a popular vote, are a less prevalent but growing phenomenon. The historical roots of both processes are explained in the 1917 case of Beall v. State:

This principle of representation ... was for many years looked upon as one of the great principles of popular government, and as necessary and indispensable for the preservation of civil order and popular liberty. After the close of the Civil War great abuses began to creep into legislation and into the administration of the National and State governments ... They were alleged to have grown out of the control by corrupt methods of legislation and administration by great corporations and a group of individuals in each State who had taken into their hands the machinery of each of the great political parties. In this way and by these methods it was charged that the government, in all its departments, was prostituted to corrupt and selfish purposes.

the situation which might exist if the Governor were to direct the Attorney General to docket an action in the name of the State contesting the validity of an enactment of the General Assembly. Inevitably in the latter situation the question would arise as to who would protect the presumption of validity, who would appear for and present the arguments which should be presented in an effort to show that the act was valid. The same question arises here. It is obvious that the Board has no interest one way or the other in the outcome of this proceeding. There is no defense here.

Id. 345. See supra note 313.
347. Id. at 86, 371 A.2d at 432-33.
351. 131 Md. 669, 103 A. 99 (1917).
To remedy these evils it was proposed by some to abolish the principle of representation, and to introduce the principle of direct legislation by the people; by others to modify the principle of representation by incorporating into the organic law the Referendum...  

Article XVI of the Maryland Constitution allows for referendums, but includes the very important restriction that "[n]o law making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution... shall be subject to rejection or repeal under this Section." Each of Maryland's eight charter counties also permits referendums as well as provisions for direct amendment of their charters. The court has held that voter referendums and charter amendments do not exceed section three of the Home Rule Amendment, which states that county councils "subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws... upon all matters covered by the express powers granted as above provided..."  

In recent years, however, the court has narrowed its support for citizen actions that may establish or overturn law. In Cheeks v. Cedlair Corp., the court ruled that citizens of Baltimore City could not use the charter amendment provision of the city charter to establish a comprehensive rent control program. The court called the city charter a fundamentally "permanent document intended to provide a broad organizational framework" for governing the city, distinguishing it from a means by which legislative goals may be articulated and achieved. The court distinguished its holding in

---

352. Id. at 677, 103 A. at 102 (emphasis in original).
355. Md. Const. art. XI-A, § 3. In 1978, the Court of Appeals affirmed its acceptance of the referendum as a legitimate right of county citizenship in Ritchmount Partnership v. Board of Supervisors, 283 Md. 48, 388 A.2d 523 (1978). In Ritchmount, the court refused to declare unconstitutional an Anne Arundel County charter provision that permits citizens to conduct referendums of bills passed by their County Council. The Court identified referendums as an "integral component of the legislative process whenever authorized." Id. at 61, 388 A.2d at 532.
357. Id. at 608, 415 A.2d at 262. In Cheeks, the Court said: "[A] charter amendment... is necessarily limited in substance to amending the form or structure of government initially established by adoption of the charter.... Its content cannot transcend its limited office and be made to serve or function as a vehicle through which to adopt local legislation." Id. at 607, 415 A.2d at 261.
358. Id. at 607, 415 A.2d at 261.
Cheeks from that in Ritchmount Partnership v. Board of Supervisors\(^{359}\) in which it had approved referendums as within the scope of the Home Rule Amendment:

Under the referendum power, the elective legislative body
... continues to be the primary legislative organ, for it has formulated and approved the legislative enactment referred to the people. The exercise of the legislative initiative power, however, completely circumvents the legislative body, thereby totally undermining its status as the primary legislative organ.\(^{360}\)

The court declared in Cheeks that charter amendments which are “essentially legislative in character” are incompatible with the Baltimore City Council’s possession of “full power to enact local laws.”\(^{361}\) The court so held because “the amendment [was] not addressed to the former structure of government in any fundamental sense ... and thus was not ‘charter material.’”\(^{362}\) In 1984, the court reinforced Cheeks by holding that a proposed county charter amendment which required resolution of labor disputes involving county-employed fire fighters through binding arbitration violated the Home Rule Amendment.\(^{363}\) The court’s constricted view of charter amendments, combined with its more recent limitation on voter referendums at the state level,\(^{364}\) foreshadowed its rejection of voter initiatives as a means of making law in Maryland.

3. Analysis.—Talbot County presents two issues, justiciability and voter-initiated legislation. To decide the latter, the court first

\(^{359}\) See supra note 355.
\(^{360}\) 287 Md. at 613, 415 A.2d at 264.
\(^{361}\) Id. at 608, 415 A.2d at 262.
\(^{362}\) Id.
\(^{364}\) Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 530 A.2d 245 (1987), arose from citizen opposition to three statutes approved by the Maryland legislature, the first two authorizing the State Stadium Authority to borrow funds through issuance of bonds, and the third designating a site to construct a stadium for professional football and baseball. Id. at 440, 530 A.2d at 247. Although the statutes that provided for fund raising did not constitute direct appropriations in that specific expenditures were not authorized, the court held that they nevertheless are included in the exception to Article XVI of the Maryland Constitution, which states that appropriations bills are not referable. Id. at 461, 530 A.2d at 254. More significantly, because the stadium bills were “packaged together for implementation as a single entity, their various parts being mutually dependent upon one another,” id. at 473, 530 A.2d at 263, the court held that the bill which involved the site could not be singled out for a referendum. Id. at 474, 530 A.2d at 263. The court viewed the stadium bills as a “unitary solution to [the legislature’s] singular objective” of constructing and financing a new stadium. Id. at 473, 530 A.2d at 263.
had to address the election boards’ and private defendants’ assertion that the ‘‘wrong plaintiffs’ [were] suing the ‘wrong defendants.’’ But the court skirted the justiciability issue, and thereby ensured future confusion over when elected officials may sue for judgment against the laws they were elected to uphold and when parties with no genuine interest in the issue or ability to remedy the claim must act to defend those laws. By avoiding the justiciability issue, however, the court was able to articulate its objection to voter-initiated legislation in the counties. While the court examined the county charter provision at issue in light of the state constitution, its rejection of voter initiatives reinforced its emerging position in favor of representative government in Maryland over direct democracy.

a. Justiciability.—The court rejected the analogy presented by the defendant election boards that, just as the Attorney General is the necessary advocate of state law, the County Attorney is obligated to defend the validity of a charter provision. Refusing to apply Burning Tree, the court maintained that Slay’s status as County Attorney did not negate his rights to sue as a citizen and taxpayer. “The expenditure of public funds to place the invalid and void initiative on the ballot could result in increased taxes or other pecuniary loss to [Slay],” the court said. “Slay has satisfied the taxpayer-standing test by showing a potential pecuniary loss if the initiative was placed on the November 8, 1988 ballot.” In treating Slay as merely a taxpayer, the court provided a clear model under which county attorneys, executives, and other officials throughout the State may take to circumvent their obligation to defend the very bodies of law that grant their authority.

365. Talbot County, 316 Md. at 339, 558 A.2d at 727.
366. Id. at 340-41, 558 A.2d at 729-30.
367. Id. at 349, 558 A.2d at 732. “[D]irect legislative initiative is constitutionally at odds with the primacy of the elected legislative body.” Id.
368. Id.
369. Id. at 341, 558 A.2d at 728.
370. Id.
371. Id.
372. Id. at 342, 558 A.2d 729.
373. When it stated that Slay could sue for declaratory judgment based on his status as a taxpayer, the court did not rule on whether the County also had standing to bring suit. “Because Slay has standing as a taxpayer, and the case could proceed with Slay as the only plaintiff, we need not determine whether the County also has standing to bring the suit.” Id.
b. Voter-Initiated Legislation.—The court’s dissolution of section 216 of the Talbot County Charter, which allowed voters to initiate and approve their own legislation, has no direct consequences on the seven other charter counties and Baltimore City, because none of those charters provide for direct voter initiative. Instead, the significance of Talbot County emerges from its philosophical underpinnings. While the court restricted its analysis to whether voter initiatives unconstitutionally exceed the power of the Council as mandated by the state constitution, the decision represents its preference for representative democracy over law-making by direct citizen action.

On its face, the notion of legislating through the ballot box seems consistent with the democratic stance that citizens should make the law as they see fit. When elected bodies prove slow to act or unresponsive to the will of the people, direct initiatives permit voters to circumvent their representatives’ actions. One analysis is that “direct legislation remedies some of the legislature’s shortcomings and serves as a fitting complement to the legislative process.” Almost two dozen states endorse the notion of direct democracy by permitting citizens to make law beyond that which is set by their legislatures.

Critics of direct democracy, however, argue that history has shown the shortcomings of legislation by ballot, particularly from the point of view of America’s minorities. “[T]he experience of blacks with the referendum has proved ironically that the more direct democracy becomes, the more threatening it is,” states Derrick A. Bell, Jr. Bell further asserts:

To criticize the trend toward direct democracy appears reactionary, if not un-American. Yet . . . the growing reliance on the referendum . . . poses a threat to individual rights in general and in particular creates a crisis for the rights of racial and other discrete minorities . . . . [S]ocial attitudes toward racial equality are an appropriate litmus to measure the danger to blacks and other minorities which may result if those urging greater reliance on the referendum prevail.

---

374. Id. at 343, 558 A.2d at 729.
375. Id. at 344-47, 558 A.2d at 730-31.
376. Briffault, supra note 350, at 1350.
377. Id. at 1348 n.4.
378. Bell, supra note 349.
379. Id. at 2-10.
Other criticisms of voter initiatives emerge from individual state experiences with the process. In some states, the politics that surround a discrete issue often overshadow elections for representatives and shift attention away from constructing responsible legislatures.\textsuperscript{380} In addition, experience proves that the side which wields the most money in a voter initiative is most likely to win, thereby turning the legislative process into a tool for well-funded special interests.\textsuperscript{381} Indeed, voter initiatives have the sinister impact of turning the legislative process into a business; enterprises devoted exclusively to ushering citizen-initiated legislation through the balloting process have emerged with the growing popularity of this breed of government.\textsuperscript{382} Talbot County attempts to insure that voter-initiated legislation will never pose these threats to government in the State's counties.

4. Conclusion.—In Talbot County, the Court of Appeals banished voter-initiated legislation as a law-making alternative in the State's county politics. The decision reinforced the court's general position that the best democracy is representative, not direct. To arrive at a finding on Talbot County's merits, however, the court passed over legitimate and persuasive arguments that the case was not yet ripe for decision—given that the plaintiff county officials challenged the very charter that grants them power, and the defendant election boards were faced with defending an issue in which they had no interest. Thus, the court's unequivocal decision on the merits only obscures the meaning of justiciability.

E. Certificates of Candidacy: First Amendment Violation

In Dixon v. Maryland State Administrative Board of Election Laws,\textsuperscript{383} the United States Court of Appeals for the Fourth Circuit held that laws which require non-indigent write-in candidates to pay a filing fee to be certified as "official" candidates and to have their vote totals publicly reported violated the first amendment.\textsuperscript{384} The court further held that the State cannot condition the reporting of write-in votes on candidate certification, regardless of whether the State requires a fee for certification.\textsuperscript{385} In so holding, the court followed a

\textsuperscript{380} Lindsey, \textit{supra} note 348, at A14, col. 1.
\textsuperscript{381} Id.
\textsuperscript{382} Id.
\textsuperscript{383} 878 F.2d 776 (4th Cir. 1989).
\textsuperscript{384} Id. at 786. U.S. CONST. amend. I. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech."
\textsuperscript{385} Dixon, 878 F.2d at 786. In a footnote, the Fourth Circuit considered the State's
recent Supreme Court trend of applying a direct first amendment analysis to evaluate the constitutionality of election laws, rather than analyzing the issue under an equal protection framework.  

1. The Case.—Reba Williams Dixon and Dana Burroughs, affiliates of the Socialist Workers Party, competed in the 1987 Baltimore City elections as write-in candidates for the offices of Mayor of Baltimore City and President of the City Council of Baltimore, respectively. On July 27, 1987, the Baltimore City Board of Supervisors of Elections denied their applications for certificates of candidacy when they failed to pay the requisite fee or, alternatively, to file as indigents. The next day, Dixon and Burroughs, along with two of their supporters, filed suit in the United States District Court for the District of Maryland, pursuant to title 42, section 1983 of the United States Code.

The complaint, which sought injunctive relief, alleged that pro-concern that a universal reporting requirement would require even the reporting of votes cast for fictitious characters, such as Donald Duck. Id. at 785 n.12. While the court stated that such a vote could be viewed as a serious political commentary worthy of constitutional protection, they did not definitively extend the State's obligation to report these votes. Id. Thus, the effect of the court's decision may not be as sweeping as it appears at first glance.

386. The fourteenth amendment equal protection clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Pursuant to this command, the Supreme Court's analysis of election laws required that it balance the injury to constitutional rights, considering both the character and magnitude of the injury, against the state's interests and the burden placed on the plaintiff's rights to effect those interests. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

The equal protection analysis implicated the first amendment through the fundamental rights strand of that analysis. The analysis employed, therefore, did not change significantly when the Supreme Court relied directly on the first amendment in Eu v. San Francisco County Democratic Cent. Comm., 109 S. Ct. 1013, 1019-20 (1989) (holding that California election laws which infringed upon political parties' first amendment rights could be upheld only if the State demonstrated a compelling interest). The first amendment analysis, because it directly concerns the freedoms of speech, association, and political expression, would appear to be a more appropriate inquiry than equal protection.

387. Dixon, 878 F.2d at 778.
388. Id.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.

Edwin B. Fruit and Margaret Mary Kreiner were Dixon's and Burroughs' supporters. Dixon, 878 F.2d at 778. Because the Fourth Circuit's decision was based almost entirely
visions in the State's general election laws violated the first and
fourteenth amendments because the laws encroached on the plain-
tiffs' fundamental rights in the absence of substantial or compelling
governmental interests. Specifically, state law provided that only
votes cast for "official candidates" would be publicly reported. To be an "official candidate," a write-in candidate had to file a cer-
tificate of candidacy and pay a filing fee. Individuals who demon-
strated an inability to pay could obtain a fee waiver, however.

The district court denied the plaintiffs' request for relief, deter-
mining that the fee requirement did not erect "significant" barriers
to candidates who sought election, or to voters who cast their votes
for these candidates. Accordingly, the rational basis test was the
proper standard of equal protection review. The district court
concluded that the State's interests—defraying the costs of write-in
candidacies and dissuading fraudulent or frivolous candidacies—
were both rational and legitimate governmental interests that suffi-
ciently supported the challenged laws. In essence, the district
court determined that "under the current Maryland statutory
scheme, write-in candidates [were] treated comparably to candidates
whose name appear[ed] on the ballot."

on the effect of the State's election laws on voters, Fruit and Kreiner in essence were the
most important parties to the action.

Dixon, 878 F.2d at 778.

Md. ANN. CODE art. 33, § 17-5(d) (1986). "The canvassing board shall also make
a statement of the whole number of votes given in each precinct and county or city, with
the names of the candidates and the number of votes given for each in tabular form." If an individual did not file a certificate of candidacy, the individual was not consid-
ered a candidate for purposes of this reporting provision. Dixon, 878 F.2d at 777.

Md. ANN. CODE art. 33, § 4D-1(b) (1986) states that "a write-in candidate is re-
quired to file a certificate of candidacy for election." Md. ANN. CODE art. 33, § 4A-6(e)
stipulated that candidates had to pay $150 when they filed for a certificate of candidacy
in an election for a Baltimore City "at-large" office. The Fourth Circuit added that
Maryland is the only state known to require write-in candidates to pay filing fees. Dixon,
878 F.2d at 777 n.1.

Md. ANN. CODE art. 33, § 4A-6(g) (1986) states that "each filing fee required by
this section or by § 7-1 is mandatory unless the candidate establishes his inability to pay
the fee." To establish an inability to pay, a candidate must submit a sworn statement of
such inability accompanied by a statement of assets and disposable net income. Id.

Md. 1988), rev'd, 878 F.2d 776 (4th Cir. 1989). In Dixon, the district court stated that
"[i]n light of these facts, when the Maryland fee is 'examined in a realistic light,' it can-
not be said that it poses a significant obstacle to a candidate's eligibility to run or to the
voters' ability to vote for him." Id.

Dixon, 878 F.2d at 778.

Dixon, 686 F. Supp. at 541-42.

Id.

Id. at 541. As the Fourth Circuit later stated, however, "[v]oters . . . have this
On appeal, the United States Court of Appeals for the Fourth Circuit reversed. The Fourth Circuit focused its inquiry on the first amendment and the effect of the election laws on the fundamental right to vote. The court's first amendment analysis emphasized the laws' consequences for voters in contrast to the district court's equal protection analysis, which focused on the state statute's treatment of candidates.

The court recognized that while the challenged filing fee requirement directly affected candidates, it invariably had a residual effect on voters who expressed their political beliefs through the support of these candidates. As a basis for this reasoning, the court cited previous cases in which the Supreme Court held that candidates' and voters' interests necessarily are intertwined. Specifically, Dixon and Burroughs were "rallying points" for voters who shared their views and were vehicles for these voters to have voiced their convictions. When the State diminished Dixon's and Burroughs' status as the representatives of the party and its beliefs, it also adversely implicated the fundamental rights to vote and to freely associate with like-minded voters.

Having found that the challenged provisions infringed upon a first amendment right, the Fourth Circuit required a compelling right of political expression taken away from them when the State refuses to make their votes public. This is no different in effect from refusing to allow them to cast their ballots in the first place." Dixon, 878 F.2d at 782-83.

399. Dixon, 878 F.2d at 780. "We think that Eu and Anderson, rather than the Supreme Court's equal protection precedents, dictate the applicable analysis to be employed in resolving the questions raised in this case." Id.

400. Id. at 778. "We consider and decide the case on the basis of the effect of the regulations on the voters of Baltimore City." Id.

401. Id. The Fourth Circuit stated that the filing fee impacts both the candidate and "equally . . . the voters who support him, because it is through their association with and their votes for the candidate that they may most effectively express their political preference." Id.

402. Id. at 779; see Bullock v. Carter, 405 U.S. 134, 143 (1972) (the Court stated that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters"); see also Lubin v. Panish, 415 U.S. 709, 716 (1974) (the Court stated that "... voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance").

403. Dixon, 878 F.2d at 781. The Fourth Circuit held that "the denial of official status to a candidate may serve to lessen the effectiveness of that candidate's campaign by making the candidate a less visible standard bearer for would-be supporters." Id. In Anderson, the Supreme Court also asserted that "[t]he exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." 460 U.S. 780, 787-88 (1983).
state interest to sustain the law.\textsuperscript{404} The court found no such interest,\textsuperscript{405} and accordingly deemed the Maryland statutes unconstitutional.\textsuperscript{406} Furthermore, the court stated that certification could not serve as a prerequisite to the public reporting of a candidate’s votes.\textsuperscript{407} Such a burden on voters’ rights was unsupported by any interest forwarded by the State.\textsuperscript{408}

2. \textit{Legal Background}.—Historically, the Supreme Court has analyzed election law cases through an equal protection framework, with fundamental first amendment rights underlying the equal protection claims.\textsuperscript{409} The Supreme Court established this method of analysis in \textit{Williams v. Rhodes}.\textsuperscript{410} \textit{Williams} involved a latticework of laws that made it “virtually impossible” for a new party to gain a place on the Ohio primary ballot.\textsuperscript{411} To gain a ballot position, Ohio required the new party to file a petition and collect the requisite signatures within a limited period of time.\textsuperscript{412} Ohio further required the new party to have an elaborate party machinery in place.\textsuperscript{413} The Supreme Court held that these provisions created an invidious distinction between new and old political parties, freezing the political status quo; accordingly, the Court struck down the Ohio laws.\textsuperscript{414}

Other states have used filing fees as a predominant means of limiting access to the ballot.\textsuperscript{415} Under an equal protection analysis,

\begin{itemize}
  \item \textsuperscript{404} Dixon, 878 F.2d at 783. The court’s analysis under the first amendment proceeded as it would have under equal protection. \textit{See supra} note 386.
  \item \textsuperscript{405} Dixon, 878 F.2d at 784.
  \item \textsuperscript{406} Id.
  \item \textsuperscript{407} Id. at 786; \textit{see supra} note 386.
  \item \textsuperscript{408} Dixon, 878 F.2d at 786; \textit{see infra} note 416.
  \item \textsuperscript{409} \textit{See Williams v. Rhodes}, 393 U.S. 23, 31 (1968) (striking down Ohio election laws as creating an unlawful distinction between new and old political parties). In \textit{Williams}, the court recognized voting as a fundamental right that should receive heightened scrutiny under an equal protection analysis. \textit{Id.} at 30-31.
  \item \textsuperscript{410} 393 U.S. 23 (1968).
  \item \textsuperscript{411} Id. at 24. The Court noted that the Ohio scheme would preclude a new party from gaining a ballot position “even though it ha[d] hundreds of thousands of members.” \textit{Id}.
  \item \textsuperscript{412} \textit{Id.} The court cited § 3517.01 of the Ohio Revised Code, which required a new party to collect enough qualified voters’ signatures to total 15\% of the ballots cast in the preceding gubernatorial election. \textit{Id.} at 24-25.
  \item \textsuperscript{413} \textit{Id.} at 25 n.1. Sections 3517.02 and 3517.04 of the Ohio Revised Code required that a new party have elected a state central committee and county central committees for each Ohio county at the primary election. \textit{Id.} Furthermore, such a party also had to have elected delegates and alternates to the party’s national convention at the primary election. \textit{Id.} (citing \textit{OHIO REV. CODE ANN.} § 3505.10 (Anderson 1968)).
  \item \textsuperscript{414} \textit{Williams}, 393 U.S. at 31.
  \item \textsuperscript{415} In \textit{Bullock}, Texas required candidates to pay filing fees as an absolute prerequisite to participation in the primary elections. 405 U.S. 134, 137 (1972). California also
\end{itemize}
filing fees ordinarily have been found to create invidious distinctions based upon economic status. While states have claimed interests in defraying election costs and requiring candidates to demonstrate their seriousness, neither interest has been found to support the burden placed on the individual as a result of that individual's economic status. Furthermore, the Supreme Court repeatedly has invalidated such provisions.

Alternatively, courts have both upheld and struck down statutes that, like the one in Williams, required candidates to petition for ballot access, depending upon the facts of the case. When the statute required only a small number of signatures, it reasonably limited ballot size yet still permitted minor party participation. Under such schemes, a candidate could demonstrate voter support and evidence his or her seriousness in seeking office by participation in the petitioning process. Because these requirements were not stifling, they satisfied the government's interest in avoiding fraudulent and frivolous candidacies, while preserving individual voters' and candidates' rights.

The Court eventually faced a patchwork of laws that employed different methods to regulate elections as a result of the states' efforts to maintain limited and orderly elections. In Anderson v. Celebrezze, enacted provisions that required candidates to pay filing fees, in an amount fixed as a percentage of the salary of the office sought, to receive the papers necessary to be listed on the ballot. Lubin v. Parish, 415 U.S. 709, 710 (1974) (citing Cal. Elec. Code § 6551 (1974)). See Bullock, 405 U.S. at 149 (holding that use of the ability to pay as a condition to being on the ballot rendered the Texas election scheme invalid); see also Lubin, 415 U.S. at 718 (holding that a system which selected candidates based upon their ability to pay a fee, with no alternative means to gain access to the ballot, did not serve the State's legitimate interest in administering elections).

For example, the Jenness court upheld a Georgia provision that required independent candidates and nominees of parties who did not gain 20% of the vote in the preceding gubernatorial election to file petitions that contained signatures which totaled 5% of the ballots cast in that previous election. 403 U.S. 431, 432-33 (1971). The Court distinguished Williams in that Georgia allowed write-in votes which did not require petitions and did not require established party machinery. Id. at 438. Unlike the situation in Williams, the Court found that the Georgia laws did not serve to freeze the political status quo. Rather, those laws effectively served the State's interest in insuring honest elections. Id. at 442. But see Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 187 (1979) (holding Illinois law "unconstitutional insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago").

See Jenness, 403 U.S. at 442.

Id. at 431; see supra note 415.

brezze,\textsuperscript{422} for example, the Court directed its inquiry towards the injury to voters occasioned by an Ohio early-filing deadline. \textit{Anderson} involved a prominent independent candidate who was precluded from a position on the State's presidential ballot. The Court found that the damage to voting and associational rights which arose out of Anderson's exclusion from the ballot was extreme.\textsuperscript{423} Furthermore, the Court found that the State's asserted interests were not compelling. The Court, therefore, invalidated the deadline.\textsuperscript{424}

Although the \textit{Anderson} decision rests on first amendment grounds, the Court analyzed the case under the framework of equal protection.\textsuperscript{425} In \textit{Eu v. San Francisco County Democratic Central Committee},\textsuperscript{426} the Court finally applied a direct first amendment analysis to an access to ballot case. \textit{Eu} involved California laws that prevented political parties from endorsing primary candidates, limited party chairperson's terms of office, and required that party chair-holders alternate between citizens of northern and southern California.\textsuperscript{427} The Court determined that these laws directly implicated the first amendment by restricting freedom of speech;\textsuperscript{428} the Court overturned the laws when the State was unable to provide a compelling interest to support them.\textsuperscript{429}

\begin{itemize}
\item\textsuperscript{422} 460 U.S. 780 (1983).
\item\textsuperscript{423} \textit{Id.} at 790-93. The candidate in this case was John Anderson who, after his defeat in the Republican primaries, ran an influential campaign as an independent in the November 1980 general presidential election.
\item\textsuperscript{424} \textit{Id.} at 805-06. The Court identified voter education, equal treatment of candidates, and political stability as the state interests. \textit{Id.} at 796, 799, 801. None of these supported the restrictive nature of the early filing deadline. \textit{Id.} at 806.
\item\textsuperscript{425} \textit{Id.} at 786-87 n.7. In \textit{Anderson}, the Court stated that "[i]n this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment." \textit{Id.}
\item\textsuperscript{426} 109 S. Ct. 1013 (1989).
\item\textsuperscript{427} \textit{Id.} at 1016.
\item\textsuperscript{428} \textit{Id.} at 1019, 1025. \textit{Eu} was an appropriate case for direct first amendment analysis because the California law directly restrained speech by prohibiting political parties from endorsing candidates who ran in their primaries. \textit{Id.}
\item\textsuperscript{429} \textit{Id.} at 1025. The Court held that "... the challenged California election laws burden the First Amendment rights of political parties and their members without serving a compelling state interest." \textit{Id.} Pursuant to this finding, the Court upheld the lower court's invalidation of the laws in question. \textit{Id.}
3. Analysis.—In Dixon, the Fourth Circuit also employed a direct first amendment analysis when it struck down the State's election laws in question.430 Although the district court had determined that the State treated write-in candidates virtually the same as candidates on the ballot, the Fourth Circuit found that the treatment differed in significant respects.431 An "official" candidate enjoyed the benefit of being published in candidate lists, which were placed in newspapers and polling places, at the State's expense.432 Furthermore, these candidates gained an advantage simply by the State's recognition that he or she was an "official" candidate.433 The State's refusal to identify Dixon and Burroughs as "official" candidates impaired their ability to garner support. The end result was that unofficial candidates were "'denied an equal opportunity to win votes.'"434

The Fourth Circuit, however, found that the rights of voters who supported non-certified write-in candidates sustained the greatest harm.435 The State's refusal to report the votes cast for Dixon and Burroughs essentially emasculated those votes.436 The court characterized the right to vote as the most fundamental of all rights, legitimizing both the government and citizens' adherence to that government's acts.437 By refusing to report the votes cast for non-certified write-in candidates, the State effectively negated those

430. 878 F.2d at 780.
431. Id. at 781-83.
432. Id. at 781.
433. Id.
434. Id. (quoting Williams v. Rhodes, 393 U.S. 23, 31 (1968)). Although it found that the election laws affected the ability of non-official candidates to gain votes, the Dixon court acknowledged that Dixon and Burroughs still were able to campaign seriously. Id. Furthermore, the right to seek office may not be a fundamental one. Id. at 779. In Bullock, the Supreme Court stated that "'the Court has not heretofore attached such fundamental status to candidacy.'" 405 U.S. 134, 142-43 (1972). It may be that Dixon's and Burroughs' ability to garner votes, as well as the court's reluctance to treat candidacy as a fundamental right, compelled the Fourth Circuit to rely upon other grounds in invalidating the challenged provisions.
435. Dixon, 878 F.2d at 782.
436. Id. at 782-83. The court stated that "'[t]he refusal to report a vote because it is cast for a candidate who has not paid a filing fee (or demonstrated his inability to pay) and become certified completely undermines the right to vote.'" Id. at 782.
437. Id. at 781. The Fourth Circuit quoted Wesberry v. Sanders, 376 U.S. 1 (1964) saying, "'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.'" Id. at 17; see also Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 184 (1979), in which the Court stated that "we have often reiterated that voting is of the most fundamental significance under our constitutional structure."
votes; it was as if they were never cast. The court considered this a substantial injury to the right to vote.

Yet, the fact that the State's election laws restricted the first amendment did not automatically render those laws invalid. As the Fourth Circuit stated, courts have upheld many regulations that restricted the electoral process when they have found that those regulations effectuated legitimate state interests. As such, the laws in question could have survived judicial scrutiny if the State had offered a compelling interest to justify the burden imposed on the franchise.

In accordance with the district court, the Fourth Circuit recognized that the State had a legitimate interest in defraying the costs of write-in candidacies and avoiding frivolous and fraudulent candidacies. A fee designed to defray costs, however, would be valid only if it were related to a specific expense that the State incurred by an additional candidate's entrance into the election. The State could not charge a fee to defray costs associated with its basic decision to hold the election. In the instant case, because the State did not demonstrate a correlation between the plaintiffs' decision to run for office and the filing fee, the court found that the fee was not

---

438. Dixon, 878 F.2d at 782-83.

439. Id. at 785 n.12. The court characterized the failure to report votes as a "significant violation of protected constitutional rights," and that "censorship of the vote is utterly inconsistent with the principles under which our form of government operates." Id.

440. Id. at 783.

441. Id. at 779, 783; see, e.g., Jenness v. Fortson, 403 U.S. 431, 442 (1971) (upholding Georgia statute that required candidates not elected in party primaries to submit a petition signed by five percent of the voters in the previous gubernatorial election).

442. Dixon, 878 F.2d at 786. The Fourth Circuit stated that "the interests asserted by defendants are insufficient to justify the serious infringement on the first amendment freedoms of write-in voters." Id. By logical implication, the court could have upheld the statutes had the State shown a compelling interest that justified burdening the plaintiffs' rights.

443. Id. at 783-84. The court stated both that "[p]reservation of the public fisc is, undoubtedly, a legitimate state objective," and that "denying official recognition to fraudulent and frivolous candidates . . . is, in some circumstances, indisputably a legitimate and weighty [objective]." Id.

444. Id. at 783. "The Supreme Court has suggested, for example, that a state may legitimately assess a fee of a candidate for election expenses . . . that arise as a result of the candidate's decision to enter the race." Id. (citing Bullock v. Carter, 405 U.S. 134, 147-48 & n.29 (1972)).

445. Id.; see supra note 418 and the Dixon court's caveat that "the Court has also indicated that this legitimacy does not extend to expenses—such as the cost of counting votes—arising solely because the State has chosen to hold the election." 878 F.2d at 783.
a legitimate exercise of state power.\textsuperscript{446}

While the Fourth Circuit also acknowledged that the State had an appropriate concern in avoiding fraudulent and frivolous candidacies, the court asserted that the State could not use a fee as the exclusive means of testing a candidate's seriousness.\textsuperscript{447} The court stated that such a requirement "would bar neither a wealthy frivolous candidate, who can afford the fee, nor a destitute one, who is entitled to a waiver."\textsuperscript{448} The State's fee requirement simply did not serve its end of avoiding fraudulent or frivolous candidacies.\textsuperscript{449}

Ostensibly, the State could have authorized filing fees that would have survived judicial scrutiny. The \textit{Dixon} court recognized that the State could charge candidates fees if the fees were related to additional expenses incurred solely by that candidate's decision to seek office.\textsuperscript{450} In fact, the court intoned that the State's practice of monitoring the financial statements that political contestants filed might have been such an incremental expense.\textsuperscript{451} The State, however, failed to develop the relationship between the filing fee and these costs, and the court found no evidence to infer that such a relationship existed.\textsuperscript{452}

On the other hand, filing fees clearly were illegitimate as an exclusive means of determining a candidate's seriousness. Courts often had held that states have a substantial interest in ensuring candidates' sincerity.\textsuperscript{453} The State, however, could have employed

\textsuperscript{446} \textit{Dixon}, 878 F.2d at 783-84.

\textsuperscript{447} \textit{Id.} at 784; see \textit{Bullock}, 405 U.S. at 145-46 (filing fees discourage serious as well as frivolous candidates); see also \textit{Lubin v. Parish}, 415 U.S. 709, 717 (1974) ("[f]iling fees, however large, do not, in and of themselves, test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office").

\textsuperscript{448} \textit{Dixon}, 878 F.2d at 784. This criticism is aimed at the statute's under-inclusive nature. That is, while the statute aimed to prevent fraudulent or frivolous candidacies, it would fail to discourage fraudulent or frivolous candidates who were wealthy, or those who could circumvent the fee due to indigence. The court also criticized the challenged statutes for being over-inclusive in that "the regulation nullifies the political expression embodied in votes cast for serious candidates such as Dixon and Burroughs ...." \textit{Id.} at 785.

\textsuperscript{449} \textit{Id.} at 784. The court again referred to the statute's under- and over-inclusiveness, stating that "[i]n light of this, we believe that conditioning the reporting of write-in votes on payment of the fee and candidate certification is a constitutionally unacceptable means of achieving defendants' goal of maintaining the dignity of the election process." \textit{Id.}

\textsuperscript{450} \textit{Id.} at 783; see supra note 444.

\textsuperscript{451} \textit{Dixon}, 878 F.2d at 783.

\textsuperscript{452} \textit{Id.} "Even assuming that these costs do vary, defendants have made no effort to demonstrate any correlation between the fee charged to write-in candidates and any particular election expense." \textit{Id.}

\textsuperscript{453} The \textit{Bullock} court stated that "a State has an interest, if not a duty, to protect the
other methods to avoid fraudulent and frivolous candidacies. For example, courts have approved, on more than one occasion, petitioning schemes that required more than minimal, but less than substantial, efforts by a candidate.

The secondary holding simply stated that the State cannot condition the reporting of vote totals for write-in candidates on certification, regardless of what the State required for certification. The practical interpretation of this statement is that the court wanted to insure that votes cast would be votes reported. The Fourth Circuit rightly was dismayed by the State’s reporting requirements that silenced minority voices. Although the court’s decision left open other avenues for the State to avoid reporting write-in votes, it appeared that any such attempts would be met with disfavor. Having declared the ultimate importance of the franchise, it would be surprising if the Fourth Circuit upheld in the future a statute that effectively eliminated the votes for minor party candidates.

4. Conclusion.—The Dixon opinion did not present any novel legal theory. Instead, it merely acknowledged a new direction in evaluating challenges to election laws that are based on the laws’ alleged adverse impact on voting or associational rights. This new direction requires that courts scrutinize the statutes in question under the first amendment. The result of such an analysis is that provisions which tend to infringe on a candidate’s access to the ballot or on a candidate’s equitable opportunity to campaign have only a remote chance of surviving the first amendment’s protective reach.

integrity of its political processes from frivolous or fraudulent candidacies.” 405 U.S. 134, 145 (1972).

454. Dixon, 878 F.2d at 784 (citing Lubin for the proposition that “there are obvious and well-known means of testing the ‘seriousness’ of a candidacy . . . . States may, for example, impose on minor political parties the precondition . . . . to file petitions for a place on the ballot . . . .” 415 U.S. 709, 718 (1974)).


456. Dixon, 878 F.2d at 786.

457. The Dixon court held that the State could not condition the reporting of votes on the payment of a fee or candidate certification. Id. at 785. Ostensibly, the State could condition reporting on other factors, such as the number of votes received. While such a scheme might come under judicial review, the Fourth Circuit did not close all methods that the State might have to condition the reporting of votes.
F. First Amendment Protection for Public Employees

In O'Leary v. Shipley, the Court of Appeals articulated a constitutional standard of protection for a candidate who runs for election against her supervisor and subsequently loses her employed position. The court held that the circuit court should have decided the candidate's claim using standards which the Supreme Court set in a series of cases that addressed public employees' rights to self-expression rather than under the standards set in a series of cases that addressed employees' political affiliations. The court entertained the case even though the candidate argued on appeal a theory of first amendment protection that she had not raised in the trial court.

1. The Case.—In May 1986, Diane O'Leary filed as a Democratic candidate for the office of clerk of the Carroll County Circuit Court. O'Leary was a deputy clerk of the court at the time and had been for ten years. Her ultimate supervisor was Republican Larry Shipley, the incumbent clerk who sought re-election. O'Leary lost the November general election to Shipley. He then informed O'Leary that he would not reappoint her for another four-year term.

458. 313 Md. 189, 545 A.2d 17 (1988).
459. Id. at 206, 545 A.2d at 25.
460. Id. at 205-06, 545 A.2d at 25.
461. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. In her appellate brief, O'Leary also cited the freedom of speech provision in the Maryland constitution. Brief of Appellant at 4, O'Leary (No. 87-812). The state provision reads in pertinent part: "[E]very citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." Md. CONST. DECL. OF RTS. art. 40. A state constitutional provision may be construed as protecting more than an analogous federal constitutional provision as long as it does not infringe on another federal right. See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). The court, however, did not refer to state constitutional protection. O'Leary, 313 Md. 189, 545 A.2d 17 (1988).
462. O'Leary, 313 Md. at 196, 545 A.2d at 20.
463. Id. at 190-91, 545 A.2d at 18. The Maryland Constitution provides that the voters of each county and Baltimore City shall elect a clerk of the circuit court for their respective jurisdictions. The term of office is four years. Md. CONST. art. IV, § 25.
464. O'Leary, 313 Md. at 191, 545 A.2d at 18.
465. Id.
466. Id.
467. Id. The elected clerk appoints as many deputy clerks as the judges of the court deem necessary. The judges must confirm the appointments. Md. CONST. art. IV, § 26. Deputy clerks are appointed for the same term as the elected clerk.
O'Leary sued Shipley in the Carroll County Circuit Court. She sought reinstatement and back pay, claiming that he had refused to reappoint her simply because she had opposed him in the election. O'Leary's original complaint did not allege a specific violation of the state or federal constitution. Instead, the complaint cited by-law X of the Maryland Court Clerks' Association, which prohibits the clerk from refusing to hire or promote anyone on the basis of "race, sex, color, religion or national origin or political affiliation."

The first suggestion of a first amendment violation came in Shipley's motion to dismiss the case. Shipley claimed that O'Leary had failed to allege and prove that he had declined to reappoint her solely because of her political affiliation. He contended that two Supreme Court political patronage cases, *Elrod v. Burns* and *Branti v. Finkel*, required O'Leary to offer such proof.

The trial judge denied the motion and the case went to trial. O'Leary and Shipley were the only witnesses. O'Leary recounted the issues she raised during the campaign, including her criticism of Shipley's management of the office. Shipley testified that some of O'Leary's remarks upset him and that he felt she might not be able to work well with some other office employees.

---

Gen. 119, 119 (1958). There is no requirement that the clerk must reappoint the deputy clerks. *Id.*

468. *O'Leary*, 313 Md. at 191, 545 A.2d at 18.

469. *Id.*

470. *Id.* at 196, 545 A.2d at 20.

471. *Id.* at 191, 545 A.2d at 18.

472. *Id.* at 192, 545 A.2d at 18.

473. *Id.*


476. *O'Leary*, 313 Md. at 192, 545 A.2d at 18. Shipley noted that he had reappointed other deputy clerks who supported O'Leary. He claimed that because of these reappointments, O'Leary did not properly make out a prima facie case that a political consideration was his sole motive in failing to reappoint her. *Id.* Under the "sole motive" test, the plaintiff must show that she lost her job solely because of her political patronage. See *Branti*, 445 U.S. at 517; *Elrod*, 427 U.S. at 350, 373.

477. *O'Leary*, 313 Md. at 191, 545 A.2d at 18.

478. *Id.* at 192-93, 545 A.2d at 18-19.

479. *Id.* O'Leary described the campaign as "agreeable" and said "nothing ever got to a personal nature . . . ." *Id.* at 192, 545 A.2d at 19.

480. *Id.* at 193-95, 545 A.2d at 19-20. When asked how he reacted to O'Leary's criticism during the campaign, Shipley replied: "I took it very personal and . . . . it was false . . . . I think it was being done to mislead the public and that's why it upset me. And I just felt that under those circumstances . . . . I had to make a choice." *Id.* at 194, 545 A.2d at 19.
The trial judge entered judgment for Shipley, noting:

"[T]he real essence of this case is: [W]as [sic] Mrs. O'Leary discharged for purely political reasons. And I find, based upon . . . the preponderance of the evidence, that she was not discharged purely for political reasons. . . . I don't believe that Mrs. O'Leary has brought forth sufficient evidence to show that . . . Mr. Shipley discharged her for purely political reasons."

The trial judge, according to the Court of Appeals, applied the Elrod-Branti "sole motive" test. At the trial, O'Leary "seemingly accepted the test as controlling, and the case proceeded to judgment on this basis."

O'Leary hired a new lawyer and appealed. She claimed that she was entitled to a new trial because the trial judge erroneously applied the Elrod-Branti patronage test. She urged the court instead to use a test that the Supreme Court developed in Pickering v. Board of Education and Mt. Healthy City Board of Education v. Doyle, arguing that the Elrod-Branti "sole motive" patronage test was not applicable to her case. O'Leary argued that under Pickering and Mt. Healthy, once she showed that "the exercise of her First Amendment rights was a motivating factor" in Shipley's decision not to reappoint her, it became his burden to prove that "he would not have reappointed her irrespective of the exercise of her First Amendment rights."

The Court of Appeals first addressed whether it would consider the new first amendment theory on appeal. The court noted that

481. Id. at 195, 545 A.2d at 20.
482. Id. (alterations by court).
483. Id. at 205, 545 A.2d at 25; see supra text accompanying notes 472-476.
484. O'Leary, 313 Md. at 196, 545 A.2d at 20.
485. Id. at 208, 545 A.2d at 26 (McAuliffe, J., dissenting).
486. Id. at 195, 545 A.2d at 20. O'Leary originally appealed to the Court of Special Appeals. Before that court could consider the case, the Court of Appeals granted certiorari on its own motion. Id.
487. Id.
490. O'Leary, 313 Md. at 195, 545 A.2d at 20.
491. Id.; see also Mt. Healthy, 429 U.S. at 287 (burden of persuasion shifts once plaintiff shows that constitutionally-protected conduct was motivating factor for decision not to rehire).
492. O'Leary, 313 Md. at 196, 545 A.2d at 20. Because the Court of Appeals granted certiorari before the Court of Special Appeals considered the case, the Court of Appeals had to consider those issues that would have been cognizable by the Court of Special Appeals. Id.; see Md. R. 8-131(b)(2).
the Maryland Rules generally prohibit appellate review of points or questions not tried and decided by the trial court.\textsuperscript{493} The court found that the "general question of the application of the First Amendment to Ms. O'Leary's non-reappointment was tried and decided by the trial court," even though she did not mention the first amendment in her complaint.\textsuperscript{494} The court additionally determined that it could review the issue even though on appeal O'Leary invoked a different theory of first amendment protection than that considered by the trial court.\textsuperscript{495} The court held that "a necessary part of reviewing the correctness of the trial court's constitutional adjudication is the determination whether the proper First Amendment theory was applied."\textsuperscript{496}

The court determined that the \textit{Elrod-Branti} and \textit{Pickering-Mt. Healthy} cases state tests for two different factual situations.\textsuperscript{497} The \textit{Elrod-Branti} test applies if a dismissal occurs solely because of political patronage, unless the position is a policy-making position.\textsuperscript{498} The \textit{Pickering-Mt. Healthy} test is appropriate when a plaintiff charges that overt expressive conduct was a factor which led to dismissal.\textsuperscript{499}

The court found that the trial court had improperly applied the \textit{Elrod-Branti} test, which is relevant only when political patronage is alleged to be the sole reason for discharge.\textsuperscript{500} The court found that in O'Leary's case, "it was apparent from the outset that [she] was alleging that her overt expressive conduct in challenging Shipley in the election was considered by Shipley and played a role, if not the

\textsuperscript{493} \textit{O'Leary}, 313 Md. at 196, 545 A.2d at 20; \textit{see} Md. R. 8-131(a). Rule 885 was in effect at the time O'Leary's attorney prepared her case for appeal. Rule 885 provides that "[t]his Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the circuit court." Md. R. 885 (current version at Md. R. 8-131(a)). Its successor, Maryland Rule 8-131(a) includes the same provision. Md. R. 8-131(a); \textit{see infra} note 521.

\textsuperscript{494} \textit{O'Leary}, 313 Md. at 196, 545 A.2d at 20; \textit{see supra} note 472 and accompanying text.

\textsuperscript{495} \textit{O'Leary}, 313 Md. at 196, 545 A.2d at 20. Three of the seven judges would have upheld the trial court because O'Leary did not raise the \textit{Pickering-Mt. Healthy} theory at trial. The dissent argued that the majority's decision was unfair and violated the intention of Maryland Rule 8-131(a). \textit{Id.} at 206-07, 545 A.2d at 25 (McAuliffe, J., dissenting). The dissent stated that it was unfair both to reverse a trial judge on an issue not before him and to subject a defendant to "successive trials for claims arising out of the same occurrence, simply because the plaintiff develops a theory she did not have before, or wishes to try a new tactic." \textit{Id.} at 208-09, 545 A.2d at 26.

\textsuperscript{496} \textit{Id.} at 195, 545 A.2d at 20.

\textsuperscript{497} \textit{Id.} at 204, 545 A.2d at 24.

\textsuperscript{498} \textit{Id.}

\textsuperscript{499} \textit{Id.}

\textsuperscript{500} \textit{Id.} at 205, 545 A.2d at 25.
sole role, in Shipley’s employment decision.” The correct test, therefore, was that found in Pickering and Mt. Healthy. The Court of Appeals reversed the trial court’s decision and ordered a new trial using the Pickering-Mt. Healthy test with specific instructions about its proper implementation.

2. Theory on Appeal.—a. Legal Background.—Appellate courts do not conduct trials anew; instead, they review lower courts’ decisions. Maryland Rule 8-131(a) codifies that basic, general principle by limiting the scope of review of Maryland appellate courts. The Court of Appeals discussed the purpose of that principle in Banks v. State. The court noted that the general rule was “adopted to ensure fairness for all parties in a case and to promote the orderly administration of the law . . . .” The Banks court said that to promote that orderly administration, parties have a responsibility to object to a perceived error to give the trial court a chance to correct the error. “[A party’s] failure to exercise the option . . . constitutes a waiver of the error estopping him from bringing it to the attention of the Court of Appeals.”

The principle is not ironclad. Maryland Rule 8-131(a) notes an exception for issues not raised at trial “if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.” Additionally, the Supreme Court has waived the application of a similar rule in some constitutional cases. Other courts

501. Id. at 205-06, 545 A.2d at 25.  
502. Id. at 206, 545 A.2d at 25.  
503. Id.  
504. See, e.g., Polizzi v. Cowles Magazines, 345 U.S. 663, 666-67 (1953) (Supreme Court will review only questions placed before lower court). But see Glidden Co. v. Zdanok, 370 U.S. 530, 535-37 (1962) (Supreme Court will consider a jurisdictional challenge on review when the challenge is based upon a non-frivolous constitutional ground).  
505. Md. R. 8-131(a). The rule states generally that the appellate court ordinarily will not decide any issue other than subject matter jurisdiction which does not plainly appear by the record to have been “raised in or decided by the trial court.” Id. The court, however, may decide such an issue “if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.” Id.  
507. Id. at 495, 102 A.2d at 271.  
508. Id.  
509. Id.  
510. Md. R. 8-191(a); see supra note 505.  
also have waived the general rule in certain circumstances.512

b. Analysis.—In O'Leary, the Court of Appeals could consider the constitutional question on appeal if it found that the trial court had considered the issue first. Failing that test, the court could determine whether the situation fit one of the specific exceptions listed in Maryland Rule 8-131(a). Failing that, the court arguably could consider whether to use its discretion to hear the new issue raised on appeal.513

The court concluded that the “general question” of the first amendment had been raised and decided below, thus satisfying the Rule.514 In the court’s view, reviewing a new first amendment theory was “not inconsistent” with the Rule.515 A contrary result, favored by three of the seven judges, would have extinguished O'Leary’s possibly meritorious claim because her attorney failed to present the trial court with the appropriate constitutional standard.516 The decision signals the Court of Appeals’ determination to regard the trial judge as more than just a referee who reacts only to the precise legal theories and cases placed before the court.

O'Leary did not claim a new cause of action on appeal; the trial judge already had considered and ruled on the constitutionality of Shipley’s action.517 It would be a harsh result indeed to inform O'Leary that although the trial judge had ruled on the constitutionality of Shipley’s actions under the first amendment, the judge’s incorrect decision must stand because O'Leary’s attorneys did not suggest that the court use the correct constitutional standard. Yet, the dissent argued for exactly this outcome.518

The procedural issue has a potentially broader application than the substantive issue because the factual situation that led to the argument neither made to lower court nor reserved in notice of appeal to Supreme Court).

512. See, e.g., SEC v. Milner, 474 F.2d 162, 166 (1st Cir. 1973) (court reached issue only tangentially raised below).

513. Maryland Rule 8-131(a) seems to grant this discretion by prefacing the sentence that outlines the Rule with the word “ordinarily.” Md. R. 8-131(a).

514. O'Leary, 313 Md. at 196, 545 A.2d at 20.

515. Id.

516. Id. at 208-09, 545 A.2d at 26 (McAuliffe, J., dissenting) (Judges Adkins and Blackwell joined Judge McAuliffe in his dissent).

517. The Court of Appeals recognized that although O'Leary’s complaint did not explicitly raise the first amendment issue “the general question of the application of the First Amendment to O'Leary's nonreappointment was tried and decided by the trial court.” Id. at 196, 545 A.2d at 20.

518. See id. at 208, 545 A.2d at 26 (McAuliffe, J., dissenting).
substantive holding rarely occurs. But the procedural ruling may be of uncertain precedential value because the court did not explain in detail its reasons for allowing the new first amendment theory on appeal.\textsuperscript{519} Given its broadest reading, however, the case could be cited for the proposition that once a party invokes the protection of a constitutional right, the trial judge has the duty to apply the correct legal theory even if the parties do not raise it.\textsuperscript{520} Given that duty, state appellate courts then may review on appeal alternative constitutional theories that the parties did not raise at trial.\textsuperscript{521}

The decision could prevent injustice to parties whose constitutional rights have been violated, but who do not argue the correct constitutional theory at the trial level. It does not seem unduly burdensome to ask the judge to apply the correct law when faced with the facts of a case and the possibility of a constitutional violation.

3. First Amendment Protection.—a. Legal Background.—The first amendment prohibits dismissal of public employees in retaliation for their public expressions.\textsuperscript{522} The protection, however, is not absolute. The Supreme Court has sought to balance the employee's interests in commenting on matters of public concern and the state's interest in efficiently providing services through its employees.\textsuperscript{523}

The Supreme Court has differentiated between employees who were dismissed or not rehired as part of a political patronage system and those who lost their jobs in retaliation for more explicit expres-

\textsuperscript{519} The majority devoted only two paragraphs to resolving the procedural issue. \textit{Id.} at 196, 545 A.2d at 20. The dissent, however, discussed only the procedural issue. \textit{Id.} at 206-09, 545 A.2d at 25-27 (McAuliffe, J., dissenting).

\textsuperscript{520} See \textit{id.} at 196, 545 A.2d at 20.

\textsuperscript{521} The proper application of Maryland Rule 8-131(a) is at issue. The Rule provides, in pertinent part:

Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal. \textit{Md. R. 8-131(a)}.

\textsuperscript{522} The first amendment can protect even employees who are subject to being dismissed without cause. A constitutionally-protected right must not be the reason for dismissal or failure to reemploy. \textit{See, e.g.,} Perry v. Sinderman, 408 U.S. 593, 596-98 (1972) (nontenured professor whose contract was not renewed still had valid claim that nonrenewal of his contract violated first and fourteenth amendments).

\textsuperscript{523} \textit{See, e.g.,} Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). "The problem... is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." \textit{Id.}
sive conduct. In *Elrod v. Burns*, the Supreme Court addressed whether public employees discharged or threatened with discharge solely because of their partisan political affiliation have a valid constitutional claim. The plaintiffs were sheriff's department employees who were either discharged or threatened with discharge when a Democratic sheriff replaced a Republican. Under a classic patronage system, it had been the practice in the county for the elected sheriff to replace noncivil service employees who were not members of or supported by the sheriff's own political party.

The Court held such a system unconstitutional because of the "restraint it places on freedoms of belief and association." It held that those in nonpolicy-making positions may not be dismissed "solely" for patronage reasons. The Court affirmed the doctrine in *Branti v. Finkel* when it upheld an injunction that prohibited the dismissal of public defenders solely on patronage grounds.

The Court protected more explicit expression by public employees in *Pickering v. Board of Education* and *Mt. Healthy City Board of Education v. Doyle*. In *Pickering*, a school board fired a teacher for publicly criticizing the board's handling of a bond issue. The Illinois Supreme Court examined the teacher's right to comment on a public matter and the school board's interest in the teacher's job performance. The Court found that the teacher's comments did not impede his performance or interfere with the schools' operation, and therefore, his dismissal was not justified.

The Court refined the *Pickering* doctrine in *Mt. Healthy*. In *Mt. Healthy*, a school board dismissed a teacher who had been involved in several incidents unconnected with his first amendment rights.

---

525. Id. at 349.
526. Id. at 350-51.
527. Id. at 351.
528. Id. at 373.
529. Id. at 355.
530. Id. at 367.
532. Id. at 520. The Court found that the attorneys could not be dismissed under the exception to the rule against patronage dismissals which allows the discharge of policy-making employees. The Court ruled that whatever policy-making the attorneys did related to their own clients and not to partisan political interests. Id. at 519.
535. 391 U.S. at 564.
536. Id. at 568.
537. Id. at 572-73.
538. The teacher had gotten into an argument with another teacher who slapped him,
The teacher also had informed a radio station of a new dress code for teachers.\(^5\) When the school board did not rehire him, it cited his communication with the radio station as one of its reasons.\(^5\) The Court ruled that the school board’s consideration of a constitutionally protected activity in deciding not to rehire the teacher was not enough to automatically invalidate the decision.\(^5\) Instead, the Court held that once the teacher established that such a constitutionally protected activity was a “motivating factor” in the decision, the burden shifted to the government to show that it would have reached the same result without regard to the constitutionally protected activity.\(^5\)

b. Analysis.—O’Leary’s dismissal clearly was not part of a political patronage system. With the exception of O’Leary, Shipley reappointed all the other deputy clerks, including those who supported O’Leary in the election.\(^5\) That fact pattern is not consistent with the types of patronage operations that the Court discussed in *Elrod* and *Branti*. O’Leary’s political activity, which allegedly led to her dismissal, was more overt and active.

Her situation is more akin to that of the teacher dismissed in *Mt. Healthy*, and the Court of Appeals reliance on that case is well-founded. To successfully challenge her dismissal, O’Leary first would have to establish that the first amendment protected her conduct.\(^5\) In *Grysen v. Dykstra*,\(^5\) sheriff’s deputies who lost their jobs after they challenged the sheriff in an election sued on first amendment grounds.\(^5\) Using *Pickering*, the trial judge found that their bid for election and their comments during the election campaign had argued with a cafeteria worker, had referred to students as “sons of bitches,” and had made an obscene gesture to two students. *Mt. Healthy*, 429 U.S. at 281-82.

\(^5\) Id.
\(^5\) Id. at 283.
\(^5\) Id. at 285.
\(^5\) Id. at 287.
\(^5\) O’Leary, 313 Md. at 194, 545 A.2d at 19. Shipley testified that political affiliation was not a factor in his hiring decisions. *Id.*, 545 A.2d at 20.

\(^5\) The Court in *Pickering* refused to create a “general standard against which all . . . statements may be judged” in determining whether a statement is protected under the first amendment. 391 U.S. 563, 569 (1968). Instead, the Court held that a balance must be struck between the interests of the employee as a citizen, and the interests of the State as an employer. *Id.* at 568. Under the facts in *Pickering*, the Court concluded that “the interest of the school administrator in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.” *Id.* at 573.

\(^5\) Id. at 284.
were protected activities. Applying the balancing test, the judge found that the deputies had spoken out on matters of public concern. He also found no significant adverse effect on the department as a result of that speech. In *O'Leary*, the Court of Appeals instructed the trial court to make a similar inquiry.

The substantive holding has a narrow application because of the relatively small number of people who are likely to run for election against their employers. The case, however, should serve as solid precedent, at least in that limited area, because of the decision's specificity and the court's detailed discussion of the issue.

4. **Conclusion.**—The trial court in *O'Leary* clearly applied the wrong first amendment test. The question is whether the Court of Appeals should have considered arguments that the trial court should have applied a different test when the plaintiff had not presented such arguments to the trial judge. The court prevented an injustice when it agreed to hear the appeal. The court was not unreasonable when it expected the trial judge to locate and apply the appropriate standard to the constitutional issue before him. The case, however, was narrowly decided and shows that parties who refine constitutional arguments on appeal may find that the appellate court will not hear their arguments.

---

547. *Id.* at 287.
548. *Id.*
549. *Id.* at 291-92.
550. 313 Md. at 206, 545 A.2d at 25.
551. The decision on the federal constitutional issue, of course, will serve as binding precedent on lower state courts only so long as the Supreme Court issues no contrary interpretation. See, e.g., *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 631-32 (1874) (Supreme Court authority over state courts in federal law questions will lead to nationwide uniformity in federal rights).
III. CRIMINAL LAW

A. Witness' Privilege Against Self-Incrimination

In *Adkins v. State*, the Court of Appeals applied and followed existing precedent when it held that an individual may invoke the privilege against compelled self-incrimination when the individual previously has been convicted of a crime and has an appeal pending at the time the prosecutor calls that individual as a witness in an accomplice's trial. Using a five factor analysis, the court concluded that prejudicial error occurred when the State called the defendant's accomplice to testify—when both the court and the prosecutor knew that the accomplice would refuse to testify—and the accomplice then invoked his fifth amendment privilege before the jury. As a result, the Court of Appeals reversed the Court of Special Appeals' ruling and remanded the case for a new trial.

1. The Case.—Joseph Teal, David Adkins, and Darryl Troxell were seen drinking together one evening in a neighborhood bar. Teal's body, minus his watch and wallet, was discovered in a stream the next day. Adkins and Troxell subsequently were arrested and charged with the robbery and felony murder of Joseph Teal. At the time, Lester Beach, a relative of both Adkins and Troxell, was incarcerated in a Pennsylvania prison on charges unrelated to this case. Pennsylvania authorities offered to drop the charges against him in

---

2. Id. at 10, 557 A.2d at 207.
3. Id. at 12-13, 557 A.2d at 208-09. For a discussion of this analysis, see infra notes 58-70 and accompanying text.
5. The fifth amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. The Supreme Court has held that the fifth amendment "protects the individual [not only] against being involuntarily called as a witness against himself in a criminal prosecution but also . . . in any other proceeding, civil or criminal, . . . where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (state's interest in maintaining integrity of civil service and its transactions with independent contractors cannot override fifth amendment requirements); see also *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (privilege against self-incrimination applies in civil proceedings).
7. Id. at 3, 557 A.2d at 204.
8. Id. A forensic pathologist testified at Adkins' trial that the cause of Teal's death was most likely a heart attack induced by attempted strangulation. *Id.*
9. Id. at 4, 557 A.2d at 204.
10. *Id.*
exchange for his help in the *Teal* case.\(^{11}\) Beach visited Troxell and Adkins separately, obtaining information that implicated both men in Teal's homicide.\(^{12}\)

Troxell already had been convicted and sentenced for Teal's murder when the State called him as a witness during Adkins' trial.\(^{13}\) Troxell's appeal of his conviction was pending in the Court of Special Appeals at the time.\(^{14}\) Adkins' attorney filed a motion in limine to protest the State's use of Troxell as a witness.\(^{15}\) The court conducted a hearing outside the jury's presence to determine whether the recorded Beach-Troxell conversation was admissible in evidence as a declaration against Troxell's penal interest.\(^{16}\) At the hearing, Troxell invoked the protection of the fifth amendment.\(^{17}\) He refused to answer the prosecutor's questions, fearing that his post-conviction testimony would be used to undermine his pending appeal.\(^{18}\) The trial judge found Troxell to be a "compellable witness"
notwithstanding his pending appeal. Troxell, however, steadfastly refused to answer any questions and the trial court held him in contempt. Troxell also indicated that he intended to invoke the privilege again if called to testify at trial.

The trial court then ruled that parts of the taped Beach-Troxell conversation were admissible under the "declaration against penal interest" exception to the hearsay rule. To admit the taped conversation, however, the State had to establish that Troxell was "unavailable" to testify. The parties debated whether Troxell's invocation of the fifth amendment outside the jury's presence was sufficient to establish his unavailability; the court ultimately allowed the State to call Troxell as a witness and question him in the jury's presence.

may be used against an individual whose case is not closed permanently. See Taylor v. Best, 746 F.2d 220, 222 (4th Cir. 1984) (post-conviction evidence, if probative and otherwise admissible, may be used against defendant whose conviction was overturned on appeal), cert. denied, 474 U.S. 982 (1985); Hummel v. Commonwealth, 219 Va. 252, 257, 247 S.E.2d 385, 388 (evidence of defendant's attempted bribe of prosecution's witness before retrial on charges of grand larceny admissible at retrial), cert. denied, 440 U.S. 935 (1979).

19. Adkins, 316 Md. at 4, 557 A.2d at 204. The trial court relied on Ellison v. State, 65 Md. App. 321, 500 A.2d 650 (1985), aff'd, 310 Md. 244, 528 A.2d 1271 (1987), which held that an individual's right to claim the fifth amendment privilege ends once the court pronounces his sentence. Id. at 332, 500 A.2d at 655. When the trial court in Adkins issued its decision, however, Ellison was pending on certiorari in the Court of Appeals. 316 Md. at 5 n.3, 557 A.2d at 205 n.3. The Court of Appeals in Ellison subsequently affirmed the Court of Special Appeals' judgment, but rejected virtually all of that court's analysis on which the trial court in Adkins justifiably had relied. Ellison v. State, 310 Md. 244, 528 A.2d 1271 (1987); Adkins, 316 Md. at 5 n.3, 557 A.2d at 205 n.3; see also infra notes 31-55 and accompanying text.

20. Adkins, 316 Md. at 5, 557 A.2d at 205.

21. Id.

22. Id.; see supra note 16.

23. Adkins, 316 Md. at 4, 557 A.2d at 204. A witness is unavailable for evidentiary purposes when there is a possibility of a subsequent trial on the same charges for which the witness already has been convicted. Ellison, 310 Md. at 244, 528 A.2d at 1271; see also Fed. R. Evid. 804 (a)(1)(2) (regarding unavailability of witnesses). The Court of Special Appeals in Adkins noted that "[t]he critical requirement [for a finding of unavailability] is a clear decision by the witness to maintain his silence after being informed that the court has rejected his claim of privilege and ordered him to testify." 72 Md. App. 493, 500, 531 A.2d 699, 702 (1987), rev'd, 316 Md. 1, 557 A.2d 205 (1989).

24. Adkins, 316 Md. at 5, 557 A.2d at 205. During the evidentiary hearing, Troxell emphatically declared that he would not testify. The prosecutor argued that the court should recall Troxell before the jury to give him another opportunity to testify and decline to establish his unavailability. Adkins, 72 Md. App. at 497, 531 A.2d at 700-01. Defense counsel objected to engaging in this procedure before the jury. Id. Although the court initially planned to conduct its inquiry outside the jury's presence, it ultimately conducted its inquiry in the jury's presence because defense counsel indicated that he would object to a finding of unavailability in either case. Id.
held him in contempt. The trial judge then declared Troxell to be unavailable as a witness, found no prejudice from recalling Troxell before the jury, and denied defense counsel's motion for a mistrial on that basis. The trial court admitted portions of the recorded conversation into evidence, and the jury subsequently convicted Adkins.

The Court of Special Appeals affirmed Adkins' conviction, finding that the trial court had not committed reversible error when it allowed the State to call Troxell before the jury, notwithstanding the prosecutor's knowledge that Troxell would refuse to testify. The Court of Appeals reversed, holding that prejudicial error had occurred when the State called Troxell as a witness in the jury's presence because both the judge and the prosecutor knew that Troxell intended to invoke the privilege.

2. Right to Invoke the Fifth Amendment Privilege.—When a witness asserts the privilege against compelled self-incrimination, the court must determine whether there is a reasonable basis for the witness to invoke the privilege and whether the witness invokes it in good faith. In ruling that the privilege protected Troxell, the Court of Appeals relied heavily on its recent decision in Ellison v. State.

In Ellison, the witness had been convicted and sentenced for second degree murder. When the prosecutor called the witness to testify at his accomplice's trial, the thirty-day period in which the witness could request a sentence review or file an appeal had not yet expired. The Court of Special Appeals held that for fifth amendment purposes, the risk of further incrimination ended when the court sentences an individual for those crimes for which the jury had convicted that individual. The Court of Special Appeals nevertheless allowed the witness to invoke the privilege, even after he had

25. Id.
26. Id.
27. Id. at 3, 557 A.2d at 204.
28. Adkins v. State, 72 Md. App. 483, 501, 531 A.2d 699, 702 (1987), rev'd, 316 Md. 1, 557 A.2d 203 (1989). The Court of Special Appeals based its finding of harmless error on the absence of prosecutorial misconduct. Curiously, the court never addressed Troxell's eligibility to invoke the privilege, noting that "[h]is 'unavailability' as a witness would flow from the fact of his refusal to testify, not from whether that refusal was legally justified." Id. at 501 n.3, 531 A.2d at 702 n.3 (emphasis in original).
30. See id. at 6-7, 557 A.2d at 205-06.
32. Id. at 246-47, 528 A.2d at 1272.
been sentenced for murder, because he still risked further prosecution by "revealing his complicity in other crimes not yet charged."  

In a case decided prior to *Ellison*, the Court of Appeals, in determining whether a witness could invoke the privilege, remarked that "[for present purpose we may assume that the controlling constitutional provision is Article 22 of the Maryland Declaration of Rights, and not the Fifth Amendment to the Federal Constitution." Interpreting this language in *Ellison*, the Court of Special Appeals distinguished between the scope of protection afforded to an individual who claimed the privilege under the fifth amendment and one who claimed the privilege under article 22 of the Maryland Declaration of Rights. The intermediate appellate court asserted that protection under the federal provision ends when the court pronounces an individual's sentence, whereas protection under the state provision ceases when the jury reaches a guilty verdict. Moreover, the Court of Special Appeals in *Ellison* observed that the use of the privilege defeats the truth-seeking function of the courts, thereby impeding "'the administration of justice.'" The court espoused that from a public policy standpoint, the scope of the privilege should be narrowly recognized.

Upon review, the Court of Appeals held that "a witness who has been found guilty and sentenced on criminal charges is entitled to claim the privilege against self-incrimination with regard to matters underlying those charges while the time for appeal or sentence review is running . . . ." Although the Court of Appeals affirmed the Court of Special Appeals' decision that allowed the witness to assert the privilege, the Court of Appeals overruled the lower court's reasoning. The Court of Appeals explained that the privilege not

34. Id. at 345, 500 A.2d at 662. The court noted that the crimes for which the witness had not yet been charged included conspiracy to commit murder and engaging in homosexual acts with the defendant. Id.
36. Id. at 207, 198 A.2d at 286.
37. 65 Md. App. at 332-38, 500 A.2d at 655-58. Article 22 of the Maryland Constitution's Declaration of Rights provides in pertinent part "that no man ought to be compelled to give evidence against himself in a criminal case." Md. Const. Decl. of Rts. art. 22.
39. Id. at 326-27, 500 A.2d at 652-53.
40. Id. at 327, 500 A.2d at 653 (quoting 8 Wigmore on Evidence § 2191, at 73 (McNaughton rev. 1961)).
41. Id.
43. Id. at 258, 528 A.2d at 1278.
only was available to protect the witness from implicating himself in crimes not yet charged, but also was available because his case still was open with respect to those crimes for which he already had been charged.\footnote{44} In such cases, a witness may invoke the privilege to protect an appeal of a conviction or a review of a sentence, and may seek constitutional protection for crimes already charged until there is a final, unappealable, unreviewable disposition of his case.\footnote{45}

In Ellison, the Court of Appeals rejected the Court of Special Appeals' distinction between the privilege against compelled self-incrimination afforded by the fifth amendment and that afforded by article 22. The Court of Appeals admonished that the two are \textit{in pari materia} and should be construed as identical in scope and protection.\footnote{46} Furthermore, the court vehemently rejected both the lower court's interpretation of the policy that supports the constitutional provision and the limits on the scope of its protection.\footnote{47} The Court of Appeals asserted that the privilege is to be given a "'liberal construction in favor of the right it was intended to secure.'"\footnote{48} Thus, a witness need not establish that his testimony definitely will result in further prosecution and conviction to be entitled to use the privilege against self-incrimination—he only need have "'reasonable

\footnote{44. \textit{Id.} at 259, 528 A.2d at 1278.}
\footnote{45. \textit{Id.}}
\footnote{46. \textit{Id.} at 259 n.4, 528 A.2d at 1278 n.4. Maryland state and federal judges are to use the same standards when they evaluate whether an individual is entitled to constitutional protection, regardless of whether the individual invokes the privilege under the state or the federal constitution. \textit{See} Richardson v. State, 285 Md. 261, 265, 401 A.2d 1021, 1024 (1979) (Article 22 "'has long been recognized as being \textit{in pari materia} with its federal counterpart.'"); Brown v. State, 233 Md. 288, 296 A.2d 614, 617 (1964) (Article 22 should receive "'a like construction'" to the fifth amendment.).}
\footnote{47. Ellison v. State, 310 Md. 244, 258, 528 A.2d 1271, 1278 (1987); \textit{see also} Hoffman v. United States, 341 U.S. 479, 486 (1951) (privilege against self-incrimination extends beyond information that would support a conviction to include evidence that in any way would aid a successful prosecution).}
\footnote{48. Ellison, 310 Md. at 258, 528 A.2d at 1278 (quoting Hoffman, 341 U.S. at 486).}
\footnote{The Court of Appeals in Ellison further admonished that the protection "'is to be 'broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.'" \textit{Id.} (quoting \textit{In re Gault}, 387 U.S. 1, 50 (1967)); \textit{see also} United States v. White, 322 U.S. 694, 698 (1944) (recognizing that "'evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime'")); Smith v. State, 283 Md. 187, 193, 388 A.2d 539, 542 (1978) (witness may invoke the privilege against self-incrimination when witness' testimony reasonably may incriminate the witness or increase punishment for charge in which witness has been found guilty but not punished), \textit{cert. denied}, 439 U.S. 1130 (1979); Allen v. State, 183 Md. 603, 607, 39 A.2d 820, 822 (1944) (privilege against self-incrimination will be "'liberally construed in order to give fullest effect to this immunity'".)}
cause to apprehend danger."

The Court of Appeals in Ellison distinguished cases in which the court rejected a sentenced individual's right to claim the privilege from those in which the court afforded the individual constitutional protection. In the former, when the courts apparently were dealing with "final unappealed criminal judgments," the court compelled the witness to testify. In the latter, however, the individual potentially still could incriminate himself or herself because "the witness had not been sentenced when called to testify," in these situations, therefore, the witness was entitled to the privilege's protection. The Adkins court followed the view espoused in Ellison when it decided that Troxell fell into this latter category because of his pending appeal.

---

49. Ellison, 310 Md. at 252, 528 A.2d at 1275 (quoting Smith, 283 Md. at 193, 388 A.2d at 542 (quoting Hoffman, 341 U.S. at 486)).

50. Id. at 255-56, 528 A.2d at 1276-77.

51. That is, the court already had sentenced the individual, and it did not appear that time remained for an appeal or that an appeal was pending. Id. at 256, 528 A.2d at 1277.

52. Id. at 256, 528 A.2d at 1277 (emphasis added). The court may compel a witness to testify when there is no further risk of self-incrimination, that is, when the witness' case is closed permanently and, thus, the double jeopardy clause of the fifth amendment isolates the witness from further prosecution. See Smith, 283 Md. at 190, 388 A.2d at 540 (quoting United States v. Gernie, 252 F.2d 664 (2d Cir. 1958) (holding that the government may compel testimony of witness who has pled guilty and cannot be incriminated further)).


55. 316 Md. at 10, 557 A.2d at 207. The Adkins court also noted Taylor v. Best, 746 F.2d 220 (4th Cir. 1984), cert. denied, 474 U.S. 982 (1985), in which the Fourth Circuit upheld the principle that each criminal defendant has the opportunity to effect a reversal of his or her conviction. The Taylor court asserted that "we will not undercut [a sentenced individual's] right to appeal under state law by prematurely assessing the merits of his appeal in a collateral proceeding." Id. at 222. In accordance with the weight of authority, the court thus would let the criminal defendant invoke the privilege throughout the appellate process. Id.; see also Ottomano v. United States, 468 F.2d 269, 273-74 (1st Cir. 1972) (holding the privilege applicable to individual called to testify in accomplice's trial while a motion to vacate his sentence was pending), cert. denied, 409 U.S. 1128 (1973); Mills v. United States, 281 F.2d 736, 740-41 (4th Cir. 1960) (holding that privilege protected witness who had pled guilty but who had not yet been sentenced); Smith, 283 Md. at 191, 388 A.2d at 541 (privilege applies to witness who has pleaded
3. Prejudicial Error.—After finding that Troxell was entitled to assert his privilege against self-incrimination, the court next considered whether the trial court committed prejudicial error when it called Troxell to testify before the jury at Adkins’ trial. In Dorsey v. State, the Court of Appeals enunciated the general rule that prejudicial error occurs unless the reviewing court is satisfied that there is no reasonable possibility that the trial court’s error influenced the verdict. Using this general principle, the Court of Appeals in Vandegrift v. State invoked a five-part test to assess the nature of error in cases in which the prosecutor has called a witness before the jury, knowing that the witness intends to invoke the privilege. The five factors that the court is to consider are as follows:

1. That the witness appears to have been so closely implicated in the defendant’s alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness’ complicity, which will, in turn, prejudice the defendant in the eyes of the jury;

2. That the prosecutor knew in advance or had reason to anticipate that the witness would claim his privilege, or had no reasonable basis for expecting him to waive it, and therefore, called him in bad faith and for an improper purpose;

3. That the witness had a right to invoke his privilege;

4. That defense counsel made timely objection and took exception to the prosecutor’s misconduct; and

5. That the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury.

...
To determine the extent of prejudicial error, the court must apply these five factors and then use the results "to assess the overall circumstances of the invocation of the privilege." 61

The Court of Appeals analyzed the extent of the trial court's error under the Vandegrift test and found that four out of the five factors had been satisfied. 62 The first factor of the Vandegrift test requires that the witness be "closely implicated in the defendant's alleged criminal activities." The Adkins facts clearly satisfied that factor because Troxell's prior conviction and pending appeal arose from the same crime for which the defendant was on trial. 63 Relying on Ellison, the Court of Appeals found that Troxell was entitled to assert the privilege because of his pending appeal, thus satisfying the third factor. 64 As to the fourth factor, the defense attorney timely objected during the evidentiary hearing to Troxell's interrogation and requested a mistrial when the prosecutor later called Troxell to testify. 65 Finally, when Troxell invoked the privilege on the stand, the trial judge failed to give any remedial instructions to dispel any impermissible inferences that the invocation created in the jurors' mind as mandated by the fifth factor in the Vandegrift test.

61. Adkins, 316 Md. at 13, 557 A.2d at 209.
62. Id. at 13-14, 557 A.2d at 209. The Court of Special Appeals in Adkins recognized the Vandegrift test as the standard to determine the nature of error in cases in which the prosecutor calls a witness before the jury, knowing that the witness will invoke the privilege on the stand. 72 Md. App. 493, 499, 531 A.2d 699, 702 (1987), rev'd, 316 Md. 1, 557 A.2d 203 (1989). Instead of applying this test in Adkins and evaluating the error based on the test's results, the Court of Special Appeals evaluated the error based on an annotation that suggested a bad faith prosecutorial intent was essential to a finding of prejudicial error. Id. at 499-500, 531 A.2d at 702; see Annotation, Propriety and Prejudicial Effect of Prosecution's Calling as Witness, to Extract Claim of Self-Incrimination Privilege, One Involved in Offense Charged Against Accused, 19 A.L.R. 4th 368 (1983). The Court of Special Appeals in Adkins reasoned that because the prosecutor's motive simply was to establish the witness' unavailability and not to create impermissible inferences in the jurors' minds, the error did not prejudice the defendant's case. 72 Md. App. at 501-02, 531 A.2d at 702-03. Thus, the Court of Special Appeals based its determination of error primarily on an evaluation of the prosecutor's intent or purpose in calling the witness. The Court of Special Appeals also cited Namet v. United States, 373 U.S. 179 (1962), in which the Supreme Court noted two instances in which prejudicial error may result when the prosecutor calls a witness before the jury when the prosecutor knows the witness will refuse to testify: (1) the government makes a conscious and flagrant attempt to build a case out of inferences that arise from the use of the testimonial privilege, or (2) when inferences from a witness' refusal to answer add critical weight to the prosecutor's case and are not subject to cross-examination. Id. at 186-87.

63. 316 Md. at 13, 557 A.2d at 209 (quoting Vandegrift v. State, 237 Md. 305, 308, 206 A.2d 250, 252 (1965)).
64. Id.
65. Id. at 14, 557 A.2d at 209.
Moreover, the trial court judge held Troxell in contempt in the jury's presence, which exacerbated the impression that Troxell was guilty and that Adkins, by association, could be guilty as well.67

Curiously, the Adkins court found that the second factor which related to prosecutorial misconduct was the only part of the Vande-grift test not satisfied.68 Although "the prosecutor knew Troxell would assert the privilege," the court found "no evidence of bad faith or misconduct on the part of the prosecution."69 The court acknowledged that the prosecutor did not call Troxell before the jury to elicit his testimony, but instead called Troxell to establish his refusal to testify to permit the prosecutor to introduce the Beach-Troxell tapes as evidence under the witness unavailability exception to the hearsay rule.70

The Adkins court recognized that the settled procedure to determine the unavailability of a witness who invokes the privilege is for the trial judge to ascertain whether the witness has reasonable and legally justified grounds to invoke the privilege, and if so, whether the witness invoked the privilege in good faith.71 The court, however, noted that no case has mandated that the trial judge conduct the inquiry before the jury.72 On the contrary, courts have held that the trial judge should ascertain a witness' availability outside the jury's presence.73 The Court of Appeals nevertheless concluded that the State's act of calling Troxell before the jury to establish his

66. Id.
67. Id.
68. Id.
69. Id.
70. Id. For a discussion of a witness' unavailability, see supra note 16.
71. 316 Md. at 6-7, 557 A.2d at 205-06.
72. Id. at 7 n.6, 557 A.2d at 206 n.6. The Court of Special Appeals in Adkins advised that to escape the difficulty of discerning the prosecutor's state of mind or intent, and to avoid arguments of prosecutorial misconduct, the "practical" or "better" approach "to follow after a witness has improbably invoked the . . . privilege . . . is to issue an order, outside of the jury's presence, directing him to testify, and admonishing him that his continued refusal to testify [will] be punishable by contempt." 72 Md. App. 493, 500, 531 A.2d 699, 702 (1987) (emphasis added) (citing United States v. MacCloskey, 682 F.2d 468, 478 n.19 (4th Cir. 1982)), rev'd, 316 Md. 1, 557 A.2d 203 (1989). Nevertheless, in a case such as this in which the trial judge ruled on the witness' availability in the jury's presence, the Court of Special Appeals indicated that prejudicial error was not created per se when the State called the witness to testify. Id. at 501, 531 A.2d at 702. Instead, the court held that the proper procedure to determine the extent of the error involved an analysis of the facts and circumstances of the case at hand, "focusing on the purpose and consequences of the event." Id.
73. Adkins, 72 Md. App. at 500, 531 A.2d at 702; see also United States v. Zappola, 646 F.2d 48, 54 (2d Cir. 1981) ("trial judge should undertake a more focused inquiry into the basis for invocation" of the self-incrimination privilege).
unavailability as a witness did not involve the kind of prosecutorial misconduct implicated in factor two of the Vandegrift test.\(^\text{74}\)

Notwithstanding this lack of prosecutorial bad faith, the court determined that the satisfaction of four out of the five factors of the Vandegrift test resulted in prejudicial error.\(^\text{75}\) The court focused its error analysis on the objective, extrinsic effects that may result from the prosecutor’s actions,\(^\text{76}\) rather than on a subjective evaluation of the prosecutor’s internal motives. Thus, the court provided a more consistent and workable method by which lower courts can evaluate whether reversible error has occurred.

4. Conclusion.—Adkins firmly establishes that a court can and should establish witness unavailability in a proceeding held out of the jury’s presence.\(^\text{77}\) Nevertheless, the mere absence of prosecutorial misconduct or bad faith when the prosecutor calls a witness before the jury to invoke his fifth amendment privilege for the record does not establish that any error which occurs is per se harmless.\(^\text{78}\) To evaluate the extent and nature of the error, the trial court must apply the Vandegrift test on a case-by-case basis and must examine the surrounding circumstances in their entirety.\(^\text{79}\) After Adkins, courts must scrutinize closely the effect of calling a witness to the stand to invoke the fifth amendment privilege before the jury even if the reason for doing so is harmless.\(^\text{80}\)

B. Disclosure of Grand Jury Information for Civil Use

In In re Criminal Investigation No. 437 In the Circuit Court for Baltimore City,\(^\text{81}\) the Court of Appeals upheld the disclosure to the federal government, for use in a civil proceeding, of certain grand jury materials gathered during a criminal investigation.\(^\text{82}\) In so holding, the court established a new standard for the disclosure of grand jury matters, giving substance to the secrecy exceptions outlined by re-

\(^\text{74}\) Adkins, 316 Md. at 14, 557 A.2d at 209. The Court of Appeals, however, did find that impermissible inferences arose when Troxell refused to answer the prosecutor’s leading questions that concerned Troxell’s association with the defendant on the night of the crime, and when the jury learned that Troxell had an appeal of his conviction pending. \(\text{Id.}\) at 11-12, 557 A.2d at 208.

\(^\text{75}\) \(\text{Id.}\) at 14, 557 A.2d at 209.

\(^\text{76}\) \(\text{Id.}\) at 13, 557 A.2d at 209.

\(^\text{77}\) \(\text{Id.}\) at 7 n.6, 557 A.2d at 206 n.6.

\(^\text{78}\) \(\text{Id.}\) at 14, 557 A.2d at 209.

\(^\text{79}\) \(\text{Id.}\) at 13, 557 A.2d at 209.

\(^\text{80}\) \(\text{Id.}\) at 13-14, 557 A.2d at 209.

\(^\text{81}\) 316 Md. 66, 557 A.2d 235 (1989).

\(^\text{82}\) \(\text{Id.}\) at 68, 557 A.2d at 236.
cent enactments in the Maryland Rules.\footnote{83}

1. The Case.—Between June 1986 and May 1988, the grand jury of Maryland conducted an investigation of a private pharmaceutical Medicaid provider (pharmacy) involving alleged overpayments of Medicaid monies.\footnote{84} During its investigation, the grand jury obtained a large volume of materials that included thousands of prescriptions, numerous computer printouts, and other documents relating to payments made to the pharmacy under the Medicaid program.\footnote{85} When the grand jury ended its investigation in May 1988 without returning criminal indictments,\footnote{86} the State employed civil means to recover overpayments.\footnote{87} Although the State initially sought recovery through state civil remedies,\footnote{88} it later asked the federal government to pursue civil remedies against the pharmacy.\footnote{89} To that end, the State\footnote{90} petitioned the circuit court pursuant to rule 4-642 to release to the federal government a small and narrowly specified portion of the materials acquired by the grand jury.\footnote{91} The court granted this motion, largely on the grounds that disclosure was unlikely to compromise secrecy.\footnote{92} The pharmacy and one of its

\footnote{83. See Mo. R. 4-642. Maryland Rules 4-641 through 4-644 apply to circuit court procedures that relate to criminal investigations, including grand jury investigations. The General Assembly adopted these rules on April 6, 1984, effective July 1, 1984. There were no comparable rules in effect in Maryland prior to this enactment. See In re Criminal Investigation No. 437, 316 Md. at 80, 81 n.8, 557 A.2d at 241, 242 n.8.}

\footnote{84. In re Criminal Investigation No. 437, 316 Md. at 68-69, 557 A.2d at 236.}

\footnote{85. Id. at 89, 557 A.2d at 246. There were roughly "twelve banker's boxes of materials." Id. The court, quoting from the trial court transcript, noted that many of the boxes contained "a hundred thousand prescriptions." Id.}

\footnote{86. Id. at 69, 557 A.2d at 236.}

\footnote{87. Id. at 69-70, 557 A.2d at 236.}

\footnote{88. Id. at 70, 557 A.2d at 236.}

\footnote{89. Id., 557 A.2d at 237.}

\footnote{90. The court simply uses 'State' as a shorthand term to signify the Attorney General and the Medicaid Fraud Control Unit, the Maryland Medical Assistance Program, and the Department of Health and its various units. Id. at 69 n.2, 557 A.2d at 236 n.2.}

\footnote{91. Id. at 70, 89, 557 A.2d at 237, 246. The State asked for 112 documents, computer printouts, and prescription receipts. Id. at 89, 557 A.2d at 246. The State also requested that the trial court allow the State to send a letter of transmittal along with the disclosed documents. Although the trial court's initial disclosure order did not include the letter, the trial court ultimately granted this motion over the pharmacy's objections. Id. at 94-96, 557 A.2d at 248-50. The letter described the documents to be disclosed, named the employee centrally involved in the transactions, and explained how some documents under investigation came to be destroyed while in the pharmacy's possession. Id. at 97-99, 557 A.2d at 250-51.}

\footnote{92. Id. at 89-90, 557 A.2d at 246-47. There is some support for the notion that, unless the workings of the grand jury are likely to be exposed, there is no need for secrecy. See, e.g., United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978) (release of grand jury documents fell outside scope of federal rule when disclosure revealed noth-}
employees appealed the disclosure order to the Court of Special Appeals and also petitioned for a writ of certiorari to the Court of Appeals.93 The Court of Appeals granted certiorari before the Court of Special Appeals announced a decision.94

2. Legal Background.—The grand jury derives from ancient English common law tradition95 with the dual "purpose[] . . . to bring to trial those who are properly charged with crime, and to protect the citizen against unfounded accusations of crime."96 The grand jury's function can be characterized as both investigative and accusative, but even though it exercises sweeping power,97 its inquiries are limited to criminal matters.98

An individual accused of a crime is entitled to a grand jury under the federal Bill of Rights. Specifically, the fifth amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . ."99 In Maryland, by contrast, an accused has no constitutional right to a grand jury indictment for three reasons.100 First, the federal provision does not apply to the states.101 Second,
the Maryland constitution does not specifically confer such a right. Finally, legislative enactments, judicial decisions, and rules of the court may change common law rights. The Court of Appeals in In re Criminal Investigation No. 437, however, notes that the grand jury still plays an integral part in the State's criminal justice system even though an accused has no constitutional right to it.

As a whole, the grand jury system has been criticized as: (1) a

102. In re Criminal Investigation No. 437, 316 Md. at 75, 557 A.2d at 239; see also Moaney v. State, 28 Md. App. 408, 346 A.2d 466 (1975).

As to the Maryland constitution, . . . "[T]here is no provision of the Maryland Constitution requiring an indictment in any case. Article 21 of the Declaration of Rights merely requires that an accused 'hath a right to be informed of the accusation against him; to have a copy of the Indictment, or Charge in due time . . . to prepare for his defense.'" In art. 5, however, of the Declaration of Rights of the Constitution of Maryland, the People declared "That the Inhabitants of Maryland are entitled to the Common Law of England . . . ." At the common law "whenever any 'felonious' offense is charged, the same requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it." Thus, by the common law, it appears that a person accused . . . is entitled to be tried upon an indictment returned by a grand jury. . . . [The defendant] asserts that this common law right is declared by statute to be the general policy of Maryland. . . . He refers to Code, art. 51, § 1, as providing:

"Whenever a person is accused of an indictable criminal offense under the laws of this State, he shall have the right to a grand jury selected at random from a fair cross section of the citizens of this State resident in the county in which the court convenes or in Baltimore City if the court convenes therein."

This may be reflective of the common law, but it was repealed by [legislative enactment]. It now reads:

"When a litigant in a court of the State is entitled to trial by a petit jury and when a person accused of a criminal offense is presented to a grand jury, the jury shall be selected at random from a fair cross section of the citizens of the state who reside in the county where the court convenes."

Thus, the "Declaration of policy", . . . is no longer expressed in terms of "having the right to a grand jury" upon accusation of "an indictable criminal offense." (emphasis added) Rather, now it is presented when "a person accused of a criminal offense is presented to a grand jury" that he is entitled to a jury selected at random. (emphasis added).

Id. at 412-13, 346 A.2d at 470 (citations omitted) (emphasis in original).

103. In re Criminal Investigation No. 437, 316 Md. at 75, 557 A.2d at 239; see also Lutz v. State, 167 Md. 12, 15, 172 A. 354, 356 (1934) (statute may abrogate common-law rights if statutory language is clear and unambiguous); supra note 102.

104. 316 Md. at 75, 557 A.2d at 239. A grand jury indictment remains as one method of charging an individual with certain crimes.

105. Id. At one time, an accused in Maryland had the right to a grand jury indictment by legislative enactment; later legislation and amendments to the Maryland Rules, however, abrogated the right. See supra note 102.
"superfluous piece of legal machinery,"\textsuperscript{106} (2) an "anachronism in these enlightened times"\textsuperscript{107} because the shroud of secrecy "flouts the concept of a fair and open hearing,"\textsuperscript{108} and (3) as an archaic remnant\textsuperscript{109} of a less civilized legal system that suspends due process rights otherwise viewed as essential.\textsuperscript{110} The grand jury system gradually is disappearing; although it originated in ancient English common law, it no longer is used in England,\textsuperscript{111} and its use is diminishing in the United States,\textsuperscript{112} including Maryland.\textsuperscript{113}

\textbf{a. Grand Jury Secrecy.---}Grand jury proceedings are protected by a long established custom of nearly absolute secrecy\textsuperscript{114} that is broken only under a very limited set of circumstances.\textsuperscript{115} The rationale for this tradition includes the need to produce the most honest and complete testimony of witnesses, to protect people who are investigated but not indicted, to shield jurors from duress or bribery, to prevent the escape of those about to be indicted, and to encourage prosecutors to present whatever evidence they may have.\textsuperscript{116}

\textsuperscript{106} Blake v. State, 54 Okla. Crim. 62, 67, 14 P.2d 240, 242 (1932) (grand jury proceedings are unnecessary when prosecuting officers are willing to make inquisition, examine witnesses, ascertain facts); \textit{see also} Lytton, \textit{Grand Jury Secrecy—Time for a Reevaluation}, 75 J. CRIM. L. & CRIMINOLOGY 1100 (1984). Lytton argues that the rule of secrecy should be re-evaluated since "entirely legitimate efforts to use or discover matters that have occurred before the grand jury are blocked . . . ." \textit{Id.} at 1100.


\textsuperscript{108} \textit{Id.}

\textsuperscript{109} A concept that is apparently antiquated will be retained solely because of the sacrosanct preeminence ascribed to it by tradition. As other legal institutions attempt to adjust to and grow with the times, the legal fiction, with remarkable resilience, continues unimpeded and unchanged. Such is the case with the concept of jury secrecy.


\textsuperscript{110} In the federal system, for example, an accused does not have the right to have her attorney present during questioning by the grand jury. \textit{See} FED. R. CRIM. P. 6(d).

\textsuperscript{111} 38 AM. JUR. 2D Grand Jury § 2, at 948 (1968). Grand juries in Maryland have broad inquisitorial powers and may originate charges in matters not brought to them by a court or the State's Attorney. Brack v. Well, 184 Md. 86, 91-92, 40 A.2d 319, 321-22 (1944).

\textsuperscript{112} Brack, 184 Md. at 95, 40 A.2d at 323.

\textsuperscript{113} Moaney v. State of Maryland, 28 Md. App. 408, 415, 346 A.2d 466, 471-72 (1975). The Court of Special Appeals noted that although there was a common-law right to indictment by a grand jury in Maryland, this right was changed by statute in the 1970s. \textit{Id.; see supra} note 102. Notwithstanding this larger trend, the Court of Appeals in \textit{In re Criminal Investigation No. 437} noted that "the grand jury still plays an important role in the administration of criminal justice in this State." 316 Md. at 76, 557 A.2d at 29.

\textsuperscript{114} 38 AM. JUR. 2D Grand Jury § 39, at 984 (1968).

\textsuperscript{115} \textit{See} id. § 41, at 987.

\textsuperscript{116} \textit{Id.} § 39, at 984-85; \textit{see also} Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979) (listing the same factors as distinct interests served by safeguarding
Grand jury secrecy is ensured by various means. In those states that use grand juries, jurors generally take an oath of secrecy. \(^{117}\) In Maryland, an oath of secrecy is required \(^{118}\) and jurors are forbidden to divulge anything that concerns the grand jury process except under court order. \(^{119}\) Maryland law also imposes penalties, including fines and imprisonment, should a juror reveal the grand jury's inner workings. \(^{120}\) Stenographers \(^{121}\) and other court personnel likewise face the possibility of sanctions for unauthorized disclosure. \(^{122}\) Grand jurors in the federal system are not required by statute to take an oath of secrecy, but like the Maryland provisions, the Federal Rules of Criminal Procedure allow jurors to disclose information only when the court directs them to do so. \(^{123}\) Grand jury secrecy also is protected by restricting the number of participants in the proceedings. \(^{124}\)

To further ensure the secrecy of grand jury proceedings, court records similarly are protected under Maryland Rule 4-642(a), which asserts that "[f]iles and records of the court pertaining to criminal investigations shall be sealed and shall be open to inspection only by order of the court." \(^{125}\) The phrase "criminal investigations" includes inquiries made by grand juries. \(^{126}\)

---

\(^{117}\) See 38 AM. JUR. 2D Grand Jury § 41, at 988 (1968).

\(^{118}\) See 38 AM. JUR. 2D Grand Jury § 41, at 964 (1968).

\(^{119}\) Md. CTS. & JUD. PROC. CODE ANN. § 8-213(a) (1989).

\(^{120}\) Id. § 8-213(b). "Oath of secrecy.—All persons who have been selected for grand jury service in the circuit court of any county in the State shall take an oath of secrecy." Id.

\(^{121}\) Id. § 8-213(b).

\(^{122}\) Id. § 8-401(e). "Disclosure of grand jury proceedings.—A person who discloses the contents of any grand jury proceeding, except for persons authorized by law to make such disclosures, is subject to a fine of not more than $1000 or imprisonment for not more than one year, or both." Id.

\(^{123}\) See id. 6(d). This section of the rule enumerates those who are allowed to attend grand jury proceedings. These people are limited to attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

\(^{124}\) See id. 5(a).

\(^{125}\) Md. R. 4-642(a).

\(^{126}\) Id. 4-641. The rule states in relevant part that "[c]riminal investigation' means
The general secrecy requirement is relaxed in the federal system, which allows the disclosure of grand jury records when authorized by one of the exceptions contained in the Federal Rules of Criminal Procedure. The rules provide for the release of information in several contexts, but most often to pursue criminal charges. The relevant part of Federal Rule 6 that so provides is section (e)(3)(C), which stipulates that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—(i) when so directed by a court preliminarily to or in connection with a judicial proceeding." If the court releases grand jury information, "the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct."

Although the Maryland rules that pertain to secrecy and disclosure are not as explicit as their federal counterparts, rule 4-642(c) prescribes the circumstances in which motions for disclosure may be made. The General Assembly, however, did not enact this rule until 1984, and no comparable procedure existed in Maryland law prior to that time, suggesting that common law restrictions which govern grand jury secrecy were in effect until then.

inquiries into alleged criminal activities conducted by a grand jury or by a State's Attorney pursuant to Article 10, § 39A." Id. (emphasis added).

128. See id. 6(e)(3)(A)-(B).
129. Id. 6(e)(3)(C). Although the standard the court announced for Maryland closely parallels the federal rule, there is no corresponding requirement that there be a pending judicial proceeding. In re Criminal Investigation No. 437, 316 Md. at 81, 557 A.2d at 242. The Court of Appeals rejected the argument that a requirement similar to that in the federal rule should be read into the common law, pointing out that the Rules Committee could have incorporated this provision had it wished to do so. Id. at 104, 557 A.2d at 253.
131. Md. R. 4-642(c).

Unless disclosure of matters occurring before the grand jury is permitted by law without court authorization, a motion for disclosure of such matters shall be filed in the circuit court where the grand jury convened. If the moving party is a State's Attorney who is seeking disclosure for enforcement of the criminal law of a state or the criminal law of the United States, the hearing shall be ex parte. In all other cases, the moving party shall serve a copy of the motion upon the State's Attorney, the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and such other persons as the court may direct. The court shall conduct a hearing if requested within 15 days after service of the motion.

Id.
132. See supra note 83.
3. **Analysis.**—Because the Maryland rule that governs the disclosure of grand jury materials is relatively recent in origin, it perhaps is not surprising that this case is one of first impression for Maryland courts.\(^3\) Noting that the Maryland rule and the federal rule concerning disclosure are "cut from the same cloth,"\(^4\) the court borrowed heavily from the Supreme Court interpretation of federal secrecy legislation to give substance to rule 4-642(c).\(^5\)

To determine when a court may order disclosure of grand jury material, the Court of Appeals reviewed a number of Supreme Court cases that had addressed the issue. These cases all required a showing that a "particularized need" exists which outweighs society's interest in the secrecy of the proceedings.\(^6\) In *Douglas Oil Co. v. Petrol Stops Northwest*, the Supreme Court announced the standard to determine whether this particularized need has been satisfied:

*Parties seeking grand jury transcripts under Rule 6(e) must*

---

133. See *In re Criminal Investigation No. 437*, 316 Md. at 81, 557 A.2d at 242. The trial court actually stayed its disclosure order pending review by the Court of Special Appeals and the Court of Appeals because of the novelty of the issues that the case presented. *Id.* at 93, 557 A.2d at 248.

134. *Id.* at 81, 557 A.2d at 242.

135. Md. R. 4-642(c); see also *In re Criminal Investigation No. 437*, 316 Md. at 82, 557 A.2d at 242. "The interpretations of the Supreme Court of the federal rule are, of course, not binding on us, but, in the circumstances, they are most persuasive, and we are inclined to follow them." *Id.* Corresponding rules in other states also resemble the federal rules, although in Connecticut, for example, the court stated that it would follow federal precedent "not because the Connecticut statute was patterned on the federal rule but because both originate from the common law requirement that grand jury testimony be secret." *In re Investigation of the Grand Juror Into Cove Manor Convalescent Center, Inc.*, 4 Conn. App. 544, 495 A.2d 1098, 1102 (state grand juries governed by state statute are similar in function to grand juries governed by the federal rule), *certif. granted*, 197 Conn. 812, 499 A.2d 59 (1985), *appeal dismissed*, 203 Conn. 1, 522 A.2d 1228 (1987).

136. *In re Criminal Investigation No. 437*, 316 Md. at 82, 557 A.2d at 243. In reaching its conclusion, the court examined United States v. John Doe, Inc. I, 481 U.S. 102, 113 (1987) (court must determine whether public benefits outweigh dangers created by limited disclosure), United States v. Sells Eng'g, Inc., 463 U.S. 418, 420 (1983) (Justice Department attorneys may not have access to grand jury materials for use in civil suit without strong showing of particularized need), Illinois v. Abbott & Assocs., 460 U.S. 557, 568 (1983) (state attorney general cannot obtain grand jury material without showing particularized need), *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979) (confirming the particularized need standard outlined in *Proctor & Gamble*), *Dennis v. United States*, 384 U.S. 855, 871-72 (1966) (information should be released when government conceives that importance of preserving secrecy is minimal and petitioners have gone beyond minimum required by rule), *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) (judge may use discretion to release grand jury minutes, but burden is on defense to show particularized need), and *United States v. Proctor & Gamble*, 356 U.S. 677, 682 (1958) (secrecy must not be broken absent a compelling necessity that must be shown with particularity).
show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.¹³⁷

The Court of Appeals in In re Criminal Investigation No. 437 set a standard that echoes the federal standard, although Maryland courts have recognized the particularized need showing in dictum.¹³⁸ The court established that:

a) The party seeking disclosure by an order of court must show a particularized need for breaching the general rule of secrecy.

b) The standard for the particularized need requirement is:

i) the material sought to be disclosed is needed to avoid a possible injustice; and

ii) the need for disclosure is greater than the need for continued secrecy; and

iii) the request to disclose covers only materials so needed.¹³⁹

The court concluded that disclosure is a discretionary matter for the trial judge, and that the flexible standard enunciated above governs disclosure.¹⁴⁰ The standard involves a balancing test, and the court recognized that seven factors may come into play in determining whether disclosure should be granted in any given case.¹⁴¹ First, there is the necessity of safeguarding the identities of those who are not indicted.¹⁴² This reflects one of the longstanding reasons for maintaining grand jury secrecy in the first place—protecting the reputations of the unindicted and the safety of witnesses.¹⁴³

¹³⁷. Douglas Oil, 441 U.S. at 222 (footnote omitted).
¹³⁸. 316 Md. at 83, 557 A.2d at 243.
¹³⁹. Id. at 100, 557 A.2d at 251.
¹⁴⁰. Id.
¹⁴¹. Id. at 100-01, 557 A.2d at 251-52.
¹⁴². Id. at 100, 557 A.2d at 251. The Supreme Court recognized this as a reason to maintain grand jury secrecy in United States v. Proctor & Gamble, 356 U.S. 677, 681 n.6 (1958) (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)). In In re Criminal Investigation No. 437, the Court of Appeals concluded that disclosure of the materials was likely to identify the subjects of the investigation, but said “that was why an order pursuant to Md. Rule 4-642(c) was required and why a particularized need had to be shown to support the order.” 316 Md. at 103, 557 A.2d at 253.
¹⁴³. Proctor & Gamble, 356 U.S. at 681 n.6 (quoting Rose, 215 F.2d at 628-29) (encouraging free disclosure by witnesses and protecting the innocent accused from disclosure of fact he has been under investigation).
Second, the court may consider whether the grand jury has concluded its operations. This presumably relates to the risk of releasing crucial information at a time when a grand jury is still susceptible to influence. Third, the court asserted that “the particularized need requirement applies to civil governmental agencies as well as to private parties.” The court, however, retreated from this position elsewhere, noting that courts are not obliged to ignore the identity of the person who makes the request. Fourth, a court may take into account whether the materials sought for disclosure are rationally related to the civil proceedings contemplated, although this alone is not enough. But the court noted, “[i]t seems, however, that a ‘rational relationship’ may be included in the balancing process.” Fifth, courts may consider whether the requested materials can be obtained through “ordinary discovery or other routine avenues of investigation” . . . [and sixth, whether]

144. *In re Criminal Investigation No. 437*, 316 Md. at 100, 557 A.2d at 252. In this case, the grand jury ended its investigations in May 1988 and the State did not initiate this action until mid-June 1988. *Id.* at 69, 70, 557 A.2d at 236.

145. The Supreme Court, however, asserts that “the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.” Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979).


147. *In re Criminal Investigation No. 437*, 316 Md. at 87, 557 A.2d at 245; *see Sells Eng’g*, 463 U.S. at 445 (standard does not require court to pretend there are no differences between governmental bodies and private parties). In the instant case, the rule provides that “the moving party shall serve a copy of the motion upon the State’s Attorney, the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and such other persons as the court may direct.” Md. R. 4-642(c). The rule is silent as to a situation, such as this, in which the moving party is the State’s Attorney, who is seeking disclosure for a civil proceeding. The Court of Appeals does not address this disparity in its opinion.

148. *In re Criminal Investigation No. 437*, 316 Md. at 88, 101, 557 A.2d at 246, 252; *see Sells Eng’g*, 463 U.S. at 445. “[T]he District Court asserted that it has found particularized need for disclosure, but its explanation of that conclusion amounted to little more than its statement that the grand jury materials sought are rationally related to the civil fraud suit to be brought by the Civil Division . . . . [T]his was insufficient . . . .” *Id.* The “rational relationship” surely exists in *In re Criminal Investigation No. 437* because the materials that the grand jury examined are identical to those required for the criminal proceedings. But the court does not discuss whether it makes any difference to its consideration that the moving party is the Attorney General. The rule establishes explicit disclosure provisions for the State’s Attorney “who is seeking disclosure for enforcement of the criminal law,” but says nothing about the case in which a State’s Attorney seeks disclosure for civil, rather than criminal purposes. Md. R. 4-642(c).

149. *In re Criminal Investigation No. 437*, 316 Md. at 88, 557 A.2d at 246.

150. *See Sells Eng’g*, 463 U.S. at 445. “[I]n weighing the need for disclosure, the court could take into account any alternative discovery tools available . . . to the agency seek-
Disclosure will save time and expense.” 151 The latter economic consideration is not enough to demonstrate particularized need because it almost always is the case that disclosure would conserve economic resources. Nevertheless, there may be occasions when the impracticality of obtaining the material through alternate means is so burdensome that it outweighs other considerations. Likewise, if the materials cannot be obtained through the usual procedures, a court might decide that disclosure is justified. 152 Finally, courts may consider the fact that a grand jury investigation produced no indictments. 153 The State’s mere failure to establish a criminal case, however, does not mean that it could not institute a legitimate civil claim.

In conclusion, Judge Orth wrote:

None of these considerations, in itself, is usually sufficient to show that there is or is not a particularized need for disclosure. But each consideration, balanced with other considerations, may weigh for or against disclosure. The weight afforded by the consideration depends upon the
particular circumstances. The bottom line is that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy.\textsuperscript{154}

The Court of Appeals determined that the trial judge’s decision to permit disclosure was “consistent with the law as we have found it to be.”\textsuperscript{155}

This case is one of first impression for the Maryland courts. Other state courts that have grappled with the standard to apply in releasing grand jury material for civil proceedings have reached similar conclusions, opting to follow federal models.\textsuperscript{156}

The Court of Appeals directly expressed the standard for determining when grand jury materials may be disclosed, a standard that previously was inferred from rule 4-642.\textsuperscript{157} Thus, the decision establishes the conditions that must be met before a court may order disclosure for civil purposes.\textsuperscript{158}

\textsuperscript{154} Id. at 101, 557 A.2d at 252.
\textsuperscript{155} Id.
\textsuperscript{156} See, e.g., People v. Tynan, 701 P.2d 80, 83 (Colo. Ct. App. 1984) (court may order release of materials if prosecution’s particularized need is sufficient); In re Investigation of the Grand Juror Into Cove Manor Convalescent Center, Inc., 4 Conn. App. 544, 555, 495 A.2d 1098, 1104 (“public or interested parties seeking access to grand jury materials must first demonstrate a particularized need”), certif. granted, 197 Conn. 812, 499 A.2d 59, appeal dismissed, 203 Conn. 1, 522 A.2d 1228 (1987); Board of Educ. v. Versario, 143 Ill. App. 3d 1000, 1005, 493 N.E.2d 355, 357 (1986) (follows federal case law interpretation of rule 6(e)(3)(A) in release of materials for use in administrative proceeding); In re Deputy Attorney-Gen. for Medicaid Fraud Control, 120 A.D.2d 586, 589, 502 N.Y.S.2d 493, 496 (App. Div. 1986) (“disclosure may be directed when, after balancing a public interest in disclosure against one favoring secrecy, the former outweighs the latter”); In re Police Comm’r, 131 Misc. 2d 695, 704, 501 N.Y.S.2d 568, 574 (Sup. Ct. 1986) (showing of compelling and particularized need must overcome considerations justifying secrecy); State v. Tenbrook, 34 Ohio Misc. 2d 14, 16, 517 N.E.2d 1046, 1048 (C.P. 1987) (existence of particularized need outweighing need for secrecy is to be determined by trial court). For example, in Tynan, the Colorado Department of Social Services requested grand jury records with the intent of using them for state civil proceedings. 701 P.2d at 82. Although it denied the motion, the Colorado Court of Appeals cited federal case law for the proposition that "facts incidentally brought to light may be used for other legitimate purposes after a court has held a hearing and determined that the prosecution’s ‘particularized need has overcome the traditional shroud of secrecy,’ and ordered the material to be released." Id. at 83 (citation omitted). Similarly, in In re Investigation of the Grand Juror, a plaintiff who entered a plea of nolo contendere to Medicaid fraud asked the court to block release of grand jury records to the department of health services. The court adopted the particularized need standard articulated in the growing body of federal case law. In re Investigation of the Grand Juror, 4 Conn. App. at 555, 495 A.2d at 1104.

\textsuperscript{157} Md. R. 4-642(a), (c). The rule provides for disclosure without affirmatively stating that there are exceptions to the general rule of secrecy. Also, nothing is mentioned in the rule about the circumstances under which a court may order disclosure. Id.

\textsuperscript{158} In re Criminal Investigation No. 437, 316 Md. at 85, 557 A.2d at 244. Some courts regard the particularized need standard as being ambiguous. See In re Final Grand Jury
Although the Maryland rules and the court's decision in this case have been shaped by their counterparts in federal legislation and case law, the state and federal rules differ in some important respects. For example, the federal rule refers to disclosure of "matters occurring before the grand jury," which suggests that it encompasses a broad range of information, and perhaps includes witness testimony, as well as documentary evidence. By contrast, the Maryland rule refers to "[f]iles and records," which may not be as sweeping as the corresponding federal rule. This could mean that, under the federal rule, there is greater breadth in the type of materials that may be disclosed. In In re Criminal Investigation No. 437, the State merely sought disclosure of documents and other business records belonging to the pharmacy. It did not attempt to obtain direct testimony given to the jury.

In other respects, however, the Maryland standard is less restrictive than that used in the federal system. Under Federal Rule 6(e), disclosure is restricted to situations "preliminar[y] to or in connection with a judicial proceeding." Because Maryland Rule 4-642(c) contains no such proviso, the Court of Appeals created no corresponding restriction in the balancing standard that it announced here. Consequently, government agencies and institutions may obtain access to grand jury information for investigative purposes, and need not show with any certainty that a judicial proceeding will result. The court could not have reached its conclusion in the instant case if the Maryland rule had more nearly replicated its federal counterpart because "the disclosure sought here was not preliminary to or in connection with a judicial proceeding."

One author has suggested that the standards set by the Supreme Court are excessively rigid and difficult to meet. In particular, the requirement that disclosure be necessary to avoid injustice in another proceeding is said to be too difficult to

---

Report Concerning the Torrington Police Dep't, 197 Conn. 698, 709, 501 A.2d 377, 382 (1985) ("'particularized need' is principally a shorthand label for the flexibility and balance that is inherent in discretionary choice").
159. FED. R. CRIM. P. 6(e)(3)(C).
160. Md. R. 4-642(a).
161. 316 Md. at 89, 557 A.2d at 246.
163. In re Criminal Investigation No. 437, 316 Md. at 85, 557 A.2d at 244.
164. See id.
165. Id. at 104, 557 A.2d at 253.
166. See Lytton, supra note 106, at 1127-28.
demonstrate, and courts instead should determine on an individual basis "whether disclosure would in any way frustrate the reasons for secrecy." This criticism also is relevant to the Maryland standard because it so closely mirrors the federal standard. A party who seeks release of grand jury information may find it insurmountably difficult to demonstrate that the disclosure is necessary to avoid injustice. If this is the case, the standard announced here is unlikely to encourage a great increase in requests for disclosure. At the same time, the case marks a departure from deeply entrenched patterns of grand jury silence, and it perhaps would be unreasonable to expect the court to make that departure more radical than the federal model. In any case, the ultimate decision is left almost entirely to the trial court's discretion.

4. Conclusion.—Because grand jury operations are a well established part of the legal system, it is unlikely that they will be substantially or rapidly altered anytime soon. Nevertheless, certain characteristics, such as the long tradition of judicially protected secrecy, have been eroded in the last decade, and it seems likely that this trend will persist as courts continue to enlarge the scope of interpretation surrounding recent legislation. In re Criminal Investigation No. 437 represents but one example of this larger movement to relax the common law stricture of grand jury secrecy.

C. Fair Trials for AIDS-Afflicted Defendants

In Wiggins v. State, the Court of Appeals held that a trial court abused its discretion when it allowed court personnel to wear rubber gloves during the jury trial of a defendant believed to have the acquired immunodeficiency syndrome (AIDS). Recognizing the

167. Lytton writes that "[t]he basic stumbling block for a more reasonable application of the rule of secrecy is Douglas Oil's requirement that disclosure is appropriate only where it is necessary to avoid an injustice in another proceeding." Id. at 1128 (emphasis in original).
168. Id.
169. Some would argue that the exceptions presently recognized are enough, that further intrusions on grand jury secrecy should not be allowed. See Rejecting Change, Nat'l L.J., Apr. 17, 1989, at 12, col. 1.
170. See supra notes 111-113 and accompanying text.
172. Id. at 240, 554 A.2d at 360. AIDS is a blood-borne or sexually transmitted disease that weakens a person's immune system. Earl & Kavanaugh, Practical Suggestions in Litigating Your First AIDS Case, 12 Nova L.J. 1203, 1205 (1988). In 1981, the first AIDS cases were reported in five homosexual men in California. From 1981 through May
fear of AIDS that pervades the public consciousness, the court in *Wiggins* determined that "it is not far-fetched that the jury, observing the gloves, thought it better, in any event, that Wiggins be withdrawn from public circulation and confined in an institution with others of his ilk." The Court of Appeals then concluded that if the jury based its verdict on such a consideration, that consideration clearly interfered with the defendant's fundamental right to a fair trial secured by the fourteenth amendment; the court remanded the case for a new trial. The decision is important because it is one of the first cases in which a court has afforded constitutional protection to a criminal defendant afflicted with AIDS.

This Note discusses the far-reaching effects that *Wiggins* is likely to have on courtroom proceedings in Maryland and in the nation. As more criminal defendants are acknowledged to have AIDS, courts will have the responsibility "to strip away fear, superstition, and the mythology of AIDS so that rational decisions can be made." The Court of Appeals recognized this responsibility and its decision to protect Wiggins' fundamental right to a fair trial will assist defendants with AIDS everywhere.

1. The Case.—Bernard Wiggins, a homosexual, lived with another homosexual, Juan Gough, and a lesbian, Jacquelyn Cooper. When Cooper and Wiggins were at a pub together one evening, Bjorn Haug approached Cooper, thinking that she was a male. Cooper introduced Haug to Wiggins and they all went back to the

1988, more than 61,000 cases of AIDS have been reported to the Centers for Disease Control, and more than 34,000 deaths have occurred. Margolis, *The AIDS Epidemic: Reality Versus Myth*, 72 JUDICATURE 58, 58 (1988).

173. *Wiggins*, 315 Md. at 242, 554 A.2d at 360. The court emphasized the media coverage that surrounds the AIDS issue and noted that public perception of AIDS has yet to be "demystified or destigmatized." The court further noted that a climate of fear exists with respect to AIDS. *Id.* at 244, 554 A.2d at 361.

174. *Id.* at 245, 554 A.2d at 362.

175. *Id.* at 239-240, 554 A.2d at 359. The fourteenth amendment of the United States Constitution provides that "[n]o state [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Court of Appeals also held that the judge erred when he admitted evidence that was seized improperly. *Wiggins*, 315 Md. at 252-53, 554 A.2d at 365-66. Police officers seized more items than the search warrant listed; the warrant authorized the seizure of only one of the items that the trial court admitted into evidence. The Court of Appeals determined that the items which were seized, but which were not listed in the warrant, failed to meet the test of the plain view doctrine. *Id.* Further discussion of this issue is beyond the scope of this Note.

176. See infra note 254 and accompanying text.

177. Earl & Kavanaugh, supra note 172, at 1223.


179. *Id.*
apartment that Wiggins, Cooper, and Gough shared together.\textsuperscript{180} After Wiggins and Haug went into Wiggins’ bedroom, someone heard Wiggins say he “was going to knock the guy off and take the car.”\textsuperscript{181} Gough heard a loud crash and found Haug unconscious and bloody in the bedroom.\textsuperscript{182} Wiggins, Cooper, Gough, and Gough’s lover, Eric Jennifer, put Haug in the trunk of Haug’s car and drove around.\textsuperscript{183} When Haug knocked on the inside of the trunk, they pulled into a vacant lot and let him out.\textsuperscript{184} Wiggins encouraged the others to hit Haug with sticks.\textsuperscript{185} Gough, Cooper, and Jennifer unsuccessfully attempted to beat Haug, then went back to the car.\textsuperscript{186} Gough later testified that he saw Wiggins swing at Haug.\textsuperscript{187} The next day, police found Haug dead with a piece of pipe imbedded in his face.\textsuperscript{188}

Wiggins was tried before a jury in the Prince George’s County Circuit Court for the crimes of felony murder, robbery with a deadly weapon, and felony theft.\textsuperscript{189} On the first day of the trial, the judge permitted the clerk of the court and the sheriff to wear gloves as they escorted Wiggins into the courtroom.\textsuperscript{190} When defense counsel objected to this procedure,\textsuperscript{191} the trial judge asked the State’s Attorney to include on the record information about Wiggins’ medical condition.\textsuperscript{192} The State’s Attorney reported to the judge that the

\textsuperscript{180.} Id. \\
\textsuperscript{181.} Id. \\
\textsuperscript{182.} Id. \\
\textsuperscript{183.} Id. \\
\textsuperscript{184.} Id. at 236, 554 A.2d at 357. \\
\textsuperscript{185.} Id. \\
\textsuperscript{186.} Id. \\
\textsuperscript{187.} Id. \\
\textsuperscript{188.} Id. \\
\textsuperscript{189.} Id. at 235, 554 A.2d at 357. \\
\textsuperscript{190.} Id. at 236, 554 A.2d at 357-58. The trial court judge explained that he based this decision on information that there was a “strong possibility or probability” that Wiggins had AIDS. Id.

The judge also declared that he would not allow the jurors to handle the exhibits in this case because he did not intend to jeopardize their safety. Id. The National Center for State Courts, however, maintains that jurors may examine physical evidence, including clothing worn by an AIDS defendant, without special precautions because any body fluids that exist on the items would have dried, and, thus, the virus no longer would be transmittable. Lattimore, \textit{AIDS and the Court Community}, \textsc{National Center for State Courts}, Feb. 5, 1988, at 1, 8.

\textsuperscript{191.} Wiggins, \textit{315 Md.} at 236-37, 554 A.2d at 358. The defense counsel noted that the guards previously had brought Wiggins into the courtroom without the benefit of gloves or other safety precautions. He also suggested that the court check with the detention center to determine whether Wiggins actually did have AIDS, but the court ignored this recommendation. Id. \\
\textsuperscript{192.} Id. at 237, 554 A.2d at 358.
Medical Examiner had diagnosed Bjorn Haug as having AIDS. In addition, the Medical Examiner diagnosed Gough, a codefendant and apartment-mate of Wiggins, as a carrier of the AIDS virus.\textsuperscript{193} As to Wiggins, the State’s Attorney said that he understood that Wiggins recently had been hospitalized for a week.\textsuperscript{194} The State’s Attorney further explained for the record that he was unable to obtain the hospital’s report and, therefore, did not know whether Wiggins had AIDS.\textsuperscript{195} The trial then proceeded.\textsuperscript{196}

On the second day of trial, the deputies brought Wiggins into the courtroom before the jury entered; nevertheless, the judge allowed the guards, who were seated behind the defendant, to continue to wear gloves during the trial.\textsuperscript{197} The defense counsel again objected and moved for a mistrial.\textsuperscript{198} The judge replied, “I have no intention of ever removing their gloves, and, therefore, your motion for a mistrial is denied.”\textsuperscript{199} After the jury returned a guilty verdict against Wiggins on all three charges,\textsuperscript{200} defense counsel renewed his motion for a new trial, which the judge summarily denied.\textsuperscript{201}

Wiggins appealed his conviction, asserting that the trial court violated his rights to due process and fundamental fairness when it allowed the guards to wear gloves in front of the jury.\textsuperscript{202} The Court of Special Appeals held that the trial judge erred when he allowed the clerk and the sheriff to wear gloves during the trial.\textsuperscript{203} Nevertheless, this court did not reverse the trial court’s ruling because it remained unconvinced that the trial judge’s cautionary measures had a prejudicial effect on the defendant’s trial.\textsuperscript{204} In addition, the Court of Special Appeals noted that the trial judge had questioned the jury members during voir dire about whether they could be impartial in the face of homosexuality.\textsuperscript{205} The jury members did not respond to the query. The Court of Special Appeals concluded that

\textsuperscript{193.} Id.  
\textsuperscript{194.} Id.  
\textsuperscript{195.} Id.  
\textsuperscript{196.} Id.  
\textsuperscript{197.} Id.  
\textsuperscript{198.} Id. at 237-38, 554 A.2d at 358.  
\textsuperscript{199.} Id. at 238, 554 A.2d at 358 (emphasis added).  
\textsuperscript{200.} Id., 554 A.2d at 358-59.  
\textsuperscript{201.} Id., 554 A.2d at 359.  
\textsuperscript{202.} Id. at 241, 554 A.2d at 360.  
\textsuperscript{204.} Id. at 199, 544 A.2d at 13.  
\textsuperscript{205.} Id., 544 A.2d at 14.
there was no reasonable possibility that the fact-finder’s decision would have been different if the security personnel not worn gloves during the trial. Thus, it affirmed the trial court’s ruling.206

The Court of Appeals disagreed with this conclusion.207 With respect to the question that the trial judge posed during voir dire, the Court of Appeals noted that the judge merely informed the jury that “[t]he case has touches of homosexuality in it.”208 The court stated, “[i]t is a far cry from not being prejudiced because the case ‘has touches of homosexuality in it,’ and not being prejudiced because the defendant may have AIDS.”209 The Court of Appeals reversed the trial court’s decision because it could not conclude beyond a reasonable doubt that the guards’ wearing of gloves did not contribute to Wiggins’ conviction.210

2. Legal Background.—“While AIDS . . . presents unprecedented challenges to many of this country’s social institutions, those posed to the criminal justice system are perhaps the most complex and ethically demanding.”211 Policy-makers in the criminal justice system must balance the conflicting responsibilities of protecting their staff members from AIDS and guarding an individual’s right to fair treatment.212 The courts’ confusion about these responsibilities has resulted in disparate treatment of AIDS defendants. In 1987, for example, one New York judge held a hearing for a defendant in a parking lot because the man was believed to have AIDS.213 Similarly, three Alabama district court judges required AIDS defendants to enter their pleas and receive their sentences by telephone.214 There have been many other instances of such treatment for which AIDS defendants have filed lawsuits; these suits have not yet been litigated.215 The media frequently report these occurrences and they probably are indicative of the current treatment of AIDS de-
fendants in courtrooms nationwide. To encourage uniformity in the New York state court system, the New York Office of Court Administra-
tion promulgated guidelines to conduct court proceedings that
include participants afflicted with infectious diseases, including
AIDS. The guidelines include the following policy: "[s]urgical
gloves may be worn under dress white gloves with a uniform blouse
at all times by court security officers . . . ." The New York state
court system's issuance of such guidelines and the incidence of special
or peculiar treatment of AIDS defendants as described above clearly indicates the significance of the Court of Appeals' holding in 
Wiggins.

3. Analysis.—In concluding that the trial court abused its discretion when it allowed the guards to wear gloves during Wiggins' trial, the Court of Appeals first noted that the State's trial judges historically have been granted wide discretion in conducting trials. In Maryland, the established rule is that the appellate court shall not disturb the trial judge's exercise of discretion unless the trial judge has clearly abused it. The Wiggins court cited Smith v. State and Hunt v. State as examples of the broad discretion afforded trial courts. In Smith, the jury informed the court that it had a unanimous verdict; when the court polled the jury, however, the jurors did not adhere to the verdict announced by the foreman. The Court of Appeals held that the trial judge did not abuse her discretion when she sent the jury back to the jury room for further deliberation. Similarly, the Court of Appeals in Hunt held that the trial court did not err when it allowed the murder victim's family to remain in the courtroom while the jury listened to a tape of police radio communications recorded at the time the defendant shot the

stance, Rhode Island and Texas courts have arraigned AIDS defendants outside the courtroom. Id. at 178.

216. Lattimore, supra note 190, at 6. The National Center for State Courts located in Williamsburg, Virginia, will provide a copy of these guidelines, as well as further information on AIDS and the court community. See Margolis, supra note 172, at 61.

217. Lattimore, supra note 190, at 6. These guidelines also permit the trial court judge to seek a waiver of a criminal defendant's presence in the courtroom if it is believed that the person has been exposed to the AIDS virus. Id.

218. Wiggins, 315 Md. at 239, 554 A.2d at 359.


221. 312 Md. 494, 540 A.2d 1125 (1988).

222. 299 Md. at 171-76, 472 A.2d at 994-97.

223. Id. at 179, 472 A.2d at 998.
victim; the court so held even though the victim’s family members became upset and eventually left the courtroom.\footnote{224. 312 Md. at 502, 540 A.2d at 1129.} 

Notwithstanding the wide latitude that trial courts historically have enjoyed, the Court of Appeals in \textit{Wiggins} asserted that a trial court may not exercise its discretion at the expense of the defendant’s fundamental right to a fair trial.\footnote{225. 315 Md. at 239, 554 A.2d at 359.} The court recognized the need to protect the defendant’s constitutional rights and it reiterated the principle stated in 1895 in \textit{Coffin v. United States}:\footnote{226. 156 U.S. 432, 457-61 (1895) (holding in part that the presumption of innocence and reasonable doubt were not sufficiently equivalent to allow only one, not both, to be stated to the jury).} 

\[
\text{"[T]here is a presumption of innocence in favor of the accused . . . and its enforcement lies at the foundation of the administration of our criminal law."}\footnote{227. \textit{Id.} at 453.}
\]

To protect this presumption, the trial court must be alert to factors that may undermine the jury’s decision-making process.\footnote{228. \textit{Estelle v. Williams}, 425 U.S. 501, 503 (1976) (holding that the state cannot require a defendant, over his objection, to wear identifiable prison clothing during a jury trial).} The Court of Appeals relied on one such factor when it held that the trial court erred when it allowed the guards to wear gloves, that is, that the judge proceeded on the assumption that the defendant had AIDS.\footnote{229. \textit{Wiggins}, 315 Md. at 240, 554 A.2d at 360.} The court concluded that such an assumption was insufficient to support the trial judge’s actions.\footnote{230. \textit{Id.} The court found that the trial court judge proceeded on an unidentified source of information and made no effort to ascertain Wiggins’ true medical status. \textit{Id.}, 554 A.2d at 359.}

The Court of Appeals then examined whether the error, in fact, affected the trial.\footnote{231. \textit{Id.} at 241, 554 A.2d at 360.} The court averred that the jury must have been curious about the gloves; the court found it unlikely that the jury was unaware of AIDS and its deadly consequences.\footnote{232. \textit{Id.} 233. \textit{Id.} at 242-44, 554 A.2d at 360-61.} The court reviewed the array of articles written about AIDS and also the number of bills to protect employees at risk of contracting AIDS filed in both houses of the Maryland legislature.\footnote{234. \textit{Id.} at 243, 554 A.2d at 361.} In addition, the court noted a plan that District of Columbia public health officials had prepared to educate the public which boldly states \"‘AIDS. IT CAN HAPPEN TO ANYBODY.’\"\footnote{235. \textit{Id.} at 242-44, 554 A.2d at 360-61.} Based on the media’s widespread coverage of AIDS and the numerous legislative attempts to
protect the public against AIDS, the Court of Appeals concluded that it was not improbable that the jury assumed that Wiggins had AIDS and was prejudiced by their assumption.\textsuperscript{235}

Next, the Court of Appeals addressed whether the trial court’s error prejudiced the defendant.\textsuperscript{236} The court in \textit{Dorsey v. State} established the standard of review to determine whether there has been prejudicial error in a criminal case.\textsuperscript{237} In \textit{Dorsey}, the court asserted that the beneficiary of an error must demonstrate beyond a reasonable doubt that the error did not influence the verdict.\textsuperscript{238} Because the State was unable to convince the \textit{Wiggins} court that the guards wearing of gloves at trial did not unduly influence the jury’s verdict, the Court of Appeals held that this procedure amounted to an abuse of discretion.\textsuperscript{239}

Curiously, the court noted in a footnote that it had not disturbed the trial court’s discretion to take safety precautions when there were good and sufficient reasons for such actions.\textsuperscript{240} For instance, there have been a number of cases in which the trial court allowed the defendant to appear before a jury in prison clothing, leg irons, shackles, etc.\textsuperscript{241} In each of these cases, the reviewing court allowed the trial court’s decision to stand when the record established that the defendant was a potential hazard to courtroom security.\textsuperscript{242} As the United States Supreme Court observed in \textit{Illinois v.}

\begin{itemize}
\item \textsuperscript{235} \textit{Id.} at 244, 554 A.2d at 361.
\item \textsuperscript{236} \textit{Id.} at 244-245, 554 A.2d at 362.
\item \textsuperscript{237} 276 Md. 638, 659, 350 A.2d 665, 678 (1976) (holding that the trial court’s allowance of a detective’s testimony that pertained to the defendant’s arrest-conviction record was a prejudicial error).
\item \textsuperscript{238} \textit{Id.} at 659, 350 A.2d at 677.
\item \textsuperscript{239} \textit{Id.} at 659, 350 A.2d at 677.
\item \textsuperscript{240} \textit{Id.} at 659, 350 A.2d at 677.
\item \textsuperscript{241} \textit{Id.} at 659, 350 A.2d at 677.
\item \textsuperscript{242} In \textit{Bowers v. State}, 306 Md. 120, 507 A.2d 1072, \textit{cert. denied}, 479 U.S. 890 (1986), the Court of Appeals held that the trial judge had not abused his discretion when he determined that Bowers should be in leg irons during the trial in light of prior institutional difficulty with Bowers and because of his personality problems. \textit{Id.} at 138, 507 A.2d at 1081. The trial judge noted on the record that the Sheriff’s Office had sent him a memorandum which indicated these problems and informed him that they thought Bowers was a security risk. \textit{Id.} at 123-24, 507 A.2d at 1073. Similarly, in \textit{Dixon v. State}, the Court of Special Appeals stated that
\begin{quote}
[i]f an accused so deports himself as to disrupt or threatens to disrupt the orderly process of the trial, or threatens to do bodily harm to the judge or courtroom attendants, the trial judge, in keeping with his obligation to assure the swift and proper administration of justice, is justified in taking such precautions as may be necessary to carry out his duty . . . . \\
\end{quote}
27 Md. App. 443, 451, 340 A.2d 396, 401 (1975) (holding that handcuffing a defendant as he entered and exited the courtroom was not an abuse of discretion).
\item \textsuperscript{242} \textit{Bowers}, 306 Md. at 123-38, 507 A.2d at 1073-81; \textit{Dixon}, 27 Md. App. at 451-52, 340 A.2d at 402.
\end{itemize}
Allen,243 "... the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant . . . ."244 Nevertheless, courts also are responsible for providing a secure courtroom for the safety of the jury, witnesses, counsel, and spectators.245 An AIDS defendant might argue "that because AIDS has been linked to illegal activity, i.e., drug abuse, as well as to other behavior that could subject the defendant to prejudice, i.e., homosexual activity," special attire could be a significant influence on the jury's judgment.246 This line of cases, however, suggests that the trial court must decide whether the prejudicial effect on the jury outweighs the interest of preserving courtroom security in determining the proper course of action. In Wiggins, the Court of Appeals thought that it did.

Commentators have called Wiggins a "groundbreaking decision"247 and "a triumph for medical evidence about AIDS transmission over popular fears and misinformation."248 Nevertheless, the Court of Appeals' holding in Wiggins does not entirely resolve the issue of whether special precautions are permissible in Maryland cases that involve AIDS defendants.249 The Court of Appeals could have definitively resolved the issue by holding that special precautions are prohibited absent good and sufficient reasons to have them, such as to preserve courtroom security. Instead, the court focused on the trial judge's assumption that Wiggins had AIDS.250 The court observed that the trial judge had not done a thorough

243. 397 U.S. 337 (1970) (holding that a defendant should be physically restrained only as a last resort).
244. Id. at 344.
245. Leyvas v. United States, 264 F.2d 272, 277 (9th Cir. 1958). In Leyvas, the Ninth Circuit examined whether the trial court erred when it posted marshals at the courtroom exits. The trial involved 34 persons indicted together on a charge of conspiracy to violate the narcotic laws and various other counts. Id. at 273. The court considered the trial court's responsibility to secure the safety of the counsel, jury, and spectators, as well as the necessity to maintain custody of the defendants, and concluded that the judge had not erred in posting the marshals. Id. at 277.
246. See W. DORNETTE, supra note 215, at 180.
249. According to The National Law Journal, the Court of Appeals only "narrowed the circumstances" under which a trial judge may permit special precautions. Haunted by Aids, supra note 247, at 6.
250. Wiggins, 315 Md. at 245, 554 A.2d at 360. The Court of Appeals cited in a footnote a number of sources that affirm the prevailing expert view that safety precautions are unnecessary when handling AIDS defendants. The court, however, refused to "enter the debate as to how AIDS is transmitted." Id. at 238-39 n.3, 554 A.2d at 359 n.3.
medical investigation and did not know whether Wiggins, in fact, had AIDS.\textsuperscript{251} Had the State established that Wiggins had AIDS, the next step then would have been for the judge to consider the prevailing expert view as to whether special precautions were needed to protect courtroom personnel.\textsuperscript{252} According to the Centers for Disease Control, the prevailing expert view is that precautions are unnecessary because those behaviors known to transmit the virus normally do not occur in the courtroom.\textsuperscript{253} Thus, the Court of Appeals has succeeded only in temporarily postponing an explicit prohibition of special precautions, absent a security risk, until the next case arises that involves a defendant infected with AIDS.

Even though the court did not conclusively prohibit special precautions, defendants infected with AIDS are likely to rely heavily on the Wiggins decision because it is one of the first reported cases that protects their constitutional right to a fair trial.\textsuperscript{254} The rights of defendants infected with AIDS will be protected greatly if other state courts find the Court of Appeals' reasoning persuasive.

4. Conclusion.—The Court of Appeals' decision in Wiggins is consistent with the current trend of the law that concerns AIDS patients. That trend generally has been to recognize AIDS patients' constitutional rights and to interpret the law in their favor.\textsuperscript{255} A few courts have even gone so far as to impose a lighter sentence for an AIDS defendant when it was apparent that a longer one would be equivalent to a life sentence.\textsuperscript{256} As the country tries to educate the

\textsuperscript{251} Id. at 240, 554 A.2d at 359-60.
\textsuperscript{252} Id. at 245 n.5, 554 A.2d at 362 n.5.
\textsuperscript{253} The Centers for Disease Control (CDC) issued advice to a Florida bankruptcy court as to whether special precautions were needed in a bankruptcy proceeding in which the debtor had AIDS. The court in \textit{In re Peacock} considered whether it should require the debtor to wear a mask during the court proceedings. 59 Bankr. 568, 569 (S.D. Fla. 1986). The CDC advised the court that there is no medical evidence to show that casual contact transmits the disease and that special precautions were unnecessary for the courtroom proceedings. \textit{Id.} at 571. The infected person, in fact, may be at risk in a courtroom because of his increased susceptibility to infections and viruses. Weisburg, \textit{AIDS: How Some Courts Are Coping}, \textit{72 Judicature} 60, 60 (1988). Some defendants infected with AIDS have chosen to emphasize that they have the disease, hoping that the trier of fact will have sympathy for them and be lenient. See W. Dornette, supra note 215, at 180. This tactic has had some effect. See infra note 256 and accompanying text.
\textsuperscript{254} The court's decision occurred at a time when the number of defendants with AIDS is growing rapidly. Hurtado, supra note 213, at 6. According to the Office of Court Administration, court appearances of defendants with AIDS have increased from 200 in 1987 to 386 in 1988. \textit{Id.}
\textsuperscript{256} In People v. Camargo, 135 Misc. 2d 987, 516 N.Y.S.2d 1004 (Sup. Ct. 1986), the
public to alleviate the fear of this fatal disease, the nation's court systems must handle AIDS cases as the Court of Appeals did in Wiggins. Fundamental rights must not "get trampled in the process of coming to terms with this disturbing phenomenon."\textsuperscript{257}

D. Preserving Sufficiency of the Evidence Review

In Warfield v. State,\textsuperscript{258} the Court of Appeals held that a defendant's renewal of a motion for judgment of acquittal, in which the defendant failed to state reasons to support his motion, nevertheless was sufficient to meet the requirements of Maryland Rule 4-324(a),\textsuperscript{259} and, thus, to preserve appellate review of the sufficiency of the evidence.\textsuperscript{260} On review of the merits, the court held that the evidence was insufficient to support the defendant's convictions.\textsuperscript{261} With this decision, the Court of Appeals has relaxed rule 4-324(a)'s requirements for the renewal of a motion.

New York Supreme Court dismissed a defendant's indictment for drug possession, citing the defendant's prognosis of three to four months to live because of AIDS. \textit{Id.} at 992, 516 N.Y.S.2d at 1007. Another example of a New York court's compassion took place during the sentencing of an AIDS defendant charged with assault and confined during the pretrial due to his inability to raise bail. Due to the seriousness of the defendant's disease, the court reduced bail so that his mother could care for him at home. He died eight days after his release. As a result of this case, the New York Supreme Court decided that bail reduction, dismissal of charges, or supervised adjournment of proceedings may be available to criminal defendants who have AIDS. People v. Gray, \textit{reported in} N.Y.L.J., June 26, 1986, at 18, col. 1; \textit{see also} United States v. Oden, 1987 U.S. Dist. LEXIS 9295 (S.D.N.Y.) (court reduced AIDS victim's sentence because it believed that prisoner would be incarcerated for a longer percentage of his life than intended by the original sentence). Other courts have found this reasoning unpersuasive, however. In State v. Wright, 221 N.J. Super. 123, 534 A.2d 31 (1987), the New Jersey Superior Court reversed the trial court's reduction of an AIDS victim's sentence. \textit{Id.} at 130, 534 A.2d at 35. Similarly, in State v. Waymire, 504 So. 2d 953 (La. Ct. App. 1987), the Louisiana Court of Appeals refused to consider AIDS as a mitigating factor when it sentenced the defendant. \textit{Id.} at 959.

\textsuperscript{257} Messitte, \textit{AIDS: A Judicial Perspective}, 72 JUDICATURE 205, 205 (1989). Schechter, \textit{AIDS: How the Disease is Being Criminalized}, 3 CRIM. JUST. 6 (1988) is another article that discusses the precarious position of defendants with AIDS. Schechter warns counsel who represent AIDS patients to be vigilant about courtroom procedure to prevent the humiliation of a defendant with the disease. \textit{Id.} at 42. Schechter attempts to give the issue an historical perspective by saying that future generations may conclude that twentieth-century society structured its laws to accommodate fear and prejudice in the same fashion that fourteenth-century society dealt with the plague. \textit{Id.}

\textsuperscript{258} 315 Md. 474, 554 A.2d 1238 (1989).

\textsuperscript{259} \textit{Id.} at 487, 554 A.2d at 1244-45. Rule 4-324(a) states in relevant part: "The defendant shall state with particularity all reasons why the motion should be granted." Md. R. 4-324(a).

\textsuperscript{260} 315 Md. at 487, 554 A.2d at 1246.

\textsuperscript{261} \textit{Id.} at 493-95, 502, 554 A.2d at 1247-48, 1252.
1. *The Case.*—Doris Weller hired Kevin Walter Warfield to shovel snow from the sidewalk and walkways of her property.\(^{262}\) Weller’s property included a detached two-car garage that she used for storage.\(^{263}\) Among other things, she stored two cans of United States coins valued at between fifty and one hundred fifty dollars.\(^{264}\) Weller testified that when Warfield was supposed to be shovelling snow, she noticed him exit from her garage;\(^{265}\) Weller had not given Warfield permission to enter the storeroom. When she confronted him about the incident, Warfield was evasive in his answer.\(^{266}\) Weller observed that boxes were "‘dissembled [sic],’" and a can of coins was missing.\(^{267}\) She questioned Warfield about the coins, but he denied any responsibility.\(^{268}\) Weller testified that the last time she had seen the coins, the garage was "‘undisturbed.’"\(^{269}\) Weller later notified the police.\(^{270}\) After an investigation, the police arrested Warfield and charged him with storehouse breaking,\(^{271}\) misdemeanor theft,\(^{272}\) and breaking and entering a storehouse.\(^{273}\)

A jury found Warfield guilty of all three offenses.\(^{274}\) At trial, Warfield moved for a judgment of acquittal at the end of the State’s evidence.\(^{275}\) The trial judge denied his motion, and Warfield proceeded to offer evidence.\(^{276}\) At the close of all the evidence, Warfield’s counsel stated, "‘I would renew—renew my Motion for

\(^{262}\) Id. at 479, 554 A.2d at 1241.
\(^{264}\) Id. at 479, 554 A.2d at 1240-41. Weller thought that the value "‘couldn’t have been less than fifty [dollars] and I’m sure it was more than fifty.’" A police officer stated that she had valued the coins at one hundred fifty dollars. \(\text{Id. at 480, 554 A.2d at 1241.}\)
\(^{266}\) Id.
\(^{265}\) Id. at 479, 554 A.2d at 1241.
\(^{272}\) Id.
\(^{271}\) Id. at 480, 554 A.2d at 1241.
\(^{270}\) Id.
\(^{269}\) Id.
\(^{267}\) Id. Weller testified that "'[t]hey were there the night before and they weren't there after he came out of the garage.’” \(\text{Id. at 481, 554 A.2d at 1242.}\)
\(^{271}\) Warfield, 315 Md. at 481, 554 A.2d at 1242; see also Md. Ann. Code art. 27, § 342 (1987).
\(^{272}\) Warfield, 315 Md. at 481, 554 A.2d at 1242. The court sentenced Warfield to ten years for count one, and eighteen months for count two; both sentences were to run concurrently. Warfield’s conviction for the third count merged with his conviction for the first. \(\text{Id.}\)
\(^{274}\) Id. at 484, 554 A.2d at 1243.
\(^{276}\) Id. Offering evidence is equivalent to withdrawing the motion. "‘If the motion is denied, he [the defendant] may offer evidence on his own behalf without having reserved the right to do so, but by so doing, he withdraws his motion.’” \(\text{Md. Ann. Code art. 27, § 593 (1987).}\)
Acquittal on all three Counts.' 277 Warfield's counsel, however, advanced no argument to support the motion, and the court denied it.278

Warfield appealed, claiming that the evidence was insufficient to sustain a conviction.279 The Court of Special Appeals held that Warfield had not preserved the sufficiency of the evidence issue for review.280 The court ruled that a motion which a party has withdrawn as a consequence of offering evidence is a "legal nullity and therefore not renewable."281 In essence, the intermediate appellate court held that a renewal of the motion essentially is an original motion; therefore, it requires particularizing the reasons to conform with the requirements of rule 4-324(a).282 Because Warfield did not particularize his second motion in accordance with the Court of Appeals' holdings in State v. Lyles283 and Brooks v. State,284 the Court of Special Appeals held that Warfield failed to preserve the sufficiency

277. Warfield, 315 Md. at 486-87, 554 A.2d at 1244.
278. Id. at 487, 554 A.2d at 1244.
279. Id. at 481, 554 A.2d at 1242.
281. Warfield, 76 Md. App. at 146, 543 A.2d at 888.
282. Id. at 147, 543 A.2d at 888. The State relied on State v. Lyles, 308 Md. 129, 517 A.2d 761 (1986) and Brooks v. State, 299 Md. 146, 472 A.2d 981 (1984) to support the argument that the defendant withdrew his motion when he offered evidence, thus producing a "legal nullity" incapable of renewal. Warfield, 76 Md. App. at 146, 543 A.2d at 887-88. The Court of Special Appeals stated that it agreed with the conclusion that a withdrawal is equivalent to a legal nullity which can not be renewed, but based its ruling on the premise that the intent of rule 4-324's particularity requirement is "to allow the trial court the opportunity to consider fully the basis for the motion." Id. at 147, 543 A.2d at 888. The court reasoned that it would be inherently difficult and too great a burden to require a trial judge to make an intelligent and informed ruling on a subsequent motion made at the close of all the evidence without the benefit of reargument, since, at that point, the trial judge would be required to consider the motion on the basis of all the evidence.

Id. (emphasis in original).

283. 308 Md. 129, 517 A.2d 761 (1986). In Lyles, the defendant moved for a judgment of acquittal at both the close of the State's evidence and at the close of all the evidence; however, the defendant failed to give support for either motion. Id. at 135, 517 A.2d at 764. Thus, the defendant explicitly waived his right to review with regard to the motion for judgment of acquittal. Id. The court held that rule 4-324(a) mandates that a party state the reasons for the motion with particularity and, absent such support, the party does not preserve the sufficiency of the evidence issue for review. Id.

284. 299 Md. 146, 472 A.2d 981 (1984). Brooks noted that it is well-established that the provisions of article 27, § 593, and rule 756 (rule 4-324's predecessor) authorize the courts to pass upon the sufficiency of evidence. Id. at 149-50, 472 A.2d at 983. Once the defendant moves for a judgment of acquittal, gives reasons in support of the motion, and the court grants the motion, there is a final disposition of the charges. Id. at 150-51, 472 A.2d at 983-84.
issue for review. The Court of Special Appeals thus affirmed the trial court’s decision on the motion for judgment of acquittal.

The Court of Appeals reversed the intermediate appellate court’s decision, holding that Warfield had preserved his right of review. The court stated that when a defendant renews a motion for judgment of acquittal at the close of all the evidence, the defendant implicitly incorporates the reasons stated in support of the first motion. The Court of Appeals rejected the intermediate appellate court’s reasoning that a “‘great burden’” is placed on the trial judge if the party does not restate the reasons for the motion. Furthermore, on review of the evidence, the court found the circumstantial evidence insufficient to support a theft conviction. The conviction for storehouse breaking could not stand either because theft is an essential element of that crime. The Court of Appeals also reversed Warfield’s conviction for breaking and entering a storehouse because there was no proof that Warfield knew that his intrusion was unwarranted. Lastly, the court noted that the fifth

286. Id. at 149, 543 A.2d at 889. Warfield was convicted on the first count of storehouse breaking pursuant to article 27, § 33, but the court vacated the sentence as to the second count of theft, article 27, § 342, merging the conviction of count two into that of count one. Id. According to Young v. State, 220 Md. 95, 151 A.2d 140 (1959), cert. denied, 363 U.S. 853 (1960), a defendant should not be convicted and separately sentenced for breaking and stealing, under one count, and for larceny under a separate count when the larceny consists of the same act as the stealing. Id. at 100-01, 151 A.2d at 143-44. Similarly, in the case at bar, Warfield’s theft conviction merges into his breaking and stealing conviction. Warfield, 76 Md. App. at 149, 543 A.2d at 889.
287. Warfield, 315 Md. at 490, 554 A.2d at 1246.
288. Id. at 487-88, 554 A.2d at 1245.
289. Id. at 487, 554 A.2d at 1245.
290. Id. at 493, 554 A.2d at 1247.
291. Id. at 495, 554 A.2d at 1248.
292. Id. at 501, 554 A.2d at 1251-52; see Md. Ann. Code art. 27, § 31B (1987). This is not a specific intent crime, but it clearly requires the general criminal intent to break and enter. Id. Section 31B is simply criminal trespass. Id. See generally Model Penal Code § 221.2 commentary at 144 (Proposed Official Draft 1962) (defining criminal trespass as a person’s “knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof”); 3 C. Torcia, Wharton’s Criminal Law § 343, at 245-46 (14th ed. 1980) (noting that burglary requires intent to commit a crime therein, while criminal trespass ordinarily has no such requirement). All criminal trespass statutes require that the one who commits the offense be aware that his or her actions are an unwarranted intrusion. See id. at 245-51. The court found that it was “not an unreasonable belief” for Warfield to think that Weller would have allowed him to enter the garage in the course of his employment. Warfield, 315 Md. at 501, 554 A.2d at 1251.
amendment double jeopardy clause\textsuperscript{293} prevented a trial court from retrying the case because the reviewing court had determined that the evidence was legally insufficient to support a conviction.\textsuperscript{294}

2. Legal Background.—Article 23 of the Maryland Declaration of Rights grants a court the authority to pass upon the sufficiency of the evidence.\textsuperscript{295} This provision states that the jury will decide legal as well as factual issues in a criminal trial, but the court may determine whether the evidence presented is sufficient to uphold a conviction.\textsuperscript{296} Article 23 is implemented both by statute\textsuperscript{297} and by rule.\textsuperscript{298} If the defendant believes that the evidence is insufficient to support the conviction as a matter of law, article 27, section 593 of the Maryland Code\textsuperscript{299} and Maryland Rule 4-324(a)\textsuperscript{300} permit the defendant to move for a judgment of acquittal on an individual count or on degrees of an offense.\textsuperscript{301} The defendant must state with par-

\textsuperscript{293} U.S. Const. amend. V. The double jeopardy clause states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." 
\textsuperscript{294} Warfield, 315 Md. at 502, 554 A.2d at 1252.
\textsuperscript{295} Md. Const. Decl. of Rts. art. 23. Article 23 states: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Id.
\textsuperscript{296} Id.
\textsuperscript{297} Md. Ann. Code art. 27, § 593 (1987). Section 593 states:
In the trial of all criminal cases, the jury shall be the judges of law, as well as of fact, except that at the conclusion of the evidence for the State a motion for judgment of acquittal on one or more counts, or on one or more degrees of an offense, may be made by an accused on the ground that the evidence is insufficient in law to justify his conviction as to any such count or degree. If the motion is denied, he may offer evidence on his own behalf without having reserved the right to do so, but by so doing, he withdraws his motion. The motion may be made at the close of all the evidence whether or not such motion was made at the conclusion of the evidence for the State. If the motion is denied the defendant may have a review of such ruling on appeal.
\textsuperscript{298} Md. R. 4-324. Maryland Rule 4-324(a) states:
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 the 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.

Further, section (c) of the Rule states:
A defendant who moves for judgment of acquittal at the close of evidence offered by the State may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the defendant withdraws the motion.
\textsuperscript{300} Md. R. 4-324(a).
\textsuperscript{301} See supra notes 297-298.
ticularity the reasons in support of the motion. If the trial judge denies the motion, and the defendant offers evidence in his or her defense, the defendant is deemed to have withdrawn the motion. Nevertheless, moving for a judgment of acquittal at the close of the State’s evidence does not preclude the defendant from renewing this motion at the close of all the evidence. Finally, denial of a judgment of acquittal is reviewable on appeal.

In Brooks v. State, the Court of Appeals stated that article 27, section 593 and rule 4-324(a) authorize the courts to review the sufficiency of the evidence. The court held that a trial judge must deny a motion for judgment of acquittal if a party presents any evidence to the court that is legally sufficient to sustain a conviction. Conversely, the trial judge must grant the motion if he or she determines that there is no relevant evidence to support a conviction. A judgment of acquittal is equivalent to a finding of not guilty by the trier of fact.

A motion for judgment of acquittal is clearly a prerequisite to review on appeal of the sufficiency of the evidence. In Ennis v. State, the defendant moved for a judgment of acquittal at the close of the State’s case, and the court denied the motion. The defendant then offered her evidence; she, however, failed to make a second motion for judgment of acquittal at the close of all the evidence. The Court of Appeals held that “failure to renew the requisite motion effectively withdraws our authority to consider an insufficiency contention.” The failure to move for renewal was

302. Md. R. 4-324(a).
305. Id.
307. Id. at 150 n.3, 472 A.2d at 984 n.3.
308. Id. at 150, 472 A.2d at 983.
309. Id. at 151, 472 A.2d at 984.
310. Id.
313. Id. at 582, 510 A.2d at 575.
314. Id. at 583, 510 A.2d at 575. Offering evidence after the trial judge denies a judgment of acquittal is equivalent to withdrawing the motion. Md. R. 4-324(c).
315. Ennis, 306 Md. at 589, 510 A.2d at 579. The court relied on Tull v. State, 230 Md. 152, 186 A.2d 205 (1962) and Lotharp v. State, 231 Md. 239, 189 A.2d 652 (1963) to reach its conclusion. Ennis, 306 Md. at 590, 510 A.2d at 579. In Tull, the defendant appealed a conviction of first degree murder based on insufficient evidence. 230 Md. at 155, 186 A.2d at 207. The defendant had not made a motion for judgment of acquittal at trial. Id. at 154-55, 186 A.2d at 207. The court stated that “[i]t is quite clear this Court will not review in the absence of a motion below.” Id. at 155, 186 A.2d at 207. In
tantamount to a failure to move for a judgment of acquittal at the trial level; thus, the defendant did not preserve the insufficiency issue for appellate review.316

The Court of Appeals requires strict compliance with rule 4-324(a), which mandates that "[t]he defendant shall state with particularity all reasons why the motion should be granted."317 In State v. Lyles,318 the defendant moved for a judgment of acquittal at the close of the State's case and again at the conclusion of all the evidence.319 The defendant did not offer argument to support either motion.320 In affirming the intermediate appellate court's decision,321 the Court of Appeals held that the defendant failed to preserve the sufficiency of the evidence issue for review.322 The court stated that rule 4-324(a)'s requirement is mandatory, and compliance is absolutely necessary to preserve appellate review.323

Finally, the Court of Special Appeals has explained that the language of rule 4-324(a) intentionally is consistent with its civil counterpart, rule 2-519(a).324 Rule 2-519(a) states in part that "[t]he

_Lotharp_, the jury convicted the defendant of homicide; the defendant, however, did not move for a judgment of acquittal during the trial. 231 Md. at 240, 189 A.2d at 652-53. The court held that "[s]ince no motion for judgment of acquittal was made at any stage of the trial there can be no review of the sufficiency of the evidence on appeal." _Id._ at 240, 189 A.2d at 653.

316. _Ennis_, 306 Md. at 590, 510 A.2d at 579; see _Md. Ann. Code_ art. 27, § 593 (1987); _Md. R. 4-324._

317. _Md. R. 4-324(a); see supra_ note 298 for text of rule 4-324(a); _see also_ State v. Lyles, 308 Md. 129, 135, 517 A.2d 761, 764 (1986).


319. _Id._ at 136, 517 A.2d at 765.


322. _Lyles_, 308 Md. at 136, 517 A.2d at 765.

323. _Id._ at 135, 517 A.2d at 764. Not all of the judges were in agreement, however. _Id._ at 136-37, 517 A.2d at 765 (Eldridge, J., concurring). The concurrence in _Lyles_ argued that defendant's counsel complied with the constitutional and statutory prerequisites for appellate review of the sufficiency of the evidence when he moved for a judgment of acquittal, even though he did not argue before the circuit court and "state with particularity all reasons why the motion should be granted." _Id._ Rule 4-324's language cannot be interpreted to preclude appellate review if the defendant fails to articulate reasons to support the motion. _Id._ at 137-38, 517 A.2d at 765-66.

324. _Id._ at 135, 517 A.2d at 764-65 (relying on the appellate court's analysis to reach this conclusion). Rule 756(a), rule 4-324(a)'s predecessor, did not require reasons to be "state[d] with particularity." _Lyles_, 63 Md. App. at 380-81, 492 A.2d at 961. In _Lyles_, the Court of Special Appeals, relying on the amendment to 756(a) and legislative intent, determined that rule 4-324(a) is supposed to parallel its civil counterpart. _Id._; see _Md. Reg._ at S-1 (Dec. 9, 1983) ("Other amendments are intended to provide consistency
moving party shall state with particularity all reasons why the motion should be granted." 325 The Court of Appeals interprets this language to require that the party who seeks a directed verdict must state the reasons in support of the motion, or the motion will fail because it is defective. 326 The Court of Appeals also has held that a party may renew a motion for a directed verdict but, if not done so properly, the party will not preserve appellate review of the sufficiency of the evidence issue. 327 A party must state the grounds for the renewal of the motion. 328

3. Analysis.—In Warfield, the Court of Appeals held that Warfield preserved his right to appellate review. 329 Rather than looking to the plain meaning of the statute and the rule, the court relied on

between the criminal rules and counterpart civil rules when there is no apparent reason for differentiation." ).

325. Md. R. 2-519(a).
326. See, e.g., Drug Fair of Maryland, Inc. v. Smith, 263 Md. 341, 355-56, 283 A.2d 392, 400 (1971) (refusing to consider request for directed verdict that trial court denied due to absence of grounds on the record); Levin v. Cook, 186 Md. 535, 540-41, 47 A.2d 505, 508 (1946) (holding prayer for directed verdict was defective due to failure to state grounds).
327. Rockville Inv. Corp. v. Rogan, 246 Md. 482, 484-85, 229 A.2d 76, 77-78 (1967) (holding that party could not rely on first directed verdict motion on appeal, having failed to properly renew the motion, and noting the purpose of stating the grounds for the motion is to inform the court and opposing counsels); see also Ford v. Tittsworth, 77 Md. App. 770, 551 A.2d 945 (1989). In Ford, defendant’s counsel motioned, “I’m renewing my motion for a verdict in favor of the plaintiff [sic] at the conclusion of the entire case.” Id. at 772, 551 A.2d at 945. Counsel then corrected his error and stated, “In favor of defendant, I’m renewing my motion.” Id. This motion failed to preserve the sufficiency of evidence issue for review. Id. at 773, 551 A.2d at 946. In another decision, the Court of Special Appeals reversed a court’s order of judgment notwithstanding the verdict because the party made no proper motion for judgment at the close of the evidence. Wolfe Bros., Inc. v. Frederick County Nat’l Bank, 78 Md. App. 119, 124, 552 A.2d 932, 934, cert. denied, 316 Md. 364, 558 A.2d 1206 (1989). “[S]ame motion, same reasons” was held to be an improper renewal. Id. But cf. Simpson v. State, 77 Md. App. 184, 549 A.2d 1145 (1988), aff’d, 318 Md. 194, 567 A.2d 132 (1989). In Simpson, the sufficiency of the evidence issue was preserved even though the defendant did not particularize the motion. Id. at 189-90, 549 A.2d at 1148. The defendant particularized the original motion and did not offer any evidence after denial, but instead rested his case. The court held that the “renewal,” absent any support, was “simply redundant and, thus, totally unnecessary.” Id.

328. Rockville Inv., 246 Md. at 484, 299 A.2d at 77.
329. 315 Md. at 487-88, 554 A.2d at 1244-45. The court based this conclusion on Kaczorowski v. Baltimore, 309 Md. 505, 525 A.2d 628 (1987), in which the court stated: When we pursue the context of statutory language, we are not limited to the words of the statute as they are printed in the Annotated Code. We may and often must consider other ‘external manifestations’ or ‘persuasive evidence,’ including a bill’s title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legisla-
the underlying legislative objectives of both. The court agreed with the intermediate appellate court that a party must articulate clearly the reasons which supported the first motion. The Court of Appeals, therefore, held that the defendant must particularize reasons so that the trial judge is aware of the exact grounds which support a finding that the evidence is insufficient to sustain a conviction. When the defendant must state the reasons that support the motion, the trial judge then can decide on the motion knowing the defendant's position. Unlike the intermediate appellate court, however, the Court of Appeals deviated from a strict interpretation of rule 4-324(a)'s language with regard to a renewal. The court found that the trial judge does not need the same degree of particularity with a renewed motion for judgment of acquittal that he or she needs to decide the original motion. The particularized reasons for the original motion are included in the trial court's record and are within the court's purview. Thus, the Court of Appeals concluded that the trial court will not suffer the burden that the intermediate appellate court believed would result when there is a renewal without supporting justification.

Lastly, the Court of Appeals stated that it is "against sound reason, common sense, and the legislative intent" to deny appellate review when a defendant's motion is based upon the reasons stated with the original motion. Moreover, the court held that when a defendant renews a motion for judgment of acquittal, the court as-
sumes that the motion incorporates the reasons stated previously.  

The court noted that the trial judge does not decide the motion in a vacuum. If the renewal is made absent supporting language, and the trial judge is unclear or uncertain about the grounds that may support the motion, then the trial judge simply can ask the defendant to restate his argument in support of the renewal. A renewal that fails to address the supporting grounds in any manner, however, will not result in a denial of a review of the evidence on appeal. The court advised that defendants at least state that the reasons for the renewal are the same as those previously argued. If the defendant wishes to state reasons that he did not articulate earlier, he should advise the court whether these reasons are in addition to or in replacement of the grounds stated in support of the original motion.

The Warfield decision not only affects criminal law, but because the court relied on an argument that parallels rule 4-324 with civil rule 2-519, the decision also modifies a line of appellate civil cases. The court specifically overruled Rockville Investment Corp. v. Rogan "insofar as the opinion indicates that the motion could be 'properly renew[ed]' only by expressly repeating the reasons originally given." The Warfield decision spawned both predictable and unpredictable results. Predictably, in K & K Management, Inc. v. Lee, appellants renewed their motion for a directed verdict "[o]n all the same bases," without 'tak[ing] the [c]ourt's time to argue further.' The Court of Appeals held that this satisfied rule 2-519(a)'s requirement that "[t]he moving party shall state with particularity all reasons why the motion should be granted." Unpredictably, the

339. Id. at 487-88, 554 A.2d at 1245.
340. Id. at 488, 554 A.2d at 1245.
341. Id.
342. Id.
343. Id.
344. Id.
345. See supra note 327.
346. 246 Md. 482, 229 A.2d 76 (1967).
347. Warfield, 315 Md. at 474, 554 A.2d at 1246; see Rockville Inv., 246 Md. at 484-85, 229 A.2d at 77-78. Ford v. Tittsworth, 77 Md. App. 770, 551 A.2d 945 (1989), also is of doubtful validity because that decision relied on Rockville. 77 Md. App. at 773-74, 551 A.2d at 946; see supra note 327.
349. Id. at 135, 557 A.2d at 972.
350. Md. R. 2-519(a). This rule basically is the equivalent in the civil context to rule 4-324, which the Court of Appeals addressed in Warfield.
351. K & K Management, 316 Md. at 135, 557 A.2d at 972.
Court of Special Appeals expanded *Warfield* in *Laubach v. Franklin Square Hospital*. In *Laubach*, a party previously had submitted a memorandum to the court that particularly set forth the grounds for the motion when the party renewed a motion for judgment at the close of all the evidence. The court held that reference to that memorandum fulfilled the requirements of rule 2-519. The court relied on the same argument that the Court of Appeals used in *Warfield* with regard to the legislative intent behind rule 4-324(a).

4. Conclusion.—*Warfield* effectively overruled a line of criminal and civil cases that demanded strict compliance with rule 4-324 and rule 2-519 when parties renewed motions for judgment of acquittal and motions for judgment respectively. The decision is significant in that courts will demand less than literal conformance to rules 4-323 and 2-519. Hence, the court’s decision will act only to benefit parties who renew a motion for judgment and, in that regard, the decision will not adversely affect litigants.

E. Knowledge as an Element in Possession Offenses

In *Dawkins v. State*, the Court of Appeals addressed the issue of whether knowledge is a required element of the crimes of possession of a controlled dangerous substance and possession of controlled paraphernalia under the State’s Controlled Dangerous Substances Act (the Act). In reversing the intermediate appellate court’s decision, the Court of Appeals held that an accused must “know of both the presence and the general character or illicit nature of the substance” before a jury can convict that person of such crimes. The court reached this decision after it examined the Act’s legislative history and compared the Act to other states’ controlled substances statutes. The Court of Appeals’ decision brought the State into accord with the majority of other states when it determined that knowledge is an element of the crime of

353. Id. at 216-17, 556 A.2d at 689.
354. Id. at 213-15, 556 A.2d at 687-88; *see supra* notes 330-336 and accompanying text.
355. *See supra* notes 306-323 and accompanying text.
357. Id. at 639-40, 547 A.2d at 1041-42; *see also* Maryland Controlled Dangerous Substances Act, Md. Ann. Code art. 27, §§ 276-302 (1987). The Court of Appeals also determined whether the defense counsel had preserved the jury instruction issue for appellate review. Id. at 640, 547 A.2d at 1042; *see infra* note 372.
358. *Dawkins*, 313 Md. at 651, 547 A.2d at 1047.
359. Id. at 645-51, 547 A.2d at 1044-47.
I. The Case.—Police arrested Leonard Dawkins in a Baltimore City hotel room; he was charged with possession of heroin and possession of controlled paraphernalia. At Dawkins' jury trial in the Baltimore City Circuit Court, the police testified that Dawkins had a tote bag in his hand when they entered the hotel room. They further testified that they found narcotics paraphernalia, a bottle cap that contained heroin residue, and men's clothing when they searched the tote bag.

Dawkins' testimony contradicted that of the police officers. He asserted that the tote bag was on a table when the police entered the room and therefore was not in his possession. He also stated that the tote bag belonged to his girlfriend, that he carried it to her hotel room at her request, that he was unaware of the contents of the bag at the time, and finally, that the police search of the bag revealed women's, not men's, clothing.

At the trial's close, the judge instructed the jury on the elements of the crime of possession under the Act. The jury requested re-instruction on the elements of a possession offense after it began its deliberations. At that time, the judge denied the defense counsel's request for a jury instruction to the effect that knowledge is an element of the crime of possession. The jury then returned a verdict against the defendant on both counts of possession, and the court sentenced him to five years imprisonment.

Dawkins appealed, contending that the court's failure to give the requested instruction was reversible error. In an unreported opinion, the Court of Special Appeals affirmed Dawkins' conviction. The court held that "the failure to give the requested instruction

360. See infra notes 402-403 and accompanying text.
361. Dawkins, 313 Md. at 640, 547 A.2d at 1042.
362. Id.
363. Id.
364. Id.
365. Id.
366. Id. at 641, 547 A.2d at 1042. The instruction did not include "knowledge" as an element of the crime of possession. Dawkins' counsel objected to the instruction, but on other grounds. Id. at 641 n.2, 547 A.2d at 1042 n.2.
367. Id. at 641, 547 A.2d at 1042.
368. Id.
369. Id. Dawkins received a four-year sentence on the count of possession of a controlled dangerous substance. He also received a consecutive one-year sentence on the count of possession of controlled paraphernalia. Id.
370. Id.
was not error because proof of scienter is not required [by the Act]." The Court of Appeals, however, held that "knowledge" is a necessary element of the crimes of possession of controlled substances and possession of paraphernalia; as a result, the court reversed and remanded the case.

2. Legal Background.—At common law, a criminal conviction always required the concurrence of an individual's wrongful act with that individual's guilty state of mind. As the Dawkins court noted, legislatures created strict liability criminal offenses in response to the complex nature of modern life and the concomitant need for the regulatory control of behavior that impacted on the public welfare.

371. Id.
372. Id. at 651-52, 547 A.2d at 1047. The State also filed a petition for certiorari, claiming that the defense counsel had not preserved the instruction issue for appellate review. Id. at 641, 547 A.2d at 1042. The Court of Appeals rejected the State's argument for two reasons. First, Dawkins' objection was timely under Maryland Rule 4-325. Id. at 642, 547 A.2d at 1043. Rule 4-325 provides in relevant part:

(a) When Given.—The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate.

(e) Objection.—No party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

The court reasoned that the defendant's objections were timely because the Rule does not require a party always to object after the initial instruction when the judge gives a supplementary instruction. A party preserves the right to review on appeal if the error occurs during the supplementary instruction and the party promptly objects to that error after the judge has given the supplementary instruction. Dawkins, 313 Md. at 642, 547 A.2d at 1043. The court also noted that even if a party's objections were not timely, or if the party failed to object altogether, the Court of Special Appeals has the discretion to reach the merits of an issue under rule 4-325(e). Id. at 643, 547 A.2d at 1043. The court reasoned that because the intermediate appellate court reached the merits of the case, rule 4-325(e) allowed the Court of Appeals to decide only whether the lower court abused its discretion. Id. The State did not make this argument, and the court found that the Court of Special Appeals had not abused its discretion. Id.

373. Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55, 62-64 (1933) (before the mid-nineteenth century, mens rea was a general requirement for conviction even for a regulatory statute violation); see also Morissette v. United States, 342 U.S. 246, 251 (1952) ("common law commentators of the Nineteenth Century early pronounced the same principle [that to constitute any crime there must be intent], although a few exceptions [such as certain sex offenses] ... came to be recognized").
374. 313 Md. at 644-45, 547 A.2d at 1044.
375. Sayre, supra note 373, at 67 n.45. "Public welfare offense" is a term used to denote a group of offenses, usually nuisances, that are punishable regardless of the ac-
Two general principles characterize "public welfare offenses." First, such offenses are regulatory in nature. Because their purpose is to regulate the impact of certain conduct on society, the conduct generally consists of "acts or omissions which are made criminal by statute but which, of themselves, are not criminal;" in other words, conduct that is \textit{mala prohibita}. Thus, an individual can commit the offense even in the absence of wrongful intent.

Second, the penalty for public welfare offenses usually is monetary. Although the penalty for possession offenses often involved imprisonment, the purpose of criminalizing possession was to regulate its potential harm to society. Possession thus was a public welfare offense.

The genesis of the Model Penal Code in 1962 and the Uniform Dangerous Controlled Substances Act in 1970 reflected a significantly altered majority view of public welfare offenses generally, and possession specifically. Possession is considered to be a seri-

\begin{itemize}
  \item 376. See id. at 56 n.5; see also Dawkins, 313 Md. at 644, 547 A.2d at 1044. The development of this type of offense paralleled the industrialization of the United States. See Morissette, 342 U.S. at 253-54. As the Morissette court explained, public welfare offenses are regarded as offenses against state authority. Id. at 256. Although such an offense does not threaten the state's security intentionally, as in a case of treason, it does threaten the state's ability to maintain the social order; thus, the injury's effect is the same regardless of the violator's intent. Legislation related to public welfare offenses, therefore, usually did not specify intent as an essential element of these offenses. Id. The earliest public welfare offenses related to liquor and adulterated milk. Dawkins, 313 Md. at 644, 547 A.2d at 1044. The class of offenses later expanded to include "violations of traffic regulations and motor vehicle laws, sales of misbranded articles, and sales or purchases in violation of anti-narcotics laws." Id. In United States v. Balint, 258 U.S. 250 (1922), the Supreme Court recognized that when a statute is silent, the requirement of \textit{scienter} is a "question of legislative intent, to be construed by the court." Id. at 252.
  \item 377. BLACK'S LAW DICTIONARY 861-62 (5th ed. 1979).
  \item 378. Sayre, supra note 373, at 72. In contrast, if the criminal statute’s purpose is punitive, then the conduct is \textit{mala in se}, and knowledge is a required element of the crime. Id.
  \item 379. Id. If the offense is punishable by imprisonment, the defendant’s interest usually outweighs the benefit to society from a conviction without \textit{mens rea}. Id. Some public welfare offenses, however, did involve either a heavy fine or a penalty of imprisonment. Id. at 79.
  \item 380. See id. at 68.
  \item 381. See id. at 73.
  \item 382. MODEL PENAL CODE § 2.05 explanatory note and comment (Proposed Official Draft 1962) (attacking strict liability “whenever the offense carries the possibility of criminal conviction, for which a sentence of probation or imprisonment may be imposed”).
  \item 383. Dawkins, 313 Md. at 650, 547 A.2d at 1047; see also MODEL PENAL CODE § 2.05 explanatory note and comment (Proposed Official Draft 1962); UNIF. CONTROLLED SUB-
ous offense," and a penalty is imposed solely to punish and to de-
ter, rather than to regulate. Because the sanctions for a pos-
session offense are punitive in nature, the Model Penal Code re-
quires knowledge as an essential element and thus removes posses-
sion from the category of public welfare offenses. The majority
of states concur with this view and include "knowledge" as a neces-
sary element of a possession offense. The Uniform Controlled
Substances Act also makes knowledge an express element of the
crime of possession of controlled dangerous substances, and
treats possession as a serious offense, suggesting a prison sentence,
a fine, or both.

The original Maryland statute that prohibited the possession of
narcotics was silent as to the element of knowledge. When the
Court of Appeals construed that statute in Jenkins v. State, it re-
fused to include knowledge as an element of a possession offense.
In Jenkins, the appellant admitted to possession of a narcotic
drug. He, however, argued that his conviction was wrongful be-
cause the State failed to establish that he knowingly possessed the
drug. The Jenkins court held that "[u]nder an indictment for a
violation of such a statute as is here involved it is not necessary to
allege or prove the scienter unless, by the statute, it is made an ingre-
dient that the thing prohibited shall be knowingly or wilfully done . . . ."

In 1970, the General Assembly adopted the Maryland Con-

---

STANCES ACT, 9 U.L.A. §§ 101-607 (1968) (providing a model act aimed at achieving
uniformity between the states' and the federal government's drug laws).
384. Dawkins, 313 Md. at 651, 547 A.2d at 1047.
385. Id.
387. See infra notes 402-405 and accompanying text. A minority of courts, however,
still regard possession as a public welfare offense. See infra note 406 and accompanying
text.
388. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. § 401(c) (1968) states in relevant
part: "[I]t is unlawful for any person knowingly or intentionally to possess a controlled
substance unless the substance was obtained directly from, or pursuant to, a valid pre-
scription . . . . Any person who violates this subsection is guilty of a misdemeanor."
389. "Any person who violates this section is guilty of a crime and upon conviction
may be imprisoned . . . , fined . . . , or both." Id. § 402(b).
390. Article 27, § 327 of the original statute provided in relevant part: "[i]t is unlawful for any person to . . . possess . . . any narcotic drug, except as authorized in this sub-
391. 215 Md. 70, 75, 137 A.2d 115, 117 (1957).
392. Id. at 74, 137 A.2d at 117.
393. Id.
394. Id. at 75, 137 A.2d at 117 (emphasis in original). The court identified the posses-
sion of a controlled dangerous substance as a public welfare offense and asserted that
trolled Dangerous Substances Act. The Act defines "possession" as "the exercise of actual or constructive dominion or control over a thing by one or more persons." The Act also made it illegal "[t]o possess . . . any controlled dangerous substance . . . or . . . controlled paraphernalia." Although the legislature modeled the Act after the Uniform Controlled Substances Act, which required that possession be knowing and intentional, the State's Act was silent as to the knowledge element.

3. Analysis.—The court began its analysis of the Act by noting that "the overwhelming majority of states . . . require that the possession be knowing." The court surveyed the law of other states that have adopted the Uniform Controlled Substances Act. Of the forty-eight states that have adopted the Uniform Act, most require that possession be knowing, either by statute or by judicial decision. Fifteen states other than Maryland, plus the District of Columbia, have statutes that are silent as to the knowledge element of possession. Thirteen of these states have determined by judicial decision that knowledge is essential to possession, while only

the statute's purpose was "to promote the public health, the public morals, the public safety and the general welfare of the State." Id. Act of Apr. 28, 1970, ch. 403, 1970 Md. Laws 881 (codified at Md. Ann. Code art. 27, §§ 276-302 (1987)).


Id. § 287(a), (d).


See Md. Ann. Code art. 27, § 277 (1987). Subsequent case law provides no guidance as to the elements of possession. In Davis v. State, 9 Md. App. 48, 262 A.2d 578 (1970), the appellants contended that their convictions in the circuit court for possession and control of marihuana, and for possession of controlled narcotic paraphernalia, were unjustified. Id. at 49-50, 262 A.2d at 579-80. The Court of Special Appeals held that under article 27, § 277, it was unnecessary for the State to allege or prove that the accused knowingly or willfully controlled the drug. Id. at 52, 262 A.2d at 581. The court also affirmed the possession conviction. Id. at 56, 262 A.2d at 583. Although it did not expressly discuss "knowledge," the court implied that "knowledge" was an element of possession, stating that "[a]n inference is clearly proper that [the defendant] knew of and possessed the marihuana and narcotic paraphernalia . . . ." Id.

Dawkins, 313 Md. at 646, 547 A.2d at 1045.

Id. at 646-49, 547 A.2d at 1045-46.

See Unif. Controlled Substances Act, 9 U.L.A. at 1-2 (1968); see also Dawkins, 313 Md. at 645-46 n.6, 547 A.2d at 1044 n.6.

Dawkins, 313 Md. at 646, 547 A.2d at 1045.

Id.
two have decided to the contrary. The court looked to cases in which the courts have held that knowledge is a requisite element of a possession offense. These decisions indicated that courts had found knowledge to be a necessary element of possession due to the punitive nature of the penalty imposed for the crime and the definitional requirements of "possession" and "dominion or control" as used in the statutes. The Court of Appeals thus interpreted the state's statutory scheme to imply that possession be "knowing.

Finally, the Court of Appeals distinguished Dawkins from Jenkins v. State, in which the court had held that knowledge was not an element of a possession offense. The court observed that it had decided Jenkins under a statute, subsequently repealed, which treated possession as a "public welfare" offense. Dawkins, by contrast, implicated a statute that incorporated the Model Penal Code concepts. Additionally, the court noted that possession of controlled dangerous substances no longer can be considered a public welfare offense because of the relationship between illegal drugs and other serious crimes. The purpose underlying the penalty for possession—punishment and deterrence—reflects the shift away from the "regulatory" view of possession.

The State's former and current controlled substances acts both are silent as to the mens rea of the possession offense. The court, however, declared that under the 1970 Act, possession was a "most serious offense" that required a guilty mind, whereas under the former act, possession was a "mere public welfare offense" with no

---

406. Dawkins, 313 Md. at 647 n.7, 547 A.2d at 1045 n.7; see, e.g., State v. Michlitsch, 438 N.W.2d 175, 178 (N.D. 1989) (holding that possession of a controlled substance is a strict liability offense; guilty knowledge is not an essential element); State v. Wood, 45 Wash. App. 299, 311, 725 P.2d 435, 442 (1986) (holding that guilty knowledge or intent is not an element of the crime of possessing controlled substance), review denied, 107 Wash. 2d 1017 (1986).

407. Dawkins, 313 Md. at 647, 547 A.2d at 1045.

408. See, e.g., Walker v. State, 356 So. 2d 674 (Ala. 1977) ("In reversing [the court below], the Supreme Court specifically held that knowledge is an essential element of the offense of illegal possession of a controlled substance under the Alabama Controlled Substances Act."); cert. denied, 356 So. 2d 677 (Ala. 1978).

409. See State v. Burns, 457 S.W.2d 721, 724 (Mo. 1970) (reasoning that "control" requires knowledge of the existence of the controlled object).

410. Dawkins, 313 Md. at 649, 547 A.2d at 1046.

411. 215 Md. 70, 74-75, 137 A.2d 115, 117 (1957).

412. Dawkins, 313 Md. at 650, 547 A.2d at 1047.

413. Id. (noting the Model Penal Code's disfavor of strict liability offenses).

414. Id.

415. Id. at 651, 547 A.2d at 1047.
requisite intent. The Court of Appeals based this distinction on the rationale that the present statute expresses the Model Penal Code's contemporary view. The court also inferred the knowledge element from the language of the statute itself.

In drawing this distinction, the court apparently ignored the General Assembly's intention that the statute should protect the public welfare in addition to being regulatory in nature. This purpose is reflected in section 276 of the statute, mention of which is notably absent from the court's opinion. Another issue that the court failed to address is why the legislature, when it patterned the Act after the Uniform Controlled Substances Act, did not include knowledge as an element in the State's Act when it was so prominent in the Uniform Act. If the knowledge element was as important to the crime of possession as the court suggests, then it seems odd that the legislature would omit it inadvertently when the Uniform Act so clearly included it. This omission is even more notable because the legislature added the word "wilfully" elsewhere in the Act, suggesting that the omission of the knowledge element of the possession offense may have been deliberate.

Although the Model Penal Code is opposed to strict liability crimes, section 2.05's comments indicate that "strict liability offenses carrying the possibility of imprisonment still exist in most jurisdictions." And, as LaFave and Scott note, it is rare for a legislature to state explicitly that an offense is of the strict liability type; rather, legislatures simply omit the knowledge element.

416. Id.
417. Id. at 650, 547 A.2d at 1047.
418. Id.
419. Id. at 638, 547 A.2d at 1041. Article 27, § 276 of the Maryland Code states in relevant part:

The General Assembly . . . finds and declares that the illegal . . . possession . . . of controlled dangerous substances [has] a substantial and detrimental effect on the health and general welfare of the people of the State of Maryland. It is the purpose of this subheading to establish a uniform law controlling . . . possession . . . of controlled dangerous substances and related paraphernalia . . . to prevent their abuse which results in a serious health problem to the individual and represents a serious danger to the welfare of the people of the State of Maryland.

420. Dawkins, 313 Md. at 645-49, 547 A.2d at 1044-46.
422. See supra note 382.
424. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.8(a), at 244 (2d ed. 1986).
Notwithstanding these concerns, the court acted within the limits of statutory construction rules when it construed the statute in accordance with the majority view of knowledge as an element of a possession offense. Some courts have construed such statutes strictly, relying on their plain meaning.\(^{425}\) Thus, these courts have imposed criminal liability without regard to intent when the statute is silent on that point.\(^{426}\) Other courts, however, have interpreted such statutes to require a wrongful intent.\(^{427}\) In so doing, these courts have considered factors such as the severity of the punishment, the statute's legislative history, and guidance from other statutes.\(^{428}\)

Before *Dawkins*, the Court of Appeals took a strict approach to statutory interpretation with regard to the crime of possession. Because the statute did not expressly require knowledge, the court considered possession to be a "no-fault" or strict liability offense.\(^{429}\) The *Dawkins* court, however, chose to adopt a more flexible approach to statutory interpretation, finding an implied knowledge requirement\(^{430}\) in the statute largely because of the severity of the punishment for a conviction of possession of controlled dangerous substances and of controlled paraphernalia.\(^{431}\) In view of the legislature's silence, the court properly brought the State into accord with the modern view of knowledge as an element of a possession offense, as reflected in the Uniform Controlled Substances Act\(^{432}\) on which the legislature modeled the State's Act.

4. Conclusion.—*Dawkins v. State* is a product of society's changing views on narcotics and narcotic abuse. It also is the product of evolving theories of criminal law. In *Dawkins*, the Court of Appeals incorporated knowledge as an essential element of the crime of possession into an otherwise silent statute. The court also discarded

\(^{425}\) Id. at 243.
\(^{426}\) Id.; see also supra note 406.
\(^{427}\) W. LaFAVE & A. SCOTT, supra note 424, at 243.
\(^{428}\) Id. at 244.
\(^{429}\) *Dawkins*, 313 Md. at 650, 547 A.2d at 1047; see also Jenkins v. State, 215 Md. 70, 75, 137 A.2d 115, 117 (1957) (not necessary to prove knowledge as an element of a possession offense unless the statute specifically requires it).
\(^{430}\) 313 Md. at 650-51, 547 A.2d at 1047.
\(^{431}\) Article 27, § 287(e) contains the punishment for the crime of possession. It states in relevant part: "Any person who violates this section shall, upon conviction, be deemed guilty of a misdemeanor and be sentenced to a term of imprisonment for not more than four (4) years, a fine of not more than twenty-five thousand dollars ($25,000), or both; . . . ."  *Md. Ann. Code* art. 27, § 287(e) (1987).
the theory that possession of controlled dangerous substances and of related paraphernalia are public welfare offenses.

Dawkins, however, leaves a number of unanswered questions. One such question is how the decision will affect the courts' approach to other public welfare offenses. Perhaps courts in the future will have to re-evaluate similar strict liability criminal offenses to determine whether there is a *mens rea* requirement and then stand ready to supply their own interpretation of the statute, absent specific statutory language or a clear legislative intent.

**F. Rejection of the Crime of Attempted Felony Murder**

Considerable controversy surrounds the crime of felony murder and aspects of the crime of criminal attempt. In *Bruce v. State*, the Court of Appeals confronted a hybrid form of these two crimes, attempted felony murder. After it analyzed the State's statutory scheme and common law, the court joined a number of other states and refused to recognize the crime. The decision ostensibly prohibits the unjust result that would occur if the court permitted the State to use the felony murder rule to transform every unintentional, nonfatal injury inflicted during the course of a felony into an attempted first degree murder charge that carried a minimum penalty of a life sentence. As such, the decision reflects the

---


436. California, Illinois, Indiana, New Jersey, New Mexico, New York, Pennsylvania, and Utah all have rejected the concept of attempted felony murder. See *infra* notes 494-501 and accompanying text. But see White v. State, 266 Ark. 499, 585 S.W.2d 952 (1979) (recognizing that attempted felony murder was a valid crime under the State's statutory definitions); Amlotte v. State, 456 So. 2d 448 (Fla. 1984) (recognizing attempted felony murder as a valid crime).

437. *Bruce*, 317 Md. at 646, 566 A.2d at 105.

438. See *infra* notes 512-513 and accompanying text.
court's commitment to limit the scope of the felony murder rule.439

The felony murder rule in Maryland, however, serves two functions. First, under the common law, it supplies the intent needed to transform an unintended killing that occurs during the course of a felony into murder. Second, under the State’s felony murder statute, it classifies a murder that occurs during the commission of certain designated felonies as a murder in the first degree. The trial court recognized these two functions of the felony murder rule and it used the rule solely to classify the already established attempt as one in the first degree. By treating this case as one that involved “attempted felony murder”—a designation which the trial court specifically avoided—the Court of Appeals failed to address the State’s novel attempt to prosecute more effectively defendants who attempt to kill their victims during the commission of another crime.

I. The Case.—On December 2, 1986, Leon Bruce and two accomplices robbed Barry Tensor in his Baltimore shoe store.440 Bruce, who was masked and carried a handgun, ordered Tensor to empty the cash registers.441 When Bruce found the second register empty, he held the gun to Tensor’s face and threatened to kill him.442 Tensor ducked to protect himself, and Bruce shot him in the stomach, apparently in reaction to this evasive movement.443 Tensor eventually recovered from the shooting.444

A jury subsequently convicted Bruce of several charges, including attempted first degree felony murder and robbery with a deadly weapon.445 The jury also found him not guilty of attempted first degree premeditated murder.446 The presiding judge decided that his jury instructions regarding the crime of attempted felony murder were erroneous because the crime did not exist under Maryland law; the judge granted Bruce’s motion for a new trial.447 A second jury found Bruce guilty of attempted felony murder for which he

439. See infra notes 475-478 and accompanying text.
440. Bruce, 317 Md. at 643, 566 A.2d at 103.
441. Id.
442. Id.
443. Id. at 643-44, 566 A.2d at 103.
444. Id. at 644, 566 A.2d at 103. Tensor’s wound was serious enough to require five weeks of hospitalization. Id.
445. Id., 566 A.2d at 103-04. The jury also found Bruce guilty of two counts of unlawful use of a handgun. Id., 566 A.2d at 104.
446. Id., 566 A.2d at 103-04.
447. Id., 566 A.2d at 104. Thus, giving jury instructions that addressed a nonexistent crime constituted the basis for a new trial. Id.
subsequently received a life sentence. Bruce appealed his conviction on the grounds that attempted felony murder is not a crime in Maryland. The Court of Appeals granted certiorari prior to the Court of Special Appeals' decision.

Reasoning that a criminal attempt is a specific intent crime, the court concluded that the crime of attempted felony murder did not exist "[b]ecause a conviction for felony murder requires no specific intent to kill." The court substantiated its decision by finding that it was consistent with the decisions of a majority of other jurisdictions which had addressed the same issue.

2. Legal Background.—a. Felony Murder.—Under the common law, the crime of murder is defined as the killing of a human being with malice aforethought. "Malice aforethought" is essentially a state of mind manifested by the intentional act of killing without justification or excuse. The law deems any intentional homicide as malicious. Under some circumstances, courts infer the requisite malice when there is no actual intent to kill. If, for example, the actor does not intend to kill, but rather only intends to inflict great bodily injury, or only intends to take an unreasonable risk, courts will infer an intent to kill.

448. Id. Bruce also was convicted of the robbery and handgun charges in the second trial. Id.
449. Id.
450. Id.
451. Id. at 646, 566 A.2d at 105.
452. Id. at 646-48, 566 A.2d at 105-06.
453. W. CLARK & W. MARSHALL, LAW OF CRIMES § 10.04, at 628 (7th ed. 1967). "[T]he total concept of 'malice aforethought' embraced three separate but related elements. ‘Malice’ supplied the first two components: 1) The intent to kill . . . ; 2) The absence of justification or excuse; and ‘aforethought’ supplied the third component: 3) The absence of mitigation.” Glenn v. State, 68 Md. App. 379, 401, 511 A.2d 1110, 1122, cert. denied., 307 Md. 599, 516 A.2d 569 (1986). Note that the “aforethought” is considered in some jurisdictions to have “evaporated” to the point at which nothing is left. Id.
454. Id. Malice in this context does not have the same meaning that it does in ordinary usage. It does not convey the notion of hatred or ill-will but rather is a term of art. R. PERKINS & R. BOYCE, CRIMINAL LAW § 1, at 57-58 (3d ed. 1982); see also R. GILBERT & C. MOYLAN, MARYLAND CRIMINAL LAW: PRACTICE AND PROCEDURE § 4.56, at 602-05 (1983); supra note 453.
455. R. PERKINS & R. BOYCE, supra note 454, § 1, at 59.
456. Id. at 59-60.
457. W. CLARK & W. MARSHALL, supra note 453, § 10.04, at 628. Under early common law, courts inferred malice whenever a defendant committed an inexcusable, unjustifiable homicide under the following circumstances:
(1) with an “actual” intent to inflict great bodily harm, despite absence of intent to kill; or, (2) by an act willfully done or a duty willfully omitted and the natural
The common-law felony murder rule infers the requisite intent whenever a killing occurs during the commission of a felony, even if the killing was unintentional. The rule transforms the actor’s intent to commit the felony into the intent to commit the homicide. Under the early common law, an individual could be charged with felony murder regardless of the dangerousness of the felony committed, the foreseeability that a death might result, or the individual’s actual intent.

Commentators have criticized the felony murder rule because it engages in the legal fiction that the intent to commit a felony supplies the malice aforethought which justifies a murder conviction. This legal fiction arguably violates the basic premise of criminal law—that criminal liability is justified only when there is moral culpability. The most egregious violation of this basic premise occurs when felony murder is categorized as a first-degree murder and when it is expanded to include co-felons.

Despite such criticism, all but four states recognize the rule.

tendency of the act or omission is to cause death or great bodily harm; or, (3) during an attempt to commit, or the commission of, some other felony though death occurs unintentionally; or, (4) when resisting lawful arrest, or in obstructing an officer in his attempt to suppress a riot or affray though death occurs unintentionally.

Id. at 656.

Id. at 657.


Fletcher, supra note 433, at 413. Fletcher also criticizes the rule as a formalistic application that overlooks the defendant’s initial recklessness towards the victim. Id. at 415; see also Roth & Sundby, supra note 433, at 453-60 (criticizing the felony murder rule’s constructive malice and presumption of culpability).

Aaron, 409 Mich. at 708, 299 N.W.2d at 316-17 (“If one had to choose the most basic principle of the criminal law in general . . . it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.” (quoting Gregan, Criminal Homicide in the Revised New Penal Law, 12 N.Y.L.F. 565, 586 (1966))).

Although degrees of murder did not exist at common law, many states have divided murder into first and second degree by legislative enactment. Under this scheme, first degree murder usually includes premeditated or “actual intent to kill” homicides and homicides that the defendant commits during the course of a felony. All other homicides generally are classified as second degree. The purpose of this classification scheme is to reserve the most severe punishment for especially heinous homicides.


464. See, e.g., Note, supra note 433, at 152-53.

Some jurisdictions, however, restrict the rule by limiting its application to homicides that take place during the course of specific, enumerated felonies or inherently dangerous felonies. Jurisdictions also limit the rule by interpreting narrowly the concept of proximate cause and restricting the time period in which a felony murder can take place.

Under Maryland’s felony murder rule, as under the common law generally, the element of malice is inferred from the defendant’s intent to commit the underlying felony. It is unnecessary to prove the usual components of first degree murder: "wilfulness, deliberation and premeditation." The underlying felony, thus, becomes an essential element of the crime. To uphold a charge of felony murder, the State must prove only "the underlying felony and the death occurring in the perpetration of the felony."

Maryland statutorily categorizes murder committed during the course of certain felonies as murder in the first degree. According to the State’s case law, the statutory provisions do not create a separate crime of “felony murder,” but rather simply classify felony murder as murder in the first degree for the purpose of

utes. Michigan judicially abrogated its common-law felony murder rule. Ohio effectively has invalidated the rule by limiting its application. Id. at 1918 n.2.

466. W. LAFAVE & A. SCOTT, supra note 424, § 7.5, at 623. These felonies usually include rape, robbery, burglary, larceny, sodomy, mayhem, and arson. Id. For Maryland’s statute, see infra note 472.

467. W. LAFAVE & A. SCOTT, supra note 424, § 7.5, at 622. For a detailed discussion of how specific states have limited the felony murder rule, see People v. Aaron, 409 Mich. 672, 698-707, 299 N.W.2d 304, 312-16 (1980).

468. See Newton v. State, 280 Md. 260, 268-69, 373 A.2d 262, 267 (1977) (“By proving every element of the underlying felony, the element of malice necessary for murder is established.”); Stansbury v. State, 218 Md. 255, 260, 146 A.2d 17, 20 (1958) (“the inference of malice may be drawn from the fact of the use of a deadly weapon directed at a vital part of the body”).

469. Newton, 280 Md. at 268, 373 A.2d at 267.

470. Id. at 269, 373 A.2d at 267.

471. Id. If the perpetrator did not have a specific intent to commit the underlying felony, then it follows that the courts cannot uphold a felony murder charge. Hook v. State, 315 Md. 25, 31-32, 553 A.2d 233, 236 (1989).

472. Md. Ann. Code art. 27, § 410 (1987). The statute, which limits the felony murder rule to specific felonies, reads as follows:

All murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape in any degree, sexual offense in the first or second degree, sodomy, mayhem, robbery, burglary, kidnapping . . . storehouse breaking . . . or in the escape or attempt to escape from the Maryland Penitentiary, the house of correction, the Baltimore City jail, or from any jail or penal institution in any of the counties of this State, shall be murder in the first degree.

Id.
punishment.\textsuperscript{473}

Note that the felony murder rule operates at two levels: to classify a killing that occurs during the course of certain felonies as murder and to classify the murder as one in the first degree. As Judge Moylan has explained for the Court of Special Appeals:

It is sometimes falsely asserted that §§ 408-410 constitute felony-murder doctrine in Maryland. That is not true. The felony-murder doctrine (see Part II.E. 3 infra) is the common law rule—defining one of the at-least three varieties of implied malice—which raises a homicide resulting from the perpetration or attempted perpetration of a felony to the murder level generally. It is only at that point, after the felony-murder rule has already operated, that §§ 408-410 come into play to provide further that in the case of certain designated felonies, the already established murder shall be punished as murder in the first degree.\textsuperscript{474}

Although the felony murder rule facilitates the prosecution of violent crimes that result in a homicide, the Court of Appeals has demonstrated a concern about its extension. \textit{Campbell v. State}\textsuperscript{475} addressed the issue of a participating felon's culpability under the felony murder rule.\textsuperscript{476} In \textit{Campbell}, the Court of Appeals reaffirmed its earlier decisions that held a participating felon responsible for felony murder when the co-felon committed the homicide.\textsuperscript{477} The court, however, refused to extend the rule and make the felon culpable if either the victim or the police killed a co-felon because the killing did not occur in furtherance of the felony.\textsuperscript{478}

\textit{b. Criminal Attempt.—}The crime of attempt essentially concerns an unfinished or failed crime.\textsuperscript{479} The early common law did not recognize the crime,\textsuperscript{480} but most jurisdictions today have enacted some form of criminal attempt statute.\textsuperscript{481} The primary justification for punishing an attempt to commit a crime is that it allows intervention before an individual completes the act and protects society from

\textsuperscript{473} See \textit{Hardy v. State}, 301 Md. 124, 137, 482 A.2d 474, 482 (1984).


\textsuperscript{475} 293 Md. 438, 451, 444 A.2d 1034, 1042 (1982) (holding that the proximate cause theory of culpability should not be used to extend the felony murder rule).

\textsuperscript{476} \textit{Id.} at 439, 444 A.2d at 1035.

\textsuperscript{477} \textit{Id.} at 442, 444 A.2d at 1037.

\textsuperscript{478} \textit{Id.} at 452, 444 A.2d at 1042.

\textsuperscript{479} \textit{C. Fletcher, supra} note 460, at 131.

\textsuperscript{480} \textit{W. Lafave & A. Scott, supra} note 424, § 6.2, at 495.

\textsuperscript{481} \textit{Id.} at 497.
someone who has demonstrated dangerous propensities.482

The elements required for criminal attempt are an "intent to commit the completed crime" and "the performance of some step, usually a substantial one, toward its commission."483 Some jurisdictions add as a third element "failure to consummate the substantive crime."484 Under Maryland law,485 the elements of attempt include an intent to commit a crime coupled with the performance of an act that is aimed at completing the crime beyond mere preparation.486

Because the crime of attempt requires a specific intent, the issue of whether attempts of unintentional crimes can exist becomes problematic. The Court of Appeals discussed this problem in Cox v. State.487 In Cox, the court addressed the issue of whether the crime of attempted voluntary manslaughter exists in the State.488 The court first established that "an attempt to commit a crime requires a specific intent."489 The court then defined voluntary manslaughter as "an intentional homicide"490 and concluded that the crime did exist under Maryland law.491 In reaching this conclusion, the court in dicta recognized that involuntary manslaughter, by contrast, was an unintentional homicide.492 The court contrasted voluntary manslaughter with involuntary manslaughter and acknowledged that attempted involuntary manslaughter was not a crime under the intent test.493

c. Attempted Felony Murder.—In 1975, New York became the first state to address the existence of the hybrid crime of attempted

482. Robbins, supra note 434, at 12; see also W. LAFAVE & A. SCOTT, supra note 424, § 6.2, at 498-99 (generally discussing the rationale of attempt); Meehan, Attempt—Some Rational Thoughts on Its Rationale, 19 Crim. L.Q. 215, 236 (1977) (discussing the prevention of potential harm even when the attempt was impossible to complete).


484. Id. at 10-11.


488. Id. at 329, 534 A.2d at 1334.

489. Id. at 330, 534 A.2d at 1335 (emphasis added).

490. Id. at 331, 534 A.2d at 1335.

491. Id. at 334, 534 A.2d at 1337.

492. Id. at 331-32, 534 A.2d at 1335-36.

493. Id. at 332-33, 534 A.2d at 1336.
felony murder. In a brief opinion, the court first noted that criminal attempt was a specific intent crime. Felony murder, on the other hand, "is not an intentional crime." It therefore followed, according to the court, that attempted felony murder was not a crime because "[o]ne cannot attempt to commit an act which one does not intend to commit."

Illinois also addressed the existence of attempted felony murder in People v. Viser. In Viser, the defendants appealed an attempted felony murder conviction based on an aggravated battery that the victim had survived. Like the New York court, the Illinois Supreme Court based its rejection of attempted felony murder on the intent needed to sustain the crime of attempt:

There can be no felony murder where there has been no death, and the felony murder ingredient of the offense of murder cannot be made the basis of an indictment charging attempt [sic] murder. Moreover, the offense of attempt requires an "intent to commit a specific offense" while the distinctive characteristic of felony murder is that it does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result.

As the Illinois court implies, recognizing attempted felony murder strains both the crimes of attempt and felony murder to their breaking points. Sustaining an attempted felony murder conviction implies that whenever a perpetrator unintentionally harms a victim during the course of a felony, the felony murder rule acts to raise that harm to the level of attempted murder.

Since the courts decided these cases, several other jurisdictions also have rejected the crime of attempted felony murder. But, at least two jurisdictions that have addressed the issue have chosen to

495. Id., 368 N.Y.S.2d at 254.
496. Id.
497. 62 Ill. 2d 568, 343 N.E.2d 903 (1975).
498. Id. at 580-81, 343 N.E.2d at 909-10.
499. Id. (citations omitted).
500. Id. at 582-83, 343 N.E.2d at 911.
recognize the crime.\textsuperscript{502} In \textit{Amlotte v. State},\textsuperscript{503} the defendant, Amlotte, knocked on a trailer door and asked to use the phone.\textsuperscript{504} After a few moments, Amlotte jumped out the door and was joined by two men who were covered by white sheets and carried guns.\textsuperscript{505} The trailer’s occupant exchanged gunfire with the men, and the three perpetrators fled the scene.\textsuperscript{506} There was no indication that anyone had been hurt in the exchange of gunfire.\textsuperscript{507} Nonetheless, Amlotte was charged with attempted felony murder and the court upheld the conviction.\textsuperscript{508} The \textit{Amlotte} court reasoned that “‘[i]f the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime.’”\textsuperscript{509}

3. \textit{Analysis}.—In \textit{Bruce}, the Court of Appeals properly rejected the notion that “attempted felony murder” is a crime. It is not a crime because it cannot be.\textsuperscript{510} Attempts are specific intent crimes, and to allow the commission of a felony to create a specific intent that in fact did not exist would be, as a New Jersey court has described it, “manifestly unintelligible.”\textsuperscript{511}

The court’s rejection of attempted felony murder as a crime thus avoids an unjust transformation of the criminal actor’s intent to commit a felony into an intent to attempt to kill. Under Maryland law, a sentence for attempt is equivalent to a sentence for the completed crime; thus, a defendant convicted of attempted felony murder would face the minimum penalty of a life sentence.\textsuperscript{512} Rejection of the crime, therefore, avoids the alarming possibility that an unintentional injury which does not result in death could carry a more severe sentence under an attempted felony murder conviction than would an intentional second degree murder conviction. The court’s

\begin{itemize}
  \item \textsuperscript{502} White v. State, 266 Ark. 499, 585 S.W.2d 952 (1979); Amlotte v. State, 456 So. 2d 448 (Fla. 1984).
  \item \textsuperscript{503} 456 So. 2d 448 (Fla. 1984).
  \item \textsuperscript{504} Id. at 449.
  \item \textsuperscript{505} Id.
  \item \textsuperscript{506} Id.
  \item \textsuperscript{507} See id. at 449-50.
  \item \textsuperscript{508} Id. at 449.
  \item \textsuperscript{509} Id. at 450 (quoting Gentry v. State, 437 So. 2d 1097, 1099 (Fla. 1983)).
  \item \textsuperscript{510} See \textit{Bruce}, 317 Md. at 649, 566 A.2d at 106 (McAuliffe, J., dissenting) (agreeing with the majority’s rejection of a mechanical application of attempted common-law felony murder).
  \item \textsuperscript{512} Attempts are punishable by a penalty not to exceed that of the attempted crime. \textit{MD. ANN. CODE} art. 27, § 644A (1987).
\end{itemize}
decision in this regard is consistent with its earlier decision in *Campbell* not to extend the doctrine of felony murder beyond its common-law boundaries.\(^{513}\)

The problem with the court's decision, however, is that it may have decided the wrong issue. This perhaps can be illustrated best by the court's use of the following LaFave and Scott hypothetical to support its conclusion that attempted felony murder cannot exist.

Some crimes, such as murder, are defined in terms of acts causing a particular result plus some mental state which need not be an intent to bring about that result. Thus, if A, B, C, and D have each taken the life of another, A acting with the intent to kill, B with an intent to do serious bodily injury, C with a reckless disregard of human life, and D in the course of a dangerous felony, all three are guilty of murder because the crime of murder is defined in such a way that any one of these mental stages will suffice. However, if the victim does not die from their injuries, then only A is guilty of attempted murder; on a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm, that he acted in reckless disregard for human life, or that he was committing a dangerous felony. Again, this is because intent is needed for the crime of attempt, so that attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another).\(^{514}\)

The issue in *Bruce*, according to the majority, was that implicated by LaFave and Scott's example of "D," who was culpable only for injuring the victim during the perpetration of a dangerous felony. *Bruce*, arguably, did not present that issue. Rather, *Bruce* presented the case of A, who acted with the intent to kill. The distinguishing factor in *Bruce*, and the point that the majority did not address, was that the trial court used the fact that the attempted murder occurred during the perpetration of a felony solely to classify the crime as attempted murder in the first degree.\(^{515}\)

At trial, Bruce's counsel argued that attempted first degree murder, as the State viewed it, was essentially a new crime of "attempted felony murder;"\(^{516}\) Judge Ross rejected this contention.

---

514. W. LaFave & A. Scott, supra note 424 § 6.2, at 500, quoted by the *Bruce* court at 317 Md. at 647-48, 566 A.2d at 105-06.
515. Record Extract at 141-42, *Bruce* (No. 89-9).
516. Id. at 139-40.
The following exchange indicates the judge’s understanding of the nature of the crime as the State presented it:

THE COURT: I am going to instruct that this is a specific intent crime, that in order to be found guilty of attempted murder, there must be a specific intent to kill.

MR. GREGORY: . . . I agree with the court’s position with regard to attempted murder, but if we’re talking about attempted felony murder, it’s my understanding—

THE COURT: You are not listening . . . . What the statute says is any murder committed in the course of the perpetration of robbery is murder in the first degree. Therefore, if someone intentionally kills a human being without excuse, justification or mitigating circumstances, and that occurs during the course of the perpetration of robbery with a dangerous or deadly weapon, the degree of murder is first degree.

MR. GREGORY: That’s correct. I’ll concede that.

THE COURT: That’s the only thing that I am going to instruct this jury.

MR. GREGORY: All right.

THE COURT: As far as so called felony murder is concerned—In fact, I’m not going to call it [attempted] felony murder. I’m going to call it [attempted] first degree murder. The only basis under my instructions that they will be able to find the Defendant guilty is that he . . . had the specific intent to kill, and that he took a substantial step in the execution of that intent, and that . . . it occurred during the course of the crime, perpetration of robbery with a dangerous or deadly weapon.

MR. GREGORY: . . . There is a dispute among the litigants of the existence of the crime.

THE COURT: I thought that you agreed with me.

MR. GREGORY: Your honor, I do not agree with the court that there is such a species of crime called attempted felony murder.

THE COURT: I’m not calling this attempted felony murder. This is attempted first degree murder, but for the perpetration of the felony. It is a specific intent crime . . . . I am not going to say that one who accidentally kills another in the course of the perpetration of a felony is guilty of murder.

MR. GREGORY: Very well.517

517. Id. at 140-42.
Bruce tried the same argument on appeal, framing the issue as whether the crime of attempted felony murder exists.\(^{518}\) This time the argument worked.

The Court of Appeals' misformulation of the issue is evidenced in the following statement: "[T]he criminal intent necessary to convict for attempted murder requires, as one of its essential elements, a specific intent to kill. Consequently, as Maryland does not recognize attempted felony murder as a crime, Bruce's conviction for committing that non-existent crime must be reversed."\(^ {519}\) Thus, the court failed to account for the fact that during the robbery, Bruce "'took the gun and aimed it at [Tensor's]... face... and... said I'm going to kill you.'"\(^ {520}\) The trial court concurred on the requisite intent;\(^ {521}\) but, unlike the Court of Appeals, it fully recognized that Bruce had demonstrated a specific intent to kill. Further, it was the Court of Appeals that characterized the crime as attempted felony murder, not the trial court. The trial court never instructed the jury on any crime entitled "attempted felony murder;" rather, it instructed the jury on attempted murder in the first degree.\(^ {522}\)

Maryland recognizes degrees of attempted murder. The Court of Appeals acknowledged in Hardy v. State\(^ {523}\) that "'[i]f the conduct of the defendant falls within the proscribed conduct in the statute

\(^{518}\) Appellant's Reply Brief at 2-4, Bruce (No. 89-9).

\(^{519}\) Bruce, 317 Md. at 648, 566 A.2d at 106.

\(^{520}\) Id. at 643, 566 A.2d at 103.

\(^{521}\) "[I]n order for one to be guilty of attempted anything, there must be a specific intent to commit the crime." Record Extract at 137-38, Bruce (No. 89-9).

\(^{522}\) Id. at 164. The instructions given were as follows:

In order for one to be guilty of attempted murder in the first degree, three things must be shown: it must be shown that the person intended to kill the victim without excuse or justification or circumstances of mitigation. It has to be a specific intent to kill the victim without excuse, without justification, and without circumstances of mitigation. That's the first thing.

Then it must be shown that that—that a substantial step was taken toward the commission of that crime. A substantial step toward intentionally killing that human being.

And third, in order for it to be attempted murder in the first degree, that intent and that substantial step or act toward the commission must occur during the course of the commission of the crime of robbery or robbery with a dangerous or deadly weapon.

Those are the three elements that must be proved in order for there to be guilt of attempted murder in the first degree. A specific intent to kill the victim without excuse or justification, a substantial step toward the commission, toward carrying out that intent, and both the intent and the substantial step or act must occur during the course of the commission of the crime of robbery or robbery with a dangerous or deadly weapon.

\(^ {523}\) 301 Md. 124, 482 A.2d 474 (1984).
labeled as first degree murder that did not result in the death of the victim, then the crime of attempted murder in the first degree has been established."\(^{524}\) Although the felony murder statute serves to classify the "already established" murder as one in the first degree, it does not create a new statutory offense.\(^{525}\) Similarly, the statute should not alter the nature of attempted murder as a specific intent crime merely because the attempt occurred in the course of one of the statute's designated felonies. The State's contention was simply that the felony murder statute should be used in a charge of attempted murder in the same manner that it is used in a completed murder; that is, to classify the "already established" crime as one in the first degree.\(^{526}\) Because the already defined attempted murder occurred in Bruce during the perpetration of a dangerous felony, that felony should serve as an aggravating circumstance to make the offense one in the first degree.\(^{527}\) This analysis is in accord with the court's discussion of first degree attempted murder in Hardy.\(^{528}\) As the State argued Bruce and presented it to the jury,\(^{529}\) the commission of the attempt during the course of a dangerous felony replaced premeditation for the purpose of classifying the attempt as one in the first degree.

There are problems, however, with such an analysis. First, by not requiring premeditation to establish first degree attempted murder, the court's decision may be at odds with its decision in State v. Holmes.\(^{531}\) In Holmes, the court distinguished attempted murder in the first degree and assault with intent to murder.\(^{532}\) The court found that "[a]ttended murder in the first degree requires a wilful, deliberate, and premeditated intent to kill, while assault with intent to murder does not."\(^{533}\) This distinction only begs the question, however: that is, whether the court's description of a first degree murder attempt is exclusive, or whether there are other methods

\(^{524}\) Id. at 139-40, 482 A.2d at 482 (emphasis added).
\(^{526}\) Brief for Appellee at 7, Bruce (No. 89-9).
\(^{527}\) Id.
\(^{528}\) See supra note 524 and accompanying text.
\(^{529}\) Brief for Appellee at 186, Bruce (No. 89-9).
\(^{530}\) Record Extract at 141-42, Bruce (No. 89-9).
\(^{531}\) 310 Md. 260, 528 A.2d 1279 (1987).
\(^{532}\) Id. at 272, 528 A.2d at 1285.
\(^{533}\) Id.
that may be used under the statute to classify the offense for purposes of degree.

There are two additional problems with using the felony murder rule to classify a murder attempt as one in the first degree. First, such a use would swallow up all second degree attempts that occur during the felony's commission, which is exactly what happened in *Bruce*. Under the State’s view of the case, the fact that the attempt occurred during the commission of the robbery required a charge of first degree attempted murder.\(^{534}\) According to the trial court, such a view precluded instructions on a second degree attempt because the felony murder statute does not recognize a second degree attempt as a lesser included offense.\(^{535}\) The second problem occurs if the jury fails to convict the defendant on the charge of first degree attempted murder. A conviction that a jury might have made under a second degree attempt charge is eliminated entirely under this application of the rule; thus, the defendant would escape liability for the attempt.

4. **Conclusion.**—As everyone seems to agree, a specific intent to kill is needed to establish attempted murder. And certainly no one should be surprised that a jury found the requisite intent in a case such as this in which the defendant pointed a gun at the victim’s head and said “I’m going to kill you.” The real problem in the decision, however, is the court’s failure to address the issue really implicated in *Bruce*: whether an attempted murder committed with the specific intent to kill can be classified as first degree attempted murder when the attempt occurs during the commission of a specifically designated felony, absent a finding of premeditation.

Application of the common-law felony murder rule to attempt crimes would work an injustice by imputing an intent to kill to a defendant who had only an intent to commit a lesser felony. To that extent, the court’s decision avoids favoring criminal prosecutions. On the other hand, by failing to apply the statutory classification of felony murder as an offense in the first degree, the decision seems to favor unnecessarily a criminal defendant who intends to kill, acts in

\(^{534}\) Record Extract at 17, *Bruce* (No. 89-9).

\(^{535}\) *Id.* at 135-36.
furtherance of that intent, and does so during the commission of a serious crime, yet only by luck fails in the attempt.

Lisa D. Ettlinger
Mary Kate A. Toomey
Phyllis-Jo Himelfarb
Debra T. Lubman
Robyn B. Millman
Colleen K. Heitkamp
IV. Evidence

A. Evidence of Prior Convictions

In State v. Joynes, the Court of Appeals held that a victim witness' criminal conviction for battery was not relevant to a defendant's claim of self-defense and therefore was properly excluded as evidence. In addition to finding that the prior conviction was inadmissible on relevancy grounds, the court also found no statutory bases for admitting the victim's prior conviction. By crafting a limited holding, the court does not preclude the future use of prior convictions under other fact situations and does not disturb any recognized uses of prior convictions under state law.

1. The Case.—On July 7, 1985, a dispute erupted between neighbors Ethel R. Joynes and Oliver Handy over the volume of music being played in the Joynes' home. The ensuing fracas left Joynes with a broken arm and Handy with stab wounds and a cut on the forehead. As a result of the incident, Handy was charged with and convicted of battery. Joynes also was charged with battery; her trial took place after Handy's.

At Joynes' trial, both parties offered conflicting evidence about which one of them was the initial aggressor. Handy testified that he yelled at Joynes to turn down the music and that Joynes requested that he come into her yard. As he did so, Handy alleged that he saw Joynes with a knife, and picked up a two-by-four to protect himself. Handy further asserted that he struck Joynes with the board only after she swung at him with the knife. According to

2. Id. at 115, 549 A.2d at 381. The victim's battery conviction arose from the same incident for which the defendant was on trial in this case. Id.
3. Id. at 120, 549 A.2d at 383.
4. Id. at 123, 549 A.2d at 385.
5. See infra notes 59-75 and accompanying text.
6. Joynes, 314 Md. at 116, 549 A.2d at 381.
7. Id. at 115-16, 549 A.2d at 381.
8. Id. at 117, 549 A.2d at 382.
9. Id.
10. Id. at 116, 549 A.2d at 381. The evidence primarily consisted of testimony from Joynes, Handy, their respective family members, and several neighbors. Id.
11. Id.
12. Id.
13. Id. Handy testified that after he hit Joynes with the board to defend himself, Joynes' husband and son attacked him, which caused Handy to fall on his back. Id. Joynes then rejoined the fight and stabbed him. Id.
Joynes’ testimony, Handy appeared in her driveway with the two-by-four and swung it at her head; Joynes suffered the broken arm as she tried to ward off his blows.\textsuperscript{14} She then retreated while Handy initiated an assault on her husband and son.\textsuperscript{15} To defend her son, Joynes rejoined the attack with a knife and stabbed Handy.\textsuperscript{16} Despite the conflicting testimony, there was agreement that Joynes’ inflicted the stab wounds after her husband and son had joined the fracas and while Handy was lying on his back in the street.\textsuperscript{17} From this, the court concluded that the altercation comprised two separate physical attacks.\textsuperscript{18}

Joynes attempted to offer into evidence Handy’s battery conviction solely to prove that he was the initial aggressor.\textsuperscript{19} The trial judge refused to admit the conviction into evidence. The judge reasoned that Handy’s conviction was not relevant to the issue of self-defense and that the introduction of Handy’s conviction as evidence would bind the current jury to the findings of fact in Handy’s trial.\textsuperscript{20} In an unreported opinion, the Court of Special Appeals held that Handy’s prior conviction for the same incident was relevant to Joynes’ self-defense claim; the court vacated Joynes’ conviction and remanded the case for a new trial.\textsuperscript{21} The Court of Appeals granted certiorari to consider whether the trial court committed reversible error when it refused to admit Handy’s prior conviction on the grounds that the conviction was irrelevant to Joynes’ claim of self-defense.\textsuperscript{22}

In holding that the trial judge did not commit reversible error when he excluded Handy’s conviction from evidence, the Court of Appeals first examined the traditional standards for the admissibility of evidence and found that Handy’s prior conviction did not meet

\begin{itemize}
  \item \textsuperscript{14} Id. at 117, 549 A.2d at 381-82.
  \item \textsuperscript{15} Id., 549 A.2d at 382.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id. at 116-17, 549 A.2d at 381-82.
  \item \textsuperscript{18} Id. at 116, 549 A.2d at 382.
  \item \textsuperscript{19} Id. at 117-18, 549 A.2d at 382. Joynes’ counsel stated that the express purpose of introducing Handy’s conviction was “not to impeach Mr. Handy, not to do anything but to show that he was the original aggressor at some point in time.” Id. (emphasis omitted).
  \item \textsuperscript{20} Id. at 118, 549 A.2d at 382. The trial judge reasoned that the Joynes’ jury had the right to consider and reach its own conclusion about the conflicting testimony. Id. He also expressed concern that the evidence of Handy’s conviction “could perhaps confuse the jury as to their obligation in this case.” Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id. at 115, 549 A.2d at 381. The issue is one of first impression in Maryland. Id. at 120, 549 A.2d at 383.
\end{itemize}
established relevancy requirements. The court then analyzed the State's statutes that control the admissibility of prior convictions and found them inapplicable to the facts in Joynes. Finally, the court cautioned against "broadening the use of prior convictions" by an improper application of state case law.

2. Legal Background.—a. General.—

(1) Relevancy.—One of the basic tenets of evidence law is that only relevant evidence is admissible. Two factors determine whether evidence is relevant: materiality and probative value. Materiality refers to the relationship between what is at issue in the litigation and the proposition that the evidence is being offered to prove. That is, for evidence to be material, it must be offered to prove a fact "of consequence" in the case. For evidence to be probative, it must make the proposition for which it is being offered slightly more possible or probable, although it need not prove the proposition conclusively or even make it appear more likely than not. Evidence that is not material and probative is irrelevant and

23. Id. at 119-20, 549 A.2d at 382-83. The court stated that Handy's battery conviction was irrelevant to the material facts at issue in the case, tending neither to prove nor disprove Joynes' charge of self-defense. Id. at 120, 549 A.2d at 383; see infra notes 55-58 and accompanying text.

24. 314 Md. at 120-23, 549 A.2d at 383-85; see infra notes 59-75 and accompanying text.


27. McCormick, supra note 26, § 185, at 541; Fed. R. Evid. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); see also Blondes v. Hayes, 29 Md. App. 663, 668, 350 A.2d 163, 165-66 (1976) (ruling that evidence may be objected to if not relevant (probative) and/or material).

28. McCormick, supra note 26, § 185, at 541.


31. McCormick, supra note 26, § 185, at 542. But see State v. Jones, 311 Md. 23, 93-
thus inadmissible.\textsuperscript{32}

Not all relevant evidence, however, is admissible.\textsuperscript{33} The court may deny the introduction of relevant evidence when its probative value is outweighed by its prejudicial effect.\textsuperscript{34} In addition, the court may deem inadmissible otherwise relevant evidence if the evidence has the potential to mislead the jury, confuse the main issues, or waste time.\textsuperscript{35}

(2) Use of Prior Convictions.—As with all evidence, the admissibility of a prior conviction generally depends upon the proposition it is being offered to prove and whether it makes that proposition more or less probable.\textsuperscript{36} Courts must analyze the costs and benefits of admitting evidence.\textsuperscript{37} At times, they will use relatively particularized rules developed to govern the admission of evidence in situations that commonly occur rather than conduct a cost-benefit analysis on a case-by-case basis.\textsuperscript{38}

Within this relevancy framework, the general rule is that when two individuals have been charged with the same crime, the conviction of one may be admitted to establish the innocence of the other, if the offense could not be committed by joint actors.\textsuperscript{39} Alternati-
tively, if the parties could be viewed as coperpetrators, then the conviction or acquittal of one party is deemed irrelevant to the guilt or innocence of the other party.\textsuperscript{40}

When self-defense is at issue, the victim's past conduct may be relevant if offered to prove, for example, the defendant's state of mind at the time of the crime or even that the victim was the initial aggressor.\textsuperscript{41} Evidence of a prior conviction offered to prove the identity of the initial aggressor essentially is evidence of the actor's violent character or propensity.\textsuperscript{42} Traditionally, the use of character evidence to prove actions in conformity with that character has been inadmissible, with a few exceptions. For example, many jurisdictions will allow the accused to offer character evidence of the victim to support a self-defense claim.\textsuperscript{43} In jurisdictions that allow evidence of prior violent acts to establish that the victim was the initial aggressor, the defendant may introduce a prior conviction to prove that the victim had committed those violent acts.\textsuperscript{44} Likewise, evidence of the victim's prior convictions often is admissible to prove the defendant's state of mind.\textsuperscript{45}

Another use of prior convictions is to impeach a witness' credibility.\textsuperscript{46} Here, most courts follow a general body of rules that regulate admissibility rather than apply a balancing test on a case-by-case basis.\textsuperscript{47} A witness' credibility is at issue whenever he or she testifies;

\begin{enumerate}
\item 1 F. Wharton, supra note 39, § 134, at 577; see also Hunter v. State, 193 Md. 596, 603, 69 A.2d 505, 508 (1949) (holding that copartner's acquittal for operating a gaming table was inadmissible in defendant's trial under the same charge).
\item The basic elements necessary to sustain a claim of self-defense include evidence demonstrating that the defendant was not the aggressor and that the defendant had a reasonable belief that he was in danger of death or serious injury. Annotation, Alleged Victim's Commission of Prior Acts of and Reputation for Violence, 15 P.O.F. 2d 167, 173 (1978) (hereinafter Annotation, Victim's Prior Acts); see also Annotation, Admissibility of Evidence as to Other's Character or Reputation for Turbulence on Question of Self-Defense by One Charged with Assault or Homicide, 1 A.L.R.3d 571 (1965). For a discussion of self-defense, see R. Perkins & R. Boyce, Criminal Law 1113-44 (3d ed. 1982).
\item Annotation, Victim's Prior Acts, supra note 41, at 173-74.
\item Id. at 177-78. See generally Fed. R. Evid. 404 (governing use of character evidence); McCormick, supra note 26, §§ 186-193, at 549-74 (general overview of the use of character evidence); Gitchel, Charting a Course Through Character Evidence, 41 Ark. L. Rev. 585 (1988) (analyzing use of character evidence under the Federal Rules of Evidence).
\item Annotation, Victim's Prior Acts, supra note 41, at 183.
\item Id. Courts often require that the defendant have knowledge of such convictions for them to be relevant to the defendant's state of mind. Id. at 174.
\item See generally McCormick, supra note 26, § 43 at 93 (overview of common-law use of prior conviction for impeachment).
\item Federal Rule of Evidence 609 outlines the use of criminal convictions for impeachment. See also Gitchel, supra note 43, at 621-22; Annotation, Construction and Appli-
thus, evidence of his or her veracity becomes relevant. Generally, when a witness has been convicted of a crime that directly reveals a propensity toward dishonesty, the conviction is admissible to diminish the witness' credibility. In addition, a felony conviction often is admissible for impeachment purposes, even though the conviction does not involve dishonesty, but usually under stricter guidelines than those for convictions of crimes that involve falsehood.

b. Maryland Law.—

(1) Relevancy.—The State's rules of evidence are not codified, but rather are found in common-law decisions, legislative enactments, and court rules. In Dorsey v. State, the Court of Appeals outlined the test for the admissibility of evidence. Dorsey addressed materiality and probative value in essentially the same manner as the federal rules.

In Joynes, the Court of Appeals applied the Dorsey test to the facts presented and found that the evidence of Handy's earlier conviction for battery was neither material nor probative. The court stated that "under the circumstances of this case," the fact that a different jury found Handy guilty of battery did not tend to prove or disprove that he was the initial aggressor in the fracas. The court noted that "[t]o admit Handy's conviction as material evidence in Joynes' trial invites pure speculation by the jury as to what the con-

49. Id. at 625; see also FED. R. EVID. 609(a)(2) (providing for the admission of prior convictions for crimes that involve dishonesty).
52. 276 Md. 638, 350 A.2d 665 (1976).
53. Id.; see also Leeson v. State, 293 Md. 425, 433-34, 445 A.2d 21, 25 (1982) (citing the Dorsey test of admissibility); MacEwen v. State, 194 Md. 492, 501, 71 A.2d 464, 468 (1950) (holding that "[t]he real test of admissibility is the connection of the fact proved with the offense charged, as evidence which has a natural tendency to establish [whether] the fact at issue should be admitted").
54. 276 Md. at 643-44, 350 A.2d at 668-69. According to Dorsey, the materiality component of relevant evidence is satisfied by a "connection of the fact proved with the offense charged. ..." Id. at 643, 350 A.2d at 668 (quoting MacEwen, 194 Md. at 501, 71 A.2d at 468). Evidence has probative value if it tends "either to establish or disprove" the material issues. Id. at 643, 350 A.2d at 669 (quoting Kennedy v. Crouch, 191 Md. 580, 585, 62 A.2d 582, 585 (1948)).
55. 314 Md. at 120, 549 A.2d at 383.
56. Id.
Because it would not be unreasonable to find that there had been two separate acts of physical force, the court concluded that "[w]here distinct battery charges arise out of a progression of physical altercations, the decision of one jury should have no bearing upon the deliberations of another." 58

(2) Use of Prior Convictions.—In Maryland, the use of prior convictions is governed specifically by statute. Section 10-904 of the Courts and Judicial Proceedings Article allows a defendant to use as a defense the conviction of another party for the same crime. 59 In Gray v. State, 60 the Court of Appeals addressed the application of this statute, as originally enacted. In Gray, the prosecution introduced a codefendant's conviction to prove Gray's own guilt. 61 The court initially found that a literal reading of the statute rendered the evidence admissible. It concluded, however, that such a construction contradicted existing evidentiary law and thus could not have been intended by the legislature when it enacted this provision. 62

The court surmised that the legislature intended that a defendant, to prove his innocence, should be able to admit into evidence a party's conviction for a crime when only one individual could have committed the crime. 63 After Gray, the legislature modified the statute to allow only the defendant the right to offer the conviction of another party when it is a conviction for "the same crime or act." 64

---

57. Id. Among other things, a battery conviction could mean that the jury found there were two distinct incidents in the altercation, that Handy was the initial aggressor, or that Joynes was the initial aggressor, but that Handy used too much force to ward off her attack. Cf. State v. Duckett, 306 Md. 503, 509-11, 510 A.2d 253, 256-58 (1986) (examining the broad meaning of the crime of battery); see also State v. Faulkner, 301 Md. 482, 486, 483 A.2d 759, 761 (1984) (holding that to establish self-defense, the force used must not be unreasonable or excessive).

58. Joynes, 314 Md. at 120, 549 A.2d at 383.

59. The statute states: "In a civil or criminal case in which a person is charged with commission of a crime or act, evidence is admissible by the defendant to show that another person has been convicted of committing the same crime or act." Md. Cts. & Jud. Proc. Code Ann. § 10-904 (1989).

60. 221 Md. 286, 157 A.2d 261 (1960). The court decided Gray based on a prior version of the current statute. At that time, the statute read: "If any person or corporation charged with committing any crime is found guilty thereof, such fact shall be admissible as evidence in any proceeding, criminal or civil, in which another person, firm or corporation shall be charged with committing the same crime or act." Md. Ann. Code art. 35, § 11 (1957) (current version at Md. Cts. & Jud. Proc. Code Ann. § 10-904 (1989)).

61. 221 Md. at 288, 157 A.2d at 263. The court strictly limited its holding to the facts of the case. Id. at 289, 157 A.2d at 263.

62. Id. at 289-90, 157 A.2d at 263-64.

63. Id. at 290, 157 A.2d at 264.

64. See supra notes 59-60 and accompanying text.
The *Joynes* court, however, found the statute to be irrelevant because Joynes and Handy were not tried for the same crime.65

State statutory law also regulates the use of prior convictions for impeachment purposes.66 The Court of Appeals recently addressed the statute's scope in *Prout v. State*.67 Under *Prout*, a prior conviction will be per se admissible for impeachment purposes if it is a conviction for a crime that the common law considered infamous when the legislature originally enacted the impeachment statute in 1864.68 *Prout* also recognized that a conviction for a lesser crime could be used for impeachment purposes at the trial judge's discretion, but only if the crime was relevant to the issue of credibility.69 The statute, however, does not justify the admission of Handy's prior conviction in *Joynes*. Here, Joynes did not offer the conviction to impeach Handy70 and, even if she did, she could not introduce it under this statute because the crime of battery is not relevant to a witness' credibility.71

As to a claim of self-defense, Maryland case law recognizes that the victim's prior acts are relevant to establish the defendant's state of mind.72 In *Williamson v. State*,73 the Court of Special Appeals held that evidence of a victim's character was admissible when it acted to corroborate the defendant's account of the crime.74 The court, however, expressly precluded the use of specific acts to establish the victim's character.75 Since *Williamson*, Maryland courts have not

65. 314 Md. at 121, 549 A.2d at 384.
68. *Id.* at 358-59, 535 A.2d at 450; see *Wicks v. State*, 311 Md. 376, 380-82, 535 A.2d 459, 460-62 (1988) (holding that petit larceny is an impeachable offense under the *Prout* definition); *Watson v. State*, 311 Md. 370, 375, 535 A.2d 455, 458 (1988) (holding that attempted rape is not an impeachable offense as defined by *Prout*).
69. 311 Md. at 363, 535 A.2d at 452.
70. *Joynes*, 314 Md. at 118, 549 A.2d at 382; see infra note 19 and accompanying text.
71. In *State v. Duckett*, 306 Md. 503, 510 A.2d 253 (1986), the Court of Appeals addressed whether a prior battery conviction was admissible for impeachment purposes and concluded that it was not sufficiently relevant to the issue of credibility. *Id.* at 510-12, 510 A.2d at 256-58.
72. See *Gunther v. State*, 228 Md. 404, 410, 179 A.2d 880, 883 (1962) (allowing the jury to consider evidence that tended to show that the defendant was familiar with the victim's violent and dangerous character); *Jones v. State*, 182 Md. 653, 659, 35 A.2d 916, 919 (1944) (holding that defendant's knowledge of wife's violent character when she drank was admissible).
74. *Id.* at 346, 333 A.2d at 658.
75. *Id.* at 346-47, 333 A.2d at 658. The court limited character evidence in these
ruled on whether the defendant can use prior convictions to corrob
orate his account of the initial aggressor's identity. The Court of
Appeals disposed of Joynes on the relevancy issue without addressing
this aspect of the self-defense claim.

3. Analysis.—The Court of Appeals carefully limited its holding
ning to the specific fact pattern of Joynes. Under Dorsey's relevancy
test for admissibility, the court did not depart from existing state law
when it concluded that Handy's battery conviction had no relevance
to Joynes' claim of self-defense. The Joynes jury heard evidence
that could have led them to conclude that Handy had been the ini
tial aggressor. Had the court found the evidence of Handy's convic
tion to be relevant, several problems would have developed. First, it
would have made the issue of whose case was tried first, rather than
just the facts of the case, of paramount importance in determining
the parties' guilt. Second, had Handy been acquitted, his acquittal
then could have been deemed relevant in proving that Joynes must
have been the initial aggressor. Finally, the Joynes jury could have
been wrongly affected by the earlier jury's conclusions had the judge
admitted the evidence as relevant.

4. Conclusion.—By crafting a limited holding, the Court of Ap
peals does not preclude the use of prior convictions in future self-
defense cases. Indeed, nothing in the court's dicta indicates that
the State's courts might not be willing to use such evidence to cor
roborate a defendant's claim that the victim was the initial aggres
or. In addition, the holding does not disturb established law that
controls the use of prior convictions for impeachment purposes. The
court likewise did not disturb the admissibility of a prior convic
tion to avoid the conviction of two people for a crime if only one of

circumstances to reputation evidence only. See also Thomas v. State, 301 Md. 294, 306-
07, 483 A.2d 6, 13 (1984) (holding that an evidentiary foundation which tends to prove
the self-defense claim must be established before evidence of the victim's violent charac
ter can be admitted to show that the victim was the initial aggressor), cert. denied, 470

76. 314 Md. at 120, 549 A.2d at 383. Under these facts, it would not be unreasona
ble for the jury to conclude that there were two separate physical altercations, and that
both parties could be charged with battery. Id. at 121, 549 A.2d at 384.

77. See supra notes 55-58 and accompanying text.

78. See supra notes 72-75 and accompanying text.

(limiting character evidence to reputation evidence only).

80. In fact, Joynes did not offer the evidence to impeach Handy. See supra notes 70-71
and accompanying text.
them could have committed it.\footnote{See supra notes 59-65 and accompanying text.}

{
State v. Joynes\} raised an important issue regarding the relevancy of a victim's prior conviction to support a claim of self-defense. The facts of Joynes, however, did not give the Court of Appeals a basis to logically include prior convictions in the body of evidence that tends to corroborate a defendant's claim of self-defense. Upholding the lower court's decision would have improperly expanded the use of prior convictions. By limiting its holding to the facts at bar, the court does not disturb prior decisions regarding the use of such evidence and does not preclude its future use under the right circumstances.

\textbf{Colleen K. Heitkamp}
V. FAMILY LAW

A. Use of Contempt Power in Paternity Proceedings

In Eagan v. Ayd,1 the Court of Appeals granted certiorari to consider whether a court may use its contempt power to compel a defendant in a paternity proceeding to submit to a blood test to determine paternity.2 Although the State's paternity statute lists specific sanctions if an individual fails to submit to a blood test, it does not mention contempt explicitly.3 The court looked to the statute's legislative history and concluded that its primary goals were to protect illegitimate children, to ensure parental support of these children, and to safeguard the public coffers.4 As a result, the court held that the legislature could not have intended to limit the court's inherent contempt powers to compel a putative father to submit to a blood test—to hold otherwise would defeat the legislature's purpose in enacting the statute.5 Through its decision, the Court of Appeals judicially legislated a more effective and much needed means of obtaining accurate evidence in paternity proceedings. The court's decision makes it more difficult for a putative father to deny responsibility for his child and, thus, easier for courts to order support for children born out of wedlock.

1. The Case.—Clarissa Ayd brought a paternity action against Frederick Eagan in the Harford County Circuit Court, alleging that Eagan was the father of her minor daughter.6 Ayd filed a motion for Eagan to submit to a blood test as provided by the paternity statute,7 but Eagan failed to appear for the test.8 The circuit court is-

2. Id. at 266, 545 A.2d at 55.
4. Eagan, 313 Md. at 275-76, 545 A.2d at 59-60.
5. Id. at 276-77, 545 A.2d at 60.
6. Id. at 266-67, 545 A.2d at 55.
7. Section 5-1029 of the Family Law Article provides in relevant part:
   (a) In general.—On the motion of a party to the [paternity] proceeding or on its own motion, the court shall order the mother, child, and alleged father to submit to blood tests to determine whether the alleged father can be excluded as being the father of the child.
   (e) Result as evidence.—(1) The results of each blood test shall be received in evidence if:
      (i) definite exclusion is established; or
      (ii) the testing 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%.
sued an order that found him in civil contempt of court when he failed to comply with the blood test order; the court allowed him five days to submit to the blood test to purge himself of his contempt.9 Eagan still refused to take the blood test, and appealed the contempt order to the Court of Special Appeals.10 Before the Court of Special Appeals' decision, the Court of Appeals granted certiorari on its own motion to clarify the sanctions available under the State's paternity statute if an individual fails to submit to a court-ordered blood test.11 The Court of Appeals affirmed the circuit court's order that held Eagan in civil contempt for his failure to submit to the blood test.12

2. Legal Background.—a. General.—Paternity law, primarily statutory in nature, evolved from the criminal "bastardy" statutes of the eighteenth century.13 The purpose of paternity statutes generally is to promote the best interests of children born out of wedlock by securing for them the same support, care, and education as children born in wedlock.14 The ideal first step in effecting this purpose is to determine the identity of the child's father. Given the highly personal and emotional nature of paternity proceedings, as well as the dramatic consequences of a finding of paternity, it is easy for either the mother or the alleged father to testify falsely; thus, oral testimony alone usually is insufficient to determine the issue of paternity.

Since the 1940s, serologic blood test results have served as im-

8. Eagan, 313 Md. at 267, 545 A.2d at 55.
9. Id. Civil contemnors "carry the keys of their prison in their own pockets," because the court will not penalize them if they comply with its order. In re Nevitt, 117 F. 448, 461 (8th Cir. 1902) (civil contempt of court was an appropriate sanction to compel county judges to levy taxes to make partial payment on a judgment recovered against the county).
10. Eagan, 313 Md. at 267, 545 A.2d at 55.
11. Id.
12. Id. at 279, 545 A.2d at 61. The Court of Appeals held that, although the statute provides specific sanctions for failure to comply with a blood test order, the statute does not preclude the court from exercising its inherent contempt power to enforce the order. Id. at 278, 545 A.2d at 61. The court declined to consider the question of "whether the legislature has the power to limit, extend or declare contempts." Id. at 279, 545 A.2d at 61.
13. Id. at 268-69, 545 A.2d at 56.
14. See Unif. Parentage Act, 9B U.L.A. 287 (1987). The National Conference of Commissioners on Uniform State Laws drafted the Uniform Parentage Act in 1973; the Act has been recommended for adoption in all states. The purpose of the Act is to provide "substantive legal equality of children regardless of the marital status of their parents." Id. at 288. At present, 17 states have adopted the Act. Id.
portant and accurate evidence in paternity proceedings.\(^\text{15}\) Although serologic blood test results were not accurate enough to serve as affirmative evidence of paternity, the results typically were admitted to serve as evidence of nonpaternity.\(^\text{16}\) The recently developed human leukocyte antigen (HLA) test yields results that are precise enough to show a high probability of paternity as well as to show that a person could not be a child's biological father.\(^\text{17}\) The use of blood tests as evidence in paternity proceedings is critical to accurately establish paternity and, consequently, legal responsibility for the child's support. Accordingly, it is important for courts to have the capacity to compel an individual to submit to a blood test.

Each state's paternity statute provides different sanctions for a party's failure to comply with a blood test order. Many states' statutes permit a trial court either to resolve the issue of paternity against a party who refuses to undergo the blood test or to use its discretion to enforce the order.\(^\text{18}\) Courts have held that the language of these statutes permits a trial court to hold noncompliant individuals in contempt.\(^\text{19}\) A few jurisdictions have statutes that expressly permit their courts to hold a putative father in contempt if he fails to submit to a court-ordered blood test.\(^\text{20}\) Conversely, some

\(^\text{15}\) Note, \textit{Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage}, 36 \textit{VAND. L. REV.} 1587, 1593 (1983). Dr. Karl Landsteiner discovered the major blood groupings in 1901. \textit{Id.} at 1589. These groupings, called antigens, are A, B, O, and AB. \textit{Id.} at n.13. This discovery facilitated the use of blood tests in paternity proceedings. The first blood tests—called serological blood tests—located antigens only on red blood cells, making them less accurate than later tests. \textit{Id.} at 1590-91.

\(^\text{16}\) \textit{Id.} at 1590. Because serological blood tests were only 50 to 60% accurate in definitively proving nonpaternity, states enacted statutes that allowed courts to admit test results as evidence in paternity cases only if the results excluded the alleged father. \textit{Id.} The Maryland paternity statute included such a provision. \textit{MD. ANN. CODE art. 16, § 66G (1981).} In 1982, the Maryland legislature amended this provision in recognition of new technological developments in genetic testing. \textit{Haines v. Shanholtz, 57 Md. App. 92, 95, 468 A.2d 1365, 1366, cert. denied, 300 Md. 90, 475 A.2d 1201 (1984).} The amended version of the statute allows the admission of blood test results as affirmative evidence of paternity if the results meet the statute's statistical requirements. \textit{MD. FAM. LAW CODE ANN. § 5-1029(e)(ii) (1984 & Supp. 1989); see supra note 7.}

\(^\text{17}\) Note, \textit{supra} note 15, at 1591. Human leukocyte antigen (HLA) tests identify antigens on white blood cells. Because the human leukocyte antigen is rarer than those found on red blood cells, HLA blood tests produce a higher probability of paternity exclusion than do serological blood tests. \textit{Id.}

\(^\text{18}\) For examples of state statutes that permit a court to resolve the issue of paternity against a party who refuses to undergo the blood test or to use its discretion to enforce the order, see \textit{Eagan, 313 Md. at 281 n.3, 545 A.d at 62-63 n.3 (Eldridge, J., dissenting).}

\(^\text{19}\) \textit{Eagan, 313 Md. 265, 281 n.3, 545 A.2d 55, 63 n.3; see Bowerman v. MacDonald, 431 Mich. 1, 25, 427 N.W.2d 477, 487 (1988) (contempt is one of the "other remedies" authorized in the Michigan paternity statute).}

\(^\text{20}\) \textit{See, e.g., D.C. CODE ANN. § 16-2343.2 (1989); GA. CODE ANN. § 19-7-45 (1982);
states' statutes do not provide any specific sanction for noncompliance with a blood test order. In these jurisdictions, courts have held that because the statute failed to enumerate any sanctions at all, contempt would be an appropriate sanction for disobeying a blood test order. Only a few states other than Maryland have paternity statutes that enumerate specific sanctions for failure to comply with a blood test order, but do not expressly empower the court to compel compliance with the order.

b. Maryland.—Although Maryland courts have determined related issues, the question of whether a court can compel a defendant in a paternity proceeding to submit to a blood test is one of first impression for the Court of Appeals. The State's courts already have interpreted other provisions of the paternity statute, and the Court of Appeals' holding in Eagan is in accord with these prior decisions. In Haines v. Shanholz, for example, the Court of Special Appeals interpreted a newly amended section of the paternity statute, which provided that blood test results may be used in paternity proceedings as affirmative evidence of paternity in appropriate circumstances. The court determined that the Maryland legislature,
in recognition of the new technological advances made in the reliability of blood test results, intended to permit the admission of blood test results as evidence.²⁷

In Adams v. Mallory,²⁸ the Court of Appeals addressed the issue of whether a court may enter a default judgment against an alleged father in a paternity proceeding as a sanction for failure to provide discovery.²⁹ The court denied the use of a default judgment as a sanction, noting that many of the statute’s provisions are designed to protect an alleged father from being compelled to present evidence.³⁰ These provisions serve to protect “[o]ne who is under the strain of actual or potential accusation, [who], although innocent, may be unduly prejudiced by his own testimony for reasons unrelated to its accuracy.”³¹

Most recently, the Court of Special Appeals in Regiec v. Stogo³² held that section 5-1029’s remedies were exclusive.³³ That is, if an individual refuses to submit to a blood test, counsel may disclose evidence to that effect to the court and jury and also may comment on that refusal. After Regiec, the Department of Human Resources drafted legislation that expressly would have authorized contempt as a sanction if a party refused to submit to a blood test. Delegate Horne, Chairman of the House Judiciary Committee, introduced House Bill 229 on the Department’s behalf. The bill, however, died in committee because not one of the twenty-three delegates voted in

---

²⁷. Haines, 57 Md. App. at 95-96, 468 A.2d at 1366. In Eagan, the Court of Appeals took Haines a step further and again gave effect to the legislature’s intent when it empowered the courts to compel a party in a paternity proceeding to submit to a blood test, thereby ensuring reliable evidence of paternity. 313 Md. 265, 276-77, 545 A.2d 55, 60 (1988).
²⁹. Id. at 455, 520 A.2d at 372. The sanctions for failure of discovery are provided in Md. R. 2-433. The Mallory court held that, although a default judgment is one of the sanctions available to a court under rule 2-433, the use of that sanction was inconsistent with the policy behind the paternity statute. 308 Md. at 467, 520 A.2d at 378. Rule 2-433(b) provides that “[i]f a person fails to obey an order compelling discovery, the court . . . may enter an order . . . treating the failure to obey the order as a contempt,” if justice so requires. Md. R. 2-433(b).
³⁰. Adams, 308 Md. at 467, 520 A.2d at 377. The defendant in a paternity proceeding is not required to file a written answer to the complaint. If he does not respond in writing, the court must enter a general denial of the complaint on his behalf. Md. Fam. Law Code Ann. § 5-1012(a), (c) (1984). At trial, the “alleged father may not be compelled to give evidence.” Id. § 5-1028(d). No one is permitted to comment if the defendant fails to testify at trial. Id. § 5-1027(c).
³³. Id. at 313, 528 A.2d at 546.
3. Analysis.—a. The Eagan Decision.—In Maryland, there is no statutory provision that requires compulsory blood tests in paternity proceedings. The only sanctions that the statute provides for failure to comply with the court’s blood test order are disclosure to the court or jury of the individual’s refusal to be tested and comment on that refusal by the court or by counsel. Despite the legislature’s failure to include contempt in the statute as a sanction, the Court of Appeals held that courts have the inherent power to hold a noncompliant defendant in civil contempt of court. Because a blood test result often is the only accurate means of establishing paternity, the court concluded that the legislature did not intend to deprive courts of such an effective means of obtaining this information.

The court reviewed the history of paternity law, the history of the Maryland paternity statute, and the legislative intent behind the provision before reaching its decision. Based on its review, the court concluded that the paternity statute’s purpose was not to benefit putative fathers, an inference that could be, but should not be, drawn from Adams. Rather, its purpose was to “remove some of

36. Eagan, 313 Md. at 278, 545 A.2d at 61. A contempt is “any disobedience of the orders and rules of a court possessing the power to punish for such disobedience.” Mascolo, Procedural Due Process and the Reasonable Doubt Standard of Proof in Civil Contempt Proceedings, 14 New Eng. J. on Crim. & Civ. Confinement 245, 249 (1988). A contempt may be either criminal or civil in nature. Id. A civil contempt arises from a private wrong in which one party causes harm to another party by failing to comply with a court order. The purpose of civil contempt is to compensate the injured party or force the disobedient party to comply by threatening to impose fines or incarceration only if he fails to comply. Id. at 250. In contrast, a criminal contempt arises from a public wrong—a party’s interference with a court’s authority or dignity. The court imposes a fine or period of incarceration to punish the party and to restore the court’s authority. Id. at 251; see State v. Roll, 267 Md. 714, 717, 298 A.2d 867, 870 (1979) (power to punish for contempt is useful weapon in court’s arsenal).
37. Eagan, 313 Md. at 276, 545 A.2d at 60.
38. The Court of Appeals’ decision in Eagan at first seems inconsistent with its decision in Adams. After all, blood test results serve as evidence in paternity proceedings.
the legal impediments to establishing paternity,"39 "to protect illegitimate children through court-ordered support based upon sophisticated and reliable genetic testing,"40 "to assist [the state] in arriving at more pre-trial settlements in paternity cases,"41 and to curtail "the expenditure of court time, prosecutor time and staff

The Adams court, however, specifically contemplated a situation in which compelled testimony would prejudice a putative father "for reasons unrelated to its accuracy." 308 Md. 453, 466, 520 A.2d 371, 378 (1987) (quoting MCCORMICK ON EVIDENCE, supra note 31, § 118, at 287). This situation may occur when the defendant has physical traits or mannerisms that cause a jury to be unsympathetic to him or when the defendant becomes confused while on the witness stand because of the pressure of cross-examination; either may give the jury the mistaken impression that he is guilty. Id. Blood test results stand alone in their reliability and accuracy: the results either indicate nonpaternity or they indicate a high probability of paternity. Neither the alleged father's demeanor nor his ability to withstand cross-examination have any effect on the reliability of the test results. Eagan thus carries forward the legislature's intent to promote the best interests of children born out of wedlock by securing support from both their fathers and their mothers. See supra note 37.

39. Eagan, 313 Md. at 273, 545 A.2d at 58. Although Eagan may be favorable to the plaintiff and the court in a paternity proceeding, it is unfavorable to the defendant. The dissent questioned whether a compulsory blood test is a governmental attempt to coerce the defendant to produce incriminating evidence through physical intrusion of his body. Id. at 287, 545 A.2d at 65 (Eldridge, J., dissenting). The dissent recognized that the legislature has a long-standing policy of granting broader statutory protection to individuals than the constitutional privilege against self-incrimination. Id. Because of this legislative policy, the dissent argued, the majority should interpret the paternity statute as protecting more than a putative father's right against self-incrimination. In fact, the majority should interpret the statute as protecting the putative father's right against governmental attempts to coerce the production of evidence through physical intrusions of his body. Id. at 288, 545 A.2d at 66. The State's courts have not yet considered this issue. Id. at 286 n.9, 545 A.2d at 65 n.9. In Davis v. State, 189 Md. 640, 57 A.2d 289 (1948), the Court of Appeals held that blood which a defendant voluntarily gave in the hospital for what he believed would be treatment could later be used as evidence against him at a criminal trial. The court held that the admission of the evidence did not violate the accused's right against self-incrimination under article 22 of the Maryland Declaration of Rights; the court expressly declined to consider whether the state could compel an uncooperative defendant to give blood that later might be used as evidence against him. Id. at 646, 57 A.2d at 291.

After Eagan, however, the Court of Appeals likely would hold that compelling a paternity defendant to submit to a blood test does not amount to coercing the production of evidence through physical intrusion. The considerations and concerns against compelled self-incrimination usually are implicated only in criminal prosecutions. A defendant in a paternity proceeding has much less at stake than a criminal defendant and, thus, does not require the same degree of protection. For example, a paternity defendant does not face a possible prison sentence, a large fine, or the stigma of a criminal conviction. A paternity defendant, however, is faced with the possibility that he will be forced to accept partial responsibility for a child who he is accused of fathering and will have the stigma of having fathered an illegitimate child. While these concerns are of great importance to the paternity defendant, the State's interest in identifying the child's father outweighs any interest the defendant may have in protecting his privacy.

40. Eagan, 313 Md. at 275, 545 A.2d at 59; see supra note 16.

41. Id.
The court also found support in out-of-state authority for its interpretation of section 5-1029. The *Eagan* Court cited a Wisconsin case, *In re D.A.A.P.*, 43 in which the Wisconsin Supreme Court interpreted that State's paternity statute whose language was similar to that of the Maryland statute when the Wisconsin court decided the case. 44 The Wisconsin Supreme Court held that a court could use contempt as a sanction if an individual failed to comply with a blood test order even though the statute specifically provided alternative sanctions. 45 The Court of Appeals similarly interpreted the Maryland statute. The court further explained that the alternative provisions were not surplusage under its interpretation. 46 The court noted cases in which a court would not be able to use contempt as a sanction to enforce a blood test order effectively, such as when a defendant disappears after the court has ordered a blood test. 47

The Court of Appeals was correct in its overall assessment of the legislature's goal in enacting the paternity statute. Yet, the court's finding that the legislature did not intend to preclude contempt as a sanction against a recalcitrant defendant is questionable given the House Judiciary Committee's unanimous rejection of legislation which would have expressly authorized contempt as a sanction.

The majority explained that its holding avoided a decision on the larger constitutional issue: namely, whether a legislature may restrict the court's use of its inherent contempt powers. 48 As the dissent points out, however, "[Section] 5-1029 might be construed as making the negative inference the usual remedy for enforcing compliance with blood test orders but also providing that, in extraordinary cases, such orders might be enforced by contempt . . . [to] avoid the constitutional difficulties that the majority perceives." 49

42. *Id.*
43. 117 Wis. 2d 120, 344 N.W.2d 200 (1983).
44. *Eagan*, 313 Md. at 277, 545 A.2d at 60.
45. *In re D.A.A.P.*, 117 Wis. 2d at 127, 344 N.W.2d at 204. Since the *D.A.A.P.* decision, the Wisconsin legislature has amended the paternity statute to expressly include contempt as one of the available sanctions. *Wis. Stat. Ann.* § 767.48(4) (West Supp. 1989).
46. *Eagan*, 313 Md. at 278, 545 A.2d at 61.
47. *Id.*
48. *Id.* at 279, 545 A.2d at 61.
49. *Id.* at 289-90, 545 A.2d at 67 (Eldridge, J., dissenting).
b. Consequences.—In 1975, the United States Congress enacted the Aid to Families with Dependent Children (AFDC) program, which provides aid for parents who are unable to support their children, but nonetheless places the burden of supporting illegitimate children on their parents.\(^5\) As a condition of eligibility for aid, the AFDC program requires that mothers of illegitimate children “cooperate with the states in establishing their children’s paternity and in order to obtain support payments from fathers.”\(^5\) Single mothers and their children can receive AFDC payments only if the government cannot locate the putative father, or if a court finds that the man suspected of paternity is not the father or is indigent.\(^5\) Thus, if a defendant in a paternity proceeding does not submit to a blood test, the plaintiff will not only be without financial or other support from the child’s father, but also without government assistance.

Compulsory blood testing in paternity proceedings will offset the inadequacy of other types of evidence that often precluded a paternity plaintiff’s recovery before \textit{Eagan}.\(^5\) By allowing the use of blood test results as evidence, courts will be able to compensate for the unreliability of subjective evidence that usually is presented in paternity proceedings, such as the child’s physical resemblance to the putative father or oral testimony, which is easily falsified.\(^5\) After \textit{Eagan}, the State’s courts now will have the ability to base their decisions in paternity proceedings on accurate and objective evidence.

\textit{Eagan} also may alleviate some of the State’s financial burden. The court’s ability to compel a paternity defendant to submit to a blood test may result in the settlement of more cases before trial. A putative father who knows that the court can require him to submit to a test which could reveal his paternity may be more likely to voluntarily acknowledge his paternity, agree to make support payments to the child, or both. Settlements would save the parties, the court, the State, and the attorneys time and money. Further, it also is in the State’s financial interest to compel a putative father to submit to a blood test because a mother is eligible to receive aid from the State under the AFDC program once she helps the State institute a paternity proceeding against the father. If paternity is established,

---

\(^5\) Note, \textit{supra} note 15, at 1596.
\(^5\) \textit{Id}.
\(^5\) \textit{Id}.
\(^5\) \textit{Id} at 1596-97.
\(^5\) \textit{Id} at 1597.
then the father is financially responsible for the child rather than the State. The Washington Supreme Court expressed the idea as follows: "The State has a compelling interest in assuring that the primary obligation for support of illegitimate children falls on both natural parents rather than on the taxpayers of this state." Finally, it is in a child's best interest to receive emotional as well as financial support from both parents. A determination of paternity may ease the social stigma attached to "illegitimacy" for a young child.

4. Conclusion.—In Eagan v. Ayd, the Court of Appeals held that a court may use its contempt power to compel a defendant in a paternity proceeding to submit to a blood test to establish paternity. By empowering courts to hold a putative father in civil contempt if he refuses to comply with a blood test order, Eagan should ensure that paternity decisions will be based on objective, reliable evidence. In addition, the decision may alleviate some of the financial burden for both the mothers of illegitimate children and the State. Moreover, this decision serves the children's best interests by increasing the likelihood that both parents will support them. The majority's decision is questionable because the statute does not specifically mention contempt as a sanction and because the legislature resoundingly defeated a bill that expressly would have authorized contempt as a sanction. The strong public policy reasons that underlie the court's holding, however, lead to the conclusion that the decision was correct in terms of its ultimate effect. Further, the legislature's intent in enacting the statute—to promote the general welfare and best interests of children born out of wedlock—is best served by the majority's decision.

Samantha H. Forman

55. State v. Wood, 89 Wash. 2d 97, 102, 569 P.2d 1148, 1151 (1977) (paternity statute that required natural father to contribute to the care, education, and support of child did not deny natural father equal protection of the laws).
VI. LABOR LAW

A. Agreements to Arbitrate Future Disputes

In Anne Arundel County v. Fraternal Order of Anne Arundel Detention Officers and Personnel, the Court of Appeals held that agreements to arbitrate future disputes generally are valid and enforceable under the State's common law. The court also concluded that the determination of whether an employee's position is part of a union's representation unit is an appropriate subject for arbitration even absent a grant of authority by the County's charter or the General Assembly.

Prior to Anne Arundel County, agreements to arbitrate future disputes generally were unenforceable under the State's common law. The court's decision, however, did not establish that all agreements to arbitrate future disputes are valid and enforceable under state common law. Additionally, the court stated that a county must have express authority to enter collective bargaining agreements that delegate certain powers to an arbitrator. A county code, as well as an act of the General Assembly or a county charter, may provide such authority. Finally, the court established that the determination of positions to be included in a representation unit does not involve a discretionary governmental power or function. Thus, the power to make such a determination can be delegated to an arbitrator.

1. The Case.—In March 1984, Anne Arundel County (the County) and the Fraternal Order of Anne Arundel Detention Officers and Personnel (the Union) entered into a collective bargaining agreement (the Agreement). In March 1985, the County created

1. 313 Md. 98, 543 A.2d 841 (1988).
2. Id. at 110, 543 A.2d at 847.
3. Id. at 116, 543 A.2d at 850.
4. See id. at 107, 543 A.2d at 846.
5. Id. at 113-14, 543 A.2d at 849.
6. Id.
7. See id. at 111, 116-17, 543 A.2d at 848, 850.
8. Id. at 100, 543 A.2d at 842. The Anne Arundel County Code authorized Anne Arundel County (the County) and the Fraternal Order of Anne Arundel Detention Officers and Personnel (the Union) to enter into a collective bargaining agreement (the Agreement). ANNE ARUNDEL COUNTY, MD., CODE art. 8, tit. 4 (1985). The Agreement set forth the employee positions that the Union represented and provided that the inclusion in the Union's representation unit of any newly created or retitled positions depended on the agreement of the Union and the County. Anne Arundel County, 313 Md. at
an additional position, Detention Officer III (lieutenant). The Union sought to include this position in the same representation unit covered by the Agreement. The County, however, charged that the lieutenants were not proper members of the representation unit. Pursuant to the Agreement, the Union sought arbitration. The County refused to enter into arbitration.

The Union filed suit seeking an order to compel arbitration and subsequently moved for summary judgment. The Anne Arundel County Circuit Court granted summary judgment in favor of the Union and issued an order compelling arbitration. The County appealed to the Court of Special Appeals. Before that court could consider the case, the Court of Appeals issued a writ of certiorari.

In affirming the circuit court's decision, the Court of Appeals addressed two issues. The main issue was whether, absent a specific statutory provision, an agreement to arbitrate future disputes is enforceable under the State's common law. The court explained that because no statutory provision applied to the Agreement between the County and the Union, the Agreement could be enforced only as a matter of common law. The State's common-law principles generally deemed agreements to arbitrate future disputes unenforceable. The court, however, agreed with the Union that it was "no longer a sensible approach" for the court to refuse to en-

100-01, 543 A.2d at 842. The Agreement also provided that the parties would submit the disputed issue to arbitration at either party's request if they could not reach a mutual agreement themselves. *Id.* at 101, 543 A.2d at 843.

9. *Anne Arundel County*, 313 Md. at 101, 543 A.2d at 843.
10. *Id.*
11. *Id.* The County's Personnel Office decided that the lieutenants were management and confidential employees. *Id.* Article 8, § 4-105(b) of the County code states: "Management employees may not join, assist in, or participate in the activities of an employee organization . . . that represents . . . employees under the direction of the management employees. Confidential employees may not join or participate in the activities of an employee organization representing . . . nonconfidential employees." *Anne Arundel County*, Md., Code art. 8, § 4-105(b) (1985).
12. *Anne Arundel County*, 313 Md. at 101, 543 A.2d at 843.
13. *Id.* at 101-02, 543 A.2d at 843. The County considered the matter resolved because the personnel office concluded that the lieutenants were management and confidential employees. *Id.* at 102, 543 A.2d at 843.
14. *Id.* at 102, 543 A.2d at 843.
15. *Id.* The circuit court stated that the representation issue differed from the compensation issue in that the representation issue was ministerial rather than discretionary in nature. *Id.*
16. *Id.*
17. *Id.*
18. See *id.*
19. *Id.* at 104-05, 543 A.2d at 844.
20. *Id.* at 105, 543 A.2d at 845.
force agreements to arbitrate future disputes. The court concluded that even in the absence of a statutory provision, agreements to arbitrate should be enforceable.

The second issue was whether, absent authorization by the county charter or the General Assembly, arbitration is valid to resolve a collective bargaining dispute in the public sector that concerns the scope of a union's representation unit. The court addressed the issue in two parts. First, the court stated that Maryland precedent established the general principle that a legislative body—state, county, or municipality—must expressly authorize a government agency to enter into collective bargaining agreements. The court concluded that the Anne Arundel County Code provided the requisite authority. In so finding, the court rejected the County's contention that a county cannot enter into a collective bargaining agreement that includes an arbitration provision without the express authority of the county charter or an act of the General Assembly.

Second, the court agreed with the County's contention that without authorization by a public general law or charter provision consistent with article X1-A of the Maryland Constitution, a county cannot delegate to an arbitrator a discretionary governmental function vested in the county executive and county council. The court, however, disagreed that delegating the representation is

21. Id. at 107, 543 A.2d at 846.
22. Id. at 110, 543 A.2d at 847.
23. See id. at 102-03, 543 A.2d at 843-44.
24. See, e.g., Office & Professional Employees Int'l Union, Local 2 v. Mass Transit Admin., 295 Md. 88, 97, 453 A.2d 1191, 1195 (1982) (stating that "absent express legislative authority, a government agency cannot enter into binding arbitration or binding collective bargaining agreements establishing wages, hours, pension rights, or working conditions for public employees"); Maryland Classified Employees Ass'n v. Anderson, 281 Md. 496, 508-09, 512, 380 A.2d 1101, 1104, 1108 (1977) (binding arbitration provision is invalid absent authorization from a State public general law or the county charter); Mugford v. Mayor and City Council, 185 Md. 266, 271, 44 A.2d 745, 747 (1945) (stating that the city charter prescribes the power of the Mayor and City Council and any delegation of such power to an independent agency is a violation of the law).
25. Anne Arundel County, 313 Md. at 113-14, 543 A.2d at 849.
26. Id. at 114, 543 A.2d at 849; see Anne Arundel County, Md., Code art. 8, tit. 4 (1985).
27. Anne Arundel County, 313 Md. at 110, 543 A.2d at 847.
28. "[A] 'public general law' is one which deals with a subject in which all the citizens are interested alike . . . ." Norris v. Mayor and City Council of Baltimore, 172 Md. 667, 681, 192 A. 531, 537 (1937) (citations omitted).
29. Md. Const. art. X1-A.
30. Anne Arundel County, 313 Md. at 110-11, 114, 543 A.2d at 847-49.
sue to an arbitrator relinquished a discretionary function of the county executive and county council.

2. **Legal Background.**—"Arbitration is the process whereby parties voluntarily agree to substitute a private tribunal for the public tribunal otherwise available to them." Maryland courts favor arbitration as a method of dispute resolution. Parties generally expect the arbitrator's specialized knowledge and experience to produce a judgment based on both the contract's literal meaning and the contract's meaning in the context of the parties' trade or business.

   a. **Common-Law Arbitration.**—Arbitration is of common-law origin. Maryland common law previously distinguished between agreements to arbitrate existing disputes and agreements to arbitrate future disputes. While the courts usually enforced agreements to arbitrate existing disputes, they generally found agreements to arbitrate future disputes to be unenforceable.

31. Id. at 111, 116, 543 A.2d at 848, 850.
34. See Bel Pre, 21 Md. App. at 315-16, 320 A.2d at 563.
35. 5 Am. Jur. 2d Arbitration and Award § 6 (1964) ("The method of settling disputes by arbitration is of common-law origin.").
36. See Mullen, Arbitration Under Maryland Law, 2 Md. L. Rev. 326, 330 (1938); see also 5 Am. Jur. 2d Arbitration and Award § 36 (1964) (At common law "[a] distinction is made between agreements to arbitrate future disputes and agreements for the submission of an existing dispute.").
37. See Mullen, supra note 36, at 330 (it was the law of Maryland that the court would enforce the agreement if the parties agreed to submit the matter to arbitration "after" the dispute arose).
38. See id. at 326 (it was a settled principle of Maryland law that agreements to arbitrate future disputes could not oust the courts of their jurisdiction); see also Bel Pre Medical Center v. Frederick Contractors, Inc., 21 Md. App. 307, 316-17, 320 A.2d 558, 564 (1974) (general common-law rule was that an agreement to arbitrate all future disputes was not enforceable and was not a bar to a suit in a law or equity court), rev'd on other grounds, 274 Md. 307, 334 A.2d 526 (1975). The Maryland courts recognized some exceptions to the common-law rule. First, if the parties submitted a dispute to arbitration and the arbitrator entered an award, the courts would enforce the award. See Continental Milling and Feed Co. v. Doughnut Corp., 186 Md. 669, 674, 48 A.2d 447, 449 (1946); Mullen, supra note 36, at 326. Second, if the arbitration was a condition precedent to bringing a court action, the courts would enforce an agreement to arbitrate future disputes. See Eisel v. Howell, 220 Md. 584, 588-89, 155 A.2d 509, 511-12 (1959). Arbitration is a condition precedent when the arbitrator decides preliminary and incidental matters of a dispute and leaves the ultimate question of liability to the court. See Mullen,
There were two reasons why the Maryland courts previously had declared agreements to arbitrate future disputes void or unenforceable. The first was that such agreements were against public policy\(^3\) and, the second, that such agreements ousted the court's jurisdiction.\(^4\)

b. **Statutory Arbitration.**—Many jurisdictions, including Maryland, have enacted arbitration statutes.\(^5\) In the Maryland Uniform Arbitration Act (the Act),\(^6\) one of the most significant departures from the common law is that agreements to arbitrate future disputes are valid, enforceable, and irrevocable.\(^7\) The General Assembly's enactment of the Act established a legislative policy that favored enforcement of agreements to arbitrate future disputes.\(^8\)

The Act, however, does not apply to collective bargaining agreements between employers and employees unless the agreement expressly provides for the Act's application.\(^9\) If a collective

supra note 36, at 326. Finally, chancery courts allowed arbitration according to the terms of the agreement if the courts' decision would result in an inequitable solution. See Con

39. See Bel Pre, 21 Md. App. at 317, 320 A.2d at 564; see also 5 AM. JUR. 2D Arbitration and Award § 36 (1964) (one reason for declaring agreements to arbitrate future disputes unenforceable is that they are against public policy).


42. MD.CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1989).

43. Section 3-206(a) reads in pertinent part: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising between the parties in the future is valid and enforceable, and is irrevocable . . . ." Id. § 3-206(a). The provision's purpose is to discourage litigation and encourage voluntary resolution of disputes outside the courtroom. See Maietta v. Greenfield, 267 Md. 287, 291, 297 A.2d 244, 246 (1972); Bel Pre Medical Center v. Frederick Contractors, Inc., 21 Md. App. 307, 320, 320 A.2d 558, 565 (1974), rev'd on other grounds, 274 Md. 307, 334 A.2d 526 (1975).

44. See Gold Coast Mall, Inc. v. Larmar Corp., 298 Md. 96, 103, 468 A.2d 91, 95 (1983) ("The Maryland Uniform Arbitration Act . . . embodies a legislative policy favoring enforcement of executory agreements to arbitrate.").

45. See Board of Educ. v. Prince George's County Educators' Ass'n, 309 Md. 85, 95-96, 522 A.2d 931, 936 (1987) (agreement did not expressly provide that the Act applied and, therefore, § 3-206(b) rendered the Act inapplicable); Howard County Bd. of Educ. v. Howard County Educ. Ass'n, 61 Md. App. 631, 637-38, 487 A.2d 1220, 1224 (1985) (referring to § 3-206(b), "There is a provision in the Maryland Act, however, which limits its applicability"), cert. granted, 306 Md. 47, 506 A.2d 1190 (1986). The pertinent part of § 3-206(b) reads: "This subtitle does not apply to an arbitration agreement between employers and employees or between their respective representatives unless it is expressly provided in the agreement that this subtitle shall apply." MD.CTS. & JUD. PROC.
bargaining agreement governed by Maryland law failed to expressly state that the Act applied, the courts applied common-law arbitration rules.46 Prior to Anne Arundel County, the courts in such cases would find an agreement unenforceable under the common law if the agreement was one to arbitrate a future dispute.47

\[c. \textit{Arbitration in Public Sector Collective Bargaining Agreements.} \textit{—} \text{Today, the use of arbitration generally is accepted in the public sector.} \textit{48} \text{Public employers, however, routinely challenge the validity and enforceability of collective bargaining agreements that relinquish discretionary legislative powers or delegate such powers to binding arbitration.} \textit{49} \]

Public employers’ managerial authority often is restricted by law.50 In Maryland, absent express legislative authority, a public employer may not enter into a binding arbitration agreement that concerns wages, hours, pension rights, or working conditions for public employees.51 Public employers may enter into collective bargaining and arbitration agreements only if expressly authorized by statute.52 In Montgomery County Education Association v. Board of Education,53 the Court of Appeals stated that “[t]he purpose of this rule is

\[\text{CODE ANN. § 3-206(b) (1989). The General Assembly intended to limit § 3-206(b) to arbitration provisions contained in collective bargaining agreements. See Wilson v. McGraw, Pridgeon & Co., 298 Md. 66, 72, 78, 467 A.2d 1025, 1029, 1031 (1983).} \]

\[46. \text{See Anne Arundel County, 313 Md. at 104-05, 543 A.2d at 844; see also Prince George’s County, 309 Md. at 98, 522 A.2d at 937 (section 3-206(b) rendered the Maryland Uniform Arbitration Act inapplicable and common-law principles controlled).} \]

\[47. 313 Md. at 105, 543 A.2d at 845. \]


\[49. \text{See Abrams, supra note 48, at 262 (“Public employers almost routinely question the arbitrator’s jurisdiction . . . or the arbitrator’s power to issue an award or remedy . . .”). See also Maryland Classified Employees Ass’n v. Anderson, 281 Md. 496, 508, 380 A.2d 1092, 1038-39 (1977) (validity of collective bargaining agreements in which municipalities agree to delegate discretionary legislative powers and functions to binding arbitration has been the subject of much recent litigation).} \]

\[50. \text{See Craver, supra note 48, at 338 (stating that managerial authority of public employers often is restricted by law).} \]


\[52. Id. at 97, 453 A.2d at 1195-96 (citing Anderson and Mugford, the court states that the Mass Transit Administration may only enter into collective bargaining agreements authorized by statute). In his article, Craver states that because the law restricts public employers, they “clearly cannot empower outside arbiters to decide matters over which they have no legal control.” Craver, supra note 48, at 338.} \]

\[53. 311 Md. 303, 534 A.2d 980 (1987).} \]
to insure that a governmental agency does not, without authority, abdicate or bargain away its statutory discretion."

3. Analysis.—The Anne Arundel County court changed the common law when it held that agreements to arbitrate future disputes generally are enforceable. The court reasoned that preventing enforcement of agreements to arbitrate future disputes was no longer a sensible approach: "There is no sound public policy for distinguishing between the enforceability of some agreements to arbitrate disputes that might arise in the future and the enforceability of all other arbitration agreements."

Earlier Maryland appellate opinions similarly expressed disenchantment with common-law arbitration rules. Anne Arundel County ended the courts' ambivalence toward common-law principles that concerned agreements to arbitrate future disputes. The ruling also was consistent with court decisions that pronounced arbitration as a favored method of resolution for labor disputes.

Common law disapproval of arbitrating future disputes originated from the jealous protection of formal legal proceedings. The courts prohibited arbitration of future disputes because

54. Id. at 313, 534 A.2d at 985.
55. 313 Md. at 110, 543 A.2d at 847.
56. Id. at 107, 543 A.2d at 846.
57. Id.
58. See Howard County Bd. of Educ. v. Howard County Educ. Ass'n, 61 Md. App. 631, 639, 487 A.2d 1220, 1224 (1985), cert. granted, 306 Md. 47, 506 A.2d 1190 (1986). In Howard County, the court recognized that common-law rules controlled, absent a provision expressly stating that the Maryland Act applied. Id. at 638, 487 A.2d at 1223. The court, however, concluded that in the context of the case, the absence of such a provision did not mean the agreement to arbitrate future disputes was unenforceable. Id. at 639, 487 A.2d at 1224. After the court stated that the Act and contemporary trends indicated a preference for arbitration, the court expanded the state public general law which authorized the negotiation of binding arbitration in public education collective bargaining agreements. Id. at 639-40, 487 A.2d at 1224. The court concluded that "antiquated common law notions abhorrent to arbitration are inapplicable." Id. at 640, 487 A.2d at 1224.
59. 313 Md. at 107, 543 A.2d at 846; cf. Bel Pre Medical Center v. Frederick Contractors, Inc., 21 Md. App. 307, 320, 320 A.2d 558, 565 (1974), rev'd on other grounds, 274 Md. 307, 334 A.2d 526 (1975). In Anne Arundel County, Maryland joined a number of other jurisdictions that have rejected or abandoned the common-law rule. Park Constr. Co. v. Independent School Dist. No. 32, 209 Minn. 182, 186-87, 296 N.W. 475, 478 (1941) (overruling earlier decisions holding that agreements to arbitrate future disputes were void); see also Board of Educ. v. W. Harley Miller, Inc., 160 W. Va. 473, 488-89, 236 S.E.2d 439, 448 (1977) (court overruled reasoning of prior cases inconsistent with the new rule).
it would allow the parties to “oust the court of jurisdiction.” The Anne Arundel County court dismissed such reasoning because arbitration is “no more an ouster of judicial jurisdiction than is compromise and settlement or that peculiar offspring of legal ingenuity known as the covenant not to sue.” Furthermore, courts are no longer jealous of their jurisdiction.

The common law also prevented the enforcement of agreements to arbitrate future disputes as against public policy. The argument found support from the fact that, prior to the Maryland Uniform Arbitration Act, the State lacked a statute which could be used to enforce agreements to arbitrate future disputes. The General Assembly signaled a change in public policy when it codified the Maryland Uniform Arbitration Act. Indeed, the statute’s enactment indicated a radical departure from common-law rules that regulated the arbitration of future disputes.

Section 3-206(a) of the Act expressly states that an agreement to arbitrate future disputes “is valid and enforceable, and is irrevocable.” Section 3-206(b) states that section 3-206(a) does not apply to agreements between employers and employees “unless it is expressly provided in the agreement that this subtitle shall apply.” Because federal labor laws generally govern collective bargaining agreements, the General Assembly enacted section 3-206(b) so that

62. Anne Arundel County, 313 Md. at 108, 543 A.2d at 846; Bel Pre, 21 Md. App. at 317, 320 A.2d at 564; see also 6 C.J.S. Arbitration § 2 (1975) (an agreement to arbitrate all disputes was “an attempt to oust the courts of jurisdiction”).

63. Id. at 108-09, 543 A.2d at 846-47 (quoting Park Constr. Co. v. Independent School Dist. No. 32, 209 Minn. 182, 186, 296 N.W. 475, 477 (1941)).

64. See E.E. Tripp Excavating Contractor, Inc. v. County of Jackson, 60 Mich. App. 221, 246-47, 230 N.W.2d 556, 568 (1975) (implying that courts are no longer “jealous of their jurisdiction” because their dockets are overloaded with cases).

65. See supra note 39.

66. See supra note 39.

67. See Mullen, supra note 39, at 330 (“there is no statute in Maryland compelling arbitration before the dispute arises” (emphasis added)).


69. Bel Pre, 21 Md. App. at 319-20, 320 A.2d at 565 (the Act “constitutes a radical departure from the common law”).


parties would state expressly whether the State's Act applied. The practical effect of section 3-206, however, was that arbitration agreements governed by state law which failed to indicate that the Act applied were deemed unenforceable under the common law. By changing the common law, the court in Anne Arundel County eliminated this outcome. Public employers will not be able to avoid an arbitrator's decision by reliance on the common-law rule.

The court's holding, however, did not establish that every agreement to arbitrate future disputes is valid and enforceable, but rather stated that such agreements are "generally" valid and enforceable. The use of the word "generally" indicates that some agreements to arbitrate future disputes will be invalid and unenforceable. Although the court did not suggest what types of agreements might be unenforceable, it appears that the court could find an agreement unenforceable in one of two ways. First, the court could adopt another exception to the Act's general provision that arbitration agreements are valid, enforceable, and irrevocable. Thus, an arbitration agreement will be valid, enforceable, and irrevocable "except upon grounds that exist at law or in equity for the revocation of a contract." Second, the court could create exceptions to the new common-law rule for arbitration of future disputes in the same way that the court developed exceptions under the old rule. Indeed the court's ruling does not exclude the possibility that the State's courts will develop case law that creates additional exceptions. Most likely, however, the court would adopt the Act's exception.

In the second part of its holding, the Anne Arundel County court concluded that the absence of authority from the County's charter or the General Assembly did not preclude the determination of the Union's representation unit by arbitration. The court addressed two issues to reach this conclusion. First, the court addressed the level of authority necessary for a county to enter into a collective

72. See Wilson v. McGraw, Pridgeon & Co., 298 Md. 66, 72-75, 467 A.2d 1025, 1028-29 (1983) (the court indicated the legislature's intention in enacting § 3-206(b)). In many cases, federal laws would govern the collective bargaining agreement unless the agreement specified that the Act applied. Id. at 74-75, 467 A.2d at 1029. Labor union representatives requested that the General Assembly enact § 3-206(b) to avoid this confusion. Id.

73. Anne Arundel County, 313 Md. at 104-05, 543 A.2d at 844.
74. Id. at 110, 543 A.2d at 847.
75. See Md. CTS. & JUD. PROC. CODE ANN. § 3-206 (1989).
76. Id. § 3-206(b).
77. See generally Mullen, supra note 36.
78. 313 Md. at 111-12, 543 A.2d at 848.
bargaining agreement that included a binding arbitration provision.\textsuperscript{79} Prior cases indicated that the requisite authority must come from a state public general law or a county or municipal charter.\textsuperscript{80} The Anne Arundel County court, however, stated that these prior cases stood for the more general principle that the requisite authority must be authorized expressly by law.\textsuperscript{81} Thus, the court allowed a lower level of authority—a county code—\textsuperscript{82} to be sufficient.\textsuperscript{83} Second, the court addressed whether, absent authority from a county charter or the General Assembly, the representation issue was non-delegable because of its impact on employees' wages and salaries.\textsuperscript{84} The court reasoned that because an arbitrator's decision concerning the appropriate representation unit would have no effect on the employee's compensation, arbitration was appropriate.\textsuperscript{85}

The court's finding that a county code is sufficient authority for a public employer to enter into binding arbitration expanded the definition of express legislative authority. The result at first appears to conflict with the Court of Appeals' earlier decision in \textit{Maryland Classified Employees Association v. Anderson},\textsuperscript{86} in which the court concluded that a county code was not sufficient legislative authority to validate a binding arbitration provision which concerned compensation for a group of public employees.\textsuperscript{87}

The apparent conflict may be resolved by recognizing the important differences between the compensation issue in \textit{Anderson} and the representation issue in \textit{Anne Arundel County}. The determination of employee compensation is a vital government function, particularly because of budget constraints. The \textit{Anderson} court may have

\textsuperscript{79} \textit{Id.} at 110-14, 543 A.2d at 847-49.
\textsuperscript{80} \textit{See}, e.g., \textit{Maryland Classified Employees Ass'n v. Anderson}, 281 Md. 496, 512, 380 A.2d, 1032, 1041 (1977) (stating that it was invalid for a charter county to enter binding arbitration over compensation absent a state public general law or county charter).
\textsuperscript{81} 313 Md. at 113-14, 543 A.2d at 849.
\textsuperscript{82} The Anne Arundel County Code states in relevant part: "Whenever the Personnel Officer and the petitioning employee organization are in disagreement as to the determination of the appropriate representation unit, the issue shall be submitted to arbitration at the request of either party." \textit{ANNE ARUNDEL COUNTY, MD., CODE ART. 8, § 4-107(e)(1)} (1985).
\textsuperscript{83} \textit{Anne Arundel County}, 313 Md. at 114, 543 A.2d at 849.
\textsuperscript{84} \textit{Id.} at 111, 543 A.2d at 848.
\textsuperscript{85} \textit{Id.} at 116, 543 A.2d at 850.
\textsuperscript{86} 281 Md. 496, 380 A.2d 1032 (1977).
\textsuperscript{87} \textit{Id.} at 513, 380 A.2d at 1041. The court stated: "Because the ... ordinance attempted to bind the County in the exercise of its legislative discretion over public employee compensation without being authorized to do so by a public general law or by the county charter, the provisions of the ordinance to that end are invalid." \textit{Id.}
recognized this fact and, as a result, demanded a high level of legislative authority in the form of a state public general law or county charter. The representation issue, however, does not directly affect wages, salary, pension rights, or working conditions. Therefore, the Anne Arundel County court concluded that a county or municipal code was sufficient authority to send the issue to arbitration. In particular, "the determination of whether positions should be included in or excluded from the representation unit is not so determinative of employee compensation as to be an inappropriate subject for arbitration in the absence of authority granted by the Charter or General Assembly." In sum, the court's conclusion suggests that collateral issues which do not impact upon vital government functions are appropriate issues to submit to arbitration if authorized by any legislative authority.

4. Conclusion.—The court's decision in Anne Arundel County gives local governments more autonomy to establish procedures for collective bargaining agreements and binding arbitration with its employees. Local governments may either enter into arbitration agreements pursuant to state laws or local charters or enact legislation to further extend public employer authority. The court's decision unfortunately does not resolve whether local governments can delegate to an arbitrator authority to decide any and all employee issues.

Under Anne Arundel County, public employers can no longer rely on the common law to avoid arbitration of a dispute that arises after formation of the arbitration agreement. Additionally, the court expanded the sources that may mandate the terms and conditions of employment of public workers when it recognized that local codes were sufficient authority for delegation of certain powers.

The Anne Arundel County decision indicates the court's willingness to abandon antiquated dogma that allows parties to avoid the arbitration process. One can only wonder, however, how far the courts will go in allowing disputes to be settled by arbitration and

88. See Anne Arundel County, 313 Md. at 117, 543 A.2d at 851.

89. Id. at 116, 543 A.2d at 850. The court supported its decision by citing federal labor cases that distinguish between the representation unit and employee compensation. See The Idaho Statesman v. NLRB, 836 F.2d 1396, 1400 (D.C. Cir. 1988) (bargaining unit represented by the union falls outside the scope of wages, hours, and other terms and conditions of employment); Newspaper Printing Corp. v. NLRB, 625 F.2d 956, 963 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981).

90. Anne Arundel County, 313 Md. at 116, 543 A.2d at 850.
other alternative methods of dispute resolution before they once again become jealous of their jurisdiction.

B. Limiting the Tort of Abusive Discharge

The Court of Appeals granted certiorari in *Makovi v. Sherwin-Williams Co.* to determine the legal relationship between the common-law tort of abusive discharge and existing antidiscrimination statutes. In the four-to-three decision, the Court of Appeals held that “[a]busive discharge is inherently limited to remedying only those discharges in violation of a clear mandate of public policy which otherwise would not be vindicated by a civil remedy.” The court based its decision on the fact that title VII of the Civil Rights Act of 1964 and Maryland’s article 49B already provide a monetary remedy for employment discrimination in the form of back pay, although not compensatory or punitive damages. Thus, an at-will employee could not base an abusive discharge claim on the antidiscrimination provisions of title VII or article 49B because they provide a statutory remedy.

91. 316 Md. 603, 561 A.2d 179 (1989).
92. Courts have labeled this cause of action as one for “wrongful,” “abusive,” or “retaliatory” discharge. These terms are used interchangeably throughout this Note.
94. *Makovi*, 316 Md. at 605, 561 A.2d at 180.
98. *Id.* at 609, 561 A.2d at 182. Title VII established the Equal Employment Opportunity Commission (EEOC) “to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 . . . .” 42 U.S.C. § 2000e-5(a) (1982). The EEOC endeavors to enforce title VII by informal methods of conference, conciliation, and persuasion. *Id.* § 2000e-5(b). If these methods fail, the EEOC may bring an action against the employer in a United States District Court. *Id.* § 2000e-5(f) (1). Title VII provides that the court may enjoin the practice and order any appropriate affirmative action, including reinstatement with back pay for up to two years. *Id.* § 2000e-5(g). Thus, title VII remedies do not include plenary, compensatory, or punitive damages. *See Makovi*, 316 Md. at 621, 561 A.2d at 188.

Similarly, the Maryland Human Relations Commission (HRC) is empowered to enforce the provisions of article 49B by receiving and investigating complaints. Md. Ann. Code art. 49B, § 11(e) (1986). By virtue of amendments made in 1977, the HRC is
Case law prior to Makovi contained no clear indication as to whether an abusive discharge action is available when an alternative statutory remedy exists.\textsuperscript{99} Makovi clarifies the law because it limits the use of the tort to employees whose rights are not safeguarded already by antidiscrimination legislation;\textsuperscript{100} the court's decision could effectively remove all statutorily protected employment cases from the domain of abusive discharge actions.

This Note discusses Makovi's significance and argues that the Court of Appeals correctly held that an abusive discharge action should arise only to remedy discharges that clearly contravene a public policy which otherwise would not be vindicated by a statutory remedy. An employee who wrongfully has been discharged from employment needs the protection of a cognizable legal claim. In the case of employment discrimination that is actionable under a federal or state statute, however, the employee already has a legal remedy, and should not be able to hold the employer liable for abusive discharge on a tort theory.\textsuperscript{101}

1. The Case.—The plaintiff, Carolyn M. Makovi, was employed on an at-will basis as a chemist for the Sherwin-Williams paint factory in Baltimore.\textsuperscript{102} Makovi learned that she was pregnant in August 1983.\textsuperscript{103} On October 10, 1983, Sherwin-Williams effectively suspended her employment: The company informed her that she could not return to her job while she was pregnant, and stopped her pay and medical benefits until she became disabled due to the pregnancy.\textsuperscript{104} Sherwin-Williams permitted Makovi to resume her job on June 14, 1984, two months after her baby was born.\textsuperscript{105}

Makovi filed an action for sex discrimination against her employer with the Equal Employment Opportunity Commission (EEOC).\textsuperscript{106} Her complaint alleged that she desired to work and was capable of doing so during the entire period from October 10, 1983, to April 12, 1984, and that her employer demanded she leave work

\textsuperscript{100} 316 Md. at 611-12, 561 A.2d at 183.
\textsuperscript{101} See id.
\textsuperscript{102} Id. at 605, 561 A.2d at 180.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 606, 561 A.2d at 180.
\textsuperscript{106} Id. at 605, 561 A.2d at 180.
as of October 10, 1983, on the pretext that her physician required her removal because of the pregnancy.\textsuperscript{107} The EEOC dismissed Makovi's complaint in December 1985.\textsuperscript{108} The EEOC found no reasonable cause to believe that her allegations were true,\textsuperscript{109} but advised her that she could pursue her claim in the United States District Court under title VII of the 1964 Civil Rights Act.\textsuperscript{110} Makovi declined to pursue that remedy.

Instead, Makovi brought an action for wrongful discharge in the Baltimore City Circuit Court.\textsuperscript{111} She complained that her temporary discharge was contrary to the public policy enunciated in title VII of the Civil Rights Act and article 49B of the Maryland Human Relations Commission statutes,\textsuperscript{112} and sought $500,000 in compensatory damages and another $500,000 in exemplary damages.\textsuperscript{113} The circuit court granted summary judgment in favor of her employer on January 14, 1987.\textsuperscript{114}

On appeal, the Court of Special Appeals held that an abusive discharge action based on sex discrimination would not lie because there was a specific statutory procedure for redress.\textsuperscript{115} The Court of Appeals affirmed; the court concluded that the tort's purpose was to provide redress in the absence of another remedy for employees who were dismissed when they refused to act unlawfully or attempted to perform a statutorily prescribed duty.\textsuperscript{116} The dissent

---

\textsuperscript{107} Id. at 605-06, 561 A.2d at 180.
\textsuperscript{108} Id. at 605, 561 A.2d at 180.
\textsuperscript{109} Id.
\textsuperscript{110} Id. If the EEOC finds that there is no reasonable cause or basis for an allegation of discrimination, it informs the employee of her right to file a civil action in the United States District Court. 42 U.S.C. § 2000e-5(b) (1982).
\textsuperscript{111} Makovi, 316 Md. at 605, 561 A.2d at 180.
\textsuperscript{112} Id. at 605-06, 561 A.2d at 180. Thus, Makovi attempted to use the statutory provisions under title VII and article 49B as the express policy basis for a tort action.
\textsuperscript{114} Makovi v. Sherwin-Williams Co., 311 Md. 278, 279, 533 A.2d 1303, 1304 (1987). The court explained that due to extraneous allegations, the circuit court treated Sherwin-Williams' motion to dismiss as one for summary judgment. Makovi, 316 Md. at 606, 561 A.2d at 180 n.3; see Md. R. 2-322(c). Rule 2-322(c) reads in part:

If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

\textsuperscript{115} Id.
\textsuperscript{116} Makovi, 75 Md. App. at 60, 540 A.2d at 495.
contended that abusive discharge should provide an alternative remedy for discrimination because previous case law did not expressly limit the tort’s applicability and because the employment discrimination statutes are nonexclusive with respect to remedies.\textsuperscript{117}

2. Legal Background.—The common-law rule of at-will employment states that either party may terminate employment at his or her pleasure at any time.\textsuperscript{118} Over the past two decades, the power of employers to discharge employees at will for any cause has been modified by both: (1) antidiscrimination legislation\textsuperscript{119} and (2) judicial exceptions to contract or tort remedies.\textsuperscript{120}

Both the United States Congress and the Maryland legislature have enacted statutory exceptions to the at-will rule. A principal federal statutory scheme that limits an employer’s right to discharge an at-will employee is title VII of the Civil Rights Act of 1964.\textsuperscript{121} Title VII prohibits any discharge motivated by discrimination with regard to race, color, religion, sex, or national origin.\textsuperscript{122} Numerous

interest in job security, particularly when continued employment is threatened . . . because the employee has refused to act in an unlawful manner or attempted to perform a statutorily prescribed duty, is deserving of recognition”), answer conformed to, 538 F. Supp. (D. Md. 1982), aff’d in part and rev’d in part, 830 F.2d 1303 (4th Cir. 1987).

\textsuperscript{117} Makovi, 316 Md. at 627-31, 561 A.2d at 191-93 (Adkins, J., dissenting). The majority notes that “exclusivity” can have a number of meanings.

If abusive discharge does not lie and there is no remedy for the employer’s conduct other than that provided in the anti-discrimination statute, the statutory remedy is exclusive because it is the only available remedy. Exclusivity of the statutory remedy as a rationale [when courts examine the scope of the tort] . . . has a number of meanings in the cases. It can mean statutorily expressed or implied preemption of all other remedies. Exclusivity, as a rationale, can also mean either that exhaustion of administrative remedies is required or that primary jurisdiction lies in the anti-discrimination enforcement agency before an independent action may be pursued.

Id. at 613, 561 A.2d at 184. The dissent interprets the majority’s approach to exclusivity as “functionally the same as though it applied the concept of legislative preemption.” Id. at 630, 561 A.2d at 192 (Adkins, J., dissenting). The dissent further notes that “[t]he history of Title VII and the pertinent portions of Article 49B belie that line of reasoning.” Id.

\textsuperscript{118} State Comm’n on Human Relations v. Amecon Div. of Litton Sys., 278 Md. 120, 126, 360 A.2d 1, 5 (1976); see 53 Am. Jur. 2d Master and Servant § 27, at 104 n.16 (1970) and cases cited therein. The at-will rule developed in the United States in the late 19th and early 20th century because it was ideally suited to the rapidly industrializing economy and the growing acceptance of the freedom-of-contract ideology. Note, Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception, 96 Harv. L. Rev. 1931, 1933-34 (1983). The rule soon became accepted as a standard of our legal culture, but it has suffered substantial erosion in recent years. Id.

\textsuperscript{119} See infra notes 121-126 and accompanying text.

\textsuperscript{120} See infra notes 127-132 and accompanying text.


\textsuperscript{122} Id.
other federal statutes prohibit the at-will discharge of an employee. Article 49B of the Maryland Code contains prohibitions nearly identical to those of title VII against employment discrimination, and several other Maryland statutes restrict an employer's absolute right to discharge an at-will employee in other circumstances. These statutes regulate, in a piecemeal manner, the employer's right to discharge at will.

Many jurisdictions recognize abusive discharge as a judicial exception to the at-will rule to lessen the rule's harsh impact. The majority of courts that recognize the tort do so under the "public policy" exception, that is, an employee may recover damages from the employer if the reasons for the employee's termination undermine an important public policy. When statutory employment discrimination law overlaps with the judicially recognized public policy exception, the question arises whether wrongful discharge


126. Abramson & Silvestri, supra note 125, at 262.

127. See Adler, 291 Md. at 36, 432 A.2d at 461; infra note 159.


129. Id. The declaration of public policy is normally a function of the legislative branch. See First Nat'l Bank v. Fidelity & Deposit Co., 283 Md. 228, 239, 389 A.2d 359, 365 (1978) (stating that "the legislature is the normal policy-declaring department of the government").
remedies are to supplement or to supplant the existing framework of federal and state laws.\textsuperscript{130}

A majority of courts favor the employer's position, allowing abusive discharge actions only as a gap-filler when statutory provisions provide no protection.\textsuperscript{131} Other courts have accepted the employee's view that the existence of a statutory remedy does not restrict the claim of abusive discharge, at least in the absence of leg-

\begin{footnotesize}
\textsuperscript{130} See Makovi, 316 Md. at 608, 561 A.2d at 181 (the issue before the court was "the legal effect of the recognition of abusive discharge when superimposed on the preexisting framework of anti-discrimination legislation.").

\textsuperscript{131} Id. at 613-21, 561 A.2d at 184-88; see Grubba v. Bay State Abrasives Div. of Dresser Indus., Inc., 803 F.2d 746, 747 (1st Cir. 1986) (holding that the wrongful discharge "cause of action exists only when there is no other adequate way to vindicate the public policy"); Bruffett v. Warner Communications, Inc., 692 F.2d 910, 919-20 (3d Cir. 1982) (refusing to recognize a common-law action for discharge or for failure to hire on the basis of handicap or disability because "the only Pennsylvania cases applying the public policy exception have done so where no statutory remedies were available"); Lapinad v. Pacific Oldsmobile-GMC, Inc., 679 F. Supp. 991, 993-94 (D. Haw. 1988) (refusing to extend the public policy exception to discharge on grounds of sex discrimination when statutes creating that policy provided a remedy); Napoleon v. Xerox Corp., 656 F. Supp. 1120, 1125 (D. Conn. 1987) (holding that because the plaintiff has an explicit statutory remedy, he may not circumvent the statute by the assertion of a private cause of action for discharge on the grounds of race); Salazar v. Furr's, Inc., 629 F. Supp. 1403, 1408 (D.N.M. 1986) (concluding that the tort of wrongful discharge does not extend to cases for which title VII and its state counterpart provide a remedy); Greene v. Union Mut. Life Ins. Co., 623 F. Supp. 295, 299 (D. Me.) (holding that Maine does not recognize the tort of wrongful discharge in violation of public policy against age discrimination due to available statutory remedies), vacated, 764 F.2d 19 (1st Cir. 1985); Crews v. Memorex Corp., 588 F. Supp. 27, 29 (D. Mass. 1984) (holding that the tort was not available for discharges on age discrimination grounds because statutory remedy was available), summary judgment granted, 677 F. Supp. 63 (D. Mass. 1987); Chekey v. BTR Realty, Inc., 575 F. Supp. 715, 717 (D. Md. 1983) (refusing to recognize abusive discharge action on age discrimination grounds because available statutory remedies exist under the Age Discrimination in Employment Act, 29 U.S.C. §§ 626, 633(a) (1982) and Md. ANN. CODE art. 49B, §§ 9-11 (1986 & Supp. 1989)); Brudnicki v. General Elec. Co., 535 F. Supp. 84, 89 (N.D. Ill. 1982) (holding that no cause of action for retaliatory discharge exists where title VII and state statute establish exclusive remedies for the discharge); McCluney v. Jos. Schlitz Brewing Co., 489 F. Supp. 24, 26 (E.D. Wis. 1980) (concluding that the rationale for the public policy exception is that a private remedy should be implied for employment discharges violative of public policy, when there is no other adequate remedy to vindicate such policy); Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1055 (E.D. Pa. 1977) (holding that application of the public policy exception requires that the discharge not only violate some well-established public policy, but also requires that no other remedy exist to protect the employee's interest), modified, 619 F.2d 276 (3d Cir. 1980); Howard v. Dorr Woolen Co., 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980) (holding that the proper remedy for unlawful age discrimination is statutory and therefore the discharge of an employee because of age or sickness does not fall within the public policy exception to the at-will rule); Allen v. Safeway Stores, Inc., 699 P.2d 277, 284 (Wyo. 1985) (holding that "[i]f there exists another remedy for violation of the social policy which resulted in the discharge of the employee, there is no need for a court-imposed separate tort action premised on public policy").
\end{footnotesize}
In 1981, the Maryland Court of Appeals recognized the tort of abusive discharge under the public policy exception to the at-will doctrine in Adler v. American Standard Corp. The court held that an at-will employee can maintain a cause of action for abusive discharge when the employee’s interest in job security deserves recognition. The court said that such an interest deserves recognition “when continued employment is threatened not by genuine dissatisfaction with job performance but because the employee has refused to act in an unlawful manner or attempted to perform a statutorily prescribed duty.” More precisely, the court found that an action for abusive discharge exists “when the motivation for the discharge contravenes some clear mandate of public policy.” The court addressed what it perceived to be a void in the law, but did not resolve whether abusive discharge is pre-empted or otherwise unavailable when an alternative civil remedy exists.

Following the Adler standard is troublesome because the courts have been unable to define the term “public policy” beyond a “relatively indeterminate description.” Courts that have attempted to define "public policy" have done so in a manner that makes it difficult for courts to apply the principle with any degree of certainty.


134. Id. at 42, 47, 432 A.2d at 470, 473.

135. Id. at 42, 432 A.2d at 470.

136. Id. at 47, 432 A.2d at 473.

137. Id. at 43, 432 A.2d at 471. Writing for the court, Chief Judge Murphy stated that “[t]he common law terminable at will doctrine in Maryland is, of course, subject to modification by judicial decision where this Court finds that it is no longer suitable to the circumstances of our people.” Id. at 42-43, 432 A.2d at 471.

138. See Makovi, 316 Md. at 608, 561 A.2d at 181.

139. Maryland-Nat’l Capital Park & Planning Comm’n v. Washington Nat’l Arena, 282 Md. 588, 605, 386 A.2d 1216, 1228 (1978). The Court of Appeals stated: [J]urists to this day have been unable to fashion a truly workable definition of public policy. Not being restricted to the conventional sources of positive law (constitutions, statutes and judicial decisions), judges are frequently called upon to discern the dictates of sound social policy and human welfare based on nothing more than their own personal experience and intellectual capacity. . . . Inevitably, conceptions of public policy tend to ebb and flow with the tides of public opinion, making it difficult for courts to apply the principle with any degree of certainty.

Id. at 605-06, 386 A.2d at 1228 (citations omitted).
define the public policy doctrine have relied on constitutions, legislative enactments, prior judicial decisions, or administrative regulations as sources of public policy. Although these provisions provide loose guidelines for the courts, Adler leaves uncertain the scope of the public policy exception.

3. Analysis.—At first glance, the majority’s decision appears to have harsh consequences for at-will employees. The exclusive nature of the available common-law and statutory remedies limits the means by which employees harmed by discrimination may vindicate their rights. As the dissent opines, the choice of available common-law or statutory remedies is nevertheless meaningful to the discrimination victim who may prefer conciliation with the employer under a statute’s administrative scheme over litigation.

Despite these considerations, the majority was correct in its decision: “Abusive discharge is inherently limited to remedying only those discharges in violation of a clear mandate of public policy which otherwise would not be vindicated by a civil remedy.” The court makes a threefold argument to support its conclusion. First, the Adler decision inherently limits the circumstances in which an employee may bring an abusive discharge action. The decision did not give blanket protection to all public policy violations. The Adler court merely intended to fill a void in the law when it recognized the tort of abusive discharge. Second, notwithstanding the nonexclusive language of title VII and article 49B, the state courts have the discretion to set the parameters of a common-law cause of action. Third, awarding tort damages to vindicate the public policy goals of these statutes would upset “the balance between right and remedy struck by the Legislature in establishing the very policy relied upon.” While the dissent makes note of rele-

140. Id. The courts foster a case-by-case determination of public policy when they create policy without legislative guidance. This lack of direction also gives little guidance to employers or employees in determining their actions in the work place. Abramson & Silvestri, supra note 125, at 270-71.
141. Abramson & Silvestri, supra note 125, at 270-71.
142. Makovi, 316 Md. at 643-44, 561 A.2d at 199 (Adkins, J., dissenting).
143. Id.
144. Id. at 605, 561 A.2d at 180.
145. Id. at 609-10, 561 A.2d at 182.
146. Id.
148. Makovi, 316 Md. at 621, 561 A.2d at 188.
149. Id. at 626, 561 A.2d at 190.
vant considerations,\textsuperscript{150} it overlooks the underpinning of the majority’s decision; the Adler court adopted the tort to remedy discharges that are not prohibited expressly by statute, yet violate public policy.\textsuperscript{151}

The Makovi majority first addressed whether Adler afforded an additional remedy for a discharge specifically precluded by an existing statutory proscription and remedy.\textsuperscript{152} The dissent accurately states that Adler did not expressly limit the use of an abusive discharge action as an alternative to the relief that existing statutes provide; nor did Adler explicitly differentiate among motives underlying public policy violations.\textsuperscript{153} The quintessence of the Adler opinion, however, logically commands the conclusion that abusive discharge is a limited tort.\textsuperscript{154} The Adler court clearly acted out of concern for the absence of any remedy for certain employee discharges.\textsuperscript{155} In Makovi, the Court of Special Appeals correctly interpreted Adler when it stated:

It does seem clear, however, that the Court was focusing on what it perceived to be a void in the law—a discharge not expressly and directly precluded by some specific stat-

\textsuperscript{150} The dissent would have accepted Makovi’s claim for the following reasons. First, Adler recognized an action for abusive discharge, without express limitation, whenever the motivation for the discharge violates a clear mandate of public policy. Makovi, 316 Md. at 628, 561 A.2d at 191 (Adkins, J., dissenting); \textit{see infra} note 153 and accompanying text. Article 49B and title VII established that sex discrimination in employment violates public policy. According to the dissent, “[i]ronically, however, the majority makes the statutes that establish the public policy, allegedly contravened here, the means of depriving Makovi of the benefits of an abusive discharge action.” Makovi, 316 Md. at 630, 561 A.2d at 192 (Adkins, J., dissenting). Second, federal and state legislatures intended that remedies under the antidiscrimination statutes be nonexclusive. \textit{Id.} at 630, 561 A.2d at 192. Thus, title VII and article 49B do not pre-empt common-law remedies for abusive discharge. \textit{Id.} at 631-43, 561 A.2d at 192-95; \textit{see infra} note 163 and accompanying text. Finally, the availability of multiple remedies supplements rather than hinders the goals of antidiscrimination statutes. Makovi, 316 Md. at 643-46, 561 A.2d at 199-200 (Adkins, J., dissenting); \textit{see infra} note 168 and accompanying text.

\textsuperscript{151} 316 Md. at 611-12, 561 A.2d at 183; \textit{see infra} notes 154-161 and accompanying text.

\textsuperscript{152} 316 Md. at 609-12, 561 A.2d at 182-83.

\textsuperscript{153} \textit{Id.} at 628, 561 A.2d at 191 (Adkins, J., dissenting).

\textsuperscript{154} \textit{Id.} at 609, 561 A.2d at 182.

ute but which nevertheless contravened some other general statement of public policy. If there were already an adequate alternative remedy in existence, the legitimate interest of the employee that the Court identified as being deserving of recognition would indeed have attained that recognition, and the newly created common-law remedy would be unnecessary to assure its protection.\textsuperscript{156}

Thus, an abusive discharge action was not intended to replace existing statutory remedies, particularly those that provided an effective remedy for the unlawful act.\textsuperscript{157} As the Court of Appeals noted, the majority of courts that have addressed the issue similarly have held that the tort is not available for a discharge protected under a statute which confers a remedy.\textsuperscript{158}

In addition, all of the cases from other jurisdictions that the \textit{Adler} court discussed dealt with discharges based on employee conduct.\textsuperscript{159} None of the cases dealt with discharges based on factors of employee status such as race, sex, age, religion, or national origin.\textsuperscript{160} This distinction between status and conduct as a basis for abusive discharge is legitimate because federal and state statutes sufficiently protect status-based dismissals.\textsuperscript{161}

\begin{footnotesize}
\begin{enumerate}
\item 156. \textit{Makovi}, 75 Md. App. at 64, 540 A.2d at 497.
\item 157. \textit{Id.} The court in \textit{Ewing v. Koppers Co.}, 312 Md. 45, 537 A.2d 1173 (1988), stated that an employer who discharges an employee in retaliation for the employee’s filing a worker’s compensation claim violates a clear mandate of public policy. \textit{Id.} at 50, 537 A.2d at 1175. The public policy at stake was that in \textit{Md. Ann. Code} art. 101, § 39A (1985), which makes this type of retaliation a criminal offense. The dissent argues that “[a] statutory remedy that provides no direct relief to the discharged employee is no bar to an \textit{Adler} tort action.” \textit{Makovi}, 316 Md. at 629, 561 A.2d at 192 (Adkins, J., dissenting). This is correct; however, Makovi’s debilitating problem is that title VII and article 49B do provide direct relief. \textit{Makovi}, 75 Md. App. at 64, 540 A.2d at 497. The public policy interest of her tort claim rests on the very statute that also provides a civil remedy.
\item 158. See supra note 131.
\item 159. \textit{Makovi}, 316 Md. at 610, 561 A.2d at 182. The discharge cases discussed in \textit{Adler} were based on three broad categories of employee conduct: (1) discharge for refusing to commit an unlawful or wrongful act; (2) discharge for performing an important public obligation; and (3) discharge for exercising a statutory right or privilege. See \textit{Adler v. American Standard Corp.}, 291 Md. 31, 37-38, 432 A.2d 464, 468 (1981), \textit{answer confirmed to}, 538 F. Supp. 572 (D. Md. 1982), \textit{aff’d in part and rev’d in part}, 830 F.2d 1303 (4th Cir. 1987); see, e.g., \textit{Perks v. Firestone Tire & Rubber Co.}, 611 F.2d 1363, 1364 (3d Cir. 1979) (employee fired for refusal to take polygraph test); \textit{Tameny v. Atlantic Richfield Co.}, 27 Cal.3d 167, 167, 610 F.2d 1390, 1331, 164 Cal. Rptr. 839, 840 (1980) (employee discharged for refusing to participate in illegal price-fixing scheme); \textit{Sheets v. Teddy’s Frosted Foods, Inc.}, 179 Conn. 471, 473, 427 A.2d 385, 386 (1980) (employee fired for insisting that employer comply with state and federal product labeling and licensing law).
\item 160. \textit{Adler}, 315 Md. at 610, 561 A.2d at 182.
\item 161. See supra notes 93, 95-98 and accompanying text.
\end{enumerate}
\end{footnotesize}
Next, the majority addressed whether an abusive discharge claim is pre-empted when the public policy basis of the employee’s claim is grounded in a statute that carries its own remedy for violations of that policy.\textsuperscript{162} The dissent contended that Makovi had a valid cause of action because the legislative intent behind the antidiscrimination statutes is expressly nonexclusive.\textsuperscript{163} Although the

\begin{itemize}
\item \textsuperscript{162} Makovi, 316 Md. at 621, 561 A.2d at 188; see Chekey v. BTR Realty Inc., 575 F. Supp. 715, 717-18 (D. Md. 1983) (holding that “the Maryland courts have not recognized a judicial exception to the terminable at will doctrine for a violation of clear public policy where a statutory exception already exists to redress violations of that public policy”).
\item \textsuperscript{163} In 1976, the General Assembly rejected several bills that proposed compensatory and punitive damages when it considered remedies under article 49B. See, e.g., S. 288, Md. Gen. Assembly (1976) (proposing general compensatory damages); S. 569, Md. Gen. Assembly (1976) (proposing compensatory and punitive damages, including damages for pain of mental anguish and humiliation). When the legislature added a provision for monetary damages to article 49B in 1977, however, they adopted language nearly identical to that in title VII’s remedy provision. Article 49B states:
\begin{quote}
If the respondent is found to have engaged in or to be engaging in an unlawful employment practice charged in the complaint, the remedy may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief that is deemed appropriate. The award of monetary relief shall be limited to a two-year period, except that such two-year period shall not apply to losses incurred between the time of the Commission’s final determination and the final determination by the circuit court or higher appellate court, as the case may be. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the monetary relief otherwise allowable.
\end{quote}

Md. Ann. Code art. 49B, § 11(e) (1986); see Makovi, 316 Md. at 624-26, 561 A.2d at 189-90 for a discussion of the legislative history of article 49B’s remedy provisions. Similarly, title VII reads:
\begin{quote}
If the court finds that the respondent had intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.
\end{quote}

\end{itemize}

Recently, the Chairman of the House Education and Labor Committee, Augustus Hawkins (D. Calif.), introduced the Civil Rights Act of 1990, which would amend title VII to provide compensatory and punitive damages for victims of intentional employment discrimination. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess. (1990). If passed, compensatory and punitive damages would be available for both
protection of federal and state antidiscrimination legislation is not
pre-emptory, the scope of a judicially created cause of action is a
state law decision.\textsuperscript{164} A court is not obligated to expand the bound-
aries of an abusive discharge action simply because concurrent statutory remedies explicitly proclaim their nonexclusivity.\textsuperscript{165} The
decision lies within the state court's discretion, in this case the Court of Appeals, which adopted the cause of action.\textsuperscript{166}

Finally, the majority addressed the practical effect of allowing
multiple remedies for employment discrimination.\textsuperscript{167} The dissent
defends a scheme of multiple remedies to assist the discharged em-
ployee,\textsuperscript{168} but this assertion clearly is the most troubling aspect of a
concurrent right of action in tort and under a statute. The practical
effect is that discharged employees have inconsistent remedies for
the same discriminatory conduct of an employer.\textsuperscript{169} There is no fea-
sible justification for permitting two employees who suffer an identical economic injury a choice of tort damages or simply a
reimbursement for back pay; such an expansion of remedies would
upset the entire legislative scheme.\textsuperscript{170} The legislature chose to limit
monetary damages to lost wages for this prohibited conduct.\textsuperscript{171} Re-
gardless of the compromise and negotiation that occurs when a leg-
islative body adopts a statutory provision such as article 49B, the
bottom line is that remedies should attempt to make the discharged
employee whole, not punish the employer.\textsuperscript{172} A judicial holding to
the contrary would provide an incongruous choice of relief.\textsuperscript{173}

\textbf{4. Conclusion.}—In Makovi, the Court of Appeals clearly in-
tended to circumscribe narrowly the circumstances in which a claim
for abusive discharge is available. If an antidiscrimination statute

\begin{thebibliography}{9}
\bibitem{164} \textit{Makovi}, 316 Md. at 621-22, 561 A.2d at 188; see Alexander v. Gardner-Denver Co., 415 U.S. 36, 50-51 (1974) (holding that title VII afforded the claimant independent remedies from final arbitration under the nondiscrimination clause of a collective-bargaining agreement); National Asphalt Pavement Ass'n v. Prince George's County, 292 Md. 75, 79-81, 437 A.2d 651, 653-54 (1981) (holding that article 49B is not pre-emptive of the field of employment discrimination).
\bibitem{165} \textit{Makovi}, 316 Md. at 621-22, 561 A.2d at 188.
\bibitem{166} \textit{Id.} at 621, 561 A.2d at 188.
\bibitem{167} \textit{Id.} at 626, 561 A.2d at 190.
\bibitem{168} \textit{Id.} at 643-45, 561 A.2d 199-200 (Adkins, J., dissenting).
\bibitem{169} \textit{See id.} at 609, 561 A.2d at 182.
\bibitem{170} \textit{Id.} at 626, 561 A.2d at 190.
\bibitem{172} Abramson & Silvestri, \textit{supra} note 125, at 272.
\bibitem{173} \textit{Id.}
\end{thebibliography}
vindicates the injury, the employee may not bring a state tort claim. The newly created common-law remedy only seeks to protect legitimate interests that have no protection under a statute. The rationale for this ruling is that: (1) previous case law did not intend to grant unconditional protection to all public policy violations, (2) state courts have the discretion to set the boundaries of a common-law cause of action, and (3) a scheme of multiple remedies would upset the balance struck by the legislature. Makovi resolves the courts' previous confusion about the parameters of the tort, and provides a foundation for removing all statutorily protected employment cases from the domain of abusive discharges actions.

Mark D. Sullivan
Patricia A. Gillis
VII. Property

A. Real Property

In People's Counsel v. Maryland Marine Manufacturing Co., the Court of Appeals held that the State Board of Public Works has the sole authority initially to approve the construction of nonriparian wetland improvements. The holding is based on a straightforward analysis of the Wetlands Act of 1970 (the Act), but the court endorses a reading of the Act that may erode one of the fundamental components of riparian ownership in the State—the rights in submerged lands adjacent to riparian parcels.

In People's Counsel, the Court of Appeals for the first time considered the application of state and county law to the development of submerged land for non-water-dependent use. The rule announced denies counties the power to regulate, through zoning, the initial planning phase of nonriparian improvements. This limitation on the counties' power, however, does not apply to proposed uses that "constitute an improvement to preserve access to navigable water or to protect the shore against erosion." In addition, the court's holding allows counties to impose zoning restrictions on the use of nonriparian improvements once the submerged land has passed into private ownership.

From the point of view of riparian owners and developers, the most significant aspect of the case may be the apparent requirement that owners purchase or lease from the State the submerged lands

2. Id. at 507, 560 A.2d at 39-40.
5. People's Counsel, 316 Md. at 506, 560 A.2d at 39.
6. See People's Counsel's Brief and Appendix at 6, People's Counsel (No. 88-89). A "non-water-dependent use" is one that is not essential to navigation or water use. Id. at 8.
7. People's Counsel, 316 Md. at 506, 560 A.2d at 39; see supra notes 3-4.
8. People's Counsel, 316 Md. at 507 n.9, 560 A.2d at 40 n.9; see also id. at 498, 560 A.2d at 35 (citing Harbor Island Marina, Inc. v. Board of County Comm'rs, 286 Md. 303, 407 A.2d 738 (1979)).
upon which they plan to build nonriparian improvements. The nonriparian use proposed in People's Counsel would have been physically contained within a pre-existing riparian improvement. Therefore, the dispositive factor in the court's holding was the planned use of the improvement under the Act rather than the improvement's direct physical effect on the wetland environment. In addition, because the Board of Public Works has the discretion to set the consideration for the conveyance of submerged lands, the impact that People's Counsel could have on the market value of riparian lots is unknown as yet.

This Note argues that the court correctly applied the Wetlands Act to determine the allocation of authority over land use between state and local governments. Nevertheless, the statute's language and purpose inadequately supports the court's construction of the Act and related provisions, insofar as they affect the distinction between public and private wetlands.

1. The Case.—This appeal resulted from the efforts of the People's Counsel of Baltimore County (People's Counsel) to block the proposed construction of a “floating restaurant” that Maryland Marine Manufacturing Company, Inc. (Maryland Marine) intended to place in the water which fronted its land. Maryland Marine owned a parcel of land on Frog Mortar Creek in Baltimore County. In 1984, a portion of the land was rezoned from residential...
tial' to "business local.' On January 16, 1987, Maryland Marine petitioned the Baltimore County Zoning Board for an opinion on the legality of a proposed "floating restaurant" to be set on pilings that extended 125 feet into the water. Nothing in the record suggests that the proposed structure differed significantly from that of a common wharf or pier.

The Baltimore County Zoning Regulations did not assign zones expressly to submerged lands. The issue before the Commissioner, therefore, was whether "'zoning lines on land extend and comprehend . . . land under water and improvements proposed or erected thereon and apply to riparian owners; further . . . whether or not the Baltimore County Zoning Regulations apply to riparian rights and to improvements erected on tidal waters or land under water.' " The Commissioner concluded that "'those uses permitted on dry land located in [a] particular zone are permitted on tide water rivers, lakes, running streams, or land under water within lines extended from the zoning boundary lines of the dry land to which the 'wet' land is attached . . . .' " People's Counsel appealed to the Board of Appeals, which affirmed the Commissioner's order. People's Counsel then appealed to the Baltimore County Circuit Court. That court also affirmed, reasoning that under Harbor Is-

---

16. Id. at 494, 560 A.2d at 33. The property initially was zoned D.R. 5.5, which allowed residential use only, with a density of 5.5 dwelling units per acre. Id. Before the rezoning, Maryland Marine operated a marina on the property under a special exception to the D.R. 5.5 zoning. Id.

17. The B.L. (Business Local) zone allows for a broad spectrum of uses, including restaurants. BALTIMORE COUNTY, MD., ZONING ORDINANCE § 230.2 (1988).

18. People's Counsel, 316 Md. at 494, 560 A.2d at 33.

19. Id. Several Maryland counties have zoning ordinances that expressly cover submerged lands. See DORCHESTER COUNTY, MD., ZONING ORDINANCE § 6.01 (1982); GARRETT COUNTY, MD., ZONING ORDINANCE art. I, § 101 (1975); KENT COUNTY, MD., ZONING ORDINANCE art. I, § 8 (1975); QUEEN ANNE'S COUNTY, MD., ZONING ORDINANCE § 2.10 (1980); ST. MARY'S COUNTY, MD., ZONING ORDINANCE art. 2, § 20.04(4) (1978) (amended as of 1982); TALBOT COUNTY, MD., ZONING ORDINANCE § 200 (1983); WORCESTER COUNTY, MD., ZONING ORDINANCE § 1.106(a) (1978). Several others zone submerged lands by implication, defining zoning lines as following the center lines of streams or rivers. See CECIL COUNTY, MD., ZONING ORDINANCE § 4.02(5); SOMERSET COUNTY, MD., ZONING ORDINANCE § 2.5 (1976). While the case, as decided, affects counties and riparian owners throughout the State, the issue likely would have been framed more in terms of fundamental riparian property rights had it arisen in one of these counties.

20. People's Counsel, 316 Md. at 494, 560 A.2d at 33.

21. Id. at 495, 560 A.2d at 34.

22. See id. at 496, 560 A.2d at 34; see also People's Counsel v. Williams, 45 Md. App. 617, 623, 415 A.2d 585, 588 (1980). In People's Counsel v. Williams, the Court of Special Appeals stated that [s]ection 524.1 of the Baltimore County Charter granting to the People's Counsel the status of one who may be "aggrieved" by a decision of the board of
land Marina, Inc. v. Board of County Commissioners, counties had the right to zone land under water, and refusing to "substitute its judgment for that of an administrative agency." The Court of Appeals granted certiorari before consideration by the Court of Special Appeals to consider "the right of riparian owners to construct improvements from their land into the tidal waters of the State, and the zoning power of counties in relation to these improvements." The court found that the hotly contested issue of whether the Baltimore County Zoning Ordinance could be construed to extend existing zoning lines on land into the water was not dispositive. The court instead addressed the more fundamental appeals and therefore entitled to appeal therefrom does not enlarge or extend the powers granted to the County by Article 25A and is therefore permissible under the Maryland Constitution.

Id.

24. People's Counsel, 316 Md. at 496, 560 A.2d at 34.
25. Id. at 493, 560 A.2d at 33. The Court of Appeals noted that a reviewing court must uphold an administrative agency's order if the record supports the agency's conclusion and the agency has not based its order on an error of law. Id. at 496-97, 560 A.2d at 34-35. If the agency's order is based on an error of law, however, the reviewing court may reverse the agency's decision without constraint. The court further noted that the issues in the instant case concerned "purely legal questions, such as the proper interpretation of § 417 of the BCZR [Baltimore County Zoning Regulations], the scope of a charter county's zoning power, and the extent of the riparian owner's right to construct improvements into the water." Id. at 497, 560 A.2d at 35.

The court framed the question presented as: "whether current Baltimore County Zoning Regulations ... are applicable to a riparian owner's proposed construction of a 'floating' restaurant on a pier extending 125 feet from the shoreline into the water in front of the owner's property." Id. The litigants, however, posed somewhat different questions. People's Counsel framed the issues more abstractly, emphasizing the nature of the use:

1. Whether the Comprehensive Zoning Ordinance (Regulations and Maps) of Baltimore County, a Home Rule County, Consistent with the Public Trust Doctrine and Applicable Public General Law, Authorizes Independent Principal Uses in the Tidal Waters of the Chesapeake Bay; Whether, Rather, the Ordinance Contemplates Wharves, Piers, Docks and Like Structures?
2. Whether There Was Any Valid Delegation of Authority to the County Administrative Agencies to Make Zoning Decisions of a Legislative Nature Concerning the Character of Principal Uses in the Waterways?

People's Counsel's Brief and Appendix at 2, People's Counsel (No. 88-89). Maryland Marine, on the other hand, approached the issue of fundamental property rights more directly, but formulated such a generalized question that it diverted the focus from the Wetlands Act:

1. Whether a riparian owner of land is entitled to construct structural improvements over tide water rivers, lakes and running streams or land under water?
2. Whether Baltimore County Zoning lines on dry land extended and comprehended tide waters and rivers, or land under water and improvements proposed or erected thereon by riparian owners?

Maryland Marine Manufacturing Company's Brief at 3, People's Counsel (No. 88-89).
issue of the scope of a landowner's right to improve submerged land that fronts riparian property.26

The litigants had invoked section 417 of the Zoning Ordinance,27 which provides a formula to calculate the extension of boundary lines on riparian lots into the tidal waters. The court found that the lines which the zoning ordinance prescribed were intended merely to "determine where waterfront structures may be placed, and do not purport to determine what kinds of waterfront structures may be built."28 Even if the court had found that section 417 extended zones into the water, however, the finding would have been irrelevant because the court concluded that the State owned the lands in question.29 Because county zoning does not bind the State,30 the question of zoning authority does not arise until privately held land is at issue. The court effectively extinguished the issue of county land use controls, and implicitly narrowed the case to two questions: what building rights does a riparian owner have, and in what manner shall the State regulate those rights?31

2. Legal Background.—While the facts of People's Counsel at first glance suggest a very narrow inquiry into public law, the case brings to the surface long-brewing uncertainties as to the substantive nature of riparian ownership.32 Before People's Counsel, divergent views within the State's case law as to the scope of the riparian owner's common-law rights33 and the unarticulated effect of the Wetlands Act of 197034 made it difficult to assess with any degree of certainty the legality of many proposed improvements.

The differences in the case law as to the source and scope of riparian rights made for credible arguments that supported vastly different positions on the meaning of title to riparian land. At one extreme, owners had a convincing argument that, subject to the ap-

26. People's Counsel, 316 Md. at 498, 560 A.2d at 35.
28. People's Counsel, 316 Md. at 497-98, 560 A.2d at 35 (emphasis in original). There is some indication, however, of a legislative intent behind Ordinance 417 to regulate the type of structures and permissible uses. See Baltimore County Council Bill No. 64, 1963.
29. People's Counsel, 316 Md. at 499-500, 560 A.2d at 35-36.
30. See City of Baltimore v. State, 281 Md. 217, 223, 378 A.2d 1326, 1329-30 (1977) (State is not bound by an enactment of the General Assembly, including authorizations of county zoning, unless specifically provided for by statute).
31. People's Counsel, 316 Md. at 499, 560 A.2d at 35.
32. These uncertainties are evidenced by the litigants' inability to agree upon the basic genus of the issues themselves as well as the fluid manner in which the court framed them.
33. See, e.g., 316 Md. at 501 n.5, 560 A.2d at 37 n.5; see also infra note 48.
patible county zoning provisions, federal, state, and local regulations, and the Board of Public Works’ approval, the right to construct improvements of their choice into the state-owned tidal waters was inherent in riparian ownership itself. At the other extreme, environmentalists had authority for the position that the riparian owner’s “right” to construct any improvements at all into the water was conferred by statute, and could be expanded or restricted at the legislature’s will. Under the Act, therefore, the riparian owner had no property “right” to construct improvements not dependent on water; the owner could do so only with special permission from the Board of Public Works. Under People’s Counsel, there is no common-law right to improve submerged lands. Any nonriparian improvement constructed with the Board of Public Works’ approval must be made on private wetlands.

The State’s riparian owners traditionally have enjoyed a variety of fundamental rights in the water and submerged lands that abut their property. These include the well-established right to the “enjoyment of a stream in its natural flow, quantity and quality,” subject to the duty “not to interfere with an equally beneficial enjoyment of it by others.” As a well-established principle of common law, the riparian owner also has title to any fast land created by a “gradual and imperceptible recession of the waters, [accretion] or any gain by the gradual and imperceptible formation of what is called alluvion, from the action of the shore in washing it against the fast land of the shore.” The right to gain title in wetlands that naturally take on the character of fast land “is considered as an interest appurtenant to the principal land, and belonging, in the nature of an incident, to the ownership of that, rather than as something acquired by prescription or possession . . . .”

Maryland authority, including People’s Counsel, is in general accord regarding the riparian rights summarized above. It is when man-made additions to the submerged land appurtenant to a ripa-

35. See infra text accompanying notes 39-42.
37. 316 Md. at 503 n.6, 560 A.2d at 38 n.6.
38. Id. at 507 n.9, 560 A.2d at 39-40 n.9.
40. Jessup, 180 Md. at 397, 24 A.2d at 790. The Act effectively has made this common-law duty the object of pre-emptive administrative enforcement.
42. Id. at 35.
43. 316 Md. at 501-02, 560 A.2d at 37.
rian lot are at issue that the cases differ as to the rights intrinsic to a riparian title. In *Baltimore & Ohio Railroad v. Chase*, the Court of Appeals stated that the riparian owner, "whether his title extends beyond the dry land or not, has the right of access to the navigable part of the river from the front of his lot, and the right to make a landing, wharf, or pier for his own use, or for the use of the public . . ." as a matter of common law. *Baltimore & Ohio Railroad* does not declare that the riparian owner has common-law title in the submerged lands over which improvements can be made; the professed common-law property right is simply the right to make the improvements, even over submerged lands that concededly belong to the State. Under this scheme, once the riparian owner actually makes the improvements, title to them vests in the owner. This title, however, derives from a state franchise, and the cases describe it as "quasi-property." For the purpose of analyzing *People's Counsel*, this component of the State's law is significant because it indicates that there is an absolute riparian property right to "wharf out" whether title in the submerged lands is held publicly or privately.

The opposing line of cases within Maryland law suggests that statutes confer all rights that concern improvements made into the water. By denying the existence of the common-law property

44. 43 Md. 23 (1875).
45. *Id. at 35* (emphasis added). The argument that the right to "wharf out" derives from the common-law concept of riparian property has been echoed by the Court of Appeals in *Causey v. Gray*, 250 Md. 380, 387, 243 A.2d 575, 581 (1968).
46. *See Causey*, 250 Md. at 387, 243 A.2d at 581.
47. Other jurisdictions have recognized remarkably broad common-law rights to build for any purpose, and refused to make the riparian/nonriparian distinction of the Wetlands Act and *People's Counsel*. *See, e.g.*, *State v. Korrer*, 127 Minn. 60, 148 N.W. 617 (1914). The Minnesota court said that riparian rights include the right . . . to build and maintain, for [the owner's] own [use] and the public use, suitable wharves, piers and landings, on and in front of his land . . . and to this end exclusively to occupy the surface of the bed of the water, subordinate and subject only to the rights of the public, and to such needful rules and regulations for their protection as may be prescribed by competent legislative authority. *This private right of use and enjoyment is not limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right.* *Id. at 71-72, 148 N.W. at 622* (emphasis added).
48. For a list of cases that stand for this proposition, see *People's Counsel*, 316 Md. at 501 n.5, 560 A.2d at 37 n.5. One of these cases, *Goodsell v. Lawson*, 42 Md. 348 (1875), decided the same year as *Baltimore & Ohio R.R. v. Chase*, 43 Md. 23 (1875), directly contradicts *Baltimore & Ohio R.R.*, holding that "the riparian owner had no right whatever at common law to make improvements into the water in front of his land." *Goodsell*, 42 Md. at 362. In *Wicks v. Howard*, 40 Md. App. 135, 136, 388 A.2d 1250, 1251 (1978), the Court of Special Appeals held that "[i]n the absence of specific statutory authority to the contrary, therefore, the right to extend permanent improvements
right to "wharf out," these cases imply that the riparian owner's right to construct improvements is dependent entirely on the prevailing state policy as expressed through legislative enactment. Under this view, the statute may be characterized as creating the right to construct improvements rather than simply regulating it. The court in People's Counsel follows the view of this second line of cases. The court did not overrule Baltimore & Ohio Railroad or Causey v. Gray expressly but, in resolving the conflict between the common-law and statutory-right cases, their continued precedential value is doubtful. At the time the court decided both Baltimore & Ohio Railroad and Goodsell v. Lawson, the statutory source of riparian rights was the Act of 1862, the predecessor to the Wetlands Act, under which the Court of Appeals decided People's Counsel. The
Act of 1862 was far more permissive than the present one with regard to the scope of allowable improvements. In an opinion dated August 24, 1972, the Maryland Attorney General stated that "[t]he unequivocal intent of the [Wetlands Act of 1970] is to limit the rights, privileges and enjoyment of riparian ownership. . . . Additionally, the 'improvements' contemplated within the wetlands law connote a more restrictive use of that term than in [the 1862 Act] . . . ." Having settled on the Wetlands Act as the source of the riparian owner's "right" to develop submerged land, the court found that the facts in People's Counsel easily fell into the nonriparian category.

3. Analysis.—The type of development that this case contemplates appears to be exactly the type which the legislature sought to regulate at the state level. The manner in which the court chose to implement the statutes' regulatory powers, however, appears to reach far beyond the language of section 9-201 of the Wetlands Act and section 10-402 of the State Finance and Procurement Article.

In cases that involve proposed uses not related directly to water access or erosion prevention, People's Counsel has transformed the "right" to develop improvements on state-owned submerged lands into the right to apply to the State for a grant or lease of those lands. Riparian owners who seek to construct such improvements first must obtain the Board of Public Works' approval for the proposed use, and then negotiate a lease or grant of the land on which the improvements are to be built. Only after the completion of these steps does power to approve or prohibit the proposed use through zoning vest in the county.

Although the statute intends to regulate nonriparian uses, it does

54. See generally Larmar Corp., 262 Md. at 38-39, 277 A.2d at 433 (citing the 1862 Act, Md. Ann. Code art. 54, § 46 (1957) (repealed 1984), which provided that "[t]he proprietor of land bounding on any navigable waters of this State, is hereby declared to be entitled to the exclusive right of making improvements into the waters in front of his said land; such improvements . . . shall pass to the successive owners . . . as incident to their respective estates.").


56. 316 Md. at 506, 560 A.2d at 39.


58. People's Counsel, 316 Md. at 506, 560 A.2d at 39.

59. Thus, while the court's decision reaffirms the counties' abstract power to zone land under water, such zoning actually has binding effect only if it is more restrictive than the State's land use decisions. In other words, the power to zone does not bestow on county governments the right to allow a broader range of uses within their jurisdictions than that which the state agency deems proper.
not by its terms require any purchase or lease of the wetlands to proceed with such a use once duly approved. The Act does not manifest any intent to prohibit nonriparian uses on public wetlands, but rather seems to provide a mechanism for their approval.\textsuperscript{60} While the court never explicitly states that such a conveyance \textit{must} occur before construction can proceed, the court’s language suggests that compliance with the Wetlands Act requires it.\textsuperscript{61} Section 9-201 “does not preclude the owner from developing any other use \textit{approved} by the Board.”\textsuperscript{62} By its plain meaning, the statute requires only that a proposed nonriparian development of wetlands withstand the Board of Public Works’ scrutiny, not that it induce the Board to sell or lease the land.

The court’s restriction of public wetlands appears at first to enhance the counties’ control over riparian development, but in fact does nothing more than the statute’s plain language indicates. The counties have a strong interest in retaining some measure of the zoning power over submerged lands, yet the court is unwilling to submit state-owned lands to this power. The decision suggests that the counties will gain zoning power once the submerged lands pass into private hands as required by the opinion.\textsuperscript{63} The statute, however, provides that \textit{any} improvements, once legally constructed, become the property of the riparian owner without the need for a conveyance at all.\textsuperscript{64} Therefore, even without the drastic step of requiring the riparian owner to purchase an interest in the wetlands,

\begin{itemize}
\item[60.] In § 9-201, which deals exclusively with the State’s wetlands, the legislature provided that “[a] right covered in this subtitle does not preclude the owner from developing any other use approved by the Board.” \textit{Md. Nat. Res. Code Ann.} § 9-201(a) (1983 & Supp. 1989). The legislature did not demand that other uses be confined to private wetlands. State wetlands are defined as those \textit{not} “transferred by the State by valid grant, lease, patent, or grant confirmed by Article 5 of the Maryland Declaration of Rights . . .” to private parties. \textit{Id.} § 9-101(n).
\item[61.] \textit{People’s Counsel}, 316 Md. at 506, 560 A.2d at 39. “Nevertheless, in furtherance of its plan, Maryland Marine may seek to acquire, by purchase or lease from the State Board of Public Works, that part of the State’s submerged land upon which the restaurant is planned to be erected.” \textit{Id.}
\item[63.] \textit{People’s Counsel}, 316 Md. at 507 n.9, 560 A.2d at 40 n.9. “Thus, should the State Board of Public Works permit Maryland Marine to acquire title to the site, § 103.2 [of the Baltimore County Zoning Regulations] may permit zoning of the site by Baltimore County since title to the formerly unzoned land would pass unto private ownership.” \textit{Id.}
\item[64.] \textit{See Md. Nat. Res. Code Ann.} § 9-201(a) (1983 & Supp. 1989). “After an improvement has been constructed, it is the property of the owner of the land to which it is attached.” This provision also would work against the court’s statutory construction, because a legislative intent to require the prior purchase of the wetlands for certain uses would render the clause ineffective.
\end{itemize}
the county zoning authorities would have jurisdiction over completed improvements under the statute's terms.

The court points to the State Finance and Procurement Article, sections 10-305 and 10-402, as guidelines for the sale or lease of wetlands. While these sections do provide clear procedures under which the parties are to carry out such conveyances, they do not purport to render any conveyance necessary in the first place. From an environmental point of view, the court's interpretation of the Wetlands Act is extremely effective: Once a conveyance is required, section 10-402 governs, and its procedural scheme subjects the proposed construction to a more exhaustive review than the Board may have taken on its own.

Kerpelman v. Board of Public Works is the only reported Maryland case that deals with the consideration required for a conveyance under section 10-305. An individual citizen brought the action in that case on the grounds that the discretionary consideration was inadequate. The court never reached the issue of adequacy, holding instead that the plaintiff did not suffer adverse tax consequences as a result of the conveyance and, thus, lacked standing. From an owner's standpoint, the effect of section 10-305(a)(1)'s applicability is unpredictable and potentially onerous.

People's Counsel devoted much of its brief to the argument that the public trust doctrine renders the use of the wetlands as a restaurant impermissible. The court characterized the argument as follows: "[S]ince Maryland's submerged lands are owned by the State in trust for its citizens, it cannot allow these lands to be placed entirely out of its control, such as by a sale or by relinquishing its rights in the land to riparian owners." The court declined to de-

66. People's Counsel, 316 Md. at 506, 560 A.2d at 39.
67. Md. State Fin. & Proc. Code Ann. § 10-402(b) (1988). The statute requires the Board to consult "the Department of Natural Resources ... the Maryland Agricultural Commission, the agricultural stabilization and conservation committee of the county in which the land lies; and the soil conservation district committee of the county in which the land lies." Id. There also are requirements of a public hearing and written notice. Id. § 10-402(c).
69. Id. at 443, 276 A.2d at 60.
70. People's Counsel's Brief and Appendix at 8-16, People's Counsel (No. 88-89).
71. The public trust doctrine holds simply that the state owns lands under water in trust for the citizens' benefit, and that the state may not permit uses over the water, or dispose of land under the water, in such a way as to interfere with the public's paramount rights of navigation, commerce, and fishing. The leading case on the doctrine is Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).
72. People's Counsel, 316 Md. at 499 n.4, 560 A.2d at 36 n.4.
cide the question because the State Finance Act explicitly allows sales of submerged lands to riparian owners. The court’s requirement that nonriparian construction take place only on private wetlands will result in a transfer of State wetlands to private hands. As such, the court’s decision is just as unsatisfactory to those who urge the application of the public trust doctrine as it is to owners and developers.

A direct challenge to the legislative authority to convey wetlands to private parties likely would not succeed in this case. Under Illinois Central Railroad Co. v. Illinois, the state may grant parcels that “can be disposed of without detriment to the public interest in the lands and waters remaining.” Kerpelman directly challenges the sale of Maryland wetlands based on a breach of the public trust; it called more clearly for the application of the doctrine than does People’s Counsel. In Kerpelman, the nature of the land’s use required that the land be filled in completely, that there be an annexation of fast land. The case did not deal with the more difficult, novel situation presented here in which a conveyance is required not because of the type of structure but because of the use to which it would be put.

4. Conclusion.—People’s Counsel preserves the counties’ power to zone privately held wetlands as well as the legislative intent to regulate development of the State’s wetlands for nonriparian purposes. The case raises the question of how to decide whether a proposed use of submerged land is sufficiently “riparian” to be allowable without state intervention under the Wetlands Act. Because the facts in this situation fell rather clearly on one side of that question, the standards by which it will be answered in the future are left undefined.

Although People’s Counsel is a decision purportedly governed entirely by statute, the court created a system of regulation by lease and sale that finds little basis in statutory authority. This portion of the court’s opinion likely will be subject to demands for clarification from riparian owners, who have a strong interest in limiting its impact.

74. 146 U.S. 387 (1892); see supra note 71.
75. 146 U.S. at 456.
77. In the future, the court may decide that, while sale or lease of the submerged lands when the Board intends to permit a nonriparian use is a legitimate way of effecting regulation, People’s Counsel, does not formally require such a conveyance.
B. Joint Will Contracts

In Shimp v. Huff, the Court of Appeals addressed whether a surviving spouse is entitled to receive an elective share and a family allowance under sections 3-203 and 3-201 of the Estates and Trusts Article when the deceased spouse previously had contracted to will his entire estate to others through a joint will with his first wife. The court held that section 3-203 entitles a surviving spouse to receive an elective share of the net estate as a matter of public policy "which surrounds the marriage relationship and which underlies the elective share statute." Further, the court found that the family allowance is a just claim against the estate and, thus, is not derived from the net estate. The court relied on section 8-105, which directs the order of payment priorities, to conclude that a family allowance is among the debts and claims which the personal representatives must pay before they disburse the remainder of the estate to creditors and legatees under the will. The court correctly extended elective share rights to surviving spouses in cases that involve a decedent's joint will contract with a former spouse; its analysis, however, lacked a clear articulation of the public policy on which it relied to justify limiting contract beneficiaries' rights. By contrast, the court's resolution of the family allowance issue was well reasoned and persuasive.

1. The Case.—On May 8, 1974, Lester and Clara Shimp executed a joint will contract. They intended the surviving spouse to

79. Section 3-203 provides in pertinent part:
    (a) General.—Instead of property left to him by will, the surviving spouse may elect to take a one-third share of the net estate if there is also a surviving issue, or a one-half share of the net estate if there is no surviving issue.
    (b) Limitation.—The surviving spouse who makes this election may not take more than a one-half share of the net estate.
80. Section 3-201 provides in pertinent part: "The surviving spouse is entitled to receive an allowance of $2,000 for personal use . . ." Id. § 3-201.
81. Shimp, 315 Md. at 645, 556 A.2d at 263.
82. Id. at 648, 556 A.2d at 264.
83. Id. at 627, 556 A.2d at 254. A former chief judge of the Baltimore City Orphans' Court, the late Philip L. Sykes, noted that a joint will is "one instrument testamentary in character, executed by two persons to effectuate a common testamentary plan. . . ." Probate Law and Practice § 12, n.13 (1956 & Supp. 1983).
In Shimp, the instrument read in pertinent part:
After the payment of all just debts and funeral expenses, we dispose of our estate and property as follows:
ITEM I. A. MUTUAL BEQUEST — We mutually give to whichever of us
receive their entire estate; at the death of the surviving spouse, several third party beneficiaries then would divide the estate among themselves.84 When Clara died in 1975, Lester filed a petition in the Washington County Circuit Court seeking a declaratory judgment to establish his right to execute a new will.85 The circuit court dismissed the petition, and the Court of Special Appeals affirmed.86 Upon further appeal, the Court of Appeals held that Lester could revoke the joint will.87 Because he and his wife had created an enforceable contract between themselves, however, "[a]t his death [the contract] may be specifically enforced in equity or damages may be recovered upon it at law."88 Shimp neither executed a new will nor altered or revoked the joint will contract.89

On April 4, 1985, Lester remarried.90 He died nine months later, leaving his second wife, Lisa Mae, but no surviving children.91 After the joint will was admitted to probate in Washington County, Lisa Mae sought both a family allowance and an elective share of Lester's estate.92 The personal representatives of the estate, Mary V. Huff and Wallace R. Huff, declined both requests.93 Lisa Mae then filed a declaratory judgment action in the circuit court.94

The circuit court held that because Lester had contracted with his first wife to assign his estate in its entirety, he did not hold an

shall be the survivor the entire estate of which we may respectfully [sic] own at our death.

B. SURVIVOR'S BEQUEST — The survivor of us gives the entire estate of his or her property which he or she may own at death as follows:

[The entire estate was devised to third party beneficiaries] . . . .

ITEM III. We, the Testators, do hereby declare that it is our purpose to dispose of our property in accordance with a common plan. The reciprocal and other gifts made herein are in fulfillment of this purpose and in consideration of each of us waiving the right, during our joint lives, to alter, amend or revoke this Will in whole or in part, by Codicil or otherwise, without notice to the other, or under any circumstances after the death of the first of us to die. Unless mutually agreed upon, this Last Will and Testament is an irrevocable act and may not be changed.

315 Md. at 627-28, 556 A.2d at 254.
84. Shimp, 315 Md. at 628, 556 A.2d at 254.
85. Id.
88. Id. at 388, 412 A.2d at 1235-36.
89. Shimp, 315 Md. at 629, 556 A.2d at 254.
90. Id., 556 A.2d at 255.
91. Id.
92. Id.
93. Id.
94. Id.
estate of inheritance at the time of his second marriage. The court characterized Lester as "merely a trustee" of the estate property, and concluded that there was no inheritable estate from which his second wife could take an elective share. Further, because the will contract bequeathed the entire estate, there were no remaining assets from which she could receive a family allowance. Before the Court of Special Appeals could consider the case, the Court of Appeals granted certiorari on its own motion "to resolve the important issues" presented.

2. Legal Background.—There has been a "confused intermingling" of contract, property, and estate law principles in will contract cases. Resolution of the conflict between surviving spouses' rights and those of third party beneficiaries, as well as the courts' reasoning to reach such resolution, has been less than uniform.

The issue of a surviving spouse's right to take an elective share in the face of beneficiaries' conflicting claims under a contract to convey property by will has arisen in a number of different fact situa-

95. Id. at 630, 556 A.2d at 255.
96. Id. To reach this decision, the circuit court judge relied on Cowman v. Hall, 3 G. & J. 398, 401 (Md. 1831), in which the court held that a widow is not entitled to dower in land for which her husband was only a trustee by virtue of a contract to dispose of the land by will which he made prior to the marriage. The Court of Appeals, however, characterized the Cowman transaction as a contract to convey property by deed, rather than a contract to devise property by will. Thus, the court found that Cowman was substantially different and did not apply to the instant case. "[T]he right of a person to transfer property upon his death to others, or the right of a person to receive property by will or inheritance, is not a natural right but a privilege granted by the State." Shimp, 315 Md. at 633-35, 556 A.2d at 256-57.
97. Shimp, 315 Md. at 630, 556 A.2d at 255.
98. Id.
100. One commentator has noted:
At least part of the difficulty arises from the fact that actions to enforce contracts to devise or bequeath are often designated as actions to enforce wills made pursuant to contract. When the will has once been made there is often a tendency to treat the rights under the will and the existing contractual rights as being identical. If the contract is thought of as a contract to pass property at death, and the will thought of as a vehicle for passing the property, much of the confusion and apparent conflicts would disappear. The contract, not the will, gives the promisee a right to the property, and, when litigation arises, it is the contract that must always be established. Once the contractual right is established the interests of the promisee are protected whether or not a will has been executed.

In the great majority of these cases, the decedent breaches a contract to devise property when he dies intestate or executes a nonconforming will. Contract beneficiaries then base their claims on a specific performance theory. In these cases, equity demands that the court consider third party rights acquired after formation of the contract, along with the contract beneficiaries’ rights, even though the beneficiaries’ rights vested immediately after the decedent made the contract. A majority of courts that have addressed this issue have concluded that the surviving spouse had the “superior equities.”

By contrast, contract beneficiaries neither can seek specific performance nor courts use their equitable powers if the decedent has executed a will that conforms to the contract. Instead, contract beneficiaries raise their claims in probate proceedings and under statutory priority rules. The courts first characterize the competing claimants either as legatees or as creditors and then evaluate the claims under the appropriate priority rules. In cases that involved divorce settlements, a number of courts addressing this issue have designated the contract beneficiaries as legatees under the will. These courts subsequently have upheld the surviving spouse’s claim.

---

101. Shimp, 315 Md. at 635, 556 A.2d at 258. The court notes that the issue has arisen in the following fact scenarios: (1) Spouse A enters into a divorce or separation agreement that requires him or her to leave part or all of the estate to the first spouse; Spouse A remarries and then dies. (2) The decedent contracts to make a will that leaves property to children or other relatives. (3) The decedent remarries after contracting to will property in exchange for services, or to refrain from legal action, or to expedite an adoption. The decedent either adheres to the contract and executes a conforming will or the decedent breaches the contract when he executes a nonconforming will or dies intestate. Id. at 636, 556 A.2d at 258.

102. Although remedies at law are available in these cases, contract beneficiaries often proceed on a specific performance theory and the courts base their decisions on a variety of equitable considerations that may not exist in all cases. See, e.g., Wides v. Wides’ Ex’r, 299 Ky. 103, 109-10, 184 S.W.2d 579, 582 (1944) (equity regards statutory policy that enforces dower rights as at least as important as policy of paying decedents’ debts before distributing estate; inequitable to deny second wife’s statutory rights); Patecky v. Friend, 220 Or. 612, 624, 350 P.2d 170, 175 (1960) (when second spouse had no notice of the will contract by surviving spouse prior to remarriage, widow entitled to statutory share); In re Arland’s Estate, 131 Wash. 297, 299, 230 P. 157, 158 (1924) (equities favoring second spouse were based upon “actual consideration”: she lived with decedent for six years and cared for him in his old age). But see Dillon v. Gray, 87 Kan. 129, 132, 123 P. 878, 878-79 (1912) (children’s enforcement of will contract was not inequitable when they provided substantial consideration for contract and father’s marriage to second wife lasted only a short time before he died).

103. Shimp, 315 Md. at 637, 556 A.2d at 259. See generally Lilly, supra note 99, at 199.

104. See Lilly, supra note 99, at 226. “In cases of a conforming will, equitable discretion does not come into play, and beneficiaries’ full recovery will depend solely upon the priorities accorded to spousal rights by the protective statutes.” Id. (emphasis added).
for an elective share over that of the contract beneficiaries because the applicable statutes gave the surviving spouse's elective share priority over the testamentary bequests.\textsuperscript{105}

One court, however, has suggested that using applicable priority statutes to analyze competing claims should be done only in cases that involve divorce settlement agreements.\textsuperscript{106} In this type of dispute, priority rights would not depend on whether the court characterizes the beneficiaries as creditors or as legatees. Instead, the surviving spouse's claim has priority because the decedent held both the legal and beneficial title to the property independently of the first spouse once the separation agreement effectuated the property division. Such a division does not occur when a spouse acquires rights to property under a joint will contract.

There are other arguments against designating contract beneficiaries as legatees when the decedent has executed a conforming

\begin{itemize}
  \item 105. For example, in \textit{In re Hoyt's Estate}, 174 Misc. 512, 516, 21 N.Y.S.2d 107, 111 (Surrogate Ct. 1940), the court found:

\begin{quotation}
[T]he claimants are not creditors under... the separation agreement... [T]he agreement merely created an enforceable obligation to make a testamentary provision for the benefit of the first wife of the [decedent] and his children after her death. The [decedent] performed that agreement. He undertook to do no more. The status of the claimants is therefore that of legatees or beneficiaries under the will. As such legatees or beneficiaries they take subject to the operation of the statutes relating to testamentary dispositions, including the right of the surviving widow to take her intestate share...
\end{quotation}

\textit{Id.; see In re Estate of Dunham}, 36 A.D.2d 467, 470, 320 N.Y.S.2d 951, 954 (1971) (because separation agreement was not intended to make a present transfer, the right of subsequent wife to elect against will of deceased husband was superior to rights of prior wife as legatee under will that complied with separation agreement); \textit{In re Erstein's Estate}, 205 Misc. 924, 930-31, 129 N.Y.S.2d 316, 322-3 (Surrogate Ct. 1954) (interpreting New York statute that governed surviving spouse's right to take intestate share as replacing dower right and, therefore, giving spouse superior rights to will beneficiary); \textit{In re Lewis' Will}, 4 Misc. 937, 939-40, 123 N.Y.S.2d 859, 862-63 (Surrogate Ct. 1953) (distinguishing between aspects of a separation agreement by which former wife was to receive from the decedent's estate continuing annual payments (as a creditor to the estate) and a testamentary disposition (as a legatee)).

\item 106. \textit{Shimp}, 315 Md. at 639, 556 A.2d at 259 (citing \textit{Rubenstein v. Mueller}, 19 N.Y.2d 228, 225 N.E.2d 540, 278 N.Y.S.2d 845 (1967)). In \textit{Rubenstein}, the estate was subject to a joint will providing that, upon the death of the survivor of a married couple, the estate "is" bequeathed to named beneficiaries. The court emphasized the importance of the use of the present tense in the text of the joint will and determined that the surviving husband received only a life estate in the property. \textit{Rubenstein}, 19 N.Y.2d at 232-33, 225 N.E.2d at 542-43, 278 N.Y.S.2d at 848-49. After his death, the testator had no property interest in the estate against which his second wife's right of election could operate. \textit{Id.} In contrast, the \textit{Rubenstein} court explained, because a "divorced husband's property after the [settlement] agreement remains his own individual property to which he holds beneficial as well as legal title, his widow's right of election may be asserted against such assets." \textit{Id.} at 235, 225 N.E.2d at 544, 278 N.Y.S.2d at 850.
\end{itemize}
will. If the decedent issues a will that conforms with the contract, the beneficiaries take as legatees under the will. If, on the other hand, the decedent breaches the contract by dying intestate or by executing a nonconforming will, the beneficiaries are designated as creditors. The anomaly in such cases is that the contract beneficiaries are in a better position if the decedent breaches the contract than they would have been had the decedent adhered to it.

Courts also have resolved the claimants' disputes based on the public policy considerations that underlie will statutes and/or the marriage relationship. Some courts have construed the right of election as the surviving spouse's personal right which no one—not even the deceased spouse—can waive unilaterally. Still others have relied on the general principle that the right to will property is a privilege—rather than an absolute right—which the state grants to individuals, and thus is subject to the limitations that the state may impose, including the statutory elective share that it grants to surviving spouses. Finally, some courts base their decisions to allow a surviving spouse's claim to an elective share on the public policy that surrounds the marriage relationship itself. These courts rely on the principle that "contracts in restraint of marriage are void as against public policy, while anything which tends to prevent marriage, or to disturb the marriage state, is viewed by the law with suspicion and disfavor." To avoid finding that a contract is a restraint of marriage, courts construe will contracts to constructively imply that the parties contemplated at the time they executed the


108. See, e.g., Rubenstein, 19 N.Y.2d at 235, 225 N.E.2d at 544, 278 N.Y.S.2d at 850 (Bergan, J., dissenting) (“The ‘personal right of election’ of a surviving spouse to take his share of the estate . . . is a right which cannot be impaired by any testamentary disposition effected by the other spouse.”); see also In re Estate of Donner, 364 So. 2d 742 (Fla. App. 1978), in which the Florida District Court of Appeals held:

Dower is a right of the wife granted to her by law and vests on the death of the husband . . . . The inchoate right of dower is purely a prerogative of the legislature which may modify or abolish it at will. It is a personal right which may be exercised only by the widow . . . . Upon vesting at the death of the spouse, dower is not subject to, affected by, or altered by the acts of the husband, including, but not limited to, contracts which he may have entered into . . . .

Id. at 751.

109. See, e.g., Erstein's Estate, 205 Misc. at 930-31, 129 N.Y.S.2d at 323 (“Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.”); see also Budde v. Pierce, 135 Vt. 152, 155, 375 A.2d 984, 986 (1977) (“It is a well established rule of law in Vermont that the statutory rights of a surviving spouse are predicated upon sound policy considerations and are to be afforded great weight and deference . . . .”).

contract the possibility that the testator might remarry.111

3. Analysis.—Maryland courts had not addressed before the issue of whether a surviving spouse is entitled to take an elective share and a family allowance when the decedent previously had contracted to will his entire estate to others through a joint will with his first wife.112 The court began its analysis by noting that because Lester's will conformed to the contract, the case did not present a specific performance claim.113 The court acknowledged that it could decide the case by analogy to the divorce cases in which the decedents had left a conforming will and the courts had characterized the beneficiaries as legatees; it declined to do so, however, because of the anomaly that would result: Contract beneficiaries would have greater rights when the decedent had breached the contract than they would when the decedent had adhered to it.114

a. Elective Share.—The court instead relied on the public policy concerns that underlie the elective share statute and that surround the marriage relationship to resolve the issue of priorities between a surviving spouse and the contract beneficiaries.115 The court cited to case law holding that an individual's ability to transfer property at death is a privilege116 that the State grants exclusively by statute.117

111. In Owens, 113 Cal. at 454, 45 P. at 713, the court held:

[I]t must have been within the contemplation of the parties that Lawrence McNallay might marry, for the contract could not have been designed as a restraint upon his marriage, or it would be void. If it was within their contemplation, and the contract embraced the taking of the deceased's entire estate to the exclusion of any future wife or child, then we have no hesitation in saying that the contract was void as against public policy. The only permissible conclusion is, therefore, that the parties contracted in contemplation of that event. Id. at, 45 P. at 713; see also Gall v. Gall, 19 N.Y.S. 332, 335 (Sup. Ct. 1892) (parties never contemplated a restriction upon decedent's right to marry; such contemplation would be void as against public policy); Patecky v. Friend, 220 Or. 612, 627, 350 P.2d 170, 177 (1960) (same). But see Keats v. Cates, 100 Ill. App. 2d 177, 192, 241 N.E.2d 645, 652 (1968) (will contract that deprived surviving spouse is not against Illinois public policy); Price v. Craig, 164 Miss. 42, 53, 143 So. 694, 696-97 (1932) (public policy should be favorable to will contracts when they guarantee survivor's support).

112. Shimp, 315 Md. at 635, 556 A.2d at 257-58.

113. Id. at 644, 556 A.2d at 262.

114. Id. at 645, 556 A.2d at 262-63; see also In re Erstein's Estate, 205 Misc. 924, 929, 129 N.Y.S.2d 316, 321 (Surr. Ct. 1954).

115. Shimp, 315 Md. at 645, 556 A.2d at 263.

116. An individual's right to "transfer property upon his death to others, or the right of a person to receive property by will or inheritance, is not a natural right but a privilege granted by the State." Shimp, 315 Md. at 645, 556 A.2d at 263 (citing Safe Deposit & Trust Co. v. Bouse, 181 Md. 351, 355, 29 A.2d 906, 908 (1943)).

117. Id.
In the court's view, the State thus may limit such rights because the State created them.\textsuperscript{118} Section 3-203, however, already exists as a legislatively enacted limitation on the right to freely convey or devise property. The question, then, is not whether the legislature can limit statutory rights, but why in certain circumstances it chooses to do so. More precisely, the court must answer: What compelling public policy does the elective share statute serve and why should the court apply that policy in this case? The court never clearly answers these questions.

The court further noted that section 3-204 of the Estates and Trusts Article describes the right to an elective share as a personal right;\textsuperscript{119} as such, another cannot waive that right unilaterally. By inference, the court seemingly suggests that even a decedent's acts that occurred before the marriage cannot affect the surviving spouse's right to receive an elective share.\textsuperscript{120} The court apparently misses an essential point. The issue in this case is not whether a third party can waive an individual's right of election. No one contends that Lisa Mae lost her elective right as a result of any action taken by Lester or some other third party.\textsuperscript{121} The sole issue is the effect on the net estate when Lester entered into the joint will contract, \textit{i.e.}, whether he left an estate at all. In other words, does Lisa Mae have an elective right to one-half of the net estate exclusive of the joint will contract, or, by the terms of the joint will contract, is she left with one-half of nothing?

The \textit{Shimp} court also mentions the importance of protecting the right of election in cases that involve a decedent's unilateral transfer "in fraud of marital rights."\textsuperscript{122} The issue of fraudulent transfer is irrelevant to this case. Thus, the court diminishes the persuasiveness of its holding by drawing a loose analogy between its prior protection of the right of election in marital fraud situations and the

\begin{itemize}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.} at 646 n.8, 556 A.2d at 263 n.8. Section 3-204 of the Estates and Trusts Article provides: "The right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised subsequent to his death . . . ." Md. \textsc{Estr. \\& Trusts Code Ann.} § 3-204 (1974).
\item \textsuperscript{120} The court seems to confuse the distinction between the right to receive an elective share of a particular estate and the general opportunity to exercise the elective right. It also seems to pose a non sequitur: The fact that no one can waive your elective right implies that you always have a right to receive a share of an estate.
\item \textsuperscript{121} In defining the right to elect as a personal right, § 3-204 simply means that a surviving spouse must be the one to exercise that right. The right can not be transferred, contracted away, delegated, or tampered with by third parties and it extinguishes upon that particular individual's death. \textit{See supra} note 119.
\item \textsuperscript{122} 315 Md. at 646, 556 A.2d at 263.
\end{itemize}
present case. But in this case, the issue arose precisely because the court found that the joint will contract was valid, and because the court upheld the surviving spouse's right to election, in spite of the valid joint will contract.

The court's final public policy argument concerns the marriage relationship itself. The court notes that as a general principle, contracts in restraint of marriage are void as against public policy. Moreover, because the possibility always exists that a surviving spouse will challenge a joint will, the testator should provide explicitly for the beneficiaries or risk their lost or diminished legacies.

The final element of the court's analysis rests on two constructive contingencies: the possibility of remarriage and the possibility of a subsequent spouse's election against the will. Faced with these two possibilities, the court concludes that the beneficiaries' rights under a will contract are limited and subordinate to the surviving spouse's elective rights.

Several elements of the court's analysis, however, are unconvincing. The court never clearly discusses how the restraint of marriage theory relates to and supports its conclusion. How would upholding the will contract act as a restraint on a marriage that already has taken place? In the same vein, how would upholding will contracts to the detriment of subsequent spouses discourage marriage, or more precisely remarriage, in general?

The court does not segregate clearly the two conflicting aspects of a will contract. Rather, the court jumps from contract restraint theories to will provision theories and then simply combines the two in its conclusion. The subtle problem that involves the time at which rights under a will contract vest is never raised or explored. Finally, the court's failure to account for the possibility of remarriage undermines the decision. Lester and his first wife could have included language in their will contract that addressed the possibilit-

123. Id. (citing Bostick v. Blades, 59 Md. 231, 232-33 (1883)).
124. Maryland law presumes that a testator realizes that a spouse might renounce a will. Id. ("[T]he testatrix is presumed to know that her husband may renounce the will, and if she makes no compensation for devises or legacies, which may be thereby extinguished, the devisees or legatees will lose the property left them." (citing Webster v. Scott, 182 Md. 118, 121, 32 A.2d 475, 476 (1943)); Mercantile Trust Co. v. Schloss, 165 Md. 18, 27-28, 166 A. 599, 603 (1933).)
125. See supra note 123 and accompanying text. Although the court restates the proposition that Bostick stands for—that contracts which discourage or restrain marriage are void as against public policy—it does not expand upon or explain the relevance of the rule to this case.
126. Shimp, 315 Md. at 647, 556 A.2d at 263.
127. See, e.g., supra note 106.
ity of remarriage. The fact that they did not and left the entire estate to third parties certainly provides a reason to find that a subsequent spouse has no elective rights.

b. Family Allowance.—In contrast to its analysis of the elective share issue, the court’s analysis of the family allowance issue was cogent and straightforward. By characterizing the two thousand dollar family allowance of section 3-201 as a just claim against the estate, the court neatly fits this issue into the payment priority scheme of section 8-105, and relates it to the language of the will contract itself.

In finding that the family allowance is not derived from the net estate, the court’s characterization of third party beneficiaries as either legatees under the will or as creditors under the contract becomes irrelevant when deciding priority of payment under section 8-105. The court interpreted the statute’s language to give the family allowance priority over “all other claims” that the statute did not enumerate specifically, e.g., ordinary contract creditors and legatees under the will. Additionally, the court construed the language of the will, which directs that bequests be made only “[a]fter the payment of all just debts,” to give priority to the family allowance. The court correctly finds that without section 8-105, a testator theoretically could contract to will away his entire estate to avoid all of his debts. This is precisely what the legislature sought to prevent.

4. Conclusion.—In Shimp v. Huff, the Court of Appeals determined that a surviving spouse is entitled to receive an elective share and a family allowance under sections 3-203 and 3-201 of the Estates and Trusts Article when the deceased spouse previously had contracted to will his entire estate to others through a joint will with

128. See supra note 80.
129. Md. Est. & Trusts Code Ann. § 8-105 (1974 & Supp. 1989) provides: “If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order: . . . (5) Family allowance as provided in § 3-201.”
130. Shimp, 315 Md. at 645, 556 A.2d at 264-65.
131. Id. at 648-49, 556 A.2d at 264.
133. Id. at 649, 556 A.2d at 265.
134. Id. at 650, 556 A.2d at 265.
135. Id.
his first wife. The court held that section 3-203 entitled a surviving spouse to receive an elective share of the net estate based on the public policy that "surrounds the marriage relationship and which underlies the elective share statute." The court also held that the family allowance is a just claim against the estate rather than a derivative of the net estate. As such, section 8-105 directs the payment of a family allowance along with the priority of payment of other debts and claims against the estate.

Peter B. Swann
Kevin J. Earnest
VIII. STATE GOVERNMENT AND ADMINISTRATION

A. Scope of State Agency's Authority

In Department of the Environment v. Showell, the Court of Appeals held that the Maryland Department of Health and Mental Hygiene (the Department) had implicit statutory authority to execute a consent order that required a local sanitary commission to agree to federal grant restrictions even though the restrictions limited a property owner's right to access a public sewerage system. The court concluded that the restrictions incorporated by the consent order did not impermissibly usurp local governmental units' control over nonpoint source pollution and land use. Rather, it found that although the consent order might limit land development indirectly, the order's primary purpose was to control water pollution, which was a proper function of the Department. The court further found that the Department's execution of the consent order was not arbitrary and capricious even though the order effectively limited, without benefit of a hearing, a property owner's ability to develop his land.

2. In 1987, while this case was pending, the legislature reorganized the Department of Health and Mental Hygiene and created the Department of the Environment. See Act of July 1, 1987, ch. 306, 1987 Md. Laws 1375. The powers and duties at issue in this case were transferred from the Secretary of the Department of Health and Mental Hygiene to the Secretary of the Department of the Environment. Id. References to "the Department" in the court's opinion and this Note are to the Department of Health and Mental Hygiene rather than the Department of the Environment.
3. 316 Md. at 271, 558 A.2d at 397. Neither the statutes nor the Department's regulations specifically authorize an "administrative consent order." The Department argued that its general enforcement powers, see, e.g., MD. HEALTH-ENVT'L. CODE ANN. § 9-319(a)(7) (1987), provided a sufficient basis for the order. See Brief of Appellant at 8-9, Showell (No. 87-61).

Showell pointed out in his brief that MD. HEALTH-ENVT'L. CODE ANN. §§ 9-334 and 9-335 (1982) authorize the Department to issue an order in response to a complaint if there was reason to believe that the person complained of was violating the water pollution control law or regulations. He therefore argued that because the Worcester County Sanitary Commission (WCSC) had not violated any rules or regulations when the Department executed the consent order, the order did not meet the requirements of §§ 9-334 or 9-335. See Brief of Appellee at 14, Showell (No. 87-61).
4. Showell, 316 Md. at 272, 558 A.2d at 397. "A nonpoint source is a source that is diffuse in nature, e.g., agricultural fields, forests, urban development, and construction sites." Brief of Appellee at 11 n.5, Showell (No. 87-61) (emphasis in original).
5. Showell, 316 Md. at 272, 558 A.2d at 397.
6. Id. at 272, 558 A.2d at 397-98; see Brief of Appellee at 14, Showell (No. 87-61). Meetings were held between the Department, the WCSC and various environmental groups to discuss the terms of the proposed consent order. . . . Property owners were not advised of these meetings or otherwise afforded an
The court's decision comes as no surprise when viewed in the context of earlier cases that addressed the Department's remedial powers.\(^7\) The decision, however, does indicate the court's willingness to interpret broadly the powers that the legislature granted to the Department to maintain the environment. Such an interpretation is consistent with increasing concerns about the environment and legislative efforts concomitant with those concerns.\(^8\)

1. **The Case.**—West Ocean City is a low-lying area with a high water table and poor soil.\(^9\) During the 1970s, many of the septic tanks in the area failed;\(^10\) raw sewage spilled into the groundwater and created a public health problem.\(^11\) In 1972, the Department adopted a regulation that required seasonal percolation tests in areas with a high water table.\(^12\) As a result of this regulation, Worces-

---

opportunity to be heard on the matter . . . [and] [n]o public hearings were held to solicit comments and suggestions on the proposed order.

*Id.* The appellees conceded in their brief that the State Administrative Procedure Act did not apply because of the "unusual posture" of the case. *Id.* at 53. The Administrative Procedure Act governs only "contested cases," which is defined as "a proceeding before an agency to determine:"

1. a right, duty, statutory entitlement, or privilege of a person that is required by law to be determined only after any opportunity for an agency hearing; or
2. the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by law to be determined only after an opportunity for an agency hearing.

MD. STATE GOV'T CODE ANN. § 10-201(c) (1984).

7. See, e.g., Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1390 (D. Md. 1975) (Department of Health and Mental Hygiene regulations that prohibited use of private septic systems constituted a reasonable exercise of the state's police powers); Maryland Dep't of Health and Mental Hygiene v. Congoleum Corp., 51 Md. App. 257, 267, 443 A.2d 130, 136 (1982) (Secretary's authority to issue order requiring Congoleum to control psychoda flies under general authority to protect public comfort even though there was no health or pollution risk); see infra text accompanying notes 74-80.


9. Showell, 316 Md. at 260, 558 A.2d at 391. The West Ocean City area encompassed approximately 2300 acres and had been designated for intensive development in the Worcester County Comprehensive Land Use Plan. Brief of Appellee at 6, Showell (No. 87-61). The Showell property was "'[t]he one large tract of vacant, developable land south of Route 50 . . . .'

Id. at 7. The consent order's service constraints reduced the area that could be developed to 1287 acres. *Id.* at 6-7.

10. "Fifty-four percent of all existing private septic systems have failed on at least one occasion." *In re Shanty Town Assocs.*, No. 86-E-144, slip op. at 21 (Dep't of Health and Mental Hygiene, Mar. 9, 1987) (administrative hearing on development company's challenge to denial of sewer hookup occasioned by the same Environmental Protection Agency (EPA) restriction at issue in Showell).

11. See Showell, 316 Md. at 260, 558 A.2d at 391.

12. See id.; Md. REGS. CODE, tit. 26, § 04.03.02(c) (1988); see also Shanty Town, slip op. at 8.
ter County denied eighty to ninety percent of the new applications for septic tank permits in West Ocean City. The Department and the Worcester County Sanitary Commission (WCSC) consequently began to explore options for providing sewage disposal in West Ocean City; they decided to construct a sewerage system from West Ocean City to an existing sewage treatment facility in Ocean City. Due to prohibitive costs, the Department and the WCSC sought a grant from the United States Environmental Protection Agency (EPA) under the auspices of the Federal Water Pollution Control Act (FWPCA).

The EPA analyzed the project's environmental effects and found that most of the land in the West Ocean City project area encompassed floodplains and wetlands. Although the agency concluded that the sewerage system would resolve the current pollution problems, it was concerned that the system also would promote extensive development in West Ocean City to the detriment of these "environmentally sensitive" lands. Thus, to prevent further development, the EPA agreed to make the grant provided that the Department and the WCSC accept restrictions that would limit access to the sewer system. These restrictions limited the use of the system to: (1) all existing and future structures located outside the floodplain, (2) all existing structures located within the floodplain, and (3) future structures to be built on floodplain land platted as a building lot before June 1, 1977. To assure compliance with the grant's restrictions, the WCSC and the Department executed an administrative consent order in which the WCSC agreed to adhere to the EPA's restrictions. The EPA subsequently approved the

13. See Showell, 316 Md. at 260, 558 A.2d at 391.
14. See id. at 261, 558 A.2d at 392.
16. Showell, 316 Md. at 262 n.3, 558 A.2d at 392 n.3 ("The 100-year floodplain encompasses the lowland and relatively flat areas adjoining inland and coastal waters including, at a minimum, that area subject to a one percent or greater chance of flooding in any given year."). This finding implicated Executive Order No. 11,988, which requires all federal executive agencies to avoid direct or indirect support of development in a floodplain whenever a practicable alternative exists. 42 Fed. Reg. 26,951 (1977).
17. See Showell, 316 Md. at 262, 558 A.2d at 392. "Apparently, all EPA's sewer grant conditions are for at least 20 years because that is the planning period required by law and regulation." Brief of Appellant at 13, Showell (No. 87-61).
18. See Showell, 316 Md. at 262, 558 A.2d at 392.
19. Id. The EPA insisted that the WCSC enter into an administrative consent order with the Department because the WCSC initially objected to the restrictions and only reluctantly accepted them after it had explored other means of financing the project. See Shanty Town Assocs. Ltd. Partnership v. EPA, 843 F.2d 782, 786-87 (4th Cir. 1988).
Affected property owners were not pleased. John Showell, III, owns 39.4 acres of undeveloped land, most of which lies within the 100-year floodplain. The land had not been platted prior to June 1, 1977, for use as a building lot. Under the consent order, Showell could connect only "one equivalent dwelling unit" for his entire 39-acre tract.

Showell brought suit against the Department and the WCSC because the restrictions hindered his development plans. He alleged that the Department had exceeded its authority when it executed the consent order and, even if it had the authority, the Department had exercised it in an arbitrary and capricious fashion.

The trial court found that the Department had exceeded its authority by executing the consent order and granted Showell's motion for summary judgment. The court based its decision on Cape May Greene, Inc. v. Warren, a Third Circuit decision holding that the EPA had exceeded its authority when it attached restrictions to sewage flow. The court cited a Third Circuit decision holding that the EPA had exceeded its authority when it attached restrictions to sewage flow.

---

20. See Showell, 316 Md. at 262-63, 558 A.2d at 392.
21. Id. at 259, 263, 558 A.2d at 391, 393.
22. Id. The EPA selected June 1, 1977, as the cutoff date because both the Department's requirement of seasonal percolation tests and Executive Order No. 11,988 were in effect at that time. Their combined effect was to limit development in West Ocean City. Id. at 262 n.4, 558 A.2d at 392 n.4.
23. One equivalent dwelling unit is defined in the consent order as a sewage flow of 280 gallons per day; it is the amount that a single-family residential unit normally produces each day. In re Shanty Town Assocs., No. 86-E-144, slip op. at 13 (Dep't of Health and Mental Hygiene, Mar. 3, 1987); see also Shanty Town, 843 F.2d at 786 n.6.
24. Showell, 316 Md. at 263, 558 A.2d at 393.
25. Id. Showell had planned to intensively develop his land with condominiums, individual homes, a marina, and a shopping complex. Brief of Appellant at 6, Showell (No. 87-61). Showell initially brought suit against the Department alone, but the circuit court dismissed the suit on the Department's motion for Showell's failure to join the WCSC and the EPA as necessary parties. Showell, 316 Md. at 263, 558 A.2d at 393. Showell amended his complaint, and included the two additional parties. Id. The EPA then removed the suit to federal district court. Id. The federal court remanded the case to the state court for lack of derivative subject matter jurisdiction. Id. The EPA successfully argued that it could not be sued in state court unless it waived its sovereign immunity; the agency cited Metropolitan Sewerage Dist. v. Wisconsin Dep't of Natural Resources, No. 81-C-1023 (E.D. Wis. Dec. 8, 1981), in which the court held that the state court did not have jurisdiction over the EPA and, because removal jurisdiction is derivative, the federal court could not acquire jurisdiction either. See Brief of Appellee app. at 12, Showell (No. 87-61). Showell again amended his complaint, naming only the Department and the WCSC as defendants. Showell, 316 Md. at 263, 558 A.2d at 393.
26. Showell, 316 Md. at 267, 558 A.2d at 395.
27. Id. at 264, 558 A.2d at 393.
28. 698 F.2d 179, 187, 192 (3d Cir. 1983) (the EPA acted beyond its statutory authority by attempting to exercise land use control through the use of grant restrictions;
verage system construction grants.\textsuperscript{29} The Department appealed to the Court of Special Appeals but, prior to that court’s consideration, the Court of Appeals granted certiorari.\textsuperscript{30}

The Court of Appeals determined that the trial judge erred when he found that \textit{Cape May Greene} “controlled” the question of whether the EPA had exceeded its authority when it imposed the grant restrictions on the WCSC.\textsuperscript{31} In concluding that \textit{Cape May Greene} did not control the issue, the Court of Appeals relied on \textit{Shanty Town Associates Ltd. Partnership v. Environmental Protection Agency}.\textsuperscript{32} Addressing the same consent order at issue in \textit{Showell}, the Fourth Circuit in \textit{Shanty Town} held that the EPA had acted within its authority when it imposed the grant restrictions.\textsuperscript{33} The \textit{Shanty Town} court distinguished \textit{Cape May Greene} on the grounds that in \textit{Cape May Greene} the EPA grant restrictions were at odds with the New Jersey Coastal Zone Management Plan and, further, that the conditions were not related directly to the goals of the FWPCA.\textsuperscript{34} In contrast, the EPA grant restrictions that the consent order imposed on West Ocean City were consistent with the State’s Coastal Zone Management Plan; the restrictions also were related directly to improving water quality, which is the FWPCA’s goal.\textsuperscript{35}

The Court of Appeals found no express statutory authority that allowed the Department to restrict access to a public sewerage system. The court, however, did find that the Department’s general statutory powers conferred on the Department an implicit authority to restrict such access to further its mission of preventing water pollution.\textsuperscript{36} The court also found that the Department had not exercised its authority in an arbitrary and capricious manner when it executed the consent order.\textsuperscript{37} Although the consent order probably would decrease the value of Showell’s land, the court concluded that the land was not totally worthless and therefore the consent order’s effect was not unduly oppressive.\textsuperscript{38}

\textsuperscript{29} \textit{Showell}, 316 Md. at 263-64, 558 A.2d at 393.
\textsuperscript{30} Id. at 264, 558 A.2d at 393.
\textsuperscript{31} Id. at 269, 558 A.2d at 396.
\textsuperscript{32} 843 F.2d. 782 (4th Cir. 1988).
\textsuperscript{33} Id. at 791-92.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 795.
\textsuperscript{36} Showell 316 Md. at 271, 558 A.2d at 396-97.
\textsuperscript{37} Id. at 273, 558 A.2d at 398.
\textsuperscript{38} Id. Although Showell claimed that his property was taken without compensation, the circuit court did not reach this issue because it found that the Secretary’s action in
2. Legal Background.—A program of "cooperative federalism" between federal, state, and local governments protects the states' water resources. Under the FWPCA, the EPA must cooperate with state water pollution control agencies and municipalities to prepare or develop "comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters." Congress also authorized the EPA to grant federal funds to states or municipalities to construct environmentally-sound sewer systems.

To further the FWPCA's mandate, the Maryland legislature designated the Department as the state water pollution control agency with "all powers that are necessary to comply with and represent this State under the Federal Water Pollution Control Act." As such, the Department administers the construction grant program under the Federal Water Pollution Control Act. Local governments seeking grant funds first must apply to the Department, which reviews the project, and if approved, forwards the application to the EPA for final approval.

The Department's general authority in the environmental area is quite broad. The Health-Environmental Article provided in part: "The Secretary has general supervision and control over the waters of the State, insofar as their sanitary and physical condition affect the public health or comfort and may make and enforce rules and regulations, and order works to be executed, to correct and prevent their pollution."

The article also vests the Department with ultimate authority over sewage disposal throughout the State. For instance, the Secretary may compel the operation of sewerage systems in a manner
that will protect the public health and comfort\textsuperscript{47} and "[p]ass on the design and construction of all . . . sewerage systems . . . to be built in this State."\textsuperscript{48} Finally, the legislature granted the Secretary the sweeping authority "[t]o exercise every incidental power necessary to carry out the provisions of this [Water Pollution Control] subtitle."\textsuperscript{49}

Maryland appellate courts and the United States District Court for the District of Maryland have interpreted the Secretary's statutory authority broadly. For example, in \textit{State of Maryland, Department of Health and Mental Hygiene v. Congoleum Corp.},\textsuperscript{50} the Court of Special Appeals upheld the Secretary's authority to issue an order that required the control of psychoda flies even though they did not present a pollution or health risk.\textsuperscript{51} The court reasoned that the Secretary's authority to protect public comfort "was broader than related to matters of public health only."\textsuperscript{52} Indeed, the court concluded that the statutory prescription of comfort "indicated that the Legislature was concerned with the public's state of well-being, as well as its organic functioning."\textsuperscript{53}

Similarly, in \textit{Smoke Rise, Inc. v. Washington Suburban Sanitary Commission},\textsuperscript{54} the United States District Court for the District of Maryland held that "[t]hrough the public trust doctrine, the State of Maryland has the duty of preserving the natural, unpolluted condition of [its] waterways."\textsuperscript{55} Thus, the federal court decided that moratoria on public sewer service which the Secretary imposed for a five-year period in certain areas of Montgomery and Prince George's Counties were "rationally related to the legitimate purpose of alleviating sewage overflows while simultaneously affording sewer service to the greatest number of persons and land uses."\textsuperscript{56}
3. **Analysis.**—The Showell court, finding no explicit authority in the governing statutes for the Secretary to restrict access to a public sewerage system, looked to the General Assembly’s intent in enacting these statutes. In so doing, the court observed that when a statute is ambiguous a court is “obligated to adopt the construction which promotes the most reasonable result in light of the objectives and purpose of the enactment.” Further, the Court of Appeals noted that courts must liberally construe state statutes which authorize local governmental units to accept federal aid and to enter contracts that contain terms necessary to obtain such aid.

The court examined the scope of the Secretary’s statutory powers and concluded that they gave the Department the implicit authority to restrict access to a public sewerage system. Because failing septic systems in West Ocean City were the source of surface and groundwater pollution, the court found that the Department had a duty to take appropriate remedial action. The best option available to remedy the problem, the court stated, was the construction of the sewerage system for which federal funds were necessary. As a result of the grant restrictions that the EPA imposed,

---

57. 316 Md. at 270, 558 A.2d at 396. As to general canons of statutory construction in Maryland, see Kaczorowski v. City of Baltimore, 309 Md. 505, 514-15, 525 A.2d 628, 632 (1987) (the court is not limited to the words of a statute when pursuing its statutory context but also may consider the legislative history of the statute); State v. Fabritz, 276 Md. 416, 422-23, 328 A.2d 275, 279 (1975) (the cardinal rule in statutory construction is to effectuate the real and actual intent of the legislature), cert. denied, 425 U.S. 942 (1976); State v. Barnes, 273 Md. 195, 208, 328 A.2d 737, 745 (1974) (statutes that are “remedial in nature... are to be liberally construed in order to advance the remedy and obviate the mischief.”).

58. Showell, 316 Md. at 270, 558 A.2d at 396; see Kaczorowski, 309 Md. at 513, 525 A.2d at 632 (“[T]he court, in seeking to ascertain legislative intent, may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.” (quoting Tucker v. Fireman’s Ins. Co., 308 Md. 69, 75, 517 A.2d 730, 732 (1986))).


60. Showell, 316 Md. at 270-71, 558 A.2d at 396-97.

61. Id. at 271, 558 A.2d at 397.

62. Id.

63. “The enormous expense associated with such a project eliminated local funding alone as an alternative and forced the WCSC to seek a construction grant from the EPA.” Id. at 261, 558 A.2d at 392; see also Brief of Appellant at 6 n.2, Showell (No. 87-61) (“In addition to the EPA grant of $5,312,000, the State granted the WCSC $1,235,400 for the project and the WCSC paid $2,700,000 out of its own funds, for a project total cost of $9,247,400.”).

64. See Shanty Town Assocs. Ltd. Partnership v. EPA, 843 F.2d 782, 792 (4th Cir.
the court recognized that the Department "essentially was con-
fronted with an all or nothing proposition: consent to the grant
conditions or forego federal funding for the project." Faced with
this choice, the Department's "execution of the consent order was a
valid exercise of the implicit power necessary to further the Depar-
tment's mission of preventing water pollution." 66

The court further held that the Department's action did not
usurp local control over nonpoint source pollution and land use. 67
In so holding, the court rejected Showell's argument that the Depar-
tment's responsibility for pollution control was limited to point
source discharges. 68 The court recognized the Secretary's broad au-
thority to regulate the State's waters and reasoned that any effects of
the consent order on other than point source discharges were
"merely incidental to the Department's valid regulation of the water
pollution problems at hand." 69 While the court acknowledged that
the EPA sought to restrict increased floodplain development to limit
nonpoint source pollution—a responsibility of the Department of
Natural Resources under the then-existing State statute 70—the EPA
itself did not attempt to control land use. The Department was not
concerned with nonpoint source pollution but rather sought to ad-
dress pollution of the water supply that resulted from failing septic
tanks. To that end, it agreed to the EPA's grant restrictions. 71 The
court also found that "the effect... on land use is at best indirect in
that Showell is not precluded from developing his land and install-
ing a private sewerage system." 72

Finally, the court held that the Department's action was neither

1988). The EPA has implicit authority to establish a "cooperative federalism" program
between state and federal governments to control nonpoint source pollution. Further,
the Fourth Circuit found no indication that Congress intended to preclude the EPA
from imposing restrictions on construction grants to be used to decrease nonpoint
source pollution from the entities that received the funds. Id.

65. Showell, 316 Md. at 271, 558 A.2d at 397.
66. Id.
67. Id. at 272, 558 A.2d at 397.
68. Id. at 266, 558 A.2d at 394. "The term 'point source' means any discernible,
confined and discrete conveyance...[e.g., a pipe, ditch or channel] from which pollu-
tants are or may be discharged." 33 U.S.C. § 1362(14) (Supp. V 1987).
69. Showell, 316 Md. at 272, 558 A.2d at 397.
70. The responsibility for nonpoint source pollution was transferred from the Depar-
tment of Natural Resources to the Department of the Environment as a result of the reor-
organization that created the Department of the Environment. See Act of July 1, 1987,
71. Showell, 316 Md. at 272, 558 A.2d at 397; see also Brief of Appellant at 12, Showell
(No. 87-61).
72. Showell, 316 Md. at 272, 558 A.2d at 397.
arbitrary nor capricious.\textsuperscript{73} Because the Department's objective was to protect the surface and groundwater of West Ocean City from contamination by failing septic systems, the court decided that the Department appropriately accepted the EPA's grant restrictions.\textsuperscript{74} Nor was the consent order unduly oppressive upon Showell: "even though the value of Showell's land will probably decrease without access to the federally-funded sewerage system, the land is not worthless. . . . The burdens on Showell's rights are necessary and not unreasonable to promote the general public health and welfare in West Ocean City."\textsuperscript{75}

In concluding that the Department's actions were neither arbitrary nor capricious, the Showell court noted that the federal district court's comments as to the legitimacy of the Department's sewer moratoria orders in \textit{Smoke Rise, Inc. v. Washington Suburban Sanitary Commission}\textsuperscript{76} applied as well to the reasonableness of the consent order in the instant case. In \textit{Smoke Rise}, the Secretary of Health and Mental Hygiene imposed the sewer moratoria orders after he found that inadequate sewerage facilities in parts of Montgomery and Prince George's County were discharging untreated sewage into the State's waters.\textsuperscript{77} The district court evaluated the purpose and the duration of the restrictions to determine whether they were reasonable. The court first found that the orders were a proper exercise of the State's police powers, stating that:

\begin{quote}
[t]he legitimacy of the state's purpose in protecting its waters from contamination by sewage overflows requires little discussion. The lesson of history is clear; it is reasonable, if not essential, that the state act to prevent the pollution of its waters by human wastes and the epidemics of disease which flourish in such conditions.\textsuperscript{78}
\end{quote}

The court then looked at the duration of the restrictions to determine whether they were reasonable and concluded that, given the scope and nature of the problem, "the five-year duration of the Secretary's moratoria orders [was] reasonable . . . ."\textsuperscript{79}

The restrictions in \textit{Smoke Rise}, however, differed in purpose and duration from those in the Showell consent order.\textsuperscript{80} In \textit{Smoke Rise},
the Department unilaterally decided to impose the moratoria for a five-year period because of the public safety hazard that would result from overloading inadequate sewerage treatment facilities. By contrast, the Department in Showell restricted access to the West Ocean City sewerage system because the EPA issued an ultimatum: impose the restrictions or forego federal funds to finance the system. To choose the latter meant that the Department would be unable to fund the project and, thus, it would have to forego the system entirely. The EPA insisted on the restrictions not out of concern for pollution from overloaded sewerage treatment facilities, but rather because the EPA was concerned with the increased development it presumed would accompany access to the new public sewerage system. Concededly, increased development could exacerbate the existing problem of nonpoint source pollution. In addition, the Department's motivation was to protect the State's surface and ground waters—a legitimate agency concern. It is by no means clear, however, that the Secretary on his own initiative would have limited access to the sewerage system absent the EPA's conditional consent to the sewerage system grant.

In addition to the fact that it was effectively the EPA's decision—rather than the Secretary's—to impose the restrictions, the duration of these restrictions also differs significantly from those in Smoke Rise. There, the district court found that a moratorium of five year's duration was reasonable given the circumstances that existed at the time in the Washington Metropolitan area. In Showell, however, the Department agreed to restrictions of a twenty-year duration. Although the duration of the Showell restrictions is four times longer than that of the restrictions in Smoke Rise, the Court of Appeals did not even mention this aspect of the consent order. The court merely noted that the consent order was reasonably necessary declaring sewer moratoria following a determination by the Department that "inadequate sewerage facilities . . . cause discharges of raw and inadequately treated sewage into waters of the State and thereby constitute a . . . nuisance to the health, safety and comfort of the public;" court held it is a reasonable exercise of the State's police powers to prevent pollution of its waters by human waste; see also Montgomery County, Maryland v. One Park North Assocs., 275 Md. 193, 195 & n.1 (1975) (court implicitly upheld Department's power to issue sewer moratoria as a part of its authority to prevent water pollution).

81. See, e.g., Brief of Appellant at 12, Showell (No. 87-61).
82. See Showell, 316 Md. at 272, 558 A.2d at 397.
83. See, e.g., Brief of Appellee at 15, Showell (No. 87-61).
85. See supra note 18 and accompanying text.
to achieve the public goal of abating pollution of the West Ocean City water and "its operation was not unduly oppressive on Showell." 86

The court, presumably because of environmental concerns, appears to have given the Department blanket permission to take any and all actions necessary to protect the State's waters. Perhaps of even greater importance, however, was the court's willingness to uphold the Secretary's authority to agree to and enforce restrictions on sewerage system access through a mechanism that affected private parties without first giving them notice and opportunity for a hearing. 87

4. Conclusion.—The Showell court followed prior case law in giving a broad interpretation to the Department's general statutory powers to control pollution. The environmental concerns at issue in this case, however, are different than those of the earlier sewer moratoria cases. The Department in this case had to comply with EPA restrictions to receive federal monies. Given the State's emphasis on protecting the Chesapeake Bay and the likely necessity for further federal funding in this area, the Department's authority to agree to such restrictions may be of even greater significance in the future. 88

LINDA M. THOMAS

---

86. Showell, 316 Md. at 273, 558 A.2d at 398.
87. See supra note 6.
88. As the Department pointed out in its brief in Showell:

A central pillar of Maryland's Chesapeake Bay Program is the upgrading of all publicly owned sewage treatment plants and sewer systems . . . . This task is projected to require more than $2 billion dollars through the year 2005 . . . . Approximately $270 million dollars of EPA grants to construct sewer systems has been obligated in Maryland since the inception of the Chesapeake Bay Program. Showell's cramped interpretation of the Secretary's authority, if adopted by this Court, will restrict the Department's and local sewer district's ability to obtain and use these grants, thereby diminishing Maryland's chance of achieving its goal of restoring Maryland waters.

Reply Brief of Appellant at 8-9, Showell (No. 87-61) (footnote and citation omitted).
IX. Torts

A. Immunity for Blood Suppliers

In *Miles Laboratories, Inc. v. Doe,*¹ the Court of Appeals held that blood suppliers were subject to neither strict liability² nor implied warranty³ claims for the alleged transmission of the acquired immunodeficiency syndrome (AIDS) virus through blood transfusions or the use of blood products.⁴ The court first found that the blood suppliers did not have immunity under the State’s blood shield statute during the time period in question.⁵ It then ruled that the pub-

1. 315 Md. 704, 556 A.2d 1107 (1989). The United States District Court for the District of Maryland certified questions of law involved in two cases to the Court of Appeals, pursuant to the Maryland Uniform Certification of Questions of Law Act, Md. Cts. & Jud. Proc. Code Ann. §§ 12-601 to -609 (1989). *Id.* at 707, 556 A.2d at 1109. The cases are Miscellaneous No. 1, Miles Laboratories, Inc. v. Doe and Miscellaneous No. 18, Maryland Chapter of the Am. Nat'l Red Cross v. Doe. The Act authorizes the court to consider only the certified questions. *See* Mercantile-Safe Deposit & Trust Co. v. Purifoy, 280 Md. 46, 371 A.2d 650 (1977) (in considering certified questions as to whether adopted children may be included in terms such as “child” and “descendant” in trust instruments, the court asserted that it “neither make[s] nor review[es] factual findings”). The court also must accept the statement of facts submitted by the certifying court. *See* Food Fair Stores, Inc. v. Joy, 283 Md. 205, 206, 389 A.2d 874, 875 (1978). Miscellaneous No. 1 involved issues of fact that were “sharply disputed by the parties.” *Miles,* 315 Md. at 709 n.4, 556 A.2d at 1109, 1110 n.4; *see also* Doe v. Miles Laboratories, Inc., 675 F. Supp. 1466 (D. Md. 1987) (denying Miles’ summary judgment motion on Doe’s strict products liability claim; decision vacated upon certification to Court of Appeals).

2. 315 Md. at 735, 556 A.2d at 1122.

3. *Id.* at 736, 556 A.2d at 1123.

4. *Id.* at 707-08, 556 A.2d at 1109. Jane Doe received a transfusion that included a blood clotting factor concentrate in September 1985; John Doe’s physicians transfused him with two units of packed red blood cells in July 1984. The transfusions in these cases occurred before the General Assembly amended the State’s blood shield statute in 1986. *Id.* at 1109, 1123, 556 A.2d at 708, 735. For a discussion of the blood shield statute, see *infra* notes 34-41 and accompanying text. Little was known about acquired immunodeficiency syndrome (AIDS) at the time of these transfusions. The medical community was just beginning to realize that AIDS could be transmitted through blood transfusions. For a medical chronology of AIDS, see Kozup v. Georgetown Univ., 663 F. Supp. 1048, 1051-53 (D.D.C. 1987), aff’d in part and vacated in part, 851 F.2d 437 (D.C. Cir. 1988). For a discussion of the relationship between AIDS and blood transfusions, see *Comment, Hospital and Blood Bank Liability to Patients Who Contract AIDS Through Blood Transfusions,* 23 San Diego L. Rev. 875, 877-80 (1986). The medical community officially recognized the transfer of AIDS through infected blood early in 1984. *Id.* at 877-78 & nn.9-10. Most significantly, until 1985 there was no way to test for the presence of the AIDS virus (or AIDS antibodies) in donated blood. *Id.* at 879 & nn.23-25.

5. *Miles,* 315 Md. at 713-14, 556 A.2d at 1111-12. Statutory immunity is available for transfusions of AIDS-infected blood that occurred after July 1, 1986. *See infra* note 41 and accompanying text.

750
lic policy justifications for imposing strict liability on sellers for defective products are "generally inapplicable [in the case of] . . . blood and its derivative products." The court also found as a matter of law that blood and blood products are "unavoidably unsafe" under comment k of the Restatement (Second) of Torts, thereby insulating suppliers of blood and blood products from both strict liability and implied warranty claims.

1. The Case.—In September 1983, Jane Doe suffered from profuse vaginal bleeding following childbirth. To stop the bleeding, physicians gave her an undetermined number of blood transfusions, including a transfusion of "Konyne," a blood clotting factor concentrate supplied by Miles Laboratories. In July 1984, physicians transfused John Doe, following a nosebleed, with "two units of packed red blood cells obtained from the Red Cross." Each of the "Does" has been diagnosed since then as having AIDS-Related Complex (ARC). Both "Does" alleged that they contracted the AIDS virus from a transfusion of contaminated blood. The "Does" sued the blood suppliers in federal district court, alleging causes of action in strict liability, implied warranty, and negligence.

In each case, the District Court certified questions of Maryland law to the Court of Appeals under the Maryland Uniform Certifica-

6. Miles, 315 Md. at 733, 556 A.2d at 1121.
7. Id. at 732, 556 A.2d at 1121.
8. Id.; Restatement (Second) of Torts § 402A, comment k (1965); see infra note 54 for the text of § 402A and note 59 for the relevant text of comment k.
9. Miles, 315 Md. at 737, 556 A.2d at 1123 ("[I]mplied warranty claims . . . cannot be sustained where the claim for strict tort liability under § 402 A fails under Comment k.").
10. Id. at 708, 556 A.2d at 1109.
11. Id.
12. Id. Miles Laboratories prepares Konyne from the blood plasma of paid donors.
13. Id. at 735-36, 556 A.2d at 1123.
14. Id. at 708-09, 736, 556 A.2d at 1109, 1123. Although AIDS-Related Complex (ARC) is less serious than AIDS, it commonly precedes full-blown AIDS. Id. at 709 & n.3, 556 A.2d at 1109 & n.3.
15. Id. at 708-09, 736, 556 A.2d at 1109, 1123.
16. Id. at 709, 735, 556 A.2d at 1109, 1123. The negligence claims were not part of any certified question and remain a possible avenue of recovery for the plaintiffs. For the view that negligence claims probably are futile because of the nearly insurmountable problems of proof, see Comment, Transfusion-Associated Acquired Immunodeficiency Syndrome (AIDS): Blood Bank Liability?, 16 U. Balt. L. Rev. 81, 97-98 (1986). But see Comment, supra note 4, at 889-96 (negligence cause of action generally viable).
tion of Questions of Law Act. The first case, *Miles Laboratories, Inc. v. Doe*, encompassed three certified questions that asked in essence: (1) whether the 1986 amendment to Maryland's blood shield statute applies retroactively to transfusions that occurred before 1986, (2) whether the original, unamended version of the statute applies to transfusions in which the recipient was infected with AIDS, and (3) assuming that neither the original nor the amended version of the statute applies, whether state common law permits recovery "based on the theory of strict liability in tort." The second case, *Maryland Chapter of the American National Red Cross v. Doe*, raised two additional questions: (1) whether a claim could be based on a breach of warranty theory, and (2) whether claims against blood suppliers "fall within the provisions of the Maryland Health Care Malpractice Claims Act."

2. Legal Background.—While AIDS is a relatively recent phenomenon, a great deal of case law and commentary exists concerning blood suppliers' liability for the transmission of the serum hepatitis virus through blood transfusions. As a general rule, the cases hold that blood suppliers are protected from strict liability and implied warranty claims. The earliest and most influential case on the issue of liability for contaminated blood is *Perlmutter v. Beth David Hospital.* Relying on a sales/service dichotomy, the *Perlmutter* court held that the provision of blood was an incidental part of the medi-

18. Miles, 315 Md. at 710-11, 713-15, 556 A.2d at 1110-12.
19. Md. Cts. & Jud. Proc. Code Ann. §§ 3-2A-01 to -09 (1989); 315 Md. at 736, 739, 556 A.2d at 1123, 1125. On the latter question, the court held that the Red Cross is not a "health care provider" within the ambit of the statute. Id. at 741, 556 A.2d at 1125.
22. 308 N.Y. 100, 123 N.E.2d 792 (1954). The complaint alleged that the hospital's provision of blood constituted a sale within the state sales act and, thus, the statute imposed implied warranties that the blood was "reasonably fit for [the] purpose" for which it was needed and that it was of "merchantable quality." Id. at 103, 123 N.E.2d at 793.
cal services which the hospital provided to the plaintiff, and did not constitute a "sale."\textsuperscript{23} The hospital, therefore, was not liable for breach of an implied warranty.\textsuperscript{24} Although \textit{Perlmutter} predates the acceptance of strict liability in tort,\textsuperscript{25} and its sales/service distinction often has been criticized,\textsuperscript{26} many courts and legislatures have used \textit{Perlmutter}'s approach to decide strict liability and implied warranty claims against hospitals for transfusions of contaminated blood.\textsuperscript{27}

The first significant departure from \textit{Perlmutter} came in \textit{Cunningham v. MacNeal Memorial Hospital}.\textsuperscript{28} \textit{Cunningham} explicitly rejected \textit{Perlmutter}, holding instead that blood is a "product" within the ambit of strict liability law.\textsuperscript{29} In a much criticized\textsuperscript{30} holding, the Illinois Supreme Court ruled that blood which contained the hepatitis virus was not an "unavoidably unsafe product."\textsuperscript{31} Under comment k of the \textit{Restatement (Second) of Torts}, the "unavoidably unsafe product" exception to strict liability applies only to products that are not impure and that inherently involve substantial risks to the user even if prepared properly.\textsuperscript{32} The Illinois court refused to apply the exception because the blood was alleged to be impure; thus, blood that contained the hepatitis virus was "in a defective condition" and "un-

\begin{enumerate}
\item[23.] \textit{Id.} at 108, 123 N.E.2d at 796.
\item[24.] \textit{Id.}
\item[25.] The leading case on strict liability is \textit{Greenman v. Yuba Power Prods.}, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Because strict liability in tort often is viewed as developing from warranty law, see, e.g., Note, supra note 20, at 1103, it is not surprising that the courts apply \textit{Perlmutter}'s rationale to strict liability cases.
\item[26.] See, e.g., Comment, supra note 16, at 89 & nn.53-54.
\item[27.] The commentators have criticized \textit{Perlmutter} for rendering a policy decision masked by the veil of sales/service dichotomy. The criticism is that the \textit{Perlmutter} court realized that blood and its abundant availability was important to society, but rather than stating that liability for transfusion-associated serum hepatitis cases would have the socially unacceptable effect of putting blood banks out of business as a consequence of large adverse judgments, the New York court justified its policy decision by resorting to the legalism of the sales/service dichotomy.
\item[28.] 47 Ill. 2d 443, 266 N.E.2d 897 (1970).
\item[29.] \textit{Id.} at 447, 266 N.E.2d at 899 (citing \textit{Restatement (Second) of Torts} § 402A comment e (1965)).
\item[31.] \textit{Cunningham}, 47 Ill. 2d at 456, 266 N.E.2d at 903-04 (quoting \textit{Restatement (Second) of Torts} § 402A comment k (1965)).
\item[32.] \textit{Restatement (Second) of Torts} § 402a comment k (1965).
\end{enumerate}
reasonably dangerous” to the recipient.\(^3\)

*Cunningham*’s effect was immediate and lasting. State legislatures, including Maryland’s,\(^3\) began to enact “blood shield statutes” to protect blood suppliers from decisions like *Cunningham*. Although only three states had passed blood shield statutes prior to 1965,\(^3\) forty-one states had enacted such statutes by 1972.\(^3\) Discovery of the link between blood transfusions and the transmission of AIDS led to another round of statutory enactments; today, forty-eight states have some form of blood shield statute that exempts suppliers from liability under both strict liability and implied warranty claims.\(^7\)

3. Analysis.—a. Statutory Interpretation.—Before Miles, the Court of Appeals had never ruled on the potential liability of blood suppliers for transfusion-related injuries. The lack of precedent primarily was due to the existence of the blood shield statute,\(^3\) which protected blood suppliers from both strict liability and implied warranty claims that arose from the transmission of the hepatitis virus.\(^3\) By its language, the blood shield statute applied only to the serum hepatitis virus.\(^4\) When the legislature amended the statute in 1986, however, it removed the limiting reference to the virus.\(^4\) Miles, therefore, presented novel questions of state statutory and common

---

33. *Cunningham*, 47 Ill. 2d at 456, 266 N.E.2d at 903.
35. Franklin, supra note 20, at 475 n.204. Arizona, California, and Wisconsin passed these early blood shield statutes. Id.
36. Id. at 474.
37. For a complete list of blood shield statutes, see Roberts v. Suburban Hosp. Ass’n, 73 Md. App. 1, 10 n.3, 532 A.2d 1081, 1086 n.3 (1987).
39. See supra note 34.
40. Id.
41. Act of Apr. 29, 1986, ch. 259, 1986 Md. Laws 995 (codified as amended at Md. Health-Gen. Code Ann. § 18-402 (1987)). The amended statute read in part: “[a] person who . . . distributes . . . whole blood or any substance derived from blood for . . . transfusion . . . is performing a service and is not subject to: [strict liability or implied warranty claims].” The amendment took effect on July 1, 1986. Miles, 315 Md. at 710, 556 A.2d at 1110 (1989). In 1987, the legislature further amended § 18-402, and it now protects suppliers of human tissues, organs, and bones, in addition to suppliers of blood
law because it involved claims based on the transmission of AIDS through blood transfusions that occurred while the original blood shield statute was in effect.

The *Miles* court first addressed whether the State's blood shield statute protected the defendants from liability. 42 Although the 1986 amendment clearly protected the suppliers, the transfusions occurred before the legislature enacted the amendment. 43 Thus, the court had to determine whether the 1986 amendment applied retrospectively.

Under Maryland law, statutes are presumed to operate prospectively only, and the presumption is rebutted only when there are clear expressions to the contrary in the statute. 44 In *Miles*, the defendants argued that the legislature intended the amendment to apply retrospectively because the greatest need for protection occurred during the period prior to 1985 when no tests were available to detect the presence of the AIDS virus in blood. 45 Nevertheless, the court held that the statute would apply prospectively only, absent a clear expression that the legislature intended it to apply retrospectively. 46

The court then examined whether the original, unamended version of the blood shield statute protected blood suppliers from strict liability in tort when the recipient allegedly contracted AIDS from a blood transfusion. 47 Prior to the 1986 amendment, the statute referred only to the serum hepatitis virus. 48 By contrast, most states' blood shield statutes used more general language. 49 The court noted that the original version of the bill used broader language, but the legislature amended it prior to adoption. 50

---

42. 315 Md. at 710-11, 556 A.2d at 1110.
43. Id. at 710, 556 A.2d at 1110.
45. 315 Md. at 711-12, 556 A.2d at 1111.
46. Id. at 712-13, 556 A.2d at 1111.
47. Id. at 713, 556 A.2d at 1111.
48. See supra note 34.
49. Williams, Blood Transfusions and AIDS: A Legal Perspective, 32 MED. TRIAL TECH. Q. 267, 287 (1986) (discussing how Maryland was then one of only six jurisdictions whose statute was limited to a specific disease); cf. Comment, supra note 4, at 889 n.69 (such statutes could be interpreted as extending to all undetected diseases transmitted through blood, because the same public policy applies).
guage that limited the statute to the serum hepatitis virus, when broader language clearly was available, was evidence that the legislature intended a limited application of the statute. The court, therefore, concluded that it would be a "forced interpretation" to expand the statute to include AIDS.

b. Strict Liability.—Having determined that neither the original nor the amended version of the statute applied to Miles, the court next addressed whether plaintiffs could recover under a common-law theory of strict liability. The court noted that in 1976 it had adopted the doctrine of strict liability in tort, under section 402A of the Restatement (Second) of Torts, in Phipps v. General Motors Corp.; at the same time, it implicitly adopted comment k's unavoidably unsafe product exception to strict liability. If Miles' preparation of Konyne for supply to hospitals and physicians constituted a sale rather than a service, then the doctrine of strict liability would apply. The court found that supplying Konyne was the sale of a product.

"virus of serum hepatitis" did not appear in the original bill. Id. at 714 n.6, 556 A.2d at 1112 n.6.

51. Id. at 714, 556 A.2d at 1112.
52. Id.
53. Id. at 714-15, 556 A.2d at 1112.
54. The Restatement (Second) of Torts § 402A (1965) states:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although:

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

55. 278 Md. 337, 363 A.2d 955 (1976). For a seller to be liable, the product must be in a "defective condition," and must be "unreasonably dangerous" to the consumer. Id. at 344, 363 A.2d at 958. For the policy justifications of strict tort liability, see Miles, 315 Md. at 717-18, 556 A.2d at 1114 (citing with approval Restatement (Second) of Torts § 402A comment c (1965)). Prior to Phipps, Maryland was one of only five states that had not adopted the concept of strict liability in tort. See Freeman & Dressel, Warranty Law in Maryland Product Liability Cases: Strict Liability Incognito?, 5 U. Balt. L. Rev. 47, 51 (1975).

56. Miles, 315 Md. at 724, 556 A.2d at 1117.
57. Id. at 724-25, 556 A.2d at 1117. The court considered both the "gravamen test," Anthony Pools, A Div. of Anthony Indus., Inc. v. Sheehan, 295 Md. 285, 455 A.2d 434
rather than a service under *Perlmutter*,\(^{58}\) and thus was subject to strict liability law.

The court then considered the argument that blood was an unavoidably unsafe product under comment k and, therefore, not subject to strict liability.\(^{59}\) It noted that comment k recognizes that certain products such as prescription drugs and vaccines have a utility which outweighs their risk, and that imposing strict liability on suppliers may keep such products off the market.\(^{60}\) The Court of Appeals referred to a number of blood products cases from other jurisdictions in which courts had found that the unavoidably unsafe product exception applied,\(^{61}\) the court reviewed in detail three significant cases.

In *Belle Bonfils Memorial Blood Bank v. Hansen*,\(^{62}\) the Colorado Supreme Court held that comment k applied to blood because the "raison d'etre of strict liability is to force some hazardous products

\(^{58}\) See supra notes 22-27 and accompanying text.

\(^{59}\) 315 Md. at 719-20, 556 A.2d at 1114-15. Comment k states:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. . . . The seller of such products, . . . is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

**Restatement (Second) of Torts** § 402A comment k (1965) (emphasis in original).


\(^{61}\) *Miles*, 315 Md. at 725, 556 A.2d at 1117. Some of these cases include: *Fogo v. Cutter Laboratories*, 68 Cal. App. 3d 744, 752, 137 Cal. Rptr. 417, 422 (1977) (Konyne manufacturer exempt from strict liability claims for transmission of the hepatitis virus), *Fisher v. Sibley Memorial Hosp.*, 403 A.2d 1130, 1134 (D.C. 1979) (blood plasma not governed by strict liability law), and *Brody v. Overlook Hosp.*, 127 N.J. Super. 331, 339-40, 317 A.2d 392, 397 (App. Div. 1974) (blood that contained undetectable hepatitis virus not unreasonably dangerous under comment k), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975). For the Court of Appeals' summary of the rationale of these cases, see *Miles*, 315 Md. at 725-26, 556 A.2d at 1118 (blood's great importance to health, the strong public interest in assuring its availability, the lack of a scientific test for the contaminant, and the "relatively small risk of transmitting the disease, renders [blood] not 'unreasonably dangerous' ").

\(^{62}\) 665 P.2d 118 (Colo. 1983) (en banc).
out of the market," a rationale inapplicable to an irreplaceable life-saving product such as blood.\textsuperscript{63} In \textit{Kozup v. Georgetown University},\textsuperscript{64} the United States District Court for the District of Columbia reached a similar conclusion, explicitly relying on public policy considerations.\textsuperscript{65} In contrast, the \textit{Miles} court found that \textit{Cunningham v. Mac-Neal Memorial Hospital}\textsuperscript{66} "rejected the argument that blood was not within § 402A or, if it was, that it was unavoidably unsafe under Comment K."\textsuperscript{67}

The \textit{Miles} court followed \textit{Kozup}, and ruled that under state common law, the public policy underlying comment k dictated that strict liability generally would not apply to blood suppliers.\textsuperscript{68} The relevant policy considerations included the need for an adequate blood supply, the absence of a test to detect the AIDS virus at the time of the transfusions, and the fact that virtually every state, including Maryland, had enacted some form of blood shield statute.\textsuperscript{69}

The court also cited with approval \textit{Belle Bonfils}, stating that "the fundamental purpose underlying strict tort liability is to force hazardous products from the market."\textsuperscript{70} In so doing, the court gave somewhat short shrift to the other policy justifications for strict liability.\textsuperscript{71} These include providing a method for bypassing negligence requirements, safety incentives, resource allocation, and loss spreading, all of which arguably may apply in some degree to blood.\textsuperscript{72} By stressing the need to keep blood products available to

\textsuperscript{63} Id. at 124.
\textsuperscript{65} Id. at 1058-60 (blood shield statutes are "sound public policy," based on concern for an adequate blood supply).
\textsuperscript{66} 47 Ill. 2d 443, 266 N.E.2d 897 (1970).
\textsuperscript{67} 315 Md. at 729-30, 556 A.2d at 1120.
\textsuperscript{68} To allow a defense to strict liability on the ground that there is no way, either practical or theoretical, for a defendant to ascertain the existence of impurities in his product would be to emasculate the doctrine and in a very real sense would signal a return to a negligence theory.
\textsuperscript{69} Cunningham, 47 Ill. 2d at 453, 266 N.E.2d at 903-04.
\textsuperscript{70} \textit{Miles}, 315 Md. at 732-33, 556 A.2d at 1121.
\textsuperscript{71} Id. at 730-32, 556 A.2d at 1120-21. In particular, the 1986 amendment to § 18-402 of the State's Health-General Article was "virtually tantamount to legislative acceptance of the basic substance of Comment k." Id. at 732, 556 A.2d at 1121.
\textsuperscript{72} Id. at 733, 556 A.2d at 1121.
\textsuperscript{73} The court states that the "fundamental purpose [of] strict tort liability is to force hazardous products from the market," \textit{id}., but that rationale does not appear in \textit{Phipps} nor in \textit{Miles'} discussion of \textit{Phipps}. Id. at 715-18, 556 A.2d at 1112-14.
the public, the court apparently assumed that imposing strict liability on suppliers ultimately would force an essential product off the market. The court, therefore, decided that the undesirability of that outcome overrides the other justifications for imposing strict liability. Some commentators 73 have questioned this conclusion, though the many blood shield statutes show that most state legislatures share the Court of Appeals' view.

c. Implied Warranty.—The court finally considered the product liability claim based on a breach of implied warranties of merchantability 74 and fitness. 75 The court concluded that the provisions of the State's Commercial Law Article applied because the case involved the sale of a product, i.e., blood. 76 Nevertheless, the court held that it would not uphold implied warranty claims in cases in which a claim of strict liability failed under the unavoidably unsafe product exception. 77 The court stated that the legislature could not have intended to require blood suppliers to warrant that their product was free from an "unknowable contaminant" 7 8 such as the AIDS virus, because to "fasten upon the blameless seller of a vitally essential lifesaving product a wholly unreasonable liability [is] certain to prove antithetical to the general public interest." 79

The court's application of the unavoidably unsafe products exception to implied warranty claims is not as surprising as it first might appear. Strict liability law essentially developed from warranty law, 80 and similar policies underlie the two doctrines. 81 Nevertheless, the court's direct application of comment k to implied warranty claims is perhaps the most surprising aspect of Miles be-

73. See, e.g., Boland, Strict Liability in Tort for Transfusing Contaminated Blood, 23 ARK. L. REV. 236, 246-47 (1969) ("highly doubtful" whether imposing strict liability would force any valuable products from the market as long as they are profitable); Williams, supra note 49, at 286 (strict liability would not deter marketing of blood products).


76. Miles, 315 Md. at 736-37, 556 A.2d at 1123.

77. Id. at 737, 556 A.2d at 1123.

78. Id. at 739, 556 A.2d at 1124-25.

79. Id., 556 A.2d at 1125.

80. See Phipps v. General Motor Corp., 278 Md. 337, 363 A.2d 955 (1976); Freeman & Dressel, supra note 55, at 75 (scope of recovery under warranty closely approaches that of strict liability); see also Note, supra note 20, at 1103-06 (tracing development of strict liability in California).

81. See, e.g., Fisher v. Sibley Memorial Hosp., 403 A.2d 1130, 1133 (D.C. 1979) (the two doctrines are "expressions of a single basic public policy as to liability for defective products").
cause, as the court notes, "theoretically, the seller's inability to discover defects in a blood product may not be relevant to a warranty cause of action." 82

The Court of Appeals' conclusion—that suppliers of blood and blood products are not subject to strict liability or implied warranty claims for harms that result from the transmission of undetectable viruses through blood transfusions 83—is consistent with the law of virtually every other state. The court reached this conclusion through an approach consistent with the common-law doctrine of strict liability, 84 rather than through a strained interpretation of the then-existing blood shield statutes.

The Miles decision will directly impact a finite number of potential plaintiffs—those who contracted the AIDS virus from blood or blood products prior to the 1986 amendment to the blood shield statute. 85 The court's explicit adoption of comment k and its reliance on the concepts of comment k to avoid liability could affect product liability law beyond the narrow realm of blood suppliers. Other industries may claim that their products, while perhaps less vital than blood, are nevertheless too valuable to force from the market by the imposition of strict liability. Miles Laboratories, Inc. v. Doe provides precedent for such an argument, but given the unique circumstances of blood, and the nearly universal legislative protection afforded to blood suppliers, Miles is easily distinguishable from most other types of product liability cases.

4. Conclusion.—By applying comment k to blood and blood products that contain undetectable contaminants, the Court of Appeals in Miles Laboratories, Inc. v. Doe shielded suppliers of these vital substances from strict liability claims. As a result, those persons who unfortunately contracted the AIDS virus through a blood transfusion will find it difficult, if not impossible, to obtain compensation for their injury. In the court's view, the necessity of ensuring an adequate blood supply must override concerns for these tragic vic-

82. 315 Md. at 739, 556 A.2d at 1124 (citing J. WHITE & R. SUMMERS, Uniform Commercial Code § 9-6, at 347 (2d ed. 1980)).
83. Id. at 736, 556 A.2d at 1123.
84. See supra notes 54-57 and accompanying text.
85. In 1986, Maryland had reported 15 cases of AIDS that resulted from blood transfusions. TESTIMONY OF GILBERT M. CLARK, EXECUTIVE DIRECTOR AMERICAN ASSOCIATION OF BLOOD BANKS, BEFORE THE COMMITTEE ON THE JUDICIARY, MARYLAND HOUSE OF DELEGATES, ANNAPOLIS, MARYLAND, March 10, 1986 at 9, cited in Comment, supra note 16, at 103. Additional cases of AIDS resulting from transfusions that occurred prior to the 1986 amendment will likely be discovered because of the long incubation period of the disease. Comment, supra note 16, at 107 n.135.
tims. The Maryland legislature made this policy judgment when it amended the State's blood shield statute in 1986; the court simply followed it.

**B. Parent-Child Immunity**

In *Hatzinicolas v. Protopapas*, the Court of Appeals held that the doctrine of parent-child immunity does not bar a minor child's tort action against her parent's business partner for an alleged act of negligence committed in the operation of that partnership business. In so holding, the court reversed the Court of Special Appeals' decision to extend the immunity to the business partner. The Court of Appeals holding stands in contrast to prior decisions that confirmed the vitality of this doctrine long entrenched in Maryland common law. Although the court reconciles its decision with prior Maryland cases, the holding ultimately is grounded in public policy considerations.

The result reached by the Court of Appeals comports with the national trend toward abrogating the parent-child immunity doctrine. The reasoning behind the decision, however, is ambiguous and may confuse lower courts with respect to the doctrine's application in future cases. Moreover, a thorough reading of the case

---

87. Id. at 342, 550 A.2d at 948.
88. Id. at 360, 550 A.2d at 957.
90. See *Hatzinicolas*, 314 Md. at 347-56, 550 A.2d at 950-55.
91. See id. at 356-59, 550 A.2d at 955-56.
93. See infra notes 156-158 and accompanying text.
supports an extremely narrow interpretation that suggests the holding will have a minimal impact in future intrafamily suits. The final part of this Note posits an alternative approach to intrafamily suits.94

1. The Case.—A two-year old child, while on the premises of her father’s partnership business (Hopkins Carry Out), lost two fingers of her right hand when the hand got caught in the gears of a meat slicer.95 The child, by her mother, sued Nicholas Protopapas as a partner96 of the Hopkins Carry Out in the Circuit Court for Baltimore City. The complaint alleged that the defendant was negligent in operating a machine that had no metal safety guard to prevent injury caused by contact with the metal chains and gears.97

The plaintiffs openly admitted that the child’s father and Protopapas were the sole proprietors and general partners of the Hopkins Carry Out.98 Protopapas subsequently filed a motion for summary judgment, claiming that the parent-child immunity doctrine barred the child’s suit.99 The circuit court judge granted the defendant’s motion for summary judgment, whereupon the plaintiffs appealed to the Court of Special Appeals.100

After the Court of Special Appeals affirmed the summary judgment,101 the Court of Appeals granted certiorari.102 In reversing the lower court’s decision, the Court of Appeals held that the child could sue her father’s partner notwithstanding the general rule of parent-child immunity.103 The court first distinguished David v. 

94. See infra notes 166-177 and accompanying text.
95. Hatzinicolas, 314 Md. at 342-43, 550 A.2d at 948.
96. Because the child’s father would be liable for contribution to his business partner for any damages awarded in this suit, a judgment for the child against the partner would mean the damage award would be payable in part by her father. See Hatzinicolas v. Protopapas, 73 Md. App. 271, 275-76, 533 A.2d 1311, 1313 (1987), rev’d, 314 Md. 340, 550 A.2d 947 (1988); see infra note 101 and accompanying text.
97. Hatzinicolas, 314 Md. at 343, 550 A.2d at 948.
98. Hatzinicolas, 73 Md. App. at 273, 533 A.2d at 1312.
99. Id.
100. Id. at 273-74, 533 A.2d at 1312.
101. Id. at 272, 553 A.2d at 1311. In affirming the summary judgment, the Court of Special Appeals noted that partners are jointly and severally liable for partnership torts; therefore, Protopapas would be able to demand contribution from the child’s father for any recovery awarded to the child. Id. at 275-76, 533 A.2d at 1313. As a result, the plaintiffs would “be able to do indirectly what they could not do directly, that is, obtain damages in their suit against appellee that in the end would be payable in part by the injured child’s father.” Id. This, in turn, would violate the parent-child immunity doctrine. Id. The soundness of this rationale is questionable. See infra note 150.
103. Hatzinicolas, 314 Md. at 342, 550 A.2d at 948.
David, a case on which the Court of Special Appeals particularly relied in its decision to extend immunity. The court then enumerated the substantive public policy justifications for its holding. Specifically, the court noted that the primary aims of the parent-child immunity doctrine are to preserve peace in the family and to recognize parental discretion in child-rearing that serves to maintain the home. In the instant case, the court maintained that allowing the suit would not impair these twin aims because the Hatzinicolas family—a family in which the child lives with both parents—would not have brought the suit to begin with if they did not believe it was in their best interests to do so. Moreover, the court observed that allowing the child’s suit would not impair domestic tranquility or parental authority in the family household because the net effect of any contribution by the child’s father simply would be a reduction in the damages awarded to the child by an amount equal to the father’s contractual, pro rata share of the partnership’s liability to his daughter. Finally, the court noted that “[w]hile the decision to have a child sue a parent’s partner may impair, or even destroy, the relationship between partners, that relationship is not the concern of the parent-child immunity doctrine.”

2. Legal Background.—The origins of the parent-child immunity doctrine can be traced to the 1891 Mississippi Supreme Court decision in Hewlett v. George. In Hewlett, a young, married woman attempted to sue her mother for wrongfully committing her to an insane asylum. The court, citing no authorities, reversed the

104. 161 Md. 532, 157 A. 755 (1932). For a discussion of this case, see infra notes 148-151 and accompanying text.
107. Id. at 356, 550 A.2d at 955.
108. Id. at 358, 550 A.2d at 956.
109. Id. at 358-59, 550 A.2d at 956.
110. Id. at 358, 550 A.2d at 956.
111. Hatzinicolas, 314 Md. at 356-59, 550 A.2d at 955-56.
112. Id. at 704, 9 So. at 885 (1891).
113. Hewlett was not the first American case to broach the subject of parent-child immunity. In Gould v. Christianson, 10 F. Cas. 857 (C.C.S.D.N.Y. 1836) (No. 5636), a seaman claimed that he stood in loco parentis to a minor child and thus enjoyed immunity with respect to negligence claims that the child brought against him. The court found for the minor child, but stated in dictum that a father enjoys immunity “to chastise a child at his discretion, without responsibility to the law, by punishments other than such as are cruel and injurious to the life or health of the child or are a public offense.” Id. at 864. Similarly, in Lander v. Seaver, 32 Vt. 114 (1859), a schoolmaster claimed immunity on the same basis. The court rejected the immunity defense of the defendant; the court,
lower court's decision and held that the child could not assert the claim against her parent because such suits would disrupt domestic tranquility.\textsuperscript{114}

Despite the dearth of precedent to support the Hewlett ruling, the doctrine of parent-child immunity "was blindly followed [for forty years] by many courts throughout the country, both with respect to negligent acts and malicious acts."\textsuperscript{115} During this period, the Supreme Court of Washington actually denied a tort claim brought by a fifteen-year old girl against her father after he had been criminally convicted of her rape.\textsuperscript{116} The Washington court's justification for its decision rested partly on a fear that the parent would inherit any recovery if the child died and partly on a concern for the financial welfare of the other family members if the court awarded damages to the child.\textsuperscript{117}

Numerous other courts that adopted the doctrine emphasized that allowing such suits could undermine parental discretion and authority.\textsuperscript{118}

\textsuperscript{114} Hewlett, 68 Miss. at 711, 9 So. at 887. The court stated in relevant part:

The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.


\textsuperscript{116} Frye v. Frye, 305 Md. 542, 545, 505 A.2d 826, 828 (1986).

\textsuperscript{117} Id. at 245, 79 P. at 789. Other courts have used similar grounds to deny recovery. See Barlow, 261 Iowa at 722, 156 N.W.2d at 110 (parental immunity barred child's suit against father for injuries sustained when son inserted his hand in meat grinder on father's business premises); Skinner v. Whitley, 281 N.C. 476, 480, 189 S.E.2d 230, 232 (1972) (parental immunity barred child's action against father for injuries sustained as a result of father's negligent driving).

\textsuperscript{118} See, e.g., Barlow, 261 Iowa at 718, 156 N.W.2d at 107-08; Luster v. Luster, 299
As to the parents—the law which imposes upon them the duty to support and discipline a minor child... accords to the parents a wide discretion. If within the wide scope of daily experiences common to the upbringing of a child a parent may be subjected to a suit for damages for each failure to exercise care commensurate with the risk—for each injury caused by inattention, unwise choice or even selfishness—a new and heavy burden will be added to parenthood.119

Courts have advanced at least seven different reasons for granting parental immunity in tort cases.120 The two most common reasons, and the most logical, are the protection of family harmony, first espoused in Hewlett, and deference to a parent's discretion and authority.121 Over the last sixty years, state courts have carved out numerous exceptions to the absolute rule of parental immunity as originally enunciated in Hewlett. These exceptions, however, have occurred mainly in situations in which the peace of the family would not be impaired.122 Most significantly, courts uniformly have held

---


120. Barlow v. Iblings, 261 Iowa 713, 717-18, 156 N.W.2d 105, 107 (1968). These reasons include: (1) danger of fraud, (2) possibility of succession, (3) family exchequer, (4) analogy to denial of a cause of action between husband and wife, (5) domestic tranquility, (6) domestic government, and (7) parental discipline and control. See McCurdy, Torts Between Parent and Child, 5 VILL. L. REV. 521, 529 (1960); McCurdy, Torts Between Persons in Domestic Relations, 43 HARV. L. REV. 1050, 1072-77 (1930); Comments on Recent Cases, 36 IOWA L. REV. 384 (1951).

121. See supra notes 114, 118-119 and accompanying text. For a thorough, critical evaluation of the historical justifications of the parent-child immunity doctrine, see Hollister, supra note 92.

122. These exceptions include cases in which: (1) an emancipated child is involved, (2) the alleged injury was inflicted intentionally or with malice, (3) the parent or child involved has died and suit is brought under either a wrongful death or survival statute, (4) the child is injured in the course of a business, rather than a personal, activity of the parent, (5) the parent is covered by insurance, and (6) the negligent parent had no custody of the injured child. See PROSSER & KEETON, supra note 92, § 122, at 906-07; Anno-
that the immunity doctrine is inapplicable in cases in which the parent's actions were intentional, willful, or malicious. In such circumstances, there often is no domestic tranquility left to preserve; thus, the primary justification for denying damages to the injured child is absent entirely. Moreover, while parents have a great deal of discretion in how to raise their children, that discretion "does not go beyond the limits of reasonable parental discipline" since "[n]o sound public policy would be subserved by extending it beyond those limits."

Of greater relevance to the Hatzinicolas case are those cases in which a number of courts have disallowed the immunity defense when the injury occurred in connection with the parent's vocational or business activities. In making this exception, the courts have recognized that a parent's negligent conduct in his or her business activities is unrelated to the discharge of parental duties; therefore, no exercise of parental discretion is involved.


\[124.\] See, e.g., Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951). In Mahnke, a man shot his wife in the head with a shotgun in his daughter's presence. One week later, the man shot himself with a shotgun, again in his daughter's presence. Id. at 63, 77 A.2d at 924.


\[126.\] See Trevarton v. Trevarton, 151 Colo. 418, 423, 378 P.2d 640, 643 (1963) (parental immunity does not bar child's suit against father for injuries suffered when father, while engaged in business activities, negligently allowed felled tree to be dragged across his son); Dunlap v. Dunlap, 84 N.H. 352, 372-73, 150 A. 905, 915 (1930) (parental immunity does not bar child's suit against employer-father for injuries sustained from collapse of staging on father's business premises); Signs v. Signs, 156 Ohio St. 566, 577, 103 N.E.2d 743, 748-49 (1952) (parental immunity does not bar child's suit against father's partnership for burns resulting from fire which burst forth from gas pump on father's partnership premises); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971) (parental immunity does not bar child's action against father's partnership for injuries suffered when father accidentally engaged farm machinery that son was cleaning); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149, (1952) (en banc) (parental immunity does not bar child's action against father for injuries sustained when father drove over child with truck used for business purposes).

\[127.\] See, e.g., Trevarton, 151 Colo. at 422, 398 P.2d at 640; supra note 126; see also Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966), overruled by Kirchner v. Crystal, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984), in which the Ohio Court of Appeals explained that "where there exists a dual relationship between a parent and child . . . the domestic relationship is merely incidental and becomes so logically irrelevant as to prevent immunity from attaching." Id. at 119, 216 N.E.2d at 376.
The creation of these numerous exceptions has fractured the parent-child immunity doctrine, resulting in an incomprehensible, inconsistent body of case law of little precedential value. Moreover, the plethora of currently recognized exceptions reflects the state courts' reluctance to apply this doctrine in modern-day circumstances. Noting the "courts' hostility toward the parental-immunity doctrine," the Supreme Court of Wisconsin abolished the doctrine in *Goller v. White*, subject to two limited exceptions. Under this decision, the doctrine applies when the alleged negligent act involves either (1) an exercise of parental authority over the child or (2) an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. Since *Goller*, many states have abrogated the immunity doctrine, either by case law or by statute.

The parent-child immunity doctrine has existed in Maryland since the 1930 case of *Schneider v. Schneider*. In *Schneider*, the Court of Appeals held that a mother could not sue her minor child for injuries sustained in an automobile accident in which she was a passenger and the child was the driver. Seven years later, the Court of Appeals held in *Yost v. Yost* that a minor child cannot maintain a suit in equity against a parent for non-support, *i.e.*, for the negligent exercise of parental duty. Since this time—and prior to the *Hatzinicolas* decision—Maryland courts have recognized only two exceptions to an absolute parent-child immunity. 

---

128. Falco v. Pados, 444 Pa. 372, 377, 282 A.2d 351, 354 (1971). "[T]he tendency has been to whittle away the rule by statute and by the process of interpretation, distinction and exception, until what we have left today is a conglomerate of paradoxical and irreconcilable judicial decisions." *Id.*

129. *See Hollister, supra* note 92, at 508-09.

130. 20 Wis. 2d 402, 408, 122 N.W.2d 193, 197 (1963).

131. *Id.* at 409, 122 N.W.2d at 198.

132. For a detailed report on the status of the parent-child immunity doctrine on a state-by-state basis as of March 1986, see Frye v. Frye, 305 Md. 542, 568-87, 505 A.2d 826, 840-49 (1986). *See also Hollister, supra* note 92; *Annotation, supra* note 122, at 1078-99, 1113-42.

133. 160 Md. 18, 152 A. 498 (1930).

134. *Id.* at 23, 152 A. at 500. The court emphasized the incongruity that would result if a minor child were allowed to sue the parent upon whom the child depended, particularly because the parent would have to finance the child's litigation costs. *Id.* Although the court observed that the majority of other state courts had followed the *Hewlett* rule that an unemancipated child cannot sue his parent in tort, it noted that the question in the instant case differed somewhat. *Id.* at 22, 152 A. at 499.

135. 172 Md. 128, 190 A. 753 (1937).

136. *Id.* at 134, 190 A. at 756.

Moore, the Court of Appeals joined most other state courts when it limited the immunity to cases in which the alleged injuries were not inflicted maliciously. Six years later, in Waltzinger v. Birsner, the court refused to extend the doctrine to suits involving an emancipated child.

In a series of cases following Waltzinger, the Maryland courts have consistently reaffirmed their commitment to the parent-child immunity doctrine, “rejecting all suggestions that [they] abrogate, alter or modify it.” Most recently, in Frye v. Frye, the Court of Appeals dispelled any notions of abrogation when it invoked the doctrine to deny a suit for damages brought by a child who was injured in an automobile accident caused by his father’s negligent driving. The court in Frye emphasized the importance of promoting family harmony and authority. In addition, the court reasoned that the legislature would have to make an exception to the doctrine with respect to motor vehicle accidents because “compulsory motor vehicle liability insurance is a creature of the legislature.”

3. Analysis.—To reconcile its decision with prior Maryland cases, the Court of Appeals first assessed the precedential value of David v. David. In David, a woman was precluded from suing her husband’s partnership for injuries she sustained while on the premises of that partnership. The court relied heavily on the law holding partners jointly and severally liable for any claims brought against their partnership. Because of this liability, each partner would be responsible for contributing his proportionate share of any judgment against the partnership. Therefore, obtaining a judgment against the partnership would have the same effect as obtaining a judgment directly against the husband. Logically, then,
the court denied recovery because the "same dictates of public policy which have been held to preclude persons who stand in the relation of husband and wife from suing each other individually in tort would also prevent either of them from maintaining such an action against a partnership of which the other was a member . . . ."\textsuperscript{151}

The Court of Special Appeals, by analogizing interspousal immunity with parent-child immunity, found the reasoning in \textit{David} to be persuasive.\textsuperscript{152} The Court of Appeals, however, distinguished \textit{David} from the \textit{Hatzinicolas} case on the basis that the wife in \textit{David} had joined her husband as a party defendant, while the child in \textit{Hatzinicolas} had sued her father's partner separately.\textsuperscript{153} The court made the distinction despite the fact that the end result would have been the same:\textsuperscript{154} The child's father would have been liable for his proportionate share of the partnership damages.\textsuperscript{155}

The ambiguity in the court's rationale stems from its conclusion that the Hatzinicolas family would not have brought the child's action unless filing the suit was in the family's best interests.\textsuperscript{156} The logic behind this argument is sound; however, as the concurring

\textsuperscript{151} \textit{David}, 161 Md. at 538, 157 A. at 757.
\textsuperscript{153} 314 Md. at 347, 550 A.2d at 950.
\textsuperscript{154} The court's dependence on this rationale is questionable since its holding embraces not only suits brought by a child against a parent's partner, but suits against the partnership. \textit{Hatzinicolas}, 314 Md. at 341, 550 A.2d at 948. Under Md. Cts. & Jud. Proc. Code Ann. § 6-406(b)(1) (1989), a suit against a partnership has the same effect as if all partners had been joined.
\textsuperscript{155} In discrediting the \textit{David} case, and dispelling any notions that Maryland precedent compels preclusion of the child's suit against Protopapas, the court places much emphasis on the decision of \textit{Tobin} v. Hoffman, 202 Md. 382, 96 A.2d 597 (1953). In \textit{Tobin}, the plaintiff was the victim of an automobile accident. \textit{Id}. The plaintiff sued her host driver, who was her husband's business partner, and also sued the operator of a second vehicle involved in the accident. \textit{Id}. The \textit{Tobin} court held that interspousal immunity did not bar the wife's claim against her husband's business partner notwithstanding the existence of a written partnership agreement compelling contribution by the otherwise immune husband. \textit{Id}. at 392, 96 A.2d at 601.
\textsuperscript{156} \textit{Hatzinicolas}, 314 Md. at 358, 550 A.2d at 956.
opinion suggests, if the "majority intends to generally abrogate the principle of parent-child immunity, it should say so." The problem with this public policy aspect of the majority's rationale lies in the potential breadth of its implications if read literally. There are a multitude of situations in which an intrafamily suit would be beneficial to the family both economically and otherwise. If the lower courts interpret the opinion to apply to that vast array of cases, the result would be a drastic reduction in the scope of the immunity doctrine.

A more likely reading of the court's reasoning, however, is an extremely narrow one. The court makes clear that it is not making a business exception to the parent-child immunity doctrine. The court simply precludes extension of the doctrine to a suit involving a parent's business partner. Obviously, if the court meant to significantly abrogate the doctrine, it would make little sense for the court to provide such a disclaimer. Furthermore, a broad interpretation of the court's reasoning would be extremely difficult to reconcile with a number of recent decisions that confirm the vitality of the doctrine in Maryland. If the court meant to overrule any of these decisions, it seems logical that the court would have done so explicitly.

The Court of Appeals in Hatzinicolas held that the parent-child immunity doctrine did not bar a child's suit against her father's business partner for negligence committed in the operation of the partnership business. Although the result reached by the court is in harmony with the decisions of other jurisdictions limiting the doctrine, the opinion is inherently weak for two major reasons. First, the court employed technical, artificial distinctions to reconcile its decision with prior Maryland decisions. Second, the court's public policy argument is ambiguous: if it is interpreted broadly by the lower courts, the decision could have far-reaching implications with respect to the application of the parent-child immunity doctrine in Maryland; on the other hand, a narrow reading by the lower

157. Id. at 363, 550 A.2d at 959 (McAuliffe, J., concurring).
158. Logically, any suits brought by a child against a parent would be in the family's best interests any time that parent carries a liability insurance policy. The court, however, does make clear that a cause of action does not hinge upon the presence of liability insurance. Id. at 358 n.12, 550 A.2d at 956 n.12.
159. Id. at 359 n.14, 550 A.2d at 956-57 n.14.
160. Id.
161. See supra note 89 and accompanying text.
162. 314 Md. at 342, 550 A.2d at 948.
courts—a much more likely prospect—will result in the continued application of the doctrine in situations in which logic and justice would dictate otherwise.

The doctrine of parent-child immunity has been criticized severely by numerous judges and commentators. The profusion of exceptions to this rule and the complete abrogation of the immunity in some states reflects the courts' reluctance to adhere to this antiquated doctrine. Maryland courts, however, have been unwilling to follow the lead of other states' courts that have severely circumscribed the scope of this "legal anachronism." There are two main reasons why they should do so.

First, one of the primary justifications for retaining the parent-child immunity doctrine is the preservation of domestic tranquility. This basis for the immunity, however, is illogical and inapplicable in the modern-day world. Given the widespread prevalence of liability insurance, it is difficult to argue that family harmony would be impaired by allowing intrafamily suits any more so than it would be by leaving an injured family member uncompensated. The fact is, "virtually no [parent-child] suits are brought except where there is insurance. And where there is [insurance], none of these threats to the family exists at all."

Moreover, the fact that children have always been able to sue their parents over property matters is completely at odds with a rule that precludes them from bringing actions in tort. In fact, the

164. See, e.g., Berman, Time to Abolish Parent-Child Tort Immunity: A Call to Repudiate Mississippi's Gift to the American Family, 4 Nova L.J. 25 (1980) (recommending total abrogation of parent-child immunity doctrine); Hollister, supra note 92 (evaluating the justifications for the doctrine and recommending its abrogation); McCurdy, Torts Between Parent and Child, supra note 120 (arguing for complete abolition of the doctrine); McCurdy, Torts Between Persons in Domestic Relations, supra note 120 (suggesting that the doctrine is illogical and pointing out possible alternatives); Comment, Tort Actions Between Members of the Family-Husband & Wife-Parent & Child, 26 Mo. L. Rev. 152 (1961) (recommending alternative solutions for intrafamily torts); Comment, Parent-Child Immunity: The Case for Abolition, 6 San Diego L. Rev. 286 (1969) (arguing for total abrogation of parent-child immunity).

165. For a list of states that have abrogated the doctrine as of 1986, see Frye v. Frye, 305 Md. 542, 568-87, 505 A.2d 826, 840-49 (1986). See also Annotation, supra note 122, at 1078-93, 1113-42.

166. Gibson v. Gibson, 3 Cal. 3d 914, 916, 479 P.2d 648, 649, 92 Cal. Rptr. 288, 288 (1971) (parental immunity did not bar child's action against father for injuries sustained when child was hit by motor vehicle after father negligently instructed the child to get out of their own car and adjust wheels of jeep that they were towing).

167. See supra note 114 and accompanying text.


169. See Prosser & Keeton, supra note 92, § 122, at 904.
risk of domestic disharmony seems greater in property suits where damages usually are paid by the parent himself or herself, as opposed to tort claims in which, as mentioned above, judgments almost always are satisfied by the parent's insurance carrier.\(^{170}\)

The second major justification for the parent-child immunity doctrine is the fear that such suits would undermine parental authority if children were allowed to bring them against their parents.\(^{171}\) While this is a legitimate ground for apprehension, the fact that parents have great discretion in raising their children should not exempt parents from their responsibility to carry out parental functions in a reasonable fashion.\(^{172}\) Moreover, there are many situations that do not involve the exercise of parental discretion at all,\(^{173}\) to allow the child to sue the parent in such cases would do little to impair parental authority and discipline.\(^{174}\)

For the above reasons, the rule that should be implemented in Maryland is the one that the Supreme Court of California adopted in *Gibson v. Gibson*,\(^{175}\) when it held that a child could sue her parent for ordinary negligence.\(^{176}\) Specifically, "the proper test of a parent's conduct is this: What would an ordinarily reasonable and prudent *parent* have done in similar circumstances?"\(^{177}\) With such a rule, a jury or judge recognizes the unique position that parents occupy, while holding them responsible for negligently injuring their child.

4. Conclusion.—The Court of Appeals' decision in *Hatzinicolas* to allow a child's suit against her father's business partner is consistent with the recent trend to abrogate the parent-child immunity

\(^{170}\) *Gibson*, 3 Cal. 3d at 919, 479 P.2d at 650, 92 Cal. Rptr. at 291.

\(^{171}\) See supra notes 118-119 and accompanying text.

\(^{172}\) As the court in *Gibson* points out, "although a parent has the prerogative and duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits." *Gibson v. Gibson* 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971).

\(^{173}\) A good example is the case at bar in which the alleged negligence involved was the operation of a slicing machine without a protective metal plate. This obviously has nothing to do with the exercise of parental discretion.

\(^{174}\) At least one court has recognized the irrationality of applying the parent-child immunity doctrine in such cases and has restricted the scope of the doctrine by allowing suits when the alleged negligent act involves either an exercise of parental authority over the child or an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. *Goller v. White*, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963).

\(^{175}\) 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

\(^{176}\) *Id.* at 921, 479 P.2d at 652, 92 Cal. Rptr. at 293.

\(^{177}\) *Id.*
doctrine. The rationale behind this decision is ambiguous, however, making it difficult to predict exactly what effect the holding will have on future Maryland court decisions. Although lower courts may interpret the ruling broadly, it is more likely that the decision will have little impact on future cases because, when read in its entirety, the opinion is relevant only to suits involving a parent’s partner or a partnership.

This Note has proposed an alternative way to deal with intrafamily suits; namely, courts should not preclude children from filing tort suits in negligence against their parents, but should account for the unique parent-child relationship when determining the reasonableness of parental conduct. Given that the parent-child immunity doctrine is antiquated, and no longer appropriate in the modern-day world, Maryland should follow the lead of numerous other states and substantially abrogate the doctrine.

C. Statute of Limitations—Products Liability

In Pennwalt Corp. v. Nasios,178 the Court of Appeals held that in a medical products liability action, a plaintiff must have not only express or implied knowledge of his or her injury and its probable cause, but also express or implied knowledge of a manufacturer’s probable wrongdoing or product defect before the statute of limitations will begin to run.179 The knowledge necessary for a cause of action to accrue, however, need not be the result of clear and unequivocal proof of the manufacturer’s negligence or the product defect.180

The court has expanded and liberalized further the State’s discovery rule by its addition of yet another element to the “discovery” necessary before a cause of action will accrue. Pennwalt indicates that the court does not intend to narrowly construe the statute of limitations to bar a plaintiff’s claim when that plaintiff could not reasonably have known that he or she had a cause of action in negligence or strict liability against a medical products manufacturer.

178. 314 Md. 433, 550 A.2d 1155 (1988). The United States District Court for the District of Maryland certified to the Maryland Court of Appeals the question of “whether under the discovery rule, knowledge of the manufacturer’s wrongdoing or product defect is required, in addition to knowledge of possible causation, to trigger the statute of limitations in a medical products liability action.” Id. at 435, 550 A.2d at 1156. The question was certified to the court pursuant to Md. CTS. & JUD. PROC. CODE ANN. § 12-601 to -609 (1989).
179. Id. at 455-56, 550 A.2d at 1167.
180. Id. at 456-57, 550 A.2d at 1167.
1. The Case.—On June 17, 1980, Holy Cross Hospital admitted Evangelia Nasios for the delivery of her second child. It quickly became apparent that Nasios was partially paralyzed. Surgery did not improve her condition; five days later, a doctor told Nasios that the anesthetic may have caused her paralysis. Nasios hired an attorney who began to investigate her claims. On July 17, 1985, five years and several attorneys later, Nasios finally filed her suit in the United States District Court for the District of Maryland against the manufacturer of the anesthetic, the Pennwalt Corporation, alleging breach of warranty, negligence, and strict liability. Pennwalt subsequently moved for summary judgment, asserting that the statute of limitations had expired and, thus, barred her claims.

2. Legal Background.—The State’s statute of limitations provides that a “civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.” Courts, however, must determine when an action “accrues” because the statute does not define the term. In giving substance to the term, Maryland courts have adhered to a liberal

---

181. Id. at 435, 550 A.2d at 1156.
182. Id. Pennwalt Corporation supplied the hospital with the anesthetic. Id.
183. Id.
184. Id. at 435, 550 A.2d at 1157. Physicians performed an emergency laminectomy to correct an epidural hematoma. Id.
185. Id.
186. Id.
187. Id. at 435-36, 550 A.2d at 1157.
188. Id. at 436, 550 A.2d at 1157.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued . . . . (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered . . . .

As a result, the court's findings do not affect the breach of warranty claim.

discovery rule, holding that a cause of action accrues when the claimant knew or should have known of the wrong.  

Historically, Maryland followed the "date of the wrong" rule to determine when a cause of action accrued. This rule provided that an action accrued on the date an injury occurred. Such a rule did not provide equitable results in all cases, however, and courts began to employ the discovery rule to redress these inequities.

The discovery rule's underlying rationale is that a plaintiff may be unaware a tort claim exists when the injury occurs. In situations in which an individual would be unable to understand or appreciate that he or she has suffered actionable harm until many years after the injury occurred, a cause of action that accrued when the injury occurred would not give the individual adequate opportunity to bring suit during the statutory period. Additionally, courts believe that strict adherence to the statute of limitations will

---

191. See, e.g., Pierce, 296 Md. at 663, 464 A.2d at 1025 (holding that the cause of action did not accrue until decedent knew or should have known of his lung cancer, and not upon discovery of the underlying asbestosis); Paffenberger, 290 Md. at 636, 451 A.2d at 680; Harig, 284 Md. at 83, 394 A.2d at 306 (extending the discovery rule in latent disease cases to the time that the "nature and cause of the injury" is discovered).

192. Pennwalt, 314 Md. at 438, 550 A.2d at 1158.

193. For other states that follow the "date of the wrong" rule, see Lafayette v. Rose, 118 Cal. App. 3d 793, 173 Cal. Rptr. 621 (1981) (products liability action against surgical instrument manufacturer, after instrument broke off and was left in plaintiff's body, barred by one-year statute of limitations that ran from the date of the injury even though plaintiff did not discover the cause of his injury until two years later), reprinted as modified, 120 Cal. App. 3d 196 (1981); Wojcik v. Almase, 451 N.E.2d 336 (Ind. Ct. App. 1983) (actions against catheter manufacturer arose on date catheter broke off in patient's body, not on date it was discovered by x-ray); Annotation, Statute of Limitations: When Cause of Action Arises on Action Against Manufacturer of Seller of Product Causing Injury or Death, 4 A.L.R.3d 821, § 13, at 92-100 (Supp. 1989).

194. Pennwalt, 314 Md. at 438, 550 A.2d at 1158.

"The effect of . . . [the date of the wrong rule] has frequently been to bar the plaintiff's claim not only before he sustained any perceptible harm, but before it was feasible for him to learn that the negligence had taken place . . . Especially where the plaintiff is unqualified to ascertain the imperfection, as in the case of negligent performance of expert or professional services, it seems harsh to begin the period at the time of the defendant's act." Id. at 439, 550 A.2d at 1158 (quoting Waldman v. Rohrbaugh, 241 Md. 137, 140, 215 A.2d 825, 829 (1966)). Waldman involved a medical malpractice action against a doctor who operated on a fractured ankle. The plaintiff did not discover the doctor's possible negligence until three years later when another doctor x-rayed the ankle and informed the patient that the first had not performed the operation properly. Waldman, 241 Md. at 139, 215 A.2d at 827. The court employed the discovery rule, holding that the use of the "date of the wrong" rule would be inequitable. Id.


196. Pennwalt, 314 Md. at 439, 550 A. 2d at 1159.
encourage plaintiffs to file actions prematurely, that is, before the injury manifests itself.\textsuperscript{197} The discovery rule resolves the dilemma by construing the accrual date as the time at which plaintiffs reasonably could have known that they have had a cause of action.\textsuperscript{198} The discovery rule thus represents an equitable accommodation to the statute of limitations' purposes, namely to:

"(1) provide adequate time for diligent plaintiffs to file suit,

(2) grant repose to defendants when plaintiffs have tarried for an unreasonable period of time, and

(3) serve society by promoting judicial economy."\textsuperscript{199} The statutory period, therefore, represents a compromise among the competing interests of plaintiffs, defendants, and the public, and "reflects a policy decision regarding what constitutes an adequate period of time for a person of ordinary diligence to pursue his claim."\textsuperscript{200}

Commentators have indicated that Maryland was the first jurisdiction in the nation to advocate the use of the discovery rule.\textsuperscript{201} In 1917, the Maryland Court of Appeals in \textit{Hahn v. Claybrook}\textsuperscript{202} found the need to mitigate the harshness of the date of the wrong rule. In \textit{Hahn}, a physician had prescribed excessive dosages of a medicine for a patient's stomach ailment in 1904.\textsuperscript{203} The patient began to notice that her skin was discolored in 1908; her skin condition progressively worsened until she stopped taking the medication in 1913.\textsuperscript{204} In 1915, the patient finally filed a medical malpractice suit.\textsuperscript{205} The Court of Appeals found that the statute of limitations "began to run from the time of the discovery of the alleged injury."\textsuperscript{206}

In 1966, the court specifically established the discovery rule as

\begin{itemize}
  \item \textsuperscript{197} \textit{Id.} at 445, 550 A.2d at 1161.
  \item \textsuperscript{198} \textit{Id.} at 440, 550 A.2d at 1159.
  \item \textsuperscript{199} \textit{Id.} at 437-38, 550 A.2d at 1158.
  \item \textsuperscript{200} \textit{Id.} at 437, 550 A.2d at 1158 (quoting Goldstein v. Potomac Elec. Power Co., 285 Md. 673, 684, 404 A.2d 1064, 1069 (1979)).
  \item \textsuperscript{201} Poffenberger v. Risser, 290 Md. 631, 634, 431 A.2d 677, 679 (1981); \textit{see} Note, \textit{The Statute of Limitations in Actions for Undiscovered Malpractice}, 12 Wyo. L.J. 30, 34 (1957). "The most modern view holds that the statute of limitations in a malpractice action does not commence to run until the negligence is discovered, or reasonably should be discovered. The discovery rule was probably first advocated in the case of \textit{Hahn v. Claybrook}.
\textit{Id.}
  \item \textsuperscript{202} 130 Md. 179, 100 A. 83 (1917).
  \item \textsuperscript{203} \textit{Id.} at 180, 100 A. at 84.
  \item \textsuperscript{204} \textit{Id.} at 185-86, 100 A. at 85.
  \item \textsuperscript{205} \textit{Id.} at 180, 100 A. at 84.
  \item \textsuperscript{206} \textit{Id.} at 187, 100 A. at 86. Although the plaintiff did not discover the injury until long after it occurred, and the action accrued at the time she discovered the alleged
an exception to the general date of the wrong rule in medical malpractice actions.\textsuperscript{207} The court subsequently extended the discovery rule to cases that involved other cases of professional malpractice\textsuperscript{208} as well as cases of latent disease.\textsuperscript{209} In \textit{Harig v. Johns-Manville Products Corp.},\textsuperscript{210} which first extended the discovery rule to the discovery of latent disease, the court concluded that a plaintiff must know not only the nature of his or her injury, but also the cause.\textsuperscript{211} In \textit{Harig}, the plaintiff did not develop asbestosis until 1975, although her last exposure to asbestos was in 1955.\textsuperscript{212} In applying the discovery rule, the court stressed the need for knowledge sufficient for the plaintiff to have notice that a cause of action exists.\textsuperscript{213} The court held that: “A plaintiff’s cause of action for latent disease, whether framed in terms of negligence or strict liability, accrues when he discovers, or through the exercise of reasonable care and diligence should have discovered, the \textit{nature and cause} of his disability or impairment.”\textsuperscript{214}

Maryland finally adopted the discovery rule as the general rule rather than the exception in \textit{Poffenberger v. Risser}.\textsuperscript{215} There, the
plaintiff filed a breach of contract and negligence action against a builder who, contrary to zoning set-back regulations, built a house too close to the adjoining property.\textsuperscript{216} The court held that

\[h\]aving already broken the barrier confining the discovery principle to professional malpractice, and sensing no valid reason why that rule's sweep should not be applied to prevent injustice in other types of cases, we now hold the discovery rule to be applicable generally in all actions and the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong.\textsuperscript{217}

In \textit{Poffenberger}, the court also held that constructive notice, that is, notice presumed as a matter of law, was insufficient to give the plaintiff knowledge of the wrong.\textsuperscript{218} The builder had argued that the plats and deeds recorded in the land records office provided the plaintiff with constructive knowledge regardless of whether the plaintiff actually knew of the information that the records contained.\textsuperscript{219} The court rejected this argument, stating that knowledge imputed from constructive notice would "recreate the very inequity the discovery rule was designed to eradicate, [and] we now hold this type of exposure does not constitute the requisite knowledge within the meaning of the rule."\textsuperscript{220}

The \textit{Poffenberger} court distinguished the legal fiction of constructive notice from the actual knowledge required by the discovery rule—be it express or implied.\textsuperscript{221} The court defined implied actual knowledge as "knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus, charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued."\textsuperscript{222} The issue of whether the plaintiff had implied actual knowledge of the injury was a question of fact,\textsuperscript{223} so the Court of Appeals reversed the grant of summary judgment and remanded the case to the circuit court.\textsuperscript{224} In \textit{Pennwalt}, the court reiterated the inquiry notice test to determine when a plaintiff will be deemed to have implied actual knowledge of an injury. A plaintiff will have such knowledge when

\begin{thebibliography}{99}
\bibitem{216} \textit{Id.} at 633, 431 A.2d at 678.
\bibitem{217} \textit{Id.} at 636, 431 A.2d at 680.
\bibitem{218} \textit{Id.} at 637, 431 A.2d at 681.
\bibitem{219} \textit{Id.} at 636, 431 A.2d at 680.
\bibitem{220} \textit{Id.} at 637, 431 A.2d at 681.
\bibitem{221} \textit{Id.}
\bibitem{222} \textit{Id.}
\bibitem{223} \textit{Id.} at 638, 431 A.2d at 681.
\bibitem{224} \textit{Id.}
\end{thebibliography}
he or she: (1) knows of facts sufficient to cause a reasonable person to investigate further, and (2) when a diligent investigation would have revealed that the plaintiff was a victim of the alleged tort.\(^{225}\) As such, the statute of limitations begins to run as of the date of inquiry notice.\(^{226}\)

3. Analysis.—Pennwalt’s motion for summary judgment\(^ {227}\) turned on the scope of express or implied actual knowledge of the injury under the discovery rule. That is, the Court of Appeals had to determine whether Nasios only had to know that Pennwalt’s product was a possible cause of her injury for her action to accrue, or whether she also needed knowledge of the manufacturer’s wrongdoing or a product defect.\(^ {228}\) The parties agreed that Nasios had actual knowledge that Nesacaine was a possible cause of her

\(^{225}\) *Pennwalt*, 314 Md. at 448-49, 550 A.2d at 1163-64 (citing O’Hara v. Kovens, 305 Md. 280, 302, 503 A.2d 1313, 1324 (1986)).

\(^{226}\) *Id.; see* Johnson v. Nadwodny, 55 Md. App. 227, 232, 461 A.2d 67, 70 (1983), in which the Court of Special Appeals held that the statutory test of “ordinary diligence” in Md. Cts. & Jud. Proc. Code § 5-203 (1980), the statute of limitations for fraud actions, paralleled the implied actual knowledge test as to when the plaintiff would be deemed to have a cause of action.

\(^{227}\) *Pennwalt*, 314 Md. at 436, 550 A.2d at 1157.

\(^{228}\) *Id.* The same question was before the Court of Appeals in Baysinger v. Schmid Prods. Co., 307 Md. 361, 514 A.2d 1 (1986), a medical products liability action against a manufacturer that involved an intrauterine device (IUD). The *Baysinger* court never answered the question, however, because it decided the case on other grounds. *Id.* at 362-63, 514 A.2d at 2. The court decided *Baysinger* based on the following issues: “Whether the trial court may determine that a cause of action has accrued under the discovery rule, on motion for summary judgment, by resolving factual inferences, evaluating witnesses’ credibility, and deciding other matters generally reserved for the jury.” *Id.* at 362, 514 A.2d at 1. The Court of Appeals reversed the intermediate appellate court, holding that summary judgment was an inappropriate resolution to the case because the facts were such that reasonable minds could differ. *Id.* at 367, 514 A.2d at 4.

Interestingly, the United States District Court for the District of Maryland subsequently held that knowledge of the manufacturer’s wrongdoing was necessary before an action could accrue in an IUD case. *See* Stone-Pigott v. G.D. Searle & Co., 660 F. Supp. 366, 368-69 (D. Md. 1987), aff’d, 884 F.2d 796 (4th Cir. 1989). Seven IUD users consolidated their claims for personal injuries and brought products liability actions against G. D. Searle & Co., the manufacturer of the Copper-7 IUD. *Id.* at 368. The federal court applied the discovery rule, and foreshadowing the Court of Appeals’ decision in *Pennwalt*, held that

From these IUD cases, has emerged the principle that knowledge of causation—that is, knowledge that a particular injury may have been caused by an IUD—may not be sufficient to start the statute of limitations running. In addition to knowledge of causation, a plaintiff must have some indication of wrongdoing before a cause of action can be said to have accrued. *Id.; see also* Perlov v. G.D. Searle & Co., 621 F. Supp. 1146 (D. Md. 1985).

[A]n additional piece of information—namely an indication that there may have been a negligent act—may be necessary before an injured party can be charged with notice that a wrong may have been committed . . . . In the absence of
paralysis more than three years before she filed suit. If knowledge of possible causation was all that was needed for a cause of action to accrue, then Pennwalt would have been entitled to summary judgment. The Court of Appeals, however, held that knowledge of manufacturer wrongdoing or product defect also is necessary before an action accrues in a medical products liability action, be it for negligence or strict liability.

In reaching its decision, the court engaged in the same manner of reasoning that led to its earlier discovery rule decisions. The court looked to the basis of the rule—that a deserving plaintiff is unaware that a cause of action exists—when it determined the time at which a cause of action “accrues” under the statute. The court considered the diligent plaintiff’s needs, the defendant’s interests, and judicial efficiency, and found that a plaintiff without knowledge of the manufacturer’s wrongdoing or of a product defect “is in the same position as one who cannot discover injury because both are blamelessly ignorant and cannot be said to have slept on their rights.” Thus, the plaintiff’s cause of action will accrue only when he or she has either express or implied actual knowledge of the manufacturer’s wrongdoing or of a product defect in addition to knowledge of possible causation.

The court explained that plaintiffs would be placed in a Catch-22 position if knowledge of manufacturer wrongdoing or product defect were not also prerequisites to starting the statute of limitations to run.

[I]f [the plaintiff] files suit within three years of discovery of the nature and cause of his injury he will have no proof of breach of duty or product defect and [the court will deny him] a remedy . . . . [I]f he waits until he gains the necessary knowledge of the defendant’s breach of duty or product defect, the statute of limitations will bar his suit.

some indication that there was a wrongdoing, a prudent person may not find it reasonable to aggressively inquire about possible product defects.

Id. at 1148.
229. Pennwalt, 314 Md. at 436, 550 A.2d at 1157.
230. Id.
231. Id. at 452, 550 A.2d at 1165. The language of the opinion suggests that the court’s decision applies to all product liability and negligence tort claims, not just those that involve medical products.
232. Id. at 453, 550 A.2d at 1166.
233. Id. at 456, 550 A.2d at 1167.
234. Id. at 454, 550 A.2d at 1166.
235. Id.
The court's application of the discovery rule properly balances the competing interests and concerns that underlie the statute of limitations. The court's decision encourages plaintiffs to timely file claims, but does not force plaintiffs to file what may be baseless claims. By delaying the start of the limitations period until a plaintiff knows or should know that a cause of action has accrued, the court believes that plaintiffs will not initiate suits simply to prevent the statute of limitations from running, thus promoting judicial economy.\textsuperscript{236} In \textit{Pennwalt}, judicial efficiency and fairness to plaintiffs tipped the balance of interests in the plaintiffs' favor.\textsuperscript{237}

Nevertheless, the court's concern with efficiency may be undermined by this additional requirement. Use of the newly strengthened discovery rule may hamper the efficiency of litigation because the issue of what a plaintiff knew or should have known is a question of fact for the jury.\textsuperscript{238} By making the statute of limitations question one of fact rather than law, trial courts may find it more difficult to dispose of cases by summary judgment. Thus, the court's reliance on the judicial efficiency interest is not entirely compelling.

The more convincing argument is that diligent plaintiffs should have every opportunity to bring their claims because the purpose of tort law is to remedy those who suffer an injury.\textsuperscript{239} Thus, with respect to knowledge of the defendant's wrongdoing or product defect, fairness to the plaintiff outweighs the defendant's interest in repose in deciding when the cause of action accrues.

The court was not unmindful of the defendant's interests. Such concern is evident in the court's decision that the knowledge required to start the statute of limitations running need not take the form of clear and unequivocal proof.\textsuperscript{240} Such a standard could have

\textsuperscript{236} \textit{Id.} at 455-56, 550 A.2d at 1167.

\textsuperscript{237} \textit{Id.} "A weighing of these three interests in a products liability case dictates that fairness to diligent plaintiffs and the promotion of judicial efficiency outweigh defendants' interest in repose, and therefore, an action accrues when the plaintiff knew or should have known that he had a cause of action." \textit{Id.}


\textsuperscript{239} See Prosser \& Keeton, supra note 92, § 1, at 5-6.

\textit{[Tort law] is directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests . . . . The law of torts, then, is concerned with the allocation of losses arising out of human activities; . . . . The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.}

\textit{Id.}

\textsuperscript{240} \textit{Pennwalt}, 314 Md. at 456-57, 550 A.2d at 1167.
extended a defendant's potential liability into the indefinite future.

4. Conclusion.—Pennwalt demonstrates the equities of the discovery rule, namely, assuring diligent plaintiffs the opportunity to have their claims heard and indicates the Court of Appeals' intention not to allow the statute to bar such plaintiffs from having their day in court.

D. Statutes of Limitations—Wrongful Death and Survival Actions

In Geisz v. Greater Baltimore Medical Center,241 the Court of Appeals held that a medical malpractice survival claim, predicated upon an injury that occurred prior to the 1975 enactment of the current medical malpractice statute of repose,242 accrues upon discovery rather than death.243 Specifically, the court held that a survival claim accrues when the plaintiff, through the exercise of due diligence, discovers or should have discovered that a cause of action exists.244 In addition, the court held that a defendant's fraud may toll the limitations period for a wrongful death claim.245 The decision grants plaintiffs potentially unlimited periods of time in which to bring both survival claims predicated on injuries that occurred before 1975 and wrongful death claims concealed by fraud.246 The court's treatment of these claims could indicate a trend toward relaxing limitations barriers.

Yet applying the discovery rule to claims for injuries that occurred before 1975 appears contrary to the spirit of the medical malpractice limitations statute as well as the basic policy of repose. In applying the fraudulent concealment statute of limitations, the court appears inadvertently to have shifted the burden of proving due diligence from the plaintiff to the defendant. Compelling arguments for keeping limitations barriers firmly in place surface from Geisz's underlying rationale and related policy considerations.

242. The medical malpractice statute of repose is codified at Md. Cts. & Jud. Proc. Code Ann. § 5-109 (1989). Under the purview of § 5-109, which the General Assembly intended to apply prospectively only, the legislature basically has reverted to the "time of injury" rule. For the actual language of the statute, see infra text accompanying note 305.
243. 313 Md. at 321, 545 A.2d at 667.
244. Id. at 314-19, 545 A.2d at 664-67.
245. Id. at 334, 545 A.2d at 674.
246. A survival action is one in which the cause of action for personal injury that the decedent holds just before or at death transfers to the decedent's personal representative. See Prosser & Keeton, supra note 92, § 125A, at 942. A wrongful death action is one in which the victim's dependents or heirs may bring their own independent cause of action for their loss at the decedent's death. Id. § 127, at 945.
1. The Case.—On September 21, 1975, twenty-nine year old Stephen F. Geisz died of Hodgkins disease.247 Four years before Geisz’s death, a biopsy had indicated the presence of the disease.248 Shortly thereafter, Geisz came under the care of Dr. George J. Richards, the Director of Radiation Therapy at the Greater Baltimore Medical Center (GBMC).249 Dr. Richards told Geisz that he had a ninety-five percent chance of being cured with radiation treatment and chemotherapy.250 After Dr. Richards’ advice and assurances that GBMC could offer him the best of care and treatment, Geisz began the prescribed treatment that continued over the next year and a half.251 During this time Geisz's condition worsened: The disease spread and fluid filled the sac around his heart.252

Dr. Richards again assured Geisz that he was receiving the best treatment possible and simply was within the five to ten percent of those who do not respond to treatment.253 Dr. Richards made these representations despite his later admissions that the radiation therapy department was understaffed and that hospital recordkeeping was insufficient.254 By November 1973, Geisz was beyond help by conventional treatment methods; Dr. Richards advised him to seek

247. Geisz, 313 Md. at 305, 545 A.2d at 660.
248. Id. at 309, 545 A.2d at 662.
249. Id. at 305-06, 545 A.2d at 660.
250. Id. at 309, 545 A.2d at 662.
251. Id. at 310-11, 545 A.2d at 662.
252. Id. The initial course of radiation treatment began January 20, 1972, and the chemotherapy began in March of 1972. On April 17, 1972, Dr. Richards performed a Galium Scan, which revealed that the disease had spread. Consequently, Dr. Richards said that he would make the treatments stronger, but reduced Geisz’s chance of recovery to 90%. Dr. Richards administered a second round of radiation treatments between May 25 and August 6, 1972. Id.
253. Id. at 310-11, 545 A.2d at 662. The plaintiff testified that in November 1973, Dr. Richards told her and the decedent that “for whatever reasons, we were at the low end of the statistics and he had given us every treatment available in the country, the best of the treatments, and [Geisz] was not responding.” Id.
254. Id. at 330, 545 A.2d at 672. Dr. Richards testified that although he knew that understaffing and “other admitted deficiencies” existed in his department, he did not believe that they affected the quality of care. Id. Several of the plaintiffs’ expert witnesses testified that

there appears to have been no treatment planning sessions . . . [and] no simulator or port films were taken to confirm adequate coverage of [Geisz’s] tumor . . . . [T]hus it is impossible to know that the patient actually received the desired treatment each day . . . . In general, this radiation was delivered far below minimum standards and in a very haphazard fashion. Id. at 333, 545 A.2d at 673-74 (emphasis in original). Another expert witness concluded that he had “never examined such wanton and irresponsible application of radiation therapy.” Id., 545 A.2d at 674.
experimental treatment at the Cancer Research Center. Treatment at the Cancer Research Center, however, was ineffective and Geisz died within two years.

A decade later, Geisz's former wife, Elaine, read a newspaper article that concerned malpractice actions instituted against Dr. Richards. Upon "discovering" this information, she sought counsel and instituted this action, which included both a survival claim and a wrongful death claim, in the Baltimore County Circuit Court. The trial court granted the defendants' summary judgment motion on the grounds that the claims were time barred. The Court of Special Appeals affirmed. Relying on Trimper v. Porter-Hayden, the Court of Special Appeals held that (1) a medical malpractice survival claim, like the latent occupational disease survival claim in Trimper, should accrue upon death, (2) the plaintiff failed to exercise due diligence as a matter of law, and therefore was precluded from tolling the limitations statute under section 5-203 of the Courts & Judicial Proceedings Article by alleging that the defendant fraudulently had concealed her claims, and (3) regardless of the plaintiff's lack of diligence, section 5-203 was not applicable to a wrongful death claim, which was statutorily created by section 3-904(g) of the Courts & Judicial Proceedings Article.

The Court of Appeals granted certiorari and reversed the lower courts' holdings. As to the survival claim, the Court of Appeals held that "statutory guidance concerning medical malpractice survival claims points to a public policy contrary to that applied in

255. Id. at 306, 311, 545 A.2d at 660, 663. The Cancer Research Center "would only accept patients who had been given up as hopeless." Id. at 311, 545 A.2d at 663.  
256. Id. at 305, 545 A.2d at 660.  
257. Id. at 306, 545 A.2d at 660.  
258. Id. Geisz's probate estate was reopened and Elaine was appointed personal representative. As personal representative, she asserted the survival claim pursuant to § 6-401(a) of the Courts & Judicial Proceedings Article and § 7-401(x) of the Estates and Trusts Article, which authorizes prosecution of a "personal action which the decedent might have commenced or prosecuted." Id.; see Md. CTS. & JUD. PROC. CODE ANN. § 6-401(a) (1989); Md. EST. & TRUSTS CODE ANN. § 7-401(x) (1974). On behalf of her son, the plaintiff filed the wrongful death claim pursuant to the Courts & Judicial Proceedings Article, §§ 3-901 to -904. Geisz, 313 Md. at 306, 545 A.2d at 660; see Md. CTS. & JUD. PROC. CODE ANN. §§ 3-901 to -904 (1989).  
259. In addition to the Greater Baltimore Medical Center (GBMC), Dr. Richards also was named as a defendant along with his professional association, Richards, Hirschfeld & Associates, P.A. Geisz, 313 Md. at 306 n.2, 545 A.2d at 660 n.2.  
260. Id. at 308, 545 A.2d at 661.  
Therefore, "under § CJ 5-101 a medical malpractice survival claim predicated on an injury occurring prior to July 1, 1975, accrues upon discovery." Further, the court found no clear and definite evidence that the plaintiff possessed knowledge that would have put her on notice of the cause of action. Absent such evidence, the Court of Appeals held that a court could not find, as a matter of law, that the plaintiff failed to exercise due diligence. Consequently, the court concluded that summary judgment was precluded because a question of fact existed as to the plaintiff's exercise of due diligence in discovering the claim.

Although the lower courts refused to apply the fraudulent concealment limitations statute to the wrongful death claim, the Court of Appeals held that it was "not inconsistent with the text of either § 3-904(g) or § 5-203 to 'deem' a fraudulently concealed wrongful death claim to accrue on discovery rather than on death."

2. Legal Background.—a. General.—Historically, legislatures have enacted limitations statutes that restrict the time period within which a plaintiff may institute an action. The primary purpose of these statutes is to insulate the courts from stale claims and to protect the defendant's reasonable expectation of repose.

264. Geisz, 313 Md. at 319, 545 A.2d at 666.
265. Id. at 321, 545 A.2d at 667. For an analysis of the court's reliance on the "guidance" of § 5-109 in distinguishing Trimper, see infra notes 308-310 and accompanying text.
266. Geisz, 313 Md. at 314, 545 A.2d at 664.
267. Id. at 317, 545 A.2d at 666. In so holding, the Court of Appeals rejected the lower court's finding that "in none of the cases was the patient in the care of another practitioner for nearly two years, with every opportunity to discover the truth; in none was there anything approaching an eleven year delay." Geisz v. Greater Baltimore Medical Center, 71 Md. App. 538, 548, 526 A.2d 635, 639-40 (1987), rev'd, 313 Md. 301, 545 A.2d 658 (1989).
268. Geisz, 313 Md. at 313-14, 545 A.2d at 664. For the argument that the plaintiff should bear the burden of establishing due diligence, see infra notes 320-325 and accompanying text.
270. Geisz, 313 Md. at 322, 545 A.2d at 668.
271. See, e.g., Walko Corp. v. Burger Chef Sys., Inc., 281 Md. 207, 210, 378 A.2d 1100, 1101 (1977) (recognizing necessity and convenience as legitimate bases for imposing statutes of limitations). But see Pennwalt Corp. v. Nasios, 314 Md. 433, 444-45, 550 A.2d 1159, 1161 (1988) (judicial economy is served better by recognizing that a cause of action accrues when the plaintiff discovers the injury, rather than forcing plaintiffs to bring claims prematurely, i.e., before the injury is discoverable).
utes of limitation ... are designed to promote justice by preventing
surprises through the revival of claims that have been allowed to
slumber until evidence has been lost, memories faded, and wit-
nesses have disappeared.' Plaintiffs who fail to enforce their
legal rights diligently within a reasonable time otherwise should be
precluded from forcing another to defend against legal action for
acts in the distant past. After a reasonable period in which plain-
tiffs can pursue their cause of action, significant weight should be
given to the policy considerations that favor defendants.

Originally, a limitations statute began to run when the last
event occurred that was necessary to complete the cause of ac-
tion. Typically, the last necessary event was the negligent act or
omission; implementation of this theory resulted in the "time of in-
jury" rule. Under this traditional rule, the limitations statute will
run even though plaintiffs legitimately are unaware that an injury
has occurred.

Realizing that some injuries are latent and inherently unknow-
able until years after they occurred, courts have recognized and

(1969) ("[T]he primary consideration underlying such legislation is undoubtedly one of
fairness to the defendant. There comes a time when he ought to be secure in his reason-
able expectation that the slate has been wiped clean of ancient obligations . . . ").


274. See Feldman, 255 Md. at 297, 257 A.2d at 426.

275. See Trimper v. Porter-Hayden, 305 Md. 31, 42, 501 A.2d 446, 452 (1985) (asserting that injured party need not know that he has suffered a legally cognizable harm to
have a complete cause of action). By adding "knowledge" as an element to the concept
of when a cause of action "accrues," the discovery rule simply postpones the running of
the limitations period under § 5-101 until the plaintiff discovers or should have discov-
ered the alleged wrong; however, the "rule does not change when a cause of action
becomes conceptually complete." Id.; see also Poffenberger v. Risser, 290 Md. 631, 639,
431 A.2d 677, 681 (1981) (Rodowsky, J., concurring) (noting that application of the
discovery rule "is much the same as if knowledge, or the reasonable means of knowl-
edge, on the part of the plaintiff were made an additional element of whatever cause of
action is presented under the statute"). See generally Kelley, The Discovery Rule for Personal
Injury Statutes of Limitations: Reflections on the British Experience, 24 WAYNE L. REV. 1641
(1978).

(holding that "[i]n Maryland, the general rule is that limitations against a right or cause
of action begin to run from the date of the alleged wrong and not from the time the
wrong is discovered"); see also Leonhart v. Atkinson, 265 Md. 219, 223, 289 A.2d 1, 4
(1972).

The "discovery rule" exception articulated in Poffenberger v. Risser, 290 Md. 631,
431 A.2d 677 (1981), eliminated this general rule in Maryland. Poffenberger held that all
civil actions accrued when the plaintiff discovered or should have discovered the injury.
Id. at 633, 431 A.2d at 679.

responded to the fundamental unfairness\textsuperscript{278} that would result from depriving plaintiffs of their right to bring a lawsuit before they have a reasonable opportunity to do so.\textsuperscript{279} Considerations for protecting "blamelessly ignorant"\textsuperscript{280} victims thus evoked a response that culminated in the judicially created "discovery principle."\textsuperscript{281} The rule tolls the statute of limitations from running until the plaintiff discovers, or by the use of due diligence should have discovered, the injury.\textsuperscript{282} By allowing a potentially unlimited time for discovery, the courts alleviate any possible unfairness to the plaintiff. Ultimately, however, the discovery rule may compromise the limitations statutes' legitimate objectives and concerns.\textsuperscript{283}

\textit{b. Maryland.}—The State's statute of limitations requires that "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."\textsuperscript{284} The statute, however, does not define the word "accrues." The discovery rule thus has developed through the courts' interpretation of the word "accrues."\textsuperscript{285} The Court of Appeals was among the first to embrace the rule\textsuperscript{286} when it held in \textit{Hahn v. Claybrook}\textsuperscript{287} that a medical malprac-

\textsuperscript{278} See, e.g., \textit{Trimper}, 305 Md. at 38, 501 A.2d at 450.
\textsuperscript{279} \textit{Hanebuth v. Bell Helicopter Int'l}, 649 P.2d 143, 147 (Alaska 1984). Courts have adopted several exceptions to the "time of injury" rule to mitigate this perceived harshness to the plaintiff. For example, many courts have held that in the case of fraud, the limitations period will not begin to run until the fraud is exposed to avoid rewarding the defendant for his fraudulent concealment of the plaintiff's cause of action. Additionally, courts generally have held under the "continuing treatment" exception that a limitations statute for medical malpractice will not begin to run until the patient-physician relationship ends. For an analysis of the "continuing treatment" exception, see generally \textit{Septimus}, supra note 277. The discovery rule, however, is the most widely prescribed exception. \textit{See Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis}, 1975 DUKE L.J. 1417, 1430-31.
\textsuperscript{282} \textit{Poffenberger}, 290 Md. at 634-35, 431 A.2d at 679.
\textsuperscript{283} \textit{See Comment, Poffenberger v. Risser—The Discovery Principle is the Rule, Not the Exception}, 41 Md. L. REV. 451, 454 (1982) (cautioning that rigid application of the discovery rule may jeopardize defendants' reasonable expectations of repose and allow stale claims into court, in contravention of the legislative policies behind the limitations statutes' enactment).
\textsuperscript{284} Md. CTS. & JUD. PROC. CODE ANN. § 5-101 (1989).
\textsuperscript{285} \textit{Geisz}, 313 Md. at 318, 545 A.2d at 666; \textit{see Md. CTS. & JUD. PROC. CODE ANN. § 5-101 (1989).}
\textsuperscript{286} \textit{Comment, supra note 283, at 456-57; see also Southern Maryland Oil Co. v. Texas Co.}, 203 F. Supp. 449, 451-52 (D. Md. 1962) (stating that \textit{Hahn v. Claybrook}, 130 Md. 179, 100 A. 83 (1917), created the discovery exception).
tice claim accrued not at the time of injury, but upon discovery.\textsuperscript{288} Although the principle was invoked intermittently following \textit{Hahn},\textsuperscript{289} \textit{Waldman v. Rohrbaugh}\textsuperscript{290} was the first case to fully embrace the rule. In \textit{Waldman}, the Court of Appeals held that a patient’s cause of action for a medical malpractice injury “accrues” when the patient knows or should have known that he has suffered an injury.\textsuperscript{291} The court reasoned that it was impossible for the patient “unskilled in medicine reasonably to understand or appreciate that actionable harm has been done him.”\textsuperscript{292} \textit{Waldman} fueled the judicial conclusion that the “danger of . . . stale claims was outweighed by the injustice which would [otherwise] be visited upon patients who failed to discover their injuries through no fault of their own during the prescribed statutory period.”\textsuperscript{293}

Under the judicially created discovery rule, the limitations period for a plaintiff’s cause of action begins to run when the plaintiff discovers or \textit{should have discovered} the cause of action.\textsuperscript{294} The rule

\begin{itemize}
  \item \textsuperscript{287} 130 Md. 179, 100 A. 83 (1917).
  \item \textsuperscript{288} \textit{Id.} at 187, 100 A. at 86.
  \item \textsuperscript{289} Following \textit{Hahn}, the discovery rule was not resurrected until \textit{Callahan v. Clemens}, 184 Md. 520, 527, 41 A.2d 473, 476 (1945). In the decade after \textit{Callahan}, plaintiffs typically justified invoking the discovery rule by alleging fraud. \textit{See}, e.g., \textit{Giessman v. County Comm'rs}, 185 Md. 350, 362, 44 A.2d 862, 868 (1945).
  \item \textsuperscript{290} 241 Md. 137, 215 A.2d 825 (1966).
  \item \textsuperscript{291} \textit{Id.} at 145, 215 A.2d at 830. The discovery rule affects when the limitations period under § 5-101 will begin to run by adding the element of knowledge to “accrues.” \textit{See} I H. WooD, \textit{LIMITATIONS OF ACTIONS} 685-86 (4th ed. 1916) (asserting that “the question [of] when a cause of action accrues is a judicial one, and to determine it in any particular case is to establish a general rule of law for a class of cases, which rule must be founded on reason and justice”); \textit{see also} \textit{Harig v. Johns-Manville Prods.}, 284 Md. 70, 75, 394 A.2d 299, 302 (1978).
  \item \textsuperscript{292} \textit{Waldman}, 241 Md. at 145, 215 A.2d at 830.
  \item Over the next decade, the courts continued to expand the concept of “profession” beyond that of the learned professions. \textit{See} \textit{Poffenberger v. Risser}, 290 Md. 631, 635, 431 A.2d 677, 679 (1981); \textit{see also} \textit{Harig}, 284 Md. at 79, 394 A.2d at 304. The \textit{Poffenberger} court reasoned that because the barrier that confined the discovery rule to professional malpractice had been broken, there was “no valid reason why that rule’s sweep should not be applied to prevent an injustice in other types of cases.” 290 Md. at 636, 431 A.2d at 680. Thus, the court abandoned a case-by-case approach and held that the discovery rule would apply generally in all actions. \textit{Id.}
  \item \textsuperscript{294} \textit{Poffenberger}, 290 Md. at 636-37, 431 A.2d at 680.
\end{itemize}
imposes an objective standard that requires a plaintiff to exercise due diligence in pursuing a claim. Courts look at the facts and circumstances of a case to determine whether the plaintiff exercised due diligence, that is, the extent to which the plaintiff should have investigated the claim further. The Court of Appeals in *Poffenberger v. Risser* focused on the "nature of the knowledge necessary, under the discovery rule, to start the running of the limitations period." The *Poffenberger* court held that:

[T]he discovery rule contemplates actual knowledge—that is express cognition, or awareness implied from knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry thus, charging the individual with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.

The question of due diligence arises only when the defendant contests the claim's legitimacy on the ground that the statute of limitations has run. The discovery rule, however, presumes that the plaintiff was diligent in the investigation and the initiation of the suit. Thus, the defendant bears the burden of disproving diligence.

The discovery rule led the courts to create a "long tail" for medical malpractice actions that has increased the number of medical malpractice claims substantially. The long delay between the

---

295. *Id.*
297. *Id.* at 636, 431 A.2d at 680.
298. *Id.* at 637, 431 A.2d at 681 (citations omitted).
300. The imposition of a maximum time limit (or ceiling) on the discovery period would help to alleviate the problem of the "long tail." "Long tail" is the term that insurers use to describe the difficulty of setting premiums through the use of actuarial techniques because the frequency and size of jury awards is so unpredictable. *See generally* Roddis & Stewart, *The Insurance of Medical Losses*, 1975 DUKE L.J. 1281.
time of treatment and a claim's resolution, coupled with the general trend toward increased litigation, has created an undue burden on both the courts and the health practitioner. Many commentators claim that medical practitioners' liability exposure over an indefinite time period has contributed significantly to the current crisis in medical malpractice insurance.

The national insurance crisis prompted the General Assembly to enact the medical malpractice statute of repose at section 5-109 of the Courts & Judicial Proceedings Article. The statute provides that a claim "shall be filed (1) within five years of the time the injury was committed or (2) within three years of the date when the injury was discovered, whichever is shorter." As the Court of Special Appeals in Glenn v. Morelos explained, "the five year maximum period will run its full length only in those instances where the three year discovery period does not operate to bar an action at the earlier date." Thus, the legislature clearly intended to "cap" the discovery rule by allowing only 2 years beyond the common-law "time of injury" rule codified in section 5-101 of the Courts & Judicial Proceedings Article, the general 3-year statute of limitations.

3. Analysis.—a. Survival Claim.—Because Geisz's injury occurred before the legislature enacted the statute of repose, which is expressly prospective, neither party argued that it governed the


303. Note, supra note 301, at 574. The insurance industry contends that due to unlimited liability there is no basis on which it can estimate and grant reasonable, affordable premiums. Id. at 575. Consequently, insurance companies have argued that this "perpetual danger of suit forces them to maintain huge reserves, funded by malpractice premiums, to protect themselves from claims brought many years after the date of the injury." Comment, supra note 279, at 1429 (citations omitted).

304. MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1989); see Glenn, 79 Md. App. at 100-01, 555 A.2d at 1069 ("The recent malpractice crisis, however, has caused a legislative reversal of this trend [toward allowing unlimited discovery periods] through enactment of shorter limitations periods and the imposition of absolute maximum limits on when a claim may be brought . . . The Court of Appeals clearly stated in Hill that this is precisely what the Maryland General Assembly did in 1975 and 1976.").


307. Id. at 97, 555 A.2d at 1068.

Rather, the court used section 5-109 to guide its analysis of the facts. The only prior Maryland case that contemplated the application of the discovery rule to a survival claim was *Trimper v. Porter-Hayden*, which the court decided under the general three-year limitations statute and involved a survival claim based on a latent, occupational disease. The *Trimper* court held that the survival claim accrued upon discovery or death, whichever occurred first.

In *Geisz*, the Court of Special Appeals, like the trial court, relied on *Trimper*'s rationale when it held that there are no policy considerations that distinguish survival claims for latent disease from those


309. *Geisz*, 313 Md. at 307 n.3, 545 A.2d at 660 n.3.
310. *Id.* at 319, 545 A.2d at 666-67.
312. The *Trimper* court distinguished *Poffenberger*, holding that

[n]one of the cases in the line of decisions applying a discovery rule dealt with an injured person who had died . . . without having brought suit based on the injury . . . . The focus of *Poffenberger*'s concern was with the injured plaintiff who discovered the wrong while living . . . . *Poffenberger* did not, however, expressly or by necessary implication address the issue now before us.

305 Md. at 41, 501 A.2d at 451. Thus, although the *Trimper* court said that the discovery rule cases did not control in survival claim suits, the *Geisz* court found these authorities persuasive, holding that "[w]hen a survival claim accrues is determined by the discovery rule." 313 Md. at 306, 545 A.2d at 660 (citing, *inter alia*, *Poffenberger* v. *Risser*, 290 Md. 631, 431 A.2d 677 (1981), *Waldman* v. *Rohrbaugh*, 241 Md. 137, 215 A.2d 825 (1966), and *Hahn* v. *Claybrook*, 130 Md. 179, 700 A. 83 (1917)).

313. 305 Md. at 52, 501 A.2d at 457-58. The court found that the elements of a cause of action and the defenses available for a wrongful death claim are fundamentally the same as those of a survival claim. *Trimper* found persuasive the legislative intent regarding the accrual of a wrongful death claim under § 3-904(g) of the Courts & Judicial Proceedings Article:

By the plain language of CJ § 3-904(g) the General Assembly has already determined that liability under the wrongful death statute should not remain open more than three years after death . . . . We need not say that the policy of CJ § 3-904(g) is solely determinative of this appeal because the same policy is also reflected in the worker's compensation statutes dealing specifically with latent occupational diseases.

*Id.* at 50, 501 A.2d at 456.

The latter statute dictates that death pre-empts the discovery period and tolls the limitations statute. Md. Ann. Code art. 101, § 26 (1985). The holding in *Trimper*, nevertheless, may be pre-empted by the recent enactment of § 5-113 of the Courts & Judicial Proceedings Article under which "[a]n action for damages arising out of an occupational disease must be filed within 3 years of discovery . . . but . . . not later than 10 years from the date of death." Md. Cts. & Jud. Proc. Code Ann. § 5-113 (1989). The legislature apparently intended to allow an additional seven years from the time of death beyond that which the court granted in *Trimper*; yet, the *Geisz* court does not mention how this legislation affects the validity of this aspect of *Trimper*'s holding.
for medical malpractice. The Court of Appeals, however, reversed the lower court’s decision because it found that accrual at death would violate section 5-109’s rationale. The court held that under section 5-109, a survival claim which remains undiscovered for more than three years after the death of the patient may still be brought if instituted within five years of the injury. Death of the patient is not a factor affecting limitations under section 5-109. Consequently, a ruling that a malpractice claim, based on an injury occurring prior to July 1, 1975, and governed by CJ § 5-101, “accrues” no later than death could, in a given case, shorten the five year period which the General Assembly considers to be the appropriate time at which to cut off undiscovered malpractice survival claims.

The Court of Appeals also found “significant” the fact that the medical malpractice statute of repose contains no provision that fixes a time at which undiscovered claims that existed prior to July 1, 1975, would be barred. Further, the absence of such a provision was not due to constitutional concerns.

Due process does not prohibit a time bar for pre-existing undiscovered medical malpractice claims so long as a reasonable period following the effective date of legislation is provided within which to assert pre-existing claims. The General Assembly either has no policy or has a policy that discovery is the only bar to injuries [incurred prior to July 1, 1975].

The court consequently concluded that the discovery rule should

314. 71 Md. App. 538, 552, 526 A.2d 635, 641-42 (1987), rev’d, 313 Md. 301, 545 A.2d 658 (1989). The Court of Special Appeals concluded by saying that . . . we see no greater or different detriment accruing to a personal representative in a malpractice case than has been imposed in a latent disease case. Indeed, the existence and cause of injury is usually (although certainly not always) easier to discover in the malpractice setting than in the latent disease case. And we see no good reason why a practitioner called upon to defend specific acts, omissions, or advice should be less favored by a statute of repose than a person or entity asked to defend whether . . . a decedent was exposed to some harmful substance.

315. Geisz, 313 Md. at 319, 545 A.2d at 667.
316. Id. at 319-20, 545 A.2d at 667.
317. Id. at 319, 545 A.2d at 667.
318. Id. at 320, 545 A.2d at 667.
govern the accrual of medical malpractice survival claims based on injuries that occurred before July 1, 1975.

As a result, patients who are injured because of medical malpractice will have a maximum of five years from the time of the injury in which to file suit, while plaintiffs who now “discover” an injury that occurred before 1975 still will have actionable claims. Thus, an individual injured in 1983 will be precluded from bringing suit, while another who was injured in 1973, or even 1963, may have a viable cause of action. This sharp distinction between claimants who were injured before 1975 and those who were injured after 1975 not only is unwarranted but also is contrary to the dictates of justice and the policy of repose. Given the long period of time that has elapsed, the defendants’ interests outweigh those of claimants injured before 1975. In such cases, consideration should shift to the physicians’ inability to defend themselves against these claims after records have been destroyed or lost, memories have faded, and witnesses have disappeared.

Even before it decided whether the judicially created discovery rule applies to claims based on injuries that occurred before July 1, 1975, the court determined that the defendants were not entitled to summary judgment on the issue of whether the plaintiffs exercised due diligence to discover the defendant’s negligence. The court held that, based upon these facts, the question of “when the plaintiffs should have discovered the survival claim is a jury question.”

Under Geisz, a defendant who wants to dispose of a claim on summary judgment has the burden of presenting “clear and definite” evidence proving that the plaintiff had actual notice of the injury and thereby failed to exercise due diligence as a matter of law. Allocating this burden to defendants places a disproportionate hardship on the medical practitioner—plaintiffs are in the unique position of knowing the circumstances that supported their exercise of due diligence. The courts, therefore, should shift to plaintiffs the burden of proving due diligence by allowing a pre-

319. In most cases, if claimants truly were diligent in pursuing their claims, it would be reasonable to assume that they would have discovered the injury after more than ten years had passed. Even in those cases in which the claimants appear to have acted diligently, the underlying policy of repose should require a ceiling on the discovery period.


321. Geisz, 313 Md. at 315, 545 A.2d at 666.

322. Id.

323. Id. at 313-14, 545 A.2d at 664.

324. Comment, supra note 283, at 460-62.
assumption that plaintiffs had actual notice of the injury. Nonetheless, a defendant's medical malpractice attorney will want to probe for information about a plaintiff's education, employment, or personal knowledge indicating that the plaintiff had reason to know of the injury.

b. Wrongful Death Claim.—The fraudulent concealment limitations statute, section 5-203 of the Courts & Judicial Proceedings Article, states: "If a party is kept in ignorance of a cause of action by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud." The genesis of the statute is based upon the notion that defendants' fraudulent acts should not shield them from liability, thereby benefitting them.

Under the Geisz facts, the State's courts for the first time addressed whether the legislatively created discovery rule that governs actions based on fraud also applies to a wrongful death claim brought under section 3-904(g). In Trimper, the Court of Appeals refused to apply the judicially created discovery rule to a wrongful death claim. The Trimper court held that since the wrongful death statute created a new liability not existing at common law, compliance with the period of limitations for such actions is a condition precedent to the right to maintain the action. The period of limitations is part of the substantive right of action. In plain words CJ 3-904(g) provides that a wrongful death action "shall be filed within three years after the death of the injured person." There is no room for judicial interpretation.

325. For a detailed argument supporting this shift in the burden of proof see, Comment, supra note 283, at 460-62. See also Finch v. Hughes Aircraft Co., 57 Md. App. 190, 230, 469 A.2d 867, 887 (allocating the burden of disproving actual notice to the plaintiff), cert. denied, 300 Md. 88, 475 A.2d 1200 (1984), cert. denied, 469 U.S. 1215 (1985).
328. See Chandlee v. Shockley, 219 Md. 493, 500, 150 A.2d 438, 442 (1959); see also Piper v. Jenkins, 207 Md. 308, 317, 113 A.2d 919, 923 (1955) ("it would not only be subversive of good morals, but contrary to the plainest principles of justice, to permit one practicing a fraud and then concealing it, to plead the statute . . .").
329. 313 Md. at 321, 545 A.2d at 667-68.
331. Id. at 35-36, 501 A.2d at 449.
Relying on Trimper, the Court of Special Appeals in Geisz rejected the argument that section 5-203, the fraudulent concealment limitations statute, could be applied to a wrongful death claim brought under section 3-904(g). The intermediate appellate court held that because section 3-904(g) "requires such action to be filed within three years after death," the legislatively prescribed period is "a 'condition precedent to the right to maintain the action' . . . and cannot be enlarged or modified in the guise of statutory construction." The Court of Appeals, however, upheld Trimper's rejection of the application of the judicially created discovery rule, but distinguished the legislatively created discovery rule embodied in section 5-203. The court noted that the legislature originally intended section 5-203 to apply to all claims. Because this legislative intent comports with the long-established principle that individuals should not benefit from their own conscious wrongdoings, the court held that the fraudulent concealment limitations statute would preserve a wrongful death claim under section 3-904(g).

After holding that the defendant's fraudulent conduct tolled the statute of limitations as to the wrongful death claim, the court addressed the standard for fraud. Prior to Geisz, the State's courts had not scrutinized seriously the allegations needed to constitute fraud under section 5-203. Cases brought under section 5-203 typically involved circumstances in which the defendant allegedly made intentional misrepresentations. Relying on Brack v. Evans, the Geisz court extended section 5-203's definition of fraud to include representations made with reckless disregard for their truth or falsity.
To determine whether representations were true or false, Geisz held that they must involve an objectively discernible fact.\(^{340}\)

In *Leonhart v. Atkinson*,\(^{341}\) the Court of Appeals held that upon proof of fraud, the limitations period will be tolled only if the plaintiff specifically alleges and proves: "(i) that they were kept in ignorance of an adverse party that they had a cause of action; (ii) how, if fraud existed, they discovered it; (iii) why they did not discover it sooner; and (iv) what diligence they exercised to discover it."\(^{342}\) *Piper v. Jenkins*\(^^{343}\) also allocated to plaintiffs the burden of alleging and proving due diligence before they are entitled to toll the limitations period.\(^{344}\)

In *Geisz*, the Court of Special Appeals found that the plaintiff failed to "establish how Mr. Geisz was kept in ignorance of his cause of action after November, 1973, much less the exercise by him or Ms. Geisz of usual or ordinary due diligence for the discovery and protection of their rights."\(^{345}\) The Court of Appeals failed to address the sufficiency of the plaintiff's allegation under the four factor test outlined above. Rather, the court merely transposed the analysis of due diligence from the survival claim onto the question of due diligence under section 5-203.\(^{346}\) This transposition effectively shifted to the defendant the burden of establishing the plaintiff's lack of due diligence through clear and definite evidence that the plaintiff had notice of the cause of action.\(^{347}\) The court empha-

---

\(^{339}\) 313 Md. at 334, 545 A.2d at 674.

\(^{340}\) *Id.* at 332, 545 A.2d at 673.

\(^{341}\) 265 Md. 219, 289 A.2d 1 (1972).

\(^{342}\) *Id.* at 227, 289 A.2d at 6.

\(^{343}\) 207 Md. 308, 113 A.2d 919 (1955); *see also* Mettee v. Boone, 251 Md. 332, 338-39, 247 A.2d 390, 394 (1968) (requiring plaintiff to show, with specificity, how the fraud was discovered and why it was not discovered sooner).

\(^{344}\) 207 Md. at 319, 113 A.2d at 924.


\(^{346}\) *Geisz*, 313 Md. at 334, 545 A.2d at 674. The Court of Appeals held that

\(^{347}\) Id. As part III A dealt with a due diligence analysis under the judicially created discovery rule, the court simply applied that analysis rather than examining the sufficiency of the plaintiff's allegations of due diligence. *Id.*
sized that the defendant must meet this burden before a court can find that the plaintiff failed to exercise due diligence as a matter of law.\textsuperscript{348}

The Court of Appeals employed sound reasoning to conclude that section 5-203 may extend the time when a wrongful death claim accrues if the defendant fraudulently has concealed the cause of action. The \textit{Geisz} court stated that the legislature first enacted section 5-203 in 1868 and that it "was expressly applicable, prospectively, to 'all actions' and thus literally embraced the then relatively new actions for wrongful death."\textsuperscript{349} The court dismissed the distinction between remedial and substantive limitations statutes when fraud has concealed the claim from the plaintiff.\textsuperscript{350} The \textit{Geisz} court, citing \textit{Scarborough v. Atlantic Coast Line Railroad Co.},\textsuperscript{351} applied section 5-203 to substantive limitations statutes on the principle that "[t]he ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legalistic distinction between the closely related types of statutes of limitations."\textsuperscript{352} Because the time period that the wrongful death statute specifies is part of the substantive right of action, the general limitations statute does not apply, nor does the judicially created discovery rule that arises from it.\textsuperscript{353} Classification of section 3-904(g) as a substantive limitations statute, however, does not preclude the application of section 5-203, which the legislature intended to apply to all causes of action.

The \textit{Geisz} court also enunciated a reasonable standard by which to define fraud under section 5-203. The court acknowledged that undoubtedly express, knowingly false misrepresentations constitute fraud under the statute.\textsuperscript{354} The court, however, also held that "a simply negligent misrepresentation, honestly made, is not a § 5-203 fraud."\textsuperscript{355} In applying traditional tort principles of deceit, the court established that representations made with reckless disregard as to

\textsuperscript{348} \textit{Id.} at 315, 545 A.2d at 665.
\textsuperscript{349} \textit{Id.} at 321-22, 545 A.2d at 668.
\textsuperscript{350} \textit{Id.} at 323, 545 A.2d at 668-69.
\textsuperscript{351} 178 F.2d 253, 259 (4th Cir. 1949), cert. denied, 339 U.S. 919 (1950).
\textsuperscript{352} 313 Md. at 323, 545 A.2d at 668-69.
\textsuperscript{353} Section 5-101 specifically states that it is applicable to all causes of action "unless another provision of the Code provides a different period of time within which an action shall be commenced." \textit{Md. Cts. & Jud. Proc. Code Ann.} § 5-101 (1989). By legislative mandate, wrongful death claims brought under § 3-904(g) are not subject to the judicially created discovery rule. \textit{Trimper v. Porter-Hayden}, 305 Md. 31, 35, 501 A.2d 446, 449 (1985).
\textsuperscript{354} \textit{Geisz}, 313 Md. at 325, 545 A.2d at 670.
\textsuperscript{355} \textit{Id.} at 326, 545 A.2d at 670.
their truth or falsity constitute fraud under section 5-203.356 The court further elaborated the fraud standard as "either [the representation's] falsity was known to the defendant or the misrepresentation was made with such reckless indifference to the truth as to impute knowledge to [the speaker] . . . ."357 To determine truth or falsity, therefore, the representation must involve an objectively discernible fact. This standard justifiably ensures that plaintiffs will not lose a cause of action when they have relied on defendants' false representations made without a legitimate basis.

Finally, the court relied on the plaintiff's exercise of due diligence to determine whether section 5-203 would toll the limitations period on the wrongful death claim.358 In the past, the burden of proving due diligence under section 5-203 has not been allocated as it is under the judicially created discovery principle. The issue of due diligence arises not in defense to the claim, but as a statutory prerequisite to using section 5-203 to toll the limitations period.359 Here, as prior cases have indicated, the plaintiff must prove due diligence under a stringent four factor test.360 Geisz, however, imposes on the plaintiff only the burden of proving fraud. Upon proof of the fraud, the Geisz court shifts the burden of disproving due diligence to the defendant, as if the question of diligence arose under the judicially created discovery rule.361

As argued in relation to the survival claim, the burden of proving due diligence under the judicially created discovery rule most equitably should fall upon the plaintiff. This argument is particularly

356. Id. at 332, 545 A.2d at 673.
357. Id. The court held that the factual question which precluded summary judgment under § 5-203 was "whether Dr. Richards had a basis for representing that the particular cancer in Geisz had been treated, but for some inexplicable reason had withstood treatment." Id. Dr. Richards was aware that hospital understaffing might have caused Geisz's treatment to be insufficient. Dr. Richards' representation that Geisz's deterioration was inexplicable, therefore, arguably could have been reckless.
358. By the express language of § 5-203, an analysis requires that the plaintiff demonstrate two conditions: (1) that the adverse party's fraud has kept the plaintiff in ignorance, and (2) that the plaintiff has exercised ordinary diligence for the discovery and protection of his or her rights. See Piper v. Jenkins, 207 Md. 308, 318, 113 A.2d 919, 924 (1955).
359. See supra notes 342-344 and accompanying text for a discussion of previous cases that allocated to the plaintiff the burden of proving due diligence under § 5-203.
360. See supra note 342 and accompanying text.
361. Although prior Maryland cases have dismissed actions because the plaintiff failed to specifically allege or prove the exercise of due diligence, Geisz fails to impose this burden upon the plaintiff. Acknowledging that when plaintiffs have the burden of proof at trial they likewise bear it upon summary judgment, the court failed to impose on the plaintiff the burden of proving diligence as a prerequisite to tolling the limitations period under § 5-203. Geisz, 313 Md. at 330-31, 545 A.2d at 672.
compelling when the plaintiff seeks to toll the limitations period based on allegations of fraud. The plaintiff ought to bear the burden of establishing an entitlement to the advantage derived from tolling the limitations period under section 5-203.

4. Conclusion.—The Geisz court held that a survival claim predicated upon an injury that occurred before 1975 accrues upon discovery rather than at death. In so holding, the court feigned reliance on the current medical malpractice statute of repose to reach a conclusion wholly inapposite to the legislature’s treatment of claims that fall under the statute. Because section 5-109 allows a maximum of five years from the time the injury occurred in which a party may bring a medical malpractice claim, allowing claims in which the injury has occurred a minimum of fourteen years ago is far from acting under the statute’s “guidance.” Because of the many policy considerations lost amidst the confusion, Geisz’s holding in regard to the survival claim most appropriately may be viewed as an invitation to the legislature to amend section 5-109 to address retrospectively claims predicated on injuries that occurred prior to 1975.

The court also held that the defendant’s fraudulent concealment of the cause of action could toll a wrongful death claim brought under section 3-904(g) of the Courts & Judicial Proceedings Article. The court established that representations made with reckless disregard for their truth or falsity could constitute fraud under section 5-203 of that article. Further, in deciding the summary judgment motion, the court shifted the burden of proving due diligence under section 5-203 from the plaintiff to the defendant. This shift in the burden is contrary to prior Maryland case law and, in effect, may overrule those cases sub silencio.

Future cases that involve either a claim predicated on an injury which occurred prior to 1975 or a claim which requires application of the fraudulent concealment limitations statute need to clarify these aspects of the Geisz decision.

E. Loss of Parental Consortium

The Court of Appeals recently addressed whether the State should recognize the loss of parental consortium as a cause of action. In a case of first impression, the Court of Appeals in Gaver v. Harrant refused to allow minor children to recover money dam-

ages for the loss of parental society and affection when a third party's negligence injured their father. The court determined that "adoption of the proposed cause of action is not compelled by changing circumstances nor by a pressing societal need." As such, the court concluded that the public policy questions implicated by the parental consortium doctrine are best left to the legislature's consideration.

At early common law, children whose parents suffered an injury through a third party's negligence had no cause of action for loss of parental consortium. Moreover, the majority of jurisdictions that recently have considered the issue have declined to accept such a cause of action. While proponents of the parental consortium

363. Id. at 33, 557 A.2d at 218.
364. Id.
365. Id.
366. Id. at 18, 557 A.2d at 211. Parental consortium includes "care, companionship, comfort, attention, protection, society, love and affection, the loss of which inflicts serious emotional harm on a child." Note, Child's Right to Sue for Negligent Disruption of Parental Consortium, 22 WASHBURN L.J. 78, 78 (1982).
doctrines have advanced sound arguments to support its adoption, the courts that have rejected this cause of action have relied on an antiquated, conservative line of reasoning to justify their decisions.

This Note analyzes the arguments for and against the doctrine of parental consortium and concludes that the Court of Appeals in Gaver did not give the doctrine proper consideration. Although its refusal to recognize the loss of parental consortium doctrine is consistent with the majority of other jurisdictions, the court based its decision upon an outdated perception of policy considerations and clearly "ignore[d] the evolution of the loss of consortium doctrine from its common law origins." 369

1. The Case.—On April 6, 1985, a 2400-pound free-standing post and beam structure collapsed on Stephen Gaver while he was assisting his neighbor, Roman Harrant. Gaver sustained severe and permanent injuries to his back, body and limbs, and no longer can work.

Gaver and his wife sued Harrant in the Frederick County Circuit Court on their own behalf and on behalf of their minor children, Khristin and John Gaver. The complaint alleged negligence, strict liability, gross negligence, loss of consortium, and "loss of society and affection—minor children." 373

The trial court dismissed this latter count when it granted Harrant's motion to dismiss on the ground that the State does not recognize such a cause of action. 374 The Gaver children appealed. 375 The Court of Appeals granted certiorari before the Court of Special Appeals could consider the case. 376 The Court of Appeals affirmed


368. See supra note 367.


370. Gaver, 316 Md. at 18, 557 A.2d at 211.

371. Id.

372. Id.

373. Id.

374. Id.

375. Id. Appeal before final resolution of the other allegations was possible because the trial court judge issued an order of final judgment against the children. Id. at 18 n.1, 557 A.2d at 211 n.1.

376. Id. at 18, 557 A.2d at 211.
the trial court's ruling and held that it would not adopt a cause of action based upon the parental consortium doctrine.\footnote{377}{Id. at 33, 557 A.2d at 218.}

2. Legal Background.—The early common law vested all of the family unit's rights in the husband/father.\footnote{378}{Id. at 18, 557 A.2d at 211.} Under the doctrine of 
\textit{paterfamilias}, the husband/father had a proprietary interest in the services of his wife and children and could recover damages for wrongful injury to them equal to the pecuniary value of the lost services.\footnote{379}{Id. at 33, 557 A.2d at 218.} Conversely, the law regarded the wife and children as "inferior" parties and afforded them no rights to the husband/father's services.\footnote{380}{Note, supra note 369, at 724.}

Gradually, the emphasis shifted away from the idea of "services" towards a "recognition of more intangible elements in the domestic relations, such as companionship and affection."\footnote{381}{See PROSSER & KEETON, supra note 92, § 124, at 916.} The common law eventually granted the husband a cause of action for loss of "consortium," which includes "love, affection, protection, support, services, companionship, care, society, and, in marriage, sexual relations."\footnote{382}{Note, supra note 380, at 295.} But because this action developed from the notion of "services" that the wife and children owed to the husband/father, no similar action existed in favor of the wife or children.\footnote{383}{Note, Compensating the Child's Loss of Parental Love, Care, and Affection, 1983 U. ILL. L. REV. 293, 294.} In 1950, the District of Columbia Court of Appeals in \textit{Hitaffer v. Argonne Co.}\footnote{384}{183 F.2d 811, 819 (D.C. Cir. 1950), cert. denied, 340 U.S. 852 (1950), overruled by Smither and Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957).} finally broadened the loss of consortium action to include the wife. The court, however, overruled this decision seven years later in \textit{Smith and Co. v. Coles}.\footnote{385}{242 F.2d 220 (D.C. Cir. 1957).} In 1967, the Maryland Court of Appeals in \textit{Deems v. Western Maryland Railway Co.} also broadened the scope of consortium actions to include wives as well as
husbands. The courts, however, have been reluctant to acknowledge that children suffer a compensable loss when a third party disrupts the family unit. The courts did not recognize a cause of action for loss of parental society and affection until 1978 in Berger v. Weber. In Berger, a father brought an action on behalf of his mentally retarded daughter for the loss of her mother's society, companionship, love, and affection after the mother sustained severe and permanent psychological and physical injuries as a result of an automobile accident. The Michigan Supreme Court, "convinced that we have too long treated the child as second-class citizen or some sort of nonperson," held that a child may recover for loss of a parent's society and companionship that results from tortious injury to the parent. Since Berger, eight states have adopted the loss of parental consortium as a valid cause of action.

3. Analysis.—In Gaver, the Court of Appeals began its analysis by noting that while parental consortium has never been recognized in the State's common law, the court may alter the common law if "compelled by changing circumstances." The court, however, stressed that the adoption of a new cause of action involves public policy considerations which the court traditionally has left to the legislature and that the court should change the common law only if it has become "unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people." The remainder of this Note examines each of the arguments that the Court of Appeals acknowledged in its discussion, as well as those that the court conveniently ignored when it determined that this area of common law has not become "unsound."

386. 247 Md. 95, 115, 231 A.2d 514, 525 (1967) (loss of spousal consortium recognized as joint action).
389. 411 Mich. at 11, 303 N.W.2d at 424.
390. Id. at 17, 303 N.W.2d at 427.
391. See supra note 367.
392. 316 Md. at 28, 557 A.2d at 216.
393. Id. at 29, 557 A.2d at 216.
394. Id., 557 A.2d at 217.
a. Uncertainty and Remoteness of Damages.—The Gaver court found the uncertainty and remoteness of damages in a parental consortium claim particularly important for two reasons: first, the child plaintiff’s injury occurs only as a consequence of another’s injury, and, second, the child plaintiff’s injury is intangible.\textsuperscript{395} According to the court, “The argument that money is a poor substitute and that the value of pain and anguish is difficult to determine is plainly inadequate to deny recovery to one who has been crippled or disfigured. When the plaintiff is not the primary victim, however, such objections become more significant.”\textsuperscript{396}

The significance that the court attributes to these two factors is largely unfounded. Damages for loss of parental consortium are no more speculative or difficult to determine than other intangible losses already recoverable in actions for loss of spousal consortium, wrongful death, emotional distress, or pain and suffering.\textsuperscript{397} Indeed, juries assess such damages every day.\textsuperscript{398} Furthermore, as one legal scholar noted:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.\textsuperscript{399}

The Gaver court also expressed the related concern that monetary damages truly cannot compensate a child’s loss of parental society and companionship.\textsuperscript{400} The inadequacy of damages, however, is not a problem unique to a loss of parental consortium action. While it acknowledged that damages may be a poor substitute for parental society and affection, the Wisconsin Supreme Court in \textit{Theama v. City of Kenosha}\textsuperscript{401} noted that damages are “the only workable way that our legal system has found to ease the injured party’s tragic loss.”\textsuperscript{402} Furthermore, courts have determined that damages can compensate a child’s loss in many ways.\textsuperscript{403} Thus, the Gaver court’s use of this

\textsuperscript{395} Id. at 30, 557 A.2d at 217.
\textsuperscript{396} Id.
\textsuperscript{398} See Note, supra note 369, at 734; Note, supra note 380, at 312-13.
\textsuperscript{400} 316 Md. at 30, 557 A.2d at 217.
\textsuperscript{401} 117 Wis. 2d 508, 344 N.W.2d 513 (1984).
\textsuperscript{403} See Hay v. Medical Center Hosp., 145 Vt. 533, 541, 496 A.2d 939, 944 (1985) (can help to ease the loss); Ueland v. Pengo Hydra-Pull Corp., 103 Wash. 2d 131, 138,
reasoning when it rejected the doctrine lacks support.

b. Expansion of Consortium Claims and Increased Costs to Society.— The Court of Appeals in Gaver also voiced concern that consortium-type claims might expand, and thus result in greater tortfeasor liability and increased societal costs. Specifically, the Gaver court noted the court's potential burden from multiple legal actions that could arise from a single tortious act. Acceptance of the parental consortium doctrine "entail[s] adding as many companion claims as the injured parent has minor children, each such claim entitled to separate appraisal and award." The Court of Appeals also voiced its fear that this cause of action would lead to similar claims by grandparents, siblings, and parent-substitutes. Finally, the court noted arguments advanced by other courts troubled by the increased societal costs that accompany increased tortfeasor liability and the danger of double recovery "because juries may already indirectly factor in a child's emotional loss through an award to the parent." The court's reasoning here again is unconvincing. Adoption of the parental consortium action undeniably presents a very real possibility of increased litigation; this dilemma, however, is not limited to parental consortium. The fear of increased litigation invariably accompanies any request for the courts to recognize a new cause of action. Additionally, the possibility of multiple lawsuits arises whenever more than one person is injured tortiously in the same accident. Courts that recognize the parental consortium doctrine arguably may circumvent this problem by requiring joinder of a child's claim for loss of parental consortium to the parents' injury

691 P.2d 190, 194 (1984) (en banc) (may aid child's continued normal development); Theama, 117 Wis. 3d at 523, 344 N.W.2d at 520 (can ease child's adjustment); see also Note, supra note 380, at 312 (damages may allow family to hire live-in help to provide guidance and companionship or to seek psychiatric treatment for the child).

404. 316 Md. at 31, 557 A.2d at 217.
405. Id. at 24, 557 A.2d at 214.
408. Id.
409. Id. at 24, 557 Md. at 214 (quoting Salin v. Kloempken, 322 N.W.2d 736, 740 (Minn. 1982)).
410. See Note, supra note 369, at 733.
412. See Note, supra note 369, at 733 n.90.
claim whenever feasible.\textsuperscript{413} The courts also can limit the loss of parental consortium action to avoid the expansion of a similar cause of action to other relatives.\textsuperscript{414} While all family members certainly have an interest in each other's society and companionship,\textsuperscript{415} the parent-child relationship is unique in that most children are dependent entirely on their parents for emotional sustenance.\textsuperscript{416} As the Arizona Supreme Court noted in Villareal \textit{v.} State Department of Transportation,\textsuperscript{417} "[t]he loss of a parent's love, care, companionship, and guidance can severely impact a child's development and have a major influence on a child's welfare and personality throughout life."\textsuperscript{418} The parent-child relationship thus compels judicial protection to a much greater extent than more remote familial relationships.\textsuperscript{419} Moreover, a court further may limit the parental consortium action to cases that involve \textit{minor} children\textsuperscript{420} or to cases in which the parent has suffered a severe and permanent injury.\textsuperscript{421}

\footnotesize{413. Three courts that recognize the loss of parental consortium action specifically require joinder of the child's consortium claim with the parent's underlying claim, if feasible. \textit{See} Dearborn Fabricating & Eng'g Corp. \textit{v.} Wickham, 532 N.E.2d 16, 17 (Ind. Ct. App. 1988); Hay, 145 Vt. at 540, 496 A.2d at 943; Ueland, 103 Wash. 2d at 138, 691 P.2d at 194.


415. Villareal, 160 Ariz. at 478, 774 P.2d at 217; \textit{Theama}, 117 Wis. 2d at 524, 344 N.W.2d at 521.


418. \textit{Id.} at 478, 774 P.2d at 217.

419. \textit{See Note}, supra note 369, at 738.


421. In Villareal, the Arizona Supreme Court limited its holding to allow loss of consortium actions "only when the parent suffers serious, permanent, disabling injury ren-}
The Gaver court's contention that it should reject the parental consortium doctrine because of the consequential impact that increased insurance rates will have on society lacks merit as well.\textsuperscript{422} The Vermont Supreme Court in \textit{Hay v. Medical Center Hospital}\textsuperscript{423} correctly observed that "it is the rights of the new class of plaintiffs, and the desire to see justice made available within our legal system which are of paramount importance."\textsuperscript{424} In addition, numerous courts have concluded that compensation will benefit the child, and ultimately society as well, because the child who has the resources—financial and otherwise—to adjust to his or her loss will mature into a productive member of society.\textsuperscript{425} These benefits unquestionably outweigh any costs to the public.\textsuperscript{426} Furthermore, even courts that reject the parental consortium action have dismissed this argument.\textsuperscript{427}

Lastly, the possibility of double recovery mentioned by the Court of Appeals is an insufficient basis for rejecting the parental consortium cause of action. The possibility of double recovery by the child exists because juries already compensate the child for lost economic support through an award to the parent. If the court does not instruct the jury that the child may not recover for loss of economic support, then that amount of money may end up both in the parent's award and the child's. Courts may avoid double recovery if they limit the injured parent's recovery to the child's loss of financial support from the parent and the child's recovery to loss of the parent's society and companionship.\textsuperscript{428} Additionally, the chance of double recovery actually compels the adoption of a parental consortium action because the children's losses then could be argued

\textsuperscript{422} 316 Md. at 31, 557 A.2d at 217.
\textsuperscript{423} 145 Vt. 533, 496 A.2d 939 (1985).
\textsuperscript{424} Id. at 540, 496 A.2d at 943.
\textsuperscript{426} See supra note 425.
\textsuperscript{427} The Oregon Supreme Court in Norwest v. Presbyterian Intercommunity Hosp., while it ultimately rejected the doctrine, agreed that this concern was unfounded when it stated that "[i]nsurance varies with potential liability under the law, not the law with the cost of insurance." 293 Or. 543, 552, 652 P.2d 318, 323 (1982); see also Note, supra note 366, at 100 (actual cost to society should be negligible because of risk-spreading effect of liability insurance).
\textsuperscript{428} Theama v. City of Kenosha, 117 Wis. 2d 508, 526, 344 N.W.2d 513, 522 (1984).
openly in court, thereby ensuring that the children's awards indeed would be used for their benefit.  

**c. Analogy to Spousal Consortium.**—One argument that supports the adoption of the parental consortium doctrine which the Court of Appeals discussed draws an analogy between parental consortium and spousal consortium. Relying on its decision in *Deems v. Western Maryland Railway Co.*, the *Gaver* court found an important distinction between parental consortium and spousal consortium as it exists in Maryland. In *Deems*, the Court of Appeals recognized that the wife was entitled to bring a loss of consortium action. The *Deems* court, however, stipulated that such action could be asserted only as a joint action. The *Gaver* court's interpretation of this requirement was that the wife never had been given her own right to sue, but rather, could sue only as part of the marital entity. "While we recognize the importance of the parent-child relationship, it does not constitute a legal and factual entity like that involved in *Deems.*"

In a persuasive dissent, Judge Adkins noted that the *Gaver* court ignored the fact that the "underlying purpose and rationale of the joint action is to compensate the individual persons who form that relationship for the personal injury which they both sustain." Adkins further pointed out the anomaly that occurs when the courts allow a spouse, but not a child, to recover for loss of consortium. An adult deprived of a spouse's care and companionship is in a much better position to adjust to the loss than a child—the adult can develop new relationships to mitigate the effects of the loss, but the child virtually is powerless in this respect.

**d. Analogy to Wrongful Death Action.**—The Court of Appeals also found unpersuasive an analogy to a wrongful death action.

---


430. 247 Md. 95, 231 A.2d 514 (1967).

431. 316 Md. at 31-32, 557 A.2d at 218.

432. 247 Md. at 113, 231 A.2d at 524.

433. *Id.* at 115, 231 A.2d at 525.

434. 316 Md. at 32, 557 A.2d at 218.

435. *Id.*


437. *Id.* at 43, 557 A.2d at 224.

438. *Id.; see also* Note, supra note 369, at 742.

439. 316 Md. at 32, 557 A.2d at 218.
Under the State’s Wrongful Death Act, a minor child may recover damages for the loss of parental society and companionship when a parent is killed. Nevertheless, the Gaver court stated that the wrongful death action was not a proper basis for comparison because it is a statutory creation. The court additionally argued that the policy reasons for allowing the recovery of nonpecuniary losses in a wrongful death action are unique to that action.

The court, however, failed to recognize that when the legislature enacted the wrongful death statute, the legislature “signified its approval of an award of monetary damages to recover for nonpecuniary losses.” Furthermore, as Judge Adkins aptly noted in his dissent, “[t]he state of the law in this area is anomalous in that a child may recover for loss of consortium if [a] parent dies as a result of another’s negligence, but not if the severely injured parent remains alive but in a vegetative state.”

e. Increased Recognition of Children’s Rights and Importance of the Family Unit.—Curiously, the Gaver majority did not even mention two major arguments frequently advanced to support adoption of the parental consortium cause of action—society’s growing recognition of children as independent persons who possess separate legal rights and the importance of the family. After exploring these arguments, however, Judge Adkins in his dissent properly concluded that the common law’s development, the legislature’s policy towards children, and the State’s recognition of the family’s importance indicate that adoption of the proposed cause of action “is wholly consistent” with the public policy of Maryland.

While the majority surprisingly overlooked the recent emergence of children’s legal rights at the national and state levels, Judge Adkins was quick to acknowledge that courts have increasingly “rec-

441. Id. § 3-904(d).
442. 316 Md. at 32, 557 A.2d at 218.
443. Id. The court stated that nonpecuniary damages are recoverable in a wrongful death action because the “pecuniary loss” rule could result in no recovery at all if the victim was very old or young, or disabled and therefore an “unproductive” member of society. Id.
444. Id. at 45, 557 A.2d at 224 (Adkins, J., dissenting). Similarly, the Arizona Supreme Court, in Villareal v. State Dep’t of Transp., found that its state legislature recognized “the value of the parent-child relationship” when it passed Arizona’s wrongful death statute. 160 Ariz. 474, 479, 774 P.2d 213, 218 (1989).
446. Id. at 33, 557 A.2d at 219.
ognized that minor children are not mere chattels, but persons also entitled to many of the same constitutional protections and freedoms as adults." The Supreme Court now clearly recognizes children as "persons" entitled to constitutional protection. For example, the Court has held that children enjoy the first amendment's guarantee of free speech, equal protection against racial discrimination, due process in civil contexts, a variety of rights in a criminal procedural context, and to an extent, the right to privacy in connection with decisions that involve procreation. Additionally, a number of states now afford minors the same right to legal redress as adults, the right to sue a parent for negligent injury, and the right to legal representation in their parents' divorce proceedings.

Similarly, the General Assembly increasingly has identified a particular need to protect both children and the family unit as a whole. Adkins' dissent points to the Family Law Article as direct evidence of the legislature's special concern for the protection of children and the family. Specifically, the statute makes parents jointly and severally responsible for their children's "support, care, nurture, welfare, and education...." attempts to protect children from abuse and neglect, provides penalties for those who leave

447. Id. at 38, 557 A.2d at 221.
448. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969). In Tinker, the Court averred that students are entitled to the freedom to express their views absent a specific showing of constitutionally valid reasons to regulate their speech. Id.
449. See id. (right to wear black armbands to protest the United States' policy in Vietnam).
454. See Note, supra note 380, at 301.
455. Gaver, 316 Md. at 38, 557 A.2d at 221 (Adkins, J. dissenting).
456. Id. at 38-40, 557 A.2d at 221-22.
458. Id. §§ 5-701 to -715.
young children unattended," and finally, establishes that it is the State's policy "to promote family stability" and "to preserve family unity." These trends in the law reflect a growing awareness that children are persons with a variety of legal interests. It follows logically from the increased recognition of children's legal rights and the importance placed on the family unit as a whole that the child's interest in parental society and affection is at least as deserving of protection as the many other interests that the State protects within the family. Children have a valid legal interest in a loss of parental consortium action that demands the opportunity for compensation congruent with that available to their parents.

3. Conclusion.—In Gaver, the Court of Appeals concluded that recognition of a loss of parental consortium action was not "compelled by changing circumstances [or] by a pressing societal need." Thus, the court left any expansion in this area to the legislature. The Gaver court's decision to defer to the legislature is inappropriate in this case, however. Loss of consortium is a common-law action, created by the judiciary rather than the legislature. By refusing to address the issue, the court ignores its "responsibility to face a difficult legal question and accept judicial responsibility for a needed change in the common law."

Moreover, the Gaver court focused on traditional arguments that disfavor a loss of parental consortium action, even though commentators have broadly and convincingly criticized those arguments. In fact, the reasoning on which the Gaver court relied has been criticized even by those courts that ultimately rejected the doc-

459. Id. § 5-801.
460. Id. § 4-401.
461. See Note, supra note 369, at 741.
462. See Note, supra note 366, at 101-02.
463. 316 Md. at 33, 557 A.2d at 218.
464. Id.
465. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 995 (Alaska 1987); Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 516, 413 N.E.2d 690, 695 (1980); accord Theama v. City of Kenosha, 117 Wis. 2d 508, 521, 344 N.W.2d 513, 519 (1984). "The obstacles to the child's right of action were created by judicial decision; it does not seem unreasonable that they should be removed by the same means." Note, supra note 369, at 729. Even a court that rejected the doctrine agreed that the question was one for the court rather than the legislature. Salin v. Kloempker, 322 N.W.2d 736, 741 (Minn. 1982).
467. See, e.g., Note, supra note 369, at 728-40; Note, supra note 380, at 307-16.
trine on other grounds. Furthermore, the court failed to give proper consideration to the affirmative reasons that support the adoption of the cause of action. The court did not even discuss in its decision the ramifications of society's increased recognition of children as independent persons.

Given the current trend of courts to deny children a cause of action for loss of parental consortium, universal recognition of this cause of action may be slow in coming. It was over seventy years ago that Dean Pound noted:

As against the world at large a child has an interest . . . in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests . . . . It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand.

Unfortunately, children's interests continue to receive short-shrift in Maryland and elsewhere. The Court of Appeals decision in *Gaver v. Harrant* maintains the status quo by denying children the opportunity to recover for the loss of parental society and affection.

**F. Insurance Coverage of Injuries That Occur at Home Day-Care**

In *McCloskey v. Republic Insurance Co.*, the Court of Special Appeals held that a home day-care provider's standard homeowner's insurance policy excluded injuries to day-care children caused by the insured's negligence. The court concluded that the policy's

---


469. For a discussion of affirmative reasons for accepting the loss of parental consortium action, see supra notes 413-424 and accompanying text.

470. In his dissent, Judge Adkins recognized that courts no longer view children as "mere chattel," but rather as persons "entitled to many of the same constitutional protections and freedoms as adults." *Gaver*, 316 Md. at 38, 557 A.2d at 221 (Adkins, J., dissenting); see supra notes 418-419 and accompanying text.

471. See supra note 367.


474. Id. at 31, 559 A.2d at 390. When an insured's intentional conduct causes the injury, homeowner's policies generally exclude coverage under a different exclusion than that discussed in this Note: "We do not cover bodily injury or property damage: . . . [arising as a result of intentional acts of an insured.]" Farmers Ins. Co. v. Hembre, 54 Wash. App. 195, 198, 773 P.2d 105, 107, cert. denied, 113 Wash. 2d 1011, 779 P.2d 729 (1989). The clause tends to preclude coverage for physical and sexual abuse of minors at day care. See generally Recent Development: The Insurance Crisis: Who's Looking After Day
"business pursuits" exclusion applied because the insured's day-care activities plainly constituted a business.\textsuperscript{475} More importantly, the court decided that a standard exception to the exclusion for "activities which are ordinarily incident to non-business pursuits" did not apply because "the activity alleged as the basis for the claim is the negligent failure to provide proper care and supervision of the child"\textsuperscript{476} and, presumably, because the negligent supervision was incident to the \textit{business} pursuit of child care for pay.

Courts generally have found it difficult to reconcile the business pursuits exclusion and its exception, acknowledging at least three distinct lines of analysis.\textsuperscript{477} The Court of Special Appeals has chosen to follow the line of cases least favorable to plaintiffs and, partially because of \textit{McCloskey}, this line now may be the preferred method of analysis.\textsuperscript{478} This Note traces the business pursuits exclusion and its exception in child care cases and suggests an alternative interpretation of the exclusion and exception clauses that might reconcile some of the conflict among the decisions. It concludes by indicating that the issue soon may become moot as insurers rewrite their policies and rely on the statutory registration provisions and insurance requirements under Maryland law.\textsuperscript{479}

1. \textit{The Case}.—Fifteen-month old Michelle Anne Vermillion died as a result of injuries that occurred while she was in the care of Edna Marie Sandrus, her day-care provider.\textsuperscript{480} The parties disputed the cause of the child's death. Linda McCloskey, Michelle's mother, argued that Sandrus shook the child to death, while Sandrus claimed that she was downstairs doing laundry and found the child

\begin{footnotes}
\item[476] \textit{McCloskey}, 80 Md. App. at 25, 559 A.2d at 387.
\item[477] \textit{Id.} at 30, 559 A.2d at 390.
\item[478] See, e.g., Moncivais v. Farm Bureau Mut. Ins. Co., 430 N.W.2d 438, 442 (Iowa 1988) (activity causing child's death was negligent care and supervision that were basic elements of day care operation); Haley v. Allstate Ins. Co., 129 N.H. 512, 515, 529 A.2d 394, 396 (1987) (per curiam) (regular day care for profit normally not a nonbusiness activity).
\item[479] See infra notes 562-571 and accompanying text.
\item[480] \textit{McCloskey}, 80 Md. App. at 20, 559 A.2d at 385.
\end{footnotes}
injured when she returned.481

At the time of Michelle's death, Sandrus cared for seven children, charging from twenty-five to forty dollars per child each week.482 Three of the seven children, plus one of Sandrus' own, were under two years old.483 She cared for the five children who were under school age all day on weekdays and the two older children (ages six and nine) "for two to three hours after school."484 Sandrus had not registered with the Department of Human Services, apparently in violation of Maryland law.485

McCloskey filed a wrongful death action against Sandrus, alleging that Sandrus' negligent supervision had caused Michelle's death.486 Sandrus requested an indemnification and defense under her homeowner's insurance policy, issued by defendant Republic Insurance Company.487 Republic responded by seeking a declaratory judgment that it was not required to defend or indemnify Sandrus because of the standard "business pursuits" exclusion which her policy contained:

481. Id. at 30 n.5, 559 A.2d at 390 n.5; Appellant's Brief and Appendix at 3, McCloskey (No. 88-1341).
482. McCloskey, 80 Md. App. at 22, 559 A.2d at 386.
483. Id.
484. Id.
485. Id. at 22 n.2, 559 A.2d at 386 n.2. There were several violations. First, Maryland requires a "family day care home" to register with the Department of Human Resources. Md. Fam. Law Code Ann. § 5-552(a) (1984); see also id. § 5-501(c)-(e) (defining terms). There are several exceptions to the registration requirement, none of which appeared to apply to Sandrus. Id. § 5-552(b). Further, even when registered, a day care provider may not care for "more than two children under the age of two years," including her own. Id. § 5-553(a), (b)(1). Finally, at the time of the injury in McCloskey, a provider could care for a maximum of six children. Id. § 5-553(b)(2). The General Assembly increased this maximum to eight on July 1, 1989. Id. § 5-553(b)(2).
486. McCloskey, 80 Md. App. at 20, 559 A.2d at 385.
487. Id. at 21, 559 A.2d at 385. Maryland law now requires that any insurance company which writes homeowner's policies must offer $300,000 of liability coverage to any family day-care home registered with the Department of Human Resources. Md. Ann. Code art. 48A, § 481D(a) (Supp. 1989). In cases in which the insurance company has not rewritten the policy, however, see infra note 563 and accompanying text, cases like McCloskey will apply—at least to providers who fail to register because of the rigorous registration requirements, see Md. Fam. Law Code Ann. § 5-552(a) (1984), which is probably the majority of home day-care providers. See Child Care: The Emerging Insurance Crisis, Hearings Before the House Select Comm. on Children, Youth, And Families, 99th Cong., 1st Sess. 51 (1985) (statement of Joseph S. Silverman, Executive Vice President, BMF Marketing Insurance Services, Inc.) (estimating that 70% of family day-care providers were unlicensed and unregulated at that time); Lawson, How France Is Providing Child Care to a Nation, N.Y. Times, Nov. 9, 1989, at C1, col. 1 (estimating that only 10% of family day-care centers in the United States are registered or licensed); see also supra notes 567-568 and accompanying text.
I. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:

b. arising out of business pursuits of any insured or the rental or holding for rental of any part of any premises by any insured.

This exclusion does not apply to:

(1) activities which are ordinarily incident to non-business pursuits. . . .

The trial court granted McCloskey's motion to intervene, but agreed with Republic that the business pursuits exclusion applied and that the insurance company had no duty to defend or indemnify Sandrus. McCloskey appealed from that ruling.

The Court of Special Appeals first decided that Sandrus' day-care operation constituted a business pursuit, hardly a surprising conclusion given that Sandrus' services earned her an income of $195 per week. The court simply listed several definitions of "business," drawn both from Maryland law and from dictionaries, and concluded without further analysis that "we have no difficulty in holding that the day care service operated by Ms. Sandrus was a 'business pursuit.'"

The court then considered whether the exception to the busi-

488. McCloskey, 80 Md. App. at 21, 559 A.2d at 385. In this Note, the first phrase in 1.b ("arising out of the business pursuits of any insured") is called the "exclusion," and the language in 1.b(1) is called the "exception."

489. Id.

490. Id. McCloskey also argued that the trial court improperly granted summary judgment in favor of Republic because the parties disagreed about the precise circumstances of Michelle's injury. ld. at 21-22, 559 A.2d at 386. The court, however, found that question irrelevant to coverage under the homeowner's policy in light of its holding that the business pursuits exclusion applied. ld. at 31, 559 A.2d at 390.

491. Id. at 25, 559 A.2d at 387.

492. Id. at 22, 559 A.2d at 386. When the provider earns considerably less, or provides care for some reason that appears to be nonbusiness, courts sometimes have decided that there is no business pursuit. See infra notes 500-513 and accompanying text.


494. McCloskey, 80 Md. App. at 25, 559 A.2d at 387. The court summarily rejected as "absurd" McCloskey's contention that Sandrus' lack of registration indicated that Sandrus was not operating a business. ld. at 25, 559 A.2d at 388. According to the court, this was equivalent to "asserting that an unlicensed operator of a motor vehicle could not be convicted of operating a vehicle without a license because the absence of a license means he is not operating the vehicle." ld., 559 A.2d at 387-88.
ness pursuits exclusion applied, *i.e.*, whether the activity that caused the injury was "ordinarily incident to non-business pursuits." After reviewing the three distinct lines of analysis under the exception, the court embraced the one that almost always denies coverage to day-care providers. By the court's logic, the cause of the injury was negligent supervision, and the negligent supervision was an activity incident to Sandrus' paid child care, which the court already had determined to be a business pursuit.

In so deciding, the court declined to consider whether a specific act by Sandrus that might have caused the injury was incident to the nonbusiness pursuit of caring for her own children, or whether Sandrus' negligent supervision of the day-care child was incident to that nonbusiness pursuit. The court only asked whether running a child-care service like Sandrus' ordinarily would be considered nonbusiness. While the cases that adopt this reasoning are unclear as to what activities would be excepted from the exclusion, the more recent cases hold that child care for pay cannot be one of them, and *McCloskey* is no exception.

2. Analysis.—a. *When Is Child Care a Business Pursuit?*—Before reaching the problematical exception to the business pursuits exclusion, courts first must decide whether the homeowner's child-care service or "babysitting" constitutes a business pursuit. Many courts nominally apply the standard of *Home Insurance Co. v. Aurigemma*, which held that a business pursuit required both "continuity" and a "profit motive.” These terms are not very useful by themselves, but the courts have decided enough child care cases by now to give the terms real meaning in that context.

Although the cases are rare, there appears to be a level of day-care service that the courts will not consider a business pursuit even though the service is regular and the provider is compensated. For instance, in *Camden Fire Insurance Association v. Johnson*, the Department of Welfare paid a grandmother eighty dollars per month to

---

495. See infra notes 517-519 and accompanying text.
497. See infra notes 549-554 and accompanying text.
498. See infra notes 520-531 and accompanying text.
500. 45 Misc. 2d 875, 257 N.Y.S.2d 980 (Sup. Ct. 1965).
501. Id. at 879, 257 N.Y.S.2d at 985; see, e.g., *Camden Fire Ins. Ass'n v. Johnson*, 294 S.E.2d 116, 118 (W. Va. 1982).
care for her grandson while his mother worked.\textsuperscript{503} The West Virginia Supreme Court decided that the grandmother was not engaged in a business pursuit, in part because "[s]he was not licensed to operate a day care center in her home and did not offer or advertise her services as a babysitter."\textsuperscript{504} Moreover, because the grandmother often cared for her grandchild without compensation, the court found that she was motivated by love and affection for the child rather than by profit.\textsuperscript{505}

Most cases, however, have held that child-care providers who are paid for their services and who care for children regularly are engaged in business pursuits. Courts look to such factors as whether providers advertised their services,\textsuperscript{506} were licensed or registered by the state,\textsuperscript{507} cared for several children,\textsuperscript{508} expected or received a substantial amount of money for their services,\textsuperscript{509} cared for children for a substantial amount of time,\textsuperscript{510} or declared their serv-

\textsuperscript{503} Id. at 117.  
\textsuperscript{504} Id. at 120. The court also noted that the same state department which paid Ms. Johnson also issued day care licenses. \textit{id.}  
\textsuperscript{505} \textit{id.; see also} Nationwide Mut. Fire Ins. Co. v. Collins, 136 Ga. App. 671, 674, 222 S.E.2d 828, 830 (1975) (woman who received five dollars per day to care for two children and feed them two meals per day not engaged in a business); Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783, 789 (Iowa 1988) (business pursuits exclusion did not apply when policy was ambiguous as to child care coverage, insurer’s agent could have informed insured of coverage but did not, and child care activities were minimal).  
\textsuperscript{508} \textit{See Moore}, 103 Ill. App. 3d at 252, 430 N.E.2d at 643.  
\textsuperscript{509} \textit{See id.; Kelsey}, 67 Or. App. at 352, 678 P.2d at 750; \textit{Hagy}, 232 Va. at 476, 352 S.E.2d at 319 (fact that profits declined not determinative).  
\textsuperscript{510} \textit{See} Burt v. Aetna Casualty and Sur. Co., 720 F. Supp. 82, 85 (N.D. Tex. 1989) (provider had an agreement to care for the injured child "for a set period of time every day and that such arrangement had continued for approximately three months prior to the child’s injury"); \textit{Haley}, 129 N.H. at 514, 529 A.2d at 396; \textit{Kelsey}, 67 Or. App. at 352, 678 P.2d at 750.
ices to be a business on their tax forms. Whether the courts invoke the Aurigemma standard of continuity and profit motive or not, all of these factors appear to be instrumental in determining whether providers either have a profit motive or have provided services continually. Therefore, unless providers can show from other evidence the absence of a profit motive or continuity of service, the presence of any one of these factors could establish a business pursuit.

Certainly there was ample evidence in *McCloskey* to find that Sandrus was engaged in a business pursuit. Although the court never discussed whether Sandrus advertised her services, it did note that she cared for a substantial number of children (7), watched them regularly (Monday through Friday), and received substantial compensation for her services ($195 per week).

b. Exception for "Activities Ordinarily Incident to Non-Business Pursuits."—(1) Three Lines of Analysis.—One need only read the business pursuits exclusion and its "ordinarily incident" exception to understand why courts routinely have criticized its drafting and interpreted it in at least three distinct ways. The exception to the exclusion clause legitimately could be read either to except most home businesses from the exclusion, or none.

Because the clause is so unclear on its face, the three lines of

511. See Piper, 517 F. Supp. at 1106.
512. 80 Md. App. at 25-26, 559 A.2d at 388.
513. Id. at 22, 559 A.2d at 386.
514. For a sample version of the clause, see supra text accompanying note 488.
515. While courts never praise the drafting of the exclusion clause, most have found that it is not ambiguous as a matter of law. See, e.g., Stanley v. American Fire and Casualty Co., 361 So. 2d 1030, 1033 (Ala. 1978); Crane v. State Farm Fire and Casualty Co., 5 Cal. 3d 112, 117, 95 Cal. Rptr. 513, 515, 485 P.2d 1129, 1131 (1971) (en banc); Moncivais v. Farm Bureau Mut. Ins. Co., 430 N.W.2d 438, 442 (Iowa 1988); Haley v. Allstate Ins. Co., 129 N.H. 512, 515, 529 A.2d 394, 396 (1987) (per curiam). But see Foster v. Allstate Ins. Co., 637 S.W.2d 655, 657 (Ky. App. 1981) (choosing the interpretation favorable to the insured when the clause "is clearly susceptible to two reasonable interpretations"); State Farm Fire & Casualty Co. v. Moore, 103 Ill. App. 3d 250, 430 N.E.2d 641 (1981) (same); see also Robinson v. Utica Mut. Ins. Co., 585 S.W.2d 593, 598 (Tenn. 1979) (not deciding whether clause is "ambiguous or merely 'difficult' to apply," but resolving doubt in insured's favor). Generally, when a court determines that a clause in an insurance contract is ambiguous, it construes the clause "most strongly against the insurer." 43 Am. Jur. 2d *Insurance* § 283, at 357 (1982). Maryland courts adhere to this rule, although they distinguish themselves from other jurisdictions by saying that they do not adhere to the rule when there is no ambiguity, but instead rely on the intentions of the parties as manifested by the entire policy. See *McCloskey*, 80 Md. App. at 23, 559 A.2d at 386-87; Mateer v. Reliance Ins. Co., 247 Md. 643, 648, 233 A.2d 797, 800 (1967). Given that other jurisdictions only apply the rule when the contract is
cases that interpret it can be introduced best with a hypothetical:516

A cares for two children for pay on weekdays from nine to five; she also cares for two young children of her own. While A is preparing lunch for herself, her own children, and the day-care children, one of the latter is burned when he pulls a pan of boiling water down on himself. The injured child sues A, claiming negligent supervision. A seeks coverage under her homeowner's policy.

1. The policy covers A because she ordinarily would care for her own children even if she did not have a day-care business. Thus, all child care that she does in her home is "ordinarily incident to a non-business pursuit."517

2. The policy does not cover A because the activity that caused the injury was A's negligent supervision of the day-care child, which is ordinarily incident to her business duties of caring for children for pay.518

3. The policy probably covers A. The activity that caused the child's injury was A's lunch preparation. Because A was preparing lunch both for herself and her children, she would have prepared lunch even if she had no day-care business; thus, the activity that caused the injury was ordinarily incident to a nonbusiness pursuit.519

(a) Crane Analysis.—Crane v. State Farm Fire and Casualty Co.520 is the leading case under the first line of analysis. In Crane, a woman cared for Crane's two children five days a week for twenty-five dollars per week plus groceries.521 When one of the Crane children burned her hand at the day-care provider's home, Crane alleged that the provider was negligent and tried to collect from the provider's insurer.522 In a widely quoted passage, the California Supreme Court held that:

Assuming that the care of the child constituted a business

ambiguous or the intentions of the parties are not clear, Maryland's distinction seems unimportant. See 43 Am. Jur. 2d Insurance § 284, at 359 (1982).

516. This hypothetical is based loosely on the facts of State Farm Fire & Casualty Co. v. Moore, 103 Ill. App. 3d 250, 430 N.E.2d 641 (1981).


519. See Gulf Ins. Co. v. Tilley, 280 F. Supp. 60 (N.D. Ind. 1967), aff'd, 393 F.2d 119 (7th Cir. 1968) (per curiam).

520. 5 Cal. 3d 112, 95 Cal. Rptr. 513, 485 P.2d 1129 (1971) (en banc).

521. Id. at 114-15, 95 Cal. Rptr. at 514, 485 P.2d at 1130.

522. Id. at 115, 95 Cal. Rptr. at 515, 485 P.2d at 1131.
pursuit, such duties under the circumstances presented here were clearly incident to Mrs. Chamberlain's nonbusiness regimen of maintaining a household and supervising her own children. Indeed, it is difficult to conceive of an activity more ordinarily incident to a noncommercial pursuit than home care of children.\textsuperscript{525}

Courts subsequently criticized \textit{Crane} because it seemed to suggest that a homeowner's policy would cover any injury that occurred at day care so long as providers also cared for their own children.\textsuperscript{524} Cases that follow \textit{Crane} have tended to do so without serious analysis; the courts merely quote the above passage and announce their approval,\textsuperscript{525} or choose the interpretation that is more favorable to the insured given two reasonable, but inconsistent, possibilities.\textsuperscript{526} Hence, there has been little refinement to \textit{Crane}'s reasoning and the criticism that it sweeps too broadly still stands.\textsuperscript{527}

None of the cases decided since 1983 has followed \textit{Crane}\textsuperscript{528}—possibly because of this lack of a solid analytical foundation—and it seems time to declare that its vitality has ended. \textit{Crane}'s view of the exception to the business pursuits exclusion requires a rigid definition of which "pursuit" an injury-causing accident is "ordinarily incident to." If providers are parents who care for their own children at home, any additional, compensated child care at that home automatically becomes incident to the nonbusiness pursuit of parenting.

This view seems to be both simplistic and dated. First, it fails to accommodate the extreme, such as when parents care for only one child of their own while making several hundred dollars a week caring for seven others.\textsuperscript{529} On these facts, it seems unlikely that providers' compensated care is merely incident to the gratuitous care of their own children. Second, because the demand for day-care serv-

\textsuperscript{523} Id. at 117, 95 Cal. Rptr. at 515, 485 P.2d at 1131.
\textsuperscript{524} \textit{See}, e.g., State Farm Fire & Casualty Co. v. Moore, 103 Ill. App. 3d 250, 254-55, 430 N.E.2d 641, 645 (1981) (suggesting that "\textit{Crane} . . . views almost any injury due to a babysitter's negligent supervision of a child as potentially within the exception," and that the better method is to examine the specific activity which caused the injury).
\textsuperscript{526} \textit{See supra} text accompanying notes 517-518.
\textsuperscript{527} \textit{See} Moncivais v. Farm Bureau Mut. Ins. Co., 430 N.W.2d 438, 442 (Iowa 1988) (finding "[t]he effect of this method of analysis is to render the business pursuits exception meaningless in many commercial child care operations").
\textsuperscript{528} \textit{See} Goodall, 658 S.W.2d at 34-35 (following \textit{Crane}).
\textsuperscript{529} \textit{See} McCloskey, 80 Md. App. at 22, 559 A.2d at 386.
ices has risen dramatically, the chance to earn money by caring for other children may have become an important reason why some parents choose not to work. If parents stay home in part because they can run a day-care business, it seems less likely that the business is incident to staying at home for the nonbusiness purpose of parenting. Third, as states increasingly regulate home day care, it begins to look more and more like a business.

(b) Stanley Analysis.—Stanley v. American Fire and Casualty Co. is the leading case under the second line of analysis. McCloskey largely follows the reasoning in Stanley. In Stanley, a one year-old child was injured at day care when she fell into a bed of hot coals in a fireplace. When the accident occurred, the day-care provider was "in the kitchen preparing lunch for herself, her own children, and the other children for whom she was baby-sitting." The Alabama Supreme Court declined to narrow the injury-causing activity to the lunch preparation, holding that the activity which gave rise to the cause of action was a failure to supervise.

In a confused but often-quoted passage, the court declined to follow Crane's implication that all parental child care for pay is necessarily incident to a nonbusiness pursuit:

In Crane the Supreme Court of California reasoned

530. N.Y. Times, Dec. 31, 1989, § 4, at 7, col. 3 (citing Bureau of Labor Statistics' figures showing that in 1960, 20.2% of mothers with children under age 6 worked; by 1988, that number had risen to 56.1%); see also Rodgers & Rodgers, Business and the Facts of Family Life, HARV. BUS. REV., Nov.-Dec. 1989, at 121 ("The labor force now includes more than 70% of all women with children between the ages of 6 and 17 and more than half the women with children less than 1 year old").

531. See supra note 485 for some of the restrictions on home day-care operators under the Maryland Family Law Article. Additionally, there are nine pages of regulations on "Family Day Care Registration." See Md. REGS. CODE tit. 07, § 02.18 (1984). The regulations list a variety of requirements that the provider, the provider's home, and inhabitants of the provider's home must meet. The provider, for instance, "shall negotiate and maintain a written agreement concerning the provision and cost of care with the parent for each child in care," id. § 02.18.09J, and "shall keep records as required by the Social Services Administration," id. § 02.18.09O.

For an article that demonstrates the practical problems that arise when a state requires licensing and the perils of trying to enforce regulations, see Reardon, Child Care Dilemma: Whom Do You Trust?, Chicago Tribune, Nov. 19, 1989, § 1, at 1 (describing the tribulations of a 67-year old Chicago-area woman who cared for as many as 47 children at one time, some 32 of whom may have been under the age of 2, but whose service showed no indication of problems and, in fact, had strong community support).

532. 361 So. 2d 1030 (Ala. 1978).
533. Id. at 1031.
534. Id.
535. Id. at 1032.
that "indeed, [sic] it is difficult to conceive of an activity more ordinarily incident to a noncommercial pursuit than home care of children." We agree with the general ascertain, [sic] but disagree with their conclusion that child care for pay is ordinarily a non-business pursuit. It should be remembered that we are not here dealing with a temporary or casual keeping of children, but rather with a more permanent arrangement for an agreed upon compensation.\textsuperscript{536}

Evidently the Stanley court misread Crane. As the court's own quote from Crane indicates, the Crane court did not conclude "that child care for pay is ordinarily a non-business pursuit;"\textsuperscript{537} rather, it concluded that a parent's participation in compensated child care is "ordinarily incident to a noncommercial pursuit."\textsuperscript{538} For support of its reading of Crane, the Stanley court relied almost exclusively on a long passage from the intermediate appellate court's opinion in Crane.\textsuperscript{539} But the quoted passage analyzes the exclusion rather than the exception—which was irrelevant on appeal.\textsuperscript{540} It fails to decide whether, assuming a business pursuit exists, child care for compensation might be excepted from the exclusion as an "activity ordinarily incident to a non-business pursuit."\textsuperscript{541}

Nevertheless, subsequent cases legitimized Stanley's reasoning, if not its foundation.\textsuperscript{542} These later cases have focused on Stanley's conclusion that the cause of injuries at day care is the provider's negligent supervision.\textsuperscript{543} The negligent supervision is viewed as incident to a business pursuit and thus falls outside the exception. A Stanley analysis, therefore, seems to involve one question, "Is it a

\textsuperscript{536} Id.
\textsuperscript{537} In fact, Crane expressly bypassed the question of whether the child care at issue was a business pursuit because it concluded that the exception to the business pursuits exclusion would apply. Crane v. State Farm Fire and Casualty Co., 5 Cal. 3d 112, 115, 95 Cal. Rptr. 513, 514, 485 P.2d 1129, 1130 (1971) (en banc).
\textsuperscript{538} Id. at 117, 95 Cal. Rptr. at 515, 485 P.2d at 1131 (emphasis added).
\textsuperscript{539} Stanley v. American Fire and Casualty Co., 361 So. 2d 1030, 1032-33 (Ala. 1978); see Crane v. State Farm Fire and Casualty Co., 14 Cal. App. 3d 727, 730-31, 92 Cal. Rptr. 621, 622-23, rev'd, 5 Cal. 3d 112, 95 Cal. Rptr. 513, 485 P.2d 1129 (1971) (en banc). In fact, the intermediate appellate court in Crane noted that "[t]he [business pursuits] clause . . . preserves coverage for some business activities ordinarily incident to non-business pursuits. This is not a purposeless obfuscatory exception to the basic exclusion." Id. at 735, 92 Cal. Rptr. at 626 (emphasis added). In an unexplained sentence, however, the court held that "the business relationship of child care for compensation is certainly not 'ordinarily incident' to the conduct of a household." Id. (emphasis in original).
\textsuperscript{540} 5 Cal. 3d at 115, 95 Cal. Rptr. at 514, 485 P.2d at 1130.
\textsuperscript{541} McCloskey repeated this mistake by incorporating the same quote into its analysis of the exception. 80 Md. App. at 29-30, 559 A.2d at 389-90.
\textsuperscript{542} For cases that follow Stanley, see infra note 545.
\textsuperscript{543} Stanley v. American Fire and Casualty Co., 361 So. 2d 1030, 1033 (Ala. 1978).
business pursuit?,” asked twice. The first answer is applied to the exclusion and the second to the exception. If the child-care operation is a business pursuit, it is excluded from coverage under the exclusion clause. And, if it is a business pursuit, it cannot be excepted from the exclusion because the negligent supervision of children is not “ordinarily incident to a non-business pursuit.”

While this analysis is not necessarily illogical, it does suggest that the courts have misinterpreted the drafter’s intention because the interpretation makes either the exclusion or the exception superfluous. The cases that follow Stanley have shed little additional light on its analysis. McCloskey, for example, quotes liberally from the Stanley opinion without explaining why a child-care business never could be excepted from the exclusion, although that is the implication. McCloskey concentrates on why the injury-causing activity is negligent supervision in general rather than any specific act of the day-care provider; this analytical focus predominates in the Stanley line of cases.

(c) Tilley Analysis.—The third method of analyzing the business pursuits clause in child-care cases began in Gulf Insurance Co. v. Tilley. In Tilley, a child was burned at day care when she pulled the cord of a coffee percolator, which overturned and spilled hot

544. A dissenting judge in an Oregon case reached this conclusion by slightly different reasoning:

I would infer from the fact that the company provided an exclusion and an exception to that exclusion that they intended the exception to have some meaning. To have any meaning at all, there must be some act or omission that is covered, even though it somehow is connected with a “business pursuit.” The majority finds no coverage, because supervision of children ordinarily is incident to the business pursuit of supervising children. That reasoning renders the exception meaningless by making the same inquiry twice. I can imagine no “activity” that would ever be covered under that approach.


546. 80 Md. App. at 28-30, 559 A.2d at 389-90.

547. Id. at 30, 559 A.2d at 390 (holding that “[t]he activity alleged as the basis for the claim is the negligent failure to provide proper care and supervision of the child while engaged in the business pursuit of providing child care for compensation on a regular basis, regardless of the specific conduct causing the injury to the child”).

548. Piper, 517 F. Supp. at 1106; Moncivais, 430 N.W.2d at 442.

549. 280 F. Supp. 60 (N.D. Ind. 1967), aff’d, 393 F.2d 119 (7th Cir. 1968) (per curiam).
coffee onto her. The day-care provider was preparing the coffee for herself and a friend. The federal district judge concentrated on the preparation of coffee as the “activity” to be analyzed:

The coffee was being prepared for Mrs. Tilley’s personal use and for the use of her friend, Mrs. Stevens. In any event, it is manifest that the preparation of hot coffee is an activity that is not ordinarily associated with a baby-sitter’s functions and ... clearly appears as an activity which was “incident to non-business pursuits” ...

Thus, Tilley and its progeny have defined narrowly the “activity” that caused the injury, and then considered whether that particular activity is ordinarily incident to a business or nonbusiness pursuit. When the activity is ordinarily incident to the care of one’s own children, for example, the exception applies and the homeowner’s policy covers the day-care provider. This analysis is appealing because it considers the facts of the injury before it forecloses a decision on coverage in child-care cases. The problem is that it inevitably leads the courts to engage in formalistic hair-splitting only to arrive at conclusions that appear horribly contrived.

(2) Reconciling the Cases.—Courts differ among themselves in defining which activity is ordinarily incident to which pursuit. The Stanley analysis interprets “ordinarily incident to” as a connector between negligent supervision and the compensated portion of the provider’s day care, which is a business pursuit, according to these

550. Id. at 62.
551. Id.
552. Id. at 65.
553. See State Farm Fire & Casualty Co. v. Moore, 103 Ill. App. 3d 250, 255, 430 N.E.2d 641, 645 (1981) (injuries to child burned after pulling pan of boiling water upon himself covered because provider was boiling water for herself and her own children as well as her day-care children; thus, activity was incident to a nonbusiness pursuit). Other cases that in some way appear to follow Tilley’s logic include Economy Fire & Casualty Co. v. Bassett, 170 Ill. App. 3d 765, 770, 525 N.E.2d 539, 542 (1988) (when day-care child injured in driveway by car driven by parent of another day-care child, court held that use of driveway by parent was incident to a business pursuit); Aetna Life and Casualty Co. v. Ashe, 88 Or. App. 391, 745 P.2d 800 (1987) (allowing summary judgment for insurer to stand when day-care child was killed after touching exposed wire of vacuum cleaner, but recognizing that “vacuuming a house may be an activity ordinarily incident to nonbusiness pursuits in some instances and that in other instances it may be incident to a business pursuit”), review denied, 305 Or. 103, 750 P.2d 497 (1988).
554. See Moore, 103 Ill. App. 3d at 255, 430 N.E.2d at 645 (homeowner’s policy covered supervisor of child, who was burned after he pulled pan of boiling water upon himself, because supervisor boiled water for herself and her own children as well as her day-care children; thus, activity was incident to a nonbusiness pursuit).
cases. Under Stanley, negligent supervision almost always is the cause of unintentional\textsuperscript{555} injuries at day care.

Crane and its progeny interpret “ordinarily incident to” to connect negligent supervision, when it is the cause of an injury, with the gratuitous care parents provide to their own children, a nonbusiness pursuit. Thus, when children are injured at day care, Stanley seems to require that courts find no coverage under homeowner’s policies, while Crane seems to require the opposite as long as the provider cares for his or her own children.

Tilley, on the other hand, interprets the activity as a specific act of the day-care provider, rather than the broader “negligent supervision.” Under this analysis, the next question is whether that act is incident to the compensated or uncompensated portion of the day-care services. Under Tilley, the problem is to define the specific injury-causing activity in some way that can be repeated predictably.

Perhaps a better way to analyze these cases is to adopt the presumption from Stanley and Crane that the injury-causing activity generally is negligent supervision, and the technique from Tilley that declines to predetermine which pursuit to which an activity is incident. Thus, courts should analyze the compensated portion of home day care not only to determine whether it is a business pursuit, but also to determine, even if it is a business pursuit, whether it is ordinarily incident to a nonbusiness pursuit. In a case like McCloskey, in which the provider cared for seven children for pay and only one of her own,\textsuperscript{556} one could hardly suggest that the compensated portion of the day care merely was incident to the uncompensated portion.\textsuperscript{557}

But the question is more difficult when a provider cares for four children of his or her own and, to help make ends meet, contracts to care for two additional children for forty dollars per week. If one of the two children is injured due to the provider’s negligent supervision, courts would agree that the care of the two additional children was a business pursuit under the Aurigemma\textsuperscript{558} standard: there was

\textsuperscript{555} See supra note 474.
\textsuperscript{556} 80 Md. App. at 22, 559 A.2d at 386.
\textsuperscript{557} The following Table summarizes the lines of analysis:

<table>
<thead>
<tr>
<th>Analysis</th>
<th>Injury-Causing Activity</th>
<th>Pursuit Incid. To</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crane</td>
<td>Negligent Supervision</td>
<td>Gratuitous care</td>
</tr>
<tr>
<td>Stanley</td>
<td>Negligent Supervision</td>
<td>Compensated care</td>
</tr>
<tr>
<td>Tilley</td>
<td>Specific Act of Provider</td>
<td>?</td>
</tr>
<tr>
<td>Suggested</td>
<td>Negligent Supervision</td>
<td>?</td>
</tr>
</tbody>
</table>

\textsuperscript{558} 45 Misc. 2d 875, 879, 257 N.Y.S.2d 980, 985 (Sup. Ct. 1965).
both a profit motive and a continuity of service. The analysis, however, should not end there.\textsuperscript{559} Courts should further consider whether the business pursuit of caring for two children for pay was incident to the nonbusiness pursuit of caring for four children gratuitously.

The difference between this analysis and that in \textit{Stanley} is subtle; either will require consideration of many of the same factors. That difference, however, is significant given the way the parties drafted their agreement. If they wanted to exclude all business pursuits from coverage, presumably they would not have added an exception to the exclusion. The exception, positioned as it generally is within the business pursuits exclusion, surely means that some \textit{business pursuits} are covered.\textsuperscript{560}

To determine whether negligent supervision is incident to a

\textsuperscript{559} In practice, \textit{Stanley} actually would take the additional, superfluous step of considering again whether the compensated portion of the business was a business pursuit. Then, after deciding that it was, the court would declare that negligent supervision could not be incident to a nonbusiness pursuit.

\textsuperscript{560} Courts occasionally have recognized that the construction urged by \textit{Stanley} appears to leave the exception with no meaning and therefore have looked for a hypothetical situation to which the exception would apply. The example invariably used concerns a businessperson who takes a client golfing and negligently injures the client on the golf course. \textit{See State Farm Fire & Casualty Co. v. MacDonald}, 87 Ill. App. 2d 15, 19, 230 N.E.2d 513, 515 (1967). These facts seem inappropriate to child-care cases because they involve neither a homeowner’s policy nor a home business. Hence, it is not surprising that the golfing hypothetical was invoked by both \textit{Crane v. State Farm Fire & Casualty Co.}, 5 Cal. 3d 112, 118, 95 Cal. Rptr. 513, 516, 485 P.2d 1129, 1132 (1971) (en banc), and a \textit{Stanley} offspring, \textit{Haley v. Allstate Ins. Co.} 129 N.H. 512, 515, 529 A.2d 394, 396 (1987) (per curiam), to reach opposite conclusions.

Several more appropriate examples were given in argument on a summary judgment motion at trial in \textit{McCloskey}. Counsel for Republic Insurance Company argued that if a barefoot boy injured his feet walking across \textit{A}'s freshly fertilized lawn, \textit{A} would be covered under his homeowner’s policy. Brief of Appellant, app. at 73, \textit{McCloskey} (No. 88-1341). If \textit{A} was a professional chemist, however, and used his lawn to test new fertilizing formulas, the business pursuits clause would exclude coverage. Similarly, counsel argued that while several children playing basketball in \textit{A}'s backyard is not a business pursuit, the business pursuits exclusion would apply if \textit{A} began charging $20 per child to play in “\textit{A}'s Basketball Clinic.” \textit{Id.} at 72-73.

These hypotheticals again seem to analyze the business pursuits exclusion, not the exception to that exclusion. They provide excellent examples of how an ordinarily nonbusiness activity might become a business pursuit, but they ignore whether that business activity might ordinarily be incident to a nonbusiness pursuit. Concededly, neither of the above examples seem to be incident to a nonbusiness pursuit. But, suppose that \textit{A}, in return for $10 an hour, agreed to teach \textit{B}'s son some basketball fundamentals on regular occasions when \textit{A}'s son and \textit{B}'s son are playing basketball in \textit{A}'s yard. \textit{A} erected the basketball net for his son’s use and it is regularly used by neighborhood children, including \textit{B}'s son. \textit{B}'s son is hurt during a “lesson” due to \textit{A}'s negligence. While \textit{A}'s lessons are probably a business pursuit, it seems reasonable, or at least possible, to say that they are incident to a nonbusiness pursuit.
business or nonbusiness pursuit, courts should place different emphasis on some of the same evidence that they already consider under *Aurigemma*. If, for example, a parent previously had worked, but stopped working to care for additional children for pay, it seems more likely that the business portion of the day care was not incident to the gratuitous portion. The same logic would apply if the provider gave up some other substantial activity, such as regular volunteer work or recreation, to accommodate additional children for pay. Courts also should consider the ratio of compensated to uncompensated day-care children under the provider’s care: The more heavily the ratio is weighted in favor of compensation, the less likely it is that the day-care activity should be excepted. Further, if the providers rely on the income from day care to support their families, courts should be less willing to except the activity as ordinarily incident to a nonbusiness pursuit than if the providers consider it merely “found money” because they had to stay home to care for their own children anyway.

3. Conclusion.—While unregistered family day care providers seem unlikely to disappear in the near future, the nature of insurance coverage for the children they supervise is rapidly changing. *McCloskey* answers only one of those questions for Maryland—whether the business pursuits clause excludes coverage under a homeowner’s policy—but that question soon may become moot. There is some indication that Maryland’s insurers now expressly exclude coverage for home day care through an endorsement to the standard policy.

---

561. All of these questions currently are relevant in deciding whether the provider had a profit motive, which is one of the components of the business pursuits definition. The suggestion simply is that they be applied differently to the exception to the exclusion, to give both the exception and the exclusion distinct meanings.

562. The number of registered family day-care centers appears to be increasing, however. *See infra* text accompanying note 566.

563. The author’s policy, for instance, includes a five-paragraph “endorsement” that denies any liability coverage for home day-care businesses and limits property coverage for such businesses. Nonetheless, the endorsement concludes, perhaps optimistically, that: “This endorsement does not constitute a reduction of coverage.” Insurance Services Office, Inc., No Section II-Liability Coverages for Home Day Care Business 1 (Form HO-322, Sept. 1987 ed.).

Additionally, insurers may be ending their long reliance on the business pursuits exception clause as it appears in virtually all of the cases discussed in this Note. For instance, an addendum to the author’s policy completely rewrites the clause:

1. Coverage E — Personal Liability and Coverage F — Medical Payments to

   Others do not apply to bodily injury or property damage:

b.1) arising out of or in connection with a business engaged in by an
When the business pursuits exception applies, courts never have construed it acceptably in child-care cases. McCloskey has added nothing new to the analysis. Courts generally have not found a reasonable way to reconcile the exclusion and the exception. The most reasonable interpretation of the exception may come from a combination of the three major lines of cases. If the provider is engaged in a business pursuit, the injury will be excepted from the exclusion only if that business pursuit reasonably can be construed to be ordinarily incident to the nonbusiness pursuit of the gratuitous care of the provider's own children.

In deciding that question, courts should balance the business portion of child care against the gratuitous portion. Presumably there would be relatively few situations in which compensated day care truly is "incident to" gratuitous care, but that is a factual standard for the courts to develop. The Court of Special Appeals undoubtedly decided McCloskey correctly in that Sandrus' compensated day care of seven children could not have been considered incident to the gratuitous care of her own child. Nonetheless, it would be a mistake for Maryland courts mechanically to apply Stanley and McCloskey to exclude coverage in all child-care cases. The business pursuits clause plainly requires some balancing; courts would do well to determine on a case-by-case basis that a home day-care service truly cannot be considered incident to the gratuitous care of the provider's own child or children before excluding coverage.

For cases decided under newer policies, the analysis will be considerably different. The Maryland legislature has ensured that insurance coverage will be available to registered family day-care providers. According to the Maryland Committee for Children, Inc., there were 9837 registered family day-care providers in Maryland. This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the business; . . .


564. McCloskey presumably will apply to all injuries that occurred before insurers added the endorsement to homeowner's policies, or to those policies that do not include the endorsement.

565. Any insurer that issues or delivers a policy or contract of homeowner's liability insurance in Maryland shall offer, to any policyholder who is registered . . . as a family day care home provider the option of purchasing coverage for liability as a result of bodily injury, property damage, or personal injury arising out of the insured's activities as a family day care provider in an amount not less than $300,000.

land in December of 1989—a dramatic increase over the 3847 registered providers in 1979.\textsuperscript{566} The same organization, however, also estimates that regulated child care covers only seventeen percent of all Maryland children under age twelve who have working mothers.\textsuperscript{567} It is not known what portion of the remainder go to unregistered family day-care providers.\textsuperscript{568} Those parents who send their children to unregistered providers may find the providers to be without coverage.\textsuperscript{569} Because registration generally is required for family day-care providers,\textsuperscript{570} it is possible that Maryland insurers eventually will not cover day care unless the providers are registered, even if the provider is willing to pay extra. This may be good policy because it creates another incentive for all day-care providers to register with the State. As a practical matter, however, it seems likely that a significant portion of family day-care providers will be unwilling to pay for a physical exam, to undergo a criminal background check, and to meet all the other regulatory requirements.\textsuperscript{571}

Unless these providers decide on their own to end their day care services, lawyers and parents alike should be aware that homeowner's insurance policies will not cover injuries that occur at unregistered family day care.

G. Intentional Interference with Business Relations

In \textit{K & K Management, Inc. v. Lee},\textsuperscript{572} the Court of Appeals held that motel owners who breached their lease with the operators of an on-site restaurant did not tortiously interfere with the business relations between the operators and their suppliers and customers.\textsuperscript{573} In holding that the trial court erred in "treat[ing] the breach of the contract between the parties as a tort,"\textsuperscript{574} the court clearly main-

\textsuperscript{566} Maryland Committee for Children, Inc., Registered Family Day Care Providers in Maryland (Dec. 1989 chart) (copy on file with \textit{Maryland Law Review}).

\textsuperscript{567} "In 1989, there was space for only 17% of Maryland children under the age of 12 with working mothers in regulated child care programs." \textit{Id.}

\textsuperscript{568} Whatever the number, however, it is certainly less than 83%. The fact that the mother works does not necessarily mean that the child goes to day care. Moreover, the Maryland statute does not cover relatives, Md. Fam. Law Code Ann. \textsection 5-552(b)(1) (Supp. 1989); \textit{see also} Md. Regs. Code tit. 07, \textsection 02.18.02B(9), 02.18.03B(1) (1984), nor are "friend[s] of the child's parents who provide[] care on a non-regular basis for less than 20 hours a month," \textit{Id.} \textsection 02.18.03B(2).

\textsuperscript{569} For a discussion of why both registered and unregistered day-care providers find it difficult to find insurance, \textit{see Recent Development, supra} note 474.

\textsuperscript{570} Md. Fam. Law Code Ann. \textsection 5-552 (Supp. 1989).

\textsuperscript{571} \textit{See Md. Regs. Code tit. 07, \textsection 02.18.03C (1984)}.

\textsuperscript{572} 316 Md. 137, 557 A.2d 965 (1989).

\textsuperscript{573} \textit{Id.} at 170, 557 A.2d at 981.

\textsuperscript{574} \textit{Id.} at 141, 557 A.2d at 967.
tained the well-settled separation of tort and contract. Thus, a plaintiff cannot convert a breach of contract action into a tort action by alleging incidental interference with third party contracts "when the conduct underlying both claims is exactly the same." 575

1. The Case.—K & K Management, Inc. (K & K), a Virginia corporation owned equally by Robert Kirby, Sr. and his two sons, Robert, Jr. and Phillip, 576 operated the Harbor City Inn, a Best Western Motel. 577 In August 1981, K & K signed a profit-sharing lease with Chul Woo and So Ja Lee, owners of a Baltimore restaurant, to operate the motel restaurant. 578 The contract provided the Lees with a five-year lease and renewal option. 579 K & K retained the right to establish general operating standards, to manage every phase of the restaurant's operation, and to retain all improvements that the Lees made to the property. 580 K & K also retained authority to terminate the agreement immediately if the Lees incurred any financial obligations or liabilities to K & K, or with thirty days written notice if the Lees failed to meet Best Western operating standards. 581

The Lees operated the restaurant for over two years. 582 During that time, K & K sent three letters that expressed its displeasure over the Lees' management. 583 Finally, the Kirbys went to the restaurant in the early hours of September 7, 1983 and, rather than sending a thirty-day termination notice to cancel the contract, precipitously changed the locks on the doors. 584 K & K claimed that the Lees had caused them to incur the liability of a potential lawsuit, thus giving them the right under the contract's provisions to terminate the agreement immediately. 585

575. Appellants' Consolidated Reply Brief and Appendix at 18, K & K Management (No. 87-145).
576. K & K Management, 316 Md. at 142, 557 A.2d at 967.
577. Id.
578. Id. at 141-42, 557 A.2d at 967.
579. Id. at 142, 557 A.2d at 967.
580. Id. at 142-44, 557 A.2d at 967-68.
581. Id. at 144, 557 A.2d at 968.
582. Id., 557 A.2d at 969.
583. Id. at 145, 557 A.2d at 969. K & K's complaints included: (1) inadequate staffing at breakfast, (2) failure to prepare group menus (to permit group accommodation packages), and (3) reports by a Best Western inspector that the service was "terrible." Id.
584. Id. at 146, 557 A.2d at 969.
585. Id. According to K & K, the "liability" was a potential lawsuit that resulted from the "termination" of a pregnant employee. Although the Lees testified that the employee had resigned, K & K received a "Notice of Benefit Determination" from the Maryland Employment Security Administration, which stated their finding that the employee was terminated "because she was pregnant and employer was afraid that if she worked past three months her job may cause complications with her pregnancy." Id.
The Lees filed suit against K & K Management and the Kirbys, claiming: (1) breach of contract, (2) conversion of the Lees' property within the restaurant, and (3) intentional interference with business relations. The jury found for the Lees on all counts, awarding them damages in the amount of $979,400. Over $750,000 of this amount resulted from the "intentional interference" tort claim. K & K appealed to the Court of Special Appeals; however, the Court of Appeals granted certiorari while the appeal was pending.

Moreover, the employee was "found eligible for benefits, which were charged to K & K." Brief of Appellants at 10, K & K Management (No. 87-1053).

K & K argued that the Lees "(a) failed to establish a right of possession to the property in question, (2) did not demand the return of that property, and (3) did not submit sufficient evidence of malice to support the punitive damages award." K & K Management, 316 Md. at 171, 557 A.2d at 981-82. As to the first issue, the Court of Appeals found that resolution of the ownership issue "turned on the proper construction" of the contract. Thus, the trial court properly submitted the issue to the jury to resolve the contract's ambiguity in light of the conflicting evidence presented at trial. Id. at 173, 557 A.2d at 982. As to the second issue, the court noted that an owner must demand the return of converted property only in the case of "constructive conversion," i.e., when the defendant's possession of the property initially was lawful. The Court of Appeals reiterated its previous finding that the contract between the Lees and K & K was "at best ambiguous" with respect to K & K's ownership interest in the disputed property. K & K, therefore, "ran the risk that there would be no legal justification for its action ... [t]hat is, it ran the risk that a jury would find it lacked any possessory interest in the property. The jury apparently so found, and thus concluded there was a direct conversion." Id. at 174, 557 A.2d at 982-83. The court affirmed as to the compensatory damages for conversion. Id. at 179, 557 A.2d at 985. Finally, the court addressed K & K's contention that the Lees failed to show sufficient malice to support the punitive damage award for conversion. Id. at 174, 557 A.2d at 983. The court noted that punitive damages are recoverable in a tort action that arises out of a contract only if the plaintiff shows actual malice. The court found that K & K's motive for re-entry was to benefit itself—not to injure the Lees. Id. at 177, 557 A.2d at 984. K & K's self-help method of re-entry to the premises was an insufficient basis from which to draw an inference of actual malice. Although not encouraged, the law permits self-help repossession. The fact that K & K's re-entry was unauthorized because the Lees had not breached the contract was not enough to support an inference of malice. Further, K & K's action breached a contract provision that did not provide for notice and its action—despite the lack of notice—was consistent with wanting to avoid a confrontation that might have resulted in violence. That the jury found the Lees had not breached the contract and, therefore, that K & K was without authority to re-enter the premises, did not convert the lack of notice into an inference of actual malice. The court reversed as to the award of punitive damages on the conversion claim. Id. at 179, 557 A.2d at 985; see infra note 639.

2. Legal Background.—The seminal English case of *Lumley v. Gye* first recognized "Intentional interference with Contract" as a compensable tort in 1853. In *Lumley*, the defendant persuaded an opera star to break her contract with the plaintiff's theater and to perform at his instead. Although the plaintiff had a cause of action against the opera star, who clearly breached her contract, he had no previously recognized claim against the theater-owner who *induced* the breach. A divided court, however, recognized that the plaintiff had a cause of action against the third-party theater owner for intentional interference with contract.

Building directly upon this landmark English case, the Court of Appeals endorsed the intentional interference tort. In 1908 and 1911, in the companion cases of *Knickerbocker Ice Co. v. Gardiner Dairy Co.* and *Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co.*, the Court of Appeals recognized a cause of action for "wrongful interference with business relations" both to an injured third party and a party to the contract.

Much confusion centers around who may assert an "intentional interference" tort claim, and the issue is litigated frequently. As the *K & K Management* court noted, "Tortious interference . . . arises only out of the relationships between three parties, the parties to a contract . . . and the interferer." The *Restatement (Second) of Torts*

---

591. Id. at 749.
592. Id. at 751.
593. Id. at 768.
594. 107 Md. 556, 69 A. 405 (1908).
595. 114 Md. 403, 80 A. 48 (1911).
596. Id. at 414, 80 A. at 49. In 1906, an ice manufacturer contracted to sell ice to an ice wholesaler at $2.25/ton. Id. at 410, 80 A. at 49. The contract also provided that neither party interfere with the customers of the other. Id. at 411, 80 A. at 49. The wholesaler subsequently contracted to sell ice to a third party at $5.00/ton. Id. The manufacturer, believing the third party properly to be its customer, threatened to withhold all future deliveries of ice from the wholesaler if it continued to sell ice to the third party. Id. at 413, 80 A. at 49. Because the manufacturer held a virtual monopoly on ice production in the area, the wholesaler succumbed to the threat and broke its contract with the third party. Id. The third party then was forced to purchase ice from the manufacturer at a higher price. Id.

In 1908, the third party sued the manufacturer for intentionally interfering with its contract with the wholesaler, alleging actual damages of the higher priced ice and "exemplary" (punitive) damages. *Gardiner*, 107 Md. at 568-69, 69 A. at 408-09. The Court of Appeals recognized that the manufacturer could be liable to the third party for actual damages but denied exemplary damages because there was no evidence of malice. Id. Three years later, the court held that the wholesaler also could sue in contract and in tort for the same act of interference. *Sumwalt*, 114 Md. at 418, 80 A. at 51.

597. 316 Md. at 154, 557 A.2d at 973.
declares that this "interferer" (who is not a party to the contract) must be either the plaintiff or the defendant for a viable tortious interference claim.\textsuperscript{598} The Court of Appeals specifically subscribed to this limitation in \textit{Wilmington Trust Co. v. Clark}:\textsuperscript{599} "[W]e have never permitted recovery for the tort of intentional interference with a contract when both the defendant and the plaintiff were parties to the contract."\textsuperscript{600}

Despite the question of who may assert an "intentional interference" tort claim, the type of claim that is cognizable clearly has expanded. Originally, \( D \) was liable only for inducing \( P \) to \textit{breach} his contract with \( T \).\textsuperscript{601} Courts expanded this concept to hold \( D \) liable if \( D \) intentionally induced \( P \) to \textit{terminate} his contract with \( T \).\textsuperscript{602} Recently, the tort has been applied successfully to hold \( D \) liable for intentionally inducing \( P \) \textit{not to form} a contract with \( T \).\textsuperscript{603} It is this brand of tort—the intentional interference tort—that is at issue in \textit{K & K Management}.

The Court of Appeals has held that four elements are necessary to demonstrate intentional interference in business relations: "(1) intentional and willful acts, (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant, (which constitutes malice) and

\textsuperscript{598} \textsuperscript{599} \textsuperscript{600} \textsuperscript{601} \textsuperscript{602} \textsuperscript{603}
(4) actual damage\(^{605}\) and loss resulting.”\(^{606}\)

The first three elements all address whether the defendant had the requisite level of intent. Intent in the sense of common-law tort refers to the desire to achieve a result or knowledge that such a result is substantially certain to occur.\(^{607}\) More than “mere knowledge,” however, is required to sustain intentional interference.\(^{608}\) The Restatement (Second) of Torts requires that “the interference, however, must also be improper.”\(^{609}\) The impropriety can be either the actor’s motive or means.\(^{610}\)

An improper motive exists when a specific “purpose” to injure the plaintiff is present.\(^{611}\) In Winternitz v. Summit Hills Joint Venture,\(^ {612}\) the defendant lessor refused to renew plaintiff lessee’s lease, thus preventing the lessee from selling his pharmacy to a third party.\(^ {613}\) Although the lessor could have had valid business purposes for refusing to renew the lease, the lessee proved that the lessor acted “maliciously and with intent to injure appellant”\(^ {614}\) by offering evidence that the lessor only agreed to lease to the third party “[a]s long as Mr. Winternitz [the lessee] walks out with nothing.”\(^ {615}\)

The nature of the actor’s conduct also may determine “improper interference.”\(^ {616}\) Improper interference can result from ac-
tions that are unlawful, unjustified, or illegal. In Bank Computer Network Corp. v. Continental Illinois National Bank & Trust Co., Continental (the defendant) used $95,000 in Bankcom's (the plaintiff) checking account to set-off $200,000 that the plaintiff had accumulated in overdue loans. The plaintiff claimed that the defendant had tortiously interfered with its general business relations. At issue was whether the defendant previously had agreed to give the plaintiff more time to pay off the loans, and thus legally was estopped from taking the set-off. The plaintiff argued that if this were the case, the defendant's set-off was not privileged, but unjustified and illegal. Therefore, the plaintiff concluded, the illegal set-off constituted grounds for a tortious interference with business relations claim. The court dismissed this argument, reasoning that "[e]ven if the means [used to collect its loan] were not proper, they do not approach the level of legal malice. We therefore conclude that the interference is more appropriately labeled 'incidental' rather than 'intentional.'" What constitutes "improper motive" sufficient to maintain tortious intention varies from state to state. There are states that

---

contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.

Id. 617. See W. Prosser, The Law of Torts § 129, at 942-43 (4th ed. 1971). Dean Prosser further notes that "some element of ill will is seldom absent from intentional interference." Id. § 130, at 953. Certain reasons for disturbing existing contractual relations are privileged, however, e.g., the disinterested protection of the defendant's property or business interests or the defendant's exercise of the right to threaten or bring a bona fide complaint. Id. at 953-54. Courts have found violence, intimidation, defamation, and injurious falsehood to be sufficient to hold defendant's intent to be improper. Id. at 952-53.

619. Id. at 496, 442 N.E.2d at 589.
620. Id., 442 N.E. at 590.
621. Id. at 497-98, 442 N.E.2d at 590-91.
622. Id. at 500, 442 N.E.2d at 593.
623. Id.
624. Id. at 501, 442 N.E.2d at 593.
625. See infra notes 635-641 and accompanying text.
hold the sanctity of contract paramount and permit actions, which constitute malice in any other context, to be compensated only within the ambience of contract. In *Glazer v. Chandler*, a Pennsylvania court found that the defendant improperly removed a deed, misrepresented the existence of an approved subdivision plan, wrongfully insisted that the title company hold $16,000, and threatened to seek a baseless injunction. Nevertheless, the court refused to find intentional interference, holding that “to permit a promisee to sue his promisor in tort for breaches of contract . . . would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions.”

At the other extreme is the Washington Supreme Court’s decision in *Cherberg v. Peoples National Bank*, in which that court affirmed the claim of tortious interference by using the common-law definition of intent as knowledge. In *Cherberg*, the defendant lessor breached its lease with the plaintiff to convert the leased building into a multi-office complex. That, in turn, interfered with the business relations between the plaintiff and his restaurant customers. The court found that the defendant acted from profit motives outside the lease and that the defendant had not made a “good faith” effort to fulfill the contract. Moreover, the court recognized the following elements of the tort: “(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination thereof; (4) resultant damage.”

3. Analysis.—In undertaking a “fundamental legal analysis,” the *K & K Management* court reviewed case law from several

627. Id. at 305, 200 A.2d at 417.
628. Id., 200 A.2d at 418.
630. Id. at 598-99, 564 P.2d at 1140-41.
631. Id. at 605, 564 P.2d at 1144.
632. Id. at 602, 564 P.2d at 1142 (emphasis added).
633. *K & K Management*, 316 Md. at 154, 557 A.2d at 973. The court first considered procedural challenges to each of the appellants’ contentions. The Lees maintained that K & K had not preserved the right to appeal because it had not objected specifically to the jury instructions on interference with business relationships. The court ruled that K & K clearly had argued its position in its motion for summary judgment, i.e., that a claim of interference with contract was inappropriate to parties to the same contract, which it had renewed at the close of the Lee’s case. Thus, K & K’s failure to object to the jury instructions was simply a recognition that, considering the court’s position on the controlling law, it had no objections to the instructions as stated. It did not waive its objec-
The court then examined Maryland precedent in its historical context and analyzed briefly the overall social policy that guided those decisions. The court first found that K & K had no "purpose" to commit "intentional and wilful acts" that were designed to cause damage to the plaintiffs' business merely because the results of their actions were "foreseeable." The court dismissed this definition of "intent," adopting instead the Restatement's position that more than mere knowledge is required. The court held that even if K & K knew with "substantial certainty" that its actions would interfere with the restaurant's regular customers, "there is no tort because the evidence is uncontradicted that [K & K's] purpose or motive in closing the restaurant was not directed at the Lees' relations with their customers." Moreover, the court held that K & K's padlocking of the restaurant was not unjustified, unlawful, or illegal so as to constitute "improper motive." K & K was justified economically when it repossessed the restaurant. In sum, K & K's efforts to maximize the profit from their restaurant property was not improper, illegal,
or tortious. 641

Second, the court relied on property law to conclude: "Re-entry is a proper remedy for . . . breach [of commercial lease]." 642 K & K reasonably believed that the Lees violated the lease and thus exercised its right to re-enter and take possession. The fact that the court subsequently ruled that the Lee's were not in breach of the contract at that time does not render K & K's actions unlawful retroactively.

Finally, the court found that the defendant's wrongful conduct can substitute for motive or purpose only when its actions are "tortious toward the third person." 643 As noted previously, 644 the court found that K & K's actions were directed toward the Lees, but were not improper or tortious toward third party customers. "The degree of impropropriety of the means employed by D in breaching a P-D contract should not convert an incidental interference with a P-T relationship, foreseeablely resulting from the breach, into an interference having the purpose or object of interfering with P's relationship with T." 645

This last comment reflects the court's analysis of the tort's historical origins as a unique remedy for injured parties who had no claim in contract. 646 The court supports this historical intent by declining the Lees' attempted expansion: "In this case the Lees seek to skirt the settled rule . . . by contending that this is a case of tortious interference by [K & K] with business relations between [the Lees] and . . . the[ir] customers and suppliers . . . ." 647

The court flirts briefly with the policy reason that underlies the

641. K & K Management, 316 Md. at 166-67, 557 A.2d at 979.
642. Id. at 167, 557 A.2d at 980 (quoting Toy Fair, Inc. v. Kimmel, 177 F. Supp. 129, 134 (D. Md. 1959)). Toy Fair similarly involved a lessor who re-entered leased premises and changed the locks, believing that the lessee had breached the contract. 177 F. Supp. at 133.
643. K & K Management, 316 Md. at 160, 557 A.2d at 976 (emphasis added).
644. See supra notes 635-641 and accompanying text.
645. K & K Management, 316 Md. at 165-66, 557 A.2d at 979.
646. See supra notes 590-593 and accompanying text; see also LAW OF TORTS, supra note 640, § 6.5, at 302. According to the authors [s]ince most important economic relations are controlled by contract . . . major protection is given this interest by the law of contracts, with its various remedies for breach. But it is to be observed that this protection is available . . . only against the party to the contract, and is not available against third persons. Id. at 302-03. Consequently, the court recognized intentional interference to protect those third persons, "based on the common law tort principle that one who intentionally induces another to break a valid contract is, unless such conduct is privileged, liable for damages legally caused thereby." Id. at 303.
647. K & K Management, 316 Md. at 156, 557 A.2d at 974.
tort's limitations: the tension between tort and contract.\(^{648}\)

If the breach of the P-D contract were treated as an improper means which overrides the lack of motive to interfere in the incidental relations between P and T, then the interference tort becomes boundless and only rarely would the breach of a commercial contract fail to be a tort as well.\(^{649}\)

Although the Court of Appeals had the opportunity to extend precedent and apply the tort to the Lee's fact situation,\(^{650}\) the court's analysis accurately reflects the predominant view of the tort. Moreover, the decision contained the tort within the scope of its original boundaries.

Most significantly, the court's decision prevented tort law from writing the eulogy for the death of contract.\(^{651}\) Eighty years ago, merging tort and contract may not have been a concern;\(^{652}\) today, because "tort" offers exorbitant damage awards,\(^{653}\) any perceived "wrong" that can be contoured into a tort, is.\(^{654}\)

\(^{648}\) Id. at 169-70, 557 A.2d at 981. This long-standing theme peppers both of the State's appellate courts' opinions. See, e.g., Bocchini v. Gorn Management Co., 69 Md. App. 1, 3, 4, 515 A.2d 1179, 1180-81 (1986) (discussing the tort/contract conflict for negligent nonperformance of a lease covenant). The Bocchini court noted, "There may have been some time in the pristine past when contracts were contracts and torts were torts and the lines of demarcation between them were clear. For good or ill, that is not the case now." Id. at 16, 515 A.2d at 1187.

\(^{649}\) K & K Management, 316 Md. at 169-70, 557 A.2d at 981 (emphasis added). For example, when a manufacturer fails to deliver goods to a wholesaler, the wholesaler may be unable to perform his contract to deliver goods to a retailer, who in turn may be prevented from filling a customer's order. If the court adopted the Lee's interpretation, virtually everyone in the chain could sue in tort instead of, or in addition to, breach of contract.

\(^{650}\) Id. at 168-69, 557 A.2d at 980-81.

\(^{651}\) See G. Gilmore, The Death of Contract (1974), in which Professor Gilmore argues that tort virtually has overtaken contract as a cause of action.

\(^{652}\) See generally Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 69 A. 405 (1908). When the court decided Knickerbocker in 1908, "pain and suffering" was not a part of compensatory damages, and the court denied punitive damages because it found no malicious intent. Id. at 569, 69 A. at 410. "[W]hen the object [of breaking the contract] was merely to benefit itself, although the plaintiff would be thereby injured, there would be no more reason for allowing [punitive] damages than there would be in a suit by one party to a contract against the other for breach of it." Id. at 569-70, 69 A. at 410.

\(^{653}\) For example, compare the total damage awards for the Lees' contract claim ($93,000) with the total damage awards for the tort of intentional interference with business relations ($750,000). K & K Management, 316 Md. at 147, 557 A.2d at 970.

\(^{654}\) See, e.g., Hales v. Ashland Oil, Inc., 342 So. 2d 984 (Fla. Dist. Ct. App. 1977), cert. denied, 359 So. 2d 1214 (1978). In Hales, the plaintiff sued Ashland Oil when the company interfered with the plaintiff's contract with Pickard to purchase 200 such boats. Id. at 986. In ruling against the plaintiff, the court said "Were it otherwise, defendants would be subjected to an endless array of suits by persons who have been indirectly injured . . . ." Id.
The value of preserving contract and tort as separate theories of law stems from a fundamental difference in the policy goals of each. In one of the most frequently cited articles on the intentional interference tort, Professor Harvey S. Perlman comments, "[C]ourts have paid too little attention to the interplay of tort and contract policies... [M]any of the activities that increase the risk of contract disruption have socially useful consequences... in a competitive market." 655

From an economic standpoint, the amoral nature of contract is concerned with promoting the efficient use of resources, and to the extent that a breach of contract promotes economic efficiency, such breach is not a tort. The Court of Appeals in Natural Design, Inc. v. Rouse Co. 656 apparently agreed: "Competition is the state in which men live and is not a tort..." 657 Tort, on the other hand, is based on concepts of moral behavior and provides remedies for wrongs that cause physical injury to persons and property.

The net effect of the court's decision in K & K Management is to circumscribe the outer limits of the intentional interference tort. The opinion further settles Maryland law on two major issues that often are raised about this amorphous tort: (1) "intent" requires improper motive, demonstrated either by a specific purpose to injure the plaintiff or by actions sufficiently egregious and unjustified as to constitute an independent tort, 658 and (2) the parties to the contract may not assert the tort if breach of contract remedies are available. 659

In 1974, Grant Gilmore concluded that contract was dead, overtaken by omnivorous tort. 660 As recently as 1986, the Supreme Court lamented that "contract law would drown in a sea of tort." 661 As Mark Twain once said, however, "The reports of my death are greatly exaggerated." 662 The K & K Management court reinforced

657. Id. at 73, 485 A.2d at 676 (quoting Goldman v. Harford Bldg. Ass'n, 150 Md. 677, 684, 133 A. 843, 846 (1926)).
658. K & K Management, 316 Md. at 159-60, 557 A.2d at 976.
659. Id. at 165, 557 A.2d at 979.
660. G. GILMORE, supra note 651, at 87.
661. East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986). Although the Supreme Court spoke in the context of product liability, the issue of contract warranty versus strict liability in tort sparks the same concern over the apparent weakening of contract's reliability.
662. Cable from Mark Twain in London to the Associated Press (1897) (quoted in J. BARTLETT, FAMILIAR QUOTATIONS 679 (1955)).
contract as a strong and reliable commercial tool when it wisely prevented the intent to commit a breach to be converted linguistically into a tortious wrong.

DAVID H. HOLLANDER, JR.
J. NICHOLAS GALLAGHER
SARAH E. LENZ
PATRICIA M. WEAVER
SARAH M. MORTENSON
JOHN J. CONNOLLY
TRENT M. KITTLEMAN
Survey Table of Cases

Maryland cases from the period June 1987 to June 1988 that are discussed in the Survey are indexed below.

<table>
<thead>
<tr>
<th>CASES</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adkins v. State</td>
<td>604</td>
</tr>
<tr>
<td>Anne Arundel County v. Fraternal Order of Anne Arundel Detention Officers and Personnel</td>
<td>691</td>
</tr>
<tr>
<td>Bruce v. State</td>
<td>656</td>
</tr>
<tr>
<td>Dawkins v. State</td>
<td>647</td>
</tr>
<tr>
<td>Department of the Environment v. Showell</td>
<td>738</td>
</tr>
<tr>
<td>Dixon v. Maryland State Administrative Board of Election Laws</td>
<td>583</td>
</tr>
<tr>
<td>Eagan v. Ayd</td>
<td>681</td>
</tr>
<tr>
<td>Farmers &amp; Mechanics National Bank v. Walser</td>
<td>521</td>
</tr>
<tr>
<td>Gaver v. Harrant</td>
<td>799</td>
</tr>
<tr>
<td>Geisz v. Greater Baltimore Medical Center</td>
<td>782</td>
</tr>
<tr>
<td>Golden Sands Club Condominium, Inc. v. Waller</td>
<td>563</td>
</tr>
<tr>
<td>Hatzinicolos v. Protopapas</td>
<td>761</td>
</tr>
<tr>
<td>In re Criminal Investigation No. 437 in the Circuit Court for Baltimore City</td>
<td>614</td>
</tr>
<tr>
<td>K &amp; K Management, Inc. v. Lee</td>
<td>829</td>
</tr>
<tr>
<td>Makovi v. Sherwin-Williams Co.</td>
<td>702</td>
</tr>
<tr>
<td>Maryland State Administrative Board of Election Laws v. Talbot County</td>
<td>573</td>
</tr>
<tr>
<td>McCloskey v. Republic Insurance Co.</td>
<td>812</td>
</tr>
<tr>
<td>Miles Laboratories, Inc. v. Doe</td>
<td>750</td>
</tr>
<tr>
<td>O'Leary v. Shipley</td>
<td>594</td>
</tr>
<tr>
<td>Pennwalt Corp. v. Nasios</td>
<td>773</td>
</tr>
<tr>
<td>People's Counsel v. Maryland Marine Manufacturing Co.</td>
<td>715</td>
</tr>
<tr>
<td>Shimp v. Huff</td>
<td>727</td>
</tr>
<tr>
<td>State v. Burning Tree Club, Inc.</td>
<td>549</td>
</tr>
<tr>
<td>State v. Gorman</td>
<td>534</td>
</tr>
<tr>
<td>State v. Joynes</td>
<td>671</td>
</tr>
<tr>
<td>Warfield v. State</td>
<td>637</td>
</tr>
<tr>
<td>Welsh v. Gerber Products, Inc.</td>
<td>511</td>
</tr>
<tr>
<td>Wiggins v. State</td>
<td>627</td>
</tr>
</tbody>
</table>